

FACING REALITY: THE PREGNANCY DISCRIMINATION ACT FALLS SHORT FOR WOMEN UNDERGOING INFERTILITY TREATMENT

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I. INTRODUCTION

Having a child is a major life event around which most Americans build their lives. For millions of couples in the United States, finding out that they are unable to conceive is a crushing emotional blow.¹ Increasingly, infertile couples are placing their hopes of having a child in infertility treatments, most commonly through in-vitro fertilization (IVF).² Women who choose to undergo IVF, however, face two risks in the employment setting. The first is that insurers or employers will deny insurance coverage for the treatment and, thus, make IVF impossible to afford. Second, and worse, is the risk that the potential mother's employer will terminate her for taking time off to undergo infertility treatment. Do women have legal recourse to combat refusal of insurance or adverse employment actions? The answer to this question remains unclear despite a significant amount of litigation and scholarship in this area.³ Even so, it seems that women have some protection against adverse employment actions, but they still have no legal means of requiring employers to provide insurance coverage for infertility treatments.⁴

In 1978, Congress amended Title VII of the Civil Rights Act of 1964⁵ to include the Pregnancy Discrimination Act (PDA).⁶ The PDA

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¹ See STAFF OF RESOLVE WITH DIANE ARONSON, RESOLVING INFERTILITY 40–41 (Diane N. Clapp & Margaret R. Hollister eds., 1999) [hereinafter ARONSON].

² Ctrs. for Disease Control & Prevention, U.S. Dep't Health & Human Servs., Assisted Reproductive Technology, <http://www.cdc.gov/art/> (last visited Mar. 14, 2010).

³ See *infra* Parts V–VI.

⁴ See *infra* Part VII.

⁵ 42 U.S.C. §§ 2000e–2000e-17 (2006).

defined sex discrimination as including discrimination on the basis of “pregnancy, childbirth, or related medical conditions.”⁷ Thus, Congress made clear that discrimination on the basis of pregnancy constituted discrimination on the basis of sex.⁸ Since the enactment of the PDA, however, the lower federal courts as well as the courts of appeals have struggled to define its scope. One of the most significant and controversial issues confronting the judiciary today is the confusion surrounding infertility treatments, particularly IVF, and whether women undergoing IVF have any protection under the PDA. Recently, in *Hall v. Nalco Co.*,⁹ the Court of Appeals for the Seventh Circuit held that adverse employment actions based on a woman’s need to take time off to undergo IVF constituted discrimination on the basis of the gender-specific condition of childbearing capacity.¹⁰ In effect, the court recognized that an infertile female employee terminated for receiving IVF could maintain an action against her employer pursuant to the PDA.¹¹ Unfortunately, even after *Hall*, the PDA falls short in a significant way—it does not require that employers provide insurance coverage for infertility treatments.¹²

This Comment surveys the law surrounding infertility treatments and gender discrimination and concludes that the legal protection for female employees undergoing IVF is disappointing and inadequate. Part II of this Comment discusses the causes and prevalence of infertility as well as the various treatments available for infertile couples, specifically IVF. Part III then examines the history of the PDA, including the Supreme Court case¹³ that prompted Congress to enact the PDA. Next, Part IV looks at two of the Supreme Court cases that followed the enactment of the PDA,¹⁴ which provide some guidance to the lower courts in interpreting the PDA. Part V summarizes three cases from the courts of appeals and their respective approaches in interpreting the PDA in the context of infertility treatments.

⁶ See § 2000e(k).

⁷ *Id.*

⁸ Congress “change[d] the definition of sex discrimination in title VII to reflect the ‘commonsense’ view and to insure that working women are protected against all forms of employment discrimination based on sex.” S. REP. NO. 95-331, at 3 (1977).

⁹ 534 F.3d 644 (7th Cir. 2008).

¹⁰ *Id.* at 645.

¹¹ *Id.* at 649.

¹² See discussion *infra* Part VI.

¹³ See *Int’l Union v. Johnson Controls*, 499 U.S. 187 (1991); *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125 (1976), *superseded by statute*, Civil Rights Act of 1964 Amendments of 1978, Pub. L. No. 95-555, 92 Stat. 2076 (1978).

¹⁴ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669 (1983).

Part VI analyzes the three cases and explores the strengths and limitations of each court's approach. Finally, Part VII asserts that Congress should amend the PDA to clarify the scope of "related medical conditions" to provide more protection to women undergoing IVF against adverse employment actions like terminations and demotions. Furthermore, Part VII concludes that existing federal statutes, such as the PDA, the Americans with Disabilities Act (ADA),¹⁵ and the Family and Medical Leave Act (FMLA),¹⁶ are the inappropriate legal tools to compel employers to provide coverage for infertility treatment because they were not designed for this type of claim. Additionally, state laws are limited in scope and lack the benefit of uniformity. Instead, this Comment suggests that the most promising avenue for obtaining insurance coverage for infertility treatments is through lobbying Congress to pass legislation like the proposed Family Building Act of 2009, which is designed to address the financial needs of infertile couples seeking fertility treatment.

II. INFERTILITY: A PHYSICAL DISEASE AND AN EMOTIONAL ROLLERCOASTER

Infertility is a serious and widespread condition affecting approximately 7.3 million couples of reproductive age in the United States.¹⁷ It is a disease of the reproductive system that interferes with one of the human body's most basic functions—the ability to reproduce.¹⁸ Infertility is a term used to describe one's inability to become pregnant after one year of sexual intercourse without conception.¹⁹

¹⁵ 42 U.S.C. §§ 12101–12213 (2006).

¹⁶ 29 U.S.C. §§ 2601–2654 (2006).

¹⁷ In 1992, Congress enacted the Fertility Clinic Success Rate and Certification Act, 42 U.S.C. §§ 263a-1 to 7 (2006), which requires that each assisted reproductive technology (ART) clinic in the United States report its annual pregnancy success rates to the United States Centers for Disease Control and Prevention (CDC). ARONSON, *supra* note 1, at 189. The CDC uses data compiled and published by the Society for Assisted Reproductive Technology (SART), an affiliate organization of the American Society for Reproductive Medicine (ASRM). *Id.* In the United States in 2002, about 7.3 million of approximately 61.6 million women, fifteen to forty-four years of age, received some kind of infertility services at some time in their lives. See Anjani Chandra et al., *Fertility, Family Planning, and Reproductive Health of U.S. Women: Data from the 2002 National Survey of Family Growth*, in DATA FROM THE NATIONAL SURVEY OF FAMILY GROWTH, at 29 (Nat'l Ctr. for Health Statistics, U.S. Dep't of Health & Human Servs., Vital and Health Statistics Series No. 23, 2005), available at http://www.cdc.gov/nchs/data/series/sr_23/sr23_025.pdf.

¹⁸ Am. Soc'y for Reprod. Med., Quick Facts About Infertility, <http://www.asrm.org/detail.aspx?id=2322> (last visited Mar. 14, 2010).

¹⁹ ARONSON, *supra* note 1, at 5.

Occurring equally in both men and women, infertility does not discriminate on the basis of sex.²⁰ About one third of infertility cases can be attributed to male factors, one third to female factors, and the remaining one third is because of either a combination of male and female factors or is unexplained.²¹

In addition to its physical aspects, infertility provokes strong emotions, such as grief, anger, and guilt.²² Most couples dream of having a family and assume that they can have children one day.²³ When that possibility is jeopardized by an infertility diagnosis, it can be an extremely painful and difficult reality to face.²⁴ In fact, an infertility diagnosis engenders such intense emotional feelings that mental health professionals consider it a life crisis.²⁵ “Coping with infertility requires the same kind of psychological and physical strength as does coping with the death of a parent, a divorce, or a life-threatening disease.”²⁶ While infertility is a frightening and emotional diagnosis for many couples, an increasing number of treatment options are available.²⁷ Still, understanding the severe emotional effects of infertility is essential to improving the legal protection for women pursuing such treatment options; legal change cannot come about until infertility treatment is accepted as a necessity rather than a luxury.

Today, infertility is no longer a taboo issue, mainly because of the advances in medical technology that have led to a number of treatment options and have given hope to millions of infertile couples.²⁸ Some treatment options include fertility drugs and hormonal treatments, surgery, and assisted reproductive technologies (ARTs).²⁹ The U.S. Centers for Disease Control and Prevention (CDC) defines ARTs as “all treatments or procedures that involve the handling of human eggs and sperm for the purpose of helping a woman become pregnant.”³⁰ The number of ART cycles performed

²⁰ *Id.* at 7.

²¹ Am. Pregnancy Ass’n, What is Infertility?, <http://www.americanpregnancy.org/infertility/whatisinfertility.html> (last visited Mar. 14, 2010).

²² ARONSON, *supra* note 1, at 40–41.

²³ *Id.* at 40.

²⁴ *See id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ *See infra* text accompanying note 29.

²⁸ ARONSON, *supra* note 1, at 6.

²⁹ *Id.*

³⁰ *Id.* at 175 (quoting Ctrs. for Disease Control & Prevention, U.S. Dep’t of Health & Human Servs.). ART includes “in vitro fertilization (IVF), gamete intrafallopian

each year doubled from 1996 to 2005 because of, in part, the correlation between age and fertility.³¹ As men and women age, they experience a significant decline in fertility.³² With more women waiting until their thirties and forties to have children,³³ an increasing number of women are turning to ARTs to achieve pregnancy.³⁴

This Comment is primarily concerned with IVF, the most commonly used ART.³⁵ IVF is a procedure in which fertilization occurs outside of the woman's body in a laboratory dish.³⁶ IVF is used to treat infertility problems, such as tubal factor, endometriosis, male factor, and unexplained infertility.³⁷ Even when a male-factor causes infertility, the woman must undergo IVF because the procedure requires that the embryos be placed in the uterus.³⁸ While IVF offers many couples the possibility of building a family, the process and cost of treatment is often an arduous and stressful journey that may inter-

transfer (GIFT), zygote intrafallopian transfer (ZIFT), embryo cryopreservation, egg or embryo donation, and gestational carriers. . . . ART does *not* include intrauterine insemination (IUI)." *Id.* ARTs, like IVF, involve four basic steps: ovulation stimulation and egg maturation, egg retrieval, fertilization, and embryo placement in the uterus. CAROL TURKINGTON & MICHAEL M. ALPER, UNDERSTANDING FERTILITY AND INFERTILITY: THE SOURCEBOOK FOR REPRODUCTIVE PROBLEMS, TREATMENTS, AND ISSUES 40–41 (2003).

³¹ "The number of ART cycles performed in the United States has more than doubled, from 64,681 cycles in 1996 to 134,260 in 2005." CTRS. FOR DISEASE CONTROL & PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., 2005 ASSISTED REPRODUCTIVE TECHNOLOGY SUCCESS RATES 61 (2007), *available at* <http://www.cdc.gov/ART/ART2005/508PDF/2005ART508.pdf> [hereinafter CDC SUCCESS RATES].

³² See ARONSON, *supra* note 1, at 11; *see also* TURKINGTON & ALPER, *supra* note 30, at 10–11 ("[B]ecause eggs are some of the longest-living cells in the body, there is a greater risk that the eggs may be defective with each subsequent year of life.").

³³ The birth rate for women aged forty to forty four increased nearly twofold from 48,607 births in 1990 to 95,788 births in 2002. Joyce A. Martin et al., U.S. Dep't of Health & Human Servs., *Births: Final Data for 2002*, 2003 NAT'L VITAL STAT. REP., Dec. 17, 2003, at 6, *available at* http://www.cdc.gov/nchs/data/nvsr/nvsr52/nvsr52_10.pdf; *see* David E. Williams, *More Hurdles as Women Delay Birth*, CNN.COM, Apr. 24, 2006, <http://www.cnn.com/2006/US/04/21/later.childbirth/> (explaining that more women over the age of thirty five gave birth to more than 586,000 babies in the United States in 2004, which comprised approximately 14% of births that year and marked an increase from 5% fifteen years earlier).

³⁴ The average age of women receiving ART services was thirty six in 2005. CDC SUCCESS RATES, *supra* note 31, at 15.

³⁵ "IVF currently accounts for about 98% of ART procedures." Am. Pregnancy Ass'n, *What is Infertility?*, <http://www.americanpregnancy.org/infertility/whatisinfertility.html> (last visited Apr. 1, 2010).

³⁶ ARONSON, *supra* note 1, at 176. In-vitro is Latin for "in glass." *Id.*

³⁷ *Id.* at 177.

³⁸ *See id.* at 155, 176.

fere with one's work and social obligations.³⁹ Each IVF cycle may require weeks to complete, and if a pregnancy does not result, many IVF cycles may be required.⁴⁰

With the average cost of an IVF cycle in the United States being \$12,400, IVF is an expensive procedure.⁴¹ In addition to the emotional and physical obstacles that infertility causes, many women will face financial obstacles relating to two different employer actions: their employer may refuse to provide insurance coverage or a health plan that includes infertility treatments, and their employer may terminate them for taking time off from work to undergo infertility treatment. Thus, financial obstacles may force women who cannot afford infertility treatment without insurance coverage or who have to forgo infertility treatment to avoid losing their job to abandon their dream of having a family. Whether infertile women have legal recourse to overcome these obstacles is still unclear.⁴²

III. THE SUPREME COURT'S 1978 DECISION IN *GILBERT* LED TO THE ENACTMENT OF THE PDA

Congress enacted the PDA in 1978 in response to the United States Supreme Court decision in *General Electric Co. v. Gilbert*,⁴³ in which the Court held that discrimination based on pregnancy did not constitute discrimination based on sex.⁴⁴ In a class-action suit

³⁹ See RESOLVE: The Nat'l Infertility Ass'n, Making Treatment Affordable, http://www.resolve.org/site/PageServer?pagename=lrn_mta_home (last visited Apr. 1, 2010).

Infertility exacts an enormous toll on both the affected individuals and on society. Women and men in their most active and productive years are distracted by the physical, financial and emotional hardships of this disease. Infertility is more than a disease, it is a devastating life crisis which can greatly impact the health, relationships, job performance and social interactions. Added to the emotional and physical toll exacted by infertility is the financial burden carried by many seeking treatment.

Id.

⁴⁰ See MAYO CLINIC FAMILY HEALTH BOOK 1069–70 (Scott C. Litin et al. eds., 3d ed. 2003). An IVF cycle normally begins with requiring the woman to take ovulation-stimulating drugs. TURKINGTON & ALPER, *supra* note 26, at 41. The eggs are then surgically removed and mixed with the sperm in a Petri dish. *Id.* at 42. If the eggs have been fertilized by the sperm, then the fertilized eggs, or embryos, are placed in the uterus. *Id.*

⁴¹ Am. Pregnancy Ass'n, *supra* note 21.

⁴² See discussion *infra* Parts V–VI.

⁴³ 429 U.S. 125 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076.

⁴⁴ *Id.* at 139–40.

brought by several female General Electric employees, the Court addressed the question of whether Title VII's prohibition on sex discrimination⁴⁵ applied to pregnancy-based discrimination.⁴⁶ The female employees at General Electric challenged the company's disability plan, which provided extensive coverage for all "nonoccupational sickness and accident benefits" but excluded from its coverage disabilities arising from pregnancy.⁴⁷

In reaching its decision, the *Gilbert* Court relied primarily on its decision two years earlier in *Geduldig v. Aiello*,⁴⁸ in which the Court had held that pregnancy discrimination is not sex discrimination under the Equal Protection Clause of the Fourteenth Amendment.⁴⁹ In *Gilbert*, the Court again employed the *Geduldig* reasoning to conclude that the disability plan distinguished not between men and women but between pregnant persons and nonpregnant persons of both sexes.⁵⁰ Accordingly, the *Gilbert* Court held that because the nonpregnant class consisted of both men and women, the plan did not constitute sex discrimination on either its face or its impact on women⁵¹—even though the Court noted that the category of pregnant persons could necessarily include only female employees.⁵² The Court rea-

⁴⁵ Title VII makes it unlawful for an employer to discriminate against an employee regarding the "compensation, terms, conditions, or privileges of employment" on the basis of the employee's sex. 42 U.S.C. § 2000e-2(a) (1) (2006).

⁴⁶ See *Gilbert*, 429 U.S. at 129. The plaintiffs claimed that General Electric's refusal to pay disability benefits under the company's insurance plan for time lost because of pregnancy and childbirth constituted discrimination on the basis of sex. *Id.*

⁴⁷ *Id.* at 127.

⁴⁸ 417 U.S. 484 (1974), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076. In *Geduldig*, female workers sued the state for excluding pregnancy and related medical disabilities from coverage under California's mandatory state disability compensation program. *Id.* at 486, 489–90. Under a Fourteenth Amendment Equal Protection analysis, the Court held that the plan's exclusion of pregnancy disabilities was constitutionally valid because the plan did not discriminate between men and women but, rather, between pregnant and nonpregnant persons (the latter of which included both men and women). *Id.* at 494, 496 & n.20, 497. The Court upheld the California disability law that excluded insurance for pregnancy-related disabilities. *Id.* at 494–97.

⁴⁹ *Id.* at 494.

⁵⁰ *Gilbert*, 429 U.S. at 135 ("The lack of identity between the excluded disability and gender as such under this insurance program becomes clear upon the most cursory analysis. The program divides potential recipients into two groups—pregnant women and nonpregnant persons. While the first group is exclusively female, the second includes members of both sexes." (quoting *Geduldig*, 417 U.S. at 496 n.20)).

⁵¹ *Id.* at 138–39.

⁵² *Id.* at 134 ("While it is true that only women can become pregnant, it does not follow that every legislative classification concerning pregnancy is a sex-based classification.").

soned that the insurance program covered the “same categories of risk”⁵³ for both men and women and that pregnancy constituted an “an *additional* risk, unique to women,”⁵⁴ for which employers were not required to provide “greater economic benefits.”⁵⁵ In other words, the Court held that women were not entitled to benefits greater than those provided to men just because they are susceptible to an “extra” risk—pregnancy.⁵⁶

The majority’s opinion in *Gilbert* produced two dissents, one from Justice Brennan and one from Justice Stevens.⁵⁷ In his dissent, joined by Justice Marshall, Justice Brennan asserted that the majority’s reasoning was “fanciful”⁵⁸ and “transparent”⁵⁹ in ignoring the reality that all pregnant persons will necessarily be women.⁶⁰ Justice Brennan argued that General Electric’s disability plan violated Title VII because excluding coverage on the basis of pregnancy is the same as excluding coverage on the basis of sex.⁶¹ In a separate dissent, Justice Stevens declared that the disability plan constituted sex discrimination because “it is the capacity to become pregnant which primarily differentiates the female from the male.”⁶²

Congress agreed with the *Gilbert* dissents and prospectively overruled the majority’s decision by adding pregnancy discrimination to Title VII’s definition of sex discrimination.⁶³ The purpose of Title VII is to provide equal employment opportunities to all groups of employees⁶⁴ and thus prohibit private and public employers from “discriminat[ing] against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such

⁵³ *Id.* at 138.

⁵⁴ *Id.* at 139.

⁵⁵ *Id.* at 138, 139 & n.17.

⁵⁶ *Gilbert*, 429 U.S. at 138, 139 & n.17.

⁵⁷ *Id.* at 146 (Brennan, J., dissenting); *see also id.* at 160 (Stevens, J., dissenting).

⁵⁸ *See id.* at 148 (Brennan, J., dissenting).

⁵⁹ *Id.* at 152 & n.5.

⁶⁰ *See id.* at 149.

⁶¹ *See id.* at 160.

⁶² *Gilbert*, 429 U.S. at 161–62 (Stevens, J., dissenting).

⁶³ *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 678, 679 & n.17 (1983) (noting that the PDA was designed to overrule the *Gilbert* decision).

⁶⁴ *See Cal. Fed. Sav. & Loan Ass’n v. Guerra*, 479 U.S. 272, 288 (1987) (emphasizing that the purpose of Title VII is “to achieve equality of employment opportunities and remove barriers that have operated in the past to favor an identifiable group of . . . employees over other employees.” (quoting *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–430 (1971))).

individual's race, color, religion, sex, or national origin.”⁶⁵ Congress legislated that “[t]he terms ‘because of sex’ or ‘on the basis of sex’ include, but are not limited to, because of or on the basis of pregnancy, childbirth, or *related medical conditions*.”⁶⁶ The second clause of the definition states that “women affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work.”⁶⁷ This clause mandates equal employment treatment, including insurance coverage, for pregnancy-related conditions as for other disabilities and thus overturns the Supreme Court's specific holding in *Gilbert*.⁶⁸

IV. SUPREME COURT PRECEDENT POST-PDA ENACTMENT

While the Supreme Court has yet to address the issue of whether women undergoing IVF are protected under the PDA, it has provided some guidance regarding the scope and proper interpretation of the Act. The Court has decided three cases addressing the PDA, none of which specifically address infertility treatments.⁶⁹ Two of the decisions, however, provide particularly useful guidance to the infertility analysis because one of the cases involved the related issue of equality

⁶⁵ 42 U.S.C. § 2000e(2)(a)(1) (2006).

⁶⁶ § 2000e(k) (emphasis added).

⁶⁷ *Id.*

⁶⁸ See *Newport News*, 462 U.S. at 678, 679 & n.17. The Court used legislative history to bolster its conclusion that the PDA's second clause was meant to directly repudiate *Gilbert*. *Id.* For example, the Court cited the remarks of Representative Hawkins:

H.R. 5055 does not really add anything to Title VII as I and, I believe, most of my colleagues in Congress when title VII was enacted in 1964 and amended in 1972, understood the prohibition against sex discrimination in employment. For, it seems only commonsense, that since only women can become pregnant, discrimination against pregnant people is necessarily discrimination against women, and that forbidding discrimination based on sex therefore clearly forbids discrimination based on pregnancy.

Id. at 679 n.17 (quoting 123 CONG. REC. 10,581 (1977) (statement of Rep. Hawkins)).

⁶⁹ See *Int'l Union v. Johnson Controls*, 499 U.S. 187, 210–11 (1991) (holding that employer's policy prohibiting all fertile women from having jobs involving actual or possible lead exposure was facially discriminatory and violated the PDA); *Cal. Fed. Sav.*, 479 U.S. at 285, 287–88 (holding that the PDA is the floor beneath which pregnancy benefits cannot fall and that state statutes may provide more protection to pregnant women); *Newport News*, 462 U.S. at 683–84 (holding employer's insurance coverage plan discriminatory against male employees and violative of the PDA where it provided less extensive benefits for the pregnancy-related conditions of spouses of male employees than for other medical conditions of spouses of female employees).

of insurance coverage,⁷⁰ and the other addressed discrimination on the basis of “potential for pregnancy.”⁷¹

A. *Pregnancy Discrimination Is Sex Discrimination*

In *Newport News Shipbuilding & Dry Dock Co. v. EEOC*,⁷² the Supreme Court held that an employer must provide the same level of health insurance coverage for the pregnancy-related medical conditions of the spouses of male employees as it does for all other medical conditions of the spouses of female employees.⁷³ In *Newport News*, the employer’s health insurance plan provided complete coverage for the pregnancy-related expenses of its female employees but limited pregnancy-related benefits for the spouses of male employees.⁷⁴ The plan also provided extensive coverage for all other medical conditions for the spouses of female employees.⁷⁵

The Court followed the Equal Employment Opportunity Commission’s (EEOC) interpretive guidelines, which stated that “if an employer’s insurance program covers the medical expenses of spouses of female employees, then it must equally cover the medical expenses of spouses of male employees, including those arising from pregnancy-related conditions.”⁷⁶ The Court reasoned that although the PDA prohibits discrimination against female employees on the basis of pregnancy, it never altered Title VII’s original prohibition against discrimination on the basis of sex.⁷⁷ Thus, the Court found that the employer’s plan discriminated against married male employees because it provided them less comprehensive coverage than it provided for married female employees.⁷⁸

B. *The Definition of Pregnancy Includes the “Potential for Pregnancy”*

In *International Union v. Johnson Controls*,⁷⁹ the Supreme Court addressed whether the employer’s fetal-protection policy constituted sex discrimination in violation of Title VII.⁸⁰ The employer, Johnson

⁷⁰ See *Newport News*, 462 U.S. at 675–76.

⁷¹ See *Johnson Controls*, 499 U.S. at 187–88.

⁷² 462 U.S. 669 (1983).

⁷³ *Id.* at 684.

⁷⁴ *Id.* at 671.

⁷⁵ *Id.* at 672.

⁷⁶ *Id.* at 673.

⁷⁷ *Id.* at 684–85.

⁷⁸ *Newport News*, 462 U.S. at 676.

⁷⁹ 499 U.S. 187 (1991).

⁸⁰ See *id.* at 190.

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Controls, Inc., manufactured batteries, in which lead was a primary component.⁸¹ Because of the harmful effects of lead exposure on fetuses, the company implemented a “fetal-protection policy” that excluded all women who were pregnant or capable of becoming pregnant from working in a battery-manufacturing job.⁸² The policy required female employees to prove that they were not capable of reproducing to obtain this particular job.⁸³ Both the district court and the Court of Appeals for the Seventh Circuit analyzed the policy as facially neutral with a discriminatory effect on women’s employment opportunities.⁸⁴ Accordingly, applying the “business necessity test”⁸⁵ and granting summary judgment in favor of the employer, both courts concluded that the employer’s policy was necessary to avoid the substantial health risk to the fetus.⁸⁶

The Supreme Court reversed the Seventh Circuit’s holding and rejected its application of the business-necessity test.⁸⁷ The Court held that the policy was facially discriminatory under the PDA, which necessarily constitutes sex discrimination, because it “classified on the basis of gender and childbearing capacity, rather than fertility alone.”⁸⁸ The policy classified on the basis of gender because it required only women to prove their lack of reproductive capacity despite evidence that lead exposure adversely affects the male reproductive system; consequently, the policy gave only men a “choice as to whether they wish[ed] to risk their reproductive health for a particu-

⁸¹ *Id.*

⁸² *Id.* at 191–92.

⁸³ *Id.*

⁸⁴ *Id.* at 197–98.

⁸⁵ The business-necessity test is used by courts to determine whether a disparate-impact claim—in which plaintiffs assert that an employer’s facially neutral policy has a discriminatory effect on a protected group—is nonetheless valid because it is justified by business necessity. *Griggs v. Duke Power Co.*, 401 U.S. 424, 429–31 (1971). The business-necessity test includes a three-step inquiry: “whether there is substantial health risk to the fetus; whether transmission of the hazard to the fetus occurs only through women; and whether there is a less discriminatory alternative equally capable of preventing the health hazard to the fetus.” *Johnson Controls*, 499 U.S. at 194. The Seventh Circuit concluded that there was a substantial health risk to the fetus; the evidence of risk from the father’s exposure was speculative and unconvincing; and the petitioners waived the issue of less discriminatory alternatives by not sufficiently presenting such alternatives. *Id.*

⁸⁶ *Johnson Controls*, 499 U.S. at 197–98.

⁸⁷ *Id.*

⁸⁸ *Id.* at 198.

lar job.”⁸⁹ Furthermore, the policy was also facially discriminatory under the PDA⁹⁰ because of its childbearing-capacity classification, which excluded employees who were “pregnant or . . . capable of bearing children.”⁹¹ Moreover, the Court noted that “the absence of a malevolent motive does not convert a facially discriminatory policy into a neutral policy with a discriminatory effect.”⁹² Consequently, the Court rejected the more lax business-necessity test under which facially neutral policies are analyzed and instead addressed whether the policy satisfied the narrow bona fide occupational qualification (BFOQ) defense to Title VII.⁹³

The BFOQ exception permits sex discrimination “in those certain instances where . . . sex . . . is a bona fide occupational qualification reasonably necessary to the normal operation of that particular business or enterprise.”⁹⁴ Johnson Controls argued that female sterility constituted a BFOQ because the battery-manufacturing job compromised the safety of the unborn children of its fertile female employees.⁹⁵ The Court rejected this argument.⁹⁶ Because the protection of fetuses was not necessary to the essence of battery manufacturing and because fertile women could perform the essential duties of battery manufacturing as efficiently as all other employees, Johnson Controls could not establish female sterility as a BFOQ.⁹⁷

⁸⁹ *Id.* at 197. The Court reasoned that the employer was concerned only with the safety of the unborn offspring of its female employees despite potential harms to the offspring of male employees as well. *Id.* at 198.

⁹⁰ *Id.* at 198–99.

⁹¹ *See id.* at 192.

⁹² *Johnson Controls*, 499 U.S. at 199.

⁹³ *Id.* at 199–200.

⁹⁴ 42 U.S.C. § 2000e-2(e)(1) (2006).

⁹⁵ *Johnson Controls*, 499 U.S. at 206.

⁹⁶ The Court stressed that the exception applied only in the narrow circumstances where sex or pregnancy actually interferes with the woman’s ability to perform the job-related activities that go to the “essence” of the employer’s business. *Id.* Accordingly, in cases where the safety of a third party is at issue, such safety must be an essential aspect of the employer’s business, *and* the woman’s sex, pregnancy, or reproductive potential must actually interfere with the woman’s ability to ensure the safety of those third parties. *Id.* at 202–04. In *Johnson Controls*, the Court rejected female sterility as a BFOQ because the essence of Johnson Controls’ business was battery manufacturing and not concern for children; thus, the fetal-protection policy was not essential to its business. *Id.* at 207. “Concerns about the welfare of the next generation [cannot] be considered a part of the ‘essence’ of Johnson Controls’ business.” *Id.* The potential fetuses were “neither customers nor third parties whose safety [was] essential to the business of battery manufacturing.” *Id.* at 203. Additionally, the status of a woman’s fertility did not relate to, let alone interfere with, her ability to perform the job’s duties. *Id.* at 206.

⁹⁷ *Id.*

Ultimately, the Court concluded that the Johnson Controls policy violated Title VII, as amended by the PDA, because the PDA was meant “to protect female workers from being treated differently from other employees simply because of their capacity to bear children.”⁹⁸ And in *Johnson Controls*, the employer determined the eligibility of workers based on their reproductive capacity or potential for pregnancy, which constituted pregnancy discrimination.⁹⁹

V. DEFINING PREGNANCY DISCRIMINATION: A DIFFICULT TASK PRODUCING CONSIDERABLE CONFUSION AMONG THE FEDERAL COURTS

While the Supreme Court has offered some general guidance on the scope of the PDA, the task of deciding whether infertility is a pregnancy-related condition under the PDA has been largely left to the lower federal courts. The lower courts have taken varying approaches in interpreting the PDA in the infertility context, which has led to confusion and inconsistent results among them.¹⁰⁰

A. *The Eighth Circuit: Infertility Is Not a Related Medical Condition under the PDA*

In *Krauel v. Iowa Methodist Medical Center*,¹⁰¹ the Eighth Circuit Court of Appeals addressed the issue of whether infertility was a medical condition related to pregnancy or childbirth within the meaning of the PDA.¹⁰² It held that infertility fell outside the PDA’s protection

Fertile women . . . participate in the manufacture of batteries as efficiently as anyone else. Johnson Controls’ professed moral and ethical concerns about the welfare of the next generation do not suffice to establish a BFOQ of female sterility. Decisions about the welfare of future children must be left to the parents . . . rather than to employers who hire those parents.

Id.

⁹⁸ *Id.* at 205.

“Under this bill, the treatment of pregnant women in covered employment must focus not on their condition alone but on the actual effects of that condition on their ability to work. Pregnant women who are able to work must be permitted to work on the same conditions as other employees

. . . .

“ . . . [U]nder this bill, employers will no longer be permitted to force women who become pregnant to stop working regardless of their ability to continue.”

Id. (quoting S. REP. NO. 95-331, at 4–6 (1977)).

⁹⁹ *Id.* at 211.

¹⁰⁰ See discussion *infra* Part VI.

¹⁰¹ 95 F.3d 674 (8th Cir. 1996).

¹⁰² *Id.* at 679.

because infertility did not include pregnancy, childbirth, or a related medical condition.¹⁰³

The plaintiff in *Krauel* was diagnosed with endometriosis and, as a result, was unable to conceive naturally.¹⁰⁴ The plaintiff-employee paid for her own infertility treatment because her employer's medical benefits plan did not provide coverage for treatment of infertility problems.¹⁰⁵ The plan excluded insurance coverage for both male and female infertility treatments.¹⁰⁶ When the plaintiff's employer denied reimbursement for her infertility treatments, the plaintiff filed suit and alleged that the employer's denial of coverage for infertility treatments violated the PDA.¹⁰⁷ The plaintiff argued that infertility was a medical condition related to pregnancy, and therefore, the employer's refusal to provide coverage for infertility treatments was discrimination on the basis of a "related medical condition" under the PDA.¹⁰⁸ The court rejected the plaintiff's argument and affirmed the district court's grant of summary judgment in favor of the employer.¹⁰⁹

The court employed a canon of statutory construction, *ejusdem generis*,¹¹⁰ meaning that when a general term follows a specific term, the general term should be understood as referring to matters similar to those in the specific terms.¹¹¹ Here, the general term was "related medical condition," and the specific term was "pregnancy or childbirth." Consequently, the court held that the plain language of the PDA did not suggest that "related medical conditions" should be applied to conditions outside the context of pregnancy and childbirth.¹¹² The court concluded that, because infertility, which "prevents conception," is "strikingly different" from pregnancy and childbirth, "which occur after conception," it was not a "related medical condition" as contemplated by the PDA.¹¹³

¹⁰³ *Id.* at 679–80.

¹⁰⁴ *Id.* at 675–76.

¹⁰⁵ *Id.* at 676.

¹⁰⁶ *Id.* at 680.

¹⁰⁷ *Krauel*, 95 F.3d at 679.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.* at 681.

¹¹⁰ The term *ejusdem generis* means "of the same kind." WILLIAM N. ESKRIDGE, JR., PHILIP P. FRICKEY & ELIZABETH GARRETT, *LEGISLATION AND STATUTORY INTERPRETATION* 253 (2000).

¹¹¹ *Id.* at 253–54.

¹¹² *Krauel*, 95 F.3d at 679.

¹¹³ *Id.*

The court distinguished *Johnson Controls*, in which the Supreme Court held that sex discrimination included discrimination on the basis of “potential pregnancy.”¹¹⁴ While “potential pregnancy” is a gender-specific medical condition because only women can become pregnant, infertility is gender neutral because it affects both men and women.¹¹⁵ Accordingly, the court held that the employer’s refusal to cover the cost of infertility treatments was not sex discrimination because both men and women are affected by infertility.¹¹⁶ The court further supported its holding by stating that the fact that neither the legislative history of the PDA nor the EEOC guidelines made any explicit reference to infertility treatment suggests that infertility is outside the purview of the PDA’s protection.¹¹⁷

Finally, the *Krauel* court expressly rejected the reasoning in *Pacourek v. Inland Steel Co.*,¹¹⁸ in which the District Court for the Northern District of Illinois held that infertility is a medical condition related to pregnancy for purposes of the PDA.¹¹⁹ The court in *Krauel* found the result in *Pacourek* unpersuasive for two reasons. First, the district court relied too heavily on the legislative history of the PDA, in which infertility is not explicitly mentioned,¹²⁰ and second, the defendant in *Pacourek*, unlike the defendant in *Krauel*, did not concede that the employer policy was gender-neutral and applicable to all infertile employees, both male and female.¹²¹ Because the policy at is-

¹¹⁴ *Id.* at 680.

Potential pregnancy, unlike infertility, is a medical condition that is sex-related because only women can become pregnant. In this case, because the policy of denying insurance benefits for treatment of fertility problems applies to both female and male workers and thus is gender-neutral, *Johnson Controls* is inapposite.

Id.

¹¹⁵ *Id.*

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 679–80.

¹¹⁸ 858 F. Supp. 1393, 1401 (N.D. Ill. 1994).

¹¹⁹ *Krauel*, 95 F.3d at 80.

¹²⁰ *Id.* The *Pacourek* court cited legislative history to support the notion that Congress intended for the PDA to provide broad protection to women against any and all employment discrimination based on gender. *Pacourek*, 858 F. Supp. at 1402. The court quoted Senator Harrison Williams’s statement, “[T]he overall effect of discrimination against women because they might become pregnant, or do become pregnant, is to relegate women in general, and pregnant women in particular, to a second-class status. . . .” *Id.* (quoting 123 CONG. REC. 29,385 (1977)). The *Pacourek* court also relied on Representative Ronald Sarasin’s statement that the PDA gives a woman “the right . . . to be financially and legally protected *before*, during, and after her pregnancy.” *Id.* (quoting 124 CONG. REC. 38,574 (1978)).

¹²¹ *Krauel*, 95 F.3d at 680. In *Krauel*, the insurance policy denied benefits to all infertile employees. *Id.* In *Pacourek*, on the other hand, the plaintiff claimed that she

sue in *Krauel* applied to all infertile employees regardless of sex, the court held that it was gender-neutral and thus did not violate the PDA.¹²²

B. The Second Circuit: Providing Less Complete Coverage for Female Infertility Does Not Run Afoul of the PDA

In *Saks v. Franklin Covey Co.*,¹²³ the Second Circuit Court of Appeals addressed the same issue that was presented in *Krauel*—whether an employer’s denial of health coverage for infertility treatments that can be performed only on women violated the PDA.¹²⁴ The court held that because the employer’s health-benefits plan’s exclusion of surgical impregnation procedures disadvantaged infertile male and female employees equally, the plan did not violate Title VII, as amended by the PDA.¹²⁵

During the course of her four years of employment at Franklin Covey Sales, Inc., the plaintiff-employee, an infertile female, underwent several infertility procedures, including IVF, to achieve pregnancy with her husband.¹²⁶ The plaintiff-employee sued her employer after being denied coverage for the cost of her infertility treatments—IVF, intrauterine insemination, and injectable fertility drugs—under her employer’s self-insured health-benefits plan (“the Plan”).¹²⁷ The Plan entitled employees to coverage for “medically necessary procedures,” including a variety of infertility products and procedures and surgical infertility treatments.¹²⁸ But the Plan expressly excluded surgical impregnation procedures, including IVF and intrauterine insemination.¹²⁹ The plaintiff claimed that the Plan violated several statutes, including the PDA, because it provided inferior coverage for infertility treatments than for illnesses unrelated to pregnancy.¹³⁰

was terminated for needing sick leave due to a medical condition that rendered her infertile. *Pacourek*, 858 F. Supp. at 1397.

¹²² *Krauel*, 95 F.3d at 680.

¹²³ 316 F.3d 337 (2d Cir. 2003).

¹²⁴ *Id.* at 340.

¹²⁵ *Id.* at 346.

¹²⁶ *Id.* at 341.

¹²⁷ *Id.* at 340–42.

¹²⁸ *Id.* at 341 (“Examples of covered surgical infertility treatments include[d] procedures to remedy conditions such as varicoceles (varicose veins in the testicles causing low sperm count), blockages of the vas deferens, endometriosis, and tubal occlusions.”).

¹²⁹ *Saks*, 316 F.3d at 341.

¹³⁰ *Id.* at 342.

Despite noting that the phrase “related medical conditions” encompassed more than pregnancy itself—a concession that the *Krauel* court was unwilling to make—the court rejected the plaintiff’s PDA claim.¹³¹ The court framed the issue as infertility, separate and apart from its treatment.¹³² As a result, the court found that *Johnson Controls* provided support for its interpretation of the PDA—that discrimination based on “fertility alone” and, by implication, infertility alone—does not violate the PDA because infertility affects men and women in equal numbers.¹³³ Accordingly, the court concluded that the Plan did not violate the PDA because its denial of coverage for surgical impregnation procedures constituted discrimination based on fertility alone and thus disadvantaged both male and female employees equally.¹³⁴ The court further noted the anomalous implications of including infertility within the protection of the PDA—that only infertile women would be part of the protected class, even though the affected class includes both men and women.¹³⁵ Therefore, the court held that infertility is not a pregnancy-related condition under the PDA and that infertility discrimination does not violate the PDA.¹³⁶

C. *The Seventh Circuit: The Issue is Not Infertility Alone*

In a case of first impression, *Hall v. Nalco Co.*, the Seventh Circuit Court of Appeals confronted the issue of whether the plaintiff-employee, Hall, stated a cognizable PDA claim against her employer who terminated her after she took time off to undergo IVF.¹³⁷ The court reversed the district court’s grant of summary judgment to the employer and held that an adverse employment action based on a gender-specific infertility treatment, such as IVF, constitutes sex discrimination under Title VII, as amended by the PDA.¹³⁸

Hall was a sales secretary for Nalco Company when, in March 2003, she requested a leave of absence to undergo IVF treatments.¹³⁹ Hall’s supervisor approved the leave.¹⁴⁰ Hall’s IVF cycle was unsuc-

¹³¹ *Id.* at 345–46.

¹³² *Id.*

¹³³ *Id.* at 346.

¹³⁴ *Id.*

¹³⁵ *Saks*, 316 F.3d at 346.

¹³⁶ *Id.* at 345–46.

¹³⁷ *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

¹³⁸ *Id.* at 649.

¹³⁹ *Id.* at 645. The court noted that each IVF cycle takes several weeks to complete and that several cycles may be required to achieve pregnancy. *Id.* at 645–46.

¹⁴⁰ *Id.* at 646.

cessful, however, and in July 2003, she requested another leave of absence to begin that August.¹⁴¹ Shortly after her request, Hall's supervisor told her that the sales office was merging with another office and that her position would be terminated as a result.¹⁴² Hall's supervisor also told her that "her termination 'was in [her] best interest due to [her] health condition.'"¹⁴³ Prior to her termination, Hall's supervisor discussed her potential termination with the company's employee-relations manager whose notes from the conversation referred to Hall's "absenteeism—infertility treatments" and stated that Hall "missed a lot of work due to health."¹⁴⁴

Hall filed a discrimination charge with the EEOC, and she subsequently sued her employer and alleged discrimination on the basis of sex in violation of Title VII.¹⁴⁵ In her complaint, Hall alleged that she was terminated for being "a member of a protected class, female with a pregnancy-related condition, infertility."¹⁴⁶ The district court found that Hall did not state a claim cognizable under the PDA and granted summary judgment to her employer.¹⁴⁷ The court reasoned that infertility is a gender-neutral condition, and thus, infertile women are not a protected class under the PDA.¹⁴⁸

The Seventh Circuit reversed the lower court's decision and held that Hall presented a cognizable PDA claim.¹⁴⁹ First, the court rejected the district court's characterization of the issue as "infertility alone"¹⁵⁰ as well as Hall's theory that infertile women are a protected class under the PDA.¹⁵¹ The PDA, the court held, was not meant to create a new protected class or to create "new rights or remedies" but was intended only to "clarif[y] the scope of Title VII by recognizing certain inherently gender-specific characteristics that may not form the basis for disparate treatment of employees."¹⁵² Thus, the *Hall* court recognized that classifications based solely on the gender-

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Hall*, 534 F.3d at 646.

¹⁴⁴ *Id.*

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Hall*, 534 F.3d at 649.

¹⁵⁰ *Id.* at 648.

¹⁵¹ *Id.* at 649 n.3.

¹⁵² *Id.* at 647.

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neutral condition of infertility are not prohibited by the PDA.¹⁵³ To this extent, *Hall* is consistent with *Krauel* and *Saks*.¹⁵⁴

Relying on *Johnson Controls*, the *Hall* court stated that, even where infertility is at issue, the “employer conduct complained of must actually *be gender neutral* to pass muster.”¹⁵⁵ Here, the court held, the issue was not infertility alone but also whether the employer conduct was gender-neutral in response to the employee’s need to undergo IVF.¹⁵⁶ To assess whether an employer action violates Title VII, the court reiterated the test for sex discrimination: “whether the employer action in question treats an employee ‘in a manner which but for that person’s sex would be different.’”¹⁵⁷

The court analogized the employer conduct in this case to the employer conduct in *Johnson Controls*, where the employer barred only fertile women from employment even though the lead exposure affected the fertility of both men and women.¹⁵⁸ The court concluded that Nalco’s conduct suffered the same defect as the employer conduct in *Johnson Controls*—that the employer policy “did not classify based on the gender-neutral characteristic of fertility alone, but rather on the gender-specific characteristic of childbearing capacity, or ‘potential for pregnancy,’ and was therefore invalid under the PDA.”¹⁵⁹

The court reasoned that where an employer bases an employment decision on an employee’s absences related to IVF treatments,

¹⁵³ *Id.* at 648.

The [*Johnson Controls*] Court held the policy was invalid under the PDA because it “classifie[d] on the basis of gender and childbearing capacity, *rather than fertility alone*.” Implicit in this holding is that classifications based on “fertility alone”—and by like implication, infertility alone—are not prohibited by the PDA, which reaches only gender-specific classifications. As the Second Circuit noted in *Saks*, this conclusion is necessary to reconcile the PDA with Title VII because “[i]ncluding infertility within the PDA’s protection as a ‘related medical condition[.]’ would result in the anomaly of defining a class that simultaneously includes equal numbers of both sexes and yet is somehow vulnerable to sex discrimination.”

Id. (quoting *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003) (footnotes and citation omitted)).

¹⁵⁴ See discussion *infra* Part VI.A.

¹⁵⁵ *Hall*, 534 F.3d at 648.

¹⁵⁶ *Id.* at 648–49.

¹⁵⁷ *Id.* at 647 (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

¹⁵⁸ *Id.* at 648–49.

¹⁵⁹ *Id.* at 648 (quoting *Int’l Union v. Johnson Controls*, 499 U.S. 187, 198–99 (1991)).

such decisions are not gender-neutral because IVF is a surgical impregnation procedure that can be performed only on women.¹⁶⁰ Employees who undergo IVF will necessarily always be women because only women have the capacity to bear children.¹⁶¹ Thus, the court concluded that “Hall was terminated not for the gender-neutral condition of infertility, but rather for the gender-specific quality of child-bearing capacity.”¹⁶²

Although the court did not reach the merits of the case, as to whether Hall was terminated on the legitimate basis of restructuring or on her absence for IVF treatments, it did suggest the latter because of the timing of her termination—shortly after her first failed IVF cycle and request for another leave of absence—and the employee-relations manager’s notes expressly referring to her IVF treatments.¹⁶³ The court concluded that Hall’s allegations presented a cognizable Title VII claim “[b]ecause adverse employment action based on childbearing capacity will always result in ‘treatment of a person in a manner which but for that person’s sex would be different.’”¹⁶⁴

VI. MAKING SENSE OF THE PREGNANCY DISCRIMINATION ACT IN LIGHT OF *KRAUEL*, *SAKS*, AND *HALL*

The conflict between the courts arises from a threshold question—how to frame the issue.¹⁶⁵ In *Krauel* and *Saks*, the courts framed

¹⁶⁰ *Id.* at 648–49.

¹⁶¹ *Hall*, 534 F.3d at 648–49.

¹⁶² *Id.* at 649; see also *Erickson v. Bd. of Governors of State Colls. & Univ. for Ne. Ill. Univ.*, 911 F. Supp. 316, 320 (N.D. Ill. 1995) (holding that female employee stated a claim under Title VII because she was terminated for undergoing fertility treatment and that her termination was thus based on her capacity to become pregnant).

¹⁶³ *Hall*, 534 F.3d at 649.

¹⁶⁴ *Id.* (quoting *L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 711 (1978)).

¹⁶⁵ See also Cintra D. Bentley, Comment, *A Pregnant Pause: Are Women Who Undergo Fertility Treatment to Achieve Pregnancy Within the Scope of Title VII’s Pregnancy Discrimination Act?*, 73 CHI.-KENT L. REV. 391, 416 (1998).

The problem stems from how this issue is approached and subsequently framed. Proponents of including women undergoing fertility treatment within the PDA aver that the diagnosis of infertility cannot be bifurcated from its treatment. This belief allows proponents to frame the issue as: whether women undergoing fertility treatment are included in the scope of the PDA. Conversely, because opponents do not, or cannot, acknowledge that the two aspects of infertility cannot be bifurcated, opponents frame the issue as: whether women who are infertile are included in the scope of the PDA. This explains why a court may conclude that the phrase “treatment for a medical condition related to pregnancy” does not include women undergoing fertility treatment:

the issue as whether infertility is a “related medical condition” under the PDA.¹⁶⁶ Because infertility is gender neutral, the courts answered in the negative.¹⁶⁷ The *Hall* court, on the other hand, did not separate infertility from the context of IVF; instead, the court framed the issue as whether women undergoing IVF can present a cognizable claim under the PDA.¹⁶⁸ The *Hall* court noted that IVF is related to pregnancy because it involves the “potential for pregnancy” and requires that the person receiving treatment have childbearing capacity.¹⁶⁹ By ignoring the connection between IVF and childbearing capacity, the *Krauel* and *Saks* courts viewed infertility in a vacuum.¹⁷⁰

A. *The Krauel and Saks Decisions Only Scratch the Surface of the Infertility Issue*

In *Hall*, the Seventh Circuit distinguished *Krauel* and *Saks*, each of which involved insurance coverage for infertility treatments rather than the termination of a female employee undergoing IVF.¹⁷¹ While the Seventh Circuit did not necessarily disagree with the decisions reached by the Eighth and Second Circuits in *Krauel* and *Saks*,¹⁷² respectively, its reasoning conflicts with certain aspects of the arguments employed in these cases.

The *Krauel* court dismissed the plaintiff’s PDA claim because it held that infertility is not related to pregnancy.¹⁷³ The court reasoned that infertility, which prevents conception, is not a condition related

the condition of infertility is being considered outside the context of diagnosis and treatment.

Id.

¹⁶⁶ See *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (“[T]he issue before us is whether the District Court properly determined that treatment of infertility is not treatment of a medical condition related to pregnancy or childbirth.”); see also *Saks v. Franklin Covey Co.*, 316 F.3d 337, 345 (2d Cir. 2003) (“Whether the PDA’s prohibition of discrimination on the basis of pregnancy and ‘related medical conditions’ extends to discrimination on the basis of infertility.”).

¹⁶⁷ See *Krauel*, 95 F.3d at 680; see also *Saks*, 316 F.3d at 346.

¹⁶⁸ See *Hall v. Nalco Co.*, 534 F.3d 644, 648 (7th Cir. 2008) (“The district court’s emphasis on this issue of ‘infertility alone’ is therefore misplaced in the factual context of this case.”).

¹⁶⁹ See *id.*

¹⁷⁰ See Bentley, *supra* note 165, at 416–17 (analyzing the *Krauel* case and concluding that “consideration of infertility in this vacuum is the root of the most common objection to finding that women undergoing fertility treatment are within the scope of the PDA: that infertility is a gender-neutral condition”).

¹⁷¹ See *Hall*, 534 F.3d at 648.

¹⁷² See *id.*

¹⁷³ *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).

to pregnancy and childbirth, which occur post-conception.¹⁷⁴ The *Krauel* court drew a bright line at pregnancy to implicate the PDA; essentially, the court made a blanket rule that infertility cannot serve as the basis for pregnancy discrimination because it is not “related to” pregnancy. This kind of analysis, however, is superficial because it looks only at the condition of infertility and stops there instead of also looking at infertility in the context of both the treatment and employer action at issue. Additionally, as the *Hall* court noted, this reasoning was nullified by *Johnson Controls*, in which the Supreme Court held that the PDA applies to classifications based on “potential for pregnancy” in addition to actual pregnancy.¹⁷⁵ Contrary to *Krauel*’s rationale, a woman’s protection under the PDA does not exist only during her nine months of pregnancy.¹⁷⁶ A woman is part of the protected class whenever an employer action adversely affects her on the basis of a biological difference, such as the capacity to become pregnant, regardless of temporal considerations.¹⁷⁷

The *Krauel* line of reasoning is similar to that employed by the majority in *Gilbert*. *Krauel* created two classes, fertile and infertile employees, as the *Gilbert* majority differentiated between pregnant and nonpregnant employees.¹⁷⁸ In both cases, the courts upheld the employment policy because the class claiming discrimination included both men and women.¹⁷⁹ As Justice Stevens wrote in his *Gilbert* dissent, with which Congress agreed, the flaw in this reasoning is viewing the condition at issue, pregnancy in *Gilbert* and infertility in *Krauel*, in a “vacuum” instead of looking at the condition in a practical context—that pregnant persons can only be women and infertile persons

¹⁷⁴ *Id.* at 679–80. The Eighth Circuit extended its *Krauel* rule to the issue of contraception in *In re Union Pac. R.R. Employment Practices Litigation*, 479 F.3d 936, 942 (8th Cir. 2007). Using the same statutory construction, the *Union Pacific* court held that contraception is not a medical condition associated with “pregnancy” or “childbirth.” *Id.* The court reasoned that contraception, like infertility, prevents conception, and pregnancy, childbirth, and related medical conditions can occur only after conception. *Id.*

¹⁷⁵ *Hall v. Nalco Co.*, 534 F.3d 644, 648 n.1 (7th Cir. 2008).

¹⁷⁶ See generally *Int’l Union v. Johnson Controls*, 499 U.S. 187, 199 (1991) (holding that classifying groups on the basis of potential for pregnancy is the same as sex discrimination).

¹⁷⁷ See *Kocak v. Cmty. Health Partners of Ohio, Inc.*, 400 F.3d 466, 469–70 (6th Cir. 2005) (holding that an employee need not be pregnant at the time of the discrimination to bring a claim under the PDA).

¹⁷⁸ See *Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 134–35 (1976), *superseded by statute*, Pregnancy Discrimination Act of 1978, Pub. L. No. 95-555, 92 Stat. 2076; *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 680 (8th Cir. 1996).

¹⁷⁹ *Gilbert*, 428 U.S. at 136–40, 145–46; *Krauel*, 95 F.3d at 680.

undergoing IVF can only be women.¹⁸⁰ In the case of infertility, the practical context includes which gender the infertility treatments affect and how employers treat their employees with regard to gender-specific infertility treatments.

The Second Circuit in *Saks* applied the *Krauel* reasoning to uphold an employer plan that provided complete insurance coverage for male infertility treatments but excluded coverage for surgical impregnation procedures.¹⁸¹ Like the Eighth Circuit in *Krauel*, the Second Circuit held that “infertility standing alone does not fall within the meaning of the phrase ‘related medical conditions’ under the PDA.”¹⁸² The court refused to include infertility within the PDA because it would create a protected class—infertile persons—which includes both men and women.¹⁸³ In *Saks*, however, the plaintiff claimed that the employer plan provided complete surgical infertility coverage for male employees but incomplete coverage for female employees.¹⁸⁴ Thus, the issue stated in *Hall* was not the gender-neutral condition of infertility alone but rather the gender-specific condition of childbearing capacity.¹⁸⁵ The health-benefits plan in *Saks* fell within the PDA because it discriminated against employees on the basis of childbearing capacity by excluding coverage for infertility treatments performed only on women on account of their childbearing capacity.¹⁸⁶ Making blanket assertions that infertility is or is not included within the purview of the PDA allows courts to avoid the specific employer action at issue and the class of persons it affects.

Ironically, the Seventh Circuit would probably have come to the same conclusion—albeit employing a different analysis—as the Eighth Circuit did in *Krauel*. The Seventh Circuit agreed that discrimination on the basis of infertility alone, a gender-neutral condition, does not violate the PDA.¹⁸⁷ Therefore, if an employer, like the one in *Krauel*, provides no coverage for infertility treatments or terminates an employee merely for being infertile, then the issue is infertility alone and the employer does not violate the PDA. On the

¹⁸⁰ See *Gilbert*, 429 U.S. at 161–62.

¹⁸¹ *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346–47 (2d Cir. 2003).

¹⁸² *Id.* at 346.

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 342. The court disagreed with the plaintiff’s contention that the employer plan provided inferior coverage for female infertility. *Id.* at 346. It stated, however, that even if it did agree with the plaintiff that the plan provided inferior coverage for women, “such inferior coverage would not violate the PDA.” *Id.*

¹⁸⁵ See *Hall v. Nalco Co.*, 534 F.3d 644, 649 (7th Cir. 2008).

¹⁸⁶ See *Saks*, 316 F.3d at 342.

¹⁸⁷ *Hall*, 534 F.3d at 648.

other hand, if the employer provides coverage for male infertility treatments but not for female infertility treatments, like the employer in *Saks*, then the issue is not infertility alone because the employer is discriminating on the basis of childbearing capacity, a gender-specific condition. Likewise, if an employer terminates an employee for the reason that she is undergoing IVF, then the employer is discriminating on the basis of childbearing capacity because it is that capacity which necessarily requires the woman, not the man, to undergo IVF.¹⁸⁸ In sum, courts must conduct more than a superficial analysis—examining infertility only on its surface—and instead more closely scrutinize infertility in the context of its treatment to determine whether the employer action is gender neutral.

B. The Limitations of the PDA Even After Hall

The *Hall* decision provides and promotes greater protection from adverse employment actions on the basis of gender-specific infertility treatments by highlighting the shallow analysis with which other courts have addressed the infertility issue. But the practical significance of the decision may be disappointing for many working women undergoing IVF.

First, employment actions based on infertility alone are not unlawful because they affect men and women equally.¹⁸⁹ Only where an employer takes into consideration a woman's gender-specific characteristic, reproductive capacity, in taking adverse actions against her does impermissible gender discrimination arise.¹⁹⁰ Accordingly, employers may lawfully exclude insurance coverage for all infertility treatments because such an employer action is gender-neutral—that is, the exclusion affects men and women in equal proportion and is not based upon any gender-specific quality.¹⁹¹ Both men and women will presumably have to face this employer policy in equal measure by paying out of their pockets for infertility treatments for themselves or their spouses.¹⁹² In fact, an employer will invite sex discrimination claims from infertile male employees if it provides insurance coverage

¹⁸⁸ *Id.* at 648–49.

¹⁸⁹ *Id.* at 648.

¹⁹⁰ *See id.* at 648–49.

¹⁹¹ *See, e.g., Saks*, 316 F.3d at 346.

¹⁹² *See id.* at 347 (“[M]ale and female employees afflicted by infertility are equally disadvantaged by the exclusion of surgical impregnation procedures . . .”).

for female infertility treatments only.¹⁹³ Therefore, the PDA does not compel employers to provide coverage for IVF.¹⁹⁴

In contrast, adverse employer actions, such as demotion or termination, based not on infertility alone but rather on infertility treatment that can be performed only on women because of their childbearing capacity—such as IVF—could lead to a valid PDA claim.¹⁹⁵ Men and women do not have to face this employer action in equal measure; women bear this burden because men do not have to take extensive time off to undergo IVF treatments.¹⁹⁶ Additionally, whereas women who undergo IVF may be viewed by their employer as potentially pregnant (thus requiring insurance coverage and more time off in the future), men can never be viewed this way.¹⁹⁷ Therefore, for employers to take adverse employment action against women on the grounds that they are taking time off to undergo IVF is unlawful discrimination.

Even though women who are terminated for undergoing IVF may have a valid PDA claim, the impact of the *Hall* decision is further limited by the fact that Title VII requires equal treatment, not better treatment.¹⁹⁸ Unfortunately, even though *Hall* may seem like a victory

¹⁹³ The Supreme Court has held that both male and female employees are protected under the PDA because the PDA does not change Title VII's original prohibition against sex discrimination. *Newport News Shipbuilding & Dry Dock Co. v. EEOC*, 462 U.S. 669, 681–82 (1983); see Katherine E. Abel, Comment, *The Pregnancy Discrimination Act and Insurance Coverage for Infertility Treatment: An Inconceivable Union*, 37 CONN. L. REV. 819, 846–47 (2005) (“Congress simply could not have intended the PDA to serve as a statute that in effect discriminates against infertile male employees by providing superior coverage to infertile female employees.”).

¹⁹⁴ If the medical condition at issue is gender neutral, as is infertility, and the employer's action is gender-neutral and it applies its policy equally to all of its employees, then it does not violate the PDA because it is based on infertility alone. See *Hall v. Nalco Co.*, 534 F.3d 644, 648 (7th Cir. 2008).

¹⁹⁵ See *id.* at 649.

¹⁹⁶ See *id.* at 648–49 (“Employees terminated for taking time off to undergo IVF—just like those terminated for taking time off to give birth or receive other pregnancy-related care—will always be women”); see also Bentley, *supra* note 165, at 423.

¹⁹⁷ See *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1401 (N.D. Ill. 1994) (holding that “[d]iscrimination against an employee because she intends to, is trying to, or simply has the potential to become pregnant is . . . illegal discrimination”).

¹⁹⁸ *Cal. Fed. Sav. & Loan Ass'n v. Guerra*, 479 U.S. 272, 291 (1987) (holding that although the PDA requires equal treatment, not better treatment, for pregnant employees, state laws can require better treatment); see Thomas H. Barnard & Adrienne L. Rapp, *The Impact of the Pregnancy Discrimination Act on the Workplace—From a Legal and Social Perspective*, 36 U. MEM. L. REV. 93, 110–11 (2005).

The protections afforded by the PDA, however, are limited by its promise of equal—but not *special*—treatment. Not all adverse employment actions taken against pregnant women (or women affected by pregnancy-related conditions) are prohibited by the PDA. Specifically, fed-

for infertile women, its impact is restricted because the employer does not commit discrimination if the employer would have fired any employee under similar circumstances. “The Pregnancy Discrimination Act requires the employer to ignore an employee’s pregnancy, but . . . not her absence from work, unless the employer overlooks the comparable absences of nonpregnant employees in which event it would not be ignoring pregnancy after all.”¹⁹⁹ For example, if the employer would have fired a male employee for taking time off to undergo cosmetic surgery, then a female employee terminated for absenteeism related to IVF will likely not be successful in bringing a PDA claim. Only where an employer singles out a gender-specific procedure like IVF for adverse employment treatment does a viable claim of sex discrimination arise. A final limitation of the *Hall* decision is that its effects are potentially restricted to those women living in the Seventh Circuit. Thus, the PDA does not provide the kind of broad protection that women need when they are trying to build a family through IVF.

VII. FEDERAL LEGISLATION IS STILL NECESSARY AFTER *HALL*

Two separate forms of federal legislation are still necessary after *Hall*. First, *Hall* highlighted the need for Congress to clarify the definition of “related medical conditions” under the PDA so that women can achieve uniform results when they sue their employers for taking adverse employment actions against them on the basis of absences in connection with infertility treatments.²⁰⁰ Second, and more importantly, federal legislation such as the Family Building Act of 2009²⁰¹ is necessary to mandate infertility insurance so that infertile couples can afford to experience one of life’s greatest joys—have children. Currently, the PDA, the ADA, and the FMLA provide some protection against adverse employment actions, but they do not provide much hope for requiring infertility insurance.²⁰²

eral law “only requires that pregnant employees be treated the same as other employees similar in their ability or inability to work.”

Id. (quoting William G. Phelps, *What Constitutes Termination of Employee Due to Pregnancy in Violation of Pregnancy Discrimination Act Amendment to Title VII of Civil Rights Act of 1964*, 42 U.S.C.A. § 2000e(k), in 130 A.L.R. FED. 473 (1996)).

¹⁹⁹ *Troupe v. May Dep’t Stores Co.*, 20 F.3d 734, 738 (7th Cir. 1994) (citations omitted).

²⁰⁰ See discussion *infra* Part VII.A.

²⁰¹ See discussion *infra* Part VII.D.

²⁰² See discussion *infra* Parts VII.B–C.

A. *The PDA Should Be Clarified but Would Still Not Require Infertility Insurance*

Since the enactment of the PDA, the judiciary has grappled with how to properly interpret which “related medical conditions” fall within its scope. Because infertility is a significant unsettled area of law within PDA jurisprudence, PDA compliance is more complex and confusing for both employers and employees. This confusion is reflected in the significant rise in PDA charges filed with the EEOC since 1997.²⁰³ As the number of PDA charges steadily increase, the judiciary is being asked to play the central role in protecting women from employment discrimination.

Infertile women are essentially asking the courts to determine two issues: first, whether the PDA can be used as a means of compelling an employer to provide insurance coverage for infertility treatments;²⁰⁴ and second, whether the PDA can be used as a tool to seek damages against an employer who has taken an adverse employment action against a woman for taking time off to undergo infertility treatment.²⁰⁵ Unfortunately, the federal courts cannot give a clear answer on either issue, and the litigation surrounding the PDA has resulted in a lack of uniformity among the courts in regard to the scope of “related medical conditions” under the PDA.²⁰⁶

Because of the magnitude and complexity of pregnancy discrimination issues today,²⁰⁷ the courts are not the appropriate forum to

²⁰³ The EEOC received 6196 charges of pregnancy-based discrimination in 2009, a nearly 56% increase from 3977 charges in 1997. See U.S. Equal Employment Opportunity Comm’n, Pregnancy Discrimination Charges, EEOC & FEPAs Combined: FY 1997–FY 2009, <http://www.eeoc.gov/eeoc/statistics/enforcement/pregnancy.cfm> (last visited Feb. 23, 2010).

²⁰⁴ See, e.g., *Saks v. Franklin Covey Co.*, 316 F.3d 337, 340–42 (2d Cir. 2003); *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996).

²⁰⁵ See e.g., *Hall v. Nalco Co.*, 534 F.3d 644, 646 (7th Cir. 2008).

²⁰⁶ Compare *Saks*, 316 F.3d at 346 (holding “[t]hat infertility standing alone does not fall within the meaning of the phrase ‘related medical conditions’ under the PDA”), and *Krauel*, 95 F.3d at 679–80 (holding “[t]hat the District Court properly concluded that infertility is outside of the PDA’s protection because it is not pregnancy, childbirth, or a related medical condition”), with *Hall*, 534 F.3d at 648–49 (discussing how discrimination on the basis of childbearing capacity is prohibited by the PDA).

²⁰⁷ In addition to infertility treatments, cases involving the scope of the PDA regarding contraception have been hotly debated. The lower federal courts have been reaching divergent decisions when considering contraception. Compare *Cooley v. Daimler Chrysler Corp.*, 281 F. Supp. 2d 979, 984–85 (E.D. Mo. 2003) (holding that denying insurance coverage for a prescription medication that allows women to control their potential for pregnancy is a sex-based exclusion under the PDA), and *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001) (holding

shape the contours of the PDA. Having a child is a major life event that should not hinge on a court's use of a particular canon of statutory interpretation, framing of the issue, or survey of legislative history that does not address the specific pregnancy-related issues that are currently important. The level of delicacy and controversy surrounding these issues requires a uniform approach developed by Congress. The only equitable and practical way to develop guidance defining the responsibilities of employers and the rights of women in the workplace is through legislation or regulations clarifying the meaning of "related medical conditions" under the PDA.

Such clarifying legislation would achieve consistency for similarly situated plaintiffs, reduce the number of PDA charges filed each year, and follow the broader and more practical approach espoused in *Hall*. But even if Congress prohibits employer discrimination against women for undergoing gender-specific infertility treatments, it would likely protect women only from adverse employment actions taken against them for absenteeism arising from infertility treatments because only women have to miss work to undergo surgical impregnation procedures. As for insurance coverage, the PDA has never been interpreted to require insurance coverage for such treatments as long as employers offer the same coverage to all of their employees.²⁰⁸

B. Little Hope for Infertility Insurance Under the ADA and the FMLA

Women undergoing IVF may have an alternative avenue for financial relief under the ADA. The ADA prohibits employers from discriminating against qualified individuals on the basis of disability.²⁰⁹ The ADA defines "disability" as "a physical or mental impairment that substantially limits one or more . . . major life activities."²¹⁰ In *Bragdon v. Abbott*, the Supreme Court held that reproduction is a major life activity.²¹¹ Thus, plaintiff-employees may sue their employ-

that excluding prescription contraceptives from insurance coverage was sex discrimination under the PDA), *with In re Union Pac. R.R. Employment Practices Litig.*, 479 F.3d 936, 942 (8th Cir. 2007) (holding that "the PDA does not require coverage of contraception because contraception is not 'related to' pregnancy for PDA purposes and is gender-neutral").

²⁰⁸ See discussion *supra* Part VI.B.

²⁰⁹ 42 U.S.C. § 12112(a) (2006). "The term 'qualified individual' means an individual who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires." *Id.* § 12111(8).

²¹⁰ *Id.* § 12102(2)(A).

²¹¹ *Bragdon v. Abbott*, 524 U.S. 624, 639 (1998).

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ers under the ADA on the theory that infertility is a disability impairing a major life activity—reproduction.²¹²

The ADA may provide a successful cause of action where the employee is suing the employer for taking an adverse employment action against her for taking time off to treat her disability.²¹³ For example, a jury could find that granting Hall's requests for time off is a "reasonable accommodation" that her employer must make.²¹⁴ The ADA, however, is not likely to provide an impetus for employers to provide insurance coverage for infertility treatments. As with the PDA, employers do not violate the ADA as long as they offer the same coverage for all employees, even if that means no coverage is offered to anyone.²¹⁵

Likewise, claims brought under the FMLA²¹⁶ would suffer the same fate. The FMLA entitles individuals who cannot perform their regular job functions because of a "serious health condition"²¹⁷ to twelve weeks of leave as well as restoration of their former position—or an equivalent position—upon returning to work.²¹⁸ The FMLA

²¹² See, e.g., *LaPorta v. Wal-Mart Stores*, 163 F. Supp. 2d 758, 763 (W.D. Mich. 2001). In *LaPorta*, the plaintiff employee asserted the ADA as one of her claims against her employer for terminating her after she took time off to undergo infertility treatment. *Id.*

²¹³ See, e.g., *id.* at 769–70. The *LaPorta* court denied summary judgment to the employer on the issue of whether the employer wrongfully terminated the infertile employee on the basis of her absences from work to undergo infertility treatment because the ADA gave the employee the right to "reasonable accommodations" for her disability of infertility. *Id.* Thus, the court recognized that the plaintiff had a cognizable ADA claim against her employer. *Id.*

²¹⁴ See, e.g., *id.* The ADA requires employers to make "reasonable accommodations to the known physical or mental limitations of an otherwise qualified individual with a disability." 42 U.S.C. § 12112(b)(5)(A) (2006).

²¹⁵ See *Saks v. Franklin Covey Co.*, 117 F. Supp. 2d 318, 326 (S.D.N.Y. 2000) (rejecting the plaintiff's ADA claim because the employer's refusal to provide infertility insurance "d[id] not offer infertile people less pregnancy and fertility-related coverage than it offer[ed] to fertile people"), *aff'd in part, remanded in part*, 316 F.3d 337 (2d Cir. 2003); see also Jessica L. Hawkins, Note, *Separating Fact from Fiction: Mandated Insurance Coverage of Infertility Treatments*, 23 WASH. U. J.L. & POL'Y 203, 213 (2007) ("[S]o long as insurers and employers offer the same insurance coverage to all its employees, they do not violate the ADA by refusing to cover infertility treatments.").

²¹⁶ 29 U.S.C. §§ 2601–2654 (2006).

²¹⁷ "The term 'serious health condition' means an illness, injury, impairment, or physical or mental condition that involves—(A) inpatient care in a hospital, hospice, or residential medical care facility; or (B) continuing treatment by a health care provider." § 2611(11).

²¹⁸ § 2612(a)(1)(D) ("[A]n eligible employee shall be entitled to a total of 12 workweeks of leave during any 12-month period . . . [b]ecause of a serious health condition that makes the employee unable to perform the functions of the position of such employee."); § 2614(a).

protects women whose IVF procedure is successful because the statute expressly authorizes employee leave for the birth of a child.²¹⁹ But whether the FMLA can protect women against adverse employment actions for the actual process of undergoing IVF is unclear. Such protection depends on the facts of the case—for example, how severely the infertility treatments are impacting the woman’s ability to function—as well as the court’s interpretation of what constitutes a “serious health condition.” Moreover, the FMLA does not require employers to provide infertility insurance but rather requires only unpaid leave for eligible employees.²²⁰ Therefore, infertile women should turn to the legislature to create a new federal mandate rather than ask the judiciary to broadly interpret the express terms of already-existing laws—a task many courts are hesitant to do.²²¹

C. *The Limitations of State Law Coverage for Infertility Insurance*

Although fifteen states²²² have enacted statutes mandating insurance coverage for infertility treatments, each state’s mandate varies in the amount of insurance coverage that employers are required to

²¹⁹ § 2612(a)(1)(A).

²²⁰ See § 2612(a)(1)(D).

²²¹ See, e.g., *Krauel v. Iowa Methodist Med. Ctr.*, 95 F.3d 674, 679 (8th Cir. 1996) (narrowly interpreting the PDA’s “related medical condition” and holding that “the District Court properly concluded that infertility is outside of the PDA’s protection because it is not pregnancy, childbirth, or a related medical condition”).

²²² These states include Arkansas, California, Connecticut, Hawaii, Illinois, Louisiana, Maryland, Massachusetts, Montana, New Jersey, New York, Ohio, Rhode Island, Texas, and West Virginia. ARK. CODE ANN. §§ 23-85-137, 23-86-118 (West, Westlaw through 2009 Reg. Sess.); CAL. HEALTH & SAFETY CODE § 1374.55 (West 2008); CAL. INS. CODE § 10119.6 (West 2008); CONN. GEN. STAT. ANN. § 38a-536 (West, Westlaw through 2010 Supp.); HAW. REV. STAT. § 431:10A-116.5 (Westlaw through the 2009 3d Spec. Sess.); 215 ILL. COMP. STAT. ANN. 5/356m, 125/5-3 (West, Westlaw through P.A. 96-885 of the 2010 Reg. Sess.); MD. CODE ANN., HEALTH-GEN. § 19-701 (West, Westlaw through all ch. of the 2009 Reg. Sess. of the Gen. Assem.); MD. CODE ANN., INS. § 15-810 (West, Westlaw through all Ch. of the 2009 Reg. Sess. of the Gen. Assem.); MASS. GEN. LAWS ANN. ch. 175, § 47H (West, Westlaw through Ch. 46 of the 2010 2d Ann. Sess.); MASS. GEN. LAWS ch. 176A, § 8K (Westlaw through Ch. 46 of the 2010 2d Ann. Sess.); MASS. GEN. LAWS ANN. ch. 176B, § 4J (West, Westlaw through Ch. 46 of the 2010 2d Ann. Sess.); MASS. GEN. LAWS ch. 176G, § 4 (Westlaw through Ch. 46 of the 2010 2d Ann. Sess.); MONT. CODE ANN. §§ 33-22-1521, 33-31-102 (Westlaw through 2009 Legis.); N.J. STAT. ANN. §§ 17:48-6x, 17:48A-7W, 17:48E-35.22 (West 2008); N.J. STAT. ANN. §17B:27-46.1x (West 2006); N.J. STAT. ANN. § 26:2J-4.23 (West 2007); N.Y. INS. LAW §§ 3216, 3221, 4303 (McKinney 2006 & Supp. 2010); OHIO REV. CODE ANN. § 1751.01(A)(7) (West, Westlaw through 2009 File 20 of the 128th Gen. Assem.); R.I. GEN. LAWS §§ 27-18-30, 27-19-23, 27-20-20, 27-41-33 (Westlaw through Ch. 365 of the Jan. 2009 Sess.); TEX. INS. CODE ANN. § 1366.001-.006 (Vernon, Westlaw through the end of the 2009 Reg. and 1st Called Sess. of the 81st Leg.); W. VA. CODE ANN. § 33-25A-2 (West, Westlaw through H.B. 4040 of 2010 Reg. Sess.).

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provide and the requirements that women must meet to qualify for coverage.²²³ State infertility-insurance laws contain several limitations, and while female employees can lobby their state legislature to pass legislation mandating any coverage or more comprehensive coverage for infertility treatments, such actions may be futile.²²⁴

Twelve states have “mandate to cover” laws, which “require insurance companies to cover infertility treatment” in every health plan.²²⁵ Two states, California and Texas,²²⁶ have “mandate to offer” laws, which require insurance companies to offer coverage for infertility treatment,²²⁷ but “[e]mployers are not required . . . to purchase this additional coverage.”²²⁸ Some states require coverage or an offer of coverage for IVF only,²²⁹ and others require coverage for all infertility treatments except for IVF.²³⁰

Additional state-law limitations exist in the form of eligibility requirements for coverage. Many states limit the number of times that a patient may undergo fertility treatment before insurance coverage is no longer provided, require a period of years (usually two to five) of infertility before a couple is eligible for coverage, require that the couple have tried less expensive procedures first, or require that the couple be married and that the donor sperm be from the husband.²³¹ Finally, four states also impose age requirements.²³²

²²³ See *infra* notes 225–235 and accompanying text.

²²⁴ See *id.*

²²⁵ Nat’l Conference of State Legislatures, Insurance Coverage for Fertility Laws, <http://www.ncsl.org/Default.aspx?TabId=14391> (last visited March 22, 2010).

²²⁶ Am. Soc’y for Reprod. Med., State Infertility Insurance Laws, <http://asrm.org/insurance.aspx> (last visited Mar. 31, 2010); Hawkins, *supra* note 215, at 214.

²²⁷ Am. Soc’y for Reprod. Med., *supra* note 226.

²²⁸ ARONSON, *supra* note 1, at 269.

²²⁹ See ARK. CODE ANN. § 23-85-137(a) (West, Westlaw through 2009 Reg. Sess.); HAW. REV. STAT. § 431:10A-116.5 (Westlaw with amendments through the 2009 Third Spec. Sess.); MD. CODE ANN., INS. §§ 15-810(b) (West, Westlaw through all Ch. of the 2009 Reg. Sess. of the Gen. Assem.); TEX. INS. CODE ANN. § 1366.003 (Vernon, Westlaw through the end of the 2009 Reg. and 1st Called Sess. of the 81st Leg.).

²³⁰ See CAL. HEALTH & SAFETY CODE § 1374.55(a)-(b) (West 2008); N.Y. INS. LAW § 3221(k)(6)(C)(v) (McKinney 2006 & Supp. 2010).

²³¹ See ARK. INS. DEP’T, RULE AND REGULATION 1, §§ 1(5)(B), (C)(1)–(2) (1991), *available at* <http://www.insurance.arkansas.gov/Legal%20DataServices/rulesandregs/rnr01.pdf> (requiring that the couple be married, that the woman’s egg be fertilized by her husband’s sperm, and that the couple “have a history of unexplained infertility” for at least two years in order to qualify for coverage); HAW. REV. STAT. § 431:10A-116.5(a)(3)-(5) (Westlaw with amendments through the 2009 3d Spec. Sess.) (imposing three eligibility requirements for insurance coverage: the couple has been infer-

In addition to the state statutes' internal limitations, the Employee Retirement Income Security Act (ERISA) exempts self-funded insurance plans from state law.²³³ Thus, self-insured employers are not subject to the minimum infertility-insurance requirements imposed by state law. This is a significant limitation on the protection of state law because a majority of covered workers participate in insurance plans that are completely or partially self-insured.²³⁴ Finally, state law is limited by the "religious employer" exemption. Six states have an exemption for religious employers whose religious tenets are inconsistent with providing insurance coverage for infertility treatments.²³⁵ Because of the limitations of state law, a federal mandate is more appropriate because it establishes a minimum level of uniformity among the states.

tile for at least five years, the couple has unsuccessfully tried other treatments, and the woman's eggs must be fertilized by her spouse's sperm); MD. CODE ANN., INS. §§ 15-810(c)(2)-(4) (West, Westlaw through all Ch. of the 2009 Reg. Sess. of the Gen. Assem.) (requiring that the woman's egg be fertilized by her spouse's sperm, that the couple have a two-year history of infertility, and that they have exhausted less expensive treatments first); *id.* § 15-810(d) (allowing entities to limit coverage to three IVF attempts per birth not to exceed \$100,000 total); *see also* Hawkins, *supra* note 215, at 214-19 (discussing state-law requirements for insurance coverage).

²³² "Connecticut allows coverage to be excluded when a person turns 40; New Jersey requires coverage for

patients age 45 or younger; New York's coverage applies from age 21 to 44; and Rhode Island sets age limits of 25 to 40, but only for female patients." JESSICA ARONS, CTR. FOR AM. PROGRESS, FUTURE CHOICES: ASSISTED REPRODUCTIVE TECHNOLOGIES AND THE LAW 9 (2007) (internal citations omitted), *available at* http://www.americanprogress.org/issues/2007/12/pdf/arons_art.pdf.

²³³ 29 U.S.C. § 1144(b)(2)(B) (2006); *FMC Corp. v. Holliday*, 498 U.S. 52, 63-65 (1990) (holding that ERISA, not state law, regulates self-insured plans).

²³⁴ Hawkins, *supra* note 215, at 220 n.125 (citing Kaiser Family Found., Employer Health Benefits 2005 Annual Survey, <http://www.kff.org/insurance/7315/sections/ehbs05-sec10-1.cfm> (last visited May 22, 2010) (noting that "54% of covered workers in 2005 [were] in a plan that [was] completely or partially self-funded")).

²³⁵ These states include California, Connecticut, Illinois, Maryland, New Jersey, and Texas.

CAL. HEALTH & SAFETY CODE § 1374.55(f) (West 2008); CONN. GEN. STAT. ANN. §§ 38a-509(c)-(e), 38a-536(c)-(e) (West, Westlaw through 2010 Supp.); 215 ILL. COMP. STAT. ANN. 5/356m(b)(2) (West, Westlaw through P.A. 96-882 of the 2010 Reg. Sess.); MD. CODE ANN., INS. § 15-810(e) (West, Westlaw through 2009 Reg. Sess.); N.J. STAT. ANN. §§ 17:48-6x(b), 17:48A-7w(b), 17:48E-35.22(b) (West 2008); N.J. STAT. ANN. § 17B:27-46.1x(b) (West 2006); N.J. STAT. ANN. §26:2J-4.23(b) (West 2007); TEX. INS. CODE ANN. § 1366.006 (Vernon, Westlaw through the end of the 2009 Reg. and 1st Called Sess. of the 81st Legislature); *see* ARONS, *supra* note 232, at 42 n.45.

D. The Family Building Act Is the Best Option for Mandating Infertility Insurance

The most compelling option for women who need insurance coverage for infertility treatment is to lobby their representatives in Congress to pass the Family Building Act of 2009 (“the Act”), proposed by Representative Anthony Weiner in the 111th Congress.²³⁶ The Act is not subject to as many restrictions as state infertility-insurance laws. First, the Act requires insurance carriers to cover the costs of infertility treatments including all ARTs.²³⁷ Second, the Act is not preempted by ERISA.²³⁸ Instead, the Act amends the Public Health Service Act and ERISA to require insurance coverage for the treatment of infertility.²³⁹ Third, the Act applies to all employers—

²³⁶ Family Building Act of 2009, H.R. 697, 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h697ih.txt.pdf. On January 26, 2009, the Act was introduced and referred to the House Committee on Energy and Commerce, the House Committee on Education and Labor, and the House Committee on Oversight and Government Reform. *See* Library of Congress, Bill Summary and Status for the 110th Congress (2007–2008), *available at* <http://thomas.loc.gov/cgi-bin/bdquery/D?d111:1:./temp/~bdjKRz:./bss/111search.html> (last visited Apr. 11, 2009). The bill has been introduced by Representative Anthony Weiner in every session of Congress since 1999. *See* Family Building Act of 2007, H.R. 2892, 110th Cong. (2007), *available at*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=110_cong_bills&docid=f:h2892ih.txt.pdf; Family Building Act of 2005, H.R. 735, 109th Cong. (2005), *available at*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=109_cong_bills&docid=f:h735ih.txt.pdf; Family Building Act of 2003, H.R. 3014, 108th Cong. (2003) *available at*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=108_cong_bills&docid=f:h3014ih.txt.pdf; Family Building Act of 2001, H.R. 389, 107th Cong. (2001), *available at*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=107_cong_bills&docid=f:h389ih.txt.pdf; Family Building Act of 1999, H.R. 2706, 106th Cong. (1999), *available at*, http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=106_cong_bills&docid=f:h2706ih.txt.pdf.

²³⁷ H.R. 697 § 2708(a)(1), 111th Cong. (2009), *available at* http://frwebgate.access.gpo.gov/cgi-bin/getdoc.cgi?dbname=111_cong_bills&docid=f:h697ih.txt.pdf.

²³⁸ *See* Hawkins, *supra* note 215, at 219 n.122. ERISA preempts any state law “relating to any employee benefit plan” and thus significantly limits the effectiveness of state mandates for insurance coverage. *Id.*

²³⁹ The Family Building Act of 2009 states the following findings:

- (1) Infertility is a disease affecting more than 6,000,000 American women and men, about 10 percent of the reproductive age population.
- (2) Recent improvements in therapy make pregnancy possible for more couples than in past years.
- (3) The majority of group health plans do not provide coverage for infertility therapy.
- (4) A fundamental part of the human experience is fulfilling the desire to reproduce.

H.R. 697 § 1.

and contains no exemption for religious employers²⁴⁰—as well as all people, regardless of age.²⁴¹ Finally, the Act also provides the floor, not the ceiling, of insurance coverage; that is, it does not preempt state law that provides greater benefits to infertile couples.²⁴²

The Act does, however, retain some common state-law limitations—albeit less stringent ones—on insurance coverage to achieve cost-effectiveness. First, the Act provides insurance coverage for ARTs only where “the participant or beneficiary has been unable to bring a pregnancy to a live birth through less costly medically appropriate infertility treatments for which coverage is available under the insured’s policy, plan, or contract.”²⁴³ Furthermore, the Act limits the fertility procedures covered to those that the Secretary of Health and Human Services deems “non-experimental.”²⁴⁴ Finally, the Act imposes a lifetime cap of six on the number of egg retrievals that can be covered by insurance.²⁴⁵ After four egg retrievals are performed, insurance is no longer required to cover additional retrievals unless a live birth results from one of the egg retrievals; in that case, two more egg retrievals are covered, for a maximum of six egg retrievals.²⁴⁶

The Act provides the most promising way for infertile couples to receive insurance coverage that will enable them to undergo infertility procedures because it recognizes the significance of the dream of having children and appropriately addresses the financial obstacles

²⁴⁰ The absence of an exemption in the statute would likely overcome a constitutional challenge based on the First Amendment’s Free Exercise of Religion Clause. The constitutional issue is nearly identical in contraception-insurance cases. Two states have upheld state laws that mandate insurance coverage for contraception without providing an exemption for religious employers. *See Catholic Charities of the Diocese of Albany v. Serio*, 859 N.E.2d 459, 528 (N.Y. 2006) (holding that state’s contraceptive-equity act mandating that health-insurance plans that provide prescription-drug coverage also cover prescription contraceptives did not violate the state constitution’s free-exercise clause); *Catholic Charities of Sacramento, Inc. v. Superior Court*, 85 P.3d 67, 91–94 (Cal. 2004) (holding that the state’s contraceptive-equity act mandating that certain employer health and disability plans that cover prescription drugs also cover prescription contraceptives did not violate state constitution’s free-exercise clause even when reviewed under strict scrutiny).

²⁴¹ *See generally* H.R. 697.

²⁴² *Id.* § 2708(h).

²⁴³ § 2708(b)(2)(A)(i).

²⁴⁴ § 2708(b)(1). The Secretary makes this determination “after consultation with appropriate professional and patient organizations such as the American Society for Reproductive Medicine, RESOLVE, and the American College of Obstetricians and Gynecologists.” *Id.*

²⁴⁵ § 2708(b)(2)(A)(ii).

²⁴⁶ *Id.*

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that put that dream at risk. At the same time, the Act is economical and includes provisions to minimize the cost to employers.

VIII. CONCLUSION

Women undergoing IVF constitute a class vulnerable to adverse employment actions, whether it is because employers view them as potentially becoming pregnant or whether employers simply do not want to pay for the cost of the infertility treatment. Infertility affects women in a unique way in that their childbearing capacity requires them to undergo time-intensive surgical impregnation procedures. Confronted with this reality, the *Hall* court provided women with broader protection under the PDA by recognizing that it is a woman's childbearing capacity, not her infertility, which distinguishes her experience with infertility from that of a man. This biological difference, the capacity to become pregnant, exposes women to employer actions that endanger their workplace status.

Because employers are not required to provide full or even partial coverage for infertility treatments in every state, national guidelines are necessary to adequately protect women trying to conceive via IVF. In order to provide this nationwide, comprehensive protection for women, Congress should clarify that the scope of the PDA encompasses employer actions that discriminate on the basis of a woman's childbearing capacity or other sex-specific conditions related to pregnancy. This clarifying legislation would prohibit employers from terminating female employees based on their need to undergo IVF because such action would constitute pregnancy discrimination.

While a broader definition of the protected class would come closer to providing women with equal opportunities in the workplace, the PDA is still inadequate to compel employers to provide insurance coverage for infertility treatments. Given the importance of having a family, and the rise in technology that has allowed couples to achieve pregnancy, denying infertile couples a chance at parenthood would be unfair. Therefore, a uniform policy of insurance coverage, such as the Family Building Act of 2009, is needed to provide millions of infertile couples with the ability to create a family.