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NOTES

SURROGACY: A LOOK INTO THE EXCLUSIONARY ADVANCES IN ASSISTED REPRODUCTIVE TECHNOLOGY

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I. INTRODUCTION

“Every time I got pregnant, I would look at the world with rose-colored glasses, and I would imagine what life was going to be like on the other side. And every time I lost a pregnancy, to have that taken away was so tough.”¹ This is the story of Rebecca Jarvis, ABC News’ Chief Business, Technology, and Economics Correspondent, who turned to surrogacy to grow her family after a demoralizing battle with infertility.² Rebecca is not alone in her story: it is estimated that between “8% and 12% of reproductive-aged couples worldwide struggle with infertility.”³ The percentage of married women struggling with infertility increased from 6.7% between 2011 and 2015 to 8.7% between 2015 and 2019.⁴ Couples dealing with infertility have higher instances of anxiety and emotional distress; in a study of 200 couples visiting a fertility clinic, approximately “half of the women and 15% of the men said that infertility was the most upsetting experience of their lives.”⁵ For many, infertility is only the beginning of a long and costly plight to have a family—one that often requires medical intervention and the use of Assisted Reproductive Technologies

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1. *Rebecca Jarvis Opens up on Infertility and Surrogacy Journey to Becoming a Family of 4*, ABC NEWS (Nov. 29, 2023, 8:12 AM), <https://abcnews.go.com/GMA/Family/rebecca-jarvis-opens-infertility-surrogacy-journey-becoming-family/story?id=105214194> [<https://perma.cc/95RU-CJZY>].

2. *Id.*

3. Mélodie Vander Borgh & Christine Wyns, *Fertility and Infertility: Definition and Epidemiology*, 62 CLINICAL BIOCHEM, 2, 2–3 (2018), <https://www.sciencedirect.com/science/article/pii/S0009912018302200?via%3Dihub> [<https://perma.cc/XEF7-7TSS>].

4. Colleen N. Nugent & Anjani Chandra, *Infertility and Impaired Fecundity in Women and Men in the United States*, NAT’L HEALTH STAT. REPORTS (Apr. 24, 2024), <https://www.cdc.gov/nchs/data/nhsr/nhsr202.pdf> [<https://perma.cc/8V9U-RNS4>].

5. *Infertility and Mental Health*, CEDARS SINAI (Sep. 8, 2020), <https://www.cedars-sinai.org/blog/infertility-mental-health.html> [<https://perma.cc/UBX4-TTVZ>].

(“ART”) to start their family.

Luckily for many, recent advancements in the development of ARTs have made the impossible possible, given those unable to conceive naturally the ability to grow their family, and substantially reduced the biological constraints and fears felt by older-aged couples and post-menopausal women starting their family later in life.⁶ In 2021 alone, 86,146 infants, or 2.3% of all infants born in the United States were conceived through ART.⁷ Even with these advancements, when ART does not work and a woman is unable to carry her own child, she is left with two options: surrogacy or adoption. Adoption has long been the most accessible option for nontraditional couples and couples struggling with infertility, and although millions of couples are waiting to adopt in the United States, a vast majority of these individuals will not share a genetic link with their adoptive child.⁸ For many, surrogacy is their only remaining option if they want to build a family that shares their genetic identity.

Although federal and state regulations of ARTs have become more sophisticated to keep up with this growing demand, surrogacy is often excluded from these ART regulatory policies.⁹ It is advantageous for health insurers and employers to race to keep up with legislation and policies that address this growing market, yet no such shift has occurred.¹⁰ As surrogacy rates continue to rise, the need to enact comprehensive legislation and regulation will only become more necessary; this is a real, urgent problem that needs to be met with comprehensive legislation and regulation.

Why is there so much pushback to regulating surrogacy? Part II will discuss the modern usage, global regulation of, and risks accompanying ART; Part III will provide an overview of the surrogacy process, a discussion of the accompanying costs of domestic and international surrogacy, moral and ethical dilemmas, and seminal surrogacy legal cases; Part IV will provide an analysis of the current federal and state regulations of ART and the exclusion of surrogacy, the inconsistencies in current regulations, exclusionary health

6. Brittany Harrison et al., *Advanced Maternal Age: Ethical and Medical Considerations for Assisted Reproductive Technology*, INT’L. J. WOMEN’S HEALTH 561, 561–62 (2017), <https://pmc.ncbi.nlm.nih.gov/articles/PMC5566409/> [<https://perma.cc/D4H4-24CW>]; see also Sudhaa Sharma & Neelam Aggarwal, *In Vitro Fertilization in Older Mothers: By Choice or By Law?*, 7 J. MID-LIFE HEALTH 103, 103–04 (2016) (noting that by the time a woman is 30 years old she will have lost about 90% of her egg supply, and as she grows older, the risk for dangerous complications arising from birth and pregnancy increase significantly).

7. *Fact Sheet: In Vitro Fertilization (IVF) Use Across the United States*, U.S. DEP’T HEALTH AND HUM. SERV. (Mar. 13, 2024), <https://www.hhs.gov/about/news/2024/03/13/fact-sheet-in-vitro-fertilization-ivf-use-across-united-states.html> [<https://perma.cc/Z78Z-V4EZ>].

8. See *Shining a Light on Waiting Children and Aspiring Adoptive Families*, ADOPTION & BEYOND, <https://adoption-beyond.org/how-many-babies-in-america-are-waiting-to-be-adopted/> (last visited Nov. 21, 2024) [<https://perma.cc/BX9F-8FPJ>]; see also *Debating Between Adoption and Surrogacy? 5 Questions to Ask Yourself*, AM. ADOPTION NEWS (Nov. 11, 2019), <https://www.americanadoptions.com/blog/adoption-or-surrogacy/> [<https://perma.cc/XY6D-6PXG>].

9. See discussion *infra* Part III.A.

10. See discussion *infra* Part IV.C.

policies across private, public, and TRICARE insurance, the exclusionary tax policies that make surrogacy largely unaffordable and inaccessible, and the economic, human rights, and employer-employee implications that create an urgent need to regulate; and finally, Part V, will discuss a proposed pathway of changes to the law that will increase affordability and accessibility.

II. OVERVIEW OF ASSISTED REPRODUCTIVE TECHNOLOGY

A. Modern Usage of Assisted Reproductive Technology

ARTs are used to treat infertility and encompass a “range of medical procedures used to address infertility and assist individuals and couples in achieving pregnancy.”¹¹ ART treatments include fertility treatments handling both eggs and sperm, and involve removing eggs from the ovaries, mixing eggs and sperm to make embryos, and implanting embryos.¹² ART procedures often use donor eggs, donor sperm, previously frozen embryos, surrogates, or gestational carriers.¹³ The Centers for Disease Control and Prevention (“CDC”) reported that in 2021, over 238,000 patients had over 413,000 rounds of ART cycles performed across 453 reporting clinics in the United States, resulting in over 91,000 live births.¹⁴ Approximately 2.3% of all infants born in the United States annually are conceived using ART.¹⁵

IVF treatment is the most common and effective type of ART and involves laparoscopically retrieving female cells developing into an egg, fertilizing in vitro, and transferring embryos into the women’s uterus to carry and birth.¹⁶ It is believed that over 4,000,000 individuals have been born following IVF.¹⁷ Intrauterine Insemination (“IUI”) is another commonly used form of ART, and involves stimulating a woman’s ovaries for a more active production of eggs,

11. *Assisted Reproductive Technology*, MEDLINEPLUS, <https://medlineplus.gov/assisted-reproductivetechnology.html> [<https://perma.cc/R7FB-JKX7>] (last visited Nov. 21, 2024); Meaghan Jain et al., *Assisted Reproductive Technology (ART) Techniques*, NAT’L INST. HEALTH, <https://www.ncbi.nlm.nih.gov/books/NBK576409/> [<https://perma.cc/WDG7-FD55>] (last updated Dec. 13, 2025).

12. Meaghan Jain et al., *Assisted Reproductive Technology (ART) Techniques*, NAT’L INST. HEALTH, <https://www.ncbi.nlm.nih.gov/books/NBK576409/> [<https://perma.cc/WDG7-FD55>] (last updated Dec. 13, 2025); MEDLINEPLUS, *supra* note 11.

13. Jain et al., *supra* note 12; MEDLINEPLUS, *supra* note 11.

14. *ART Success Rates*, CDC, <https://www.cdc.gov/art/artdata/index.html> [<https://perma.cc/P2NX-EP2D>] (last visited Nov. 21, 2024).

15. *Id.*

16. Jain et al., *supra* note 12.

17. Press Release, The Nobel Prize, The Nobel Assembly at Karolinska Institute has today decided to award the Nobel Prize in Physiology or Medicine 2010 to Robert G. Edwards for the development of in vitro fertilization (Oct. 4, 2010), <https://www.nobelprize.org/prizes/medicine/2010/press-release/> [<https://perma.cc/2W5D-RUAV>]

and then injecting sperm into the uterus.¹⁸ Intracytoplasmic sperm injection (“ICSI”) involves injecting a single sperm into the egg and is often used in combination with IVF.¹⁹ Frozen embryo transfer (“FET”) is the process in which frozen embryos created during a previous IVF cycle are placed in a woman’s uterus.²⁰ These are all the most common forms of ART, but if a woman is unable to carry a pregnancy to term using these methods, gestational surrogacy is the only remaining option for those that are not interested in adoption.²¹

B. Risks of Assisted Reproductive Technologies

The use of ART does not come without risk associated with pregnancy, delivery, and childhood.²² Risks include hyper stimulation of ovaries, ovarian torsion, infection, bleeding, death, failure to conceive, multiple gestation, premature and “small for gestational age” infants, birth defects, later in life health risks for children born after ART, epigenetic imprinting disorders, risks from handling gametes and embryos, risks of culture, risks associated with cryopreservation, and gamete and embryo “mix ups.”²³ Sepsis, pre-eclampsia, hemorrhage, and maternal death are all risks associated with childbirth, and the hormonal changes faced after pregnancy exacerbate mental health conditions like postnatal depression or postnatal psychosis.²⁴

III. OVERVIEW OF SURROGACY

A. Surrogacy Process

Surrogacy is the process in which a gestational carrier, also known as a surrogate, carries and births the baby of a couple or individual, also referred to as intended parents.²⁵ There are two types of surrogacies: gestational and

18. Andrew J. Levi, *Overview of the Types of Assisted Reproductive Techniques (ART)*, PARK AVE. FERTILITY, <https://parkavefertility.com/overview-of-the-types-of-assisted-reproductive-techniques-art/> [https://perma.cc/GQJ5-8A9E] (last visited Nov. 21, 2024).

19. MEDLINEPLUS, *supra* note 11.

20. *Id.*

21. *Surrogacy*, YALE MED., <https://www.yalemedicine.org/conditions/gestational-surrogacy> [https://perma.cc/SH7H-EZMX] (last visited Oct. 13, 2024).

22. Robert W. Rebar, *What Are the Risks of the Assisted Reproductive Technologies (ART) and How Can They be Minimized?* 12 REPROD. MED. BIOLOGY 151, 151 (2013).

23. *Id.* at 152.

24. Lisa Roscoe, *Surrogacy — Wish Fulfillment or Exploitation?*, MATERNITY ACTION (Feb. 4, 2020), <https://maternityaction.org.uk/2020/02/surrogacy-wish-fulfilment-or-exploitation/> [https://perma.cc/W6EF-G2NV].

25. YALE MED., *supra* note 21.

traditional surrogacy.²⁶ In gestational surrogacy, embryos made of the sperm and egg of the intended parents are implanted into the surrogate's uterus through IVF for the surrogate to carry and deliver.²⁷ The fetus does not share any DNA with or relation to the surrogate. In traditional surrogacy, the surrogate is related to the fetus.²⁸ Here, the surrogate's own eggs are used to create the pregnancy that they then carry and deliver.²⁹ The surrogacy processes may be purely altruistic, where the surrogate mother is not paid for her services, or commercial, where the surrogate mother is compensated for her services.³⁰

To begin the surrogacy process, intended parents will generally work with a surrogacy agency to find a viable surrogate.³¹ Surrogate agencies generally have a rigorous screening process and strict standards around age, health, weight, pregnancy history, criminal history, financial stability, and medication use.³² Once a surrogate is identified, the contracting process begins.³³ Both the surrogate and the intended parents are represented by attorneys, and all negotiations are handled between their respective attorneys.³⁴

Surrogacy contracts generally address issues surrounding parental rights, custody issues, location of delivery, future contact between parties, insurance for both parties, control over medical decisions during the pregnancy, payment of medical bills and liability for medical complications, availability of medical history and personal medical information of the surrogate, intended parents presence during doctor's visits, financial considerations, and legal fees.³⁵ Intended parents and surrogate insurance policies are often evaluated at this point to ensure there is no lapse in coverage and that anticipated and unanticipated medical expenses will be covered.³⁶ Intended parents may also obtain the services of an escrow agent to facilitate payments to protect the relationship between the surrogate and intended parents if any issues arise.³⁷ Once the complexities of this phase of the process are decided, an embryo

26. *Gestational Surrogacy*, CLEVELAND CLINIC, <https://my.clevelandclinic.org/health/articles/23186-gestational-surrogacy> [<https://perma.cc/YB4P-HESK>] (last visited Oct. 13, 2024).

27. *Id.*

28. *Id.*

29. *Id.*

30. Brian Clowes & Marisa Cantu, *The Ethics of Surrogacy*, HUM. LIFE INT'L., <https://www.hli.org/resources/surrogacy-ethical-issues/> [<https://perma.cc/4EM8-D8TT>] (last updated June 5, 2023).

31. *See Parent Roadmap*, COLLECTIVE SURROGACY, <https://www.collectivesurrogacy.com/surrogacy-roadmap> [<https://perma.cc/F6WH-5YSW>] (last visited Nov. 21, 2024).

32. *Am I Eligible?*, COLLECTIVE SURROGACY, <https://www.collectivesurrogacy.com/am-i-eligible> [<https://perma.cc/5QHP-QN9R>] (last visited Nov. 21, 2024).

33. *Id.*

34. *Legal Aspects of Domestic Gestational Carrier Agreements*, RESOLVE, <https://resolve.org/learn/family-building-options/surrogacy/legal-aspects/> [<https://perma.cc/CA4Z-97W6>] (last visited Nov. 21, 2024).

35. *Id.*

36. *Id.*

37. *Id.*

transfer will be scheduled with the surrogate.³⁸ To reduce the resulting number of multiple pregnancies and maximize the number of resulting live births, IVF clinics are limited to transferring only one embryo per procedure.³⁹ Once a pregnancy is confirmed, parental oversight and involvement will vary, and it will generally follow guidelines set forth in the surrogacy contract.⁴⁰ Once a surrogate has completed the first trimester of pregnancy, or has reached the statutorily designated point in the pregnancy, intended parents will obtain a birth order.⁴¹ A birth order allows intended parents to establish the parentage of their child before they are even born.⁴² To file a pre-birth order, intended parents and surrogates must sign statements of parentage for the unborn baby and doctors must complete an affidavit stating they completed the embryo transfer.⁴³ If intended parents do not obtain a birth order, then one or both intended parents will be required to adopt the child.⁴⁴ Not all states allow intended parents to file a pre-birth order, and instead, may require the filing of a post-birth order.⁴⁵ Post-birth orders are generally filed three to five days after the birth of the child.⁴⁶ The birth of the child is dictated by a delivery plan, which is generally outlined in the surrogacy contract, or as a separate plan developed by the intended parents, surrogates, and the healthcare facility, and determines who will be allowed in the birthing chamber, who will cut the umbilical cord, and who will hold the baby first, amongst other things.⁴⁷ Once the child is born, the remaining phases of the surrogacy process are dictated heavily by state law.⁴⁸ Intended parents may have to file a birth certificate or post birth order establishing their parentage, request citizenship and obtain a passport for any child born abroad, or potentially complete an adoption.⁴⁹

38. *Id.*

39. *How Surrogacy Works: A Step-by-Step Guide*, SENSIBLE, <https://www.sensible-surrogacy.com/surrogacy-guide/how-does-surrogacy-work/#embryo-transfer> [https://perma.cc/T4K5-WJC9] (last visited Nov. 21, 2024); *Guidance on the Limits to The Number of Embryos to Transfer: A Committee Opinion (2021)*, ASRM, <https://www.asrm.org/practice-guidance/practice-committee-documents/guidance-on-the-limits-to-the-number-of-embryos-to-transfer-a--committee-opinion-2021/> [https://perma.cc/Y3BN-REBN] (last visited Mar. 8, 2025).

40. SENSIBLE, *supra* note 39; ASRM, *supra* note 39.

41. *How You Can Protect Your Parental Rights in Surrogacy*, AM. SURROGACY, <https://www.americansurrogacy.com/parents/pre-birth-orders> [https://perma.cc/T5GB-S8LE] (last visited Nov. 21, 2024).

42. *Id.*

43. RESOLVE, *supra* note 34.

44. *Id.*

45. AM. SURROGACY, *supra* note 41.

46. *Id.*

47. William Houghton, *How Does Surrogacy Work*, SENSIBLE, <https://www.sensible-surrogacy.com/surrogacy-guide/how-does-surrogacy-work/#embryo-transfer> [https://perma.cc/T4K5-WJC9] (last visited Nov. 21, 2024).

48. See discussion *supra* Part III.A; see discussion *infra* Part IV.B.

49. Houghton, *supra* note 47.

B. Cost of Domestic and International Surrogacy

In 2022, the global commercial surrogacy industry was valued at approximately \$14 billion and is projected to rise to \$129 billion by 2032.⁵⁰ Even with this increased market capitalization, the surrogacy process remains largely unaffordable for Americans. A complete surrogacy process may cost as much as \$200,000, reflecting \$20,000 to \$80,000 for medical expenses, \$3,000 to \$15,000 for legal support, \$6,000 to \$54,000 for surrogacy recruiting programs, and \$20,000 to \$55,000 for carrier compensation.⁵¹ The median household income of all households in the United States in 2024 was \$83,730, which does not come close to covering the full cost of the surrogacy process and makes this largely unaffordable without additional assistance.⁵² Many intended parents must rely on medical insurance coverage and tax reimbursement to cover the remaining financial obligations imposed, and if that is not enough, may only be able to afford to hire an international surrogate from a lower-cost country, which creates an additional set of risks.⁵³

The increased costs of domestic surrogacy have led to an increase in international surrogacy births, so much so, that it is believed that approximately 20,000 children are born through the international surrogacy market annually.⁵⁴ Ukraine, Georgia, Mexico, the Philippines, and Colombia are several of the most popular international markets for surrogacy.⁵⁵ In Ukraine, a full surrogacy process costs between \$40,000 to \$65,000.⁵⁶ Gestational surrogacy is limited to married heterosexual couples, and the embryos must be produced using the sperm of the intended father and the eggs of the intended mother.⁵⁷ In Georgia,

50. Lauren Danielowski, *Reproduction as Work: Addressing a Gap in Current Economic Rights Discourses*, 25 HEALTH & HUM. RTS. J. 2, 29 (2023); Karen Gilchrist, *The Commercial Surrogacy Industry Is Booming as Demand for Babies Rises*, CNBC (Mar. 7, 2023, 1:37 AM), <https://www.cnbc.com/2023/03/07/womb-for-rent-more-women-are-working-in-commercial-surrogacy-industry.html> [<https://perma.cc/SDF7-ZLUJ>].

51. Pedro Brandao & Nicolás Garrido, *Commercial Surrogacy: An Overview*, 44 REV. BRAS. GYNECOL. OBSTET. 1141, 1142 (2022), <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC9800153/> [<https://perma.cc/H82E-F6YS>].

52. MELISSA KOLLAR & ZACH SCHERER, INCOME IN THE UNITED STATES: 2024 45 (U.S. CENSUS BUREAU, Sep. 2025), <https://www2.census.gov/library/publications/2025/demo/p60-286.pdf> [<https://perma.cc/AS49-KVKF>] (noting that the median household income amount reflects an aggregate composed of family households comprised of married-couple households, female householders with no spouse present households, male householders with no spouse present households, and female and male nonfamily households).

53. See discussion *infra* Parts IV.C, V.B.

54. *International Surrogacy—Call for Action by the International Social Service Network*, INT'L SOCIAL SERV. U.S., <https://www.iss-usa.org/international-surrogacy-call-for-action-by-the-international-social-service-network/> [<https://perma.cc/9MHP-2CWN>] (last visited Nov. 21, 2024).

55. *Best Countries for Surrogacy: All that Intended Parents Need to Know*, INT'L FERTILITY GROUP BLOG, <https://ifg-ivf.com/blog/best-countries-for-surrogacy-all-that-intended-parents-need-to-know.html> [<https://perma.cc/VPJ2-R36P>] (last visited Nov. 21, 2024).

56. *Id.*

57. *Id.*

a full surrogacy process may cost between \$30,000 to \$60,000, and a standard process encompasses surrogate selection, medical procedures, legal assistance, and ongoing support in one location, making it easier, more streamlined, and affordable for intended parents.⁵⁸ In Mexico, surrogacy costs range between \$40,000 to \$60,000, is available to everyone, and does not restrict homosexual couples or single intended parents.⁵⁹ As domestic costs increase, the international surrogacy market is becoming an increasingly cost-effective option.

C. Moral and Ethical Dilemmas

There is a whirlwind of controversy surrounding the moral and ethical implications of surrogacy. Many oppositionists to surrogacy believe that surrogacy commodifies women's bodies, exploits women, poses unnecessary health risks, infringes upon bodily autonomy, and is a form of "reproductive prostitution."⁶⁰ There is often a socioeconomic inequality between surrogate mothers and intended parents, who are often wealthier, have advanced education, and have higher status careers.⁶¹ Many of the women in surrogacy arrangements are vulnerable and not well-educated, and because of this, may not have proper informed consent.⁶²

In countries like China, where surrogacy is strictly prohibited, surrogates can be bound to contractual obligations that infringe upon their rights and put them at risk for physical injury.⁶³ Since the enactment of heightened restrictions in China, there have been increased instances of illegal black market surrogacy operations that have perpetuated child trafficking operations and exploited women for profit.⁶⁴ India was also once a booming surrogacy market, but in 2016, legislators passed sweeping legislation that made commercial surrogacy

58. *Id.*

59. *See How Much does Gestational Carrier Cost in Mexico*, CAREM SC, <https://carem.mx/en/how-much-does-gestational-carrier-cost-in-mexico/> [https://perma.cc/7RNZ-6PU5] (last visited Mar. 4, 2026); *see also Surrogacy Program Cost in Mexico*, NEWLIFE MEXICO, <https://www.newlifemexico.net/surrogacy-program-cost-mexico/> [https://perma.cc/SXS4-M8LF] (last visited Mar. 4, 2026).

60. *Understanding Surrogacy Controversy: What's The Big Deal?*, AM. SURROGACY BLOG (Sep. 10, 2018), <https://www.americansurrogacy.com/blog/understanding-surrogacy-controversy-whats-the-big-deal/> [https://perma.cc/3DB3-GGUU]; Sneha Singh, *Who Do You Belong To? Bodily Autonomy Violations and Health Risks During Surrogacy*, FEM LENS BLOG (June 8, 2022), <https://femlens.com/blog-post/who-do-you-belong-to-bodily-autonomy-violations-and-health-risks-during-surrogacy/> [https://perma.cc/CX3E-EMDP]; Clowes & Cantu, *supra* note 30.

61. Roscoe, *supra* note 24.

62. Singh, *supra* note 60.

63. Yue Zhao, *Protection of Rights and Legal Remedies for Surrogate Mothers in China*, HUMAN. & SOC. SCI. COMM'N (2023), <https://www.nature.com/articles/s41599-023-02370-x> [https://perma.cc/YZ9E-2W8K].

64. Zhang Long, *Qingdao Authorities to Probe Claims of Illegal Surrogacy Operation*, SHINE (Aug. 29, 2024, 10:45 PM), <https://www.shine.cn/news/nation/2408293138/> [https://perma.cc/J5FF-YG8W].

illegal, requiring surrogates to be close relatives to the intended parents and banning foreigners and non-resident Indians from seeking surrogate mothers in India.⁶⁵ This legislation was enacted largely to prevent and address the exploitation of surrogate mothers.⁶⁶ So, while regulating surrogacy has many positive effects, it does not completely prevent the exploitation of surrogates, and in some cases, perpetuates this exploitation.

Proponents of surrogacy claim that surrogacy has the opposite effect: that it serves as a vehicle for impoverished women to lift themselves out of poverty.⁶⁷ In a study published by the National Institute of Health (“NIH”) evaluating the social paradoxes of commercial surrogacy in developing countries, it was found that women in India often decided with their husbands whether to become a surrogate, and the primary intention was to improve the socioeconomic condition of the family.⁶⁸ Surrogacy allowed women to work in better conditions than would otherwise be unavailable to them.⁶⁹ So, for those parents whose only remaining option is to utilize an international surrogate, their journey towards building a family will likely be impeded by a plethora of moral, ethical, and legal obstacles and risks.

IV. ANALYSIS OF CURRENT SURROGACY REGULATIONS

The growing infertility industry has become one of the most heavily regulated industries, with regulations spanning across federal and state levels that regulate every facet of the process.⁷⁰ Even with this increased prominence, surrogacy is still not explicitly regulated under these frameworks and is often excluded from any form of comprehensive regulation.⁷¹

A. Federal Regulation of Assisted Reproductive Technology and the Exclusion of Surrogacy

Clinics and physicians providing ART services are bound by federal

65. Vaibhav Tiwari, *Surrogacy Regulation Bill Passed In Lok Sabha: 10 Points*, NDTV (Dec. 19, 2018, 7:34 PM), <https://www.ndtv.com/india-news/surrogacy-regulation-bill-passed-in-lok-sabha-10-points-1965215> [<https://perma.cc/76UN-8JN2>].

66. Bronwyn Parry & Raki Ghoshal, *Regulation of Surrogacy in India: Whenceforth Now?* BMJ GLOB. HEALTH (Oct. 8, 2023), <https://pmc.ncbi.nlm.nih.gov/articles/PMC6195148/> [<https://perma.cc/5FYJ-6LPR>].

67. *Id.*

68. Virginie Rozée et al., *The social paradoxes of commercial surrogacy in developing countries: India before the new law of 2018*, BMC WOMEN'S HEALTH (Oct. 15, 2020), <https://pmc.ncbi.nlm.nih.gov/articles/PMC7559454/> [<https://perma.cc/XFW7-JH8B>].

69. *Id.*

70. *Oversight of Assisted Reproductive Technology*, ASRM, <https://www.asrm.org/advocacy-and-policy/media-and-public-affairs/oversite-of-art/> [<https://perma.cc/C94M-5A83>] (last visited Nov. 21, 2024).

71. *Id.*

guidelines to maintain federal licensing.⁷² The Fertility Clinic Success Rate and Certification Act mandates that clinics performing ART provide data for all procedures performed to the CDC.⁷³ The Food and Drug Administration (“FDA”) regulates drugs and devices used in IVF and other ART processes.⁷⁴ If a patient undergoing ART treatment uses donor gametes, then the tissues used are subject to heightened FDA screening.⁷⁵ The Clinical Laboratory Improvement Act sets federal standards for facilities or sites that test human specimens, including the facilities used in ART processes, and the College of American Pathologists, the American Board of Obstetrics and Gynecology, and the American Board of Urology set ethical guidelines and membership requirements for physicians providing ART treatment and services.⁷⁶ Still, even with such heightened scrutiny and strict guidelines, there is one common thread amongst these regulations: surrogacy is noticeably absent.

There have been multiple attempts to pass federal surrogacy legislation, several of which have recently been introduced to the United States House of Representatives (“the House”) and died in committee. The “Preventing Forced Abortions Act of 2024” was introduced to the House on July 10, 2024, and if it becomes law, will limit the enforceability of any clauses in a surrogacy contract that requires a surrogate mother to have an abortion at the request of any intended parent, agent, or party of the surrogacy contract from being enforced in federal court.⁷⁷ On July 20, 2021, the Support Through Loss Act was introduced to the Senate Health, Education, Labor, and Pensions committee, and if it becomes law, will allow Americans to receive paid leave following a pregnancy loss, failed surrogacy arrangement, or a “diagnosis or event that impacts pregnancy or fertility.”⁷⁸

On June 27, 2023 the Equal Access to Reproductive Care Act was introduced to the House of Representatives, and if it becomes law, will amend §213(d) of the Internal Revenue Code (“IRC”) to include “traditional reproductive surrogacy” and “gestational reproductive surrogacy” in the definition of “Assisted Reproduction.”⁷⁹ It will also expand the “coverage of surrogacy” definition to include intended parents by incorporating “. . . intends

72. *Policy Documents: The Fertility Clinic Success Rate and Certification Act*, CDC, <https://www.cdc.gov/art/nass/policy.html> [<https://perma.cc/RQ8N-8ZP9>] (last visited Nov. 21, 2024); see *Clinical Laboratory Improvement Amendments*, CDC, <https://www.cdc.gov/clia/php/about/index.html> [<https://perma.cc/B3RY-NLCC>] (last visited Nov. 21, 2024); see also ASRM, *supra* note 70.

73. See Fertility Clinic Success Rate and Certification Act of 1992, H.R. 4773, 102nd Cong. (1992); see also *Policy Documents: The Fertility Clinic Success Rate and Certification Act*, *supra* note 72.

74. ASRM, *supra* note 70.

75. *Id.*

76. See 42 U.S.C. § 201 *et seq.*; *Clinical Laboratory Improvement Amendments*, *supra* note 72; ASRM, *supra* note 70.

77. Preventing Forced Abortions Act of 2024, H.R. 8985, 118th Cong. (2024).

78. Support Through Loss Act, S.2390, 117th Cong. (2021).

79. Equal Access to Reproductive Care Act, H.R. 4391, 118th Cong. (2023).

to take legal custody or responsibility for any children born as a result of such assisted reproduction.”⁸⁰ These pieces of legislation have not advanced past committee review since initially being introduced.

Additionally, The Model Uniform Parentage Act (“UPA”) was modified in 2017 and has been enacted in California, Washington, and Vermont.⁸¹ Although the UPA has not been enacted uniformly across the United States, it serves as a guide to ensure consistent results across states and limit forum shopping for favorable state laws.⁸² The UPA rules have evolved to provide safeguards of protection for gestational and genetic surrogacy arrangements, guidelines for surrogacy agreements and practice, and protections for genetic surrogates to withdraw consent.⁸³

B. Inconsistent State Regulation

Because surrogacy is not regulated at the federal level, the states have borne the burden of regulating surrogacy, and that regulation is inconsistent at best.⁸⁴ The legality of surrogacy, surrogate contract enforceability, compensation, and the process of establishing parentage with the court are key issues that vary significantly at the state level.⁸⁵

California, Connecticut, Washington, D.C., Delaware, Maine, New Hampshire, Nevada, Rhode Island, Vermont, and New Jersey are the most surrogate friendly states.⁸⁶ Generally, in these states, surrogacy is legal, pre-birth orders are granted throughout the state, and both parents will be named on the birth certificate.⁸⁷ California surrogacy rules have largely been established by precedent.⁸⁸

Calvert v. Johnson and *Buzzanca v. Buzzanca*, two cases argued in the state of California where surrogates challenged the parental rights of the intended parents to a surrogate-born child have held that the determination of parentage

80. Equal Access to Reproductive Care Act, H.R. 4391, 118th Cong. (2023).

81. Susan L. Crockin et al., *Legal Principles and Essential Surrogacy Cases Every Practitioner Should Know*, 113 FERTILITY AND STERILITY 908, 909 (2020); UNIFORM PARENTAGE ACT (UNIF. L. COMM’N 2017); CAL. FAM. CODE §§ 7600–7606 (2020); WASH. REV. CODE § 26.26A.001 et seq. (2019); VT. STAT. ANN. tit. 15C, § 101 et seq. (2018).

82. Jhonell Campbell, *Gestational Surrogacy Contract Terms Under the 2017 Uniform Parentage Act*, 9 CHILD & FAM. L.J. 3, 4–5 (2021).

83. UNIFORM PARENTAGE ACT (UNIF. L. COMM’N 2017).

84. *What does SCOTUS’s “Chevron Deference” Ruling Mean for the Future of Federal Reproductive Rights?*, CTR. FOR REPROD. RTS., <https://reproductiverights.org/scotus-chevron-deference-reproductive-rights/> [<https://perma.cc/UX7W-MX6H>] (last visited Sep. 9, 2024).

85. *Id.*

86. *US Surrogacy law Map by State*, SURROGATE FIRST, <https://surrogatefirst.com/for-intended-parents/us-surrogacy-law-map/> [<https://perma.cc/NKT6-J2W4>] (last visited Nov. 21, 2024).

87. *Id.*

88. *What you Need to Know About Surrogacy Laws in California*, AM. SURROGACY, <https://www.americansurrogacy.com/surrogacy/california-surrogacy-laws> [<https://perma.cc/HQT3-25PH>] (last visited Nov. 21, 2024); see *infra* notes 89–91 and accompanying text.

in gestational surrogacy is guided by intent of the parties.⁸⁹ Additionally, in January 2013, California Family Code § 7960 went into effect, permitting and legalizing surrogacy.⁹⁰ This codifies the requirements parties must follow when entering a surrogacy arrangement, sets forth disclosure requirements and mandatory provisions that must be included in surrogacy agreements, and provides guidelines for establishing parentage.⁹¹

Thirty-two states are viewed as surrogate friendly, where surrogacy is legal, but pre-birth orders vary in their availability and additional post-birth legal procedures may be required.⁹² In 2021, New York enacted the New York State Child-Parent Security Act, which legalizes gestational surrogacy and establishes legal criteria for gestational surrogacy agreements to protect both the surrogates and intended parents.⁹³ In Maryland, gestational surrogacy is permitted, but surrogacy contracts that involve the payment of a fee to the birth mother are illegal and unenforceable, and the decision to grant adoption is based on the best interest of the child.⁹⁴

Five states are generally not favorable to surrogacy and have incredibly complex processes.⁹⁵ In these states, surrogacy is legal, but pre-birth orders are generally unavailable and pose a slew of legal issues, and surrogate contracts are void and unenforceable.⁹⁶ In Arizona, gestational surrogacy is expressly prohibited by the Arizona Revised Statute §25-218, which also makes surrogacy contracts unenforceable.⁹⁷ In Indiana, gestational surrogacy is prohibited, making surrogate contracts void, unenforceable, and against public policy.⁹⁸ Gestational surrogacy still exists in Indiana, and many jurisdictions within the state will grant pre-birth orders.⁹⁹ This inconsistency adds a layer of complexity and confusion for intended parents and surrogate mothers, which ultimately may

89. AM. SURROGACY, *supra* note 88.

90. CAL. FAM. CODE § 7960 (2013).

91. *Id.*

92. SURROGATE FIRST, *supra* note 86 (highlighting that Alabama, Alaska, Arkansas, Colorado, Florida, Georgia, Hawaii, Illinois, Iowa, Kansas, Kentucky, Massachusetts, Maryland, Minnesota, Missouri, Mississippi, Montana, North Carolina, North Dakota, New Mexico, New York, Ohio, Oklahoma, Oregon, Pennsylvania, South Carolina, South Dakota, Texas, Utah, Wisconsin, and West Virginia are considered surrogacy friendly states).

93. *The New York State Child-Parent Security Act: Gestational Surrogacy*, N.Y. STATE DEP'T OF HEALTH, <https://www.health.ny.gov/community/pregnancy/surrogacy/> [<https://perma.cc/S2WL-7N3D>] (last visited Oct. 12, 2024).

94. *Gestational Surrogacy Regulations in Maryland*, GO STORK, https://www.gostork.com/us_state/maryland/ [<https://perma.cc/FNW4-98SW>] (last visited Jan. 6, 2026).

95. SURROGATE FIRST, *supra* note 86 (highlighting that Idaho, Indiana, Tennessee, Virginia, Arizona, and Wyoming are states that have policies that are not favorable for surrogacy).

96. *Id.*

97. *Gestational Surrogacy Regulations in Arizona*, GO STORK, https://www.gostork.com/us_state/arizona/ [<https://perma.cc/Q4MH-HLME>] (last visited Oct. 10, 2024); ARIZ. REV. STAT. § 25-218 (2024).

98. *Gestational Surrogacy Regulations in Indiana*, GO STORK, https://www.gostork.com/us_state/indiana/ [<https://perma.cc/69DV-WUX5>] (last visited Oct. 10, 2024); *see also* IND. CODE § 31-20-1-1 (2024).

99. GO STORK, *supra* note 98.

lead to abuse or further issues throughout the surrogacy process.

Louisiana is the least surrogate-friendly state; commercial surrogacy is outright prohibited, all parties to an unsanctioned surrogacy arrangement may be subject to civil and criminal penalties, and surrogacy is limited to only heterosexual married couples.¹⁰⁰ Surrogacy Bill HB 1002, enacted on August 1, 2016, “restricts gestational surrogacy to heterosexual married couples using their own gametes and places onerous requirements on surrogacy arrangements . . . [such as a] no compensation requirement.”¹⁰¹ Under Louisiana law, contracts to compensate a traditional surrogate are contrary to public policy, and thus, are void and unenforceable.¹⁰² Married heterosexual couples using their own egg and sperm may only be declared legal parents in a pre-birth order if they have “[both] been residents of Louisiana for at least [six] months, surrogacy is medically necessary, and [the gestational carrier] is not paid compensation . . . [additionally] court approval prior to embryo transfer is required.”¹⁰³ Because of this restrictive policy, intended parents are unable to obtain an adoption order if they bear no genetic relation to the surrogate-born child, and unmarried couples, homosexual couples, or couples who require the use of donor eggs and sperm are completely restricted from using surrogacy as a form of ART.¹⁰⁴

Similarly to Louisiana, Michigan was once one of the most unfavorable states for surrogacy, but with the recent enactment of the Assisted Reproduction and Surrogacy Parentage Act, Michigan has become a model for how impactful proper regulation may be to intended parents. Under new regulation, gestational surrogacy is permitted and the “intended parents [are recognized] as the resulting child’s sole legal parents.”¹⁰⁵ Prior to the enactment of this Act, a couple was once forced to adopt their twins born by surrogate after a judge denied them parental rights simply because the twins had been carried by a surrogate.¹⁰⁶ Michigan law did not view the intended parents as the legal parents, and required the twin’s birth certificates to list the names of the surrogate parents instead of the intended parents, even though the couple and the couple’s fertility doctor stated in an affidavit that the intended parents were the biological parents of the twins born via surrogacy.¹⁰⁷ The couple had to go through the costly adoption process that entailed visits from social workers, intrusive questions

100. *Gestational Surrogacy in Louisiana*, CREATIVE FAM. CONNECTIONS, <https://www.creativefamilyconnections.com/us-surrogacy-law-map/louisiana/> [https://perma.cc/W5PZ-UZLQ] (last visited Nov. 21, 2024).

101. *Id.*

102. LA. REV. STAT. § 9:2713 (2023), *amended by*, LA. REV. STAT. § 9:2720 (2025).

103. LA. REV. STAT. § 9:2720 *et seq.*; CREATIVE FAM. CONNECTIONS, *supra* note 100.

104. CREATIVE FAM. CONNECTIONS, *supra* note 100.

105. MICH. COMP. LAWS § 722.1701 *et seq.* (2025); *Gestational Surrogacy in Michigan*, CREATIVE FAM. CONNECTIONS, <https://creativefamilyconnections.com/us-surrogacy-law-map/michigan/> [https://perma.cc/Z753-RV2K] (last visited Jan. 6, 2026).

106. See Maria Cramer, *Couple Forced to Adopt Their Own Children After a Surrogate Pregnancy*, N.Y. TIMES (Jan. 31, 2021), <https://www.nytimes.com/2021/01/31/us/michigan-surrogacy-law.html> [https://perma.cc/8WM2-DKNK].

107. *Id.*

about their upbringing and approach to parenting, fingerprinting, and criminal background checks; essentially, these parents had to prove that they were fit to adopt their own child.¹⁰⁸ Since the passage of the Assisted Reproduction and Surrogacy Parentage Act, parents will no longer have to go through this long, demoralizing, and expensive process. Michigan serves as a model for change that many non-surrogate friendly states may emulate.

C. Exclusionary Health Insurance Policies

While states are making leaps and bounds in their regulations of various forms of ART, there is a jarring gap in the coverage of surrogacy; no state expressly requires surrogacy procedures to be covered by private insurance providers or employers, and any insurance providers that do provide surrogacy coverage, do so voluntarily.¹⁰⁹ Surrogacy is the black sheep of the ART industry, and is consistently excluded in legislation and actions that regulate other forms of ART and pregnancy-related activities.

1. Private Health Insurance

Private insurance companies generally do not cover the cost of surrogacy, embryo transfers, or any corresponding fertility treatments.¹¹⁰ These plans may offer a benefit allowing coverage for freezing and retrieving eggs, but that benefit does not extend to cover the cost of donated eggs, and artificial insemination may only be covered if the surrogate is using a combination of her own eggs with the genetic father's sperm.¹¹¹ Private insurance companies may even include a clause in their insurance policy that excludes medical coverage for surrogate pregnancies, but if this is not included, they are required to cover the costs as they normally would if it were a traditional pregnancy, excluding companion fertility treatments.¹¹² ART and surrogacy coverage is now a premium benefit that is used to attract and retain top employees. Starbucks, Walmart, Adobe, American Express, Bain and Company, Bank of America, Google, and The Walt Disney Company are amongst a growing list of companies that have realized the value of including fertility coverage into their portfolio of employee benefits.¹¹³ Starbucks offers \$25,000 for IVF, \$10,000 for

108. *Id.*

109. *Medical Insurance for the Surrogate*, SENSIBLE, <https://www.sensible-surrogacy.com/find-insurance-for-surrogate-mother-in-the-us/> [<https://perma.cc/UEC7-89AC>] (last visited Nov. 21, 2024).

110. *Id.*

111. *Id.*

112. *Id.*

113. Kassi Strong, *15 Companies That Offer Fertility Benefits, and What You Need to Know About Each*, RESCRIPTED (Dec. 4, 2022), <https://rescripted.com/posts/15-companies-that-offer-fertility-benefits> [<https://perma.cc/BT3R-653B>].

IVF-related medications, and \$10,000 for surrogacy and adoption.¹¹⁴ Walmart has partnered with Kindbody, a clinic system that provides IVF, surrogacy, and adoption assistance, and offers employees \$20,000 for IVF, surrogacy, and adoption, and \$10,000 for IVF-related medications.¹¹⁵ Adobe heavily subsidizes the cost of surrogacy and offers a \$60,000 lifetime coverage for fertility services.¹¹⁶

Several states have enacted laws that require private insurers to provide IVF and fertility preservation coverage.¹¹⁷ In California, large group insurers with more than 100 employees are required to provide coverage for the diagnosis and treatment of infertility and fertility services, including IVF.¹¹⁸ Arkansas has enacted laws that require all individual and group insurance policies that provide maternity benefits to cover IVF.¹¹⁹

Louisiana and Montana have passed laws that require private insurance providers to provide fertility preservation coverage and some infertility coverage.¹²⁰ Louisiana requires private health coverage plans include coverage for standard fertility preservation services for covered individuals who have been diagnosed with cancer and whose treatments may directly or indirectly cause iatrogenic infertility.¹²¹ Texas has passed laws that requires group insurers to offer coverage for IVF, and employers may choose whether or not to include infertility coverage as part of their employee health benefit package.¹²² Oklahoma and Kentucky have passed laws that require private insurance plans to provide coverage for standard fertility preservation services.¹²³ Oklahoma recently passed legislation that went into effect on January 1, 2025, that requires any health benefit plan to provide coverage for standard fertility preservation services to covered individuals diagnosed with cancer when a medically necessary treatment may directly or indirectly cause iatrogenic infertility.¹²⁴

None of these state laws apply to medical plans protected under the Employee Retirement Income Security Act of 1974 (“ERISA”) or self-insured

114. *Id.*

115. *Id.*

116. *Id.*

117. *Insurance Coverage by State*, RESOLVE, <https://resolve.org/learn/financial-resources-for-family-building/insurance-coverage/insurance-coverage-by-state/> <https://perma.cc/D4VN-95ZR> (last updated Sep. 30, 2024) (highlighting California, Utah, Colorado, Illinois, Maryland, Delaware, New Jersey, New York, Connecticut, Massachusetts, Rhode Island, New Hampshire, and Maine’s policies).

118. *Id.*

119. *Id.*

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.*

124. *Id.*

plans.¹²⁵ ERISA was established to protect individuals enrolled in private health plans by setting minimum standards of protection.¹²⁶ ERISA does not cover plans managed by government entities, religious organizations, or plans maintained solely to comply with laws pertaining to workers compensation, unemployment, or disability.¹²⁷ A recent example is California's recent passage of Senate Bill 729, which requires fully insured, large group health plans to provide coverage for infertility and fertility diagnosis and treatment.¹²⁸ Under ERISA, religious employers, self-funded ERISA plans, and small group plans are exempt from this coverage mandate.¹²⁹

2. Public Health Insurance

Medicare and Medicaid are two public health insurance programs available to Americans and are managed by the Centers for Medicare and Medicaid Services.¹³⁰ Medicare was created in 1965 by Title XVIII of the Social Security Act and provides federal health insurance to the elderly and disabled.¹³¹ Individuals who have paid into the Social Security system for a total of ten years are aged sixty-five and older, are disabled and eligible for Social Security benefits, or have end-stage renal disease, which is permanent kidney failure requiring dialysis or transplant, may qualify for Medicare.¹³² Medicaid was created in 1965 under Title XIX of the Social Security Act, was designed to provide publicly funded healthcare for low-income children and adults, and is co-administered by the states and federal government.¹³³ Medicaid coverage has been expanded to cover low-income pregnant women, the disabled, dependent children and their mothers, and beneficiaries who are not eligible for any cash assistance program, so long as they meet the federally required minimum

125. See Employee Retirement Income Security Act, 29 U.S.C. § 1001 *et seq.*; see also *ERISA*, U.S. DEPT. OF LAB., <https://www.dol.gov/general/topic/health-plans/erisa> [<https://perma.cc/25ER-F922>] (last visited Mar. 6, 2025). Even if a state enacts legislation that requires all employers to cover IVF procedures, ERISA may block states from requiring certain plans to meet this requirement, as “self-insured ERISA plans are not required to provide coverage for state-mandated benefits, such as coverage of mammograms or Pap smears,” and in this case, IVF or surrogacy coverage. *ERISA PLANS*, KFF 61–62, <https://www.kff.org/wp-content/uploads/sites/3/2015/06/c111.pdf> [<https://perma.cc/YN9A-TDWD>] (last visited Mar. 2, 2026).

126. *Id.*

127. *Id.*

128. Jesse Hansen, *IVF Treatment Coverage Mandates: A State-by-State Breakdown*, ONEDIGITAL (Oct. 10, 2024), <https://www.onedigital.com/blog/ivf-coverage-by-state/> [<https://perma.cc/8DWJ-DX2Z>].

129. *Id.*

130. COMMITTEE ON THE CONSEQUENCES OF UNINSURANCE, OVERVIEW OF PUBLIC HEALTH INSURANCE PROGRAMS 153–58 (Nat'l Acad. of Sci., 2022), <https://www.ncbi.nlm.nih.gov/books/NBK221009/> [<https://perma.cc/R68L-PVK9>] [hereinafter Nat'l Acad. of Sci.].

131. *Id.* at 153; see also 42 U.S.C. § 1395 *et seq.*

132. *Id.*

133. *Id.*; 42 U.S.C. § 1396 *et seq.*

standards.¹³⁴ The federally required minimum standards allow Medicaid enrollment for individuals that have children under the age of six, are pregnant women whose family income is below 133% of the federal poverty level, and children ages 6–18 with family incomes below 100% of the federal poverty level.¹³⁵ States set income standards for adults without children, and parents of children are categorically eligible if they meet income and asset tests.¹³⁶ Indiana sets a monthly income limit of \$4,055 for a family of five and a monthly income limit of \$6493.45 for pregnant individuals.¹³⁷ The Affordable Care Act (“ACA”) is the seminal piece of healthcare legislation that has expanded access to affordable healthcare to all Americans.¹³⁸ The ACA made sweeping reforms to the healthcare and health insurance industry, and established regulatory requirements to the individual and family health insurance market, expanded Medicaid to cover low-income adults, established an individual mandate and employer mandate and penalty, and established premium subsidies and cost-sharing reductions available in the health insurance exchange and Marketplace for individuals with self-funded coverage.¹³⁹

While these federally subsidized programs have drastically broadened access to healthcare, they provide an antiquated approach to covering ART technology and outright fail to include surrogacy in their protections. No Medicaid program covers artificial insemination or in-vitro fertilization, and most Medicaid recipients pay out of pocket for fertility treatments.¹⁴⁰ Surrogates’ income generally precludes them from qualifying for many forms of public assistance, such as Medicaid.¹⁴¹ Medicare may cover certain doctor’s visits, outpatient care, medical supplies, and some medically necessary fertility treatments, but will not cover IVF or surrogacy.¹⁴²

The ACA requires health insurers in the Marketplace to include maternity

134. Nat’l Acad. of Sci., *supra* note 130.

135. *Id.*

136. *Id.*

137. *Eligibility Guide*, IND. MEDICAID FOR MEMBERS, https://www.in.gov/medicaid/members/apply-for-medicaid/eligibility-guide/#Pregnant_Individuals [https://perma.cc/C9E4-ND5N] (last visited Nov. 21, 2024).

138. Elizabeth Davis, *The Difference Between Medicaid and Obamacare*, VERYWELL HEALTH, <https://www.verywellhealth.com/whats-the-difference-between-medicaid-obamacare-1738843> [https://perma.cc/3FUA-5C4M] (last updated Sep. 15, 2024).

139. *Id.*

140. Gabriela Weigel et al., *Coverage and Use of Fertility Services in the U.S.*, KFF (Sep. 15, 2020), <https://www.kff.org/womens-health-policy/issue-brief/coverage-and-use-of-fertility-services-in-the-u-s/> [https://perma.cc/S2YJ-29RM].

141. *The Surrogacy Source: Can I be on Public Assistance & Become A Gestational Surrogate?*, FERTILITY SOURCE COS. (Feb. 17, 2016), <https://www.fertilitysourcecompanies.com/blog/the-surrogacy-source-can-i-be-on-public-assistance-and-become-a-gestational-surrogate> [https://perma.cc/7TVM-H5Z7].

142. *Does Medicare Cover Fertility Treatments?*, MEDICARE.ORG <https://www.medicare.org/articles/does-medicare-cover-fertility-treatments/> [https://perma.cc/WQA3-Z68D] (last visited Nov. 22, 2024).

care, which generally includes surrogacy.¹⁴³ Many of the policies that include surrogacy are costly and can cost upwards of \$600 per month, and must be purchased during an open enrollment period in November and December.¹⁴⁴ If individuals plan to enroll outside of the open enrollment period, they must purchase policies on the open market, which can cost anywhere from \$1,000 to \$1,500 per month.¹⁴⁵ In response to the growing expense of IVF, the Trump administration issued a directive titled, “Expanding Access to In Vitro Fertilization,” in February 2025, expressly stating the administration’s intent to decrease the financial burden of IVF and to increase the number of benefits available to intended parents.¹⁴⁶ Surrogacy was noticeably absent from this directive.

3. TRICARE

TRICARE is the uniformed services health care program for active-duty service members, active-duty family members, National Guard and Reserve members and their families, retirees and retiree family members, and certain former spouses.¹⁴⁷ Benefits extend to sponsors and their family members and vary depending on an individual’s beneficiary category.¹⁴⁸ TRICARE coverage for surrogacy is considered a limited benefit, and TRICARE pays second for services and supplies related to maternity care, including antepartum care, child birth, postpartum care, and complications of pregnancy for a surrogate mother who is a TRICARE beneficiary or has a contractual agreement with intended parents.¹⁴⁹ Under this policy, surrogate mothers seek reimbursement from the adoptive parents, and any amount designated for medical expenses under the surrogacy contract must be exhausted before TRICARE will cover the benefits of the surrogate mother.¹⁵⁰ Without a surrogate contract, TRICARE does not cover maternity services provided to a TRICARE beneficiary acting as a surrogate.¹⁵¹ TRICARE does not address whether TRICARE is preserved in states where surrogacy is illegal or where surrogacy contracts are either illegal,

143. William Houghton, *Buying Health Insurance for Your Surrogate*, SENSIBLE, <https://www.sensible-surrogacy.com/find-insurance-for-surrogate-mother-in-the-us/> [https://perma.cc/67NV-XE37] (last visited Nov. 22, 2024).

144. *Id.*

145. *Id.*

146. *Expanding Access to In Vitro Fertilization*, THE WHITE HOUSE (Feb. 18, 2025), <https://www.whitehouse.gov/presidential-actions/2025/02/expanding-access-to-in-vitro-fertilization/> [https://perma.cc/TY3P-US9H].

147. *TRICARE 101*, TRICARE, <https://www.tricare.mil/Plans/New> [https://perma.cc/J8ND-5UKD] (last visited Nov. 22, 2024).

148. *Eligibility*, TRICARE, <https://www.tricare.mil/Plans/Eligibility> [https://perma.cc/GJ9K-32EX] (last visited Nov. 22, 2024).

149. *Surrogacy*, TRICARE, <https://tricare.mil/CoveredServices/IsItCovered/Surrogacy> [https://perma.cc/JR5N-SKB3] (last visited Nov. 22, 2024).

150. *Id.*

151. *Id.*

unenforceable, or viewed as unfavorable to public policy.

In March 2024, the Department of Defense (“DoD”) amended its ART services to allow severely ill and injured active-duty service members to use donor gametes and embryos procured at their own expense.¹⁵² The DoD and the Department of Veterans Affairs (“VA”) provide some coverage for ARTs, including IVF, egg freezing, fertility medications, and IUI, but with the restrictions that the service member have a serious illness or injury sustained during active duty, and that that injury creates a need for ART to procreate.¹⁵³ In October 2024, several female service members challenged the service connection requirement of this amendment, claiming the requirement that veterans must show that their need for IVF must be connected to their military service violated the Fifth Amendment of the Constitution, the Affordable Care Act, and the Administrative Procedure Act.¹⁵⁴ Amber Bohlman, one of the plaintiffs, is a Marine Corps veteran who cannot demonstrate that her infertility is service connected, and was denied coverage of her ART because she failed to satisfy the service connection requirement.¹⁵⁵ Lindsay Church, another plaintiff, is a nonbinary Navy veteran who has a service-connected disability but has been told that the disability is not a direct cause of her infertility, and therefore, does not satisfy the service connection requirement.¹⁵⁶ An unnamed plaintiff, who is a female active-duty military service member, has gone through several rounds of failed IUI with her wife, and the only remaining medically-indicated procedure is IVF.¹⁵⁷ This member is precluded from receiving coverage for IVF because she does not have a category II or III illness that satisfies the service connection requirement.¹⁵⁸ The District Court dismissed this suit without prejudice for lack of subject matter jurisdiction and failure to state a claim, and the Plaintiff’s filed an appeal with the Second Circuit Court of Appeals in January 2025 that is still pending review.¹⁵⁹

Although there are limitations to the IVF treatment coverage, it is still possible for individuals to obtain coverage for IVF treatment; the same cannot be said for surrogacy, as the inclusion of surrogacy as an available form of ART is noticeably absent.

In a general policy statement on April 4, 2024, the VA explicitly stated that, “third-party donation and surrogacy are not covered benefits—the benefit is

152. Joseph Clark, *DOD Amends Assisted Reproductive Services Policy for Severely Ill and Injured Active Duty Service Members*, TRICARE NEWSROOM (Mar. 11, 2024), <https://newsroom.tricare.mil/News/TRICARE-News/Article/3703473/dod-amends-assisted-reproductive-services-policy-for-severely-ill-and-injured-a> [https://perma.cc/YV9F-838M].

153. *Id.*

154. *Nat’l Org. for Women-New York City v. U.S. Dep’t of Def.*, 755 F. Supp. 3d 350, 354 (S.D.N.Y. 2024).

155. *Id.* at 358.

156. *Id.*

157. *Id.* at 357–58.

158. *Id.* at 358.

159. *Id.* at 367.

designed to allow the member and spouse to become biological parents through reproductive technologies where Active Duty injury or illness has made it impossible to conceive naturally.”¹⁶⁰ The policy further elaborated that “gestational surrogacy . . . will remain outside the scope of VA IVF services.”¹⁶¹ The DoD’s amended policy allows for a third-party gestational carrier in limited instances, but the VA does not extend that coverage; Congress’ authorization for VA to provide fertility counseling and treatment, including ART, is limited to providing these services to covered veterans and their spouses.¹⁶² Therefore, the VA may not provide IVF services to a person who is neither the covered veteran nor the spouse of a covered veteran.¹⁶³ While the DoD’s policy is less exclusionary, VA’s authorization for whom it can cover supersedes DoD policy.¹⁶⁴ In April 2025, the Expanding Access to Fertility Care for Servicemembers and Dependents Act was introduced to the House to expand TRICARE coverage to include ART, regardless of whether previous requirements are met or applicable.¹⁶⁵ If enacted, this will eliminate the requirement for coverage only to be extended if infertility results from serious illness or injury resulting from service-connected disability, amongst other restrictive requirements.¹⁶⁶ As transformative as this bill would be to expanding ART coverage to service members who once were excluded from coverage, the coverage is limited to “. . . assisted reproduction, including intravaginal insemination, intracervical insemination, and intrauterine insemination . . . [i]n-vitro fertilization . . . the preservation of embryos, eggs, or sperm through cryopreservation . . . [and] [s]uch other forms of assisted reproductive services as determined appropriate by the Secretary.”¹⁶⁷ Again, surrogacy is noticeably absent in policy that, if passed, would federally regulate ART.

D. Exclusionary Tax Policies

Under the IRC Section 213(a), taxpayers are allowed to deduct expenses paid for medical care of the taxpayer to the extent the expenses exceed 7.5% of the tax payers adjusted gross income.¹⁶⁸ Section 213(d)(1)(A) provides that

160. Instructions for Determining Eligibility for In Vitro Fertilization and IVF Benefit, 89 Fed. Reg. 23518, 23519 (Apr. 4, 2024) (to be codified at 38 CFR pt. 17).

161. *Id.* at 23521.

162. *Id.*

163. *Id.*

164. Amanda Miller, *VA’s New IVF Policy Doesn’t Cover Surrogates or Unmarried Partners, Unlike Tricare*, MILITARY.COM (Apr. 23, 2024, 5:34 PM), <https://www.military.com/daily-news/2024/04/23/vas-new-ivf-policy-doesnt-cover-surrogates-or-unmarried-partners-unlike-tricare.html> [<https://perma.cc/ZH3V-ECUT>].

165. Expanding Access to Fertility Care for Servicemembers and Dependents Act, H.R. Res. 3025, 119th Cong. (2025).

166. *Id.* at 2.

167. *Id.* at 3.

168. I.R.S. Priv. Ltr. Rul. 109450-20 (Jan. 12, 2021), <https://www.irs.gov/pub/irs-wd/202114001.pdf> [<https://perma.cc/J5MX-SSYS>].

permissible medical care deductions include amounts paid for the “diagnosis, cure, mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body.”¹⁶⁹ Surrogacy related expenses are viewed differently than individual pregnancy and maternity expenses because services to a surrogate are not provided directly to the tax payer, which is required by the IRC.¹⁷⁰ The IRC does not explicitly expand its coverage to include ARTs, but instead, has done so through various Private Letter Rulings (“PLR”). The IRS defines a PLR as “a written statement issued to a taxpayer that interprets and applies tax laws to the taxpayer’s represented set of facts.”¹⁷¹ A PLR is issued in response to a written request submitted by a taxpayer and may not be relied on as a precedent by other taxpayers or by IRS personnel.”¹⁷²

There are several notable IRS PLR’s that have addressed the tax status of surrogates: PLR 202114001, PLR 2004-0187, and PLR 2002-0291.¹⁷³ PLR 202114001 responded to an inquiry by a male same sex couple, Taxpayers “A” and “B,” who wished to have a child using sperm donated by Taxpayer A, an egg donated by Taxpayer B’s sister, and a gestational surrogate to carry the child to term.¹⁷⁴ The couple sought a ruling under IRC § 213 as to the viability of deducting medical expenses attributed to both individuals, egg retrieval, sperm donation, IVF, surrogate childbirth expenses, surrogate medical insurance related to the pregnancy, legal and agency fees for the surrogacy, and any other medical expenses relating to the surrogacy.¹⁷⁵ The IRS concluded that the costs and fees related to egg donation, IVF procedures and gestational surrogacy do not qualify as deductible medical expenses, and only the medical expenses directly attributable to the tax payers, such as the sperm donation and freezing, were deductible within the limitations of IRC § 213.¹⁷⁶

PLR 2004-0187, and relatedly PLR 2002-0291, responded to an inquiry by an individual seeking a ruling that the “cost of using a surrogate mother to bear [their] child would be allowed as an exception to the tax on early distributions

169. *Id.*

170. Anu Gogna & Kathleen Rosenow, *Since You Asked: Can an Employer Provide Surrogacy Benefits on a Tax-Favored Basis?*, WTW (Mar. 28, 2023), <https://www.wtwco.com/en-us/insights/2023/03/since-you-asked-can-an-employer-provide-surrogacy-benefits-on-a-tax-favored-basis> [<https://perma.cc/JDH9-WB96>].

171. *Tax Exempt Bonds Private Letter Rulings: Some Basic Concepts*, IRS, <https://www.irs.gov/tax-exempt-bonds/teb-private-letter-ruling-some-basic-concepts> [<https://perma.cc/7TH5-LJP7>] (last visited Nov. 22, 2024).

172. *Id.*

173. I.R.S. Priv. Ltr. Rul. 109450-20 (Jan. 12, 2021), <https://www.irs.gov/pub/irs-wd/202114001.pdf> [<https://perma.cc/J5MX-SSYS>]; I.R.S. Priv. Ltr. Rul. 2004-0187 (Sep. 13, 2004), <https://www.irs.gov/pub/irs-wd/04-0187.pdf> [<https://perma.cc/CXA9-G6WK>]; I.R.S. Priv. Ltr. Rul. 2002-0291 (Aug. 12, 2002), <https://www.irs.gov/pub/irs-wd/02-0291.pdf> [<https://perma.cc/Y3GC-96UF>].

174. I.R.S. Priv. Ltr. Rul. 109450-20 (Jan. 12, 2021), <https://www.irs.gov/pub/irs-wd/202114001.pdf> [<https://perma.cc/J5MX-SSYS>].

175. *Id.*

176. *Id.*

from an individual retirement plan under § 401(k) of the [IRC].”¹⁷⁷ The individual sought to borrow money from their 401(k) plan to cover surrogacy-related expenses, as loan amounts from distributions in some events are not treated as taxable distributions to the plan and are not subject to an early distribution penalty.¹⁷⁸ In both instances, the IRS determined that a surrogate mother is not considered the taxpayer, the taxpayers spouse, or a non-relative dependent, as listed in § 512(a), and neither is an unborn child, so medical expenses paid for a surrogate mother and her unborn child generally do not qualify for 213(a) deduction.¹⁷⁹

Reimbursable ART expenses include any medical fees directly involving the insured and their dependents or spouse, clinic fees for standard procedures involved in surrogacy, hormone therapy, sperm donation, IVF, and egg donation and retrieval; They do not cover the cost of surrogacy itself.¹⁸⁰ *Morrissey v. United States* challenged the applicability of IRC § 213 allotted expenses. Here, Morrissey and his male partner sought to have a child through IVF, using Morrissey’s sperm to fertilize donated eggs and create embryos that were then implanted into a surrogate mother.¹⁸¹ Morrissey claimed to be “effectively infertile” because he is in a homosexual relationship, and it is physiologically impossible for two men to conceive a child through sexual relations.¹⁸² In this process, Morrissey paid nearly \$57,000 out of pocket for IVF-related expenses, \$1,500 for procedures performed directly to him, such as sperm collection, \$55,000 to identify, retain, and compensate the egg donor and surrogate for their services, which included payment for their services, medical care and coverage, travel, and other related expenses.¹⁸³ In response to his amended return claiming \$36,538 in medical expenses and a refund of \$9,539, the IRS concluded that Mr. Morrissey only spent \$1,500 for his blood work and sperm collection, and thus does not meet the 7.5% threshold for allowable deductions.¹⁸⁴ Accordingly, Mr. Morrissey could not deduct the expenses unless he was also able to deduct expenses relating to the identification, retention, and care of the egg donor and gestational carrier, which the IRS concluded were not qualified deductible expenses.¹⁸⁵ The IRS denied Mr. Morrissey’s refund sought, disallowed his IVF-

177. I.R.S. Priv. Ltr. Rul. 2004-0187, 1 (Sep. 13, 2004), <https://www.irs.gov/pub/irs-wd/04-0187.pdf> [<https://perma.cc/CXA9-G6WK>]; I.R.S. Priv. Ltr. Rul. 2002-0291 (Aug. 12, 2002), <https://www.irs.gov/pub/irs-wd/02-0291.pdf> [<https://perma.cc/Y3GC-96UF>].

178. I.R.S. Priv. Ltr. Rul. 2004-0187, 1 (Sep. 13, 2004), <https://www.irs.gov/pub/irs-wd/04-0187.pdf> [<https://perma.cc/CXA9-G6WK>]; I.R.S. Priv. Ltr. Rul. 2002-0291 (Aug. 12, 2002), <https://www.irs.gov/pub/irs-wd/02-0291.pdf> [<https://perma.cc/Y3GC-96UF>].

179. I.R.S. Priv. Ltr. Rul. 2004-0187, 2 (Sep. 13, 2004), <https://www.irs.gov/pub/irs-wd/04-0187.pdf> [<https://perma.cc/CXA9-G6WK>]; I.R.S. Priv. Ltr. Rul. 2002-0291 (Aug. 12, 2002), <https://www.irs.gov/pub/irs-wd/02-0291.pdf> [<https://perma.cc/Y3GC-96UF>].

180. Houghton, *supra* note 143.

181. *Morrissey v. U.S.*, 871 F.3d 1260, 1263 (11th Cir. 2017).

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.* at 1264

related deductions, and concluded that the expenses were not directly provided to the taxpayer [Mr. Morrissey], his spouse, or his dependent, and thus were disallowed.¹⁸⁶ On appeal, the District Court sided with the IRS, holding that the IRC does not permit Mr. Morrissey to “deduct the expenses attributable to the identification, retention, compensation, and care of the women who served as the egg donor and gestational surrogate in his IVF process.”¹⁸⁷

Magdalin v. Commissioner is another seminal tax case, where a father with normal reproductive capabilities sought deduction of surrogate and IVF related medical expenses.¹⁸⁸ The court held that expenditures incurred by a taxpayer to undergo in vitro fertilization processes are not eligible for reimbursement under the IRC § 213, and the First Circuit Affirmed.¹⁸⁹ All of these cases have one common thread: intended parents were using surrogates to birth their children, who would ultimately become their future dependents. Our antiquated tax code does not consider the complexities of surrogacy, and failure to update the internal revenue code to reflect the complexities of a multi-billion-dollar industry constitutes a failure to regulate.

E. Urgency Behind the Need to Regulate

To fully understand how to make sweeping regulatory changes to surrogacy law, it is imperative to first understand the gravity of a need for regulation. As infertility rates rise, and ART becomes more advanced and accessible, it is inadequate that legislation still does not consider surrogacy a viable ART worthy of regulation.¹⁹⁰ Surrogacy is often the last resort for intended parents desperate to make their dreams of having a family a reality. Failing to regulate perpetuates the problems that plague surrogacy, and excluding surrogacy from other forms of ART diminishes how powerful of a resolution surrogacy may be to infertility. Surrogacy is an economic issue, a human rights issue, and an employee benefits issue that necessitates regulation. This section will discuss the intricacies behind the urgent need for regulation, the implications of failing to regulate, and potential state and federal legislative solutions.

1. Economic Implications

Regulation needs to be passed to decrease the cost of surrogacy. The cost of surrogacy is nearly triple the average household income in the United States.¹⁹¹ As the cost of living continues to rise, the cost of surrogacy will only increase,

186. *Id.* at 1263–64.

187. *Id.* at 1272.

188. *Magdalin v. C.I.R.*, 96 T.C.M. (CCH) 491 (Tax 2008), *aff'd*, No. 09-1153, 2009 WL 5557509 (1st Cir. Dec. 17, 2009).

189. *Id.* at 3.

190. See discussion *supra* Parts IV.A, IV.B.

191. See *supra* notes 51–59 and accompanying text.

thus making it unaffordable for most of the United States population.¹⁹² State regulation has allowed other forms of ARTs to remain affordable and accessible, so regulating surrogacy would likely have the same effect.¹⁹³ Studies have shown that costs may be a treatment barrier for ARTs.¹⁹⁴ In states with no mandated fertility services coverage, or mandates that did not include assisted reproductive technologies, couples were up to 46% more likely to discontinue care than counterparts who lived in states with comprehensive mandates that required assisted reproductive technology coverage.¹⁹⁵ Additionally, studies have shown that in states that have enacted mandates requiring employers of a certain population to include fertility-related services, there were instances of higher ART utilization, fewer embryos per transfer, and lower rates of multiple gestations, which in turn, lowered the cost of these ART procedures.¹⁹⁶

The global commercial surrogacy industry is projected to rise to \$129 billion by 2032.¹⁹⁷ There are significant economic interests at stake with a market that size, and failure to federally regulate would be negligent of our legislature. Congress regulates all major economic activities in the United States, yet they fail to regulate one that impacts so many Americans and has such an impact on the economy. With the rising cost of domestic surrogacy, coupled with the vast amount of limitations, intended parents will likely start taking their money to international countries for surrogacy services; this is a real and urgent threat to our economy.

2. Human Rights Implications

Second, surrogacy is a human rights issue. As of 2017, surrogacy was completely banned in fifty countries, legal in forty countries, not regulated in thirty countries, and partially tolerated in twenty-one countries.¹⁹⁸ In countries where surrogacy is outright banned, surrogacy does not cease to exist; it shifts to exist outside of the public eye, and without the scrutiny of public view, thus

192. See *supra* notes 51–59 and accompanying text.

193. Jacqueline C. Lee et al., *Association of State Insurance Coverage Mandates with Assisted Reproductive Technology Care Discontinuation*, 228(3) AM. J. OF OBSTETRICS AND GYNECOLOGY 1, 6 (Nov. 9, 2022), <https://pubmed.ncbi.nlm.nih.gov/36368429/> [<https://perma.cc/3NM7-E4JK>] (noting findings that individuals living in states without mandated ART coverage were more likely to discontinue treatment after unsuccessful ART care cycles compared to individuals living in states with mandated ART insurance coverage).

194. *Id.*

195. *Id.*

196. *Id.*

197. See Danielowski, *supra* note 50 (noting that the international surrogacy market is a “rapidly expanding and changing reproductive tourism economy, which is transnational economy.” *Id.*); see also Gilchrist, *supra* note 50.

198. Yuri Hibino, *Ongoing Commercialization of Gestational Surrogacy Due to Globalization of the Reproductive Market before and after the Pandemic*, 14 ASIAN BIOETHICS REV. 349, 350 (Aug. 18, 2022), <https://pmc.ncbi.nlm.nih.gov/articles/PMC9386202> [<https://perma.cc/Z9UT-PHKJ>].

creating a breeding ground for exploitation.¹⁹⁹ Surrogacy has the power to empower women to uplift themselves from poverty, and if regulated properly, gives them the tools to protect themselves from exploitation. Individuals that utilize IVF and other forms of ART have many legal safeguards at their disposal to remedy any exploitation or unjust treatment; if surrogacy was legal, and regulated, these protections would be extended, but without regulation, women are at risk of exploitation and persecution with little to no remedy.²⁰⁰ If the United States does not take action to consistently regulate the domestic surrogacy market across the United States, or take action to make domestic surrogacy more affordable and accessible, American intended parents will be driven to more affordable and accessible international markets, which in turn, will perpetuate human rights violations.

3. *Employer and Employee Implications*

Third, surrogacy is an employee benefits issue. For employers to remain competitive, they need to offer benefits to their employees that support them through all phases of life. With the advancement and availability of ART, companies are starting to include fertility benefits in their portfolio of coverage.²⁰¹ Many major companies now offer robust IVF, surrogate, and adoption benefits to their employees.²⁰² As the market for top talent gets more competitive, employees can be more selective of where they work, and for individuals looking to start a family, fertility benefits are a competitive and attractive benefit that may become a deciding factor in where they choose to work.

V. PROPOSED CHANGES TO LAW

To protect the rights of intended parents, surrogates, and all remaining parties involved in the surrogacy process, it is imperative that sweeping reform is passed at the federal and state levels that make surrogacy more affordable and accessible. Making surrogacy more accessible and affordable goes hand in hand with one another—if we make surrogacy more accessible, it will become more affordable, and vice versa. Today, surrogacy is largely available only to those that can afford the staggering costs, live in states where surrogacy is legal or subsidized, or those that have the means to travel and work with out of state surrogates that live in “surrogate friendly” states. To remedy this, we must regulate surrogacy consistently with other forms of ART, expand current ART regulations to include surrogacy in their scope of regulations, provide protections for all parties involved in the surrogacy process, and amend and

199. *Id.* at 353.

200. *See* Danielowski, *supra* note 50; *see also* Gilchrist, *supra* note 50.

201. *See supra* notes 106–12 and accompanying text.

202. *See supra* notes 106–12 and accompanying text.

expand legislation that promotes the accessibility of surrogacy.

A. Legislative Action to Increase Affordability

To make surrogacy become a viable option, is imperative that any regulation that impacts the affordability of ART at the federal and state level should be amended and extended to include surrogacy.

First, Congress should start by passing the Equal Access to Reproductive Care Act (“EARCA”)²⁰³ If EARCA becomes law, expenses arising from surrogacy will now be treated as medical expenses of the taxpayer.²⁰⁴ This would allow families to deduct the cost of egg retrieval, sperm donation, IVF, surrogate childbirth expenses, surrogate medical insurance related to the pregnancy, legal and agency fees for the surrogacy, and any other medical expenses relating to the surrogacy from their taxes, which would save families thousands of dollars.²⁰⁵

Second, in addition to expanding the deductibility of expenses associated with surrogacy, adoption tax credits should be expanded to cover the cost of surrogacy-related adoptions.²⁰⁶ Currently, an individual is eligible to claim an adoption credit of up to \$16,810 in qualified expenses if a qualified child is adopted.²⁰⁷ A qualified child includes a child that is under the age of 18, and is physically or mentally incapable of self-care.²⁰⁸ In many “non-surrogacy friendly” states, intended parents are required to adopt their biological children that are born through surrogacy, and under current tax code, are required to bear the burden of this expense.²⁰⁹

Third, it is imperative that flexible spending account (“FSA”) and health savings account (“HSA”) rules be modified to allow deduction of expenses for third-party surrogates. The IRS has limited qualified medical expenses to only approved expenses incurred by the individual, their spouse, and any dependents.²¹⁰ Under this current structure, surrogates are noticeably excluded because they are a third party, and benefits traditionally extend only to a covered individual and their spouse, thus preventing intended parents from deducting any expenses that they would otherwise be able to deduct if they were carrying

203. Equal Access to Reproductive Care Act, H.R. 4391, 118th Cong. (1st Sess. 2023).

204. *Id.*

205. I.R.S. Priv. Ltr. Rul. 109450-20 (Jan. 12, 2021), <https://www.irs.gov/pub/irs-wd/202114001.pdf> [<https://perma.cc/BPK2-JEHM>] (illustrating how these procedures are not currently included and how enacting EARCA would make them included).

206. *See Adoption Credit*, IRS, <https://www.irs.gov/credits-deductions/individuals/adoption-credit> [<https://perma.cc/N44L-AL4C>] (last visited Feb. 2, 2025).

207. *Id.*

208. *Id.*

209. *See* discussion *supra* Part V.B.

210. *See Publication 969 (2024), Health Savings Accounts and Other Tax Favored Health Plans*, IRS, https://www.irs.gov/publications/p969#en_US_2024_publink1000204083 [<https://perma.cc/G9S7-K8PK>] (last visited Feb. 2, 2025) (discussing qualified medical expenses for HSA and FSA plans).

their child themselves.²¹¹

Fourth, “mandate to offer” and “mandate to cover” laws requiring companies of certain sizes to offer ART and fertility benefits to employees, should be codified under federal law, and extended to include surrogacy.²¹² The One Big Beautiful Bill, enacted into public law in July 2025, codified provisions of the expired Tax Cuts and Jobs Act and Achieving A Better Life Experience Act that allowed designated beneficiaries of disabled individuals contribute to tax-favored savings accounts that can be used for disability-related expenses.²¹³ Because reproduction is recognized as a major life activity, infertility is treated as a disability under the Americans with Disabilities Act (“ADA”); accordingly, there may be a potential avenue to extend ABLE savings account eligibility to individuals struggling with infertility, allowing those funds to be used for ART and surrogacy expenses.²¹⁴

Fifth, IRC § 213(a) must be expanded to include unreimbursed surrogacy-related expenses in the definition of “deductible medical expenses.” This expansion allows intended parents to deduct expenses related to the identification, compensation, and medical care of a surrogate.²¹⁵ IRC § 401(k) must also be amended to allow for surrogacy related expenses to be included in the definition of a qualified medical expenses that may be deductible if it exceeds 7.5% of an intended parent’s income.²¹⁶ With surrogacy costs rapidly increasing, these tax incentives are necessary to limit the mounting financial burdens that intended parents face.

B. Legislative Action to Increase Accessibility

In addition to codifying and modifying current legislation that would make surrogacy more affordable, it is imperative that sweeping changes also be made to increase accessibility for all parties involved in the surrogacy process.

First, the Model Uniform Parentage Act (“MUPA”), which serves as a standardized baseline of regulations to which states may implement in a blanket policy, or modify to develop their own policies, should be enacted in all fifty states.²¹⁷ This would provide consistent protection for gestational and genetic

211. *Surrogate Mother: HSA Eligibility*, HSA STORE, <https://hsastore.com/hsa-eligibility-list/s/surrogate-mother?> [<https://perma.cc/GQ8H-TTTP>] (last visited Feb. 2, 2025).

212. *See supra* notes 125–129 and accompanying text.

213. *See* Pub. L. No. 119-21, Title XI, Subtitle A, Part 3, 139 Stat. 72 (2025); *see also* CONG. RSCH. SERV., R47846, REFERENCE TABLE: EXPIRING PROVISIONS IN THE “TAX CUTS AND JOBS ACT” (TCJA, P.L. 115-97) (2024).

214. *How does the Americans with Disabilities Act (ADA) Apply to Employees Who Have Infertility*, JAN: CONSULTANT’S CORNER, <https://askjan.org/publications/consultants-corner/vol12iss09.cfm> [<https://perma.cc/AGM9-QL4F>] (last visited Feb. 2, 2025); *Infertility Discrimination*, RESOLVE, <https://resolve.org/advocacy/our-issues/infertility-discrimination/> [<https://perma.cc/JY54-ECG8>] (last visited June 1, 2026).

215. *See* discussion *supra* Part IV.D.

216. *See* discussion *supra* Part IV.D.

217. Crockin, Edmonds & Amy Altman, *supra* note 81.

surrogacy arrangements and provide guidelines for surrogacy agreements, surrogacy practice, and protections for genetic surrogates to withdraw consent; regardless of where a surrogate or intended parent lives, they know that regulations will remain consistent if they relocate or return to another state.²¹⁸

Second, Congress should enact the Preventing Forced Abortions Act of 2024.²¹⁹ This Act sets forth guidelines that prohibit federal courts from enforcing surrogacy contracts that (1) require surrogates to have an abortion, and (2) allow intended parents to withhold compensation for surrogates that refuse to have an abortion.²²⁰ If passed in the House, surrogates will regain their right to bodily autonomy and have safeguards in place to protect them from being forced to have an unwanted abortion, even if they were initially amenable.²²¹ This would provide surrogates with more bodily autonomy and control, and potentially open the door for individuals to become surrogates that were previously hesitant to become surrogates because of the lack of bodily autonomy.

Third, the Expanding Access to Fertility Care for Servicemembers and Dependents Act should be amended to expressly include surrogacy in the definitions of covered ART services and codified by Congress.²²² The “connected to military service” requirement under TRICARE and lack of express language including surrogacy in the approved definitions must be eliminated, because the current language providing inclusion of “other forms of assisted reproductive services as determined appropriate by the Secretary” opens the door to potential inconsistency caused by wavering political influence, and may lead to further inconsistent regulation.²²³ Requiring individuals who have served our country, and continue to serve our country, to prove that their inability to carry a child to term must be connected and derived from their military service is dehumanizing, demoralizing, and must be eliminated.

VI. CONCLUSION

The only way to make surrogacy affordable and accessible to many Americans is to make sweeping regulations that codify federal protections for surrogacy and extend current regulations of ART to include surrogacy. Without these sweeping changes, there will be a lack of consistent protections for surrogates, intended families, and children, and in turn, surrogacy will never become an affordable and accessible option for intended parents trying to conceive, and many individuals unable to conceive naturally will never be able to have a family that is genetically related to them; many people that turn to

218. *Id.*

219. *See supra* note 77 and accompanying text.

220. *See* Press Release, Andy Ogles, Congressman, Ogles Introduces Bill to Stop Forced Abortions (July 10, 2024), <https://ogles.house.gov/media/press-releases/ogles-introduces-bill-stop-forced-abortions> [<https://perma.cc/UB6N-XGWB>]; *see also supra* note 77 and accompanying text.

221. *See supra* note 77 and accompanying text.

222. *See supra* notes 165–167 and accompanying text.

223. *See supra* notes 165–167 and accompanying text.

surrogacy have gone through extreme devastation and this is their last hope.

Without federal regulations in place to secure cohesive protections, it is the responsibility of other governing bodies to adjust policies and laws to that regulate surrogacy. It is imperative that all fifty states enact the Model Uniform Parentage Act, that Congress enact the Preventing Forced Abortions Act, and that the Expanding Access to Fertility Care for Servicemembers and Dependents Act be amended and codified. This is not just a state issue, this is a federal issue that impacts reproductive rights, human rights, and the economy. The lack of regulation impacts interstate commerce and encroaches upon constitutionally protected rights, so it is imperative that surrogacy is no longer excluded from ART Regulations, and instead, treated as another powerfully impactful ART.