Rejecting Instrumentalism: Medical Deductions for Family Formation Denied

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In August of 2017, my lawyer presented our oral arguments to the Eleventh Circuit Federal Court of Appeals in Montgomery, Alabama, in my case against the Internal Revenue Service (IRS). The case involved the denial by the IRS of my family's tax deduction for medical expenses related to *in vitro fertilization* (IVF) and surrogacy.

I am part of a same-sex couple, and the IRS has allowed medical expenses related to family formation for opposite-sex couples. Our treatment by the IRS seemed wrong under the statute, unfair generally, and even unconstitutional.

The government believed it had a strong case—that our medical expenses were not necessary, as they argued the relevant statute commands. The IRS official auditing our tax return was clear. Our decision to build a family as two gay men was merely our "choice," he explained unabashedly, and all related expenses would not be subsidized by the United States government through the medical deduction provision.

This Article is a reflection on my experience. It will discuss my case: the facts, the law, and our arguments. It will describe our experience at the Eleventh Circuit in more detail and the way we were actually lampooned by Judge Newsom, a recent Trump appointee to the Eleventh Circuit.

The treatment of my case by the Eleventh Circuit represents a type of judicial decision-making that I label *teleological instrumentalism*. That technique refers to judges using decision-making techniques instrumentally to achieve the goal they think is appropriate as the outcome of any given case.

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Teleological instrumentalism builds on *legal realism* to acknowledge that human beings are inherently biased and bring that bias to every decision they make. Where jurists might claim to be relying on appropriate neutral decision-making techniques and frameworks, they are often merely justifying the outcome that they prefer in the dispute under consideration.

This Article will ultimately reflect on the teleological instrumentalist approach of the judges in reaching their decision to deny relief in my case. Finally, I will conclude with a call for federal judges to resist the inclination to follow their biases, implicit or otherwise, reject teleological instrumentalism, and embrace a principled, neutral approach to decision-making based on statutory and constitutional language, intent, context, and precedent.

I. INTRODUCTION

My husband and I were ecstatic when, in 2014, we were able to have twin boys with the help of an egg donor and a gestational surrogate. As a same-sex couple, building our family was not only wildly challenging, but also incredibly expensive. We knew that the tax code in the United States allowed tax deductions for medical expenses related to any function of the body.[1] We added up our own expenses and took the deductions as expenses related to our reproductive function. Unfortunately, the Internal Revenue Service (IRS) did not agree with our position. After an investigation, our deductions were denied.[2]

By then, we were aware that the IRS had allowed for the deduction of medical expenses related to family formation for opposite-sex couples, dating all the way back to 1994.[3] We could not understand why we would be treated differently, especially after landmark Supreme Court cases like *United States v. Windsor* had already vindicated the rights of same-sex couples to be treated the same as opposite-sex couples under the United States tax code.[4] Our treatment by the IRS seemed wrong under the statute, unfair generally, and unconstitutional. Those tax deductions can ultimately reduce the expenses of family formation and, for some, might even make the difference between deciding to have a family or not. For ourselves, but also for every other person not in a traditional marriage who wishes to pursue family formation and receive the tax benefits that flow from deducting the medical expenses, we sued.

In August of 2017, the oral arguments for my case against the IRS were presented to the Eleventh Circuit Federal Court of Appeals in Montgomery, Alabama.[5] The lawyer who delivered the oral arguments, Richard Euliss, hailed from Carlton Fields' Washington D.C. office, a national law firm with a fantastic reputation. Richard is an accomplished tax litigator, well-known and well-respected for his skills.[6] Specifically, our case involved the denial by

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[1] I.R.C. § 213 (2018).

[2] Letter from Malcolm T. Haile, Sr., Supervisory Revenue Agent, I.R.S. to Joseph F. Morrissey (July 20, 2014) (on file with author).

[3] *See generally* Sedgwick v. Comm'r, No. 10133-94 (T.C. filed June 14, 1994) (noting that the IRS settled with an opposite sex couple regarding their deduction for expenses related to IVF and surrogacy).

[4] *See* United States v. Windsor, 570 U.S. 744, 775 (2013) (determining that the Defense of Marriage Act violated the Fifth Amendment by providing that "marriage" was only a legal union between a man and a woman).

[5] Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017), *aff'g* Morrissey v. United States, 226 F. Supp. 3d 1338 (M.D. Fla. 2016).

[6] The law firm of Carlton Fields represented me in this case *pro bono*. Richard Euliss led the team that worked on my case. He and his team worked tirelessly on both written and oral submissions in the case. Richard, his team, and the firm of Carlton Fields have my eternal thanks for their work.

the IRS of my family's tax deduction for medical expenses related to *in vitro* fertilization (IVF) and surrogacy.

The government, however, believed it had a strong case—the relevant statute categorized our medical expenses as unnecessary.[7] The IRS official auditing our tax return was unwavering in his conclusion. Our decision to build a family as two gay men was merely our "choice," he explained unabashedly, and all related expenses would not be subsidized by the United States government through the medical deduction provision.[8]

I wandered around Montgomery the afternoon before our oral arguments were to take place and was moved when I visited the Civil Rights Memorial Center and the Rosa Parks Museum. Etched into the wall in front of the Civil Rights Memorial Center, just above the memorial fountain, that has water spilling over its edges, are Martin Luther King, Jr.'s words (quoting from the Bible): ". . . until justice rolls down like waters and righteousness like a mighty stream."[9]

Even though tax deductions cannot approach horrors like the lynchings that are remembered at the Civil Rights Memorial Center, the memorial also reminds visitors of Robert Kennedy's speech in South Africa in 1966 when he said, "[f]ew will have the greatness to bend history; but each of us can work to change a small portion of the events, and in the total of all these acts will be written the history of this generation."[10] And so, we marched into the imposing federal courthouse on that sweaty August day in Montgomery, cautious but somehow optimistic. Sadly, we lost.

While the results in our case were upsetting, losing our case at the Eleventh Circuit was hardly surprising. The Eleventh Circuit is the same circuit that upheld Florida's outright ban on gay people adopting in 2004.[11] What

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[7] I.R.C. § 213 (2018).

[8] Telephone Conversation with Gary Shepherd, IRS Agent (June 2014).

[9] Dr. Martin Luther King, Jr. spoke those words during his famous "I Have a Dream" speech. Martin Luther King, Jr., I Have a Dream (Aug. 28, 1963).

[10] Robert F. Kennedy, Day of Affirmation Address at the University of Capetown (June 6, 1966).

[11] Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 806 (11th Cir. 2004), *cert. denied*, 543 U.S. 1081 (2005). In 1977, Florida enacted a statute that made it patently illegal for gay people to adopt, regardless of the best interests of the child. FLA. STAT. ANN. § 63.042(3) (West 2005). The statute was challenged and upheld by the Eleventh Circuit in *Lofton*. *Lofton*, 358 F.3d at 806. In that case, the Eleventh Circuit considered evidence of discriminatory intent in the passage of the bill, including homophobic remarks by representatives discussing the legislation. *Id.* at 826–27. Nonetheless, the court reasoned that as long as there was any conceivably rational purpose underlying the statute, the court had to uphold it. *Id.* at 818. The statute was subsequently invalidated by *In re* Adoption of Doe. *In re* Adoption of Doe, 2008 WL 5006172, *29 (Fla. Cir. Ct. Nov. 25, 2008). The statute was still not repealed until July 1, 2015, though by then it had not been enforced in five years. Gary Fineout, *Florida Legislature Repeals State Ban on Gay Adoption*, AP NEWS (April 14, 2015), [https://perma.cc/E7KT-4U43].

was surprising, however, was the disheartening discussion that took place during the oral argument and the posture of the opinion issued by the Eleventh Circuit in the case.

It was further debilitating to receive subsequent advice from the law firm representing us that we should not proceed to challenge the ruling in the United States Supreme Court. Their opinion was corroborated by highly accomplished, nationally known civil rights attorneys. Given the changing composition of the Supreme Court, we were told the Court is unlikely to vindicate civil rights of any sort, and might, in fact, use the case as an opportunity to set back the civil rights gains made on behalf of gay people in recent decades.

The treatment of our case by the Eleventh Circuit represents a type of judicial decision-making that I label *teleological instrumentalism*. The term "teleological" springs from the Greek word *telos*, meaning goal.[12] "Teleological instrumentalism" refers to judges instrumentally using decision-making techniques to achieve the goal that they think is appropriate outcome of any given case. The technique builds on *legal realism* to acknowledge that human beings are inherently biased and bring that bias to every decision they make.[13] Where jurists might claim to be relying on appropriate neutral decision-making techniques and frameworks, they are often merely justifying the outcome they prefer in the dispute under consideration.

This Article is a reflection on my unique experience. It will discuss our case: the facts, the law, and our arguments. This Article will also describe our experience in the federal courts and the opinions that were issued by both the district court and the Eleventh Circuit Court of Appeals. This Article will ultimately reflect on the teleological instrumentalist approach of the judges in reaching their decision to deny relief in my case. Finally, this Article will conclude with a call for federal judges to resist the inclination to follow their biases, implicit or otherwise, reject teleological instrumentalism, and embrace a principled, neutral approach to decision-making based on statutory and constitutional language, intent, context, and precedent. Only then can litigants hope to trust and rely on the courts to vindicate statutory and constitutional rights that are otherwise inappropriately denied.

II. BACKGROUND

In order to better grasp the government denial of our medical deductions related to IVF and surrogacy, it is important to understand just how much effort, heartache, and perseverance were involved in our family formation process. All told, we worked for four years, underwent seven IVF procedures, worked with three different surrogates, two different egg donors, and spent over one hundred thousand dollars before we finally had our children.

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[12] *Telos*, MERRIAM WEBSTER, [https://perma.cc/922P-2DH5] (last visited Apr. 5, 2020).

[13] *See generally* N.E.H. HULL, ROSCOE POUND & KARL LLEWELLYN: SEARCHING FOR AN AMERICAN JURISPRUDENCE (1997) (providing a broad discussion of legal realism).

Despite everything we went through, the government refused to dignify our claim and subsidize our efforts through the tax deduction, where it would and has for opposite-sex couples.

Our story begins when I met my husband, Mark Montgomery, twenty years ago. In the early years we were together, we never really considered marriage or children. We had grown up in a country and in communities where gay marriage was illegal and gay people having children was usually the product of an earlier opposite-sex marriage. As our relationship evolved, however, so did the country's attitudes toward same-sex relationships, marriage, and families.

In 2003, Massachusetts became the first state to legalize gay marriage.[14] Other states followed.[15] Everything seemed to be in flux. Some states had legalized gay marriage only to take a turnabout and prohibited them again. In California, gay couples who had married when it was legal continued to have their marriage respected even though new gay marriages were later prohibited.[16] The issue of gay marriage in California ended up in the federal courts, where, ultimately, the prohibition on gay marriage was overturned.[17] Of course, by 2015, in *Obergefell v. Hodges*, the United States Supreme Court declared that the right of gay people to marry was a fundamental right under the United States Constitution.[18]

Through this cultural upheaval, we had gay friends and acquaintances who were getting married in various states. We had a gay friend and neighbor in Florida who had children with the help of IVF and a surrogate. Through him we met other gay couples having children through surrogacy and lesbian couples using sperm donors. Another friend had begun a child and family services agency and was counseling gay couples on family formation issues, including adoption and surrogacy arrangements. Suddenly, anything seemed

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[14] Goodridge v. Dep't of Pub. Health, 798 N.E.2d 941, 969–70 (Mass. 2003).

[15] For example, in 2008 Connecticut was the second state to legalize gay marriage. *See* Kerrigan v. Comm'r of Pub. Health, 289 Conn. 135, 957 A.2d 407 (2008). Iowa followed in 2009. *See* Varnum v. Brien, 763 N.W. 2d 862 (2009).

[16] In 2008, a statutory ban on gay marriage was ruled unconstitutional in California under the California constitution. *In re* Marriage Cases, 183 P.3d 384, 452 (Cal. 2008). As of June 16, 2008, therefore, gay couples could marry in California. In November of that year, however, California passed a constitutional referendum to amend the California constitution to prohibit gay marriage (Proposition 8). Jesse McKinley & Laurie Goodstein, *Bans in 3 States on Gay Marriage*, N.Y. TIMES (Nov. 5, 2008), [https://perma.cc/ZX34-89EQ]. The California Supreme Court then upheld Proposition 8, which led to the oxymoronic result that gay people who married prior to Proposition 8 had valid marriages, but gay marriages were invalid after Proposition 8 was enacted. Strauss v. Horton, 207 P.3d 48, 122 (Cal. 2009).

[17] Perry v. Brown, 671 F.3d 1052, 1096 (9th Cir. 2012) (holding the lower court's decision to overturn Proposition 8 unconstitutional). The Supreme Court then heard the case but dismissed it on the basis that the plaintiffs bringing the case lacked standing. Hollingsworth v. Perry, 570 U.S. 693, 715 (2013).

[18] Obergefell v. Hodges, 135 S. Ct. 2584, 2608 (2015).

possible. By about 2008, Mark and I began discussing the real possibility of starting a family together. But, of course, we were still living in Florida where adoptions by gay people were illegal.[19] Surrogacy seemed like the best route to having children. Then, we learned about the Florida surrogacy statute.[20]

In Florida, for a surrogacy agreement to be honored and enforced by the courts, it has to be between a surrogate and intended parents who are married.[21] Of course, as we were considering starting a family ten years ago, gay people still could not be married in Florida.[22] Florida would not respect, honor, or enforce surrogacy agreements where the intended parents were gay.

So, neither adoption nor surrogacy arrangements were legally condoned for gay people in Florida. Therefore, while Florida allowed gay men to be foster parents, there was no legally sanctioned way for gay men to become permanent legal parents in Florida.[23]However, the same was not true for gay women. While gay women still could not legally adopt, there was no legal prohibition on sperm donations that would allow gay women to become biological parents. But we as gay men were deadlocked. And so, we gambled.

As I mentioned, we knew other gay men in Florida who were forming their families with surrogates, despite the law clearly requiring intended parents to be married and infertile. Those parents gambled, they explained, that the surrogate would not try to break the surrogacy agreement in any way. Most importantly, they gambled with the chance that the surrogate would not try to gain custody of the child or children she would carry for the intended parent or parents. If that were to happen, the result might be a traditional custody battle with the intended parents fighting for custody against the surrogate. This gamble meant that it was all the more important to be sure that intended parents found the right surrogate and trusted her completely. That, we figured, was crucial to the process anyway. And so, we joined the others in the gamble in 2011 and began our journey to parenthood through surrogacy.

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[19] FLA. STAT. ANN. § 63.042(3) (West 2005).

[20] FLA. STAT. ANN. § 742.15 (West 2019).

[21] *Id.* (stating that The marriage requirement categorically excludes gay people). The statute contains the additional requirement that the married couple essentially be infertile. *Id.* § 742.15(2)(a). *See* Lowe v. Broward Cnty., 766 So. 2d 1199, 1211 (Fla. Dist. Ct. App. 2000) (upholding the marriage restriction).

[22] In fact, in 2008, Florida held a referendum to amend its constitution to prohibit same-sex marriage. *See* McKinley & Goodstein, *supra* note 16. The amendment passed and same-sex marriage became patently unconstitutional. *See* McKinley & Goodstein, *supra* note 16. Civil unions were also prohibited. *See* FLA. CONST. art. I, § 27 (providing amendment to the state constitution).

[23] FLA. STAT. ANN. § 63.042(3) (West 2005); FLA. STAT. ANN. § 742.15 (2019).

III. SURROGACY: THE PROCESS AND THE EXPENSE

In a surrogacy arrangement, a woman agrees to carry a baby (or multiple in our case) to term for an intended parent or parents.[24] Crucial to the arrangement is that the surrogate agrees to have no parental rights and to transfer any parental rights she might ever have to the intended parent or parents. In traditional surrogacy arrangements, the egg is from the surrogate, making the surrogate the biological mother of the child.[25] The sperm is typically provided by the intended father, making him also a biological parent.[26]

In gestational surrogacy, the egg is donated by a third party.[27] The sperm, again, is provided by the intended father.[28] IVF is then used to transfer one or more embryos into the surrogate.[29] So, in a gestational surrogacy arrangement, the surrogate is not a biological parent. This fact minimizes risk for the intended parents because if a traditional custody battle were to ever ensue, it is likely that the biological father would prevail over the surrogate. Because of that lowered risk, gestational surrogacy arrangements are now typically preferred.

Knowing our options, we looked more into the finer details of the process of transferring the embryos. In advising couples through the process, fertility doctors do not ordinarily recommend trying to have multiple babies. However, multiple embryos are often transferred through IVF because the rates of achieving a successful pregnancy can be low. If more than one is transferred, the odds of having a successful pregnancy are increased. Because multiple embryos are often transferred, it is very possible that multiple babies are the result.

Learning all of this information, we set out to find the perfect surrogate and an egg donor. That process is dizzying. There is a plethora of agencies ready to provide profiles of young women who are willing to be egg donors and others who are willing to be surrogates. The donors and surrogates are usually screened by the agencies, but there are no guaranties regarding the quality of the screening.

Furthermore, deciding on priorities for egg donors has its own dynamic. Does the egg donor need to be a college graduate? Does she need to be attractive? And what does attractive mean, really? Did we care about hair color, race, musical or athletic abilities? We began working with an agency in Chicago. It took months for my partner and I to agree on a donor. She seemed

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[24] 7 RICHARD A. LORD, WILLISTON ON CONTRACTS § 16:22 (4th ed. 2010).

[25] *Id.*

[26] *Id.*

[27] *Id.*

[28] *Id.*

[29] *Id.*

spectacular in every way. We were beyond excited to start the personal journey with her.

Once my husband and I decided on our egg donor, we set out to find a surrogate. Through some local friends we found someone who seemed to be a perfect fit. She had three children of her own and had a successful career that demanded intelligence and empathy. She was smart and nurturing; she understood what pregnancy meant for her body and her life. Once again, we were thrilled.

After we completed the search for an egg donor and surrogate, we then turned to all of the required legal agreements. We had an agreement with a Chicago agency that sourced and vetted egg donors and surrogates, an agreement with the egg donor herself, and then an agreement with the surrogate. None of the agreements were simple, and we had to work through all the details with attorneys who specialized in these types of agreements.[30] We quickly learned various questions we had not considered. What would we all do if the baby was found to be special needs during the pregnancy? Could we abort? Would the surrogate agree to follow our wishes if we would? What if the surrogate was in an accident, and perhaps fell into a coma, but the baby was still viable? Would the surrogate's husband agree to let us keep her body alive to give birth to the child? These questions were profound and profoundly troubling for all parties involved. Even considering that last question almost made our surrogate back out. We finally hashed through it all, and we were ready to go.

In addition to the complexity from the legal documents, the medical process was not easy either.[31] There are screening tests for everyone and then procedures—so many procedures. The egg donor has to be medically treated to hyper-ovulate and then have her eggs removed. The surrogate has to have her body regulated and put on the same menstrual cycle as the egg donor, then given medicine to prepare her uterus for the *embryo* implantation. All in all, the preparations and procedures take months.

After months of preparation and planning, the first attempt failed. We simply did not have a successful pregnancy after the first IVF procedure. We were, however, prepared for this. We knew IVF is not always successful and many intended parents go through multiple cycles. And so, we invested more time and more procedures to undergo a second attempt.

After the various additional procedures, the second attempt failed as well. Undaunted, we carried on. On the eve of the third attempt, the doctors did

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[30] *See generally* Joseph F. Morrissey, *Surrogacy: The Process, the Law, and the Contracts*, 51 WILLAMETTE L. REV. 459 (2015) (explaining the surrogacy process and the contracts involved).

[31] *See generally What To Expect During the Surrogacy Medical Process*, AM. SURROGACY, [perma.cc/8BJU-7DRU] (last visited May 1, 2020) (providing a basic explanation of the medical procedures related to surrogacy).

their routine pre-implantation screening of the surrogate, including drug testing. They reported that our surrogate tested positive for amphetamines. The surrogate protested the results. She claimed that it must have been a mistake, but the clinic refused to proceed with the third attempt. We were devastated.

It took many months for us to even consider moving forward with the process all over again, but we did. The process was similarly challenging, but we found another egg donor and another surrogate. We went through all the legal hurdles for a second time.

Again, though, the doctors found a problem with our new surrogate on the eve of the IVF procedure. Her uterine lining had not responded appropriately to the medicine and was not ready for an embryo transfer. In looking into the cause, the surrogate confessed failing to take her medicine on a timely basis. And just like that, we had another strike-out. Given how critical and demanding the process was, we refused to work with her again.

As time went by, we started to question why all of this was happening to us. Were we just not meant to be parents? Maybe it was all too much? Were we getting too old in our mid and late forties now? Could we go through the heartache and disappointment again? For some reason, we decided to keep going. We interviewed more potential surrogates with the help of our local attorney. None of the candidates seemed right. It was during this third search for a surrogate that I remember feeling a sense of desperation. And then, we met the one.

Our neighbor, who had children through a surrogate, had been at a local playground with his son. He started chatting with a mom who was there with her son. When she asked our neighbor where his son's mom was, he told her he had worked with a surrogate. To his surprise, she then responded that she, in fact, had been a surrogate in the past. She had successfully delivered twins for a couple in their forties. Moreover, she was anxious to do it again for the right couple. Hearing this, he anxiously brought her to us.

After getting to know each other, we all agreed to proceed. After we completed all the legal hurdles, we underwent the appropriate procedures. Unfortunately, once again, repeated IVF procedures were unsuccessful. Our surrogate was amazing, though. Her strength and determination were infectious, and we simply kept trying. Our clinic, however, was not so determined. We could not believe it. Compounded with everything else that had gone wrong for us, our clinic essentially fired us. With so many failed attempts, they suggested we find another clinic, that maybe we would have more success elsewhere. And so, after everything we had been through, we did. Of course, we did.

Our new doctor had a high rate of successful IVF pregnancies. In meeting with us, he insisted we transfer only one embryo. Knowing the difficulty we had had in the past, I challenged him on this; we had been through so much and had so many failed attempts. I encouraged him to reconsider to give ourselves better odds of success. He refused but agreed that if he failed

in the IVF procedure with one embryo, then he would transfer two for the next attempt.

Sure enough, we had another failure. Keeping to his word, our doctor transferred two embryos the next time. And that is when the magic happened. After years of trying, multiple egg donors, multiple surrogates, endless medical screenings and procedures, and over one hundred thousand dollars spent, our surrogate was finally pregnant. Our incredible twin boys were born in June of 2014. Looking back at the experience, every minute and every penny was worth it in every way.

IV. TAX DEDUCTIONS FOR MEDICAL EXPENSES

While we were struggling with our IVF and surrogacy arrangements, the world continued to evolve. The Supreme Court decided *United States v. Windsor* in 2013.[32] *Windsor* struck down the part of the federal Defense of Marriage Act (DOMA) that provided a marriage had to be between a man and a woman, paving the way for same-sex marriage to become legal throughout the United States.[33] But *Windsor* actually involved a tax issue. The issue there was whether a same-sex couple, married in Canada, would get the benefit of marriage protections in the taxation of one of the spouse's estate after she had died.[34] The Court ruled that the due process clause of the Fifth Amendment meant that the surviving spouse could not be deprived of her status as a married person by DOMA, and that she was fully entitled to the tax benefits that any married person would get.[35] In its opinion, the Court discussed both the liberty interest inherent in the Fifth Amendment and equal protection provided therein.[36]

At a time when gay rights were being vindicated throughout the United States and the world, it seemed only right that we should invoke the medical deductions provision of the tax code and apply it to our own situation. If the Supreme Court thought Edith Windsor should get the same tax deductions as people in opposite-sex relationships, then surely the IRS would follow that precedent with us.

Section 213 of the Internal Revenue Code (IRC) essentially provides that all medical expenses are deductible from income, to the extent such expenses exceed 7.5% of adjusted gross income.[37] More specifically, that section defines medical expenses to include expenses "for the "diagnosis, cure,

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[32] United States v. Windsor, 570 U.S. 744, 749–52 (2013).

[33] *Id.*

[34] *Id.*

[35] *Id.* at 775.

[36] *Id.* at 769–75.

[37] I.R.C. § 213(f) (2018).

mitigation, treatment, or prevention of disease, or for the purpose of affecting any structure or function of the body."[38]

In interpreting the plain text of the code, it seemed clear to me that our medical expenses associated with IVF and surrogacy "affect[ed]" a "function of the body" as the statute demands—my reproductive function.[39] Empowered by *Windsor*, I asked our tax accountant to figure out our medical expenses, see if they met the threshold for deduction, and then take the deduction if we could. However, our tax accountant was dubious. She was aware of a tax court case from 2008, *Magdalin v. Commissioner*, where a single man had attempted to deduct IVF expenses involving an egg donor and a gestational surrogate.[40] The man had been denied the deduction.[41]

To see whether we could distinguish our case from the *Magdalin* decision, I looked further into the court's reasoning. From the short opinion, it was clear that the man involved had children from a previous relationship with a woman.[42] Both the government's argument and the court's decision focused on these previous children to argue this man had no medical need for IVF and surrogacy.[43] Instead, his decision to have additional children was a *choice*, rather than a necessity.[44] The government argued that this man "'had no physical or mental defect or illness which prohibited him from procreating naturally', as he in fact has."[45] Further, that his "'choice to undertake these procedures was an entirely personal/nonmedical decision.'"[46] The court in its opinion stated that Section 213 "require[s] a causal relationship in the form of a 'but for' test between a medical condition and the expenditures incurred in treating that condition."[47] The court went on to reiterate the government's position that there was no underlying medical condition that required treatment.[48]

This opinion seems inapposite to the plain language of the statute, which required no such medical necessity for a medical expense to be deducted.[49] But even if the *Magdalin* tax court were to be followed by other federal courts

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[38] *Id.* § 213(d)(1)(A).

[39] *Id.*

[40] Magdalin v. Comm'r, No. 09-1153, 2009 WL 5557509, at *1 (1st Cir. Dec. 17, 2009).

[41] *Id.*

[42] *Id.*

[43] *Id.*

[44] *Id.*

[45] Magdalin v. Comm'r, 96 T.C.M. (CCH) 491, *3 (2008).

[46] *Id.*

[47] *Id.* (citing Jacobs v. Comm'r, 62 T.C. 813, 818 (1974)).

[48] *Id.* at *3–4.

[49] *Id.* at *3.

(and those courts are not legally required to do so), in our case, there was a *de facto* medical necessity. It seemed too obvious to even have to argue that literally "but for" medical intervention, my husband and I would not have been able to have our children.

Aside from diverging from the clear language of the statute, the *Magdalin* decision led me to start thinking about equal protection under the Fifth Amendment of the Constitution. The corollary to the *Magdalin* opinion is that for opposite-sex couples engaging in IVF and/or surrogacy these kinds of expenses generally would meet the test and would be deductible. For most opposite-sex couples, IVF and/or surrogacy is only undergone if there is an underlying physical fertility or gestational issue. Again, "but for" that issue, the couple would not seek medical intervention. Thus, the interpretation used by the *Magdalin* Court would result in deductions typically being allowed for opposite sex couples using surrogacy, but not for same-sex couples. *De facto*, infertile opposite sex couples were really no different from same sex couples in having to resort to medical help for family formation. However, they, would be entitled to the deduction, whereas we would not.

After we discussed the *Magdalin* decision, why it seemed wrongly decided, and why it was inapplicable to my situation our accountant finally relented. In 2012, we filed an amended 2011 return to take the medical deduction. In 2014, however, I was informed that the IRS would be reviewing my return. In particular, the IRS planned to specifically investigate the medical deductions that we were seeking.

The IRS agent assigned to my case was a man named Gary Shepherd. I never met him in person, as all of our conversations happened over the telephone. Mr. Shepherd explained to me that he did not believe the expenses were medically necessary, and my decision to have children through surrogacy was simply "my choice." I was amazed that the government would adopt such a simplistic, anachronistic approach, especially in light of *Windsor*. I mentioned all of this to Mr. Shepherd. I asked him if he was familiar with the recent *Windsor* case. He was not. I explained that in *Windsor* and others like it, the Supreme Court vindicated the equal rights of gay people and insisted that the tax code be applied even-handedly.[50] Even after explaining this decision, Mr. Shepherd could not understand why I thought he was treating me unequally.

In maintaining my position, I explained that I *de facto* had no choice if I wanted to have biological children but to use medical intervention. He literally contested me on that point. I asked if he was encouraging me to cheat on my partner and somehow choose a woman to impregnate? He hemmed and hawed. I asked him about the complications that might flow from that

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[50] *See* United States v. Windsor, 570 U.S. 744, 775 (2013) (holding that the Defense of Marriage Act violated the Fifth Amendment by providing that "marriage" was only a legal union between a man and a woman).

arrangement—the custody battles—and was it really the government's position that I proceed that way? That such a "choice" to somehow impregnate a woman was viable for me? I was angry, but also in a certain amount of shock and awe that I was getting such an absurd response from the government. In fact, while it may seem like our conversation was heated, it was not. Mr. Shepherd was very friendly throughout our conversation.

Nonetheless, Mr. Shepherd admitted that he was nearing retirement, and the issue of deductibility of reproductive expenses for gay men was simply beyond him. I actually asked him if he knew any gay people, to which he responded no. I asked if he had ever read about or watched any films or television programs concerning gay people. Again, he replied no. Not even *Will & Grace*, I asked?[51] "Who are they?" he replied.

His decision had been made before we even spoke on the phone. This decision was recorded in a letter to me that simply stated that such deductions were disallowed because they had to be made "for Medical Services provided to the taxpayer, his spouse, or dependent."[52] And with that perfunctory explanation, I began to seek legal representation.

Carlton Fields is one of, if not, the most prestigious national firms based in the Tampa Bay area, where we were living. I knew several of their lawyers and many had been involved with Equality Florida, an organization dedicated to gay rights in Florida.[53] I asked if they would consider my case. I was absolutely delighted when they agreed and met the team, which included its lead tax litigator, Richard Euliss. The lawyers at Carlton Fields are smart and tenacious. They worked tirelessly crafting memoranda for the courts and later preparing and mooting oral arguments that would be presented to the Eleventh Circuit on our behalf.

Our arguments circled around two points. First, that the statute did not demand any "but for" necessity for medical expenses to be deductible.[54] Instead, the statute merely stated that deductions were allowed for expenses related to any function of the body.[55] Our expenses, of course, were related to the reproductive function. Second, to the extent the statute was going to be applied to deny me the deduction, it treated me differently from people in opposite-sex relationships, in violation of the due process and equal protection clause of the Fifth Amendment. Because we all thought the statute was

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[51] *Will & Grace* (NBC television broadcast) (*Will & Grace* was and remains a very popular television sitcom on NBC featuring openly gay characters that began airing in 1998. It ran for eight seasons until 2006 and then was revived in 2017. The home page for the series is available at https://www.nbc.com/will-and-grace).

[52] Letter from Malcolm T. Haile, Sr., *supra* note 2.

[53] *About Equality Florida*, EQUALITY FLA. ACTION, INC., [https://perma.cc/S4GJ-E2KA] (last visited May 1, 2020).

[54] I.R.C. § 213 (2018).

[55] *Id.*

clear and that our statutory argument was strong, we did not think the courts would need to even get to the constitutional argument.

V. THE FEDERAL DISTRICT COURT

In the Federal District Court in Tampa, Judge Richard Lazzara ruled on a motion for summary judgment that the expenses related to IVF and surrogacy were not expenses that were related to the taxpayer, his spouse, or a dependent.[56] This language mirrored the language used by the IRS in its letter denying the deduction.[57] Judge Lazzara simply did not agree that the expenses at stake were undertaken in connection with the reproductive function of the taxpayer's body.[58] Judge Lazzara further reasoned that any unmarried heterosexual male could and would be treated the same way under the statute were they to pursue IVF and surrogacy for any reason unrelated to an infertile spouse.[59] Thus, there was no constitutional infirmity in the denial of the deduction either.[60]

Judge Lazzara carefully considered precedent, including the *Magdalin* case. He carefully noted that taxpayers have the burden to establish a tax benefit.[61] And that deductions, "as a matter of legislative grace, are to be strictly construed."[62] Judge Lazzara was respectful in his authored opinion. He was not, however, able to move the government forward in its application of the tax code to include and dignify the lives and actions of minorities who are routinely denied benefits granted to their majoritarian counterparts.

His analysis of the statute was unfortunately superficial, and simply buttressed what the IRS agent had already stated. While deductions are a matter of legislative grace and should be narrowly construed, once they are granted, they must be granted to all taxpayers, regardless of sexual orientation or any other immutable characteristic. To say that reproduction is not a function of the taxpayer's body is to construe the statute so narrowly that it loses meaning. The statute does not, as the judge and government seemed to argue, mandate invasive procedures be undertaken on the taxpayer. Instead, the congressional language is broad and permissive, "affecting any function or structure of the body."[63]

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[56] Morrissey v. United States, 226 F. Supp. 3d 1338, 1341–42 (M.D. Fla. 2016).

[57] Letter from Malcolm T. Haile, Sr., *supra* note 2.

[58] *See Morrissey*, 226 F. Supp. 3d at 1343.

[59] *Id.*

[60] *Id.* at 1344–45.

[61] *Id.* at 1341.

[62] *Id.* at 1344 (citation omitted).

[63] I.R.C. § 213(d)(1)(A)(a) (2018).

Further, to argue that there is not disparate treatment of gay men by this decision is not in accord with the reality of the situation. In the vast majority of cases that would be governed by this opinion, people in opposite-sex relationships will be granted the deduction, while gay men will simply not. As mentioned above, opposite sex couples are not likely to use surrogacy unless there is a physical issue with the woman's own reproductive abilities. Under the IRS and Judge Lazarre's reasoning, the opposite sex couple would qualify for the medical deduction since the expenses would be related to the woman's reproductive ability. Indeed, Judge Lazzara himself was careful to note that only an "unmarried" heterosexual man would be treated the same way as a man in a same-sex relationship.[64] For married heterosexual taxpayers, then, the opinion seems to say that the government should subsidize the expense.[65] While for gay men, the government will not. In both cases, taxpayers are pursuing family formation via medical intervention, but both cases are not treated equally under the law.

To say that there are outlier cases where a heterosexual person might not get the deduction as proof of equal application of the statute is to deny what will routinely be the case. Routinely, the application of this logic will treat gay men differently than straight people and deny them the deduction. This, in turn, makes family formation more costly for gay men, and, therefore, more difficult to pursue. In the end, it perpetuates and legitimizes discrimination and will likely mean fewer individuals in same-sex relationships will pursue their dream to have children. And that is exactly why we appealed.

VI. THE APPEAL TO THE ELEVENTH CIRCUIT

As news about the federal case hit the press, I was surprised to start receiving e-mails from similarly situated gay men who were contemplating building families through the expensive surrogacy process.[66] Being allowed

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[64] *Morrissey*, 226 F. Supp. 3d at 1343.

[65] *Id.*

[66] E.g., Letter from John Doe, to Joseph F. Morrissey (Oct. 21, 2016) (on file with author).

> I was recently reading about your case with the IRS trying to get the IRS to recognize the costs associated with IVF and gestational carriers as legitimate medical expenses. I wanted to send you my unsolicited appreciation for your efforts.
>
> My partner and I are currently in the process of trying to start a family and have also been incurring the (substantial) costs of egg donors, fertility clinics, agencies, legal representation, and a gestational carrier. We even tried to limit some of the impact of costs by having pre-tax income put aside in flex spending accounts but were told that the FSA funds couldn't be placed towards any costs of surrogacy other than the sperm freezing itself. Fortunately, we have the financial means to make it possible with post-tax funds, but I can imagine that for many people, the additional

the deduction, I was told, would be a huge help. It might, in fact, make the difference between having children or not.

It was not an uncalculated decision to appeal to the Eleventh Circuit. The federal government had made an offer to discuss a cash settlement to simply end the litigation. I discussed the idea of settling with my legal team at Carlton Fields. On the one hand, a victory, even a limited victory in terms of a cash settlement with no precedential value, is still a victory. On the other hand, I thought about all those other people out there for whom a deduction for IVF and/or surrogacy might really make the difference between proceeding to build a family or not. Some had e-mailed me, and I felt like we were in the fight, in some ways, together.

It was the precedential value of the case that made us pursue it in the first place. The deduction in our case had a value of about ten thousand dollars—significant, but not as significant as allowing other families to claim the deduction going forward. Moreover, in the aftermath of cases like *Windsor*, I felt like the government really needed to take note that it was time to treat gay people with dignity and equality in every aspect of government interaction. Therefore, we decided against taking the settlement and continued to pursue our case.

My legal team, again, worked diligently to craft the written submissions that would go to the court. And in the end, the submissions were brilliant. My legal team carefully explained our case, distinguished and applied precedent, and made the impassioned plea for equal justice.

We learned our case would be heard by the Eleventh Circuit sitting in Montgomery Alabama. As we made our plans to travel to Montgomery, we learned which judges would be on our panel. The panel of three judges would be chaired by a very senior judge, the Honorable Charles R. Wilson. With him on the bench would be Kevin C. Newsom, who had just been appointed by President Trump, and the Honorable Federico A. Moreno, a United States District Judge for the Southern District of Florida, who would be sitting by designation. It was front of these three judges that we delivered our argument.

> burden of having to set aside enough post-tax funds to go through these expenses would make having their own children nearly impossible.
>
> I am inspired and amazed by what you and your partner are doing. I don't have a legal background but enjoyed reading the very well-written brief for your case. Thank you for making the effort to fight for something which will help to legitimize the only way we have, as gay men, to be genetically related to our own children.

A. The Oral Argument

The beginning of the questioning from the panel came exactly six seconds into the oral argument presented by our attorney, Richard Euliss.[67] It was at that moment that Judge Newsom interrupted him to circumscribe the statutory argument and make sure that our argument concerned only the piece of that statute that mandates that medical expenses "affect[] a bodily function" or structure of the body.[68] Soon thereafter, as Mr. Euliss was explaining the plain meaning of the statute, Judge Wilson interrupted, stating, not asking, that there was no authority for Mr. Euliss' position.[69] Of course, the statute itself is legally binding authority, and its plain meaning must be followed.

Mr. Euliss then offered up two examples of the IRS actually allowing deductions for IVF and surrogacy where the intended parents were in an opposite-sex relationship.[70] He went on to discuss the plain meaning of the statute—that reproduction is a function of the body and that having a child plainly affects reproduction, as the statute commands.[71]

Judge Newsom interrupted again, this time to offer up an explanation of the reproductive process—that two people are required and that all the male has to do is produce motile sperm.[72] He continued to explain that I could do that (produce sperm) both before the medical procedures in question here and after.[73] Thus, the statutory requirements that a function be affected were not met.[74] Of course, here, he was conflating "affect" with "changed," or "altered," a requirement not included in the statutory language.

Judge Wilson noted that there seemed to be two precedent cases where a man tried to deduct IVF and surrogacy expenses from his taxes, but the IRS refused to allow the deduction.[75] When Mr. Euliss attempted to explain that those cases were wrongly decided, but also distinguishable, Judge Newsom again interrupted, wondering which it was, were they wrong or

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[67] Oral Argument at 0:06, Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017) (No. 17-10685), http://www.ca11.uscourts.gov/oral-argument-recordings?title=&field_oar_case_name_value=morrissey&field_oral_argument_date_value%5Bvalue%5D%5Byear%5D=2017&field_oral_argument_date_value%5Bvalue%5D%5Bmonth%5D=8.

[68] *Id.* at 0:36.

[69] *Id.* at 1:56.

[70] *Id.* at 3:47.

[71] *Id.* at 4:10.

[72] *Id.* at 4:28–4:38.

[73] Oral Argument, *supra* note 67, at 4:39–4:45.

[74] *Id.* at 6:12.

[75] *Id.* at 6:40–6:49.

distinguishable?[76] Mr. Euliss held his own and explained that they were both wrong and distinguishable.[77] They were wrong because there is no "but for" necessity required for deductible medical expenses written into the statute, and distinguishable because the men in those cases had children with women previously.[78] Thus, IVF and surrogacy were not their only option for biological reproduction. As Mr. Euliss concluded, for me and gay men like me "it is IVF or bust."[79]

When the government attorney began his oral argument, Judge Wilson asked whether the women involved should get the deduction, and not me, since it was their bodies that were impacted after all.[80] This question showed a profound lack of understanding of the surrogacy process. Even the government lawyer responded by explaining that I, as the intended parent, had incurred all the expenses, and that the women actually did not have any expenses to deduct.[81]

Judge Newsom came back with what he referred to as "genuine questions" that if a sweeping definition of deductions for expenses affecting a bodily function were used, then why couldn't he deduct his gym membership?[82] He said this to a round of laughter on the panel among the judges.[83] He continued to ask why he couldn't deduct the cost of healthy meals next?[84] His comments were met with more laughter.[85]

The government's attorney, at first, sided with Judge Newsom and replied that Judge Newsom's arguments about the gym were stronger than our arguments regarding medical expenditures for IVF and surrogacy.[86] Soon, though, even the government's attorney acknowledged that the IRS uses an ordinary meaning interpretation of the statute and it begins with medical expenses, so that gym costs and meals would not be entitled to be deducted.[87]

I was sitting in the gallery observing all of this and growing more and more contemptuous. That, of course, is one of the reasons why even lawyers

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[76] *Id.* at 7:34.

[77] *Id.* at 7:37.

[78] *Id.* at 7:15, 7:33.

[79] Oral Argument, *supra* note 67, at 12:03.

[80] *Id.* at 13:17.

[81] *Id.* at 13:24–13:28.

[82] *Id.* at 17:543–17:56.

[83] *Id.* at 17:57.

[84] *Id.* at 19:02.

[85] Oral Argument, *supra* note 67, at 19:03.

[86] *Id.* at 19:15.

[87] *Id.* at 19:44.

should never represent themselves. Instead, Mr. Euliss showed perfect professional restraint. He began his reply to the government's presentation with an explanation that the statute allows deductions for medical expenses.[88] Gym memberships and meals clearly did not qualify for under the medical expense deduction, while IVF and surrogacy procedures, which involve doctors, laboratories, prescription drugs, and medical facilities, clearly do.[89] Mr. Euliss went on to explain how not allowing the deduction could easily be perceived as discriminatory and a constitutional violation.[90] He reminded the court that the statute dictates deductions for medical expenses affecting bodily functions.[91] He ended with two truisms that all would accept: that reproduction is a bodily function, and that there can be no greater reproductive effect than having a child.[92]

B. The Opinion

Regardless of the oratory prowess of my attorney, the Eleventh Circuit issued an opinion against us relatively quickly.[93] Judge Newsom authored the opinion.[94] As will be further explained below, the language used in the opinion itself shows a condescending hostility towards gay men generally and our case specifically.[95] Moreover, the Eleventh Circuit manipulated the statutory language to achieve what the court portrayed as the obvious outcome of the case. The Eleventh Circuit misapplied precedent, disregarded analogous situations where taxpayers have gotten IRS relief, and ignored favorable IRS treatment of similarly situated heterosexual taxpayers.[96]

1. Demeaning Language

True to his behavior during the oral arguments, Judge Newsom began his opinion with a joke: "This is a tax case. Fear not, keep reading."[97] He then

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[88] *Id.* at 25:19.

[89] *Id.* at 25:20.

[90] *See id.* at 25:49

[91] *See* Oral Argument, *supra* note 67, at 25:16.

[92] *Id.* at 27:26–27:56.

[93] Morrissey v. United States, 871 F.3d 1260, 1260 (11th Cir. 2017) (issuing the opinion just one month later on September 25, 2017, and holding that the "taxpayer could not deduct costs attributable to egg donor and gestational surrogate.").

[94] *Id.* at 1262.

[95] *See generally Morrissey*, 871 F.3d 1260 (using the phrase "homosexual male" to describe me and later claiming that "lower organisms" reproduce asexually, as opposed to "human beings" who must reproduce sexually and require "the involvement of both male and female gametes.").

[96] *See* Osius v. Comm'r, No. 15472-11S (T.C. filed June 30, 2011); Sedgwick v. Comm'r, No. 10133-94 (T.C. filed June 14, 1994).

[97] *Morrissey*, 871 F.3d at 1262

mentions that the case involves "two important and (as it turns out) interesting questions."[98] Newsom framed the issue by immediately dehumanizing me. He described the issue stating, "First up: Was the money that a homosexual man paid to father children [deductible] . . . ?"[99] Instead of using my name as the plaintiff and describing I was a gay man in a same-sex committed relationship, he simply refers to me as the "homosexual."[100]

It is currently widely understood that the use of the word "homosexual" professionally is offensive. The New York Times and the Washington Post both restrict the use of the term.[101] The Gay and Lesbian Alliance Against Defamation (GLAAD) explains that "homosexual" is a term now generally used by anti-gay extremists: "Because of the clinical history of the word 'homosexual,' it is aggressively used by anti-gay extremists to suggest that gay people are somehow diseased or psychologically/emotionally disordered—notions discredited by the American Psychological Association and the American Psychiatric Association in the 1970s."[102]

By contrast, in the landmark Supreme Court case of *Windsor*, discussed above, involving the tax treatment of a surviving spouse who was in a same-sex marriage, Justice Kennedy describes the issue with reference to "two women" who "were married" and were in a "same-sex" marriage.[103] Similarly, in the landmark Supreme Court case of *Obergefell*, where gay marriage was legalized, Justice Kennedy discusses, respectfully, the fact that "[t]he Constitution promises liberty to all within its reach . . . ."[104] He describes plaintiffs as those who "seek to find that liberty by marrying someone of the same sex."[105]

Going backwards in time, Judge Newsom's opinion looked more similar to a Supreme Court opinion in 1986. The Supreme Court in *Bowers v. Hardwick* ruled that "homosexuals" had no right to engage in "sodomy."[106] That Court used the word homosexuals throughout and described the conduct

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[98] *Id.*

[99] *Id.*

[100] *Id.*

[101] *See GLAAD Media Reference Guide—Terms to Avoid*, GLAAD, [perma.cc/63BM-2M9P] (last visited May 1, 2020) (listing offensive terms).

[102] *Id.*

[103] United States v. Windsor, 570 U.S. 744, 749–51 (2013).

[104] Obergefell v. Hodges, 135 S. Ct. 2584, 2593 (2015).

[105] *Id.*

[106] Bowers v. Hardwick, 478 U.S. 186, 192 (1986).

being regulated as sodomy.[107] *Bowers*, of course, was later overruled by *Lawrence v. Texas* in 2003.[108]

In *Lawrence*, Justice Kennedy was again the author of the opinion.[109] He described the same situation that had been described in *Bowers* as "homosexual sodomy" as "two persons of the same sex . . . engag[ing] in certain intimate sexual conduct."[110] The result of *Bowers*, of course, was to continue to stigmatize and discriminate against gay people. The result of *Lawrence* was to vindicate their humanity and assure for them the guarantees of liberty found in the Constitution. Intentionally or not, Judge Newsom used the anti-gay demeaning language that was used in *Bowers* and that is currently actively avoided by fair-minded journalists and jurists alike.

2. Manipulating the Statute

The opinion then finally turned to the language of the statute itself. Regarding the statute, our argument had been a simple one: the statute's plain language allowed medical deductions for any expenses affecting a function of the body.[111] My expenses were all connected with my goal of having children. Thus, the expenses were connected to and, indeed, affected my reproductive function.

However, the Eleventh Circuit took the clear statutory language and changed it to avoid this obvious interpretation. First, the judges focused on the word "affect" and substituted as an equivalent "materially influencing or altering."[112] They pulled that language from Webster's Dictionary.[113] Of course, there are plenty of other definitions of the word "affect." Even in the opinion's cite to Webster's Dictionary, the court also says that affect can mean, "to act, or produce an effect, upon; to impress or influence . . . ."[114] But they chose to use the narrowest definition. Other dictionary definitions define "affect" simply as "to have an effect on."[115]

Even using the Eleventh Circuit's own definition of affect as "materially influencing or altering," the statute is still easily satisfied in my case.[116] My medical expenses materially influenced or had an impact on my reproductive

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[107] *Id.* at 187–96.

[108] Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[109] *Id.* at 562.

[110] *Id.* at 562, 570.

[111] I.R.C. § 213 (2018)

[112] Morrissey v. United States, 871 F.3d 1260, 1265–66 (11th Cir. 2017).

[113] *Id.* at 1265.

[114] *Id.*

[115] *See Affect*, OXFORD ENGLISH DICTIONARY (3d ed. 2010).

[116] *Morrissey*, 871 F.3d at 1265.

function—having children. All of the expenses were made to pursue the goal of having children. But even with the court's narrow definition, the opinion focuses only on the "alter" portion.[117] Because nothing about my bodily functions were altered, according to the court, the statute was not satisfied.[118] The Eleventh Circuit effectively substituted the much narrower "altered" into the definition, replacing the very broad word chosen by Congress, "affect."

The opinion also drills down on what "function" must mean and again arrives at an unreasonably narrow conclusion.[119] In our argument, the "reproductive function" has its plain meaning—the ability to have children.[120] That, of course, once again, is why all of my medical expenses were undertaken.

In their discussion of reproduction, the court, apparently again in an attempt at humor, tells its readers that it is necessary in this case to educate (the public, presumably) "with a primer on the science of human reproduction."[121] Through this discussion, the court explains that reproduction takes a male and a female.[122] Further, the male's role is limited to providing motile sperm.[123] Under this view, therefore, the male reproduction function is solely and only about producing motile sperm. Taking that narrow view, the vast majority of my expenses had little or nothing to do with my motile sperm.[124] Instead, those expenses involved the egg donor, her eggs, the gestational surrogate, and her pregnancy and related expenses.[125]

This narrow view of reproduction defies the plain, common sense meaning of the term. If the Eleventh Circuit had again consulted Webster's Dictionary, they would have found that reproduction is indeed a term that broadly refers to the ability to have children. Webster's Dictionary defines reproduction as "the production by living organisms of new individuals or offspring."[126] Again, using the statute and this common-sense definition, the expenses at stake were all made to affect my ability to have offspring, i.e. to reproduce.

It is further telling that in its primer on human reproduction, the court decides to explain that there are "lower organisms that reproduce

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[117] *Id.* at 1265–66.

[118] *Id.*

[119] *Id.* at 1266–67.

[120] *Id.* at 1265–66.

[121] *Id.* at 1266.

[122] *Morrissey*, 871 F.3d at 1266.

[123] *Id.*

[124] *Id.* at 1267.

[125] *Id.*

[126] *Reproduction,* OXFORD ENGLISH DICTIONARY (3d ed. 2010).

asexually," but that "human beings reproduce sexually."[127] This explanation is both unnecessary and inaccurate. It is also demeaning. Of course, men in same-sex relationships cannot reproduce sexually. Instead, as in my case that was under scrutiny by the court, reproduction was indeed achieved asexually. The court's discussion seems to equate, then, what we did with that which "lower organisms" do, "through fission, budding, or the like."[128]

Once again, even if the court's narrow definitions were used, the statute in this case was satisfied. If you narrow the reproductive function of my body to the production and contribution of motile sperm, the genetic material in the sperm continues to exist and develop once it is united with the egg. So, if we really need to trace the court's thought process, my reproductive material continues to be affected, to grow and develop, and indeed to alter, until and even after a child is born. All of that happens in connection with the egg that is donated, and the care of the gestational surrogate, making all expenses related thereto deductible under the language of the statute.

3. Misapplying Precedent

The opinion then supports its decision with reference to two previously decided tax court cases, *Magdalin v. Commissioner* and *Longino v. Commissioner*.[129] Both cases applied a standard that seems to have been rejected by the court.[130] At a minimum, that standard was ignored. Both cases are also factually distinguishable from my case in a fundamental and meaningful way. Nonetheless, the court relies on those cases to buttress its holding.[131]

Magdalin was discussed at some length earlier in connection with the federal district court opinion issued in this case.[132] As was mentioned there, the analysis seemed perfunctory and the outcome seemed wrongly decided. The court reasoned that the medical deduction statute required a "but for" causation test to prove that the expenses would not have been undertaken but for some medical condition (like infertility).[133] Because Mr. Magdalin had fathered children previously in the context of an opposite-sex

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[127] *Morrissey*, 871 F.3d at 1266.

[128] *Id.*

[129] *Id.* at 1267–68 (citing Magdalin v. Comm'r, 96 T.C.M. (CCH) 491 (2008), *aff'd,* 105 A.F.T.R.2d 2010-442 (1st Cir. 2009); Longino v. Comm'r, 105 T.C.M. (CCH) 1491 (2013), *aff'd*, 593 F. App'x 965 (11th Cir. 2014)).

[130] *Morrissey*, 871 F.3d at 1267–68.

[131] *Id.*

[132] *See supra* Part III.

[133] *Magdalin* v, 96 T.C.M. (CCH) 491, at *3 (2008), *aff'd,* 105 A.F.T.R.2d 2010-442 (1st Cir. 2009).

relationship, the tax court ruled that there was not but for causation in his undertaking IVF and surrogacy in the case under consideration.[134] Similar to the *Magdalin* case, *Longino* involved a single man, who had previously fathered children in the context of an opposite-sex relationship, was attempting to deduct IVF and surrogacy expenses.[135] In this case, however, the biological mother was to be the taxpayer's fiancé.[136]

Both of those cases are factually distinguishable from my case. Both involved men who had fathered children in an opposite sex relationship. So, the "but for" standard announced in *Magdalin* was not met. Both men were indeed able to have children without IVF and surrogacy. If that 'but for' standard was applied in my case, the standard would be met. I had not and could not father children with my same-sex partner 'but for' medical intervention.

In addition, neither *Magdalin* nor *Longino* are binding on the Eleventh Circuit. *Magdalin* was a tax court case that was affirmed in the First Circuit.[137] *Longino* was indeed affirmed in the Eleventh Circuit, but was an unpublished decision, and therefore is not binding.[138] Nonetheless, the court used both cases to drive its conclusion that the statutory analysis was correct and consistent with precedent.[139]

The court, however, actually ignored the standard set forth in *Magdalin*. It did not apply the 'but for' standard in the discussion of the statute—in fact, it did not even mention it.[140] Instead, the court focused on convenient additional language in *Magdalin* that the medical expenses were not for the purpose of affecting any structure or function of the taxpayer's body.[141] But *Magdalin* and *Longino* were both decided on the basis that the medical expenses were not necessary because there was no underlying medical defect.[142] *Longino* specifically stated in its perfunctory analysis that "a taxpayer cannot deduct the IVF expenses of an unrelated person if the taxpayer does not have a defect which prevents him or her from naturally conceiving children."[143]

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[134] *Id.*

[135] Longino v. Comm'r, 105 T.C.M. (CCH) 1491 (2013), *aff'd*, 593 F. App'x 965 (11th Cir. 2014).

[136] *Id.*

[137] *See generally Magdalin*, 96 T.C.M. (CCH) 491 (deciding case in the tax court, which was subsequently affirmed on appeal in *Magdalin v. Comm'r*, 105 A.F.T.R. 2d 2010-442 (1st Cir. 2009)).

[138] *See generally Longino*, 105 T.C.M. (CCH) 1491 (deciding case in the tax court and subsequently affirmed on appeal at *Longino v. Comm'r*, F. App'x. 965 (11th Cir. 2014)).

[139] Morrissey v. United States, 871 F.3d 1260, at 1267–68 (11th Cir. 2017).

[140] *Id.*

[141] *Id.*

[142] *Magdalin*, 96 T.C.M. (CCH) 491, at *4; *Longino*, 105 T.C.M. (CCH) 1491, at *11.

[143] *Longino*, 105 T.C.M. (CCH) 1491, at *11.

Magdalin and *Longino* used a standard to evaluate the medical deduction statute that the court did not use. Regardless, the court relies on their conclusion to buttress its own. Both cases were also factually distinguishable in a fundamental way—both taxpayers there had fathered children in opposite-sex relationships. Therefore, medical expenditures arguably were not "necessary."

4. Disregard for Favorable IRS Treatment

The court also disregarded the fact that the IRS has interpreted the medical deduction provisions broadly in accord with congressional intent and has allowed a wide range of expenses to be deductible medical expenses.[144] Those expenses include weight loss expenses[145] and gender reassignment procedures.[146] Further, the government has allowed deductions for the installation of a swimming pool, an elevator, and air conditioning, none of which directly alter the function or structure of a taxpayers body, but all of which were deemed to have a sufficient effect on the taxpayer's health.[147] The opinion does not mention any of those deductions. These deductions were, however, discussed in our written submissions to the court.[148]

And more specific to our case, the court also disregards the fact that the IRS has at least twice specifically allowed IVF and surrogacy expenses to be deducted for taxpayers in opposite-sex relationships. In both *Osius v. Commissioner*[149] and *Sedgwick v. Commissioner*,[150] the IRS allowed medical deductions related to surrogacy and IVF for opposite-sex married couples where the couple was not able to have biological children otherwise. These situations are directly analogous to my case and suggest that I also should have been allowed the deduction. The court dismissed reference to these cases as not probative since they involved settlement agreements.[151] And while, technically speaking, settlements are not precedential, these cases are certainly

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[144] As was detailed in our submission to the Eleventh Circuit, the statutory language itself is broad, including expenses made "for the purpose of affecting any structure or function of the body." I.R.C. § 213(d)(1)(A) (2018). This is reflective of Congress' intent that the statute be interpreted broadly. *See* S. REP. NO. 77-1631, at § 127 (1942), *as reprinted in* 1942-2 C.B. 504.

[145] *See* Rev. Rul. 2002-19, 2002-1 C.B. 778.

[146] *See* O'Donnabhain v. Comm'r, 134 T.C. 34, 59–6 (2010).

[147] *See generally* Ferris v. Comm'r, 582 F.2d 1112 (7th Cir. 1978) (addressing the deductibility of expenses relating to a swimming pool); Berry v. Wiseman, 174 F. Supp. 748 (W.D. Okla. 1958) (expenses related to elevator deemed deductible); Post v. United States, 150 F. Supp. 299 (N.D. Ala. 1956) (expenses related to elevator deemed deductible); Gerard v. Comm'r., 37 T.C. 826 (1962) (expenses related to installation of air conditioning deemed deductible).

[148] Opening Brief of Plaintiff-Appellant at 12, Morrissey v. United States, 871 F.3d 1260 (11th Cir. 2017 (No. 17-10685), 2017 WL 1232286.

[149] Osius v. Comm'r, No. 15472-11S (T.C. filed June 30, 2011).

[150] Sedgwick v. Comm'r, No. 10133-94 (T.C. filed June 14, 1994).

[151] Morrissey v. United States, 871 F.3d 1260, 1271 (11th Cir. 2017).

telling about the government's position. Moreover, neither *Magdalin*, nor *Longino*, relied upon heavily by the court, are binding precedent on the Eleventh Circuit either.

Moreover, as mentioned above, in *Windsor*, the Supreme Court has very recently ruled that people in same-sex relationships should get the same benefits that the tax code confers on people in opposite-sex relationships.[152] In addition, *Lawrence*, also mentioned above, talked about the Constitution guaranteeing liberty for all people, including those in same-sex relationships.[153] Unlike *Magdalin* and *Longino*, neither of which are binding on the Eleventh Circuit, as Supreme Court cases, *Windsor* and *Lawrence* are binding on the Eleventh Circuit. Granted the specific issues in both of those cases were different from the issue in our case, but the overarching principles are directly applicable. Nonetheless, these cases were ignored.

As *Windsor* pointed out, it is constitutionally impermissible to treat people in same-sex relationships differently than people in opposite-sex relationships.[154] Because the IRS has allowed medical deductions in cases like mine where the couples involved were opposite-sex, we argued that the IRS's denial of the deduction in my case violated by the liberty interest and the equal protection clause of the Fifth Amendment. Both of those provisions supported the Court's conclusion in *Windsor*, and both, we argued, supported the IRS granting me the medical expense deduction.[155] Coupled with the IRS's different treatment of me in comparison to opposite-sex couples was the clear animus on the part of the IRS when the agent reviewing my deduction in the first instance explained that deciding not to have children sexually with a woman was simply my choice. That agent's decision was confirmed by his manager and on appeal at the IRS, with both higher level decision-makers showing deference to his conclusion.

The court, of course, dismissed our constitutional claim, primarily because it believed it already established that the government was merely applying the statute in an even-handed way, and therefore, in no way, was being discriminatory.[156] Once again, this is ignoring the relevant facts, just discussed above, that lead to the opposite conclusion. The opposite-sex couples who could not have children without medical intervention have been granted the deduction for their related medical expenses, while I, in the context of a same-sex relationship, was not.

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[152] United States v. Windsor, 570 U.S. 744, 751–52 (2013).

[153] Lawrence v. Texas, 539 U.S. 558, 562 (2003).

[154] *Windsor*, 570 U.S. at 774.

[155] Opening Brief of Plaintiff-Appellant at 43–44, *Morrissey*, 871 F.3d 1260 (No. 17-10685), 2017 WL 1232286.

[156] *Morrissey*, 871 F.3d at 1271.

In the court's explanation of the constitutional dimensions of the case, the opinion actually cites *Lofton v. Sectretary of the Department of Children and Familiy Services*, a 2004 case that upheld Florida's blanket statutory prohibition on gay adoptions.[157] *Lofton* was never technically overturned, but was discredited when the state courts in Florida invalidated that statute, and the Florida legislature finally rescinded it.[158] The court did not need to cite to *Lofton* but did so to explain that equal protection claims receive rational basis review when there is no fundamental right or suspect class implicated.[159] Given that the *Lofton* case has been discredited, the court's reliance on that case to buttress a basic point that is discussed in many cases is perhaps telling. That adoption ban itself was passed with legislative comments expressly saying to the gay community "[w]e're really tired of you. We wish you'd go back in the closet."[160] Federally, of course, the Supreme Court specifically ruled that animus against a politically unpopular group cannot sustain government action even under the rational basis test.[161]

Of course, in our case we had argued that procreation deserves heightened scrutiny as a fundamental right and cited to the landmark case of *Skinner v. Oklahoma.*[162]In *Skinner*, the Court announced procreation was indeed "fundamental to the very existence and survival of the [human] race" and is a "basic civil right[] of man."[163] In applying *Skinner* to my case, the court decided that the right we were asserting was not a broad fundamental right to procreate but instead a narrow right to an IRS deduction related to a specific and novel kind of procreation through IVF and surrogacy.[164] Describing my situation in that way made the general right to procreation inapplicable in my case. Similarly, in *Bowers* (now overruled), the Court did not find a fundamental right to homosexual sodomy,[165] while, by contrast, in *Lawrence* the Court did find a broad fundamental right to consensual sexual intimacy.[166]

The conclusion that I had no fundamental right to procreation through IVF and surrogacy, of course, once again ignores that fact that IVF and

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[157] *Id.* at 1268 (citing Lofton v. Sec'y of the Dep't of Children & Family Servs., 358 F.3d 804, 827 (11th Cir. 2004)).

[158] *See supra* note 11 (explaining the history of Florida's anti-gay adoption laws at the statutory level and in the courts).

[159] *Morrissey*, 871 F.3d at 1269.

[160] *In re* Adoption of Doe, 2008 WL 5070056, *10 (Fla. Cir. Ct. Aug. 29, 2008) (quoting *Gay Bills Pass Both Houses*, FLA. TIMES-UNION (June 1, 1977)).

[161] Romer v. Evans, 517 U.S. 620, 631–36 (1996).

[162] Skinner v. Oklahoma, 316 U.S. 535, 541–42 (1942).

[163] *Id.* at 541.

[164] *Morrissey*, 871 F.3d at 1269–70.

[165] Bowers v. Hardwick, 478 U.S. 186, 193–96 (1986), *overruled by* Lawrence v. Texas, 539 U.S. 558, 578 (2003).

[166] *Lawrence*, 539 U.S. at 577–79.

surrogacy in my case were the only route to procreation. Therefore, my very ability to procreate generally was at stake. Any government treatment of that fundamental right that is restrictive should, therefore, receive heightened scrutiny.

The court's analysis is similar to the now discredited analysis that opponents of same-sex marriage used. Where it was generally conceded that there was a well-established right to marriage in the United States,[167] opponents of same-sex marriage would often say that the general right did not extend to the unique circumstance of marriage for same-sex couples. *Obergefell* overturned that faulty logic.[168] Nonetheless, the logic persists in the court's argument here. If the case under consideration can be somehow carefully circumscribed[169] as novel, then the more general fundamental right at stake can be ignored. Just as marriage has long been held to be a fundamental right and *Obergefell* applied that to same-sex couples, procreation has long been held to be a fundamental right,[170] and the federal courts should recognize that right for all as well.

The opinion goes on to make the argument that the federal courts should not decide policy-related issues that are better left to the legislative process.[171] The court argued that if it were to give heightened protection to my ability to procreate by using IVF and surrogacy, it would be taking "the matter outside the arena of public debate and legislative action."[172] The opinion further cautions that with all its ethical dimensions, chilling further legislative debate on IVF and surrogacy would be inappropriate.[173] In reality, any further legislative initiative concerning IVF and surrogacy would be unaffected by a positive ruling in my case.

And, of course, we were never asking the Eleventh Circuit to enter the legislative arena. The statute we were concerned with is one that was already passed into law and many years ago at that.[174] Our petition merely sought equal application of that statute, given the fundamentality of the interest at stake.

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[167] *See generally* Loving v. Virginia, 388 U.S. 1 (1967) (reiterating the fundamental right to marriage while holding unconstitutional a statute making inter-racial marriage illegal).

[168] Obergefell v. Hodges, 135 S. Ct. 2584, 2598–603, 2608 (2015).

[169] *Morrissey*, 871 F.3d at 1269 (citing Doe v. Moore, 410 F.3d 1337, 1343 (11th Cir. 2005)) (supporting carefully describing the right at stake).

[170] Skinner v. Oklahoma, 316 U.S. 535, 541 (1942).

[171] *Morrissey*, 871 F.3d at 1269–70.

[172] *Id.* at 1270 (citing Doe v. Moore, 410 F.3d 1337, 1343 (11th Cir. 2005)).

[173] *Id.*

[174] Medical deductions were first allowed under the United States Revenue Act of 1942, Pub. L. No. 753, ch. 619, § 127, 56 Stat. 798, 825–26 (1942) (current version at I.R.C. § 213 (2018)).).

VII. TELEOLOGICAL INSTRUMENTALISM

In both the oral arguments and the published opinion, the court refers to traditionally accepted neutral canons of interpretation and decision-making, including textualism, and respect for precedent.[175] On the contrary, as discussed above, it appears that the court actually manipulated the text of the statute. It relied on certain non-binding cases as precedent and ignored relevant cases that are binding.[176] Because of this, it appears that the Eleventh Circuit actually decided the case on a different basis—a basis I label here as *teleological instrumentalism*. Under that decision-making framework, the court frees itself to manipulate the relevant statute and the Constitution instrumentally to pursue the result, the goal, it believes is appropriate.

The idea of teleological instrumentalism builds on both legal realism and the recognition of bias in human decision-making, bias that can be explicit or implicit. While there are many iterations of legal realism, the legal realism based on the work of Oliver Wendell Holmes was a reaction to legal formalism.[177] Pursuant to legal formalism, the outcome of legal disputes is dictated by the law governing the dispute.[178] That law is merely applied dispassionately to arrive at the outcome of the dispute. Legal realism acknowledged that legal decision-making is not always that straightforward and that decision-makers may or may not even state the actual reasons for their decisions in their published opinions.[179] In this way, legal realism has led to the acknowledgment that bias is a very real part of the legal system.[180]

There is vast amount of research on bias and an express acknowledgment in the legal field that decision-making, even outcomes of legal contests, can be tainted by bias.[181] For example, pattern jury instructions now include instructions cautioning jurors to strive to overcome their biases, whether they be explicit or implicit.[182] An Illinois pattern jury instruction explains simply that, "[w]e all have feelings, assumptions, perceptions, fears, and stereotypes about others. Some biases we are aware of and others we might not be fully aware of, which is why they are called 'implicit biases' or 'unconscious

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[175] *See Morrissey*, 871 F.3d at 1267–68; Oral Argument, *supra* note 67, at 1:56, 6:40–6:49.

[176] *See supra* Part V.

[177] *See generally* Justice Holmes, Address at the Dedication of the New Hall of the Boston University School of Law: The Path of the Law (Mar. 25, 1897), in, 10 HARV. L. REV. 457 (1897) (presenting Holmes' definition of the law as merely being predictive of what judges will decide in cases and further discussing the fact that judges are influenced by a variety of factors that they may not explain in their opinions).

[178] *Id.*

[179] *Id.*

[180] *See* Michael P. Ambrosio, *Legal Realism*, 2000 N.J. LAW. 30, 30, 36–37 (2000).

[181] *Id.*

[182] Illinois Pattern Jury Instructions, Civil, No. 1.08 (2019).

biases.'"[183] The jury instruction then goes on to encourage jurors to avoid acting on the bases of any of those biases.[184]

A 2019 law article on implicit bias first comments on how prevalent discussions of implicit bias have become, but then carefully admonishes the reader not to be overly critical of people for their implicit biases, since, by definition, they are biases that the holder does not even realize they possess.[185] Moreover, the author explains that implicit biases are commonplace in our complex and fast-paced world as people are forced to make quick judgments about people and events to evaluate the situations they confront.[186]

Nevertheless, particularly in the legal world, decision-makers must strive to overcome their biases or risk injury to minority groups and damage to the very notion that we are governed by a rule of law. A 2017 empirical study on implicit bias in the judiciary reviewed some of the existing literature on implicit bias before presenting its own empirical results confirming racial and religious bias among federal and state court judges.[187] More broadly, there have been scientific studies conducted to try to assess the extent to which individuals exhibit implicit bias.[188] Those studies have found, among other associations, that being gay is often associated as bad (similarly so is being Muslim, elderly, disabled, or even obese).[189] Because of these implicit biases minority groups, including racial, religious and sexual minorities, are often harmed.[190]

This Article does not portend to be an empirical study on implicit bias. It is, however, a case study involving a decision that seems blatantly contrary to the governing statute and the Constitution. It also involves needless commentary from the decision-makers, from the IRS officials to the Eleventh Circuit Judges that shows, at a minimum, a lack of understanding and compassion toward my case, and, at a maximum, a virulent contempt for a same-sex couple attempting to secure the same statutory and constitutional rights that their opposite-sex counterparts enjoy.

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[183] *Id.*

[184] *Id.*

[185] Alfred Ray English, *Understanding Implicit Bias*, ARIZ. ATT'Y, Mar. 2019, at 10.

[186] *Id.*

[187] *See generally* Justin D. Levinson et al., *Judging Implicit Bias: A National Empirical Study of Judicial Stereotypes*, 69 FLA. L. REV. 63 (2017) (presenting empirical findings of implicit bias in the federal and state judiciary).

[188] *Id.* at 73 (using Implicit Association Tests (IAT), social scientists measure the extent to which implicit biases exist).

[189] *Id.* at 80.

[190] *Id.* at 68.

Teleological instrumentalism in judicial decision-making is based on bias, whether express and acknowledged or implicit. Regardless, it amounts to judicial activism. It is the imposition of policy preferences by members of the judiciary and is a usurpation of the legislative function. Accordingly, it is taboo and therefore, of course, it would never be acknowledged in any opinion of any court. It appears, nonetheless, to be very present and represents a very dangerous trend in judicial decision-making. It is a form of judicial decision-making that should be acknowledged and limited.

What is worse, is how widespread the phenomenon is. In my case, I was strongly advised not to pursue an appeal to the United States Supreme Court. The advice was plain—the current Supreme Court would not only likely rule against me, but that it might take my case as an opportunity to set back gay rights more generally. That advice came from my law firm and from advocates working at the highest level of civil rights appellate advocacy. And so, we stopped. Our lawsuit came to an end, and we lost.

VIII. CONCLUSION

This Article is a reflection on my own personal journey to vindicate the rights of men in same-sex relationships to form families and have government support in the process, just as our opposite-sex counterparts do. Those rights would and should extend to any person not in a traditional marriage. Our case represents just one example of a court that appears to have manipulated the governing statute and the Constitution in this case instrumentally to achieve the goal that they believed appropriate, a decision-making framework I refer to here as teleological instrumentalism.

But what may be most disturbing about the end to our lawsuit is the fact that advocates and citizens can no longer trust the federal courts, including the highest court in the land, to act in a neutral way. Instead, the widespread understanding that the courts are biased is well entrenched and has a very real and negative impact on justice calling into question the very rule of law itself.