

**SUPREME JUDICIAL COURT  
SITTING AS THE LAW COURT**

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**LAW DOCKET NO. FED-16-14**

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**KAYLA DOHERTY,  
PLAINTIFF-APPELLANT**

**v.**

**MERCK & CO., INC.,  
and  
UNITED STATES OF AMERICA,  
DEFENDANTS-APPELLEES,**

**and**

**THE ATTORNEY GENERAL FOR THE STATE OF MAINE,  
INTERVENOR DEFENDANT-APPELLEE**

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**ON CERTIFICATION FROM THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MAINE**

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**BRIEF OF DEFENDANT-APPELLEE  
THE UNITED STATES OF AMERICA**

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## I. STATEMENT OF FACTS

Maine’s Wrongful Birth Statute provides that “[i]t is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury” unless “based on a failed sterilization procedure.” 24 M.R.S.A. § 2931(1)-(2). The certified questions before this Court concern this “failed sterilization” exception to the bar against healthy child claims. Appellant contends that the Wrongful Birth Statute’s “failed sterilization” exception is not limited to procedures sought for the purpose of permanently rendering an individual incapable of procreating for the rest of his or her life. She argues that methods of contraception intended to be impermanent and reversible (like her own) also qualify. Because Appellant has taken pains to inappropriately characterize the procedure at issue here as being “sterilization,” and included other surplusage previously removed by the federal court, the United States briefly provides its own statement of the facts and issues. *See* M.R. App. P. 9(b); *see generally* App. at 14.

### A. **The Federal Court Certifies Questions Determinative Of The Action Which Would End The Lawsuit Now**

The United States, as discussed in greater detail below (*infra* Part I.C), stands in the shoes of the medical provider here for purposes of the questions currently on certification before this Court. App. at 17. In the underlying federal court action, Appellant alleged professional negligence and lack of informed consent against the United States arising from the medical provider’s ineffective

insertion of a long-acting, reversible contraceptive device called either Implanon or Nexplanon. *Id.* at 16 n.6, 17-18. As a result of this alleged medical malpractice, Appellant gave birth to a healthy baby boy. *Id.* at 17. She sought damages on the theory that the birth of her normal, healthy child constituted a compensable injury recognized under the Maine Health Security Act’s comprehensive medical malpractice scheme. *Id.* at 17-18.

The United States moved to dismiss on the basis that the Wrongful Birth Statute expressly excludes Appellant’s healthy child claim. Thus, the United States argued, even taking Appellant’s factual allegations as true, Section 2931(2) of the Wrongful Birth Statute barred all of her claims because the birth of a healthy child is not a legally cognizable injury under Maine law and her use of Implanon or Nexplanon did not fall within the statutory exception providing limited relief for a “failed sterilization procedure.” App. at 18.

Appellant mischaracterizes the United States’ motion to dismiss as based on “a handful of reasons mostly rooted in the [] ‘public policy’ underlying the [Wrongful Birth Statute].” Appellant’s Br. at 2. To the contrary, as the federal court noted, the United States primarily challenged Appellant’s “ability to characterize her procedure as ‘sterilization’—the term used in the Wrongful Birth Statute.” App. at 14. For purposes of the certified questions, the federal court therefore accepted Appellant’s allegations as true in considering the United States’

argument that Maine law allows no recovery here even if her allegations are proven. *Id.* It denied the United States’ motion to dismiss “pending answers to questions of Maine law regarding the Maine Wrongful Birth Statute by the Law Court,” *id.* at 18, and further “removed any characterization of the plaintiff’s procedure (leaving in place its factual description) and also some surplusage not material to the certified questions,” *id.* at App. at 14.

**B. Appellant Does Not Allege In The Underlying Lawsuit That She Sought A Procedure For Her Permanent Sterilization**

Appellant visited the Lovejoy Health Center (“Lovejoy”) in Albion, Maine, “to inquire about her birth control options” in January 2012. App. at 14, 26.

Appellant does not allege that her visit to Lovejoy was to obtain treatment for the purpose of her permanent sterilization. It was instead “to avoid having a baby until she had economic stability.” *Id.* at 15, 27. “[B]efore she started a family,” Appellant had “hoped to attend nursing school and establish herself in the [nursing] profession.” *Id.* at 27; *see also id.* at 17.

Appellant was seen by an employee of Lovejoy’s parent company, federally-funded HealthReach Community Health Centers, Dr. Amanda Ruxton. *Id.* at 15, 26. Implanon or Nexplanon was recommended to Appellant by Dr. Ruxton. *See id.* at 15 (“Dr. Ruxton recommended the use of an implantable drug”), 26 (alleging “Dr. Ruxton recommended implantable contraception”).

Appellant’s statement of facts indicates that Dr. Ruxton’s subsequent attempt to insert Implanon or Nexplanon into her arm in February 2012 was a “sterilization procedure.” Appellant’s Br. at 5.<sup>1</sup> Yet in her own pleading, Implanon and Nexplanon are identified as “long term contraceptive prescription drug[s].” App. at 19. Appellant’s allegations involve an “implantable birth control drug.” *Id.* Appellant “*sought contraception, not sterilization*, from her physician.” *Id.* at 37 (emphasis added). She nonetheless seeks damages as a result of the birth of her healthy child on the theory that her failed contraception was really a “failed sterilization.”

**C. The United States Is Treated As A Healthcare Provider For Purposes Of This Action**

The United States, by operation of the Federal Tort Claims Act, 28 U.S.C. § 2671, *et seq.*, appears before this Court as if it were a private healthcare practitioner subject to a medical malpractice action at Maine law. The health center which employed Dr. Ruxton, Lovejoy, was a covered entity pursuant to the Federally Supported Health Centers Assistance Act, which extends the Federal Tort Claims Act’s liability protections against medical malpractice lawsuits to Lovejoy employees acting within the scope of their employment. App. at 14-15.

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<sup>1</sup> Appellant cites to pages 16 and 26 of the Appendix, which contain the federal court’s statement of facts and her own allegations, respectively. Neither references Appellant undergoing a “sterilization procedure.” *Id.* Additional surplusage regarding “public policy the world over . . . treat[ing] [Implanon or Nexplanon] as tantamount to sterilization methods such as tubal ligation” are also included in Appellant’s statement of facts. *See* Appellant’s Br. at 3-4. These are the same characterizations which the federal court removed because they were “not material to the certified questions.” App. at 14.

Dr. Ruxton was acting within the scope of her employment at the time she treated Appellant. *Id.* at 15.

The Federal Tort Claims Act therefore uniquely “stress[es] the Government’s equivalence to a private party” by “treat[ing] the United States more like a commoner than like the Crown.” *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1637-38 (2015). Dr. Ruxton is covered by the Federal Tort Claims Act “under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.” 28 U.S.C. § 1346(b)(1); *see also* 28 U.S.C. § 2674 (“The United States shall be liable . . . in the same manner and to the same extent as a private individual under like circumstances.”). The United States accordingly moved to dismiss Appellant’s federal court causes of action based on her unwanted pregnancy, birth, and child-rearing allegations, because they are not cognizable under the Wrongful Birth Statute.

For the reasons detailed below, the United States submits that this Court should answer the certified question of whether the “Wrongful Birth statute prohibit[s] all recovery for [Appellant] against [the United States] because of the nature of the procedure she underwent” involving Implanon or Nexplanon in the positive, App. at 12, and otherwise uphold the statute’s constitutionality.

## II. STATEMENT OF ISSUES

Maine tort claimants are barred from “maintain[ing] a claim for relief or receiv[ing] an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages,” 24 M.R.S.A. § 2931(2), with just one exception:

A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.

*Id.*

As such, the only issue presented for review pertinent to the United States<sup>2</sup> is the federal court’s third certified question: whether the “Wrongful Birth statute prohibit[s] all recovery for [Appellant] against [the United States] because of the nature of the procedure she underwent” involving Implanon or Nexplanon. App. at 12. This presents “a definitional question regarding the scope of the statutory language in section 2931(2) allowing limited damages for a ‘failed sterilization procedure’—specifically, whether it covers the method of birth control at issue in this case.” *Id.* at 11.

If the answer to the above question is yes, and Appellant is allowed to proceed with her claims under the “failed sterilization exception,” an additional

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<sup>2</sup> The United States takes no position with respect to certified questions one and two concerning whether the Wrongful Birth Statute or *Macomber v. Dillman* applies to product manufacturers.

question arises concerning whether the Wrongful Birth Statute “limit[s] the recoverable damages to her expenses incurred for the procedure and pregnancy, pain and suffering connected with the pregnancy, and loss of earnings during pregnancy.” *Id.* at 12.

Appellant contends that these pure questions of statutory interpretation also implicate additional federal and state constitutional concerns. *See generally* Appellant’s Br. at 29-49. The United States disagrees.

### **III. SUMMARY OF ARGUMENT**

Appellant’s action against the United States arising from the birth of her healthy child is proscribed by Section 2931(2) of the Wrongful Birth Statute because it is not “based on a failed sterilization procedure.” The term “sterilization” is clear and unambiguous. Interpreted according to its plain meaning in the context of the Maine Health Security Act, and giving effect to the Legislature’s intent in enacting that statute, the “sterilization” referenced in Section 2931(2) only encompasses procedures administered to be permanent. Appellant’s reading of “sterilization” to include her own “reversible method[] of long-term contraception” does no more than pay lip service to the applicable rules of statutory construction. Appellant’s Br. at 25. Besides being improper, Appellant’s attempts to manufacture ambiguity when none exists are also self-defeating. Looking beyond the statutory language to the legislative history here proves the

United States’ point—Section 2931(2) codified this Court’s pre-Wrongful Birth Statute decision of *Macomber v. Dillman*, which solely concerned a failed sterilization for the purpose of *permanent* sterilization. Appellant therefore has no claim against the United States.

The fact that Maine law does not recognize Appellant’s healthy child wrongful birth claim is unassailable under both the state and federal Constitutions. Appellant’s inability to obtain relief under the Wrongful Birth Statute has nothing to do with her rights “to make her own decisions with regard to reproduction, contraception, and abortion.” Appellant’s Br. at 34. Paradoxically, Appellant freely exercised those very same rights by going to a federally-funded health center and deciding to get contraception. Neither the federal nor the Maine Constitution provides Appellant the right to sue her doctor for negligence because her contraception fails. Her arguments relying on the Supreme Court’s equal protection and substantive “reproductive rights jurisprudence” are therefore inapplicable and misplaced. Even more so are her open courts and jury trial constitutional arguments.

This Court will not “erase fifty years of United States Supreme Court precedent” by finding that Appellant is barred from recovering in tort against the United States. Appellant’s Br. at 12. It will be recognizing the continued meaning and effect of a well-settled Maine statute in force for the past 30 years.

#### IV. ARGUMENT

This Court has interpreted the Maine Health Security Act on many occasions,<sup>3</sup> including in the present context of the Wrongful Birth Statute.<sup>4</sup> Doing so now, as before, requires an examination of the plain meaning of the Wrongful Birth Statute within the context of the Maine Health Security Act as a whole to give effect to the Legislature’s intent. Approached accordingly, there is no ambiguity: “It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury” unless “based on a failed sterilization procedure.” 24 M.R.S.A. § 2931(1)-(2). “Sterilization,” as referenced in Section 2931(2), means a procedure administered to be permanent, not other various methods of long-term contraception meant to be reversible. Resort to legislative history bolsters this plain, common usage reading. Appellant is therefore barred from recovering against the United States because the nature of the procedure she underwent falls far outside of Section 2931(2)’s “failed sterilization” exception. Her inability to recover raises no constitutional concerns.

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<sup>3</sup> See, e.g., *Frame v. Millinocket Reg’l Hosp.*, 2013 ME 104, ¶ 5, 82 A.3d 137, 140; *D.S. v. Spurwink Servs., Inc.*, 2013 ME 31, ¶¶ 16-17, 65 A.3d 1196, 1200; *Baker v. Farrand*, 2011 ME 91, ¶ 21, 29 A.3d 806, 813-14; *Dickey v. Vermette*, 2008 ME 179, ¶ 5, 960 A.2d 1178, 1180; *Smith v. Hawthorne*, 2007 ME 72, ¶¶ 10-12, 924 A.2d 1051, 1053-54; *Butler v. Killoran*, 1998 ME 147, ¶¶ 6-8, 714 A.2d 129, 131-32; *Brand v. Seider*, 1997 ME 176, ¶¶ 3-4, 697 A.2d 846, 847; *Sullivan v. Johnson*, 628 A.2d 653, 655-65 (Me. 1993); *Givertz v. Me. Med. Ctr.*, 459 A.2d 548, 553-54 (Me. 1983).

<sup>4</sup> See *Thibeault v. Larson*, 666 A.2d 112, 114-15 (Me. 1995); *Musk v. Nelson*, 647 A.2d 1198, 1200-01 (Me. 1994).

**A. The “Failed Sterilization” Exception Under Section 2931(2) Does Not Permit Appellant’s Failed Contraception Lawsuit**

Elsewhere in her Brief, Appellant stresses the plain, unambiguous meaning and purpose of the Maine Health Security Act to argue that the Wrongful Birth Statute is inapplicable to product manufacturers. *See* Appellant’s Br. at 12-22. Yet she jettisons these rules of statutory construction once it comes time to address what “sterilization” means. Instead, Appellant strives to create ambiguity by resort to a series of *faux*-Brandeis Brief arguments that “sterilization” is “any long-lasting effort to render a woman infertile.” Appellant’s Br. at 29. Appellant’s cited socioeconomic commentary, Wikipedia references, and Google searches, however, do not alter the Wrongful Birth Statute’s text. The plain meaning and common usage of “sterilization,” overall structure and context underlying it, and application of multiple rules of statutory construction all show that the “failed sterilization” exception applies only to procedures administered to *permanently* sterilize an individual. Even if “sterilization” was reasonably susceptible to different interpretations—and it is not—resort to other indicia of legislative intent would reinforce this beyond dispute. Applicable legislative history makes clear that Section 2931(2) codified this Court’s *Macomber v. Dillman* decision. That decision solely concerned a failed procedure performed for the purpose of a patient’s “permanent sterilization.”

**1. Appellant’s expansive interpretation of “sterilization” contravenes the intent of the Legislature**

Interpreting the Wrongful Birth Statute requires, in the first instance, an examination of “the plain meaning of the statute within the context of the whole statutory scheme to give effect to the Legislature’s intent.” *D.S. v. Spurrwink Servs., Inc.*, 2013 ME 31, ¶¶ 16-17, 65 A.3d 1196, 1200 (quoting *Baker v. Farrand*, 2011 ME 91, ¶ 21, 29 A.3d 806, 813-14); *see also Pierce v. City of Bangor*, 105 Me. 413, 74 A. 1039, 1040 (Me. 1909) (“The object of construing a statute is to ascertain the intent of the Legislature. . . . by an examination of the phraseology of the statute itself, and by ascertaining the circumstances and conditions surrounding, and the subject-matter, object, and purpose of the enactment of the statute.”). Ascertaining and effectuating the intent of the Legislature here shows that “sterilization” cannot be read to encompass failed procedures meant to be reversible and indefinite, rather than permanent.

The Wrongful Birth Statute “repudiate[d] certain types of actions, and limit[ed] available damages for other, related actions.” *Musk v. Nelson*, 647 A.2d 1198, 1200 (Me. 1994). Professional negligence claims concerning the birth of a child were accordingly “divided . . . into two categories: the birth of a healthy child and the birth of an unhealthy child.” *Thibeault v. Larson*, 666 A.2d 112, 115 (Me. 1995). Generally “the birth of a healthy child,” as expressed in subsections (1) and (2), “is not a legally cognizable injury.” *Id.* Only where a “healthy child is born as

a result of a failed sterilization” may “an action . . . be maintained for limited damages” in connection with the pregnancy as well as the initial costs of the sterilization. *Id.*; *see also* 24 M.R.S.A. § 2931(2) (“A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy”).

The Wrongful Birth Statute was enacted against the larger backdrop of the Maine Health Security Act, which the Legislature intended to occupy the entire field of professional medical negligence claims.<sup>5</sup> *See, e.g., D.S. v. Spurwink Servs., Inc.*, 2013 ME 31, ¶ 19, 65 A.3d 1196, 1200. Out of “concern for the effect of malpractice liability on health care professionals” the Legislature “acted to limit that liability.” *Flanders v. Cooper*, 1998 ME 28, ¶ 12, 706 A.2d 589, 592; *see also Choroszy v. Tso*, 647 A.2d 803, 807 (Me. 1994) (the Maine Health Security Act was passed “in response to a growing concern for the costs of health care and

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<sup>5</sup> Appellant volunteers that the Wrongful Birth Statute is “an integral part of the [Maine Health Security Act]” which was included “as part of a significant effort at tort reform aimed at limiting medical malpractice claims[.]” Appellant’s Br. at 1. The Maine Health Security Act was therefore meant to occupy the field of professional negligence claims against healthcare providers, with the Wrongful Birth Statute included as part of its package. *Id.* at 13 (citing *Musk v. Nelson*, 647 A.2d 1198, 1201 (Me. 1994)). The Legislature’s goal was to “stem the tide of rising malpractice costs.” *Id.* at 17 (quoting *Saunders v. Tisher*, 2006 ME 94, ¶ 15, 902 A.2d 830, 834).

medical malpractice insurance.”). In doing so it was “particularly sensitive” to the Maine Health Security Act’s “wrongful birth section.” 2 Legis. Rec. 1470 (1986).

The end product of this legislative process was a law expressly excluding all claims for relief based on the birth of a healthy child outside of the narrow context of “a failed sterilization procedure.” Reading the Wrongful Birth Statute to more broadly permit damages arising from an “implantable contraceptive” drug meant to be merely long-acting and reversible is neither supported by the language of the statute nor the Legislature’s intent to limit rather than expand the potential liability of medical providers. Indeed, the Legislature unambiguously broadcast this purpose from the Wrongful Birth Statute’s opening lines:<sup>6</sup>

**Intent.** It is the intent of the Legislature that the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child.

24 M.R.S.A. § 2931(1). Construed in the context of this overall statutory scheme, the plain language and common usage of “sterilization” can only mean one thing: a procedure meant to permanently render an individual incapable of procreating.

**2. Section 2931(2) plainly and unambiguously permits healthy child claims only where the failed procedure was performed for the purpose of the patient’s permanent sterilization**

In order to effectuate the Legislature’s intent the Wrongful Birth Statute must be construed by reference to its plain language, considering such language “in

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<sup>6</sup> See, e.g., *Cote v. Georgia-Pacific Corp.*, 596 A.2d 1004, 1005 (Me. 1991), where statute unambiguously set forth on its face the Legislature’s intention.

the context of the whole statutory scheme to avoid absurd, illogical, or inconsistent results.” *Kennebec Cnty. v. Me. Pub. Emp. Ret. Sys.*, 2014 ME 26, ¶ 20, 86 A.3d 1204, 1210 (citations and quotations omitted); *see also Harrington v. State*, 2014 ME 88, ¶ 5, 96 A.3d 696, 697 (same). Applying this approach proves the term “sterilization” to be clear and unambiguous, and readily applied here in accordance with its plain meaning. *See, e.g., Carrier v. Sec’y of State*, 2012 ME 142, ¶ 12, 60 A.3d 1241, 1245; *Garrison City Broad., Inc. v. York Obstetrics & Gynecology, P.A.*, 2009 ME 124, ¶ 9, 985 A.2d 465, 468; *Gaeth v. Deacon*, 2009 ME 9, ¶ 15, 964 A.2d 621, 625.

Neither the Wrongful Birth Statute nor the Maine Health Security Act more generally defines “sterilization.” The term must therefore be afforded its “plain, common, and ordinary meaning, such as people of common intelligence would usually ascribe.” *Dickau v. Vt. Mut. Ins. Co.*, 2014 ME 158, ¶ 22, 107 A.3d 621, 628 (citations and quotations omitted); *see generally* 1 M.R.S.A. § 72(3) (words must be construed “according to the common meaning of [their] language,” with any “[t]echnical words and phrases and such as have a peculiar meaning convey[ing] such technical or peculiar meaning.”); *State v. Reckards*, 2015 ME 31, ¶ 7, 113 A.3d 589, 593 (noting that statutory term “ha[d] a common usage that can be looked up in a dictionary” in upholding criminal law against constitutional vagueness challenge); *Kotch v. Am. Protective Servs., Inc.*, 2002 ME 19, ¶ 10, 788

A.2d 582, 585 (analyzing plain meaning of statute “[a]s a matter of common usage” by reference to dictionary definition).

The common usage of “sterilization” casts the word in terms of its permanency. For example, despite arguing that Black’s Law Dictionary is of no assistance, the definition provided by Appellant herself refers to sterilization as “the act of making (a person or other living thing) *permanently* unable to reproduce.” See Appellant’s Br. at 25 (citing BLACK’S LAW DICTIONARY 10th ed. 2014) (emphasis added); compare STEDMAN’S MEDICAL DICTIONARY 1338 (24th ed. 1982) (definition of sterilization as “[t]he act or process by which an individual is rendered incapable of fertilization or reproduction”), with STEDMAN’S MEDICAL DICTIONARY 1338 (28th ed. 2013) (defining sterilization as “[t]he act or process by which an individual is rendered incapable of fertilization or reproduction”). “Sterilization” is a procedure by which one seeks to render him or herself permanently incapable of reproducing.

No person of common intelligence who simply wanted to defer having a child and pursue a career before starting a family would tell his or her doctor, “Sterilize me.” The converse is just as true. No person of common intelligence looking to be rendered permanently unable to procreate for the remainder of his or her life would ask for a mere contraceptive. These differences alone, both as a matter of common usage and common sense, should be enough to end the inquiry.

The distinction between a failed sterilization (which Appellant did not seek) and a failed contraception (which she did seek) hinges on the whether the procedure was sought for permanent purposes. The former qualifies under Section 2931(2). The latter does not.

Moreover, the Legislature's passage of language defining sterilization in terms of permanence elsewhere in the Maine Revised Statutes further defeats Appellant's position. With the "Due Process in Sterilization Act of 1982," for example, the Legislature stated its intent "that sterilization procedures are generally irreversible and represent potentially permanent and highly significant consequences for the patient involved." 34-B M.R.S.A. § 7002. "Sterilization" was accordingly defined as "a medical or surgical procedure, *the purpose of which is to render an individual permanently incapable of procreation.*" *Id.* § 7003(9) (1982) (emphasis added). Just as significantly, the law distinguishes between "sterilization" and "contraception." Petitions for a determination that sterilization is in the best interest of a person must detail "[l]ess drastic alternative contraceptive methods which have been tried or the reason those methods are believed to be unworkable or inappropriate for the person being considered for sterilization." 34-B M.R.S.A. § 7011(6). Courts may only find sterilization in a person's best interest where "[m]ethods of contraception less drastic than

sterilization have proven to be unworkable or inappropriate for the person.” *Id.* § 7013(5)(A).

The Legislature therefore did not intend “the well-established meaning of [this] well-known term” to mean one thing in the context of the Due Process in Sterilization Act of 1982 and another in the context of the amendments it passed to the Maine Health Security Act just four years later. *See Dubois v. Madison Paper Co.*, 2002 ME 1, ¶ 13, 795 A.2d 696, 699; *see generally Musk v. Nelson*, 647 A.2d 1198, 1202 (Me. 1994) (“The Legislature is presumed to be aware of the state of the law . . . when it passes an act.”). Here the “whole body of contemporaneous legislation upon [the] particular topic” of sterilization should be considered, as “one act may throw light upon the other in the interpretation of the other act in search of legislative intent.” *Givertz v. Me. Med. Ctr.*, 459 A.2d 548, 553-54 (Me. 1983); *see also Smith v. Chase*, 71 Me. 164, 165, 1880 WL 4115 (Me. 1880) (“[A]ll the statutes on one subject are to be viewed as one” in order to “form a consistent and harmonious whole, instead of an incongruous, arbitrary and exceptional conglomeration.”). The term “sterilization,” as used in the Due Process in Sterilization Act and the Wrongful Birth Statute, cannot be read in conflict “when an alternative, reasonable interpretation yields harmony” by reading both statutes as requiring a permanent purpose. *See Pinkham v. Morrill*, 622 A.2d 90, 95 (Me. 1993).

Finally, the express and sole mention in Section 2931(2) of the narrowly excepted situation of “failed sterilization” impliedly excludes the availability of damages outside of that context, such as for a failed contraception. *See Musk v. Nelson*, 647 A.2d 1198, 1201-02 (Me. 1994) (“a well-settled rule of statutory interpretation states that express mention of one concept implies the exclusion of others not listed”); *see also Radvanovsky v. Maine Dep’t of Manpower Affairs Emp’t Sec. Comm’n*, 427 A.2d 961, 967 (Me. 1981) (“The time-honored precept of ‘*expressio unius est exclusio alterius*’ should find ready application in the construction of legislation, where the Legislature has manifested a deliberate attempt to be specific to the minute detail.”). The Legislature could easily have extended the language of Section 2931(2) to expressly include Plaintiff’s alleged “failed contraception” scenario, in addition to “failed sterilization.” That it did not do so—shortly after codifying the definition of “sterilization” in the Due Process in Sterilization Act, which further distinguished between contraception and sterilization—demonstrates that the Wrongful Birth Statute cannot and should not be read to allow the relief for the birth of a normal, healthy child outside of the context of a failed sterilization meant to be permanent. The Wrongful Birth Statute “provides a single exception and implicitly denies the availability of any other.” *Musk*, 647 A.2d at 1202.

**3. Appellant’s interpretation of Section 2931(2) lends itself to absurd results**

Interpreting Section 2931(2) to permit actions based on failed “reversible methods of long-term contraception” the same as “failed sterilizations” sought for permanent purposes invites “results that are absurd, inconsistent, unreasonable, or illogical.” *Harrington v. State*, 2014 ME 88, ¶ 5, 96 A.3d 696, 697 (quoting *State v. Fournier*, 617 A.2d 998, 999 (Me. 1992)). The Wrongful Birth Statute allows litigants who conceive following a failed permanent sterilization procedure—and only after such a failed procedure—to recover damages in connection with pregnancy, since pregnancy was the very event which was sought to be irrevocably avoided. The same cannot be said for non-permanent procedures involving contraception, which provide only preventative, indefinite, and reversible protection.

However, Appellant’s position would require a reading of the Wrongful Birth Statute that ignores these differences by placing procedures meant to be temporary on equal footing with those meant to last forever. It would be a mistake to do so. The Legislature could not have intended the absurd result of the Wrongful Birth Statute allowing the failed contraception claim of Appellant (who envisioned “starting a family”) to the same extent as someone seeking lifelong protection against reproducing (in order to definitively avoid starting or expanding

a family). *See also infra* Part IV.A.4 (detailing Legislature’s codification of this Court’s *Macomber v. Dillman* decision).

Appellant’s circular argument that Section 2931(2) sterilization need not have been sought for permanent purposes “because permanent sterilization does not always exist regardless of the method used” reinforces the absurdity of such a reading. *See* Appellant’s Br. at 25; *see generally id.* at 24-29. That any given sterilization procedure sought to be permanent<sup>7</sup> might have a variable success rate—and, indeed, might later be reversed—is exactly the point behind Section 2931(2). The sterilization procedure administered to be permanent “fails” when the subsequent birth of a healthy child reveals it was impermanent. The statute does not require that the procedure *actually* result in an individual’s permanent inability to procreate. If that were the case, the statutory language would impermissibly be rendered superfluous because all “sterilization procedures” would be fail-proof. *See, e.g., Labbe v. Nissen Corp.*, 404 A.2d 564, 567 (Me.

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<sup>7</sup> It is facially apparent that the “failed sterilization procedure” referenced in Section 2931(2) is not limited to the context of a tubal ligation, such as was at issue in *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986) and *Musk v. Nelson*, 647 A.2d 1198 (Me. 1994). Appellant nonetheless predicts that the United States “would have this Court believe that [] tubal ligation . . . is the only kind of ‘sterilization procedure’ a woman can have if she wants to avail herself of a remedy under § 2931(2).” Appellant’s Br. at 24; *see also id.* at 42 (arguing—incorrectly—that the United States “urged the federal court to . . . foreclose damages for all women . . . except for a narrow subset of women who seek tubal ligation as a form of contraception.”). The United States takes no such position. Myriad sterilization procedures sought for permanent purposes would qualify under Section 2931(2). *See, e.g., Box v. Walker*, 453 A.2d 1181, 1182 (Me. 1983) (suggesting—as Appellant points out, *see* Appellant’s Br. at 24—“alternative methods for achieving sterilization”). A failed insertion of the non-permanent, reversible contraceptive Implanon or Nexplanon, however, is not one of them.

1979) (“Nothing in a statute may be treated as surplusage if a reasonable construction supplying meaning and force is otherwise possible.”) (citing cases).

In sum, to answer Appellant’s question, “[i]n ten years, will [long-lasting] contraception be considered a ‘sterilization procedure’” pursuant to the Wrongful Birth Statute, the answer is the same now as it will be in the future: “No.”

Appellant’s Br. at 28. A “sterilization procedure” means a procedure sought for the purpose of rendering oneself permanently incapable of producing children.

That is not what Appellant is alleged to have sought.

**4. To the extent Section 2931(2) may be read as ambiguous, its legislative history proves that the procedure must have been performed for the purpose of the patient’s permanent sterilization**

Since the plain meaning of “sterilization” here is only reasonably susceptible to one interpretation there is no need to consult the Wrongful Birth Statute’s legislative history. *See, e.g., Harrington v. State*, 2014 ME 88, ¶ 5, 96 A.3d 696, 697; *Gaeth v. Deacon*, 2009 ME 9, ¶ 15, 964 A.2d 621, 625 (ambiguity only exists where “a statute can reasonably be interpreted in more than one way and comport with the actual language of the statute”). Appellant contends that the “plain text of the [Wrongful Birth Statute] ‘is not so plain,’” however, and that the term “is ambiguous because it is undeniably susceptible of more than one reasonable

interpretation.” Appellant’s Br. at 24.<sup>8</sup> This position, in addition to being incorrect, is self-defeating.

By its enactment of the Wrongful Birth Statute, and specifically Section 2931(2), the Legislature “basically codified” this Court’s pre-Wrongful Birth Statute decision of *Macomber v. Dillman*, 505 A.2d 810 (Me. 1986). *See* 2 Legis. Rec. 1466 (1986). A side-by-side reading of the case and the statute reinforces this. *Compare Macomber*, 505 A.2d at 813 (holding that “a parent cannot be said to have been damaged or injured by the birth and rearing of a healthy, normal child,” and limiting “the recovery of damages, where applicable, to the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during that time”), *with* 24 M.R.S.A. § 2931(1)-(2) (“the birth of a normal, healthy child does not constitute a legally recognizable injury and that it is contrary to public policy to award damages for the birth or rearing of a healthy child” . . . . “A person may maintain a claim for relief based on a failed sterilization procedure resulting in the birth of a healthy child and receive an award of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of

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<sup>8</sup> Appellant cites only one case in a footnote, *Fuhrmann v. Staples Office Superstore E., Inc.*, 2012 ME 135, ¶ 26, 58 A.3d 1083, 1094, in support of the term “sterilization” being subject to more than one interpretation and ambiguous. Appellant’s Br. at 29 n.48. That case, however, dealt with differences between the definitions of “employer” in two separate statutes, the Maine Whistleblowers Protection Act and Maine Human Rights Act, rather than a single, commonly understood, word. *Id.* at ¶¶ 24-25, 1094.

earnings by the mother during pregnancy”). The “failed sterilization” at issue in *Macomber* was a tubal ligation “for the purpose of [the plaintiff’s] *permanent* sterilization.” 505 A.2d at 812 (emphasis added).<sup>9</sup>

Appellant emphasizes this legislative history in her arguments that the Wrongful Birth Statute does not apply to Merck, *see* Appellant’s Br. at 17-18, but avoids it entirely when the meaning of “sterilization” is discussed, *id.* at 23-29. However, the import of the Legislature’s adoption of *Macomber* cannot be avoided. That Section 2931(2) “basically codified” the *Macomber* decision as it related to a failed procedure for the purpose of the plaintiff’s “permanent sterilization” erases any possible doubt as to the meaning of “sterilization” here.

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In sum, Plaintiff’s argument that “the only reasonable interpretation of the [Wrongful Birth Statute] is that the term ‘sterilization procedure’ in § 2931(2) applies to any long-lasting effort to render a woman infertile,” Appellant’s Br. at 29, ignores the plain meaning and common usage of “sterilization,” the overall structure and context underlying the Wrongful Birth Statute, and multiple canons of statutory construction, and is also belied by the very decision of this Court

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<sup>9</sup> The “failed sterilization” at issue later in *Musk v. Nelson* was also an intended permanent tubal ligation. 647 A.2d 1198, 1200 (Me. 1994). The permanency of the sterilization sought in *Musk* was reinforced by the fact that the plaintiff there actually underwent a second tubal ligation for sterilization after she gave birth. *See Musk* App. Br. at 4, Nov. 4, 1993.

which was ultimately codified as law by the Legislature and has been in effect for the past three decades. Appellant lacks a claim for relief against the United States.

**B. The Wrongful Birth Statute is Constitutional**

As the federal court observed in its Certificate of Questions, the Attorney General for the State of Maine has intervened to defend the constitutionality of the Wrongful Birth Statute before this Court. App. at 11. The United States additionally argues as follows.

**1. The Wrongful Birth Statute has nothing to do with Appellant’s substantive due process and equal protection rights**

The present case does not implicate Appellant’s substantive due process or equal protection rights under the Fourteenth Amendment of the United States Constitution or the Maine Constitution. *See* U.S. CONST. AMEND. XIV, § 1; ME. CONST. ART. I, §§ 1, 6-A; *State v. Demerritt*, 149 Me. 380, 103 A.2d 106, 109 (Me. 1953) (interpreting equivalent provisions of Maine Constitution as having the same meaning as the Fourteenth Amendment).<sup>10</sup> Appellant’s lengthy detour through the United States Supreme Court’s “reproductive rights jurisprudence” fails to find any substantive due process or equal protection analogue to her present case.

Appellant’s Br. at 34-41. That is because none exists.

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<sup>10</sup> This Court has “previously determined that the substantive due process rights of the United States and Maine Constitutions are coextensive,” *see Doe I v. Williams*, 2013 ME 24, ¶ 65, 61 A.3d 718, 737, and also that “[t]he equal protection clause of the Maine Constitution guarantees rights equivalent to those in the federal Equal Protection Clause,” *see Choroszy v. Tso*, 647 A.2d 803, 808 (Me. 1994).

a) **The Wrongful Birth Statute neither constitutes state action nor affects a fundamental substantive due process right of Appellant**

Appellant’s argument that the Wrongful Birth Statute “contravenes all of the U.S. Supreme Court precedent” on reproductive rights is disproven by the cases she cites. Appellant’s Br. at 35. It is obvious that one of these things is not like the other: Planned Parenthood personnel convicted for providing advice to married couples about preventing conception under a state law which criminalized the use of contraceptives;<sup>11</sup> a speaker convicted for lecturing on the use of contraceptives and providing a contraceptive to a woman under a state law which criminalized providing contraceptives to non-married people;<sup>12</sup> a woman wishing to terminate her pregnancy by an abortion seeking to overturn a state law criminalizing abortion;<sup>13</sup> a distributor of contraceptives challenging a state law criminalizing the sale of contraceptives to minors and other limitations;<sup>14</sup> a doctor and abortion clinics seeking to overturn a state law limiting access to abortions;<sup>15</sup> a woman legally availing herself of the ability to have her doctor administer a contraceptive device “before she started a family” in order to “to avoid having a baby until she had economic stability,” but after unexpectedly having a normal, healthy child, “ask[ing] to be compensated.” Appellant’s Br. at 11.

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<sup>11</sup> See Appellant’s Br. at 35, citing *Griswold v. Connecticut*, 381 U.S. 479, 480-85 (1965).

<sup>12</sup> See Appellant’s Br. at 35-37, citing *Eisenstadt v. Baird*, 405 U.S. 438, 440-43 (1972).

<sup>13</sup> See Appellant’s Br. at 37-38, citing *Roe v. Wade*, 410 U.S. 113, 120-21 (1973).

<sup>14</sup> See Appellant’s Br. at 39, citing *Carey v. Population Servs. Int’l*, 431 U.S. 678, 681-84 (1977).

<sup>15</sup> See Appellant’s Br. at 39, citing *Planned Parenthood v. Casey*, 505 U.S. 833, 844-46 (1992).

Except for the last example—Appellant’s present circumstances—these cases all concern states limiting and in most instances criminalizing contraception and abortion. Appellant, by contrast, was free “to make her own decisions with regard to reproduction, contraception, and abortion.” *Contra* Appellant’s Br. at 34. She did so, in fact, unimpeded by any “government interference [in her] personal decisions” by the Wrongful Birth Statute specifically or any action by the State of Maine more generally. *See Carey*, 431 U.S. at 685. Accordingly, she fails to meet even the “threshold inquiry [as to] whether a state action occurred in this matter.” *Northup v. Poling*, 2000 ME 199, ¶ 9, 761 A.2d 872, 875; *see also Doe v. Graham*, 2009 ME 88, ¶ 22 n.7, 977 A.2d 391, 399 n.7 (“[S]tate action [is] a prerequisite to maintaining a due process challenge.”). The Wrongful Birth Statute does not implicate Appellant’s right to privacy. It merely forecloses her ability to pursue a cause of action in tort.

It is because her real interest is in proceeding with this tort lawsuit that Appellant provides pages of citation to inapposite reproductive rights jurisprudence in lieu of the “careful description of the asserted fundamental interest” this Court requires. *Green v. Comm’r of Mental Health and Mental Retardation*, 2000 ME 92, ¶ 14, 750 A.2d 1265, 1270. Identifying Appellant’s actual asserted interest—“to be compensated . . . like every other tort victim in Maine,” *see* Appellant’s Br. at 11—is dispositive to her substantive due process arguments because “the right to

pursue a cause of action is not a fundamental right.” *Choroszy v. Tso*, 647 A.2d 803, 808 (Me. 1994) (in context of equal protection analysis); *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1177 (Me. 1990) (same). Ultimately, no fundamental interest has ever been at issue in this case.<sup>16</sup> Her substantive due process claim therefore fails.

**b) The Wrongful Birth Statute passes equal protection rational basis review and does not disparately impact women**

As described above, because no state action was involved here Appellant’s “contentions that the defendants’ actions deprived [her] of due process and equal protection under the federal and state Constitutions” fail as a threshold matter.

*Onat v. Penobscot Bay Med. Ctr.*, 574 A.2d 872, 876 (Me. 1990); *see also* *Chestnut v. State*, 524 A.2d 1216, 1220 (Me. 1987) (“The equal protection clause of the fourteenth amendment nullifies only State action which produces the irrational—the arbitrary—and, therefore, invidious discrimination.”) (citation and quotations omitted). “Absent a fundamental right or suspect class,” neither of which is implicated by the Wrongful Birth Statute, the “rational relationship test”

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<sup>16</sup> Appellant cites several state court cases from other jurisdictions in support of her substantive due process and equal protection arguments. *See* Appellant’s Br. at 39-40, 47 (*Lovelace Med. Ctr. v. Mendez*, 805 P.2d 603, 610 (N.M. 1991); *Burk v. Rivo*, 551 N.E.2d 1, 4 (Mass. 1990); *Fulton-DeKalb Hosp. Auth. v. Graves*, 314 S.E.2d 653, 654 (Ga. 1984)). Yet these cases do not address the constitutionality of state wrongful birth statutes because, contrary to this case, none of the states in question had a wrongful birth statute. The cases instead addressed the question of whether the states’ respective common law would recognize such tort claims, and are therefore irrelevant to this appeal. Significantly, these cases address sterilization procedures which—like those at issue under Maine’s Wrongful Birth Statute, were clearly intended to be permanent rather than merely long-term and reversible. *See Mendez*, 805 P.2d at 610 (citing the couple’s desire “to procreate no further” and their “undesired costs of raising another child to adulthood.”).

is applied to “simply inquire whether the statute is rationally related to a legitimate state interest.” *Choroszy v. Tso*, 647 A.2d 803, 808 (Me. 1994). Applying this test to the Wrongful Birth Statute demonstrates its constitutional soundness.

As this Court noted in *Choroszy* more than two decades ago when applying a rational basis review to the Maine Health Security Act’s statute of repose, “[t]he state’s objective—to control the cost of medical malpractice insurance and of health care in general—is a legitimate one, and a statute of limitations is a rational way to achieve that objective.” *Id.*; see also *Musk v. Nelson*, 647 A.2d 1198, 1202 (Me. 1994) (“Limiting the availability of the discovery rule bears a rational relationship to the Legislature’s goal to reduce malpractice insurance premiums and control the cost of health care.”).

The Legislature’s decision with respect to the Wrongful Birth Statute is rationally related to these same goals and therefore valid under an equal protection analysis. The Wrongful Birth Statute strikes a balance between allowing wrongful birth actions to proceed while reducing medical malpractice costs and liability. It allows claims to proceed as to unhealthy children and other causes of action (§§ 2931(3)-(4)), while limiting healthy child claims to only those based on failed sterilization procedures (§§ 2931(1)-(2)). Specific to healthy child claims, Section 2931 also furthers the Legislature’s intent to place reasonable limitations on the malpractice liability on health care professionals. See *Flanders v. Cooper*, 1998

ME 28, ¶ 12, 706 A.2d 589, 592. In those limited instances where a procedure meant to be permanent fails, the parents of the healthy child may pursue their claim. In the more common context of patients seeking non-permanent, reversible contraceptive protections, recovery for the birth of a healthy child is barred. Healthcare costs and provider liability are thus limited with respect to the larger, latter category while allowing the more circumscribed, former category of tort claimants to proceed. The Wrongful Birth Statute therefore easily passes the only review potentially applicable here, which is rational basis review.

Appellant suggests that the law is either not gender neutral, or alternatively, that it disparately impacts women as opposed to men. Neither position has merit. In *Musk*, this Court observed specifically that the Wrongful Birth Statute was “gender neutral on its face.” 647 A.2d at 1202. Moreover, Appellant’s contention that the Wrongful Birth Statute “has functionally no impact on men” and “does not impact men in the same way it impacts women” is incorrect. Appellant’s Br. at 42-43, 44. A man who seeks a non-permanent procedure to avoid procreating, but which fails and results in the birth of a healthy child, will be barred from “maintain[ing] a claim for relief or receiv[ing] an award for damages based on the claim that the birth and rearing of a healthy child resulted in damages to him,” just as Appellant is here. 24 M.R.S.A. § 2931(2).

No grounds therefore exist to invalidate the Wrongful Birth Statute on substantive due process or equal protection grounds.

**2. The open courts provision of ME. CONST. ART. I, § 19, provides no basis to invalidate the Wrongful Birth Statute**

The open courts provision of the Maine Constitution does not, as Appellant argues, guarantee her redress on the basis of her healthy child claim. Appellant's Br. at 29-33 (citing ME. CONST. ART. I, § 19). To the contrary, the open courts provision only provides for accessible courts where the alleged "wrong [is] recognized by law as remediable in a court." *See, e.g., Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶ 6, 997 A.2d 92, 94; *State v. Bilynsky*, 2008 ME 33, ¶ 6, 942 A.2d 1234, 1236; *Maine Med. Ctr. v. Cote*, 577 A.2d 1173, 1176 (Me. 1990). As this Court observed in *Musk v. Nelson*, the Wrongful Birth Statute "repudiates certain types of actions, and limits available damages for other, related actions." 647 A.2d 1198, 1200 (Me. 1994). Appellant's healthy child claim arising from her failed contraception is among the types of actions the Legislature specifically proscribed as irremediable. Her desire to recover in tort does not transform her ability to do so into a constitutional entitlement. *See Choroszy v. Tso*, 647 A.2d 803, 808 (Me. 1994) (the pursuit of a cause of action is not a fundamental right).

Appellant's characterization of this result as imposing a substantive, absolute bar changes nothing. *See* Appellant's Br. at 30-31. The Maine Health Security Act's timing provision, found in Section 2902, has such an effect on a

much broader population of prospective tort claimants, and was upheld by this Court against a similar open courts challenge more than 20 years ago in *Choroszy v. Tso*, 647 A.2d 803 (Me. 1994). There the plaintiffs, like Appellant here, “emphasize[d] the language of the Open Courts provision that guarantees to *every person* a remedy for an injury inflicted,” and “contended that by foreclosing their cause of action . . . the Legislature has violated this constitutional requirement.” *Id.* at 807 (emphasis original). This Court, while acknowledging the plaintiffs’ hardship, nonetheless held that the three-year statute of repose did not violate the open courts provision even though it removed from litigants a remedy for wrongs inflicted before they were even able to discover it. *Id.* The Wrongful Birth Statute, as with Section 2902’s statute of repose in *Choroszy*, therefore does not violate the open courts provision.<sup>17</sup>

Appellant’s open court’s argument thus fails because she lacks a cause of action cognizable at Maine law under 24 M.R.S.A. § 2931(1)-(2). To the extent Appellant challenges the public policy underlying the Wrongful Birth Statute, “that challenge is better addressed to the Legislature.” *Godbout*, ¶ 6, 95.

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<sup>17</sup> The statute of the repose found at Section 2902 of the Maine Health Security Act is substantive, not merely procedural. *See Choroszy*, at 807-08 (discussing Legislature’s decision to enact a statute of repose through Section 2902 by reference to case law equating repose statutes to a substantive bar).

**3. Appellant’s state and federal rights to a jury trial are not implicated by the Wrongful Birth Statute**

Appellant has no right to a jury trial under Article I, § 20, of the Maine Constitution and the Seventh Amendment of the United States Constitution because, as she seems to acknowledge, the Wrongful Birth Statute leaves her no cause of action in the first instance for a court to decide. *See* Appellant’s Br. at 34. In analyzing whether a right to a jury trial attaches the Court “determine[s], first, the nature of an action.” *Thermos Co. v. Spence*, 1999 ME 129, ¶ 10, 735 A.2d 484, 487. Here, Appellant’s cause of action does not exist. The inquiry thus ends before it begins.

Moreover, with respect to the United States, Plaintiff’s jury trial constitutional argument is academic. She acknowledges that the Federal Tort Claims Act “forecloses a plaintiff’s right to a jury trial” against the United States, “so one would not be available to [her].” Appellant’s Br. at 33 n.54. Appellant admits, as to her suit against the United States, that the Federal Tort Claims Act’s non-jury trial does not violate her constitutional rights. *Id.*

**C. If Appellant Is Allowed To Proceed Against The United States, Her Recoverable Damages Would Be Limited To Those Enumerated Under Section 2931(2)**

In the event this Court determines that Appellant is allowed to proceed with her claims against the United States under the “failed sterilization exception,” the federal court certified the ancillary question of whether the Wrongful Birth Statute

“limit[s] the recoverable damages to her expenses incurred for the procedure and pregnancy, pain and suffering connected with the pregnancy, and loss of earnings during pregnancy.” App. at 12. It does. Section 2931(2) expressly limits claims for relief based on a failed sterilization procedure resulting in the birth of a healthy child and to “award[s] of damages for the hospital and medical expenses incurred for the sterilization procedures and pregnancy, the pain and suffering connected with the pregnancy and the loss of earnings by the mother during pregnancy.” As stated by this Court in *Thibeault v. Larson*, 666 A.2d 112, 115 (Me. 1995), only where a “healthy child is born as a result of a failed sterilization” may “an action . . . be maintained for limited damages in connection with the pregnancy as well as the initial costs of the sterilization.”

## V. CONCLUSION

The Wrongful Birth Statute does not permit Appellant to recover damages in tort arising from her failed Implanon or Nexplanon contraceptive because such procedure is not alleged to have been administered for the purpose of her permanent sterilization. The birth of her normal, healthy child thus does not constitute a legally recognizable injury at Maine law. Appellant’s various constitutional challenges lack merit. Her “fundamental right to reproductive freedom [was not] abridged by the [Wrongful Birth Statute].” To the contrary,

such a right is not implicated. There is no constitutional basis to invalidate the long-standing tort law enacted by the Wrongful Birth Statute.

Dated at Portland, Maine this 27th day of April, 2016.

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## CERTIFICATE OF SERVICE

I, Andrew K. Lizotte, attorney of record for Defendant-Appellee the United States of America, hereby certify that I have on this 27th day of April, 2016, caused two copies of the foregoing Brief to be served upon the counsel of record in this action by U.S. Mail addressed as follows:

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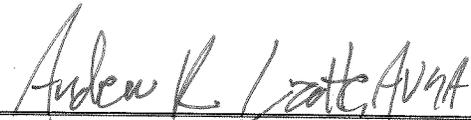
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