Bloomberg Law News 2026-03-02T09:54:59049948673-05:00

Second Circuit Scrutinizes Role in Deciding Veterans' IVF Row

By Beth Wang 2026-02-26T13:03:51000-05:00

Second Circuit judges on Thursday were wary of arguments that the court doesn't have authority to review a challenge to a federal policy imposing certain requirements on veterans who want to access IVF benefits.

While the Defense and Veterans Affairs departments say federal law requires challenges to the provision of veterans benefits to go through administrative review and that federal district courts lack jurisdiction in most cases to review those issues, the National Organization for Women's New York City chapter argues there's an exception for facial constitutional claims.

"When we talk about whether something strips us of our ability to review, we need to be careful. The presumption is there is judicial review," US Court of Appeals for the Second Circuit Judge Raymond J. Lohier Jr. said.

NOW-NYC claims the policy requiring active-duty service members and veterans to prove their infertility was caused by a service-related injury or illness in order to receive IVF benefits violates the right to procreate and discriminates against female service members. The US District Court for the Southern District of New York in October dismissed all of the organization's claims against the VA, saying it didn't have jurisdiction over those claims, and it partially dismissed claims against the Defense Department.

Federal law bars judicial review of benefits-related claims against the VA and directs all of them to the Board of Veterans Appeals, Assistant US Attorney Tomoko Onozawa said.

"Why wouldn't we say say this facial challenge is different and needs not be channeled?" Chief Judge Debra Ann Livingston asked.

Lohier also wondered whether Congress is authorized to strip plaintiffs of the ability to mount a challenge in court.

Congress can do that, but they didn't intend to with this particular law, said Indu Pandey, a Yale Law

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School student intern who argued under the supervision of Michael Wishnie of Yale's Jerome N. Frank Legal Services Organization and Priscilla Smith of the school's Reproductive Rights and Justice Project.

Onozawa pointed to a provision of the law that says the secretary of the VA "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits to veterans."

But the government is asking the court to "put a huge amount of weight" on the phrase "affects the provision of benefits," Lohier said.

Senior Judge Robert Sack countered that the court isn't here to decide whether it's appropriate to bring the claims through federal court, saying to Pandey, "To say it's appropriate doesn't mean you win or lose on the merits."

NOW-NYC also argues the Defense Department's policy is arbitrary and capricious and was issued without rationale. The organization isn't saying the agency can't put limits on IVF care, only that it's arbitrary to require service members to prove the link between their infertility and a service injury, said Elizabeth Beling, also a Yale Law student intern.

Onozawa countered the Defense Department first explained its rationale in a 2010 policy saying it would provide the "maximum support" possible, and reiterated that stance in its 2024 amended policy. The agency fulfilled its obligation to provide the maximum support and doesn't have to extend its support beyond that, she added.

The case is Nat'l Org. for Women - New York City v. U.S. Dep't of Def., 2d Cir., No. 25-71, oral argument 2/26/26 .

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