25-71

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Case No. 23-CV-6750 (VEC) (S.D.N.Y.)

NATIONAL ORGANIZATION FOR WOMEN-NEW YORK CITY,
***Plaintiff-Appellant*,**
v.
UNITED STATES DEPARTMENT OF DEFENSE, and
UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,
***Defendants-Appellees*.**

REPLY BRIEF FOR THE PLAINTIFF-APPELLANT

Elizabeth Beling, Law Student Intern
Tobey Phillips, Law Student Intern
Ashley Anderson, Esq.
Rose C. Goldberg, Esq.
Michael J. Wishnie, Esq.
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
YALE LAW SCHOOL
P.O. Box 209090
New Haven, CT 06520
Phone: (203) 432-4800

Indu Pandey, Law Student Intern
Yael Caplan, Esq.
Priscilla J. Smith, Esq.
REPRODUCTIVE RIGHTS & JUSTICE PROJECT
INFORMATION SOCIETY PROJECT
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
Phone: (347) 262-5177

TABLE OF CONTENTS

INTRODUCTION **1**
ARGUMENT **4**
I. THE DISTRICT COURT HAS JURISDICTION OVER NOW-NYC'S CLAIMS AGAINST VA. 4
A. The Government misreads the text of Section 511. 4
B. NOW-NYC's constitutional claim is not precluded. 8
C. NOW-NYC cannot obtain meaningful review of its Section 1557 claim in the VJRA system. 10
II. DOD'S IVF POLICY VIOLATES THE APA BECAUSE IT IS UNREASONABLY EXPLAINED. 13
A. Defendants fail to justify DoD's dissimilar treatment of IVF as compared to similar medical procedures. 14
B. Defendants fail to adequately address NOW-NYC's differential impact claim. 15
C. DoD failed to consider obvious alternatives to the policy's design. 17
D. Defendants fail to refute that alternative statutes could authorize IVF without the SCR. 18
III. SECTION 1557 OF THE AFFORDABLE CARE ACT ALLOWS PLAINTIFFS TO PLEAD DISPARATE IMPACT THEORIES OF DISCRIMINATION. 20
A. Section 1557's text and purpose provide a universal pleading standard that allows for disparate impact claims. 21
B. If Section 1557 incorporates Title IX pleading standards, it should allow disparate impact claims. 22
C. NOW-NYC has adequately pleaded disparate impact. 25
IV. PLAINTIFF HAS SUFFICIENTLY ALLEGED THAT THE SCR VIOLATES THE RIGHT TO PROCREATE. 26
CONCLUSION **30**

TABLE OF AUTHORITIES

Cases

Alexander v. Sandoval, 532 U.S. 275 (2001) 23, 24
Am. Ass'n of Cosmetology Sch. v. Devos, 258 F. Supp. 3d 50 (D.D.C. 2017) 18
Axon Enter. Inc. v. Fed. Trade Comm'n, 598 U.S. 175 (2023) 12, 13
Bates v. Nicholson, 398 F.3d 1355 (Fed. Cir. 2005) 12
Biediger v. Quinnipiac Univ., 691 F.3d 85 (2d Cir. 2012) 23
Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald, 830 F.3d 570 (D.C. Cir. 2016) 6
Brodsky v. U.S. Nuclear Regul. Comm'n, 704 F.3d 113 (2d Cir. 2013) 20
Broudy v. Mather, 460 F.3d 106 (D.C. Cir. 2006).....6
California v. EPA, 72 F.4th 308 (D.C. Cir. 2023) 17
Chance v. Rice Univ., 984 F.2d 151 (5th Cir. 1993) 23
Chau v. Sec. & Exch. Comm'n, 665 F. App'x 67 (2d Cir. 2016) 12
Citizens to Pres. Overton Park, Inc. v. Volpe, 401 U.S. 402 (1971) 18
Cleveland Bd. of Educ. v. LaFleur, 414 U.S. 632 (1974).....28
Cmty. Health Choice, Inc. v. United States, 970 F.3d 1364 (Fed. Cir. 2020) 11
Cnty. of Los Angeles v. Shalala, 192 F.3d 1005 (D.C. Cir. 1999).....14
Craig v. Boren, 429 U.S. 190 (1976).....24
Dep't of Com. v. New York, 588 U.S. 752 (2019) 18
Disabled Am. Veterans v. U.S. Dep't of Veterans Affs., 962 F.2d 136 (2d Cir. 1992) 5, 6, 8
Doe v. BlueCross BlueShield of Tennessee, Inc., 926 F.3d 235 (6th Cir. 2019).....22
Doe v. CVS Pharmacy, Inc., 982 F.3d 1204 (9th Cir. 2020) 22
Elgin v. Dep't of Treasury, 567 U.S. 1 (2012) 9, 12
Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246 (2009) 24
Garland v. Ming Dai, 593 U.S. 357 (2021).....20
Good News Club v. Milford Cent. Sch., 533 U.S. 98 (2001)..... 28, 29
Harris v. McRae, 448 U.S. 297 (1980).....27
Hooper v. Bernalillo Cnty. Assessor, 472 U.S. 612 (1985)..... 27, 28
Jackson v. Birmingham Bd. of Educ., 544 U.S. 167 (2005) 23
Johnson v. Robison, 415 U.S. 361 (1974) 9

Karmatzis v. Hamilton, 553 F. App'x 617 (7th Cir. 2014).....10
LaCount v. United States, No. 24-20161, 2025 WL 416991 (5th Cir. Feb. 6, 2025).....9
Loper Bright Enters. v. Raimondo, 603 U.S. 369 (2024).....20
Lorillard v. Pons, 434 U.S. 575 (1978).....20
Lucas v. VHC Health, 128 F.4th 213 (4th Cir. 2025).....22
Maher v. Roe, 432 U.S. 464 (1977).....27, 28
Mandala v. NTT Data, Inc., 975 F.3d 202 (2d Cir. 2020).....25
Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins., 463 U.S. 29 (1983).....17
N. Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982).....23
Pavan v. Smith, 582 U.S. 563 (2017).....28, 29
Petroleum Commc'ns, Inc. v. FCC, 22 F.3d 1164 (D.C. Cir. 1994).....16
Poloceno v. Dallas Indep. Sch. Dist., 826 F. App'x 359 (5th Cir. 2020).....23
Powers v. McDonough, 713 F. Supp. 3d 695 (C.D. Cal. 2023).....13
Regents of Univ. of Cal. v. Bakke, 438 U.S. 265 (1978).....23
Religious Sisters of Mercy v. Becerra, 55 F.4th 583 (8th Cir. 2022).....22
Rosa H. v. San Elizario Indep. Sch. Dist., 106 F.3d 648 (5th Cir. 1997).....23
SEC v. Chenery Corp., 318 U.S. 80 (1943).....18
Skinner v. Oklahoma, 316 U.S. 535 (1942).....26
Stewart v. Azar, 313 F. Supp. 3d 237 (D.D.C. 2018).....16
Thomas v. Principi, 394 F.3d 970 (D.C. Cir. 2005).....5
Thunder Basin Coal Co. v. Reich, 510 U.S. 200 (1994).....10
U.S. Nat'l Bank of Or. v. Ind. Ins. Agents, 508 U.S. 439 (1993).....21
United States v. N.S. Food Prods. Corp., 568 F.2d 240 (2d Cir. 1977).....16
United States v. Roberts, 363 F.3d 118 (2d Cir. 2004).....21
Veterans for Common Sense v. Shinseki, 678 F.3d 1013 (9th Cir. 2012).....7, 11
Washington v. Davis, 426 U.S. 229 (1976).....23, 24
Westar Energy, Inc. v. FERC, 473 F.3d 1239 (D.C. Cir. 2007).....14
Wolfe v. McDonough, 28 F.4th 1348 (Fed. Cir. 2022).....11

Statutes

5 U.S.C. § 704.....16, 17
5 U.S.C. § 706.....13, 16
10 U.S.C. § 1074(a).....18

10 U.S.C. § 1074(c)(4)(A) 14, 19
10 U.S.C. § 1074d(b) 18
20 U.S.C. § 1681 3
29 U.S.C. § 794 21
38 U.S.C. § 1984 8
38 U.S.C. § 3702 8
38 U.S.C. § 502 7
38 U.S.C. § 511 ..... passim
38 U.S.C. § 7252 5
38 U.S.C. § 7261 10
42 U.S.C. § 18116 ..... 2, 13
42 U.S.C. § 2000e 3
Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. J, tit. II, § 234, 136 Stat. 4459 (2023) 1, 20

Other Authorities

Assisted Reproductive Technology Services, TRICARE (Sept. 17, 2024) 20
Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 Yale L.J. 2470 (2015) 22

Regulations

34 C.F.R. § 106.21(b)(2) 25
TRICARE; Mental Health and Substance Use Disorder Treatment, 81 Fed. Reg. 61,068 (Sept. 2, 2016) 19

Administrative Materials

Exec. Order No. 14,216, 90 Fed. Reg. 10,451 (Feb. 18, 2025) 15

Legislative Materials

H.R. Rep. No. 100-963 (1988) 9

Administrative Decisions

Nagler v. Derwinski, 1 Vet. App. 297 (1991) 12
Names Redacted by Agency, Docket No. 16-35 496A, 2019 BVA LEXIS 6443 (B.V.A. Jan. 4, 2019) 11

Petite v. McDonough, 35 Vet. App. 64 (2021) 11
Skaar v. Collins, 38 Vet. App. 225 (2025) 12

INTRODUCTION

The United States Department of Defense ("DoD") and Department of Veterans Affairs ("VA") require service members and veterans seeking in vitro fertilization ("IVF") benefits to prove that an injury or illness incurred during service caused their infertility. J.A.98-105 (2024 DoD Policy Memo); J.A.226-232 (2012 DoD Policy Memo); J.A.106-120 (2024 VA Policy Memo). By limiting the IVF benefit to those who can satisfy this Service Connection Requirement ("SCR") and denying the benefit to individuals—disproportionately female[1]—who cannot, the Government illegally discriminates under constitutional and statutory law. DoD also failed to explain or justify its discriminatory policy, running afoul of the Administrative Procedure Act ("APA"). Plaintiff-Appellant NOW-NYC challenges the SCR in Defendants' IVF policies and in VA Appropriations Acts. *See, e.g.*, Consolidated Appropriations Act, 2023, Pub. L. No. 117-328, Div. J, tit. II, § 234, 136 Stat. 4459 (2023) ("Section 234").

The Government's opposition to this appeal only confirms that NOW-NYC's challenge should move forward. First, the Government misreads the Veterans Judicial Review Act, 38 U.S.C. § 511 ("VJRA"), and overstates the reach of VJRA preclusion. The Government also mischaracterizes NOW-NYC's challenge to

[1] *See* Amicus Brief of American Society of Reproductive Medicine 13-18, ECF No. 43.1 (citing medical literature establishing the challenges with diagnosing infertility and tracing its causes, especially for female anatomy).

Section 234 as an individual benefits dispute, disregarding binding circuit precedent that district courts retain jurisdiction over facial constitutional challenges. The Government offers no meaningful rebuttal to NOW-NYC's argument that the Section 1557 claim[2] is beyond VA's expertise and the VJRA exclusive-review system, in which agency tribunals and the specialized court that reviews individual agency decisions has no jurisdiction to review the claim and no authority to provide the relief NOW-NYC requests.

Second, the Government asks this Court to ignore the APA and rubber-stamp DoD's deficient decision-making process, despite the Government's failure to explain its policy choices, its reliance on post hoc justifications, its failure to consider obvious alternatives, and the SCR's inconsistency with DoD's stated policy goals. Notably, the Government tries but fails to undercut that the SCR's differential impact is relevant to NOW-NYC's arbitrary and capricious claim, which Plaintiff sufficiently pleaded. Unfortunately, the District Court did not even require DoD to produce the administrative record for its IVF policy—a routine step to ensure informed judicial review of APA claims.

Third, the Government's contention that Section 1557 does not permit disparate impact claims for sex discrimination is unpersuasive. The statute's text,

[2] Patient Protection and Affordable Care Act, Pub. L. No. 111-148, § 1557, 124 Stat. 119, 260 (2010) (codified at 42 U.S.C. § 18116(a) (2012)) ("Section 1557").

structure, and history are best understood to incorporate a uniform pleading standard, applicable to claimants across all protected classes. And even if Section 1557 sex discrimination claims were interpreted through a Title IX, 20 U.S.C. § 1681, lens alone, disparate impact claims would be cognizable. Title IX, like Title VII, 42 U.S.C. § 2000e, allows for disparate impact claims; this Court has never held otherwise.

Finally, the Government misrepresents NOW-NYC's right to procreate claim, misconstrues the scope of relief requested as requiring the Government to fund IVF benefits for all, and sidesteps Supreme Court precedent. By supporting the right to procreate of those who can satisfy the SCR, but denying this support to those who cannot, the Government creates a regime of haves and have-nots, violating the equal right to procreate. The Government cannot escape the well-established principle that where it affirmatively offers a benefit that implicates a fundamental right, discrimination in the provision of that benefit must withstand heightened scrutiny, which the SCR cannot.

This Court should reverse the District Court's dismissal and allow NOW-NYC's claims to proceed.

ARGUMENT

I. The District Court has jurisdiction over NOW-NYC's claims against VA.

The Government's reading of Section 511, the VJRA's jurisdictional provision, is inaccurate and overbroad. Congress intended—and this Court has held—that the VJRA does not preclude facial constitutional challenges. Moreover, the VJRA system provides no opportunity for meaningful review of Plaintiff's claim that VA's IVF policy violates Section 1557, which is collateral to the VJRA adjudication system and outside of VA's expertise.

A. The Government misreads the text of Section 511.

The Government's recitation of the VJRA pulls apart its operative text, distorting its scope. The two sentences of the VJRA's jurisdiction-stripping provision, Section 511(a), must be read in tandem. Section 511(a)'s first sentence provides that the "Secretary shall decide all questions of law and fact *necessary* to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans . . . ." 38 U.S.C. § 511(a) (emphasis added). This is followed by: "[T]he decision of the Secretary *as to any such question* shall be final and conclusive and may not be reviewed by any other official or by any court . . . ." *Id.* (emphasis added). Together, these two sentences vest the VA Secretary with initial and exclusive authority over certain benefits-related questions, made pursuant to VA benefits statutes, and ensure that judicial review of those questions is limited to a

specialized pathway. For those questions, Section 511(a) allows veterans to seek review only at the Board of Veterans' Appeals ("BVA"), with subsequent appeals going first to the Court of Appeals for Veterans Claims ("CAVC"), and then to the Federal Circuit. 38 U.S.C. § 7252.

Section 511(a)'s use of "*any such question*" in the provision's second sentence refers to questions contemplated in the first sentence. 38 U.S.C. § 511(a) (emphasis added). This structure clarifies that the VJRA prevents *only* review of claims asking Article III district courts to decide questions the Secretary must answer to determine eligibility for benefits under VA statutes. By contrast, questions not answered by the Secretary in the course of benefits provision, such as whether the SCR is facially legal or comports with Section 1557, may be reviewed in Article III district courts. Because these questions are, by definition, *unnecessary* to determining individual eligibility for benefits, they fall outside of the VJRA's channeling provision and may be reviewed.[3] Thus where, as here, veterans do not "make a claim for benefits nor challenge the denial of such a claim," Section 511(a) is not implicated. *Disabled Am.*

[3] Even when VA decides a question in connection to a benefits proceeding, that does not necessarily require the claim to be channeled into the VJRA system. *Cf. Thomas v. Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005) ("The raised 'questions of law and fact' relate to whether [VA's] alleged withholding of the diagnosis states a tort claim, and resolution of those questions is not 'necessary' to the benefits determination.").

Veterans v. U.S. Dep't of Veterans Affs., 962 F.2d 136, 141 (2d Cir. 1992) ("*DAV*").[4] NOW-NYC is not contesting a denial of benefits by the Secretary or seeking benefits for an individual veteran. Instead, NOW-NYC challenges the facial constitutionality of the SCR and its lawfulness under an antidiscrimination statute. These challenges are outside of and unnecessary to a decision by the Secretary on any veteran's claim.

The Government's reliance on the *Blue Water Navy* court's gloss on *Broudy v. Mather*, 460 F.3d 106 (D.C. Cir. 2006), obfuscates the VJRA's necessity requirement. Gv't Br. at 19-21 (discussing *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, 830 F.3d 570, 574-75 (D.C. Cir. 2016)). In *Blue Water Navy*, the court underscored that the plaintiffs' APA challenge to a VA policy of general applicability would "require the district court to adjudicate questions decided by the Secretary that are 'necessary' to the Secretary's decision [to deny a class of veterans presumptive benefits]." 830 F.3d at 574. Here, by contrast, the constitutional and statutory questions the District Court must resolve regarding the facial legality of the SCR and its compliance with antidiscrimination laws are independent of the Secretary's decision to provide or withhold benefits. NOW-NYC is not asking the

[4] To distract from the limits of the text of Section 511, the Government charges NOW-NYC with arguing that "VJRA only governs review of individualized denials of benefits." Gv't Br. at 19. Not so. NOW-NYC Br. at 25 ("actions seeking collateral review of individual benefits outcomes" are precluded).

District Court to review a decision to deny a specific individual or class of individuals benefits.

The Government's reliance on *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012) ("*VCS*"), fares no better. Gv't Br. at 21-22. While the *VCS* court emphasized that the VJRA implicates "VA decisions that relate to benefits decisions," 678 F.3d at 1025 (internal quotation omitted), this limitation must be understood through the rest of Section 511(a). Indeed, while the *VCS* court found that some of the plaintiffs' claims were precluded, plaintiffs' claim that VA regional office practices violated the Due Process Clause was allowed to proceed because it was "sufficiently independent of any VA decision as to an *individual veteran's claim for benefits* . . . ." *Id.* at 1034 (emphasis added). Here, as with the Due Process claim in *VCS*, evaluating the constitutionality of statutes and VA's compliance with antidiscrimination laws that shape how veterans present benefits claims, "is different than a consideration of the decisions that emanate through the course of the presentation of those claims." *Id.*

Further, the Government's assertion that Section 511(b)(1) demonstrates that Congress intended VJRA preclusion to "encompass more than individual determinations," Gv't Br. at 19, misunderstands the role of that subsection. *Id.* at 19 n.3. Congress allowed certain VA actions, chiefly rulemaking, to be reviewed directly in the Federal Circuit. 38 U.S.C. § 511(b)(1) (citing 38 U.S.C. § 502). But

to fall under Section 511(b)'s exceptions, a VA decision must first fall into Section 511(a)'s scope. Section 511(b)(1) does not redefine which claims are precluded in the first place.[5]

B. NOW-NYC's constitutional claim is not precluded.

The Government attempts to circumvent this Circuit's binding precedent by mischaracterizing NOW-NYC's facial constitutional claim as a challenge to a denial of benefits. But NOW-NYC does not challenge a "decision by the Secretary," a necessary predicate for VJRA preclusion. *See* 38 U.S.C. § 511(a). NOW-NYC contends that the SCR in Section 234 is unconstitutional. J.A.40 ¶ 119. Rather than, for example, asking the District Court to review a decision about a particular beneficiary's infertility qualification under the SCR, NOW-NYC "challenge[s] the constitutionality of a statutory classification drawn by Congress . . . ." *DAV*, 962 F.2d at 141. This is squarely within the District Court's jurisdiction. *Id.* at 140 ("Article III district courts have power to rule on the constitutionality of acts of Congress.").

[5] Section 511(b)'s remaining exceptions confirm the VJRA's focus on individualized adjudication of benefits. In narrow instances, Subsections 511(b)(2) and (b)(3), accordingly, preserve district court jurisdiction over claims involving VA-administered life insurance and home loan programs, which might generate common law type claims unsuitable for the VJRA's specialized adjudication system. *See* 38 U.S.C. § 3702 *et seq.*; *id.* § 1984.

Further, *Elgin v. Department of Treasury*, 567 U.S. 1 (2012), relied on heavily by the Government, Gv't Br. at 22-24, involves preclusion under an entirely different statutory scheme with distinct "text, structure, and purpose" and is inapposite. *Elgin*, 567 U.S. at 10. The VJRA's text confirms that Congress intended Article III district courts to retain jurisdiction over facial constitutional challenges. *See* 38 U.S.C. § 511(a).

Similarly, the legislative history of the VJRA refutes the Government's claim that Congress narrowed the holding of *Johnson v. Robison*, 415 U.S. 361 (1974), through the VJRA. Gv't Br. at 22 n.5. For example, the House Committee on Veterans' Affairs noted that *Robison* "is generally accepted as being in accord with a line of decisions stretching back to *Marbury v. Madison* which hold that the courts have a constitutional responsibility to determine whether Congressional enactments meet constitutional muster." H.R. Rep. No. 100-963, pt. 1, at 20 (1988).

No federal circuit has held that *Elgin* requires interpreting the VJRA to the contrary. In fact, in the years since *Elgin*, circuit courts have treated facial and as-applied challenges differently regarding VJRA preclusion. *See LaCount v. United States*, No. 24-20161, 2025 WL 416991, at *1 (5th Cir. Feb. 6, 2025) (recognizing that facial constitutional challenges to acts of Congress are not precluded under the VJRA), *cert. denied*, No. 24-6889, 2025 WL 1496533 (U.S. May 27, 2025);

Karmatzis v. Hamilton, 553 F. App'x 617, 619 (7th Cir. 2014) (affirming district court's ruling that veteran "did not make a facial constitutional attack").

C. NOW-NYC cannot obtain meaningful review of its Section 1557 claim in the VJRA system.

The Government's reliance on the *Thunder Basin* factors only reinforces the District Court's jurisdiction over NOW-NYC's Section 1557 claim.[6] *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994).

The first and most pivotal *Thunder Basin* factor—access to meaningful judicial review—favors NOW-NYC. Absent District Court jurisdiction, NOW-NYC would have nowhere to turn for review of its Section 1557 claim. Even if an individual veteran included a Section 1557 claim in a benefits application, neither a VA regional office nor the BVA would have power to act on it. On review, the CAVC's doors would be closed. While the CAVC may "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions," it may only do so "to the extent *necessary* to its decision . . . ." 38 U.S.C. § 7261 (emphasis added).

[6] The Government incorrectly argues that NOW-NYC did not raise this argument at the District Court. *See* Pl.'s Br. Opp'n Mot. To Dismiss 10, ECF No. 57 ("[The District Court] has jurisdiction over Plaintiff's claims because it can resolve questions of law and fact without reviewing any prior benefits determinations.").

The Government's selective drafting suggests *some* Affordable Care Act ("ACA") claims are reviewable in the CAVC. Still, the Government provides no indication as to why NOW-NYC's Section 1557 claim would be reviewable. Gv't Br. at 28. The cases the Government cites, *id.* at 29 n.9, are inapposite, involving CAVC and Federal Circuit interpretations of ACA provisions, not determinations of legality under the ACA. *See, e.g.*, *Wolfe v. McDonough*, 28 F.4th 1348, 1355-56 (Fed. Cir. 2022) (interpreting an ACA provision as a reference point to VA's scheme for reimbursement of deductibles); *Cmty. Health Choice, Inc. v. United States*, 970 F.3d 1364, 1371 (Fed. Cir. 2020) (interpreting an ACA provision for a claim not subject to VJRA channeling).[7] The Government's argument also incorrectly presumes the CAVC agrees it has jurisdiction. In short, because NOW-NYC "cannot bring its suit in the Veterans Court, that court cannot claim exclusive jurisdiction over the suit." *VCS*, 678 F.3d at 1035.

Moreover, Section 1557—a civil rights law wholly separate from the VA benefits statutory framework—is not "a law that affects the provision of benefits by the Secretary to veterans . . . ." 38 U.S.C. § 511(a). How the Secretary decides to

[7] Other decisions cited by the Government acknowledge but do not rule upon the ACA's applicability. *See Names Redacted by Agency*, Docket No. 16-35 496A, 2019 BVA LEXIS 6443, at *6 (B.V.A. Jan. 4, 2019) (rejecting an ACA argument because its provisions "are not applicable to the CHAMPVA program"); *Petite v. McDonough*, 35 Vet. App. 64, 73 (2021) (stating "the Court does not reach [the ACA] issue at this time").

comply with Section 1557 is not subject to VJRA preclusion. *See Bates v. Nicholson*, 398 F.3d 1355, 1365-66 (Fed. Cir. 2005); *Skaar v. Collins*, 38 Vet. App. 225, 230-31 (2025) (Jaquith, J., concurring).

Even if NOW-NYC's Section 1557 claim could theoretically be reviewed, the inability to obtain discovery in the CAVC would preclude meaningful judicial review of NOW-NYC's disparate impact claim. *See* NOW-NYC Br. at 16. Further, NOW-NYC seeks a declaratory judgment that the SCR is unlawful, J.A.43-44, relief the CAVC has held it cannot provide. *Nagler v. Derwinski*, 1 Vet. App. 297, 306-07 (1991) (stating CAVC may not issue declaratory judgments).

The Government's arguments regarding the other two *Thunder Basin* factors are unavailing. The Government does not support its assertion that NOW-NYC's Section 1557 claim is a "vehicle . . . for a benefit to be provided" and thus must not be wholly collateral. Gv't Br. at 29 (quoting *Elgin*, 567 U.S. at 22). The Government's reliance on *Elgin*'s "vehicle" language ignores subsequent Supreme Court decisions that apply the "wholly collateral" factor.[8] In *Axon Enterprise, Inc. v. Federal Trade Commission*, the Supreme Court held a claim was wholly collateral because it did not "address the sorts of procedural or evidentiary matters an agency often resolves," nor did it "relate to the subject of the enforcement actions," or

[8] *See Chau v. Sec. & Exch. Comm'n*, 665 F. App'x 67, 72 (2d Cir. 2016) (noting that the "wholly collateral" factor was "not clearly defined" when *Elgin* was decided).

challenge "actions taken in the agency proceedings." 598 U.S. 175, 192-93 (2023). NOW-NYC's claim shares the same key features: it is unconnected to any VA proceeding and is brought under a civil rights statute of general applicability.

The Government states that "the administration of health-care benefits is at the heart of the VA's expertise." Gv't Br. at 29. However, as a civil rights statute, Section 1557 exists outside the expertise of VA and the specialized benefits system it oversees. *See* 42 U.S.C. § 18116 (adopting "ground[s] prohibited under" and "enforcement mechanisms provided for and available under" several civil rights statutes); *cf. Powers v. McDonough*, 713 F. Supp. 3d 695, 715 (C.D. Cal. 2023) (noting that Article III courts are "better equipped" to handle claims under "a generally applicable anti-discrimination statute"), No. 24-6338 (9th Cir. argued Apr. 8, 2025).

II. DoD's IVF policy violates the APA because it is unreasonably explained.

Defendants' efforts to defend the District Court's reasoning are unpersuasive: DoD promulgated the IVF policy incorporating the SCR in violation of the APA.[9] 5 U.S.C. § 706(2)(A). First, Defendants misrepresent NOW-NYC's argument that DoD was obligated to consider its differential treatment of IVF as compared to similar covered medical treatments. Second, Defendants fail to counter NOW-

[9] NOW-NYC maintains that DoD's policy is in violation of the Constitution and federal law under the APA. 5 U.S.C. § 706(2)(B)-(2)(C); *see infra* Sections III, IV.

NYC's claim that the SCR's differential impact on female service members should have been evaluated by the agency. Third, Defendants attempt to hide DoD's failure to consider obvious alternatives during the policymaking process behind impermissible post hoc justifications. Fourth, Defendants misunderstand NOW-NYC's argument that the agency needed to justify its choice to rely on 10 U.S.C. § 1074(c)(4)(A) for authorization at the time of adoption. Defendants do not address NOW-NYC's contention that the District Court erred in failing to order production of the administrative record before adjudicating the APA claims. NOW-NYC Br. at 43-44.

A. Defendants fail to justify DoD's dissimilar treatment of IVF as compared to similar medical procedures.

Defendants do not address that the law requires agencies to affirmatively justify dissimilar treatment of a regulated activity. *Cnty. of Los Angeles v. Shalala*, 192 F.3d 1005, 1022 (D.C. Cir. 1999); *Westar Energy, Inc. v. FERC*, 473 F.3d 1239, 1241 (D.C. Cir. 2007). Instead, Defendants misstate NOW-NYC's arguments. Gv't Br. at 37-39, 52. NOW-NYC does not assert that dissimilar treatment may never occur but rather that an agency must justify it at the time of decision. NOW-NYC Br. at 46-48.

Defendants also incorrectly assert that there are no analogous covered medically necessary treatments. Gv't Br. at 38-39. NOW-NYC provided examples

of similar covered medically necessary treatments not subject to service-connection restrictions, such as erectile dysfunction medication, NOW-NYC Br. at 46-48, which the Government rejected without basis. Gv't Br. at 38-39, 47. Moreover, the Government's accusation that NOW-NYC is substituting its own view of medically necessary treatment is patently false. *Id.* at 38. NOW-NYC has shown that IVF treatment fits into DoD's *own* definitions and provided support from leading medical experts. NOW-NYC Br. at 46. Oddly, the Government rejects DoD's definition and now claims it does not have to justify deviations from the very standards it promulgated, Gv't Br. at 38, a textbook example of arbitrary and capricious decision-making in violation of the APA. This unexplained differential treatment is underscored by DoD's willingness to cover IVF for civilian employees, NOW-NYC Br. at 48, and its commitment to reducing regulatory barriers to IVF. *See* Expanding Access to In Vitro Fertilization, Exec. Order No. 14216, 90 Fed. Reg. 10451 (Feb. 18, 2025); NOW-NYC Br. at 50.

B. Defendants fail to adequately address NOW-NYC's differential impact claim.

Defendants' response to NOW-NYC's claim that DoD failed to evaluate the obvious differential impact of its policy on female service members is unpersuasive. *See* NOW-NYC Br. at 55-56.

The Government asserts there is no requirement under the APA to evaluate differential impact and that differential impact need not be evaluated because "[a]ll regulations have differential impacts." Gv't Br. at 57. To the contrary, if a policy inevitably imposes a differential impact, especially on a protected group, failure to consider it falls short of the APA's reasoned decision-making requirements. *Petroleum Commc'ns, Inc. v. FCC*, 22 F.3d 1164, 1172 (D.C. Cir. 1994) ("An agency must justify its failure to take account of circumstances that appear to warrant different treatment for different parties."). Moreover, courts routinely evaluate differential impact claims as part of the arbitrary and capricious analysis under § 706(2)(A). *See, e.g.*, *United States v. N.S. Food Prods. Corp.*, 568 F.2d 240, 253 (2d Cir. 1977) (holding agency's facially neutral policy arbitrary and capricious for its failure to evaluate differential impact on different regulated parties); *Stewart v. Azar*, 313 F. Supp. 3d 237, 263-64 (D.D.C. 2018) (holding HHS's approval of program was arbitrary and capricious where agency failed to consider impact on subgroup of beneficiaries). Defendants' assertion that there is no differential impact is both wrong and premature at the motion to dismiss stage and NOW-NYC meets the bar of pleading a differential impact, *see infra* Section III.C, at 25.

This claim is not dependent on this Court's disposition of NOW-NYC's Section 1557 claim because: (1) Defendants have not argued these claims are excluded under 5 U.S.C. § 704; (2) even if this Court found that Section 1557 does

not permit disparate impact claims for sex discrimination, there would be "no other adequate remedy in a court," *id.*, leaving the APA as Plaintiff's exclusive route to remedy; and (3) even if this Court found no disparate impact as a factual matter, the APA's differential impact standard differs from the disparate impact standard; it requires the agency to have at least considered the impact.

C. DoD failed to consider obvious alternatives to the policy's design.

Defendants do not address DoD's failure to contemporaneously evaluate reasonable alternatives to its chosen IVF policy design. *See* NOW-NYC Br. at 50; Gv't Br. at 51, 54. This failure renders the policy arbitrary and capricious and requires vacatur. *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 42, 50-51 (1983); *see also* Gv't Br. at 54 n.19 (citing *State Farm* as paradigmatic example). Instead, Defendants argue that agencies are not obligated to consider *every* possible alternative.[10] Gv't Br. at 54. This is a straw man. Here, there is no record of contemporaneous evaluation of *any* alternatives or justification as to why

[10] Defendants' citation to *California v. EPA*, 72 F.4th 308, 317 (D.C. Cir. 2023) is puzzling. Gv't Br. at 54. There the EPA *did* consider several alternatives, which the court found adequate under the APA. *California*, 72 F.4th at 317. Moreover, Defendants omit text from the *California* quotation. *Id.* at 54. In full, the text explains that the Clean Air Act did not require the agency to conduct an additional scientific study for each alternative. NOW-NYC does not claim that any statute imposes extra study requirements on DoD. *California* confirms NOW-NYC's argument: agencies must consider some alternatives at the time of promulgation.

there were no alternatives.[11] *See Am. Ass'n of Cosmetology Sch. v. Devos*, 258 F. Supp. 3d 50, 72 (D.D.C. 2017) ("When an agency's reasoning involves a non-obvious, essential factual assumption, the agency must justify that assumption . . . as part of its affirmative duty to engage in rational decisionmaking.").

Moreover, DoD does not adequately justify its one-sentence statement committing to "maximum support" for "members who have become seriously ill or injured as a result of their service." Gv't Br. at 53. The Government, without explanation, chose a radically under-inclusive design. NOW-NYC Br. at 50.

D. Defendants fail to refute that alternative statutes could authorize IVF without the SCR.

As NOW-NYC demonstrates, numerous statutes could authorize IVF services without necessitating the SCR.[12] DoD could have relied on a combination of statutory authorities or repealed IVF's exclusion from CHAMPUS basic TRICARE coverage—both far more inclusive alternatives that would better achieve DoD's

[11] Defendants attempt to collapse the distinction between rational basis and hard look review under the APA. *Citizens to Pres. Overton Park, Inc. v. Volpe*, 401 U.S. 402, 416 (1971); Gv't Br. at 35-40. The APA absolutely forbids post hoc rationalizations, *SEC v. Chenery Corp.*, 318 U.S. 80, 94 (1943); *Dep't of Com. v. New York*, 588 U.S. 752, 780 (2019), even where there may be "plausible reasons." Gv't Br. at 37.

[12] The Government, Gv't Br. at 55, and District Court, J.A.252-53, acknowledge DoD can provide IVF benefits pursuant to 10 U.S.C. § 1074(a) and § 1074d(b), NOW-NYC Br. at 52; the Government offers only post hoc reasons for not doing so.

stated goal.[13] The policy itself acknowledges only one such alternative—the regulatory CHAMPUS exclusion of IVF—but does not evaluate the efficacy of removing the regulatory barrier. J.A.46-47, 231.

The Government's only response is to repeat that 10 U.S.C. § 1074(c)(4)(A) provides *a* basis for authorizing IVF services. It wholly fails to refute that other statutory provisions also authorize IVF coverage, including for service members currently excluded from IVF and without the discriminatory SCR. *Compare* NOW-NYC Br. at 51-53 *with* Gv't Br. at 51-52. The Government has nowhere explained its choice to rely on authority that requires the discriminatory SCR versus one that would not. NOW-NYC Br. at 51-53.

Defendants attempt to evade their obligation to consider alternatives by insisting, after the fact, that they are not feasible. Gv't Br. at 56. There is no reason

[13] Defendants' assertion in litigation that these alternatives would not expand access is unfounded. The overlapping statute option would extend coverage to currently non-qualifying female service members and all currently non-qualifying service members in proximity to a military hospital. Also, DoD could provide full TRICARE coverage of IVF by rescinding its own regulations, NOW-NYC Br. at 54-55, which DoD implicitly acknowledges in its 2010 memo when discussing the need for an authorizing statute. DoD has taken similar actions before demonstrating feasibility. *See, e.g.*, TRICARE; Mental Health and Substance Use Disorder Treatment, 81 Fed. Reg. 61068, 61069, 61071 (Sept. 2, 2016) (codified at 32 C.F.R. pt. 199) (removing certain regulatory exclusions on treatment of gender dysphoria and citing multiple statutory authorities).

why providing additional IVF care at military hospitals, which already occurs,[14] would be infeasible, nor why fertility benefits for women are incompatible with TRICARE's existing health infrastructure. The Government's attempt to craft an ex post facto rationalization, *Garland v. Ming Dai*, 593 U.S. 357, 369 (2021), is insufficient and untimely. *Brodsky v. U.S. Nuclear Regul. Comm'n*, 704 F.3d 113, 119 (2d Cir. 2013).

Defendants attempt to dodge this debate by claiming that Congress endorsed its legal reasoning when it adopted Section 234. Gv't Br. at 52. This is incorrect. NOW-NYC Br. at 51, 53. Section 234 merely authorizes VA to match the level of IVF coverage DoD provides; it does not determine the statutory authority on which DoD must rely or the appropriateness of DoD's SCR. *See* Section 234.[15]

III. Section 1557 of the Affordable Care Act allows plaintiffs to plead disparate impact theories of discrimination.

At this pre-discovery stage, Plaintiff plausibly pleaded a disparate impact claim under Section 1557.[16] Section 1557 provides a universal pleading standard

---

[14] *Assisted Reproductive Technology Services*, TRICARE (Sept. 17, 2024), https://perma.cc/RP7M-R6DN (IVF services are available at eight military hospitals).

[15] *Lorillard v. Pons*, 434 U.S. 575, 581 (1978), cited by the Government, holds that Congress is *aware* of previous construction of statutory language and may adopt those constructions when appropriate, Gv't Br. at 52, not that Congress must adopt prior agency interpretations of statutes. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 412-13 (2024).

[16] The Government is incorrect that NOW-NYC forfeited its claim of sex discrimination. NOW-NYC explicitly alleged that SCR "has a disparate impact on

that allows for disparate impact claims. Even if sex discrimination under Section 1557 was governed by only Title IX, this Court's Title IX precedents and the statute's history suggest that it allows disparate impact claims.

A. Section 1557's text and purpose provide a universal pleading standard that allows for disparate impact claims.

The Government's textual argument hinges on Congress's use of "or" as opposed to "and" to join Section 1557's list of incorporated statutes. Gv't Br. at 43 n.14. This Court, however, has interpreted "or" to convey a conjunctive meaning when demanded by purpose and statutory context. *See, e.g.*, *United States v. Roberts*, 363 F.3d 118, 121 (2d Cir. 2004) (upholding interpretation of statute's use of "or" as conjunctive). Absent a conjunctive reading of "or", Section 1557 would largely be duplicative of existing protections under the incorporated statutes, which already forbid discrimination by programs and activities receiving federal funding, including healthcare. *See, e.g.*, 29 U.S.C. § 794 (Rehabilitation Act).

Moreover, a universal pleading standard aligns with Section 1557's purpose in the ACA. *See U.S. Nat'l Bank of Or. v. Ind. Ins. Agents*, 508 U.S. 439, 455 (1993) (instructing courts to examine whole laws and purpose). Consistent with its "profound commitment to principles of nondiscrimination," Congress enacted the

---

women and LGBTQ+ individuals, in violation of Section 1557's prohibition on sex and sexual orientation discrimination." J.A.34 (Amended Complaint).

ACA "to expand the rights of all patients to equal healthcare free from discrimination." Note, Elizabeth B. Deutsch, *Expanding Conscience, Shrinking Care: The Crisis in Access to Reproductive Care and the Affordable Care Act's Nondiscrimination Mandate*, 124 Yale L.J. 2470, 2490 (2015); *see* NOW-NYC Br. at 34. The Government's overly narrow interpretation of Section 1557 would lead to illogical results that contradict Section 1557's broad mandate. NOW-NYC Br. at 35.

This is an issue of first impression in this Circuit, and the Government provides no case law requiring this Court to fracture Section 1557's pleading standards. Neither *Doe v. BlueCross BlueShield of Tennessee, Inc.*, 926 F.3d 235, 238 (6th Cir. 2019), nor *Doe v. CVS Pharmacy, Inc.*, 982 F.3d 1204, 1209 (9th Cir. 2020), require this Court to hold otherwise. Gv't Br. at 42-43. The Government is wrong that *Lucas v. VHC Health*, 128 F.4th 213, 219 (4th Cir. 2025), and *Religious Sisters of Mercy v. Becerra*, 55 F.4th 583, 588 (8th Cir. 2022) explicitly rule on the appropriate pleading standard under Section 1557. Gv't Br. at 42.

B. If Section 1557 incorporates Title IX pleading standards, it should allow disparate impact claims.

The Government tries to hitch Title IX to Title VI, Gv't Br. at 45, but ignores the pertinent ways those statutes diverge. As the Supreme Court warned, "[t]he meaning and applicability of Title VI are useful guides in construing Title IX . . . *only to the extent that the language and history of Title IX do not suggest a contrary interpretation* . . . . [W]e must not fail to give effect to the differences between them."

N. Haven Bd. of Ed. v. Bell, 456 U.S. 512, 529-30 (1982) (emphasis added). The best reading of Title IX's purpose and legislative history distinguishes it from Title VI and shows its commonality with Title VII.

The Government cites cases that do not address NOW-NYC's arguments about Title IX's purpose and history.[17] Gv't Br. at 46-47. The Government ignores that Congress must have intended to authorize disparate impact claims and additional protections beyond those offered by Title VI. *See* NOW-NYC Br. at 39-40. This difference is embodied in how Title VI and Title IX relate to the Constitution's Equal Protection Clause. Title VI "proscribe[s] only those racial classifications that would violate the Equal Protection Clause or the Fifth Amendment." *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 287 (1978). Given the scope of the Equal Protection Clause, *see Washington v. Davis*, 426 U.S. 229,

[17] The Government cites *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 173 (2005), and *Biediger v. Quinnipiac University*, 691 F.3d 85, 97 (2d Cir. 2012), for the proposition that Title IX does not include disparate impact, but these courts sidestepped the issue. Gv't Br. at 46-47. Similarly, the Government's reliance on *Chance v. Rice University*, 984 F.2d 151 (5th Cir. 1993), and subsequent Fifth Circuit cases is misplaced. Gv't Br. at 46-47. The Fifth Circuit ultimately "retreated" from the holding that Title IX did not include disparate impact and instead found, in denying rehearing en banc in *Chance*, that it need not reach the question. *See Rosa H. v. San Elizario Indep. Sch. Dist.*, 106 F.3d 648, 655-56 (5th Cir. 1997) (discussing 989 F.2d 179 (5th Cir. 1993)). *Poloceno v. Dallas Independent School District*, 826 F. App'x 359, 362-63 (5th Cir. 2020), erroneously relies on *Alexander v. Sandoval*, 532 U.S. 275 (2001) and the abrogated panel decision in *Chance*. None of the contrary trial court opinions relied upon by the Government are binding and each relies on *Sandoval*, without justification.

239-40 (1976), it follows that the Supreme Court held that an individual cannot advance disparate impact claims under Title VI in *Sandoval*, 532 U.S. at 280-81. The Government also ignores how *Sandoval*'s holding is rooted in Title VI's specific context. *Id*. The Title IX cases they cite echo this misreading, treating *Sandoval* as if it resolved questions far beyond its actual holding.

The same is *not* true of Title IX. In *Fitzgerald v. Barnstable School Committee*, 555 U.S. 246 (2009), the Court rejected the argument that "Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination," explaining that the protections in Title IX and the Equal Protection Clause diverge in important ways. *Id.* at 256 (quoting the lower court) (internal quotations omitted). The history of Title IX's enactment by Congress in 1972, when equal protection sex discrimination jurisprudence was unsettled, supports the distinction between Title IX and Title VI. Because the Court did not apply heightened scrutiny to sex discrimination until 1976, *see Craig v. Boren*, 429 U.S. 190, 197 (1976), Congress in 1972 could not have intended Title IX to be, like Title VI, coextensive with the Equal Protection Clause. Because constitutional protections against sex discrimination were very limited in 1972, Congress's specific reference to sex discrimination in Title IX shows that Congress intended it to protect against forms of sex discrimination beyond those addressed by the Equal Protection Clause.

Finally, the Government fails to address NOW-NYC's argument that the text of Section 1557 gives rise to claims allowed in the regulations of the underlying statute. Here, because Title IX regulations protect against disparate impact, so too does Section 1557. NOW-NYC Br. at 38-40; *see, e.g.*, 34 C.F.R. § 106.21(b)(2). Similarly, the Government does not address NOW-NYC's argument that this Court's precedent analogizing the proof required for Title VII and Title IX counsels in favor of recognizing that disparate impact claims are cognizable under Section 1557. *See* NOW-NYC Br. at 41-42.

C. NOW-NYC has adequately pleaded disparate impact.

The Government's insistence that the sparse amount of publicly available data dooms NOW-NYC's claim ignores basic pleading requirements. Gv't Br. at 48-49. The Government substitutes the standard for *establishing* disparate impact on the merits for the pleading standard. *Id.* at 47-48. At the motion to dismiss stage, plaintiffs need only "set forth enough factual allegations to plausibly support" the elements of a claim. *Mandala v. NTT Data, Inc.*, 975 F.3d 202, 209 (2d Cir. 2020). NOW-NYC exceeds this permissive standard by citing statistical evidence supporting Plaintiff's disparate impact allegation. *See* NOW-NYC Br. at 32-33 (citing data establishing that men are much more likely to receive at least one specific infertility diagnosis linked to service, while women are fourteen times more likely to have unexplained infertility).

Further, the Government's claim that Plaintiff "points to nothing" in relation to service members is disingenuous. Gv't Br. at 48. It is entirely reasonable for Plaintiff to rely upon studies conducted on veterans, who are, by definition, former service members, to assert plausible claims relating to service members. At this stage, NOW-NYC is not required to cite government data—that is what discovery is for.

IV. Plaintiff has sufficiently alleged that the SCR violates the right to procreate.

Defendants do not contest that the equal right to procreate is fundamental and that heightened scrutiny applies where it is implicated. *See* NOW-NYC Br. at 61-62; *Skinner v. Oklahoma*, 316 U.S. 535, 541 (1942) (recognizing that the equal right to procreate is among the "basic civil rights of man"). Instead, the Government mischaracterizes NOW-NYC's claim, misconstrues the scope of relief requested, and dodges Supreme Court precedent. Gv't Br. at 34-35. Because the SCR implicates the right to procreate, heightened scrutiny applies, a standard the SCR cannot withstand.

NOW-NYC does not demand that the Government "subsidize [the] choice" of all veterans and service members to build a family. *Id.* at 32. NOW-NYC argues that when the Government provides a benefit implicating a fundamental right, but excludes one group from eligibility without adequate justification, it violates the Constitution. *See* NOW-NYC Br. at 58 (citing relevant cases). In the cases cited by

NOW-NYC, the Government conferred a benefit implicating a fundamental right but imposed arbitrary restrictions on equal access to those benefits, rendering them unconstitutional. *Id.* at 57-59; *see, e.g.*, *Maher v. Roe*, 432 U.S. 464, 469-70 (1977) (asserting that when the state interferes with a fundamental right it is "subject to constitutional limitations"); *Hooper v. Bernalillo Cnty. Assessor*, 472 U.S. 612, 623 (1985) (holding unconstitutional a law that created "two tiers" of veterans by arbitrarily denying benefits to one group).

The Government's answer to NOW-NYC's right to procreate claim is to hide behind *Harris v. McRae*, 448 U.S. 297 (1980), and *Maher*, 432 U.S. at 470, ignoring the distinction between those cases and this one. In *McRae* and *Maher*, plaintiffs argued that the government must accord equal treatment to two *different* forms of medical care: abortion and childbirth. *See Maher*, 432 U.S. at 470; *McRae*, 448 U.S. at 313. The Court evaluated the state's choice to provide only one of these benefits in the first place, holding the Constitution did not prevent the state from making a "value judgment favoring childbirth over abortion . . . ." *McRae*, 448 U.S. at 314 (quoting *Maher*, 432 U.S. at 474). But this case is not about a choice between provision of two different services. It concerns DoD's and VA's choice to provide one benefit—IVF coverage—to one group of people and not another, *see* NOW-NYC Br. at 60-61, rendering the Government's reliance on *Maher* and *McRae* inapposite. The decision at hand is whether the manner in which DoD and VA

dispense IVF benefits, an issue "subject to constitutional limitations," *Maher*, 432 U.S. at 470, is constitutional.

The Government continues to avoid the real issue, this time by framing this as a funding case and complaining that NOW-NYC fails to cite cases concerning "selective subsidies." Gv't Br. at 35. This case does not concern whether a service must be covered, but instead whether unequal coverage of IVF benefits under the SCR conforms to constitutional and statutory law. The Government provides a benefit enabling procreation for some veterans and people in the military, but not others, based on a distinction that cannot be constitutionally justified. *See, e.g.*, *Pavan v. Smith*, 582 U.S. 563, 566 (2017); *cf. Good News Club v. Milford Cent. Sch.*, 533 U.S. 98, 109, 112 (2001) (holding a public school violated Free Speech Clause by providing space for some groups to meet, but not others, based on religious viewpoints).

Additionally, the Government claims the unequal provision of benefits distinction collapses because it would require IVF benefits for all Americans. The Court has never conceptualized the scope of relief from discriminatory policies in this way. When crafting relief, courts are concerned with the universe of individuals who would qualify for the benefit had they not been subject to an unconstitutional restriction. *See, e.g.*, *Cleveland Bd. of Educ. v. LaFleur*, 414 U.S. 632, 648 (1974) (addressing only teachers); *Hooper*, 472 U.S. at 623 (addressing only veterans who

became residents of a state after an arbitrary date). Here, the relevant universe is limited to service members and veterans eligible for DoD and VA health care benefits who would qualify for IVF services but for the SCR.

Finally, the Government argues that the SCR is not a direct restriction on the right to procreate. *See* Gv't Br. at 32. But unequal access to the exercise of a right *is* a restriction on that right. Unequal access to the listing of a parent's name on a birth certificate did not directly restrict the right to marriage, to be a parent, or to be in a same-sex marriage. *Pavan*, 582 U.S. at 565. Nor did the unequal access to public fora for speech, *Good News Club*, 533 U.S. at 112, prevent the right to speak in other fora. The Government's discriminatory provision of benefits in those cases nonetheless implicated these rights, and was therefore subject to constitutional review, as the SCR must be here.

The Government recognizes that heightened scrutiny is appropriate when the exercise of a fundamental right is jeopardized. Gv't Br. at 35. The SCR cannot survive such review. It neither serves a compelling government interest nor, as evidenced by the number of veterans and service members left outside its narrow circle of beneficiaries, is it conducted through the least restrictive means. NOW-NYC Br. at 62-63.

CONCLUSION

For the foregoing reasons, the Court should vacate and reverse the District Court's judgment.

Respectfully submitted,

/s/ Michael J. Wishnie
Elizabeth Beling, Law Student Intern
Tobey Phillips, Law Student Intern
Ashley Anderson, Esq.
Rose C. Goldberg, Esq.
Michael J. Wishnie, Esq.
JEROME N. FRANK LEGAL SERVICES ORGANIZATION
YALE LAW SCHOOL[18]
P.O. Box 209090
New Haven, CT 06520
Tel: (203) 432-4800
michael.wishnie@ylsclinics.org

/s/ Priscilla J. Smith
Indu Pandey, Law Student Intern
Yael Caplan, Esq.
Priscilla J. Smith, Esq.
REPRODUCTIVE RIGHTS & JUSTICE PROJECT
INFORMATION SOCIETY PROJECT
YALE LAW SCHOOL
319 Sterling Place
Brooklyn, NY 11238
Tel: (347) 262-5177
priscilla.smith@ylsclinics.org

[18] This brief does not purport to state the views of Yale Law School, if any.

CERTIFICATE OF COMPLIANCE

WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(e) and Local Rule 32.1(4)(a) because this brief contains 6,975 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f). This brief complies with the typeface of Fed. R. App. P. 32(a)(5)(A) and the type style requirements of Fed. R. App. P. 32(a)(6) because it is prepared in a proportionally spaced 14-point Roman style font, Times New Roman.

/s/ Michael J. Wishnie
Michael J. Wishnie

August 11, 2025

/s/ Priscilla J. Smith
Priscilla J. Smith

August 11, 2025