25-0071

IN THE
United States Court of Appeals
for the Second Circuit

NATIONAL ORGANIZATION FOR WOMEN - NEW YORK CITY,
Plaintiff-Appellant,

v.

UNITED STATES DEPARTMENT OF DEFENSE, UNITED STATES DEPARTMENT OF VETERANS AFFAIRS,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York
Case No. 1:23-cv-6750
The Honorable Valerie E. Caproni

BRIEF OF THE AMERICAN SOCIETY FOR REPRODUCTIVE MEDICINE AS AMICUS CURIAE IN SUPPORT OF PLAINTIFF-APPELLANT

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1(a) of the Federal Rules of Appellate Procedure, the American Society for Reproductive Medicine certifies that, as a nonprofit, 501(c)(3) organization, it has no parent corporation and no publicly held corporation owns 10% or more of stock in the American Society for Reproductive Medicine.

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STATEMENT OF INTEREST[1]

The American Society for Reproductive Medicine ("ASRM") is an internationally recognized organization dedicated to the advancement of reproductive medicine through evidence-based practice, education, research, and advocacy. Founded in 1944, for more than eight decades ASRM has provided a forum for its now more than 9,000 members to engage in continued education, publish articles, provide and receive official ethics opinions, and amplify important issues within reproductive medicine. ASRM's broad membership includes scientists, medical doctors, and other healthcare support personnel, including many who practice in New York, Connecticut, and Vermont. ASRM has an interest in this appeal because it is committed to ensuring that service members are not unfairly denied access to assisted reproductive technology.

In furtherance of this commitment, ASRM publishes studies and provides online resources about infertility to service members. *See, e.g.*, Desireé M. McCarthy-Keith et al., *Will Decreasing Assisted Reproduction Technology Costs Improve Utilization and Outcomes Among Minority Women?*, 94 Fertil. Steril. 2587

[1] No party's counsel authored this brief in whole or in part, and no party, party's counsel, or person—other than ASRM, its members, or its counsel—contributed money intended to fund preparing or submitting this brief. All parties consented to the filing of this brief.

(2010); Soc'y for Assisted Reprod. Tech., *SART Fertility Experts—Military Families and Fertility* (Nov 12, 2024), https://perma.cc/XM9F-AKAC.

ASRM also regularly files or joins amicus briefs in appeals, like this one, that raise issues of importance in reproductive medicine. *See, e.g.*, *Antoun v. Antoun*, No. 23-0727 (Tex. filed May 2, 2024), https://perma.cc/P3ZZ-ZFW2; *LePage v. Ctr. for Reproductive Med., P.C.*, No. SC-2022-0515 (Ala. filed Feb. 23, 2024) https://perma.cc/4VTD-MS7H; *Alliance for Hippocratic Med. v. FDA*, No. 23-10362 (5th Cir. docketed May 4, 2023), ECF No. 354; *FDA v. Alliance for Hippocratic Med.*, Nos. 23-235 & 23-236, 2024 WL 399937 (U.S. filed Oct. 12, 2023).

With this amicus brief, ASRM intends to assist this Court by providing a scientific and medical perspective relevant to the parties' briefs.

SUMMARY OF THE ARGUMENT

Military service poses extraordinary challenges to service members, and service members make extraordinary sacrifices for their country. Among such sacrifices, service members face increased risks of infertility, often precisely as a result of the challenging conditions they experience as part of service, which can include a wide array of physical and mental traumas, and toxic exposure. Yet despite the sacrifices made by the military population—and the increased risks of infertility it faces—Department of Veterans Affairs ("VA") regulations and Department of

Defense ("DoD") policy often deny service members the *in vitro* fertilization ("IVF") treatment that could help them overcome infertility.

At the heart of these denials is a service connection requirement in both VA regulations and DoD policy, which requires active and former service members to prove a connection between their military service and their infertility. This requirement creates serious inequities, because infertility is a highly complicated phenomenon whose precise etiology is often impossible to determine. As a consequence, many active and former service members who have undertaken the sacrifice of military service and face increased risks of infertility will not be eligible for IVF treatment—not because their infertility is disconnected to service, but because in many instances, science has not progressed far enough for them to be able to prove the connection. The service connection requirement also creates arbitrary classes of winners and losers—awarding IVF benefits to those who happen to be able to prove the etiology of their infertility, while denying such benefits to those who cannot.

In view of these inequities, ASRM supports Plaintiff-Appellant NOW-NYC's challenge to the VA and DoD IVF policies, and urges this Court to reverse the district court's dismissal of NOW-NYC's complaint.

ARGUMENT

NOW-NYC has filed a lawsuit challenging the DoD and VA IVF policies on APA, Section 1557, and constitutional grounds. J.A.13-44 (Am. Compl.). At issue is the VA and DoD's requirement that veterans and servicemembers, respectively—populations with substantially higher rates of infertility than the general public—must prove that their infertility is causally linked to an injury or illness that occurred during their service. J.A.13-15 (Am. Compl. ¶¶ 2, 7).

Under the VA's regulations, a veteran, or the spouse of a veteran, may access IVF only if the veteran has "a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment." 38 C.F.R. § 17.380(a)(1)(i)–(ii). This means that a veteran must be able to point to an illness or injury that was "incurred or aggravated" during active duty, which resulted in the veteran's eventual need for fertility treatment. 38 U.S.C. § 101.

The DoD's policy similarly limits IVF care to active-duty service members "who have sustained a serious or severe illness/injury while on active duty that led to the loss of their ability to procreate without the use of [IVF]." J.A.100 (DoD, Memorandum, Amended Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Categories II or III) Active Duty Service Members (Mar. 8, 2024) ("Amended Policy Memo")). In addition, as the DoD policy states, the active-duty service member must also suffer an injury or illness so serious,

severe, or catastrophic that the service member is "unlikely to return to duty" and may even be "medically separated from the military." DoD Instruction 1300.24, at 14 (Dec. 1, 2009); *see also* J.A.103 (Amended Policy Memo).

NOW-NYC sued the DoD and VA alleging, among other things, that the service-connection requirement is unlawful. The district court dismissed NOW-NYC's Amended Complaint, and NOW-NYC has appealed. For the reasons below, ASRM supports NOW-NYC's appeal, and urges reversal of the district court's decision, because the VA Regulations and DoD policy that NOW-NYC challenges impose unfair and undue burdens on the military population's ability to obtain IVF.

I. VA REGULATIONS UNFAIRLY LIMIT ACCESS TO IVF TREATMENT

A. Military Service Creates Increased Risk of Infertility

While many people struggle with infertility, challenges with infertility are especially pronounced for service members, both active and former. Numerous aspects of military service present challenges to service members' physical and mental health that can adversely affect fertility in ways unique to, or more pronounced for, active-duty service members and veterans than for their civilian counterparts. These include:

- **Damage to reproductive organs.** Service members, especially those deployed to conflict zones, can suffer injuries that harm or destroy their

reproductive organs, rendering them unable to procreate.[2] For female soldiers, the protective body armor itself, typically designed for male bodies, can cause damage to reproductive organs that impedes fertility.[3]

- **Traumatic brain injury.** Service members may also suffer traumatic brain injuries, which can decrease sexual desire, lower sperm production, and increase sexual dysfunction, all of which can decrease fertility.[4]
- **Spinal cord injuries.** Spinal cord injuries, often sustained in combat, can result in paralysis, chronic pain, and other serious medical problems that adversely affect fertility.[5]
- **Post-traumatic stress disorder.** Active and former service members often experience PTSD, which can increase rates of infertility.[6] One study of female veterans found that women diagnosed with PTSD were more than

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[2] *Examining Women Veterans' Access to the Full Spectrum of Medical Care, Including Reproductive Healthcare, Through the Department of Veterans Affairs (VA) Veterans Health Administration (VHA): Hearing Before the H. Comm. on Veterans' Affs.*, 117th Cong. 2 (2022), https://perma.cc/9HDL-U64K (statement of Dr. Ginny Ryan, M.D., on behalf of ASRM).

[3] *See* Ctr. for Reprod. Rights, *Serving Those Who Serve? Access to IVF for Servicemembers and Veterans* (Aug. 6, 2020), https://perma.cc/SZF9-VWEB; Bob Woodruff Found., *Spotlight on How Military Service Can Affect Fertility* (June 27, 2023), https://perma.cc/H3K6-F4LW [hereinafter *Spotlight*].

[4] *See, e.g.*, *Spotlight*, *supra* note 3.

[5] VA, *Office of Research & Development* (June 6, 2024), https://perma.cc/M5J6-AW9A; Ctr. for Reprod. Rights, *supra* note 3.

[6] Ctr. for Reprod. Rights, *supra* note 3; *Spotlight*, *supra* note 3.

twice as likely to experience infertility as those without a mental health diagnosis, and more than six times as likely to experience sexual dysfunction.[7] Another study found male veterans with PTSD four times more likely than men without PTSD to experience erectile dysfunction, and have significantly reduced sperm motility.[8]

- **Stress and depression.** Studies have found a correlation between increased stress and longer time to pregnancy, and infertility.[9] Forms of stress and depression resulting from military service, in particular, have been associated with increased rates of infertility.[10] For example, the same study that found that female veterans with PTSD were more than twice as likely to experience infertility than veterans without PTSD made a similar finding for female veterans with depression.[11] Veterans with both PTSD

[7] Beth E. Cohen et al., *Reproductive and Other Health Outcomes in Iraq and Afghanistan Women Veterans using VA Health Care: Association with Mental Health Diagnoses*, 22 Women's Health Issues e461, 14 (2012).

[8] *Spotlight*, *supra* note 3.

[9] Abigail Mancuso et al., *Infertility and Health-Related Quality of Life in United States Women Veterans*, 29 J. Women's Health 412, 417 (2020); *see also* Ayeh Bolouki & Fatemeh Zal, *Impact of War on Fertility and Infertility*, 23 Archives Iranian Med. S16, S18–S19 (2020).

[10] *See* Bolouki & Zal, *supra* note 9, at S19.

[11] Cohen et al., *supra* note 7, at 14.

and depression were almost three times as likely to experience infertility than veterans without a mental health diagnosis.[12]

- **Adverse effects on lifestyle.** Lifestyle factors including diet, exercise, sleep, and alcohol consumption may adversely affect fertility.[13] Military service, including physical and mental trauma experienced by service members while serving, can have adverse lifestyle consequences—such as increased alcohol consumption and sleep deprivation—which in turn may adversely affect fertility.[14]
- **Prescription medications.** Certain prescription medications, including some used to treat PTSD, depression, and other service-related mental disorders, may themselves lead to complications that reduce fertility.[15]

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[12] *Id.*

[13] *See, e.g.*, Nat'l Inst. of Child Health & Hum. Dev. ("NICHD"), *What Lifestyle and Environmental Factors May Be Involved with Infertility in Females and Males?* (May 4, 2022), https://perma.cc/4YMQ-8TCH.

[14] *See, e.g.*, U.S. Gov't Accountability Off., *Lack of Sleep Has Left Our Military Less Combat Ready and More Prone to Accidents with Dire Consequences* (Apr. 11, 2024), https://perma.cc/8R47-PNK3; Nat'l Inst. on Drug Abuse, *Substance Use and Military Life DrugFacts: General Risk of Substance Use Disorders* (Oct. 2019), https://perma.cc/BF6H-PSES; Sarah Meadows et al., Rand Corp., *2018 Department of Defense Health Related Behaviors Survey* (2021); *see also* Kristin Van Heertum & Brooke Rossi, *Alcohol and Fertility: How Much Is Too Much?*, 3(10) Fertil. Rsch. Prac. 1, 3–5 (2017); Dhaia Ahmed Attia et al., *Sleep Deprivation Effect on Concentration of Some Reproductive Hormones in Healthy Men and Women Volunteers*, 11 J. Adv. Pharm. Educ. Rsch. 156, 156–59 (2021).

[15] *Spotlight*, *supra* note 3.

- **Toxic exposure.** Military service can involve exposure to radiation, chemicals, and other environmental toxins, some of which have been associated with lower sperm production and increased infertility.[16]
- **Noise exposure.** Constant noise exposure, such as to gunfire, machinery, and aircraft, has been associated with increased infertility among men.[17] Noise exposure also leads to higher rates of tinnitus among veterans, which in turn has been associated with irregular menstrual cycles among women.[18]
- **Sexual violence/assault.** According to a 2023 Department of Defense survey, 6.8 percent of active-duty service women experienced unwanted sexual contact in the prior year.[19] A 2014 study of the impact of such

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[16] *See, e.g.*, VA, *Airborne Hazards and Burn Pit Exposures*, https://perma.cc/53U9-TE22; *Spotlight*, *supra* note 3, Abigail Mancuso et al., *Lifetime Infertility and Environmental, Chemical, and Hazardous Exposures Among Female and Male US Veterans*, 227 Am. J. Obstet. Gynecol. 744.e1 (2022); Abigail Mancuso et al., *Infertility and Health-Related Quality of Life in United States Women Veterans*, *supra* note 9, at 412–13.

[17] Kyoung-Bok Min & Jin-Young Min, *Exposure to Environmental Noise and Risk for Male Infertility: A Population-Based Cohort Study*, 226 Env't Pollution 118, 122, 123 (2017).

[18] Jin-Na Yu et al., *Association Between Menstrual Cycle Irregularity and Tinnitus: A Nationwide Population-Based Study*, 9(14038) Sci. Rep. 1, 3 (2019), https://www.nature.com/articles/s41598-019-50559-5; *see also* James A. Henry, *Impact of Tinnitus on Military Service Members*, 184 Mil. Med. 604, 604–13 (2019).

[19] DoD, *Annual Report on Sexual Assault in the Military* 3 (2023).

unwanted sexual contact on women veterans found that veterans with a history of attempted or completed sexual assault were almost twice as likely to self-report infertility as those who had not experienced sexual assault.[20]

- **Deployments.** Military deployments can interfere with pregnancy. Becoming pregnant typically requires having sexual intercourse during a narrow ovulation window each month. Lengthy deployments and irregular schedules can make that challenging, if not impossible, for active-duty couples and families.[21]
- **Delaying plans to start a family.** The demands of military service lead many service members to delay starting a family until they are no longer on active duty.[22] By that time, many find they are unable to have children, given age-related declines in fertility.[23]

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[20] Ginny L. Ryan et al., *Voluntary and Involuntary Childlessness in Female Veterans: Associations with Sexual Assault*, 102 Fertil. Steril. 539, 544 (2014).

[21] *Why Are Members of the Military More at Risk for Male Infertility?*, Legacy (May 29, 2022), https://perma.cc/K86P-DSWK.

[22] *See, e.g.*, Jennifer Buechel et al., *A Grounded Theory Approach to Navigating Infertility Care During U.S. Military Service*, 189 Mil. Med. 352, 353 (2024); Kelly Kennedy, *Why Isn't Infertility in Military Women a Bigger Conversation?*, The War Horse (Feb. 26, 2020), https://perma.cc/FGU2-XJZK.

[23] *See, e.g.*, Am. Coll. of Obstetricians & Gynecologists, *Committee Opinion No. 589: Female Age-Related Fertility Decline* (2020), https://perma.cc/GB4Q-DJUR.

In view of the above, it is unsurprising that estimates of infertility among active and former service members are often high. In a 2018 survey of active duty and veteran servicewomen, for example, 37% of respondents reported struggling with infertility.[24] A 2013 survey of more than 20,000 veterans deployed to Iraq and Afghanistan in support of Operation Enduring Freedom and Operation Iraqi Freedom found that the lifetime history of infertility was 15.8% for women and 13.8% for men.[25] And a similar survey from 2022 of female veterans that served in the Gulf War found that 20.8% reported having difficulty conceiving, including 24.7% of those actually deployed to the Persian Gulf.[26]

These reported estimates are substantially higher than infertility levels the CDC has reported for the general population, which has estimated that among married or cohabiting persons in the 15–49 age range, approximately 11% of men and 8% of women are infertile.[27] These higher infertility rates among veterans and

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[24] *Spotlight*, *supra* note 3.

[25] Jodie Katon et al., *Self-Reported Infertility Among Male and Female Veterans Serving During Operation Enduring Freedom/Operation Iraqi Freedom*, 23 J. Women's Health 1, 5 (2013).

[26] Alexa Friedman et al., *Preliminary Findings from the Gulf War Women's Cohort: Reproductive and Children's Health Outcomes Among Women Veterans*, 19 Int'l J. Env't Res. Pub. Health 1, 6 (2022), https://doi.org/10.3390/ijerph19148483.

[27] Colleen N. Nugent & Anjani Chandra, CDC, *National Health Statistics Reports Number 202: Infertility and Impaired Fecundity in Women and Men in the United States, 2015–2019* (Apr. 24, 2024), https://perma.cc/U52M-PRR4.

active service members are unsurprising, given the extraordinary challenges faced by service members that can impair fertility.

B. Many Infertile Veterans Are Denied IVF, Even When Infertility Likely Stems from Military Service

For active and former service members struggling with infertility, IVF treatments offer hope. In IVF, eggs are surgically retrieved and fertilized using a sperm sample in a laboratory, and one or more of the resulting embryos are transferred into the woman's uterus.[28] IVF is generally the most effective form of assisted reproductive technology,[29] and has helped numerous infertile couples to conceive. In many cases, IVF may be the most promising means for infertile veterans and service members to conceive.[30]

Yet, despite the increased risks of infertility faced by the military population, VA regulations often stand in the way of infertile veterans from obtaining the IVF treatment they need. Veterans seeking IVF treatment must satisfy the VA's regulations requiring veterans to prove a service-connected disability that "results in the inability of the veteran to procreate without the use of fertility treatment." 38

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[28] NICHD, *Assisted Reproductive Technology* (June 18, 2024), https://perma.cc/YJ3U-KNQ6.

[29] *See*, *e.g.*, NOW-NYC Br. 1; ASRM Prac. Comm., *Evidence-Based Treatments for Couples with Unexplained Infertility: A Guideline*, 113 Fertil. Steril. 305, 316 (2020).

[30] *See*, *e.g.*, *id*. at 316.

C.F.R. § 17.380(a)(1)(i)–(ii). This service connection requirement unfairly excludes many infertile veterans from IVF treatment because (1) as a scientific matter, it is often impossible to pinpoint the root medical condition giving rise to infertility; (2) even where the medical condition giving rise to infertility can be identified, proving that the medical condition is connected to military service is often not possible; and (3) increased age, though often resulting in infertility and a direct result of military service, is not deemed a service-connected injury or illness and therefore does not qualify a veteran for IVF.

1. Diagnosing a Medical Cause of Infertility Is Often Impossible

To obtain IVF under VA regulations, a male veteran must show "a service-connected injury or illness that prevents the successful delivery of sperm to an egg," while a female veteran must generally demonstrate "a service-connected injury or illness that prevents the egg from being successfully fertilized by sperm." 38 C.F.R. § 17.380(a)(2). To meet such requirements, veterans must generally identify the medical condition causing their infertility. J.A.28, 30 (Am. Compl. ¶¶ 67, 72).[31] But this is often not possible, and approximately 15–30% of infertility cases are found

[31] *See also* Maya Dawson, *Expanded IVF Benefits for Veterans Don't Solve Access Problems, Advocates Say*, KOMU.com (Sept. 15, 2024), https://perma.cc/3CYY-EPQX (quoting Paralyzed Veterans of America).

to be unexplained or idiopathic.[32] In such cases, service members will generally be ineligible for IVF coverage, because the military will conclude that there is no condition that can be considered a service-connected injury or illness.

As discussed below, there are several reasons why many infertility cases cannot be explained.

Complexity of Reproductive Systems and Conditions Contributing to Infertility. Human reproductive physiology is extraordinarily complex—especially for women—and there are numerous potential physiological reasons for infertility. Achieving pregnancy requires the successful operation of intricate physiological and hormonal processes, involving every organ of the female reproductive system, and everything must happen in the right way and at the right time for a pregnancy to occur. This includes:

- **Ovulation**. A woman must produce an egg for a pregnancy to occur.[33] If a woman has no eggs, or for other reasons does not ovulate, a pregnancy cannot occur.

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[32] *E.g.*, ASRM Prac. Comm., *Evidence-Based Treatments for Couples with Unexplained Infertility*, *supra* note 29, at 305; Stephanie Edmonds et al., *Infertility Services for Veterans: Policies, Challenges, and Opportunities*, 37 Seminar Reprod. Med. 12, 13 (2019).

[33] Cleveland Clinic, *Ovulation* (July 28, 2022), https://perma.cc/UZ6P-CRAN.

- **Fertilization.** The egg must be fertilized, which typically occurs in the fallopian tubes within 12–24 hours of ovulation.[34] If the egg does not travel from the ovaries to the fallopian tubes, does not encounter sperm in the fallopian tubes or the uterus, or the sperm does not penetrate the outer layer of the egg and fuse with the membrane, a pregnancy cannot occur.[35]
- **Implantation.** Even when there is a fertilized egg, it must successfully implant in the lining of the uterus (called the endometrium) for a pregnancy to occur.[36] Successful implantation allows the embryo to develop into a fetus. If implantation is not successful, or is not successfully maintained, a pregnancy cannot be sustained.[37]

Each of the general processes above is extraordinarily complex, and many couples experience infertility because a wide array of problems can occur at each of the steps above. Some of these difficulties are briefly discussed below.

Problems with ovulation. Women fail to ovulate for numerous reasons, often involving the regulation of reproductive hormones by the hypothalamus or the pituitary gland. Ovulation disorders include:

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[34] Cleveland Clinic, *Conception* (Sept. 6, 2022), https://perma.cc/KWE9-283Z.

[35] *Id.*; Johnson Alberts et al., *Fertilization*, *in Molecular Biology of the Cell* (4th ed. 2002), https://www.ncbi.nlm.nih.gov/books/NBK26843/.

[36] Cleveland Clinic, *Blastocyst* (Apr. 29, 2022), https://perma.cc/5UF6-FCB7.

[37] *Id.*

- **Polycystic ovary syndrome (PCOS)**, a condition in which the ovulation-inducing hormones fail to stimulate the release of eggs from the preovulatory follicles;[38]
- **Hypogonadotropic hypogonadism,** a form of hypothalamic-pituitary dysfunction in which the pituitary gland fails to produce the hormones responsible for stimulating ovulation;[39]
- **Primary ovarian insufficiency**, a condition in which the ovaries prematurely cease to function normally;[40]
- **Hyperprolactinemia**, a condition in which the production of excess prolactin interferes with the secretion of luteinizing and follicle-stimulating hormones—hormones essential for ovulation—and thus disrupts ovulation.[41]

Problems with fertilization. There are also many reasons that fertilization may not occur, including but not limited to the following:

[38] Diana Hamilton-Fairley & Alison Taylor, *Anovulation*, 327 Brit. Med. J. 546, 546–47 (2003).

[39] *Id.* at 546.

[40] *Id.* at 547; Mayo Clinic, *Female Infertility* (Aug. 27, 2021), https://perma.cc/3SSK-Z2LU.

[41] Ursula B. Kaiser, *Hyperprolactinemia and Infertility: New Insights*, 122 J. Clinical Invest. 3467, 3467 (2012).

- **Damage to fallopian tubes (tubal infertility)**, damaged or blocked fallopian tubes can prevent sperm from getting to the egg, or block the passage of the fertilized egg into the uterus;[42]
- **Cervical issues**, the cervix can interfere with sperm getting to the egg, such as with cervical stenosis (a narrowing of the cervix), and can also fail to produce the type of mucus needed for effective sperm transport;[43]
- **Issues with sperm quality**, problems with sperm quality can also prevent or impede fertilization, including (1) low sperm count; (2) poor sperm motility, in which sperm are less able to swim effectively to reach the egg; (3) abnormal sperm morphology, in which sperm have an unusual shape, which may make it difficult to penetrate the egg; and (4) immaturity, in which sperm are not fully developed and cannot fertilize an egg;[44]
- **Issues with egg quality**, problems with the quality of a woman's eggs may further pose complications for fertilization, such as structural or genetic

[42] Mayo Clinic, *supra* note 40.

[43] *Id.*

[44] NICHD, *What Are Some Possible Causes of Male Infertility?* (Jan. 31, 2017), https://perma.cc/JQL3-MRYV; ASRM, *Reproductive Facts*: *Sperm Morphology (Shape): Does It Affect Fertility?* (2023), https://perma.cc/8BC4-48QB.

problems that can result in an abnormal embryo that is non-viable or at risk for miscarriage.[45]

Problems with implantation. Beyond problems with ovulation and fertilization, there are also many reasons that a fertilized egg may not successfully implant in the uterine wall, including hormonal imbalances and uterine and endometrial abnormalities.[46] Uterine fibroids are one common cause of implantation failure, because fibroids can distort the shape and size of the uterus, creating an environment that is less hospitable for implantation, and disrupt the flow of blood and nutrients the embryo needs to implant and develop.[47] Poor egg quality may also contribute to implantation failure, as oocytes with chromosomal abnormalities may result in nonviable preimplantation embryos.[48]

Because numerous physiological conditions may prevent pregnancy from occurring, it is often difficult—or not possible at all—to pinpoint the precise medical condition giving rise to infertility.

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[45] ASRM, *Age and Fertility* 5 (2012), https://perma.cc/H5ZF-FTT6.

[46] NICHD, *What Are Some Possible Causes of Female Infertility?* (Jan. 31, 2017), https://perma.cc/Z6KH-GCHE.

[47] *Id*; Mayo Clinic, *supra* note 40.

[48] ASRM, *Age and Fertility*, *supra* note 45, at 5; Danilo Cimadomo et al., *Impact of Maternal Age on Oocyte and Embryo Competence*, 9(327) Frontiers Endocrinol. 1, 4 (2018).

Infertility may come from one or both partners. Further increasing the challenge of diagnosing infertility is that the condition(s) giving rise to infertility may reside in either or both partners. As with women, male infertility can arise from a variety of potential medical conditions. In men, these include (1) issues with ejaculation, such as retrograde ejaculation and erectile dysfunction, or tubule defects, including blockages of the testicle, tubes, epididymis, vas deferens, ducts, or urethra; and (2) sperm defects, including with respect to morphology, motility, concentration, and volume, which in turn can be negatively impacted by various hormonal imbalances, chronic conditions or infections, varicocele or other testicular conditions, undescended testicles, prior surgery, and chromosomal and genetic defects.[49]

Moreover, infertility is often the result of a combination of factors in both men and women, and in up to half of infertility cases with an identified cause, abnormalities are found in both partners.[50] Diagnosing infertility thus often means going through the diagnostic wringer for two patients instead of one—and then

[49] *See* NICHD, *What Are Some Possible Causes of Male Infertility?*, *supra* note 44; Am. Urological Ass'n & ASRM, *Diagnosis & Treatment of Infertility in Men: AUA/ASRM Guideline* 6 (2024); Stephen W. Leslie et al., *Male Infertility*, NCBI Bookshelf (Feb. 25, 2024), https://www.ncbi.nlm.nih.gov/books/NBK562258.

[50] Edmonds et al., *supra* note 32, at 14–15.

trying to identify the interaction of conditions in each partner that could be impeding procreation.

No single test to diagnose the reason for infertility. Compounding the problems of diagnosing infertility is that no single test can diagnose all potential medical conditions that might be causing infertility.[51] Because of the numerous possible medical conditions that can result in infertility, the effort to reach a diagnosis is essentially a process of elimination. Even when one condition or abnormality is identified, it may not be sufficient to explain infertility, because infertility often results from more than one abnormality. In fact, approximately 25% of couples experiencing infertility have multiple contributing factors.[52]

Moreover, in women in particular, diagnostic tests can be especially challenging to carry out, because they often require assessment of biological processes and anatomy *inside the body*—and more so than with men. For example, egg quality may be affected by a variety of environmental exposures.[53] Yet, because ovulation and fertilization occur within a woman's body, it is often difficult to assess

[51] Cleveland Clinic, *Unexplained Infertility* (June 7, 2022), https://perma.cc/T8RU-XFCL.

[52] *E.g.*, ASRM, *Infertility: An Overview* 4 (2017), https://perma.cc/P6R4-33S5.

[53] Meaghan Jain et al., *Environmental Toxins and Infertility*, NIH Bookshelf (Jan. 19, 2025), https://perma.cc/8QBT-R2GX.

the quality of an egg or embryo, especially in the absence of IVF. This can make assessment of female infertility especially difficult.

Unidentified medical conditions potentially linked to infertility. Also compounding unexplained infertility is that the science of infertility is still evolving, and not all medical conditions responsible for infertility appear to have been identified. For example, research has identified a potential link between autoimmune disorders (including lupus, Hashimoto's disease, thyroiditis, and rheumatoid arthritis) and female infertility, but the relationship is not yet understood.[54] By way of another example, the pathologies underlying the relationship between trauma and fertility difficulties are still being explored.[55]

As a consequence of the difficulty of diagnosing the condition giving rise to infertility, many veterans are denied IVF treatment. In many cases, this is not because their infertility is unrelated to service, but because science has not progressed far enough for veterans to be able to prove that their infertility is a service-connected illness or injury, or even that their infertility flows from any illness or injury at all.

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[54] NICHD, *What Are Some Possible Causes of Female Infertility?*, *supra* note 46.

[55] *See, e.g.*, Christine Hahn et al., *Exposure to Traumatic Events, Emotion Regulation, and Traumatic Stress Among Infertility Patients: A Moderation Analysis*, 24 Hum. Fertil. 136, 141–43 (2019).

2. Even When the Underlying Medical Condition Giving Rise to Infertility Can Be Diagnosed, Demonstrating a Service Connection Is Often Not Possible

A further impediment to obtaining IVF treatment under VA regulations is that, even when the medical condition underlying a veteran's infertility can be diagnosed, it is often not possible to prove the medical condition was caused by military service.

A veteran seeking to establish a link between a service event and his or her infertility must generally show the service event is "at least as likely as not" the cause of their infertility. *See, e.g.*, *McPherson v. McDonough*, No. 22-7088, 2024 WL 4002580, at *1 (Vet. App. Aug. 30, 2024) (citation and internal quotation marks omitted). Making this showing in the face of more than one possible cause of infertility can be difficult, if not impossible. *Gross v. Peake*, No. 06-2371, 2008 WL 3895520, at *4–6 (Vet. App. Aug. 5, 2008) (affirming a Board of Veterans' Appeals determination that a veteran's infertility was not service connected because it was "less likely as not" that the veteran's infertility was caused by in-service treatment of gonorrhea than by a disease he had in childhood (citation and internal quotation marks omitted)).

Indeed, this standard can present major challenges to proving a service connection, because many of the medical conditions that give rise to infertility have numerous potential causes. As a consequence, pinpointing the true cause among

several possible causes—and proving that such true cause is military service—may prove impossible for many service members.

For example, PCOS is the most common cause of ovulation troubles, and accountable for 30% of female infertility cases.[56] But PCOS does not have a single known cause—it is driven by a combination of genetic and environmental factors, including exposure to toxins as well as diet and lifestyle choices.[57] Even in cases in which a veteran has been able to determine that the medical condition explaining her infertility is PCOS, it will often not be possible for her to show that her PCOS was connected to military service, as opposed to being caused by numerous other exposures or lifestyle choices made during her time as a civilian. *See also, e.g.*, *Goodson v. McDonough*, No. 23-2682, 2024 WL 1854498, at *1 (Vet. App. Apr. 29, 2024) (declining to find service connection for a diagnosis of uterine fibroids, and thus declining to provide benefits associated with a hysterectomy, because "[t]he etiology of [the] fibroids was unclear and appeared to be a consequence of hormonal factors and consumption of certain foods and alcohol" rather than military service (citation and internal quotation marks omitted)).

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[56] Diana Hamilton-Fairley & Alison Taylor, *Anovulation*, 327 Brit. Med. J. 546, 546 (2003).

[57] Samradi Singh et al., *Polycystic Ovary Syndrome: Etiology, Current Management, and Future Therapeutics*, 12(4) J. Clinical Med. 1, 1–2 (2023), https://doi.org/10.3390/jcm12041454.

The difficulty of establishing a connection between infertility and military service is further compounded by the fact, as the VA has acknowledged, the link between military service and infertility is understudied.[58] Thus, even though several studies indicate that there is an association between infertility and various aspects of military service (such as increased exposure to noise, chemicals, and sexual violence), a conclusive causal link between these aspects of service and infertility may be elusive. *See, e.g.*, Ryan et al., *supra* note 20, at 546 (explaining that "unmeasured confounders" meant that researchers "[could not] say that attempted or completed sexual assault caused [the] subjects' reproductive outcomes"). In such cases, veterans may not be able to prove that aspects of their military service caused their infertility, even though a plausible association exists. *See, e.g.*, *O'Connell v. McDonough*, No. 22-1720, 2023 WL 6210881, at *6 (Vet. App. Sept. 25, 2023) (affirming a Board of Veterans' Appeals decision denying benefits where "the [medical] examiner went on to opine that the medical literature did not show a link between the chemicals [the veteran] was exposed to during service and male infertility" (citation omitted)); *Allen v. McDonough*, No. 23-2621, 2024 WL 2853640, at *3 (Vet. App. June 6, 2024) (discussing the Board's use of "current

[58] *See, e.g.*, Pls.' Opp'n to Mot. to Dismiss, Ex. C at 5, *Nat'l Org. of Women-New York City v. Dep't of Def.*, No. 1:23-cv-06750 (S.D.N.Y. Apr. 19, 2024), ECF No. 57-3.

literature" to conclude that "the [appellant's] previous pelvic prolapse and the resulting hysterectomy surgery [were] not related to [military] service or the activities performed in the service" (first alteration in original)).

In addition, the time elapsed between a veteran's military service and the veteran's application for IVF treatment can further impede proving a service connection, because there may be multiple potential causes of a veteran's infertility—some arising after service. In such instances, proving that infertility occurred as a result of events *during* service—as opposed to events occurring *after* service—may not be possible.

This difficulty is especially pronounced in instances in which a veteran did not seek medical care for an illness or injury during service. In such instances—where there is no contemporaneous documentation of an illness or injury incurred during service—the VA or Board of Veterans' Appeals may be especially inclined to find absence of a connection between a veteran's present infertility and their past military service. *See, e.g.*, *Williams v. Shinseki*, No. 07-2548, 2013 WL 1003655, at *2 (Vet. App. Mar. 14, 2013) (explaining a Board decision that denied service connection because the veteran's service medical records were "negative for any complaints or diagnoses of infertility or sterility" and even though the veteran "reported that he and his wife were studied . . . because they could not conceive, evidence in support of this contention [was] not of record" (citations and internal

quotation marks omitted)). Veterans may face such denials even though, in many instances, aspects of military service that cause infertility may not manifest until after the completion of service, as in the case of exposure to ionizing radiation, which negatively impacts male fertility, but which may not be evident until after military service.[59]

3. Declines in Fertility Caused by Aging While in the Military Will Not Satisfy the Service-Connection Requirement

A further inequity of the VA's service requirement concerns its treatment of aging. Age is a major cause of infertility, and many service members become infertile precisely as a result of aging during their military service.[60]

In women, aging leads to infertility for a variety of reasons, including that the number and quality of eggs declines with age, making it harder to conceive and increasing the risk of miscarriage.[61] In men, age-related fertility declines have been linked to decreased sperm quality (*e.g.*, semen volume, sperm count, motility,

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[59] Sarah C. Krzastek et al., *Impact of Environmental Toxin Exposure on Male Infertility Potential*, 9 Translational Androl. Urol. 2797, 2802–03 (2020); *see also* Marcin Wróblewska et al., *The Role of Selected Elements in Oxidative Stress Protection: Key to Healthy Fertility and Reproduction*, 25 Int'l J. Molecular Sci. 9409 (2024).

[60] David B. Dunson et al., *Increased Infertility with Age in Men and Women*, 103 Obstet. Gynecol. 51, 54 (2004).

[61] Cimadomo et al., *supra* note 48, at 1; Angena Agenor & Sohinee Bhattacharya, *Infertility and Miscarriage: Common Pathways in Manifestation and Management*, 11 Women's Health 527, 527 (2015).

morphology, and DNA integrity), as well as adverse reproductive outcomes, including pregnancy loss and stillbirths.[62]

Age-related fertility declines are particularly pronounced in women, and age is the single most important predictor of female fecundity.[63] Between the ages of 18 and 24, a woman's fertility reaches its peak; after that, it gradually declines until the age of 27, when it abruptly drops off.[64] Around the age of 35, fertility declines even more dramatically.[65]

As a result, in numerous cases, veterans experience the loss of fertility precisely as a result of their military service—and in particular, from aging during that service. Take, for instance, a woman who enters the military fertile at age 21, but who leaves the military infertile at age 36. While such a woman likely experiences this loss of fertility precisely as a result of aging during military service, nothing in the VA regulations would treat this loss of fertility as a service-connected "disability" that "results in the inability of the veteran to procreate without the use of fertility treatment." 38 C.F.R. § 17.380(a)(1)(i)–(ii). Thus, in cases like this one,

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[62] Aris Kaltsas et al., *Impact of Advanced Paternal Age on Genetic Disorders in Offspring*, 15 Genes 1, 14 (2023).

[63] ASRM Prac. Comm., *Fertility Evaluation of Infertile Women: A Committee Opinion*, 116 Fertil. Steril. 1255, 1258 (2021).

[64] Emmanuel I. Obeagu et al., *Infertility: Prevalence & Consequences*, 10 Int'l J. Current Rsch. Chem. Pharm. Sci. 43, 45 (2023).

[65] *Id.*

the infertile veteran would be forced to cover the cost of IVF herself, even though she sacrificed her reproductive prime to serve her country.

Moreover, for many service members, starting a family during their active service—a potential way to address declining fertility—is not a viable option. There are many reasons active-duty service members—who later become veterans—must defer starting a family until after military service,[66] including that (1) there is often a need to be mission-ready or physically fit;[67] (2) military service may not be conducive to raising a young child;[68] and (3) deployments, changes of station, and separation from partners make conception impossible.[69]

4. The Net Effect of VA Regulations Is to Leave Many Infertile Veterans Without Access to IVF Treatment

The net effect of the VA regulations is that many veterans who made sacrifices to their country that adversely affected their fertility cannot access IVF treatment. As NOW-NYC observes in its brief, a 2023 VA report on fertility treatments between FY 2018 and 2022 found that over the five-year study period, only 541 patients completed a cycle of IVF. U.S. Dep't of Veterans Affs., *Report to Congress*

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[66] Buechel et al., *supra* note 22, at 353.

[67] *Id.* at 355.

[68] Kennedy, *supra* note 22.

[69] Ariel J. Dunn et al., *Impact of Family Planning Decisions Among Women in the U.S. Military*, 122 Fertil. Steril. e103 (2024) (conference abstract); *see also* Buechel et al., *supra* note 22, at 365.

on Fertility Treatment Data 15 (2023), https://perma.cc/MRC5-65D9. This is true even though, in any given three-year period, over 17,000 veterans are diagnosed with infertility. J.A.130 ¶ 5 (2021 VA Infertility Study). Such data reveals that the United States military is falling short on providing IVF.

Moreover, the VA regulations impose a particularly undue burden on women's access to IVF treatment. While the effect of military service on infertility remains understudied, recent data reported by the military indicates that both infertility generally and diagnosis codes for "unspecified infertility" (a proxy for unexplained infertility), are much more frequently reported in military women than military men.[70] *See* J.A.131 tbl 1.1., J.A.176 fig. A1, J.A.182 Fig. 7 (infertility reported to be more than 10 times higher in military women than men, and unspecified infertility diagnoses 14 times greater prevalence in military women). Because unexplained infertility generally translates to denials of IVF treatment—and because data indicates that female service members have higher rates of infertility and unexplained infertility—military women are especially likely to experience IVF treatment denials as a result of the military's service connection

[70] Increased unexplained infertility in women may arise from the fact that diagnosing infertility in women often poses especially difficult challenges, including studying internal organs and biological processes, and to a greater extent than with men. *See supra* Section I.B.1.

requirement. The military needs to do better for its infertile service members—especially women.

II. DOD POLICY ALSO UNFAIRLY LIMITS ACCESS TO IVF TREATMENT

While infertile veterans must pursue IVF treatment from the VA, active-duty service members must seek IVF treatment from the DoD. As with the VA's regulations, the DoD's policy also imposes a service connection requirement, *see* J.A.99 (Amended Policy Memo), and thus poses the same inequities as the VA regulations. As with the VA regulations, active-duty service members with unexplained infertility will not be able to prove a service connection under DoD policy. *See supra* Section I.B.1. And, as with VA regulations, the DoD policy often fails to extend IVF treatment to many service members who have incurred infertility as a result of military service. *See supra* Section I.B.

In fact, DoD policy goes especially far in denying active service members IVF treatment, even in many cases in which a causal link between infertility and a medical condition incurred during service can be established. This is the result of the DoD's requirement that an active service member must prove that their infertility is the result of a "Category II" or "Category III" injury or illness. *See* J.A.103 (Amended Policy Memo). A "Category II" illness or injury is "serious," such that the service member is "unlikely to return to duty within a time specified by his or her Military Department," and "[m]ay even be medically separated from the

military," whereas a Category III illness or injury is "severe or catastrophic," such that the service member is "highly unlikely to return to duty," and "[w]ill most likely be medically separated from the military." *See* DoD Instruction 1300.24, at 14. Because many medical conditions giving rise to infertility will not be considered "serious," "severe," or "catastrophic," many active service members will not be eligible for IVF treatment—even if they able to identify a medical condition incurred during service that is the undisputed cause of their infertility.

For example, while ovulation disorders are a common cause of infertility, few if any ovulation disorders would be sufficiently "serious," "severe," or "catastrophic" to result in the service member likely being "medically separated" or "unable to return to duty"—and thus not Category II or III illnesses that would qualify that service member for IVF treatment. The same would be true with many medical conditions that impede successful implantation and fertilization, such as issues with egg and cervical mucus quality, or semen quality. And loss of infertility resulting from aging while in military service would not be eligible for IVF treatment under DOD policy either, because aging is not an "injury" or "illness"—let alone a "serious" or "severe" one.

Thus, as with VA regulations, DoD IVF policy fails numerous infertile service members—not just in cases of unexplained infertility, but also in many instances in

which a link to military service is clear. The DoD IVF policy, like the VA IVF regulations, should be overturned.

CONCLUSION

For the foregoing reasons, ASRM supports NOW-NYC's appeal, and urges this Court to reverse the district court's judgment.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

In compliance with Federal Rules of Appellate Procedure 29(a)(4)(G), 29(a)(5), 32(a)(5)(A), and Circuit Rules 29.1(c) and 32.1(a)(4)(A), this amicus brief uses a proportionally spaced typeface, 14-point Times New Roman font, and contains 6,858 words, excluding those parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). As permitted by Federal Rule of Appellate Procedure 32(g)(1), the undersigned relied on the word count feature of Microsoft Word in preparing this certificate.

April 11, 2025

/s/ Eric R. Sonnenschein
Eric R. Sonnenschein