25-71

United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 25-71

NATIONAL ORGANIZATION FOR WOMEN — NEW YORK CITY,

Plaintiff-Appellant,

—v.—

U.S. DEPARTMENT OF DEFENSE, and U.S. DEPARTMENT OF VETERANS AFFAIRS,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF OF *AMICI CURIAE* NATIONAL MILITARY FAMILY ASSOCIATION (NMFA) AND BLACK VETERANS PROJECT (BVP) SUPPORTING PLAINTIFF-APPELLANT

Andrew T. Tutt
Jennifer F. Kaplan
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

Counsel for Amici Curiae National Military Family Association (NMFA) and Black Veterans Project (BVP)

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

INTRODUCTION 3

ARGUMENT 3

I. ACCESS TO IVF IS CRITICAL TO THE HEALTH AND WELLNESS OF ACTIVE-DUTY SERVICE MEMBERS AND VETERANS AND TO MILITARY READINESS, AS THE AVAILABILITY OF MILITARY HEALTH BENEFITS AFFECTS RECRUITMENT AND RETENTION. 3

A. There are thousands of active-duty service members and veterans who may need access to IVF. 3

B. Active-duty service member and veteran access to IVF is vital to military retention and readiness. 5

C. Access to IVF has fundamentally changed the lives of numerous active-duty service members and veterans. No active-duty service member or veteran should be denied IVF. 7

D. The service-connected infertility requirement unfairly penalizes active-duty service members and veterans whose infertility may be difficult or impossible to prove, and/or may be secondary to an already service-connected condition(s). 10

CONCLUSION 11

CERTIFICATE OF COMPLIANCE 12

CERTIFICATE OF SERVICE 13

TABLE OF AUTHORITIES

Page(s)

Other Authorities

Becca Stanek, *IVF Success Rates by Age In 2024*, Forbes Health (Sept. 18, 2023), https://bit.ly/4b6iRkS 6

Blue Star Fams., 2021 Military Family Lifestyle Survey Comprehensive Report 31 (2022), https://bit.ly/4l5k4yC 5

Britta Lokting, *How the US Military's Fertility Policies Are Leaving Women to Suffer*, The Nation (May 18, 2023), https://bit.ly/4la1yFu 8

In vitro fertilization (IVF), Mayo Clinic, https://bit.ly/3VUlt0P 3-4

Infertility: The Impact of Stress and Mental Health (Apr. 17, 2019), https://bit.ly/4b5WQ5C 7

Infertility, Mayo Clinic (Sept. 13, 2023), https://bit.ly/49UpSUQ 6

Katherine Schaeffer, *The Changing Face of America's Veteran Population*, Pew Rsch. Ctr. (Nov. 8, 2023), https://pewrsr.ch/3sz5lpc 4

Lindsay Mahowald, *LGBTQ+ Military Members and Veterans Face Economic, Housing, and Health Insecurities*, Center for American Progress (Apr. 28, 2022), https://bit.ly/3TZBr7i 5

Maite Amorebieta et al., *Service members and veterans are fighting for the right to fertility treatments*, NBC News (May 9, 2024), https://nbcnews.to/3FJ4f0m 4, 8

Marissa Conrad, *How Much Does IVF Cost*, Forbes Health (Aug. 14, 2023), https://bit.ly/4dcXD6G 6

Mental Health Implications of Infertility, VA (Apr. 5, 2022), https://bit.ly/3QfJQm4 6-7

Paralyzed veterans advocate for permanent fertility benefits, Denver 7 ABC (June 19, 2020), https://bit.ly/3Qipb0M 9

U.S. Dep't of Defense, *2023 Demographics, Profile of the Military Community*, Military OneSource, https://bit.ly/4kZjthY 4

Unexplained Infertility, Cleveland Clinic (June 7, 2022), https://bit.ly/44wpjzP 7

INTEREST OF *AMICI CURIAE*[1]

National Military Family Association (NMFA) is the leading nonprofit dedicated to serving all military families. Since 1969, NMFA has worked with families to identify and solve the unique challenges of military life through advocacy and diverse programming. NMFA provides scholarships for military spouses, camps for military kids, and programs for military teens. Its research creates a better understanding of the experience of today's military families. NMFA serves the families of the currently serving, veteran, retired, wounded or fallen members of the Army, Marine Corps, Navy, Air Force, Space Force, Coast Guard, and Commissioned Corps of the USPHS and NOAA.

The Black Veterans Project (BVP) is a 501(c)(3) nonprofit organization deploying a restorative justice strategy leveraging research-backed narrative storytelling, public advocacy, and impact litigation to combat the legacy of racial discrimination in access to benefits

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation of or submission of this brief. No one other than the *amici curiae* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this *amici* brief.

experienced by Black veterans and their families. BVP envisions a future where the service of all veterans is honored and protected. BVP strives for a society that embodies equity, empowering those who have served, celebrating their contributions, and granting them full access to the benefits and resources they've earned.

NMFA and BVP have a substantial interest in the issue presented in this case. Active-duty service members, veterans, and their families rely on healthcare provided by the Department of Defense ("DoD") and the Department of Veterans Affairs ("VA") to carry on productive, healthy lives. For those individuals that NMFA and BVP serve who dream of starting a family, living a productive and healthy life includes access to reproductive healthcare, such as in vitro fertilization ("IVF"). Left undisturbed, the "service-connected" infertility requirement for IVF treatment unfairly penalizes active-duty service members and veterans whose cause of infertility may be difficult to prove and/or may be secondary to an already service-connected condition(s). NMFA and BVP offer wide-lens perspectives on the requirement's detrimental effects on active-duty service members and veterans and maintains that IVF

treatment should be included as part of the general medical benefits package available to them through the DoD and VA.

INTRODUCTION

IVF is a key aspect of reproductive healthcare for America's active-duty service members and veterans. Many active-duty service members and veterans, including those diagnosed with infertility, may require IVF to begin or grow their families. The "service-connected" infertility requirement is depriving these active-duty service members and veterans access to critical reproductive healthcare. The service-connection requirement for IVF coverage should be rescinded.

ARGUMENT

I. ACCESS TO IVF IS CRITICAL TO THE HEALTH AND WELLNESS OF ACTIVE-DUTY SERVICE MEMBERS AND VETERANS AND TO MILITARY READINESS, AS THE AVAILABILITY OF MILITARY HEALTH BENEFITS AFFECTS RECRUITMENT AND RETENTION.

A. There are thousands of active-duty service members and veterans who may need access to IVF.

IVF is a series of procedures and treatments that can result in a pregnancy and is a critical treatment for many people hoping to grow their families who find themselves unable to procreate unassisted. *In*

vitro fertilization (IVF), Mayo Clinic, https://bit.ly/3VUlt0P. IVF is a remarkable treatment, allowing those who could not otherwise have a child to grow their families. This impacts miliary families and NMFA and BVP members broadly, and includes, among others, individuals who have been diagnosed with infertility, those who identify as LGBTQ+, and those with disabilities that interfere with reproduction.

There are thousands of active-duty service members and veterans who may require IVF for a variety of reasons. Moreover, they may suffer higher rates of infertility than others. Maite Amorebieta et al., *Service members and veterans are fighting for the right to fertility treatments*, NBC News (May 9, 2024), https://nbcnews.to/3FJ4f0m ("In a 2018 survey, 37% of active-duty women said they struggled with infertility, a rate that is three times the national average."). Over 200,000 women serve in active duty and there are approximately 2 million female veterans. U.S. Dep't of Defense, *2023 Demographics, Profile of the Military Community*, Military OneSource, https://bit.ly/4kZjthY; Katherine Schaeffer, *The Changing Face of America's Veteran Population*, Pew Rsch. Ctr. (Nov. 8, 2023), https://pewrsr.ch/3sz5lpc. There are roughly 79,000 LGBTQ+ active-duty service members and an estimated 1 million LGBTQ+

veterans. Lindsay Mahowald, *LGBTQ+ Military Members and Veterans Face Economic, Housing, and Health Insecurities*, Center for American Progress (Apr. 28, 2022), https://bit.ly/3TZBr7i. While it is true that any service member, regardless of gender or sexual orientation, may require IVF treatment, women, LGBTQ+ individuals, and people with disabilities are more likely than others to require IVF to grow their families. And the number of active-duty service members and veterans who may require IVF increases every day.

B. Active-duty service member and veteran access to IVF is vital to military retention and readiness.

Active-duty service members and veterans have identified family building challenges as one of the reasons they would leave the military. Blue Star Fams., 2021 Military Family Lifestyle Survey Comprehensive Report 31 (2022), https://bit.ly/4l5k4yC. Ensuring that our active-duty service members and veterans have generous healthcare and compensation benefits available during and after their service, including the finances and healthcare necessary to grow and support their families, provides the kind of economic, social, and emotional support that contributes to military readiness.

The cost of IVF can place immeasurable burdens on active-duty and veteran families. IVF is an expensive procedure even when covered by health insurance. But when families must pay for IVF out of pocket, they must pay tens of thousands of dollars for just a single round of treatment. And not every family obtains desired results in a single round of IVF. Marissa Conrad, *How Much Does IVF Cost*, Forbes Health (Aug. 14, 2023), https://bit.ly/4dcXD6G. Depending on age and health, families may need to go through as many as six rounds of IVF. Becca Stanek, *IVF Success Rates by Age In 2024*, Forbes Health (Sept. 18, 2023), https://bit.ly/4b6iRkS. This can require individuals and families to spend hundreds of thousands of dollars simply to start or grow their families.

A requirement to prove a connection between infertility and a time in military service places yet more burdens on active-duty service members, veterans, and their families. Infertility can be caused by any number of experiences or conditions. *Infertility*, Mayo Clinic (Sept. 13, 2023), https://bit.ly/49UpSUQ. Of course, infertility can be caused by physical injury suffered on the battlefield. But it can also result from exposure to hazardous materials during service, or even from mental health conditions stemming from service. *Mental Health Implications of*

Infertility, VA (Apr. 5, 2022), https://bit.ly/3QfJQm4; *Infertility: The Impact of Stress and Mental Health*, Pyschiatry.org (Apr. 17, 2019), https://bit.ly/4b5WQ5C.

With so many possible causes, proving that infertility is connected to service when the connection is not a physical injury is next to impossible for the average active-duty service member or veteran. Sometimes infertility cannot be explained at all. *Unexplained Infertility*, Cleveland Clinic (June 7, 2022), https://bit.ly/44wpjzP. Under current regulations, even active-duty service members and veterans with a service-connected diagnosis that is *known to cause infertility* are still required to prove that their infertility is service-related. Without guaranteed access to IVF treatments, active-duty service members and veterans face unnecessary financial and family planning stress.

C. Access to IVF has fundamentally changed the lives of numerous active-duty service members and veterans. No active-duty service member or veteran should be denied IVF.

Over the years, limited coverage for IVF has helped numerous active-duty service members and veterans realize their dreams of starting or growing their families. Their stories show that no active-duty

service member or veteran should be denied the healthcare necessary to bring new life into the world.

Jacquelyne Nichols, a former aviator in the Marines, and her husband, who also served in the Marines, struggled to conceive when she returned home from a deployment in Qatar in 2018. As of May 2024, she was undergoing IFV and qualified for the costs to be covered by the VA. However, she describes her experience getting the VA to pay for her benefits as a "fight" and "basically a full-time job to make sure [she's] getting what [she] needs." Amorebieta et al., *supra* at 4.

Julie Eshelman and her husband, an active-duty serviceman in the Army Reserve, started trying to build their family in 2016. After suffering three miscarriages, they had a successful IVF, but it cost them $20,000 and five years. Britta Lokting, *How the US Military's Fertility Policies Are Leaving Women to Suffer*, The Nation (May 18, 2023), https://bit.ly/4la1yFu.

Chris Hull, U.S. Army veteran, and his wife, Ash, knew that IVF would be necessary to start their family. In 2004, while Chris was on his way home for leave, Chris's friend was driving and fell asleep at the wheel, crashing the car, and leaving Chris with quadriplegia. Chris uses

a wheelchair and will require the use of a wheelchair his entire life. When he and his wife decided they wanted a family, they were prepared—like anything else in life—to do whatever it takes. But it would require IVF, an extremely expensive and often emotionally exhausting procedure. For Chris and Ash, the decision to grow their family by having another child was directly dependent on whether they would have access to IVF through the VA. Without VA coverage, Chris and his wife worried they "may have to face the financial strain of having to pay [for IVF] [themselves.]" *Paralyzed veterans advocate for permanent fertility benefits,* Denver 7 ABC (June 19, 2020), https://bit.ly/3Qipb0M. Had they not had benefits through the VA, their parenting journey may have never begun.

These stories show that IVF is critical to active-duty service members and veterans who wish to start a family. Any limitation on access to this benefit is a burden on these individuals and their families. No active-duty service member or veteran should be required to prove a connection between service and infertility to access basic healthcare. The only remedy for this is for IVF to be fully available to all active-duty service members and veterans served by the military health system.

D. The service-connected infertility requirement unfairly penalizes active-duty service members and veterans whose infertility may be difficult or impossible to prove, and/or may be secondary to an already service-connected condition(s).

The requirement that an active-duty service member or veteran must prove that his or her infertility is etiologically connected to his or her military service in order to be eligible for IVF treatment unfairly penalizes individuals whose cause of infertility is difficult or impossible to identify. As discussed above, frequently, the actual cause of an active-duty service member or veteran's infertility only proves to be a medical mystery. For these individuals the service-connected infertility requirement inequitably penalizes them for infertility that is the hidden result of a medical or psychological consequence of their military service, and/or may be secondary to an already service-connected condition(s) that has resulted in infertility but has gone unrecognized as having such an effect. Consequently, in fairness to all active-duty service members and veterans who are deserving of DoD/VA-supplied IVF treatment, IVF should be made a component of the miliary medical benefits package.

CONCLUSION

The Court should reverse the decision below.

Dated: April 11, 2025

Respectfully submitted,

/s/ Andrew T. Tutt

Andrew T. Tutt
Jennifer F. Kaplan
ARNOLD & PORTER
KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, DC 20001
(202) 942-5000
andrew.tutt@arnoldporter.com

Counsel for Amici Curiae National Military Family Association (NMFA) and Black Veterans Project (BVP)

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 29(a), the undersigned counsel hereby certifies that this brief complies with the type-volume limitation of the Federal Rules of Appellate Procedure and this Court's Local Rules. As measured by the word processing system used to prepare this brief, there are 1,893 words in this brief.

/s/Andrew T. Tutt
Andrew T. Tutt

Counsel for Amici Curiae National Military Family Association (NMFA) and Black Veterans Project (BVP)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was filed electronically on April 11, 2025 and will, therefore, be served electronically upon all counsel.

/s/ Andrew T. Tutt
Andrew T. Tutt

Counsel for Amici Curiae National Military Family Association (NMFA) and Black Veterans Project (BVP)