

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK**

NATIONAL ORGANIZATION FOR
WOMEN-NEW YORK CITY,

Plaintiff,

v.

UNITED STATES DEPARTMENT OF
DEFENSE, and UNITED STATES
DEPARTMENT OF VETERANS AFFAIRS,

Defendants.

Civ. No. 1:23-CV-06750-VEC

February 9, 2024

AMENDED COMPLAINT

1. After devotedly serving their country, many service members and veterans are eager to build their families. Family support is critical to military readiness and to the success of service members and veterans. As President Biden recently declared, “[T]he commitment and resilience of military-connected families are essential to the recruitment, retention, and readiness of our Armed Forces and the enduring strength of our Nation. Meeting the economic, social, and emotional needs of our military and veteran families, military caregivers, and survivors is a national security imperative.” Exec. Order 14100 (June 9, 2023).

2. Tragically, infertility is pervasive within the military community, leaving thousands of service members and veterans struggling to build their families. Initial research indicates service members and veterans face higher rates of infertility than the general population. For many, fertility-related obstacles to family building are a direct result of their service.

3. Some service members and veterans suffer combat-related injuries that impair their ability to have children. Others are exposed to toxic chemicals or environmental hazards that

damage their fertility. Still others suffer sexual assault while serving or develop post-traumatic stress disorder, both of which are proven infertility risk factors. Moreover, the routine demands of military life, such as deployments and regular permanent changes of station, force many service members to postpone marriage and childrearing.

4. TRICARE, the military health care program operated by Defendant U.S. Department of Defense (“DoD”), and the Veterans Health Administration (“VHA”), a part of Defendant U.S. Department of Veterans Affairs (“VA”), respectively, provide fertility care for many service members and veterans. For eligible service members and veterans, this care can include in vitro fertilization (“IVF”), the most effective known fertility treatment.

5. Yet Defendants severely limit IVF availability, unlawfully excluding entire segments of the military and veteran community on discriminatory and arbitrary grounds.

6. Service members and veterans seeking coverage of IVF treatments must, together with a spouse, be able to provide their own sperm and eggs and are prohibited from using gametes from third parties (“Member Gamete Requirement”). Defendants’ policies also limit the benefit to service members and veterans who are lawfully married (“Marriage Requirement”).

7. Finally, Defendants impose a third condition on IVF coverage: active-duty service members and veterans must receive an infertility diagnosis, which is facially unavailable to same-sex couples and single persons, along with a determination that their infertility was directly caused by their service (“Infertility Causation Requirement”). This requirement has two elements. First, DoD and VA both define infertility based on lost ability to reproduce coitally, meaning that the injury must have affected the ability of the service member or veteran to biologically reproduce with a partner of a different sex. Second, active-duty service members who are diagnosed with infertility are ineligible for IVF unless they can show that they suffered a serious or severe illness

or injury that “has made it impossible to conceive naturally.” Veterans diagnosed with infertility similarly must establish that their infertility is “service-connected” to receive IVF coverage from VHA.

8. As a result, Defendants’ IVF policies exclude active-duty service members and veterans who are a) single or unmarried; b) unable to use their own eggs or sperm because of a serious illness or injury; c) in a same-sex couple or couple with the same reproductive organs; or d) unable to establish that their infertility is service-connected (for veterans) or caused by a serious illness or injury sustained during active duty (for service members).

9. These requirements are far more restrictive than the requirements imposed on most other forms of care offered to active-duty service members and veterans, including other reproductive healthcare. For example, veterans can access oocyte cryopreservation (or egg freezing), intrauterine insemination (“IUI,” or artificial insemination), and erectile dysfunction medication through VA without a specific service-connected infertility diagnosis.

10. By excluding service members and veterans from IVF coverage on the basis of sex, sexual orientation, marital status, and/or the cause of their infertility, Defendants’ discriminatory policies violate Section 1557 of the Affordable Care Act, the due process and equal protection guarantees of the Fifth Amendment of the Constitution, and the Administrative Procedure Act.

11. Plaintiff National Organization for Women – New York City (“NOW-NYC”) and its military and veteran members seeking IVF services who are in same-sex or unmarried couples, are single, and/or whose infertility is not determined by Defendant DoD or Defendant VA to be the result of military service, are harmed by Defendants’ discriminatory IVF policies. These NOW-NYC members are categorically denied the IVF treatment they need to build their families.

12. NOW-NYC seeks injunctive and declaratory relief on behalf of itself and its members enjoining Defendants from enforcing the discriminatory eligibility provisions of their IVF policies and declaring those provisions unlawful, so that no service member or veteran is denied the care they need to start a family solely because of who they love, their choice whether or not to marry, or the precise source of their fertility challenges. Specifically, NOW-NYC asks that this court declare unlawful and permanently enjoin Defendants from enforcing the Marriage Requirement, the Member Gamete Requirement, and the Infertility Causation Requirement (collectively, the “Discriminatory Provisions”).

PARTIES

13. Plaintiff National Organization for Women – New York City is a membership-based organization whose mission is to ignite change for the women and girls of New York by advancing laws and powering activism. NOW-NYC is devoted to protecting the equal rights of women and LGBTQ+ people and considers the provision of reproductive healthcare to be an essential component of its organizational mission. NOW-NYC’s members pay annual dues, participate in making organization-wide policy, vote for board members, and apply to be elected or selected to join the board themselves. NOW-NYC’s members include service members and veterans denied IVF coverage by Defendants because of each of the Discriminatory Provisions. These members have standing to sue in their own right and their individual participation in this matter is not necessary.

14. Defendant U.S. Department of Defense is the federal agency that includes the military service branches, including the Army, Air Force, Navy, Marine Corps, and Space Force. It is the federal agency that administers the laws providing benefits and other services to active-duty service members. DoD is an agency within the meaning of 5 U.S.C. § 552(f)(1).

15. Defendant U.S. Department of Veterans Affairs is the federal agency that administers the laws providing benefits and other services to veterans, their dependents, and their beneficiaries. VA is an agency within the meaning of 5 U.S.C. § 552(f)(1).

JURISDICTION AND VENUE

16. This Court has jurisdiction under 28 U.S.C. §§ 1331, 1346, 42 U.S.C. § 18116, and the Due Process Clause and equality guarantees of the Fifth Amendment of the U.S. Constitution. An actual controversy exists between the parties within the meaning of 28 U.S.C. § 2201(a), and this Court may grant declaratory relief, injunctive relief, and other relief pursuant to 5 U.S.C. §§ 705-06.

17. Venue lies in this district pursuant to 28 U.S.C. § 1391(e)(1)(C) because Plaintiff NOW-NYC is incorporated in the State of New York and maintains its principal place of business in this district, no real property is involved, and Defendants are agencies of the United States.

FACTUAL ALLEGATIONS

I. Veterans and Service Members Experience Disproportionately High Rates of Infertility.

18. After putting their lives on hold to serve their country, a significant percentage of service members and veterans struggle to start a family. More than two-thirds of respondents in one large-scale survey reported family-building challenges.¹

19. Although understudied, preliminary research suggests that service members and veterans experience infertility at higher rates than civilians. One 2018 survey found that 37 percent

¹ Blue Star Fams., 2021 Military Family Lifestyle Survey Comprehensive Report 13 (2022), https://bluestarfam.org/wp-content/uploads/2022/03/BSF_MFLS_Results2021_ComprehensiveReport_03_14.pdf.

of respondents (female veterans and servicewomen) grappled with infertility.² This represents a rate more than four times the national average for women.³

20. Infertility affects service members and veterans of all gender identities. In another study of veterans by researchers at VA, both male and female respondents reported experiencing infertility at higher rates than those reported by the general population. This same study found that female veterans are more likely than male veterans to seek care for infertility,⁴ consistent with national trends.

21. Military service itself exposes many service members to risk factors that can cause infertility. Those deployed in combat may suffer head, spinal, or genitourinary injuries that affect their fertility. Female service members may also incur injuries with effects on fertility due to wearing ill-fitting combat gear designed for male bodies. Many service members are exposed to toxic chemicals or physical or environmental hazards that impair their ability to have children.

22. Due to extended temporary duty assignments and deployments, service members sometimes experience disruptions in preventative health care services, such as cervical cancer screenings, or delays in treatment for conditions like endometriosis, which may increase their risk of infertility.

23. Many veterans and service members also experience sexual assault and/or harassment during service (collectively referred to as military sexual trauma), a known cause of infertility. Among veterans who use VA healthcare, approximately 23 percent of women reported

² Serv. Women's Action Network, *Access to Reproductive Health Care: The Experiences of Military Women* 7 (2018).

³ See Morgan Snow, Tyler M. Vranich, Jamie Perin & Maria Trent, *Estimates of Infertility in the United States: 1995–2019*, 118 *Fertility & Sterility* 560 (2022) (finding infertility rates in U.S. from 1995-2019 varied between 5.8-8.1%).

⁴ 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* 175, 177 (2013).

sexual assault in the military, and approximately 55 percent of women reported sexual harassment in the military.⁵ This prevalence is orders of magnitude larger than that in the general population.

24. A history of sexual assault is associated with an increased likelihood of experiencing infertility among women veterans. In one study by VA researchers, women veterans who experienced attempted or completed sexual assault were nearly twice as likely to self-report infertility than those who did not report such experiences.⁶

25. The psychological effects of service affect fertility as well. According to VA, 11 to 20 percent of Iraq and Afghanistan veterans suffer from post-traumatic stress disorder (“PTSD”).⁷ Compounding matters, survivors of military sexual trauma are three times (for males) and nine times (for females) more likely to suffer from PTSD than veterans without such experiences.⁸ Research shows that PTSD has a negative effect on fertility in the population at large and particularly among veterans.⁹

26. The demands of military service also routinely force service members to postpone family building. In a 2023 DoD survey of active-duty servicewomen, half of respondents reported that they “delayed getting pregnant or starting a family” during their service.¹⁰

⁵ *How Common Is PTSD?*, U.S. Dep’t of Veterans Affs., https://www.veteranshealthlibrary.va.gov/MentalHealth/PTSD/About/142,UG4335_VA.

⁶ Ginny L. Ryan et al., *Voluntary and Involuntary Childlessness in Female Veterans: Associations with Sexual Assault*, 102 *Fertility & Sterility* 539, 544 (2014); see also Ginny L. Ryan et al., *Sexual Assault and Lifetime Infertility Diagnosis in Male and Female U.S. Military Veterans*, 116 *Fertility & Sterility* E46 (2021).

⁷ *Posttraumatic Stress Disorder*, Off. of Res. & Dev., U.S. Dep’t of Veterans Affs., <https://www.research.va.gov/topics/ptsd.cfm>.

⁸ Rachel Kimmerling, Kristian Gima, Mark W. Smith, Amy Street & Susan Frayne, *The Veterans Health Administration and Military Sexual Trauma*, 97 *Am. J. Pub. Health* 2160, 2162-63 (2007).

⁹ Kristin Mattocks et al., *Infertility Care Among OEF/OIF/OND Women Veterans in the Department of Veterans Affairs*, 53 *Med. Care* 68 (2015); 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* 461 (2012); Ginny L. Ryan et al., *Military Service and Medical Associations with Infertility in U.S. Veterans*, 114 *Fertility & Sterility* E25 (2020); Rachel Wamser-Nanney, *Trauma Exposure, PTSD and Indices of Fertility*, 41 *J. Psychosomatic Obstetrics & Gynecology* 116 (2020).

¹⁰ Sarah O. Meadows, Rebecca L. Collins, Megan S. Schuler, Robin L. Beckman & Matthew Cefalu, *The Women’s Reproductive Health Survey (WRHS) of Active-Duty Service Members*, 10 *RAND Health Q.* 11 (2023).

27. Many members of the military community face additional hurdles to family-building. Approximately 6 percent of service members identify as lesbian, gay, or bisexual.¹¹ Additionally, about 48 percent of active-duty service members¹² and 37 percent of veterans are unmarried.¹³ These persons may be unable to conceive through opposite-sex intercourse.

II. Defendants Discriminate in Their Coverage of IVF Services.

28. Service members and families of the U.S. Military, the Reserve, and the National Guard can receive healthcare through TRICARE, the U.S. Military's healthcare program. Military veterans and their families are eligible to receive healthcare through VHA, a component of VA.

29. Defendant DoD has broad authority to provide medically necessary healthcare, 10 U.S.C. § 1074(a), including infertility care, 10 U.S.C. § 1074d(b), without any service-relatedness or serious injury or illness requirement. VHA similarly has broad authority to "provide a complete medical and hospital service for the medical care and treatment of veterans." 38 U.S.C. § 7301(b).

30. Unlike other healthcare services, Defendants' IVF policies facially exclude service members or veterans who are a) single or unmarried; b) unable to use their own eggs or sperm because of illness or injury; c) in a same-sex couple or couple with the same reproductive organs; or d) unable to establish that their infertility is service connected (for veterans) or caused by a serious illness or injury sustained during active duty (for service members).

31. Thus, Defendants severely and discriminatorily restrict access to IVF, the most effective artificial reproductive technology. Because of the Discriminatory Provisions, many service members and veterans are ineligible for IVF.

¹¹ Sarah O. Meadows et al., RAND, 2015 Department of Defense Health Related Behaviors Survey 213 (2018).

¹² Nat'l Acads. Scis. Eng'g & Med., Strengthening the Military Family Readiness System for a Changing American Society 93 (2019).

¹³ Nat'l Ctr. for Veterans Analysis & Statistics, Profile of Veterans: 2017 (2019), https://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2017.pdf.

A. TRICARE's IVF Policies Are Discriminatory.

32. On April 3, 2012, the Assistant Secretary of Defense for Health Affairs issued a memorandum ("2012 DoD Policy Memo") on the subject of "Policy for Assisted Reproductive Services for the Benefit of Seriously or Severely Ill/Injured (Category II or III) Active Duty Service Members," which provided implementation guidance on a new IVF policy. A copy of this memorandum is attached as Exhibit A.

33. The 2012 DoD Policy Memo dictates that IVF benefits are limited to service members who are lawfully married, and who, together with their spouse, are capable of producing their own set of sperm and eggs. Third-party gamete donation is explicitly barred. These Marriage and Member Gamete Requirements facially exclude single service members, unmarried service members, and service members in same-sex relationships.

34. Further, the 2012 DoD Policy Memo provides that IVF services are available only to seriously ill or injured service members (defined as having a Category II or III injury or illness under the DoD's Care Coordination Categories) who can no longer conceive "naturally."

35. TRICARE's Assisted Reproductive Services webpage, attached as Exhibit B, explains that IVF eligibility extends only to active-duty service members who "[h]ad a serious illness or injury while on active duty (Category II or III)" and "[l]ost the ability to reproduce coitally due to that illness or injury." The term "coitally" refers to the "physical union of male and female genitalia." *See* Merriam-Webster Dictionary (defining "coitus"). Accordingly, the Infertility Causation Requirement imposes a further discriminatory barrier to single service members and couples with the same reproductive organs.

36. Besides information provided on TRICARE's Assisted Reproductive Services webpage, service members receive little guidance about how to access IVF care. As such, the process is unclear and confusing for many service members.

37. According to the 2012 DoD Policy Memo, after meeting the Marriage and Member Gamete Requirements, a service member must have documentation of a Category II or III illness or injury related to active-duty service. A Category II or III illness or injury is sufficiently serious that the service member cannot return to duty within a specified time or will likely have to be medically separated from the military owing to their serious or severe injury or illness.

38. The service member's primary care manager or other provider, who is significantly involved in the care of the qualifying condition, must send a memo certifying that the qualifying illness or injury occurred during service.

39. The service member's branch of service must certify the accuracy of the memo, which must include the member's qualifying diagnosis, whether it meets the standard for Category II or III, and a summary of the relevant medical information supporting the Category II or III designation. The memo then must be endorsed by the member's branch of service and verified by the Office of the Chief Medical Officer.

B. VHA's IVF Policies Are Discriminatory.

40. Even after Defendant DoD began providing IVF services in 2012, VHA continued to prohibit IVF care for veterans.

41. In 2017, for the first time, the Continuing Appropriations and Military Construction, Veterans Affairs, and Related Agencies Appropriations Act authorized VA to use appropriated medical services funds to provide IVF services to veterans and their partners in

accordance with the conditions established in the 2012 DoD Policy Memo. Pub. L. No. 114-223, § 260, 130 Stat. 857, 897 (2017).

42. VA subsequently promulgated an Interim Final Rule implementing the 2017 Appropriation Act's IVF coverage requirements. 82 Fed. Reg. 6273 (Jan. 19, 2017). The Final Rule took effect in 2019. 38 C.F.R. § 17.380 ("VA 2019 Regulations").

43. The VA 2019 Regulations permit VA to provide IVF services to a veteran and the spouse of that veteran when clinically appropriate, 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).

44. However, the VA 2019 Regulations also incorporate the discriminatory terms of the 2012 DoD Policy Memo, stating that IVF treatment will be provided to veterans subject to the limitations on the benefit established in the 2012 DoD Policy Memo. *Id.* § 17.380(a)(3).

45. VA elaborated and clarified its new IVF policy in agency guidance. *See* VHA Directive 1334 (Mar. 12, 2021). A copy of VHA Directive 1334 is attached as Exhibit C. This guidance confirms that IVF services for veterans are subject to the terms of the 2012 DoD Policy Memo, *id.* at 2, including the Marriage, Member Gamete, and Infertility Causation Requirements. *Id.* at 2-4. As VHA Directive 1334 declares: "IVF services are only available to a cisgender opposite-sex legally married couple or other legally married couple with opposite-sex gametes/reproductive organs." *Id.* at 3; *see also id.* at 10 (stating the same in the eligibility section).

46. Consistent with its discriminatory approach, VHA defines "infertility" in Directive 1334 to mean a veteran's "inability to achieve a pregnancy after one year of regular unprotected sexual intercourse with their lawful spouse," subject to certain exceptions. *Id.* at 5. As a result,

single or unmarried couples, and married couples with the same reproductive organs, can by law never have “infertility” for VA purposes under the Infertility Causation Requirement.

47. VA’s authority to use funds to provide IVF pursuant to the terms of the 2012 DoD Policy Memo has been renewed and extended in VA appropriations bills every year since 2017, most recently in the Consolidated Appropriations Act, 2023. Pub. L. No. 117-328, § 234, 136 Stat. 4459 (2023) (“2023 VA IVF Appropriations Statute”). A copy is attached as Exhibit D.

48. As a result, the 2012 DoD Policy Memo continues to serve as the basis for VA’s provision of IVF benefits to veterans.

49. A veteran who fails any one of the Discriminatory Provisions is ineligible for IVF services. The consequence of the Discriminatory Provisions and this process is that many veterans are completely precluded from accessing IVF services because they are single, unmarried, or in a married couple with the same reproductive organs. VA will not even attempt to determine whether these veterans satisfy the Infertility Causation Requirement.

50. As VA Secretary McDonough acknowledged at an April 27, 2023 press conference, there “are limitations on services that VA can provide to include to legally married, same-sex couples, [limitations] that we think are not in keeping with our requirement[] to care for all veterans.” Secretary McDonough expressed his hope that these limitations might be reformed.

III. Defendants’ Infertility Causation Requirement Singles Out IVF Services for Irrational and Discriminatory Treatment.

51. To obtain IVF coverage, both Defendants impose an additional Infertility Causation Requirement not applied to other health care. First, both Defendants use a discriminatory definition of infertility that limits services to only service members and veterans who have lost the ability to reproduce through unprotected heterosexual intercourse. And second, both Defendants provide IVF services only where a service member or veteran can trace their infertility to their service.

A. TRICARE's Infertility Causation Requirement is Out of Step with Other Care.

52. Defendant DoD's burdensome Infertility Causation Requirement does not appear in any statute applying to active-duty service members. Instead, DoD has discretion under statute to provide all medically necessary, proven health care services without a service-related injury or illness to active-duty service members. *See* ¶ 29, *supra*.

53. Thus, DoD had authority to promulgate regulations to provide IVF in a nondiscriminatory manner. Instead of doing so, however, the 2012 DoD Policy Memo relied on Section 1633 of the National Defense Authorization Act for Fiscal Year 2008 as authorizing IVF care. That statute, codified at 10 U.S.C. § 1074(c)(4), permits the Secretary of Defense to provide "respite care and other extended care benefits" to service members "who incur[red] a serious injury or illness on active duty." The injury or illness described in the statute is intended to be sufficiently serious as to typically require the designation of a "primary caregiver[]" for the service member, which does not apply to IVF services. *See* 10 U.S.C. § 1074(c)(4)(B)(i).

54. Yet nothing in Section 1074(c)(4) requires the Secretary to limit services provided, including IVF services, to care redressing a specific serious injury or illness incurred during active duty. Defendant DoD's decision to rely on Section 1074(c)(4) and to impose a service-related injury or illness requirement where none existed, rather than exercising its broader statutory authority under other statutory provisions, including less restrictive provisions of Chapter 55, was arbitrary, unnecessary, and irrational.

55. Further, upon information and belief, *no* medical care available to service members who are on active duty for more than thirty days, other than IVF, is subject to a specific injury causation requirement. TRICARE typically covers medically necessary health care services for active-duty service members regardless of whether they sustain a serious illness or injury. 32

C.F.R. § 199.4. TRICARE covers emergency, specialty, and routine care, including health care unrelated to an injury sustained on active duty, like pregnancy and well-baby care. *Id.* § 199.4(c)(2)(viii). Even plastic or reconstructive surgery, where medically indicated, is provided whether the need arises from a service-related injury or some other health need, like correction of a congenital anomaly. *Id.* § 199.4(e)(3)(ii)(B)(8).

56. The limited availability of IVF for service members under TRICARE is also out of step with the federal government’s coverage of such care for other federal employees. Other federal employees can access IVF services irrespective of their sexual orientation and marital status and without a requirement of an on-the-job injury impairing fertility. For example, beginning in 2024, all Federal Employee Health Benefit (“FEHB”) plans will be required to cover IVF medications, and certain plans, including in New York, will cover all IVF services.

B. VHA’s Infertility Causation Requirement is Out of Step with Other Care.

57. At VA, the IVF coverage limitations are also unique. Veterans with a 100 percent disability rating are eligible for *all* VA services *except* IVF, including preventive, specialty, inpatient and outpatient care, vision, and dental, without needing to connect a particular medical need to an in-service injury or disease. Veterans with a disability rating of 50 percent or more are eligible for all services regardless of service-connection—except IVF and dental care. Upon information and belief, IVF is the only medical service provided by VA for which *all* veterans must prove specific service-connection, even those who are 100 percent disabled.

58. VHA provides other fertility services and treatments for eligible VA healthcare enrollees that include diagnostic services for fertility problems, such as hormone evaluations and sperm function tests, hormone therapy, surgical corrections of structural pathologies, fertility medications, oocyte cryopreservation, and IUI.

59. None of these other fertility services provided by VA include the same exclusionary coverage limitations as IVF, where veterans must prove that their infertility is specifically service connected. *See* VHA Directive 1332 (Exhibit E).

60. For example, VA covers IUI, a fertility treatment different from IVF in which sperm is placed directly into the uterus, for veterans irrespective of marital status, service-connection, or need for donor sperm or eggs. Nor must veterans seeking IUI establish that their infertility is caused by service.

61. Because of the Discriminatory Provisions, countless individuals who serve or served our country are unable to access the treatments they need to build a family, even when their inability to do so is the result of their military service.

IV. Defendants' Discriminatory IVF Policies Harm members of Plaintiff NOW-NYC.

62. Among those harmed by the Discriminatory Provisions are members of Plaintiff NOW-NYC.

63. By restricting access to a medically necessary and proven fertility treatment on the basis of discriminatory and arbitrary markers including marital status, sexuality, and infertility causation, the Discriminatory Provisions undermine NOW-NYC's fight for reproductive justice and non-discrimination.

64. The Discriminatory Provisions' facial and categorical exclusion of all veterans and service members who are either a) single or unmarried; b) unable to use their own eggs or sperm because of illness or injury; c) in a same-sex couple or couple with the same reproductive organs; or d) unable to establish that their infertility is service connected (for veterans) or caused by a Category II or III illness or injury sustained on active duty (for service members) undermines

NOW-NYC's mission no matter how the Discriminatory Provisions are applied to specific individuals.

65. Members of Plaintiff NOW-NYC are burdened by the Discriminatory Provisions and, as a result, are unable to start the families they desire.

66. For example, one NOW-NYC member, an active-duty military service member, underwent several rounds of IUI with her wife, a civilian TRICARE beneficiary. In order to afford paying for these services out of pocket, they had to sell their house. Unfortunately, the IUI procedures were unsuccessful. The only remaining medically indicated procedure is IVF, which they cannot afford. Their military healthcare will not cover IVF services due to the 2012 DoD Policy Memo's Discriminatory Provisions. Because they are a same-sex couple, they must use donor sperm to conceive. In addition, this NOW-NYC member cannot establish that she has a Category II or III illness or injury that prohibits her from "natural" or "coital" (i.e., heterosexual) reproduction. As a result, this NOW-NYC member cannot have the children she dreamt of while serving her country.

67. Two other members of NOW-NYC, an active-duty Air Force officer and his wife, who is a civilian TRICARE beneficiary, have been forced to pay for expensive fertility care out of pocket. They underwent four failed rounds of IUI and two failed embryo transfers through IVF while they were stationed in Ohio. Diagnosed with "unexplained infertility," this couple was facially ineligible for IVF benefits from TRICARE under the Infertility Causation Requirement. Due to the member's military occupational specialty, he traveled two weeks a month, which intensified the stress and uncertainty associated with self-funded fertility treatments.

68. At the end of his assignment in Ohio, the family moved to Arizona on military orders and faced the costly reality that they would have to either transport their three remaining

embryos through a professional courier, or else fly back and forth from Arizona to Ohio to continue pursuing IVF to build their family. They ultimately had to search for a new fertility clinic in Arizona on their own, again paying all embryo transfer costs out of pocket. Before completing another transfer, their fertility clinic closed, and the couple had to find yet another doctor. Finally, their third embryo transfer was successful, and the officer's wife is currently pregnant. At this point, the couple has spent almost \$40,000 for fertility services. They have two remaining embryos that they hope to use to build their family in the future. They will have to pay for the IVF procedures and the embryo transfer themselves unless TRICARE's Infertility Causation Requirement is removed.

69. Another member of NOW-NYC, a Navy veteran, sought fertility care through VHA, but was denied IVF services because she is single, not married.

70. Another member of NOW-NYC, Lauren Durden, is a Navy veteran married to her husband, Kole. Ms. Durden has a disability rating of 100 percent due to the loss of a reproductive organ and other health conditions. Ms. Durden and her husband sought IVF services through VHA. Although Ms. Durden was diagnosed with service-connected infertility and meets VA's Infertility Causation Requirement, the couple was denied under the Member Gamete Requirement by VA because Kole is a transgender man who cannot produce his own sperm. The couple has been forced to begin pursuing private IVF options but hopes to use VA services in the future if the Discriminatory Provisions are removed.

71. Another member of NOW-NYC, Amber Bohlman, an unmarried Marine veteran in a committed relationship with an opposite-sex partner, has pursued fertility treatment for over five years, including three unsuccessful rounds of IUI and multiple fertility medications. Because the former Marine is not married to her male partner, and because she lacks a confirmed service

connection for her infertility diagnosis, she is ineligible for IVF services from VHA. This is particularly frustrating given that Ms. Bohlman has a disability rating of 100 percent, and accordingly, receives all of her healthcare, including dental care, from VHA. Against all odds, Ms. Bohlman is currently pregnant but remains ineligible for IVF services should she wish to become pregnant again in order to continue building her family with her partner. This NOW-NYC member has explored the possibility of obtaining non-covered care, but the cost and difficulty of accessing IVF outside of VHA make it untenable.

72. Another NOW-NYC member, Lindsay Church, a nonbinary Navy veteran who uses they/them pronouns, began planning for a family with their wife. The member has service-connected injuries that their doctors indicated prevent them from safely carrying a child to term. Church has been told that their service-connected disability is not a direct cause of their infertility, but rather a secondary cause, and therefore does not satisfy the conditions required by the Infertility Causation Requirement. As a result, Church and their wife are ineligible for IVF and other fertility services from VHA. They have been forced to pursue expensive private options to start a family.

73. Another member of NOW-NYC, an unmarried Navy veteran, served in her capacity as a health professional after obtaining an advanced degree. Service in the Navy meant relocation to different places around the world every two years, resulting in a delay in forming relationships which would allow her to build the family she desired. Single at the time of her separation from the Navy, experiencing service-connected disabilities, and nearing the end of her fertile years, this member hoped for VA's support in building the family she had put on hold. Unfortunately, she did not receive it. This member paid out of pocket for two cycles of IVF, neither of which were covered by VHA because of the discriminatory Marriage, Infertility Causation, and Member Gamete Requirements. Fortunately, this NOW-NYC member became pregnant on the second

round. She remains ineligible for future VHA IVF services that would be required for her to become pregnant a second time.

74. Other members of NOW-NYC are women veterans who are single. One such member, an Army veteran, has service-connected PTSD that VA recognizes results from military sexual trauma, an experience associated with an increased likelihood of infertility. However, because VA defines “infertility” as “the inability to achieve a pregnancy after one year of regular unprotected intercourse with their lawful spouse,” these single veteran members can never demonstrate infertility—let alone that it is due to a service-connected disability. They are ineligible for IVF services due to VA’s arbitrary and discriminatory Marriage and Member Gamete Requirements. If the Marriage and Member Gamete Requirements were eliminated, some of them would likely remain ineligible due to the Infertility Causation Requirement.

75. The Discriminatory Provisions have discouraged other veteran NOW-NYC members from seeking a diagnosis of service-connected infertility as an exercise in futility. They know that even with such a diagnosis, they are ineligible for IVF care through VA because they are in same-sex married couples or are single or unmarried.

76. NOW-NYC members include active-duty service members, including commissioned officers, who seek to start families but are excluded from IVF care because of each one of the Discriminatory Provisions. However, these members are fearful of potential retaliation and the collateral consequences of identifying themselves by name or disclosing publicly their need for IVF services covered by TRICARE. Not only would being named require them to share private medical and family structure information with the public, but it would also risk potential punitive action by their chains of command under the Uniform Code of Military Justice (UCMJ).

77. Article 88 of the UCMJ punishes “any commissioned officer who uses contemptuous words against . . . the Secretary of Defense.” 10 U.S.C § 888. Article 133 punishes “any commissioned officer” for “conduct unbecoming an officer.” *Id.* § 933. Article 134 stands as the UCMJ’s catch-all to punish behavior deemed to “the prejudice of good order and discipline in the armed forces,” and “all conduct of a nature to bring discredit upon the armed forces.” *Id.* § 934.

78. The UCMJ purposefully gives broad discretion to commanding officers in interpreting behavior to satisfy the conditions of its punitive articles. It is reasonable for the active-duty service members of NOW-NYC to fear that by publicly stating that DoD’s IVF policy discriminates against them based on their family building choices, and that they are members of the Plaintiff organization that has brought federal civil rights litigation against DoD, they could be punished under these or other articles of the UCMJ.

79. Despite the intimate nature of details about one’s medical history and family structure, additional members of NOW-NYC may be willing to disclose their identities to the Court and Defendants, with sufficient assurances of privacy and confidentiality and guarantees against retaliation.

80. On July 10, 2023, NOW-NYC wrote the U.S. Department of Justice to request that DoD and VA immediately suspend enforcement of the Discriminatory Provisions and advising that NOW-NYC was prepared to file suit. A senior official acknowledged receipt of the request that same day but neither Defendants nor their counsel made any substantive response prior to the filing of this lawsuit.

81. Plaintiff and its members have exhausted their administrative remedies, to the extent exhaustion is required. The statutory scheme for review of VA benefits provides no appeal

from a denial of IVF coverage, nor is judicial review of decisions available via the U.S. Court of Appeals for Veterans Claims.

CLAIMS

CLAIM I

Discrimination on the Basis of Sex in Violation of Section 1557 of the Patient Protection and Affordable Care Act (Against Both Defendants)

82. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

83. Section 1557 of the Affordable Care Act (“ACA”), codified at 42 U.S.C. § 18116(a), prohibits discrimination on the basis of sex, including discrimination on the basis of sexual orientation and gender identity, in any health “program or activity that is administered by an Executive Agency” or that receives federal financial assistance.

84. VHA and TRICARE are federally funded health programs administered by executive agencies and subject to the non-discrimination protections of Section 1557.

85. By excluding from coverage LGBTQ+ individuals who must rely on donor sperm or eggs to conceive, the Member Gamete Requirement, as set forth in the VA 2019 Regulations, VHA Directives 1332 and 1334, and the 2012 DoD Policy Memo, discriminates against members of Plaintiff NOW-NYC on the basis of sex in violation of Section 1557.

86. The 2012 DoD Policy Memo states that IVF benefits are available to service members “who have sustained [a] serious or severe illness/injury while on active duty that led to the loss of their natural procreative ability.” On its Assisted Reproductive Services webpage, TRICARE further defines IVF eligibility to extend only to active-duty service members who

“[h]ad a serious illness or injury while on active duty (Category II or III)” and “[l]ost the ability to reproduce coitally due to that illness or injury.”

87. VHA Directive 1334 similarly requires service-connected infertility and defines “infertility” for the purposes of IVF benefits as “the inability to achieve a pregnancy after one year of regular unprotected sexual intercourse.”

88. Under the Infertility Causation Requirement embodied in the plain language of the 2012 DoD Memo, TRICARE Assisted Reproductive Services webpage, and VA regulations and policies, same-sex couples are facially excluded from IVF coverage. As such, the Infertility Causation Requirement discriminates on the basis of sex in violation of Section 1557.

89. By applying stricter eligibility requirements to IVF than to other forms of healthcare, the Infertility Causation Requirement discriminates against members of Plaintiff NOW-NYC on the basis of sex in violation of Section 1557.

90. Because women, transgender people, and same-sex couples disproportionately need IVF to start families, the Infertility Causation Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, 2012 DoD Policy Memo, and the TRICARE Assisted Reproductive Services webpage, has a disparate impact on women and LGBTQ+ individuals, in violation of Section 1557’s prohibition on sex and sexual orientation discrimination.

91. To the extent that the Discriminatory Provisions are also reflected in any other regulations or guidance, including 32 C.F.R. Part 199, such restrictions also constitute unlawful discrimination on the basis of sex.

CLAIM II

Violations of the Fifth Amendment of the United States Constitution's Guarantee of Equal Protection – Sex Discrimination (Against Both Defendants)

92. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

93. The Member Gamete Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, and 2012 DoD Policy Memo, violates the equality guarantees of the Fifth Amendment because they discriminate against members of Plaintiff NOW-NYC on the basis of sex.

94. The Infertility Causation Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, 2012 DoD Policy Memo, and TRICARE Assisted Reproductive Services webpage, also violates the equality guarantees of the Fifth Amendment because they discriminate against members of Plaintiff NOW-NYC on the basis of sex.

95. Under the plain language of the DoD Memo, TRICARE Assisted Reproductive Services webpage, and VA regulations and policies, same-sex couples are facially excluded from meeting the Infertility Causation Requirement. This discrimination based on sexual orientation constitutes impermissible sex discrimination under the equal protection guarantees of the Fifth Amendment.

96. By applying stricter requirements to IVF than to other forms of healthcare, the Infertility Causation Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, the 2012 DoD Policy Memo, and TRICARE Assisted Reproductive Services webpage, discriminate against members of Plaintiff NOW-NYC on the basis of sex in violation of the equality guarantees of the Fifth Amendment.

97. Inevitably aware that more women, transgender people, and same-sex couples need IVF to start families, DoD and VA policy makers implemented the Infertility Causation Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, 2012 DoD Policy Memo, and the TRICARE Assisted Reproductive Services webpage, as an intentional barrier to reproductive healthcare for protected groups of persons in violation of the Fifth Amendment's equal protection guarantees.

98. The Infertility Causation Requirement is enmeshed in an otherwise discriminatory IVF policy, which facially excludes same-sex couples, unmarried couples, and single individuals, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, and 2012 DoD Policy Memo. The Infertility Causation Requirement thus operates in tandem with the Marriage and Member Gamete Requirements to wholly ensure the exclusion of same-sex couples and other protected groups from IVF coverage. By making it more difficult for same-sex couples and other protected groups to access government benefits, each Discriminatory Provision denies same-sex couples and other protected groups equal protection of the laws.

CLAIM III

Violations of the Fifth Amendment of the United States Constitution's Guarantee of Equal Protection – Marital Status Discrimination (Against Both Defendants)

99. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

100. The Marriage Requirement and the Member Gamete Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, and 2012 DoD Policy Memo, violate the equality guarantees of the Fifth Amendment because they facially exclude unmarried service members and veterans from coverage.

101. The 2012 DoD Policy Memo, which forms the basis for Defendants' provision of IVF benefits, states that IVF benefits are "limited to permitting a qualified member to procreate with his or her lawful spouse." VA regulations and VHA Directive 1334 likewise limit eligibility for IVF services to a "legally married couple." Under the plain language of the Marriage Requirement contained in the DoD Memo and VA regulations and policies, it is impossible for single or otherwise unmarried service members and veterans to obtain coverage.

102. A single person can only provide their own sperm or eggs and therefore cannot utilize IVF without using donor gametes. Thus, the Member Gamete Requirement also unlawfully discriminates on the basis of marital status.

103. Discrimination on the basis of marital status is subject to heightened, or "intermediate," scrutiny because unmarried people have historically faced discrimination and disadvantage under American law and are a quasi-suspect class.

104. The Marriage Requirement and the Member Gamete Requirement fail this standard of review because they do not further important governmental interests.

105. In the alternative, the Marriage Requirement and the Member Gamete Requirement fail rational basis review because the categorical exclusion of unmarried persons is not rationally related to any legitimate state interest.

106. To the extent that the Discriminatory Provisions are also reflected in any other regulations or guidance, including 32 C.F.R. Part 199, such restrictions also constitute unlawful discrimination on the basis of marital status.

CLAIM IV

Violations of the Fundamental Right to Marry Guaranteed by the Due Process Clause and Equality Guarantees of the Fifth Amendment of the United States Constitution (Against Both Defendants)

107. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

108. The right to freedom of choice regarding marriage is a deeply entrenched right under the United States Constitution and is fundamental to the liberty guaranteed by the Fifth Amendment. *Loving v. Virginia*, 388 U.S. 1 (1967); *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Boddie v. Connecticut*, 401 U.S. 371 (1971).

109. The Marriage and Member Gamete Requirements, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, and 2012 DoD Policy Memo, prevent unmarried service members and veterans from obtaining IVF benefits, and thereby burden their fundamental right to freedom of choice regarding marriage.

110. State action implicating fundamental rights is subject to strict scrutiny and is permissible only if it is narrowly tailored to serve a compelling state interest. The Marriage Requirement and the Member Gamete Requirement cannot withstand this exacting review.

111. Furthermore, members of Plaintiff NOW-NYC have been denied equal protection on the basis of their exercise of their fundamental right to freedom of choice regarding marriage.

112. To the extent that the Discriminatory Provisions are also reflected in any other regulations or guidance, including 32 C.F.R. Part 199, such restrictions also constitute an unconstitutional restriction on the right to marry.

CLAIM V

Violation of the Fundamental Right to Procreate Guaranteed by the Due Process Clause and Equality Guarantees of the Fifth Amendment to the United States Constitution (Against Both Defendants)

113. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

114. By excluding from coverage same-sex couples, couples unable to produce their own gametes, single or unmarried veterans and service members, and veterans and service members who lack service-connected infertility (for veterans) or infertility caused by a Category II or III illness or injury sustained during active duty (for service members), the Discriminatory Provisions, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, 2012 DoD Policy Memo, and TRICARE Assisted Reproductive Services webpage, violate members of Plaintiff NOW-NYC's rights to liberty, privacy, and equality as guaranteed by the Due Process Clause of the Fifth Amendment.

115. The right to procreate is fundamental and within the scope of the Fifth Amendment's guarantee of the rights to liberty and equality. *See Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

116. Government action implicating fundamental rights is subject to strict scrutiny and is permissible only if it is narrowly tailored to serve a compelling state interest. The Discriminatory Provisions cannot withstand this exacting review.

117. Members of Plaintiff NOW-NYC have been denied equal protection on the basis of their exercise of their fundamental right to procreate. The Discriminatory Provisions introduce discrimination based on sex, sexual orientation, and other irrational classifications into the provision of a benefit the government has attached to the fundamental right to procreate.

CLAIM VI

Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution – Irrational Infertility Causation Requirement (Against Both Defendants)

118. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

119. The Infertility Causation Requirement, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, VHA Directives 1332 and 1334, 2012 DoD Policy Memo, and TRICARE Assisted Reproductive Services webpage, limits the availability of IVF services to active-duty service members who are unable to reproduce “naturally” or “coitally” due to a Category II or III illness or injury incurred on active duty and to veterans who are unable “to achieve pregnancy after one year of regular unprotected sexual intercourse” due to a “service-connected” disability.

120. By contrast, virtually all other healthcare services may be available, based on eligibility categories, to TRICARE and VHA beneficiaries without the need for an additional designation of service-relatedness.

121. Further, other federal employees can access IVF services (for example, through coverage in FEHB plans) without regard to the source of their infertility and without any obligation to demonstrate that an on-the-job injury has caused infertility.

122. The Infertility Causation Requirement is not rationally related to any legitimate government interest and thus violates the Due Process Clause of the Fifth Amendment.

123. To the extent that the Discriminatory Provisions are also reflected in any other regulations or guidance, including 32 C.F.R. Part 199, such restrictions are also unlawful and in violation of the Due Process Clause.

CLAIM VII

Violation of the Due Process Clause of the Fifth Amendment to the United States Constitution – Irrational Donor Gamete Exclusion (Against Defendant VA)

124. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

125. The prohibition on donor gametes, as set forth in the 2023 VA IVF Appropriations Statute, VA 2019 Regulations, and VHA Directives 1332 and 1334, proscribes the use of donor gametes for IVF services even where beneficiaries meet all other eligibility criteria. By contrast, VHA beneficiaries may use donor gametes for other fertility treatments such as IUI.

126. The Member Gamete Requirement is not rationally related to any legitimate government interest and thus violates the Due Process Clause of the Fifth Amendment.

CLAIM VIII

Violations of the Administrative Procedure Act (APA), 5 U.S.C. § 706(2)(A) – Arbitrary and Capricious (Against Defendant DoD)

127. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

128. The issuance of the 2012 DoD Policy Memo is a final agency action.

129. Application of the 2012 DoD Policy Memo in 2023 to deny IVF services to active-duty service members who are members of NOW-NYC is also a final agency action.

130. The Discriminatory Provisions, which exclude certain service members and veterans from coverage, constitute arbitrary agency action in violation of the APA, 5 U.S.C. § 706(2)(A).

131. Agency rules or actions that are not “reasoned” are invalid under the APA. *See Motor Vehicle Mfrs. Ass’n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983).

132. Defendant DoD failed to offer any reasoned explanation for the inclusion of the Discriminatory Provisions in its IVF policies.

133. Defendant DoD failed to provide adequate justification for the several ways in which the Discriminatory Provisions exclude similarly situated individuals from coverage and otherwise diverge from current understandings of and approaches to families and family-building.

134. First, the Discriminatory Provisions exclude from coverage several classes of individuals who are otherwise similarly situated to those who can access IVF through TRICARE.

135. Second, the Discriminatory Provisions are arbitrary and capricious because, by restricting access to IVF to married couples with opposite-sex reproductive organs, they erroneously reflect unsubstantiated and discriminatory ideas of who should be parents.

136. Third, the Discriminatory Provisions are arbitrary and capricious because they have not been updated to reflect changing legal understandings of marriage and family formation.

137. Fourth, the Discriminatory Provisions are arbitrary and capricious because they are inconsistent with how the federal government regulates access to IVF services for other federal employees. IVF services are made available to other federal employees irrespective of marital status, sexual orientation, or service-connected injury (or lack thereof). Defendant DoD has failed to adequately reconcile its IVF policies with existing federal policies.

138. Fifth, the Discriminatory Provisions are arbitrary and capricious because they are not in accord with policies on parenthood of the rest of the military. Other DoD policies pertaining to parenthood, such as the various benefits available for service member dependents, acknowledge and support the ability of LGTBQ+ service members to build families and have children.

139. Sixth, the Infertility Causation Requirement is arbitrary and capricious because they impose burdensome restrictions on IVF services that are not applied to other TRICARE-

provided healthcare. These onerous requirements do not appear in and are not required by any statute that applies to service members who have served for more than thirty days.

CLAIM IX

Violations of the Administrative Procedure Act, 5 U.S.C. § 706(2)(B) – Contrary to the U.S. Constitution (Against Both Defendants)

140. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

141. By violating the Fifth Amendment’s equal protection and due process guarantees, the Discriminatory Provisions, as set forth in the VA 2019 Regulations, VA Directives 1332 and 1334, 2012 DoD Policy Memo, and TRICARE Assisted Reproductive Services webpage, violate the APA’s guarantee of constitutional agency actions in 5 U.S.C. § 706(2)(B).

CLAIM X

Violations of the Administrative Procedure Act, 5 U.S.C. § 706(2)(C) – Contrary to Federal Law (Against Both Defendants)

142. The allegations of the preceding paragraphs are incorporated by reference as if they were fully set forth herein.

143. The Discriminatory Provisions, as set forth in the VA 2019 Regulations, VA Directives 1332 and 1334, 2012 DoD Policy Memo, and TRICARE Assisted Reproductive Services webpage, discriminate on the basis of sex in violation of Section 1557 of the ACA.

144. By violating Section 1557, Defendants violate the APA, 5 U.S.C. § 706(2)(C).

PRAYER FOR RELIEF

WHEREFORE, Plaintiff respectfully requests that the Court:

(1) Declare that the challenged Discriminatory Provisions in both Defendants’ IVF policies and regulations—namely, the Marriage Requirement, the Member Gamete Requirement, and the Infertility Causation Requirement—violate the Administrative Procedure Act, Section

1557 of the Affordable Care Act, and the Fifth Amendment to the U.S. Constitution, and are therefore unlawful;

(2) Declare that the 2023 VA IVF Appropriations Statute is unconstitutional to the extent it requires the Discriminatory Provisions in Defendant VA's IVF policy;

(3) Enjoin both Defendants from enforcing the Discriminatory Provisions in their IVF coverage policies and regulations;

(4) Award reasonable attorneys' fees; and

(5) Grant any other and further relief that the Court deems just and proper.

Respectfully submitted,

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