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 April 19, 2024

PLAINTIFF'S BRIEF IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS

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I. INTRODUCTION

There is only one form of medical care that no veteran, even one rated 100% disabled, can access unless they prove that their specific need for care is caused by an injury sustained during military service: in vitro fertilization ("IVF"). It is undisputed that this form of medical care is sex-specific, and under Supreme Court and Second Circuit precedent, such differential treatment is sex discrimination. It is also settled in this Circuit that plausible allegations of sex discrimination should not be dismissed at the pleading stage, and certainly not based on the government's post-hoc, untested assertions of cost concerns and other justifications. Accordingly, the motion to dismiss of the U.S. Department of Veterans Affairs ("VA") must be denied. The restrictions on IVF care for active-duty service members reflect the same irrationality and unlawful sex discrimination. For similar reasons, therefore, the motion to dismiss of the U.S. Department of Defense ("DoD") should also be denied.

This categorical restriction on IVF, the Infertility Causation Requirement ("ICR") is not compelled by statute; rather, DoD implemented it in 2012, against the backdrop of a long history of animus and discrimination against women in the military, and particularly servicewomen who want to start families. VA then adopted the same policy through successive appropriations statutes. Even when Defendants explicitly excluded unmarried people, single women, and gay couples from accessing IVF, the ICR posed a significant barrier to access, since infertility is often impossible to trace to any medically identifiable source, let alone to a known service-related injury. Now, the ICR leaves many service members and veterans without the family building options they deserve.

Plaintiff has plausibly alleged that the ICR is unlawful for four reasons: it (1) discriminates based on sex in violation of the Constitution and Section 1557 of the Affordable Care Act; (2) infringes on the right to procreate; (3) categorizes without any legitimate government interest, only

one grounded in animus; and (4) is arbitrary and capricious in violation of the Administrative Procedure Act.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Department of Defense

Defendant DoD has broad authority to provide medically necessary healthcare, 10 U.S.C. § 1074(a), including infertility care. 10 U.S.C. § 1074d ("Female members . . . shall also be entitled to . . . [c]omprehensive obstetrical and gynecological care, including care related to pregnancy and the prevention of pregnancy [and] [i]nfertility"). DoD is responsible for meeting the healthcare needs of active-duty service members, who regulations largely bar from seeking alternative health insurance. *See* 32 C.F.R. § 199.3(d) ("[I]t is the intent that all medical care be provided an active-duty member through the Uniformed Services medical care system"); *Active Duty Service Members and OHI*, TRICARE, https://www.tricare.mil/Plans/OHI (describing DoD restrictions on active-duty service members' use of health insurance alternatives).

In 2012, DoD issued a memorandum ("2012 DoD Policy Memo") authorizing the provision of limited IVF services to certain service members. ECF No. 40 ("Am. Compl.") ¶ 32. The 2012 DoD Policy Memo facially excluded service members who (1) were single or unmarried ("Marriage Requirement"); (2) were in a couple whose members had the same reproductive anatomy; or (3) needed donor gametes to conceive ("Member Gamete Requirement"). *Id.* ¶ 30. The 2012 DoD Policy Memo also limited IVF 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" ("Infertility Causation Requirement"). *Id.* ¶ 86.

On March 8, 2024, approximately six months after Plaintiff filed this suit, DoD released an amended IVF policy. ECF No. 49-1 ("2024 DoD Policy Memo"). The new policy removed the

2012 DoD Policy Memo's Marriage and Member Gamete Requirements. However, DoD retained its restriction on IVF access to "seriously or severely ill or injured Service members (Category II and III)"[1] who "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 assisted reproductive technology." *Id.* at 2.[2]

B. Department of Veterans Affairs

VA also 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). Under its statutory mandate, VA "shall furnish hospital care and medical services which the Secretary determines to be needed" both "to any veteran for a service-connected disability" and "to any veteran who has a service-connected disability rated at 50 percent or more." 38 U.S.C. § 1710(a)(1). Veterans with a disability rating over 50% can access all care through VA except for dental, emergency care, and IVF, regardless of whether they need the care to treat a particular service-connected disability. *Id.* Veterans with "total disability" (a disability rating of 100%) are eligible for all VA care, including dental and emergency, regardless of why they need it—*except* for IVF.[3] 38 U.S.C. § 4.16; 38 U.S.C. § 1712(a)(1)(F); *id.* § 1728(a)(3). IVF is the only form of VA healthcare *always* subject to a service-connection requirement like the ICR.

Section 234 of the 2023 VA Appropriations Act authorizes VA to use "amounts

[1] A Category II condition is "a serious injury or illness" that leaves the service member "unlikely to return to duty within a [certain] time" and warrants possible medical separation from the military. DoD Directive 1300.24 at 14 (Encl. 4) (2009). Category III is "a severe or catastrophic injury or illness" where the service member is "highly unlikely to return to duty" and "[w]ill most likely be medically separated from the military." *Id.*

[2] For DoD only, under the same policy, ART includes intrauterine insemination (IUI).

[3] Defendants claim that "certain other benefits provided by VA contain a service-connected disability requirement." ECF No. 52-1 ("Mot. Dismiss") at 27. This is false. There is no other medical service which VA categorically limits to veterans who can prove service connection. Defendants cite VA statutes regarding dental and emergency care, but these same provisions expressly authorize care for several categories of veterans without service connection. *See* 38 U.S.C. § 1712(a)(1)(G) (authorizing dental care for veterans with "a [non-dental] service-connected disability rated as total"); *id.* § 1712(a)(1)(F) (authorizing dental care for "a veteran who is a former prisoner of war"); *id.* § 1728(a)(3) (covering emergency treatment for "[*a*]*ny disability* of a veteran if the veteran has a total disability permanent in nature from a service-connected disability" (emphasis added)).

appropriated or otherwise made available . . . for the 'Medical Services' account" to provide "fertility counseling and treatment using assisted reproductive technology to a covered veteran or the spouse of a covered veteran." Consolidated Appropriations Act, 2023, Pub. L. No. 117–328, Div. J, Tit. II, § 234(a)(1), 136 Stat. 4459, 4964 (2023) ("VA Appropriations Act" or "Section 234"). A "covered veteran" is defined as "a veteran . . . who has a service-connected disability that results in the inability of the veteran to procreate without the use of fertility treatment." *Id.* at § 234(b)(2). Section 234 defines "assisted reproductive technology" ("ART") by reference to the benefits available to service members under the 2012 DoD Policy Memo. *Id.* at § 234(b)(3).[4]

Prior to April 2024, VA incorporated the same Marriage and Member Gamete Requirements as DoD's IVF Policy, restricting IVF eligibility to "cisgender opposite-sex legally married couple[s] or other legally married couple[s] with opposite-sex gametes/reproductive organs." Am. Compl. ¶ 45. VA also defined "infertility" for the purposes of IVF benefits as "the inability to achieve a pregnancy after one year of regular unprotected sexual intercourse." *Id.* ¶ 46.

On April 4, 2024, in response to this suit, VA released a policy statement detailing changes to its IVF policy in line with DoD's March 8 changes, removing the categorical exclusion of unmarried veterans and ban on donor gametes. Exhibit A ("2024 VA Policy Memo"). But VA will continue to restrict IVF coverage "to certain seriously injured Veterans no longer able to procreate without the use of fertility treatment" due to a service-connected injury. *Id.* at 9.

C. Plaintiff NOW-NYC

Plaintiff NOW-NYC is an organization whose membership includes service members and veterans who are eager to start families but are barred by Defendants' discriminatory IVF policies. Of the nine NOW-NYC members whose stories appear in the Amended Complaint, only one may

[4] Congress recently renewed that authorization with unchanged text in the Consolidated Appropriations Act, 2024, Pub. L. No. 118-22, Div. A, Tit. II, § 234.

be able to access IVF in light of Defendants' removal of the Marriage and Member Gamete Requirements. Am. Compl. ¶ 70. The other members, including single women and LGBTQ couples with status-based and age-related infertility, and a couple whose infertility has been diagnosed as "unexplained," remain unable to access IVF due to the ICR. *Id.* at ¶¶ 66-69, 71-74.

On February 9, 2024, Plaintiff filed an Amended Complaint challenging the ICR, and Defendants moved to dismiss. This Court should deny Defendants' motion.

III. STANDARD OF REVIEW

On a motion to dismiss under Fed. R. Civ. P. 12(b)(1), "the district court must take all uncontroverted facts in the complaint . . . as true, and draw all reasonable inferences in favor of the party asserting jurisdiction." *Tandon v. Captain's Cove Marina of Bridgeport, Inc.,* 752 F.3d 239, 243 (2d Cir. 2014) (internal citations omitted). On a motion to dismiss under Fed. R. Civ. P. 12(b)(6), the court draws all reasonable inferences in the light most favorable to the plaintiff. *See Gibbons v. Malone*, 703 F.3d 595, 599 (2d Cir. 2013). The court must consider the complaint and whether it "contain(s) sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 554, 570 (2007)).

Additionally, dismissal of this action at the pleading stage is inappropriate because Plaintiff's allegations trigger heightened scrutiny. Defendants' justifications for their discriminatory policy must be "fleshed out in discovery, and decided on a motion for summary judgement or at trial." *Lloyd v. City of New York*, 43 F. Supp. 3d 254, 264 (S.D.N.Y. 2014) (finding that the appearance of differential treatment is enough at the motion to dismiss stage in an equal protection case); *see also Cornelio v. Connecticut,* 32 F.4th 160, 173-74 (2d Cir. 2022) (concluding that claims triggering heightened scrutiny should not be dismissed at the pleading stage).

IV. ARGUMENT

Defendants' motion to dismiss should be denied. Plaintiff has standing to bring its claims which are within the jurisdiction of this Court, and has stated claims for relief under the Fifth Amendment, the Affordable Care Act ("ACA"), and the Administrative Procedure Act ("APA").

A. Plaintiff Has Associational Standing to Challenge DoD's IVF Policies.

Plaintiff has associational standing to challenge Defendant DoD's IVF policies, *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977), and does not need to disclose the names of any individual service members at this stage.[5]

1. *Names are not required at the pleading stage to establish associational standing.*

An organization suing on behalf of its members must show that at least one member would otherwise have standing to sue individually. *Hunt*, 432 U.S. at 343. Second Circuit precedent allows organizations to plead standing without naming names. *See Bldg. & Const. Trades Council of Buffalo & Vicinity v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006) (holding that members can plead an injury without "nam[ing] names"); *Faculty, Alumni, & Students Opposed to Racial Preferences v. N.Y. Univ.*, 11 F.4th 68, 76 (2d Cir. 2021). Contrary to Defendants' claim, ECF No. 52-1 ("Mot. Dismiss") at 12-13, in *Do No Harm v. Pfizer Inc*, 96 F.4th 106 (2d Cir. 2024), the Second Circuit explicitly declined to decide whether "naming names" is required at the pleading stage, holding only that an organization must name members "at the summary judgment stage." *Id.* at 115.

The Supreme Court "regularly allows organizations to sue on behalf of unnamed members," *Do No Harm*, 96 F.4th at 124 (Wesley, J., concurring) (citing *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 200–01 (2023)), and "has not read *Summers* to create

[5] Defendant does not contest Plaintiff's standing to bring claims against VA on behalf of its veteran members.

a naming requirement." *Id.* (discussing *Summers v. Earth Island Inst.*, 555 U.S. 488 (2009)). Courts in this district and elsewhere have adopted this principle. *See New York v. U.S. Dep't of Com.*, 351 F. Supp. 3d 502, 606 n.48 (S.D.N.Y. 2019) ("[T]o hold that Article III requires an organization to name [members] would be in tension with one of the fundamental purposes of the associational standing doctrine—namely, protecting individuals who might prefer to remain anonymous."); *Nat. Res. Def. Council, Inc. v. Wheeler*, 367 F. Supp. 3d 219, 227-28 (S.D.N.Y. 2019) (citing *New York*, 351 F. Supp. 3d at 606 n.48); *Speech First, Inc. v. Shrum*, 92 F.4th 947, 949 (10th Cir. 2024) (permitting pseudonymous declarations and explaining that requiring naming was "clearly not the intent" of the *Summers* Court); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (refusing to adopt view that "an injured member of an organization must always be specifically identified in order to establish Article III standing"); *but see Pen Am. Ctr., Inc. v. Trump*, 448 F. Supp. 3d 309, 321 n.1 (S.D.N.Y. 2020) (relying on a reading of *Summers* that the Second Circuit declined to adopt in Do No Harm).

2. *Plaintiff's members' concerns about privacy and retaliation necessitate anonymity.*

Even if naming names were generally required, the risk of exposing highly sensitive personal information concerning Plaintiff members' sexual lives and medical histories, without providing any benefit to Defendants, the Court, or the public, counsels in favor of preserving anonymity. *See Sealed Plaintiff v. Sealed Defendant*, 537 F.3d 185, 190 (2d Cir. 2008) (listing factors that weigh in favor of pseudonymous pleading, including when the government is a defendant; whether a suit involves purely legal issues; and whether naming would reveal highly sensitive information); *see also Whalen v. Roe*, 429 U.S. 589, 599-600 (1977) (recognizing a constitutional right to avoid public disclosure of medical information); *S.D. v. Decker*, No. 22-cv-

03063, 2022 WL 1239589, at *3 (S.D.N.Y. Apr. 27, 2022) ("[T]hat petitioner is litigating against the government weighs [in favor of pseudonymity].").

Moreover, Plaintiff's active-duty members face unique risks of retaliation when suing their employer compared to civilians, Am. Compl. ¶¶ 76–79, and courts in this Circuit and elsewhere have allowed service members to sue their employers pseudonymously both during and after their service.[6] *See, e.g.*, *Karnoski v. Trump*, No. C17-01297, 2017 WL 11431253 (W.D. Wash Oct. 10, 2017) (transgender service member pseudonymously challenged the military's transgender ban); *Doe v. U.S. Dep't of the Army*, 99 F. Supp. 3d 159 (D.D.C. 2015) (pseudonymous National Guardsman sued the Army); *Doe v. Hagenbeck*, 870 F.3d 36 (2d. Cir. 2017) (plaintiff sued pseudonymously after discharge from Army).

Plaintiff here seeks to protect its members from the harm exposure would impose.[7] If required, Plaintiff is prepared to submit anonymous declarations of service members harmed by DoD's policies or, alternatively, submit non-anonymous declarations under seal. *See Do No Harm*, 96 F.4th at 117 (acknowledging that parties may proceed anonymously to the public when they identify themselves to the court); Am. Compl. ¶ 79.

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[6] Defendants claim that service members "routinely" sue the federal government "in their own names," but they cite only one case within the past 35 years brought by an active-duty service member against the military. *See* Mot. Dismiss at 14; *Church v. Biden*, 573 F. Supp. 3d 118 (D.D.C. 2021) (over COVID-19 vaccine mandates). Defendants also ignore several cases where service members challenged COVID-19 vaccine mandates *pseudonymously*—including in the same court that heard *Church*. *See Navy Seal 1 v. Austin*, 600 F. Supp. 3d 1 (D.D.C. 2022), *vacated and remanded on other grounds*, No. 22-5114, 2023 WL 2482927 (D.C. Cir. Mar. 10, 2023); *Navy Seal 1 v. Austin*, No. 8:21-cv-2429, 2022 WL 520829 (M.D. Fla. Feb. 18, 2022); *U.S. Navy SEALs 1-26 v. Austin*, 594 F. Supp. 3d 767, 774 (N.D. Tex. 2022). Of the three other cases Defendants cite, one involved Army reservists, not active-duty service members, *Matthew v. United States*, 311 Fed. App'x 409, 411 (2d Cir. 2009); the second is nearly 40 years old and from the Ninth Circuit, *Bon v. United States*, 802 F.2d 1092 (9th Cir. 1986); and the third was a suit brought against another service member who removed the case to federal court, arguing that the U.S. was the proper defendant. *Cubias v. United States*, No. 19-CV-46-FL, 2019 WL 4621981, *1 (E.D.N.C. Sept. 23, 2019). These cases hardly show a "routine" practice among service members of suing the government without the shield of anonymity.

[7] Plaintiff's members face vitriol as potential beneficiaries of any expanded IVF policy. After VA's recent expansion of IVF to same-sex and unmarried couples in response to this litigation, federal lawmakers decried IVF as "morally dubious" and a threat to the "nuclear family." *See* Letter from Matthew M. Rosendale et al., Members, U.S. Cong., to Denis R. McDonough, Sec'y, U.S. Dep't of Def. (Mar. 20, 2024) (calling VA's IVF coverage for same-sex couples and unmarried veterans "shocking … on a moral level" and accusing VA of trying to "remake the nuclear family").

B. The Veterans Judicial Review Act Does Not Divest This Court of Jurisdiction.

Plaintiff's claims against VA are properly within the jurisdiction of this Court. *See* 28 U.S.C. § 1331, 42 U.S.C. § 18116. As the Second Circuit has held, the Veterans Judicial Review Act ("VJRA") only precludes District Court review of "*decision[s] by the Secretary under a law that affects the provision of benefits*," 38 U.S.C § 511, and not of facial challenges to the constitutionality of a statutory classification, *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992). The Second Circuit and its sister circuits have held that cases like this one—namely, (1) facial constitutional challenges to statutes and (2) challenges unrelated to individual benefits determinations—are within a District Court's jurisdiction and beyond the VJRA's purview. *See id.*; *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006) ("Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans' benefits or to consider all issues that might somehow touch upon whether someone receives veterans' benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits.") (emphasis in original).

1. *The Court has jurisdiction over this facial constitutional challenge to a statute*

The Second Circuit has held that district courts can "properly exercise[] jurisdiction over . . . [v]eterans' facial constitutional challenges," such as this one, *Disabled Am. Veterans*, 962 F.2d at 144, because a statute drawn up by Congress is not a "decision by the Secretary." 38 U.S.C § 511; *see also Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2d Cir. 1992) ("[D]istrict courts continue to have 'jurisdiction to hear *facial* challenges of legislation affecting veterans' benefits.'") (quoting *Disabled Am. Veterans*, 962 F.2d at 140) (emphasis in original); *Schwingle v. United States*, No. 20-CV-6394 CJS, 2022 WL 9462632, at *6 (W.D.N.Y. Oct 14, 2022) ("The VJRA . . . permits, for example, 'suits challenging the constitutionality of the statutes underlying

veterans' programs, to which § 511(a) does not apply'"); *see also Sugrue v. Derwinski*, 26 F.3d 8, 11 (2d Cir. 1994). As the Second Circuit explained in *Disabled American Veterans*, interpreting the VJRA as precluding constitutional challenges to federal statutes affecting veterans' benefits "implicates issues of separation of powers," and courts should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question." *Disabled Am. Veterans*, 962 F.2d at 140-141 (a finding that VJRA did not apply to facial constitutional challenges was a reasonable alternative interpretation).

Where the Secretary has not made the decision but only implemented the decision of Congress, Section 511(a) does not preclude district court review. *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005). As VA Secretary Denis McDonough recently acknowledged, the restriction on IVF coverage is statutorily required and not at the discretion of VA (stating that, as to IVF, there "are limitations on services that VA can provide . . . that we think are not in keeping with our requirement[] to care for all veterans"). U.S. Dep't of Veterans Affairs, *VA Secretary Press Conference*, YOUTUBE (Apr. 27, 2023), https://www.youtube.com/watch?v=axBLy_iG6lA.[8] Because this lawsuit is a facial challenge to the constitutionality of Section 234(b)(2) of the VA Appropriations Act, this Court has jurisdiction.

2. *This litigation does not concern individual benefits determinations.*

Further, this Court has jurisdiction over Plaintiff's claims because it can resolve questions of law and fact without reviewing any prior benefits determinations. The word "necessary" in the text of Section 511 indicates that preclusion applies only when the district court *cannot* resolve

[8] In deciding a 12(b)(6) motion to dismiss, the court may take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned," Fed. R. Evid. 201(b), such as public records, including agency documents, documents available on government websites, and government press releases. *See, e.g.*, *Democratic Nat'l Comm. v. Russian Fed'n*, 392 F. Supp. 3d 410, 419 (S.D.N.Y. 2019); *In re Zyprexa Prods. Liability Litig.*, 549 F. Supp. 2d 496, 501 (E.D.N.Y. 2008).

questions of fact or law without determining the propriety of a VA benefits decision. *See Monk v. United States*, No. 22-CV-1502, 2024 WL 1344712, at *6 (D. Conn. Mar. 29, 2024) (while the plaintiffs' claims "touch[ed] upon whether someone receive[d] veterans' benefits," they "[did] not require [the Court] to re-open individual benefits decisions, evaluate the VA's findings of fact or law, or pass judgement on any individual VA benefits decision" (quoting *Broudy*, 460 F.3d at 112)); *Broudy*, 460 F.3d at 115 (court had jurisdiction because plaintiffs' claims "did not *require* the district court 'to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits.'" (emphasis added)); *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (9th Cir. 2012) (same); *Price v. United States*, 228 F.3d 420, 422 (D.C. Cir. 2000) (same).

The legality of the irrational and discriminatory ICR can be determined by examining the face of the statutory classification. This Court can, and has jurisdiction to, resolve all questions of law and fact without reopening or relitigating any individual benefits determination.[9]

C. The Infertility Causation Requirement Violates the Equal Protection Guarantee of the Fifth Amendment.

The ICR is the most burdensome restriction placed on access to healthcare provided to service members or veterans. Am. Compl. ¶¶ 55–61. Accordingly, Plaintiff plausibly alleges that it violates the Fifth Amendment by unconstitutionally discriminating (1) based on sex, by subjecting sex-specific healthcare to unique burdens, and (2) between members seeking IVF and those seeking other healthcare services, as well as between those who can prove the etiology of infertility and those who cannot, without any conceivable rational basis. Because intermediate scrutiny is triggered by Plaintiff's sex discrimination allegations, Plaintiff's claims should not be

[9] Defendants claim that even though Plaintiff challenges a statute, not a decision by the Secretary, its members must first have filed claims for benefits with VA and appealed the inevitable denial. *See* Mot. Dismiss at 16 (citing *Heckler v. Ringer*, 466 U.S. 602, 621-622 (1984)). However, *Heckler* was decided based on an exhaustion requirement in the Medicaid Act, and there is no exhaustion requirement for Plaintiff's facial constitutional challenges.

dismissed at the pleading stage. *See Cornelio v. Connecticut*, 32 F.4th 160, 173-74 (2d Cir. 2022); *United States v. Virginia*, 518 U.S. 515, 533 (1996) (burden is on government to satisfy heightened scrutiny, relying on actual evidence of its rationale rather than explanations offered in litigation).

While the government is free to decide whether to provide certain benefits, including IVF services, distribution of benefits is not a Constitution-free zone. Once the government provides benefits, the way it does so is subject to constitutional limitations. *Pavan v. Smith*, 582 U.S. 563, 566 (2017) (finding it unconstitutional for a state to issue birth certificates to children born to opposite-sex married couples, but not to children born to same-sex married couples); *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 837 (1995) (if a public university chooses to fund secular groups exercising free speech, it must also fund religious groups); *Califano v. Westcott*, 443 U.S. 76, 89–93 (1979) (providing cash welfare benefits to families with unemployed fathers but not to unemployed mothers constitutes unconstitutional sex discrimination).[10] Because Defendants have chosen to provide IVF coverage to active-duty service members and veterans, the way they do so is subject to constitutional review.

1. *Defendants have historically excluded and undervalued women on the basis of their childbearing capacity.*

The ICR is a contemporary manifestation of a long history of invidious discrimination against women and women's healthcare in the military and reflects the view—one that persists today—that family-building is incompatible with military service for women. This ongoing hostility to pregnancy among service members creates a plausible inference that the ICR is not "the product of neutral, persuasive actuarial considerations, [but] rather stemmed from a policy that purposefully downgraded women's role in the labor force [and] served to undercut the

[10] *Harris v. McRae*, 448 U.S. 297 (1980), is not to the contrary as Defendants argue. In *Harris*, the Court considered whether the government was obliged to provide Medicaid funding for abortion in the first place, not whether it could discriminate among beneficiaries in doing so. *Id.* at 301.

employment opportunities of women who become pregnant while employed." *See Gen. Elec. Co. v. Gilbert*, 429 U.S. 125, 149 (1976) (Marshall, J. dissenting) (superseded by the Pregnancy Discrimination Act, Pub. L. No. 95–555, 92 Stat. 2077 (1978)).

Although women have served in every conflict fought by the United States since the Revolutionary War, they did not become permanent members of uniformed service regular and reserve forces until congress enacted the Women's Armed Services Integration Act in 1948. Pub. L. No. 80-625, 62 Stat. 356 (1948). Still, military women were considered unfit for leadership roles, if not for service entirely, due to their sex-specific reproductive capacities. They could not command men or serve in combat roles, and pregnant women and women with minor children were automatically discharged. *Id.* VA only began providing some women-specific healthcare services in 1992, *see* Veterans Healthcare Act of 1992 § 106(a)(3), Pub. L. No. 102–585, 106 Stat. 4943 (1996), and only authorized pregnancy and delivery services in 1999, *see* Provision of Hospital and Outpatient Care to Veterans, 64 Fed. Reg. 54207, 54210 (Oct. 6, 1999). DoD did not offer women access to comprehensive family planning services until 2016. *See* National Defense Authorization Act for Fiscal Year 2016, Pub. L. No. 114–92, 129 Stat. 726, 813, 868 (2015).

While some barriers may be gone, Defendants' policies and practices still reflect the view that family building and military service are incompatible. The Defense Advisory Committee on Women in the Services identified that "[s]ervice members continue to report pregnancy negatively affects a servicewoman's career trajectory [including] promotion and career advancement [and] removal from key roles, leadership opportunities, and advanced training . . . leaving women at a disadvantage relative to their male peers." 2023 DEF. ADVISORY COMM. WOMEN SERVS. 122 [hereinafter DEF. ADVISORY COMM.]. The report noted that "[l]imited reproductive healthcare access was among the factors Service members felt might discourage women from joining the

military or staying beyond their service obligation" and that the "[l]ack of adequate reproductive healthcare may contribute to loss of motivation, reduction of productivity, health and well-being impacts, diminished quality of life, and family problems and, overall, may negatively impact the Military Services' readiness, all of which affect military retention."[11] *Id.* For example, one enlisted woman shared that when she got pregnant, her unit "hated her" because "they were mad [she] got 3 months of maternity leave" as "[t]hey thought they were doing all the hard work while [she] was sitting at a desk all day." *Id.* at 125. She explained: "If I want to have another kid, I'm scared it will set me back in my career," and that she now feels "guilty about wanting to have a family." *Id.* In short, the military continues to foster an environment that tells female service members that family building and military service do not mix. The ICR furthers this discriminatory history.

2. *The Infertility Causation Requirement is a classification on the basis of sex.*

Plaintiff plausibly pleads that by imposing the ICR on sex-specific health care based on invalid stereotypes about military service and women's health, Defendants disadvantage those seeking IVF based on sex. "To state a claim for an equal protection violation based on sex," plaintiffs may allege that "a law or policy is discriminatory on its face" in that "it expressly classifies persons on the basis of [gender]." *Hayden v. County of Nassau*, 180 F.3d 42, 48 (2d Cir. 1999). As a restriction limited to IVF, a medical service provided only to people with uteruses,[12] the ICR classifies on the basis of sex, just as applying differential treatment to pre- or post-natal care or other pregnancy-related benefits expressly classifies based on the sex-specific trait of having a uterus. *See Nevada Dep't of Human Resources v. Hibbs*, 538 U.S. 721, 733-34 (2003); *Tuscon Woman's Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004) ("*Hibbs* strongly supports

[11] A 2020 Government Accountability Office (GAO) study recognized that the stigma against pregnancy is widespread and is one of the top reasons that women leave the service. *See* U.S. GOV'T ACCOUNTABILITY OFF., FEMALE ACTIVE-DUTY PERSONNEL: GUIDANCE AND PLANS NEEDED FOR RECRUITMENT AND RETENTION EFFORTS (2020).
[12] As noted prior, Defendant DoD places the same IVF restrictions on inteauterine insemination (IUI).

plaintiffs' argument that singling out abortion in ways unrelated to the facts distinguishing abortion from other medical procedures is an unconstitutional form of discrimination on the basis of gender.").[13] Courts have recognized that IVF in particular is a treatment predicated upon the "gender-specific quality of child-bearing capacity." *Hall v. Nalco Co.*, 534 F.3d 644, 647 (7th Cir. 2008). As a court in this district held relying on *Hall*, "only women undergo surgical implantation procedures; therefore, only women and not men stand in potential danger" of facing discrimination for pursuing IVF. *Govori v. Goat Fifty, L.L.C.,* No. 10 Civ. 8982 (DLC), 2011 WL 1197942, at *3 (S.D.N.Y. March 30, 2011).[14]

Defendants themselves identify IVF as women's healthcare. For example, in a press release announcing the 2024 DoD Policy Memo, DoD characterized IVF as "women's health policy." Joseph Clark, *DOD Amends Assisted Reproductive Services Policy* (Mar. 11, 2024), https://www.defense.gov/News/News-Stories/Article/Article/3702693/dod-amends-assisted-reproductive-services-policy-for-seriously-severely-ill-or/. VA similarly assigns responsibility for its IVF program to the "VHA Office of Women's Health." ECF No. 40-4 ("Am. Compl. Ex. C") at 1. Only "Patients with Oocytes and Uteri" can access IVF through VA; zero "Patients with Sperm" access either IVF or embryo cryopreservation. Exhibit B at 16.[15]

Targeted regulation of a medical procedure that only one sex can undergo, such as IVF, is sex discrimination triggering heightened scrutiny if the regulation is a "pretext[] designed to effect an invidious discrimination against members of one sex or the other." *Geduldig v. Aiello*, 417 U.S.

[13] State courts have agreed. *Allegheny Reproductive Health Ctr. v. Pennsylvania Dep't of Hum. Servs.*, 309 A.3d 808, 881 (Pa. 2024) (targeting abortion for regulation discriminates on basis of sex in violation of equal rights); *State v. Planned Parenthood of the Great Northwest*, 436 P.3d 984, 1001 (Alaska 2019) (same); *New Mexico Right to Choose/NARAL v. Johnson*, 975 P.2d 841, 859 (N.M. 1998) (same).

[14] *Saks v. Franklin Covey Co.*, 316 F.3d 337, 346 (2d Cir. 2003) which was decided twelve years before *Obergefell*, did not contemplate gay couples procreating through IVF, and has been distinguished post-*Obergefell* is not to the contrary. Moreover, *Saks* contained no allegations of sex-stereotyping as the basis for the exclusion of certain infertility treatments. Compl. Ex. C at 1, ECF No. 40-4.

[15] Plaintiff received exhibits B and C from Defendant VA pursuant to a FOIA request.

484, 496 n.20 (1974). As the Court explained in *Hibbs*, laws and policies targeting sex traits like childbearing capacity fall into this category when they are attributable to "invalid gender stereotypes" of women and their role in the family and workplace, rather than actual "different physical needs of men and women." 538 U.S. at 733 n.6; *Tucson Woman's Clinic v. Eden*, 379 F.3d 531, 548 (9th Cir. 2004); *see also Virginia*, 518 U.S. at 516 (rejecting "overbroad generalizations about the different talents, capacities, or preferences of males and females" in the context of military service and training); *Doe v. Maher*, 515 A.2d 134, 159 (Conn. 1986) ("Since time immemorial, women's biology and ability to bear children have been used as a basis for discrimination against them.").[16] For example, in *Hibbs*, the Court held that state family leave benefit policies that discriminated based on childbearing capacity were grounded in sex stereotypes and therefore violated the Fourteenth Amendment's prohibition on sex discrimination. *Hibbs*, 538 U.S. at 733 n.6, 735 (holding that history of unconstitutional sex discriminatory family leave policies gave Congress Section 5 authority to enact the FMLA to remedy this history of unlawful sex discrimination). Here, applying the ICR only to IVF is similarly grounded in the stereotypical view that pregnancy and family building are incompatible with military service.

DoD and VA treat medically necessary, sex-specific infertility care differently from any other form of healthcare. The only treatments for which DoD attaches a service-caused serious injury or illness requirement are IVF and IUI which, like IVF, is sex-specific in that it can be provided only to a patient with a uterus. *See* 32 C.F.R. § 199.4(e)(3)(i)(B)(3); 2024 DoD Policy Memo at 4 (IV.A). And IVF is the *only* VA health treatment subject to a service-connected

[16]*Hibbs* specifically rejected the argument that its decision was precluded by *Geduldig*, noting that sex stereotyping, rather than actual differences in the "physical needs of men and women," was in play. *Hibbs*, 538 U.S. at 733 n.6. *Dobbs* is not to the contrary. *Dobbs v. Jackson Women's Health Organization*, 597 U.S. 215, 236 (2022) (in dicta, reaffirming that targeting sex-based medical procedures for regulation in ways "designed to effect an invidious discrimination against members of one sex or the other" triggers "heightened constitutional scrutiny" (internal quotations omitted)).

condition requirement, even for veterans with a total disability rating, Am. Compl. ¶¶ 55, 57–60,[17] and for which it imposes an arbitrary cut-off at a particular stage of treatment. For example, VA "[e]nsur[es] that Veterans with PTSD have access to required [mental health] services across the continuum of care and peer support services as needed," regardless of whether the veteran's PTSD is service connected. VHA Directive 1160.03, Treatment for Veterans with Posttraumatic Stress Disorder (Oct. 16, 2023).

On the other hand, both agencies recognize the need to treat *male*-specific healthcare needs, like erectile dysfunction, regardless of whether the veteran or service member has a service-connected diagnosis or serious injury or illness underlying the need for that particular treatment. *See* ECF No. 40-3 ("Am. Compl. Ex. B") at 1 (TRICARE's "Assisted Reproductive Services" coverage includes treatment for certain erectile dysfunction); ECF No. 40-6 ("Am. Compl. Ex. E") at 16 (providing VHA evaluation and treatment of erectile dysfunction). Nor can Defendants allege that services such as treatment for erectile dysfunction are necessary to make a service member "physically fit for service." Mot. Dismiss at 20.

In addition to facially subjecting *female*-specific healthcare to more onerous requirements than all other healthcare, the ICR poses more of an impediment for women than for men. According to VA's own assessments, female veterans suffer from infertility at nine times the rate of male veterans. Exhibit C, Table 1.1, at 10. Women are also more likely to struggle to meet the ICR because infertility is more likely to be unexplained, and therefore impossible to connect medically to service, in women than in men. *Compare* Exhibit C, Table 1.3.1, at 16 *with* Table 1.2.1, at 11.

[17] As noted, veterans with a disability rating over 50% can access all care through VA except for dental, emergency care, and IVF, without a requirement that care be for a service-connected disability. Veterans with a disability rating of 100% are eligible for all care through VA, including dental and emergency care, regardless of why they need the care—except for IVF.

3. *The Infertility Causation Requirement is subject to and fails intermediate scrutiny.*

Under the Fifth Amendment's equal protection guarantee, sex discrimination is subject to intermediate scrutiny, which places the burden on the government, not the plaintiff, to show "that the [challenged] classification serves 'important governmental objectives and that the discriminatory means employed are substantially related to the achievement of those objectives.'" *Virginia*, 518 U.S. at 524 (internal citations omitted). To survive intermediate scrutiny, Defendants' justifications must be "genuine, not hypothesized or invented *post hoc* in response to litigation." *Id*. at 533.

Here, Defendants cursorily offer three governmental interests for the first time in their motion to dismiss, none of which they frame as "important." *Id.* at 524; *see* Mot. Dismiss at 18–19, 23. Rather than pointing to direct or even strong circumstantial evidence of Congressional intent, the government appears to invent hypothetical interests from whole cloth: (1) IVF's relative cost; (2) in the case of DoD, IVF's lack of a connection to "military readiness;" and (3) a potential interest in "compensat[ing]" service members and veterans only for "service-related injury or illness." Mot. Dismiss at 18–20. These are "*post hoc*" justifications that cannot survive intermediate scrutiny, *Virginia*, 518 U.S. at 533, especially at the pleading stage, and cost in particular is not an adequate justification under intermediate scrutiny. *Clarkson v. Coughlin*, 898 F. Supp. 1019, 1051 (S.D.N.Y. 1995) (explaining that "savings of time, money and effort are insufficient justifications" under heightened scrutiny to justify sex discrimination (citing *Frontiero v. Richardson*, 411 U.S. 677, 690 (1973))). These stated reasons are also pretexts for sex stereotyping and cannot survive the standard of *Hibbs* and *Geduldig*. *Geduldig*, 417 U.S. at 496 n.20; *Hibbs*, 538 U.S. at 733 n.6. Indeed, as discussed below, the claimed objectives do not even survive rational basis review. Dismissal on the pleadings is thus not appropriate here. *See Cornelio*,

32 F.4th at 173–74. Courts engaging in intermediate scrutiny deny motions to dismiss in which the government insufficiently alleges an "important" governmental interest. *See, e.g.*, *Doe No. 1 v. Putnam County*, 344 F. Supp. 3d 518, 538–39 (S.D.N.Y. 2018); *Kole v. Vill. of Norridge*, 941 F. Supp. 2d 933, 943 (N.D. Ill. 2013).

4. *The Infertility Causation Requirement fails even rational basis review.*

Defendants' three justifications fail even rational basis review, particularly in light of Defendants' well-documented history of animus against women service members. *Romer v. Evans*, 517 U.S. 620, 633 (1996) (finding that a state constitutional amendment lacked rational basis because it was "at once too narrow and too broad" and therefore was more likely rooted in animus); *see supra* at 12. Like the law at issue in *Romer*, the ICR is both overinclusive and underinclusive in relation to Defendants' proffered justifications, and it imposes "immediate, continuing, and real injuries that outrun and belie any legitimate justifications that may be claimed for it." *Id.* at 635.

a) Cost cannot justify the Infertility Causation Requirement.

Defendants' cost rationale fails for two reasons. First, the ICR is underinclusive. *See City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 446 (1985) (applying rational basis review to an underinclusive classification and concluding "[t]he State may not rely on a classification whose relationship to an asserted goal is so attenuated as to render the distinction arbitrary or irrational"). Defendants have not explained why IVF—as opposed to other "expensive and complex" healthcare—is subject to this restriction. Mot. Dismiss at 19, 27. Reconstructive surgery to correct congenital anomalies is also "expensive and complex," as are organ transplants, aortic valve replacements, lifetime care for chronic diseases, and other medical interventions—all of which Defendants provide regardless of the cause of the condition. Am. Compl. ¶¶ 55, 57. If Defendants' primary concern were cost, then they would apply a causation requirement to more than just IVF.

Second, Defendants' cost rationale is not credible because IVF is a narrow benefit that already comes with substantial limitations on coverage, even for eligible individuals. Both agencies' policies are capped at "a maximum of 6 attempts to achieve 3 completed IVF cycles." Am. Compl. Ex. C at 12; 2024 DoD Policy Memo at 4. Thus, at $20,000 per IVF cycle, Ex. 2 at 14, the agencies would spend at most $60,000 on IVF per eligible recipient—less than VA spends on many treatments, including Hepatitis C.[18] Further, if Defendants were to treat IVF in parity with non-sex-specific healthcare, then it would be available as a covered service only for service members diagnosed with infertility during service, as well as veterans who are directly service-connected for infertility or whose VA disability rating is at least 50%. 38 U.S.C. § 1710(a)(1).[19]

b) Military readiness cannot justify the Infertility Causation Requirement.

The ICR is also underinclusive in relation to DoD's military readiness rationale.[20] DoD provides other healthcare unrelated to military readiness, including pregnancy and well-baby care, plastic and reconstructive surgery, and erectile dysfunction, as mentioned above. Am. Compl. ¶ 55. If prioritizing military readiness truly motivated Defendant DoD to impose the ICR, these other forms of care would also be restricted by stringent eligibility criteria, rather than available to all

[18] Patricia Kime, *VA, DoD Spend More than $450M on Costly Hepatitis Drug*, Military Times (Jan. 8, 2015), https://www.usatoday.com/story/news/politics/2015/01/08/government-hepatitis-drug-costs/21462363/ (over $60,000 per Hepatitis C treatment per veteran); *VA Has Cured 100,000 Veterans of Hepatitis C*, VA News (Aug. 2, 2019), https://news.va.gov/64162/va-cured-100000-veterans-hepatitis-c/ (at one point, "VA was starting a Veteran on HCV treatment every 72 seconds on a typical work day; a rate of almost 2,000 new treatments each week").

[19] Only 16.5% of veterans have a disability rating of 50 to 100%. *Service-Connected Disability-Rating Status and Ratings for Civilian Veterans 18 Years and Over*, U.S. Census Bureau (2022), https://data.census.gov/table/ACSDT1Y2022.B21100?q=B21100.

[20] The military readiness rationale has historically been used by Defendants to justify discriminatory policies based on sex and sexual orientation. *See, e.g.*, National Defense Authorization Act for Fiscal Year 1994, ch. 37, 107 Stat. 1547, 1670-1671 (1993) (repealed 2011) ("The presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion which are the essence of military capability."); Sabrina Siddiqui & Molly Redden, *Donald Trump says US military will not allow transgender people to serve*, THE GUARDIAN (July 26, 2017), https://www.theguardian.com/us-news/2017/jul/26/trump-says-us-military-will-not-accept-or-allow-transgender-people-to-serve ("Our military must be focused on decisive and overwhelming . . . victory and cannot be burdened with the tremendous medical costs and disruption that transgender in the military would entail.")

service members where medically necessary. And studies commissioned by DoD itself have recognized that IVF is integral to military readiness, directly contradicting Defendants' motion to dismiss. DEF. ADVISORY COMM. at 121 (concluding that "[l]ack of adequate reproductive healthcare may . . . negatively impact the Military Services' readiness").

c) An interest in only compensating for injuries caused by service cannot justify the Infertility Causation Requirement.

The ICR is also overinclusive as a means of directing compensation toward injured service members and veterans. The ICR operates to exclude many service members and veterans facing causes of infertility that are in fact service-related but are unlikely to meet DoD and VA's overly burdensome requirements. Per Defendant VA's own data, three-fourths of veterans' infertility has an unknown etiology and thus cannot meet the service-connection requirement. Exhibit C at 11, 16 (finding that 76.7% of infertility among female veterans is "unexplained" or "unspecified," with an unknown biological cause). But the agencies require service members and veterans to establish medically that an in-service event led to the loss of ability to procreate. 2024 DoD Policy Memo; 2024 VA Policy Memo.

d) Plaintiff has plausibly alleged that the ICR fails even rational basis scrutiny.

In *Romer*, such overinclusive, underinclusive, and unsupported government reasoning was grounds to infer that animus, rather than legitimate government interests, underlaid the policy at issue. *Romer*, 517 U.S. at 633. Here, Plaintiff has alleged that treating sex-specific infertility care differently from all other healthcare is sex discrimination rooted in stereotypes as to the secondary status of women in the military and the incompatibility between family building and service for women. Plaintiff has also alleged that this unique treatment of IVF is fundamentally irrational. As such, Plaintiff has sufficiently pled a Fifth Amendment equal protection claim. Plaintiff has alleged

that treating sex-specific infertility care differently from all other healthcare is sex discrimination rooted in stereotypes as to the secondary status of women in the military and the incompatibility between family building and service for women. Plaintiff has also alleged that this unique treatment of IVF is irrational, including Defendants' classifications as to who may access IVF, particularly in light of Defendants' history of animus against those most harmed by the ICR.

D. Plaintiff States a Claim Under Section 1557 of the Affordable Care Act Against the Agencies' Infertility Causation Requirements.

By discriminating based on sex, the ICR also violates Section 1557 of the Affordable Care Act. A plaintiff states a claim for sex discrimination under Section 1557 by plausibly alleging they were (1) excluded from participation in, denied the benefits of, or subjected to discrimination in the provision of (2) federally funded healthcare services, and (3) that this treatment occurred on the basis of sex. 42 U.S.C. § 18116 (incorporating Title IX and Title VI standards); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 946 (9th Cir. 2020) (Title IX); *Doe v. Columbia Univ.*, 101 F. Supp. 3d 356, 367 (S.D.N.Y. 2015) (Title IX); *see also Tolbert v. Queens Coll.*, 242 F.3d 58, 69 (2d Cir. 2001) (Title VI). Because (1) members of NOW-NYC were denied IVF coverage due to the ICR, (2) VHA and TRICARE are federally funded healthcare services, and (3) the ICR facially discriminates on the basis of sex, the Court should deny the motion to dismiss Plaintiff's Section 1557 claim.

Defendants claim Plaintiff has not plausibly alleged that the ICR discriminates on the basis of sex, and that, even if it has, the intent standard is not met because "Plaintiff must show that the Agencies were trying to harm the Protected Classes." *See* Mot. Dismiss, at 23. This is simply incorrect. First, the ICR plainly "discriminates on the basis of sex." *See supra* Section IV(C)(1). Section 1557 incorporates Title IX standards, which hold that discrimination "'on the basis of sex' encompasses pregnancy-based discrimination." *See Conley v. Nw. Fla. State Coll.*, 145 F. Supp.

3d 1073, 1076 (N.D. Fla. 2015); *see also* 81 Fed. Reg. 31375, 31387 (May 18, 2016) (interpreting Section 1557 to prohibit "discrimination on the basis of pregnancy, false pregnancy, termination of pregnancy, or recovery from, childbirth or related medical conditions, sex stereotyping, and gender identity"). By applying a unique, onerous requirement to gender-specific healthcare for those of child-bearing capacity, Defendants facially discriminate on the basis of sex.

Second, a showing of discriminatory intent is not necessary where, as here, a Section 1557 plaintiff demonstrates facial discrimination. In such instances of facial discrimination, the plaintiff "need not otherwise establish the presence of discriminatory intent." *Berton v. Aetna Inc.* 2024 WL 869651, at *3 (N.D. Cal. Feb. 29, 2024) (internal quotations omitted).

Even beyond the facial classification, there exists a plausible inference that the decision to implement and retain the ICR was intentional sex discrimination. *See Doe v. Columbia Univ.,* 831 F.3d 46, 56 (2d Cir. 2016) ("[A] complaint under Title IX . . . is sufficient with respect to the element of discriminatory intent . . . if it pleads specific facts that support a minimal plausible inference of such discrimination."). The determination of whether a claim is plausible is "context specific." *See Ashcroft v. Iqbal*, 556 U.S. 662, 663–64 (2009). In this case, "that context includes the history of barriers to healthcare" that women service members and veterans have faced. *Klaneski v. Bristol Hospital, Inc.*, 2023 WL 4304925, at *5 (D. Conn. June 30, 2023). The discriminatory origins of the ICR and its continued burdens on a protected class are "among the factors the Court must consider in assessing the allegations of any Amended Complaint" and here, they point toward intentional discrimination. *Id.*

E. The Infertility Causation Requirement Violates the Fundamental Right to Procreate Under the Due Process and Equal Protection Clauses.

The ICR violates the rights of service members and veterans to procreate, and their equal rights to procreate. *See Skinner v. Oklahoma,* 316 U.S. 535, 541 (1942) (recognizing that the right

to procreate is "one of the basic civil rights of man . . . fundamental to the very existence and survival of the race"). The Court in *Skinner* held that application of a sterilization program to some prisoners but not others, based on the crimes they had committed, violated the Equal Protection Clause because it discriminated as to who could access the fundamental right to procreate. *Id.* at 541-42. This same right is implicated by Defendants' ICR.

First, in the context of military service, the ICR effectively denies service members and veterans the fundamental right to procreate. Military service carries discrete and unique risks to fertility, including physical trauma, PTSD, toxic exposure, and disruptions in preventive healthcare services that can increase the risk of infertility. *See* Am. Compl. at ¶¶ 18, 21–25. Despite the increased infertility concerns among the military population, Defendants limit redress through IVF to the small minority who can prove the etiology of their infertility. *See* Exhibit C at 16 (explaining that more than 75% of infertility among female veterans is "unexplained" or "unspecified").

The medical and financial realities of military service compound to burden the right to procreate. The structure of TRICARE and VHA healthcare make it difficult, if not impossible, to seek IVF treatment elsewhere. An active-duty service member presumably has no other employer through which they could receive health insurance and would have to pay out-of-pocket on the insurance marketplace. Even if a service member could afford other coverage, and IVF were available where they were stationed, they would have to navigate complex DoD and service branch-specific regulations that limit coordination of benefits between TRICARE and non-TRICARE health insurance. *See Active-Duty Service Members and OHI*, *supra* at 2. On the VA side, a veteran with a 100% disability rating who is eligible for all non-IVF care but cannot prove the ICR would similarly be forced to purchase insurance on the private market or pay out-of-pocket to access IVF. A veteran with a 100% disability rating is presumptively unable to work and,

therefore, to access health insurance through an employer. Thus, in the unique context of TRICARE and VHA, restrictions on access to IVF do not just withhold a benefit; the restrictions effectively deprive ineligible service members and veterans of their fundamental right to procreate.

Second, by imposing the ICR on IVF, burdening the right to procreate of some and not others, the Defendants unconstitutionally discriminate in the imposition of this burden, violating the equal right to procreate. *See Skinner*, 316 U.S. at 541; *Eisenstadt v. Baird*, 405 U.S. 438, 452-54 (1972) (invalidating provision of contraceptives to unmarried persons); *see also Obergefell v. Hodges*, 576 U.S. 644, 674 (2015) (holding that Equal Protection Clause and Due Process Clause prohibit infringement of fundamental right to marry through same-sex marriage bans). The Defendants' proffered justifications will not meet the standard for strict scrutiny at summary judgment or trial. Even if they had asserted compelling interests, which they did not, the ICR is not narrowly tailored to any of the justifications offered to this point. *See supra*, Section IV(C)(4). In any case, claims triggering heightened scrutiny, like those implicating the right to procreate, should not be dismissed at the pleading stage. *See Cornelio*, 32 F.4th at 173–74.

F. DoD's Serious Illness/Injury Requirement is Arbitrary and Capricious and Contrary to Law.

Under the APA, a reviewing court must set aside an agency decision that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *New York v. FERC*, 783 F.3d 946, 958 (2d Cir. 2015). When an agency has discretion to make a policy determination, that determination must be reasoned and rational. *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016); *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (explaining that an agency must "examine the relevant data and articulate a satisfactory explanation for its action"); *NRDC, Inc. v. EPA*, 961 F.3d 160 (2d Cir. 2020) (agency must give "adequate reasons for its decisions"); *County of Rockland v. U.S. Nuclear Regul.*

Comm'n, 709 F.2d 766, 776 (2d Cir. 1983) (describing the test as primarily one of "rationality").

DoD's application of the ICR is neither reasoned nor rational. It is not reasoned because DoD has failed to provide any explanation for its reliance on 10 U.S.C. § 1074(c)(4) as the authorizing statute for IVF coverage. And it is not rational because Section 1074(c)(4), a statute providing limited extended benefits to seriously ill service members requiring caretakers, is facially inapplicable to service members undergoing IVF; DoD has authority to provide IVF under other, more pertinent statutes on which it could have relied; and even Section 1074(c)(4) does not require service members to demonstrate that infertility was caused by service.

1. *DoD irrationally relied on Section 1074(c) to authorize IVF services.*

DoD's unexplained decision to rely solely on its authority under Section 1074(c)(4)(A) to justify the ICR, a provision inapplicable to IVF services, is arbitrary and capricious, particularly because infertility is explicitly included under more general healthcare provisions.

DoD has broad authority to provide medically necessary healthcare, *see* 10 U.S.C. § 1074(a), including infertility care, *see* 10 U.S.C. § 1074d(b), without any service-relatedness or serious injury or illness requirement. But instead of exercising its authority to cover IVF services per those two statutes, DoD claims to rely on Section 1633 of the National Defense Authorization Act for Fiscal Year 2008, codified at 10 U.S.C. § 1074(c)(4), as its sole authority to provide IVF, and now claims it is bound to limit IVF with the ICR. The government's claim that the ICR is required by statute cannot be squared with the text of Section 1074(c)(4)(A).

None of the categories of service authorized by Section 1074(c)(4) apply to service members undergoing IVF. Instead, that Section authorizes DoD to provide certain extended benefits to service members who are so ill or injured as to require primary caretakers. 10 U.S.C. § 1074(c)(4)(B)(i). The extended benefits must be "comparable to that provided by the Secretary

under subsections (d) and (e) of section 1079," Section 1074(c)(4)(A), which is limited to those with (1) "moderate or severe mental retardation," (2) a "serious physical disability" which "precludes the person with the disorder, condition or anatomical loss from unaided performance of at least one Major Life Activity," (3) an "extraordinary physical or psychological condition" which results in the beneficiary being homebound, (4) severe physical disabilities in toddlers and infants, and (5) multiple disabilities. 32 CFR § 199.5. None of these apply to service members receiving IVF.

DoD is authorized to provide IVF under 10 U.S.C. § 1074(a) (granting DoD authority to provide medically necessary healthcare) and 10 U.S.C. § 1074d(b) (authorizing "[c]omprehensive obstetrical and gynecological care, including care related to pregnancy and the prevention of pregnancy [and] [i]nfertility"). Its decision not to exercise this authority is arbitrary and irrational.

2. *Section 1074(c)(4) does not contain any service causation requirements.*

Regardless, the ICR is not mandated by Section 1074(c)(4), nor does it appear in its text. That Section expressly requires the provision of "comprehensive" care to eligible service members, not just care limited to narrowly redressing the serious illness or injury. Congress established service causation requirements in two neighboring statutes: Section 1074a (those in active duty for fewer than thirty days, inactive-duty training, or funeral honors duty) and Section 1074b (cadets, midshipmen, and those in SROTC). Congress could have written a similar limitation into Section 1074(c)(4) but did not do so.

3. *DoD's decision to impose the Infertility Causation Requirement is not reasoned.*

DoD did not provide in its 2012 or 2024 memoranda, or even in its Motion to Dismiss, any explanation for exercising solely its authority under Section 1074(c)(4), and only provided a rationale for the ICR for the first time in its Motion. *Encino Motorcars*, 579 U.S. at 221 ("[W]here

the agency has failed to provide even that minimal level of analysis, its action is arbitrary and capricious and so cannot carry the force of law."); *LVM v. Lloyd*, 318 F. Supp. 3d 601, 613 (S.D.N.Y. 2018) (determining that a policy "instituted without sufficient investigation or justification" violated the APA). As a result, DoD's IVF policy and the decisions pursuant to it were arbitrary and irrational.

The government now attempts to supplement the record in this litigation by offering, for the first time, purported justifications for the ICR. *See* Mot. Dismiss at 19, 25. However, its explanations cannot be considered. "In reviewing agency action, 'a court is ordinarily limited to evaluating the agency's contemporaneous explanation in light of the existing administrative record.'" *Rural & Migrant Ministry v. United States EPA*, 565 F. Supp. 3d 578, 598–99 (S.D.N.Y. 2020) (quoting *DOC v. New York*, 139 S. Ct. 2251, 2573 (2019)). "An agency cannot adopt a different rationale to justify its decisionmaking for the purposes of litigation," *id.* at 599, as Defendants do here, and an agency's litigating position alone cannot satisfy the requirement of reasoned decision-making. Since DoD failed to articulate any explanation for imposing the ICR when it issued the Policy in 2012 or again in 2024, the requirement is not reasoned and fails arbitrary-and-capricious review.

4. *The Infertility Causation Requirement is DoD's policy decision, not a matter of statutory interpretation.*

The government attempts to avoid arbitrary and capricious review altogether by arguing that its decision to limit IVF access was a matter of statutory interpretation, not policy judgement, because "DOD's SCD Condition is *required* by the statute under which it provides IVF benefits: Section 1074(c)(4)," Mot. Dismiss at 33 (emphasis added), and relies on *Catskill Mountains Chapter of Trout Unlimited, Inc. v. EPA* to argue for deferential review. 846 F.3d 492, 521 (2d Cir. 2017). But the challenged DoD regulations adopting the ICR, *see* 32 C.F.R. § 199.4, were not

required by statute, and as such, DoD cannot claim a statutory limitation on its policymaking authority to evade arbitrary-and-capricious review of the reasonableness of its actions. *See Nat'l Ass'n of Regul. Util. Comm'rs v. ICC*, 41 F.3d 721, 727 (D.C. Cir. 1994). Where an "agency purport[s] to find in the statute a legal constraint . . . that is simply not there," it is appropriate for the Court to evaluate whether the agency's action is "unreasonable" and apply arbitrary-and-capricious review. *Id*. at 728. Here, the Court should apply the arbitrary-and-capricious test to DoD's decision to impose the ICR because the government's argument relies on a statutory "constraint" that is "simply not there." *Id.*

In *Catskill Mountains*, "the EPA justified its interpretation of the [statute] in an explanation spanning nearly four pages of the Federal Register, touching on the text of Section 402, the structure of the Act, and pertinent legislative history." 846 F.3d at 505. Because the EPA's interpretation touched on specific language of the Act, was published long before litigation commenced, and was contained in a legislative rule, it fit within the sphere of deference imagined by *Chevron v. NRDC*. By contrast, the 2012 DoD Policy Memo and 2024 Amended Policy Memo cite only the 2008 NDAA and do not engage in *any* statutory interpretation. As such, DoD's Policy Memos and subsequent interpretations are more like an agency policy judgement reviewable under *State Farm*.

Even if the Court were to apply *Chevron*, DoD's interpretation of Section 1074(c) does not warrant deference and is not reasonable. Defendant has not indicated that it engaged in any "careful consideration" of its authority to provide IVF and any applicable statutory limitations, and its interpretation of Section 1074 in its motion to dismiss should not receive *Chevron* deference. *Barnhart v. Walter*, 535 U.S. 212, 222 (2002); *see also Kisor v. Wilkie*, 139 S. Ct. 2400, 2417 (2019) (holding "a court should decline to defer to a merely "convenient litigating position" or

"*post hoc* rationalizatio[n] advanced" to "defend past agency action against attack"). And regardless, the Court can conclude that Congress "has directly spoken to the precise question at issue." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). As noted, Congress could have imposed a service-relatedness requirement on Section 1074(c)(4), as it did for other sections, but chose not to.

Although it is entirely appropriate for the Court to analyze the ICR under *State Farm*'s arbitrary and capricious standard, the policy is also invalid under a more deferential standard. Even if the Court is persuaded that DoD's ICR is a matter of statutory interpretation rather than policymaking, that interpretation did not take place in a formal, well-reasoned format meriting *Chevron* analysis. And DoD's interpretation of Chapter 55 in general and Section 1074(c)(4)(A) in particular is not reasonable.

5. *The Infertility Causation Requirement is ultra vires and contrary to law.*

Moreover, DoD was acting contrary to law and outside the scope of its authority in imposing and retaining the ICR because the policy violates Section 1557. *See supra* Section IV.D. Defendants have not moved to dismiss Plaintiff's Claim X. DoD violated Section 706(2)(C) of the APA by choosing to authorize and implement IVF coverage in a manner that conflicts with Section 1557 when they had an alternative viable option for statutory authority. *See New York v. U.S. Dep't of Health & Hum. Servs.*, 414 F. Supp. 3d 475, 532 (S.D.N.Y. 2019) ("This authority could sustain only a portion of the terrain that the Rule purports to cover.").

V. CONCLUSION

For the foregoing reasons, the motion to dismiss should be denied.

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New Haven, Connecticut

Respectfully Submitted,

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