

Appeal No. 21-1432

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**In the United States Court of Appeals  
for the Federal Circuit**

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ROBERT J. LABONTE, JR.,

*Plaintiff-Appellant*

*v.*

UNITED STATES,

*Defendant-Appellee*

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On Appeal from the United States Court of Federal Claims,  
No. 18-1784C, Judge Richard A. Hertling

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**BRIEF OF AMICI CURIAE  
NATIONAL VETERANS LEGAL SERVICES PROGRAM AND  
PROTECT OUR DEFENDERS  
IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL**

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## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, undersigned counsel for amici curiae certifies the following:

1. The full name of the amici curiae represented by me in this case are the National Veterans Legal Services Program and Protect Our Defenders.

2. The names of the real parties in interest represented by me are the same.

3. The amici curiae represented by me are nonprofit corporations.

4. Amici curiae did not participate in proceedings in the lower tribunals. The names of all law firms and the partners or associates that appeared for the amici now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are: None.

5. The following cases known to counsel are pending in other courts or agencies that will directly affect or be directly affected by this Court's decision in the pending appeal: None.

6. The following information is required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees): n/a.

MARCH 26, 2021

/s/ Liam J. Montgomery  
LIAM J. MONTGOMERY

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The National Veterans Legal Services Program and Protect Our Defenders respectfully submit this brief as amici curiae pursuant to Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29.<sup>1</sup>

### **INTEREST OF AMICI CURIAE**

The National Veterans Legal Services Program (“NVLSP”) is an independent, nonprofit organization that has worked since 1981 to ensure that the United States government provides our nation’s 25 million veterans and active duty personnel with the federal benefits that they have earned through service to our country. NVLSP advocates before Congress, federal agencies, and courts to protect service members and veterans. When, as here, an Article III court’s ruling threatens to deprive large groups of our nation’s service members, veterans, or their families of rights granted by Congress, NVLSP authors amicus curiae briefs supporting appellate review and reversal.

Protect Our Defenders (“POD”) is nonprofit organization that works to transform the culture of harassment and rape in the military through legal

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<sup>1</sup> Both parties consented to the filing of this brief. Neither party’s counsel authored this brief in whole or in part, and no person other than amici and their counsel contributed money towards the preparation or submission of this brief. *See* Fed. R. App. P. 29(a)(4)(E).

reform, advocacy, public education, and pro bono services for survivors of sexual assault and harassment in the military. It seeks to safeguard service members and civilians from sexual violence, improve safety, and promote equality in the military. Given its advocacy on behalf of veterans who have been wrongfully discharged after experiencing sexual assault or harassment, POD has a vital interest in supporting appellate review and reversal of judicial decisions that threaten to limit the remedies available to correct such injustices.

## **INTRODUCTION**

Robert LaBonte, Jr., an Iraq war veteran, is indisputably suffering from post-traumatic stress disorder (“PTSD”) and a traumatic brain injury (“TBI”). Instead of recognizing his service-connected injuries while he was on active duty, however, the Army court-martialed him and punitively discharged him in 2008 for misconduct related to his injuries. It was not until 2014 when the Army Discharge Review Board (the Army “DRB”), recognizing his debilitating mental and physical health condition and his quality of service, granted him clemency and retroactively removed his punitive discharge. Appx3.

Mr. LaBonte’s experience is sadly common. In 2017, for example, the Government Accountability Office reported that 62% of service members discharged for misconduct between 2011 and 2015 had been diagnosed with

PTSD, TBI, or a similar condition that could be associated with misconduct. Government Accountability Office, GAO-17-260, *DOD Health: Actions Needed to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations* 12 (May 2017) [hereinafter *Actions Needed*]. When a service member's discharge paperwork reflects a court-martial discharge, this information can have a profound and destabilizing impact by frustrating future career prospects, making it harder or impossible for veterans to access benefits, including medical treatment for PTSD or a TBI, and by creating a stigma that can follow them for the rest of their lives.

Yet within the military, things are slowly changing. As recognition has grown of the role that PTSD and TBI, as well as Military Sexual Trauma, can play in a service member's misconduct, the Department of Defense and Congress have, in recent years, directed the DRBs and Boards for Correction of Military Records ("BCMRs") to give more liberal consideration to these conditions as they review veterans' applications to amend their discharge paperwork—including those who have been court-martialed. By "considering mitigating facts and removing injustices from . . . military records," these boards "provide extraordinarily important services for our service members and veterans." *Overview of Military Review Board Agencies: Hearing Before*

*the H. Subcommittee on Military Personnel of the Committee on Armed Services, 115th Cong. 1 (2017) (statement of Rep. Mike Coffman, Chairman).*

The trial court’s decision, which restricts the boards’ authority to perform this essential function when the “reason for separation” on the service member’s discharge paperwork “reflects the decision of [a] court-martial,” Appx13, should be reversed. It is plainly inconsistent with the boards’ statutory authority to “correct any military record” when “necessary to correct an error or remove an injustice,” 10 U.S.C. § 1552(a)(1), and to “substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial,” 10 U.S.C. § 874(b), as well as other law, guidance, and established practice.

Even if the statutory language in section 1552 were ambiguous (it is not), when a court interprets the meaning of a statute or regulation providing benefits to veterans or service members, such as 10 U.S.C. § 1552(f), any “interpretative doubt is to be resolved in the veteran’s favor,” *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Because veterans like Mr. LaBonte have “performed an especially important service for the Nation, often at the risk of [their] own li[ves],” *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009), the veterans’ canon is one of the few surviving canons of statutory interpretation that puts

a thumb on the scale in favor of a specific class of parties, though it is perhaps better viewed as “more like a fist than a thumb,” *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, Veterans L.J. 1 (Summer 2013) (citing, *inter alia*, *Henderson v. Shinseki*, 562 U.S. 428 (2011)), <https://tinyurl.com/y5lkblqx>.

Particularly in light of this special solicitude to veterans, this Court should consider the significant repercussions that the trial court’s decision will have on any veteran separated pursuant to a court-martial seeking a discharge upgrade—not just those, like Mr. LaBonte, seeking a disability retirement. Such a result would frustrate the ability of review boards to “remove an injustice,” regardless of the mitigating factors that may warrant a change, and undermine efforts by the Department of Defense and Congress to expand consideration of such factors in granting relief.

## ARGUMENT

### **A. A DD Form 214 plays a significant role in a veteran’s post-military life.**

At the completion of their military service, all service members are issued a DD Form 214 (or “DD-214”) “describing relevant data regarding the Service member’s service and the circumstances of termination.” DoDI 1336.01(3)(c) (2009). This form, which is the “authoritative source of

information required for the administration of State and Federal laws applicable to personnel who have been discharged, released, or transferred to a Reserve Component while on active duty,” *id.* at 3(f), “contains important information such as a veteran’s dates of service, awards, training, rank, combat experience, characterization of discharge, and a notation if the discharge was for disability, if applicable.” Leslie C. Rogell, *An Attorney’s Guide to Veterans’ Rights and Benefits*, 22 GPSolo 56, 57–58 (2005).

Contrary to the trial court’s holding that a DD-214 is an administrative record “related” to a court-martial under 10 U.S.C. § 1552(f), a court-martial conviction will not necessarily be reflected on a veteran’s DD-214 at all. Three boxes on this form are relevant here: Box 24, describing the “character of service,” Box 28, containing the “narrative reason for separation,” and Box 26, which includes the corresponding “separation code.” Any of these boxes can—but may not—reflect that the veteran had a court-martial conviction. Where a service member is separated pursuant to a court-martial sentence, Boxes 26 and 28 will list the court-martial as the reason for separation, like Mr. LaBonte’s DD-214 does, and Box 24 will reflect a description of the service member’s character of service that could only be given by an approved court-

martial sentence, such as a punitive or “bad conduct” discharge. *See, e.g.*, 32 C.F.R. § 724.111.

Other service members with a court-martial conviction who do not receive a punitive discharge as part of their sentence may still be discharged administratively after their conviction. *See* Army Regulation 635-200, ch. 13-2(d), 14-2(f). For those service members, the court-martial would not be listed as the narrative reason for separation on their DD-214, even if it was a factor that triggered the administrative separation process. *See, e.g.*, ABCMR20100000427 (July 20, 2010) (noting narrative reason for separation on DD-214 of veteran who was convicted by court-martial but subsequently administratively separated read “misconduct – commission of a serious offense”).

In Mr. LaBonte’s case, the Army DRB has already removed the punitive discharge imposed by the court-martial that appeared in Box 24, and its authority to do so is not disputed in this case; only the BCMR’s authority to change the narrative reason in Box 28 (and, by extension, the corresponding separation code in Box 26) are the subject of this appeal.

The information reflected in Boxes 24 and 28 on a veteran’s DD-214 “profoundly impacts their future and civilian life.” Stephanie Smith Ledesma,



*PTSD and Bad Paper Discharges: Why the Fairness to Soldiers Act Is Too Little, Too Late*, 10 *Elon L. Rev.* 189 (2018). First, it can have a disastrous financial impact: the circumstances surrounding a veteran’s discharge have implications for his or her eligibility for disability compensation, pensions, educational or housing assistance, health care, and numerous other benefits. Umar Moulta-Ali & Sidath V. Panangala, *Veterans’ Benefits: The Impact of Military Discharges on Basic Eligibility*, Congressional Research Service (Mar. 6, 2015), <https://fas.org/sgp/crs/misc/R43928.pdf>. “By law, certain situations resulting in a discharge under less than honorable conditions constitute a legal bar to the payment of benefits.” U.S. Dep’t of Veterans Affairs, *Claims for VA Benefits and Character of Discharge: General Information* (Mar. 2014), [https://www.benefits.va.gov/BENEFITS/docs/COD\\_Factsheet.pdf](https://www.benefits.va.gov/BENEFITS/docs/COD_Factsheet.pdf); *see also* 38 U.S.C. § 5303; 38 C.F.R. § 3.12(d). This includes discharges that are issued as part of a court-martial sentence. *Id.* As the military’s benefits and insurance coverage “has become the main source of financial, psychological, and medical support” for most veterans, the denial of these benefits can be catastrophic. Ledesma, *supra*, at 197–98. These veterans—often already among the most vulnerable due to the conditions of

their discharge—are therefore unable to obtain mental health treatment to which they would otherwise be entitled.

Second, these financial barriers are compounded by the stigmatic effects of a “bad paper” discharge, which can refer to any discharge status on a DD-214 that is less than honorable. *See* Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors*, May 19, 2016, <https://www.hrw.org/report/2016/05/19/booted/lack-recourse-wrongfully-discharged-us-military-rape-survivors>. “Veterans are required to show their discharge papers at virtually every juncture: when seeking employment, applying to school, . . . applying for a home loan or housing assistance, even for getting a veteran license plate or a discount at a gym.” *Id.* A bad paper discharge can be “a powerful barrier to private-sector employment,” and “[v]eterans with bad paper are more likely to suffer mental health conditions or homelessness.” Michael J. Wishnie, “*A Boy Gets into Trouble*”: *Service Members, Civil Rights, and Veterans' Law Exceptionalism*, 97 B.U. L. Rev. 1709, 1724 (2017). Veterans with bad paper also take their own lives twice as often as other veterans. *Id.*

In short, “[b]ad paper is deeply shameful, imposing a lifetime stigma that marks the former service member as having failed family, friends, and

country.” *Id.*; see also *Rogers v. United States*, 24 Cl. Ct. 676, 690 (1991), *opinion corrected*, 26 Cl. Ct. 255 (1992), *aff’d*, 996 F.2d 317 (Fed. Cir. 1993) (finding DD-214s containing discharge information that presents a “derogatory connotation to the public at large” creates a “stigma” that can have far-reaching effects on a veteran, including inability to find a job). A court-martial conviction can be especially damaging; even the military’s own court-martial manual recognizes the stigma that a conviction can create. See Joint Service Committee on Military Justice, *Manual for Courts-Martial*, Part V(1)(c) (2019 ed.) (describing nonjudicial punishment as a means to maintain discipline “without the stigma of a court-martial conviction”).

**B. Veterans with PTSD or TBI and survivors of Military Sexual Trauma are disproportionately likely to have bad paper.**

The damaging impact of bad paper is disproportionately concentrated among certain categories of veterans, who are more likely to have been discharged for misconduct, including through court-martial convictions, than other service members. These impacted groups include veterans, like Mr. LaBonte, who have been diagnosed with PTSD or a TBI, as well as survivors of Military Sexual Trauma.

## 1. PTSD and TBIs

PTSD and TBIs are more common in veterans than the general population. See Ranak B. Trivedi et al., *Prevalence, Comorbidity, and Prognosis of Mental Health Among US Veterans*, 105 Am. J. Pub. Health 2564, 2566 (2015), <https://tinyurl.com/y7s7vhug>. A study published by the Congressional Research Service in 2015 found that between 2000 and 2015, approximately 177,461 service members were diagnosed with new cases of PTSD, including 138,197 deployment-related cases, and an additional 327,299 were diagnosed with a TBI. Maj. Bryant A. Boohar, *Combat Stress Claims: Veterans' Benefits and Post-Separation Character of Service Upgrades for "Bad Paper" Veterans After the Fairness for Veterans Act*, 227 Mil. L. Rev. 105 (2019).

Veterans suffering from one of these conditions are more likely to have bad paper: a Government Accountability Office analysis found that 62 percent of the service members separated for misconduct between 2011 and 2015 had been diagnosed with PTSD, a TBI, or a related condition. *Actions Needed*, *supra*, at 12; accord Robyn M Highfill-McRoy et al., *Psychiatric Diagnoses and Punishment for Misconduct: The Effects of PTSD in Combat-Deployed Marines*, BMC Psychiatry (Oct. 2010),

<https://bmcpyschiatry.biomedcentral.com/articles/10.1186/1471-244X-10-88>.

In fact, PTSD and TBI are sometimes referred to as the “signature wounds of the conflicts in Afghanistan and Iraq,” caused by the “mental and physical trauma” the service members have experienced in combat. *Actions Needed*, *supra*, at 1–2.

There is a growing body of research “on the connection between PTSD and behavior, including how PTSD symptoms can look like misconduct.” Jessica L. Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards’ Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 Cal. L. Rev. 1357, 1375 (Oct. 2020). PTSD in deployed service members often does not fully manifest until they return to the garrison and have difficulty reintegrating. Boohar, *supra*, at 99. “[T]hese conditions can adversely affect servicemembers’ moods, thoughts, and behavior,” *Actions Needed*, at 1, and if untreated, “can quickly send a service member into a spiraling descent of poor work performance, undesired behaviors at work and at home, and eventually career ending misconduct,” Boohar, *supra*, at 99.

## 2. Military Sexual Trauma

Military Sexual Trauma and PTSD are also closely related. In fact, “PTSD is more prevalent among sexual assault survivors than among combat veterans.” *Hearing Before the H. Subcommittee on Military Personnel of the Committee on Armed Services 115th Cong. 66 (2017)* (comment by Rep. Tsongas); accord Rachel Kimerling, et al., *Military-Related Sexual Trauma Among Veterans Health Administration Patients Returning from Afghanistan and Iraq*, 100 *Am. J. of Pub. Health* 1409–1412 (2010). “About 65% of male victims and 45.9% of female victims of sexual assault experience a lifetime struggle with PTSD.” Kaylee R. Gum, Note, *Military Sexual Trauma and Department of Veterans Affairs Disability Compensation for PTSD: Barriers, Evidentiary Burdens and Potential Remedies*, 22 *Wm. & Mary J. Women & L.* 689, 702–03 (2016). Military Sexual Trauma survivors are more likely to experience a negative career outcome, including premature separation or discharge. Anthony J. Rosellini, et al., *Sexual Assault Victimization and Mental Health Treatment, Suicide Attempts, and Career Outcomes Among Women in the U.S. Army*, 107 *Am. J. of Pub. Health*, 732–739 (2017); Melissa E. Dichter & Gala True, “*This Is the Story of Why My Military Career Ended Before It Should Have*’: *Premature Separation from*

*Military Service Among U.S. Women Veterans*,” 30 J. of Women & Social Work 187–199 (2015).

**C. Restricting the boards’ authority to change a DD-214 that references a court-martial would be contrary to law, DOD guidance, and established practice.**

Congress and the Department of Justice have in recent years begun to recognize and appreciate the role that TBIs and PTSD, whether originating from combat experience or Military Sexual Trauma, can play in a service member’s misconduct and subsequent court-martial conviction. Veterans who have bad paper, whether from recent discharges or from decades earlier, have been encouraged to apply to DRBs and BCMRs for discharge upgrades under new laws and guidance that provide for liberal consideration of the role that PTSD, TBIs, and Military Sexual Trauma may have played in the conduct that resulted in their separation from service. BCMRs have been actively exercising their statutory authority to change the narrative reason for separation listed on DD-214s in these cases.

The trial court’s holding that the boards do not have authority to change the narrative reason for separation where the reason listed is a court-martial is plainly inconsistent with their statutory delegation of power and undermines recent policy efforts aimed at addressing disparities among veterans with

mental health conditions. Although the trial court issued its ruling in the context of a request for medical retirement, in practical effect, if affirmed it could have significant repercussions for any veteran seeking relief from the boards where there is a reference to a court-martial on their DD-214.

**1. Boards for the Correction of Military Records have been delegated broad authority to correct errors and remove an injustice.**

BCMRs were established in the aftermath of World War II to relieve Congress of the burden of changing military records through private bills. Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 Admin. L. Rev. 499, 500 (2013). While each branch of the military has its own board, “[t]he boards operate under a single statute.” *Id.*; see generally 10 U.S.C. § 1552. That statute grants the boards authority to “correct any military record” when “necessary to correct an error or remove an injustice.” 10 U.S.C. § 1552(a)(1). That power includes the authority to “substitute an administrative form of discharge for a discharge or dismissal executed in accordance with the sentence of a court-martial.” 10 U.S.C. § 874(b).

This delegation of authority was intended to be exceptionally broad. Shortly after § 1552 was passed, the Attorney General explicitly addressed the



question of whether the boards' authority was limited by another law providing for the finality of court-martial judgments, and the answer was emphatically no: As the boards' authority "was intended to supply a remedy in lieu of such relief by private acts," "[no legislation] could have such finality as to prevent the Congress from providing relief [from court-martial] by private act." 41 U.S. Op. Att'y Gen. 49, 1949 WL 1644.

Under these provisions, BCMRs have "acted on a variety of court-martial cases." S. Rep. No. 98-53, at 36 (1983). Their decisions have an enduring impact on the affected veterans: "[n]ot only financial consequences, although healthcare and education benefits do often hang in the balance, but more significantly, those decisions have the potential to make our veterans mentally whole and restore dignity and pride to them and their families." *Hearing Before the H. Subcommittee on Military Personnel of the Committee on Armed Services*, 115th Cong. 2 (2017) (statement of Rep. Niki Tsongas).

In 1983, Congress amended § 1552 to add subsection (f) as part of a set of broader reforms in the Military Justice Act to "enhance the quality and effectiveness of the military justice system." S. Rep. No. 98-53, at 1. The legislative history makes clear that this amendment was intended to prevent boards from duplicating the functions of the UCMJ by "render[ing] legal

judgments on the results of courts-martial by overturning, as a matter of law, findings or sentences of courts-martial.” S. Rep. No. 98-53, at 11. Instead, the boards were to focus on “action in the nature of clemency” in order to “*relieve an individual of certain adverse effects of a court-martial conviction*” without “disturb[ing] the underlying judgment.” *Hearings Before the H. Subcommittee on Manpower and Personnel of the Committee on Armed Services on S. 2521*, 97th Cong. 36 (1982) (statement of William H. Taft, IV, General Counsel of the Department of Defense) (emphasis added); *accord* S. Rep. No. 98-53, at 36–37. In other words, subsection (f) was added to prevent administrative bodies from making legal determinations or overturning court-martial convictions; it was *not* intended to subvert the boards’ broad power to mitigate the impacts of those convictions, including by upgrading the character of a discharge and/or changing the narrative reason for separation reflected on a veteran’s DD-214 when “necessary to . . . remove an injustice.” 10 U.S.C. § 1552(a)(1).

**2. DOD and military guidance confirm the broad scope of the boards’ power, including to change the narrative reason for separation in cases involving a court-martial.**

Between 2014 and 2018, the Department of Defense issued a series of interpretive memoranda that instruct the boards to give liberal consideration

to veterans who received less than fully honorable discharges based on misconduct and were suffering from mental health conditions developed during service, including PTSD, TBI, and Military Sexual Trauma. *See* Memorandum from Secretary of Defense Charles Hagel to Secretaries of the Military Departments, (September 3, 2014) (on file with Dep't of Defense) [hereinafter "Hagel Memo"] (directing military boards to consider PTSD and "PTSD related conditions" as "potential mitigating factors in the misconduct that caused the under other than honorable conditions characterization of service"); Memorandum from Principal Deputy Under Secretary of Defense Brad Carson to Secretaries of the Military Departments, (Feb. 24, 2016) (on file with Dep't of Defense) (expanding the scope of DOD's guidance to all veterans alleging PTSD in connection with their discharge upgrade claim, and extending the statute of limitations for these claims); Memorandum from Under Secretary of Defense A. M. Kurta to Secretaries of the Military Departments, (Aug. 25, 2017) (on file with Dep't of Defense) [hereinafter "Kurta Memo"] (clarifying that previously issued guidance applies to veterans who are survivors of sexual assault or sexual harassment); Memorandum from Under Secretary of Defense Robert Wilkie to Secretaries of the Military Departments (July 25, 2018) (on file with Dep't of Defense) [hereinafter

“Wilkie Memo”] (outlining factors that should be considered in applications seeking relief on equity, injustice, or clemency grounds); *see also* 10 U.S.C. §§ 1552(h), 1553(d) (codifying standards).

These policies, which are binding upon adjudications of veterans’ discharge upgrade claims, have “changed the landscape for many ‘bad paper’ veterans suffering with PTSD and related behavioral health conditions by giving them a better chance to successfully upgrade their character of service and access VA services.” Boohar, *supra*, at 106.

The memoranda make clear that this liberal guidance applies not only to upgrades to the character of a discharge, but also to requests for changes to the narrative reason for separation on a veteran’s DD-214. For instance, the Kurta Memo provides that, “[u]nless otherwise indicated, the term ‘discharge’ includes the characterization, narrative reason, separation code, and reenlistment code.” *Id.* at 3. It also provides that “[e]vidence that may reasonably support more than one diagnosis or a change in diagnosis . . . will be liberally construed as warranting a change in narrative reason to ‘Secretarial Authority,’ ‘Condition not a disability,’ or another appropriate basis.” *Id.* at 2–3. Likewise, the Wilkie Memo specifically refers to “[c]hanges to the narrative reason of separation” as a form of relief that can be granted

“on equity, injustice, or clemency grounds.” *Id.* at 2. *See also Hassay v. United States*, 150 Fed. Cl. 467, 483 (2020) (noting the government conceded these memoranda were binding on the BCNR in connection with “Mr. Hassay’s request for a change in his discharge status,” including his narrative reason and separation code, to reflect disability retirement).

Cases involving courts-martial are not exempted from this guidance. To the contrary, the most recent guidance issued by DOD instructs the review boards to give “appropriate consideration” to service members with past criminal convictions, Wilkie Memo at 1, and clarifies that the policy “applies to more than clemency from sentencing in a court-martial,” but also “*to any other corrections*, including changes in a discharge, which may be warranted on equity or relief from injustice grounds.” *Id.* at 4 (emphasis added).

Guidance provided on official military websites also reflects the broad authority of review boards, including the power to change the narrative reason for separation in circumstances involving a court martial. For instance, FAQs published on the Army Discharge Review Board’s website state that the ADRB “may change any characterization to fully Honorable with a change of reason to Secretarial Authority. . . [if that] discharge [was] issued by a Special Court-Martial.” *See* <https://arba.army.pentagon.mil/adrb-faq.html>. Similarly,

the Applicant's Guide to Applying to the Army Board for Correction of Military Records (ABCMR) published by the Army instructs veterans that "if [their] discharge was directed by a general court-martial order, [they] must apply directly to the ABCMR . . . for consideration of an upgrade of [their] discharge characterization *or a change of a reason for discharge.*" See <https://tinyurl.com/j49urjn4>, at 8 (emphasis added). Guidance published by the Air Force is consistent. See Military Personnel Records, Air Force Personnel Center, <https://www.afpc.af.mil/Career-Management/Military-Personnel-Records/> ("The Secretary of a military department, acting through a BCMR, has authority to change *any military record*, when necessary, to correct an error or remove an injustice. A correction board may consider applications for correction of a military record, *including a review of a discharge issued by court-martial.*" (emphasis added)).

**3. BCMRs exercise their authority to amend narrative reasons for discharge on DD-214s consistent with DOD policy.**

In the wake of the Department of Defense guidance providing for liberal consideration of mitigating circumstances related to misconduct, the boards have routinely exercised their authority to remove injustices by amending the narrative reason for separation for veterans with PTSD, TBI, and Military

Sexual Trauma. Indeed, a joint study of the ABCMR conducted for the first year following issuance of the Hagel Memo in 2014 determined that “[t]he overall grant rate for all veterans applying for PTSD-based discharge upgrades . . . [r]ose more than twelve-fold from 3.7% in 2013 to 45%.” Sundiata Sidibe & Francisco Unger, Vietnam Veterans of Am. & Nat’l Veterans Council for Legal Redress, *Unfinished Business: Correcting “Bad Paper” for Veterans with PTSD 2* (2016), <https://tinyurl.com/4m5cycpd>.

Likewise, the boards “routinely change the narrative [reason for separation] to reflect secretarial authority” in cases where the service member was discharged as a result of conduct stemming from a sexual assault. *Hearing Before the H. Subcommittee on Military Personnel of the Committee on Armed Services*, 115th Cong. 12-13 (2017) (testimony of Francine C. Blackmon, Deputy Assistant Secretary of the Army (Review Boards)). Notably, boards have acted to change the narrative reason for separation in cases involving sexual assault even where their discharges were honorable, in recognition of the fact that “the narrative reason for discharge [of personality disorder was considered] deeply stigmatizing and may prevent them from getting jobs or benefits.” *Id.* at 11 (comment from Rep. Tsongas).

Several recent examples illustrate how boards are exercising their statutory authority to change the narrative reason for separation in cases involving a court martial to correct an error or remove an injustice. In a not-yet-published November 2020 decision, the Board for Correction of Naval Records (“BCNR”) granted a petitioner’s request to upgrade his bad conduct discharge, which was the result of a sentence issued by a special court-martial. *See* Addendum. In its opinion, the BCNR emphasized that it had considered the petitioner’s request, which included evidence of PTSD and TBI, “in light of” guidance memoranda issued by the Department of Defense. *Id.* at 2. The BCNR not only upgraded the discharge to reflect “Honorable,” but also granted what it considered to be the petitioner’s “implied[.]” request to change the narrative reason for separation referencing a court-martial, correcting it to reflect “Secretarial Authority,” as well as the separation code. *Id.* at 1, 3.

Similarly, in September 2020, the Air Force Board for Correction of Military Records (“AFBCMR”) granted the application of a former airman who had pleaded guilty to offenses at a court-martial and was sentenced to a bad conduct discharge. BC201903622 (Sept. 3, 2020). Concluding that the applicant was “the victim of an injustice,” the AFBCMR upgraded the applicant’s discharge to “general (under honorable conditions)” and changed



the narrative reason for separation from “Court-Martial (Other Than Desertion)” to “secretarial authority.” *Id.* at 2.

Finally, in a 2016 case, the AFBCMR granted a request by a former airman to upgrade his bad conduct discharge to “general (under honorable conditions)” and to change the narrative reason for separation from “Court Martial (Drug Related Offense)” to “Secretarial Authority.” BC199602552 (July 12, 2016). The applicant presented evidence that he suffered from PTSD during the period in which the misconduct resulting in the court-martial occurred. In granting the former airman’s request, the AFBCMR concluded that it would “be unjust for him to endure the effects of the stigma that is attached to a [bad conduct discharge]” and found that “the interest of justice [was] best served by removing this blemish from his life . . . upgrading this discharge . . . and changing his narrative reason for separation to Secretarial Authority”. *Id.* at 2. *See also* BCNR 5448-14/8917-13 (June 17, 2014), [https://boards.law.af.mil/NAVY/BCNR/CY2014/NR5448 %2014.pdf](https://boards.law.af.mil/NAVY/BCNR/CY2014/NR5448_%2014.pdf) at 2–3 (changing the petitioner’s narrative reason for separation from “court-martial” to “Secretarial Authority” in light of a previous decision to upgrade his bad conduct discharge, and concluding that “no useful purpose is served by

Petitioner’s record continuing to reflect such a stigmatizing narrative for reason for separation”).

**4. The DD-214 is not an administrative record “related” to a court-martial.**

The trial court’s decision restricts the broad authority that the boards have been exercising by holding that a DD-214 is an administrative record “related” to a court-martial. This interpretation of “related,” which the trial court conceded was “broad,” Appx12, was based on dictionary definitions, as well as the trial court’s apparent belief that it was reading the statute to avoid surplusage, since it could not conceive of an administrative record related to a court-martial that did not comprise “the official records of the court-martial itself.” Appx12–13.

This holding—which entirely ignores the veterans canon that instructs statutes affecting benefits for veterans are to be construed in the beneficiaries’ favor, *Brown*, 513 U.S. at 118—overlooks myriad such examples of related administrative records, including the ones provided in the United States Army Court of Criminal Appeals’s own handbook for its military justice practitioners. This handbook sets out the original documents that form the official “Record of Trial,” which includes, *inter alia*, the charge sheet, investigative report, all evidence admitted, record of advice to the accused, and

post-trial recommendations. Office of the Clerk of Court for the United States Army Court of Criminal Appeals, *The Post-Trial Handbook: A Guide for Military Justice Practitioners*, ch. 2-1–2-3 (2012) [hereinafter *Post-Trial Handbook*]; see also *Manual for Courts-Martial, supra*, at R.C.M. 1112 (defining the contents of the “record of trial”). It then provides a lengthy list of 21 related “Additional documents” of an administrative nature that may also be attached to the “record of trial.” *Post-Trial Handbook, supra*, ch. 2-4. This list includes, *inter alia*, proofs of service, waivers of appellate review, the forum request, deferment requests, documents related to clemency, and explanations for failure to follow certain rules. *Id.* at 2-4. Crucially, it does not mention the DD-214 at all.

In short, the court’s sweeping holding in this case that the Board “is without authority to change the reason for separation due to court-martial,” Appx14, based on a broad and incorrect reading of “related administrative record,” will upend the boards’ longstanding practices and preclude veterans suffering from PTSD, TBI, and Military Sexual Trauma from obtaining relief that was clearly intended to be (and, up until now, has been) available to them.

**D. Affirmance of the *LaBonte* decision would have a disparate impact on similarly situated veterans.**

In addition to being contrary to law, guidance, and the established practice of the boards, the trial court's holding that a DD-214 is "an administrative record 'related' . . . to [a] conviction by court martial" under § 1552(f) will create or exacerbate irrational and unfair disparate impacts among similarly situated former service members.

First, as explained above, not all service members with a court-martial conviction in their record have it reflected on their DD-214. A service member can be convicted by a court-martial—even of misconduct serious enough to result in confinement—without receiving a punitive discharge. *See* Army Regulation 635-200, ch. 13-2(d). Rather than being "sentenced" to any type of discharge, these service members may instead be separated administratively after their conviction. *Id.* (noting a convicted soldier who has not already been sentenced to a punitive discharge may be considered for administrative separation while the soldier is still serving their sentence to confinement at a detention facility); *accord id.* ch. 1-17(c). A veteran in this situation would not have the court-martial conviction listed as the narrative reason for separation on their DD-214. *See, e.g.,* ABCMR20100000427. Thus, under the trial court's holding, this veteran's ability to obtain medical retirement from the boards

would not be affected, while a veteran who was also convicted by a court-martial, but whose punishment did include a punitive discharge, would be barred from seeking a medical retirement or simply a change to Box 28 (and by extension Box 26)—*even if*, like Mr. LaBonte, the veteran has already received clemency and had the punitive discharge in Box 24 removed.

Second, a veteran facing a court-martial may request an “Other Than Honorable” discharge in lieu of a court-martial. *Moulta-Ali & Panangala, supra*, at 9; *see also* Army Regulation 635-200, ch. 10. A veteran in this circumstance may have engaged in conduct identical to a veteran who received a punitive discharge, but he or she would not have a court-martial conviction reflected on their DD-214. The trial court’s ruling would have the perverse effect of restricting the boards’ authority to grant relief for veterans simply because they opted for a trial.

Finally, affirmance of the trial court’s holding would also exacerbate existing disparities among the service branches that the Department of Defense has recognized and worked to address. “The rate of misconduct discharges varies greatly by branch.” *Stuck in Red Tape: How VA’s Regulatory Policies Prevent Bad Paper Veterans from Accessing Critical Benefits: H. Subcommittee on Disability Assistance & Memorial Affairs*,

116th Cong. 3 (2020) (statement of Maureen Siedor, Legal Director, Swords to Plowshares). For instance, the Marine Corps issues an Other than Honorable Discharge to one out of every ten Marines, whereas the Air Force issues the same discharge to one out of every 20 Airmen; the Army issues them to only 3% of service members. *Id.* In light of the fact that “[s]imilarly situated service members sometimes receive disparate punishments,” the Department of Defense has advised the boards that “[w]hile a court-martial or a command would be within its authority to choose a specific disposition forum or issue a certain punishment, DRBs and BCM/NRs should nevertheless consider uniformity and unfair disparities in punishments as a basis for relief.” Wilkie Memo at 2.

## CONCLUSION

The trial court’s decision is contrary to law, guidance, and established practice. It will have a disproportionate and lifelong impact on our most vulnerable veterans, like Mr. Labonte, who are already struggling with PTSD or a TBI as a direct result of their service to their country. For these reasons, amici respectfully request that the decision be reversed.

MARCH 26, 2021

Respectfully submitted,

/s/ Liam J. Montgomery

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**CERTIFICATE OF SERVICE**

I, Liam J. Montgomery, counsel for amici curiae and a member of the Bar of this Court, certify that, on March 26, 2021, a copy of the attached Brief of Amici Curiae National Veterans Legal Services Program and Protect Our Defenders was filed electronically through the appellate CM/ECF system with the Clerk of the Court. I further certify that all parties required to be served have been served.

MARCH 26, 2021

/s/ Liam J. Montgomery  
LIAM J. MONTGOMERY



**CERTIFICATE OF COMPLIANCE  
WITH TYPEFACE AND WORD-COUNT LIMITATIONS**

I, Liam J. Montgomery, counsel for amici curiae and a member of the Bar of this Court, certify, pursuant to Federal Rule of Appellate Procedure 32(g) and Federal Circuit Rule 29(b), that the attached Brief of Amici Curiae National Veterans Legal Services Program and Protect Our Defenders is proportionately spaced, has a typeface of 14 points or more, was prepared using Microsoft Word, and contains 5,803 words.

MARCH 26, 2021

/s/ Liam J. Montgomery  
LIAM J. MONTGOMERY

**ADDENDUM**

Board for Correction of Naval Records Decision  
November 23, 2020

Pages 1 - 4



DEPARTMENT OF THE NAVY  
BOARD FOR CORRECTION OF NAVAL RECORDS  
701 S. COURTHOUSE ROAD, SUITE 1001  
ARLINGTON, VA 22204-2490

SJN  
Docket No: [REDACTED]  
Ref: Signature Date

From: Chairman, Board for Correction of Naval Records  
To: Secretary of the Navy

Subj: REVIEW OF NAVAL RECORD OF FORMER PRIVATE [REDACTED]  
USMC, [REDACTED]

Ref: (a) 10 U.S.C. §1552  
(b) SECDEF Memo of 3 Sep 14 "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming PTSD"  
(c) PDUSD Memo of 24 Feb 16 "Consideration of Discharge Upgrade Requests Pursuant to Supplemental Guidance to Military Boards for Correction of Military/Naval Records by Veterans Claiming PTSD or TBI"  
(d) PDUSD Memo of 25 Aug 17 "Clarifying Guidance to Military Discharge Review Boards and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault or Sexual Harassment"

Encl: (1) DD Form 149  
(2) Advisory Opinion (AO) of 10 Jul 20

1. Pursuant to the provisions of reference (a), Petitioner, filed enclosure (1) with this Board requesting that his "Bad Conduct Discharge" discharge be upgraded to General (under honorable conditions) or Honorable due to Post-Traumatic Stress Disorder (PTSD) and Traumatic Brain Injury (TBI). He also impliedly requested that the separation authority, his narrative reason for separation, and separation code be changed. Enclosures (1) and (2) applies.

2. The Board, consisting of Mr. Goode, Mr. Newman, and Mr. Cash reviewed Petitioner's allegations of error and injustice on 17 September 2020, and pursuant to its regulations, determined that the corrective action indicated below should be taken on the available evidence of record. Documentary material considered by the Board consisted of the enclosures, relevant portions of the naval records, and applicable statutes, regulations, policies, post-service medical diagnosis and enclosure (2), an advisory opinion (AO) provided by a qualified mental health professional.

3. The Board, having reviewed all the facts of record pertaining to Petitioner's allegations of error and injustice, finds as follows:

Subj: REVIEW OF NAVAL RECORD OF FORMER PRIVATE [REDACTED]

a. Before applying to this Board, Petitioner exhausted all administrative remedies available under existing law and regulations within the Department of the Navy.

b. Petitioner enlisted in the Marine Corps and began a period of active duty on 23 June 1980. On 11 March 1981, he received nonjudicial punishment (NJP) for 24 days of unauthorized absence (UA). On 17 June 1981, he was convicted by special court-martial (SPCM) of five days of UA, and breaking restraint by leaving a Correctional Custody Unit Facility. On 22 December 1981, he was convicted by SPCM of 51 days of UA, missing ship's movement through design, and larceny. Petitioner was sentenced to a period of confinement at hard labor, forfeiture of pay and a bad conduct discharge (BCD). On 15 December 1983, he was separated from the Marine Corps with a BCD.

c. With his application, Petitioner stated he was doing well in the Marine Corps until 6 January 1981. While home on leave, he intervened during a robbery, was attacked with a baseball bat sustaining blows to the head, as well as multiple punches and kicks to the head. He stated that after that head trauma event, he experienced constant headaches, numbness and tingling to his face, speech difficulties, dizziness, and light-headedness, confusion, and memory difficulties. He experienced episodes of behavior he could not explain, to include UA "without any goal or destination in mind." He also reported psychological symptoms, stemming from the head trauma, of emotional lability, nightmares, flashbacks, irritability, frequent confusion, poor frustration tolerance, poor attention span and concentration consistent with PTSD.

d. Enclosure (2), states that Petitioner provided personal statements describing medical and psychological symptoms following the 1981 incident that are consistent with both TBI and PTSD, with his assertion that these conditions negatively affected his judgment and behavior leading to his in-service misconduct. Therefore, at this time, based on the available evidence, it was opined that there is sufficient evidence that Petitioner experienced TBI and PTSD during his military service and that his in-service misconduct could be attributed to a mental health condition.

e. Petitioner's request was fully and carefully considered by the Board in light of the Secretary of Defense's Memorandum, "Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requested by Veterans Claiming Post Traumatic Stress Disorder" of 3 September 2014 and the "Clarifying Guidance to Military Discharge Review Board and Boards for Correction of Military/Naval Records Considering Requests by Veterans for Modification of their Discharge Due to Mental Health Conditions, Sexual Assault, or Sexual Harassment" memorandum of 25 August 2017.

## CONCLUSION

Upon review and consideration of all the evidence of record, the Board concluded that the Petitioner's request warrants favorable action in the form of relief. The Board reviewed his application under the guidance provided in references (b) through (d) intended to be covered by this policy.

Subj: REVIEW OF NAVAL RECORD OF FORMER PRIVATE [REDACTED]  
[REDACTED]

In this regard, the Board noted Petitioner's misconduct, and does not condone his actions. However, based upon Petitioner's overall record, in light of enclosure (2), and given our current understanding of mental health conditions, relief in the form of his characterization of service should be changed to "Honorable."

In view of the foregoing, the Board finds the existence of an injustice warranting the following corrective action.

#### RECOMMENDATION

Petitioner's naval record is corrected to show that on 15 December 1982, he received an "Honorable" discharged.

Petitioner's naval record is corrected to show that on 15 December 1982, the separation authority was "MARCORSEPMAN par 6214."

Petitioner's naval record is corrected to show that on 15 December 1982, the reason for discharge was "Secretarial Authority."

Petitioner's naval record is corrected to show that on 15 December 1982, the separation code was "JFF1."

Petitioner be issued a new Certificate of Release or Discharge from Active Duty (DD 214).

No further action be granted.

A copy of this report of proceedings be filed in Petitioner's naval record.

Upon request, the Department of Veterans Affairs is informed that Petitioner's application was received by the Board on 8 April 2019.

4. It is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

Subj: REVIEW OF NAVAL RECORD OF FORMER PRIVATE [REDACTED]

5. Pursuant to Section 6(c) of the revised Procedures of the Board for Correction of Naval Records (32 Code of Federal Regulations, Section 723.6(c)), it is certified that a quorum was present at the Board's review and deliberations, and that the foregoing is a true and complete record of the Board's proceedings in the above entitled matter.

11/23/2020

X 

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ELIZABETH A. HILL  
Executive Director

Signed by: HILL.ELIZABETH.ANNE.1106915438