No. 21-2095

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT L. DOYON,
Plaintiff-Appellant,
v.

THE UNITED STATES OF AMERICA,
Defendant-Appellee.

On appeal from the United States Court of Federal Claims (No. 1:19-cv-01964-LKG)

BRIEF OF PROTECT OUR DEFENDERS AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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August 31, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-2095

Short Case Caption Doyon v. United States

Filing Party/Entity Protect Our Defenders

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Name: Maya Eckstein

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Protect Our Defenders		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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RULE 29 STATEMENT

Amicus curiae files this brief with the consent of all parties under Federal Rule of Appellate Procedure 29(a)(2). No party or its counsel, or any other person other than *amicus* and its counsel, authored this brief in whole or in part, or contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(a)(4)(E).

STATEMENT OF INTEREST

Protect Our Defenders is dedicated to ending rape and sexual assault in the military. It honors, supports, and gives voice to survivors of military sexual assault and sexual harassment—including service members, veterans, and civilians assaulted by members of the military. Protect Our Defenders works for reform to ensure survivors and service members are provided a safe, respectful work environment and have access to a fair, impartially administered system of justice. To that end, Protect Our Defenders supports, and routinely advocates for, "liberal consideration" in the adjudication and review of benefits determinations for service members discharged from the military in the wake of sexual trauma, to ensure that we "care for [those] who shall have borne the battle" and their surviving families. President Lincoln's Second Inaugural Address (March 4, 1865), https://tinyurl.com/9c87xmfb.

INTRODUCTION

For most of its history, the United States military ignored mental health, discharging service members suffering from service-connected psychological conditions without procedural protections—let alone support services—and stripping them of the benefits they so desperately needed. Acknowledging this shameful past, the Department of Defense ("DOD") has adopted several policies granting veterans with service-connected mental health diagnoses the benefit of the doubt when seeking changes to their military records. This "liberal consideration" guidance is best summarized in the Hagel and Kurta Memoranda. *See* Department of Defense, Supplemental Guidance to Military Boards for Correction of Military/Naval Records Considering Discharge Upgrade Requests by Veterans Claiming Post Traumatic Stress Disorder (Sept. 3, 2014) ("Hagel Memo"), https://tinyurl.com/c2twbfye; Department of Defense, 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 (Aug. 25, 2017) ("Kurta Memo"), https://tinyurl.com/sv9wfdvk.

Despite veteran Robert Doyon's undisputed diagnosis of post-traumatic stress disorder ("PTSD"), the Claims Court refused to apply liberal consideration to his request to update the "fitness for duty" determination in his military records.

That conclusion is wrong and warrants reversal. As Doyon ably demonstrates in his opening brief, DOD policies entitle veterans suffering from mental health conditions to liberal consideration of *the entirety* of their military records—including fitness and disability retirement determinations.

The Claims Court's erroneous application of liberal consideration stands to resonate far beyond Doyon's individual circumstances, and even those of veterans suffering only from PTSD. Protect Our Defenders submits this brief to shed light on the grave consequences the lower court's decision would inflict on the other substantial population that the Kurta Memo specifically addresses—survivors of military sexual assault.

Like Doyon, thousands of survivors of military sexual assault historically received "unsuitability" rather than "unfitness" discharge characterizations. And like Doyon, this characterization stigmatizes them and precludes survivors from receiving the full suite of benefits that they deserve. Notwithstanding the long history of injustices perpetrated by the military against sexual assault survivors and DOD's recent attempts at remediation and prevention, the Claims Court's decision would wall off a vital avenue of relief for survivors seeking medical benefits earned in service to their country.

The Court should reverse.

ARGUMENT

It is no secret that sexual assault and harassment pervade the military branches. The statistics are staggering. In 2018, for example, one-fourth of active duty women reported experiencing sexual harassment in the military. Department of Defense Fiscal Year 2018 Annual Report on Sexual Assault in the Military at 12 ("2018 DOD Annual Report"), https://tinyurl.com/y88k7fbr. That same year, 20,500 service members reported that they were sexually assaulted or raped. Department of Defense Fiscal Year 2019 Annual Report on Sexual Assault in the Military at 6 ("2019 DOD Annual Report"), https://tinyurl.com/5e6f9zdz. Service member perpetrators commit at least 62% of military sexual assaults. 2019 DOD Annual Report, Appendix B at 11. And sexual-minority service members—especially male service members identifying as gay or bisexual—suffer harassment and assault at even higher numbers than the general population. *See* Ashley C. Schuyler, et al., *Experiences of Sexual Harassment, Stalking, and Sexual Assault During Military Service Among LGBT and Non-LGBT Service members*, 33 J. TRAUMATIC STRESS 3, 6–7 (June 2020).

Because of underreporting, these startling numbers tell only part of the story. 2019 DOD Annual Report at 14. Two of every three victims of military sexual assault did not report their assault in 2018. 2018 DOD Annual Report at 4. This tragic state of affairs makes perfect sense in light of well-founded fears of

retaliation. Indeed, reports of actual retaliation abound and add to an already stark story:

- Approximately 21% of female service members who reported a sexual assault were subjected to conduct meeting the legal criteria for the kind of retaliatory behavior prohibited by military law. 2018 DOD Annual Report at 20.
- A third of victims separate from the military after reporting abuse. Inspector General, U.S. Department of Defense, Evaluation of the Separation of Service Members Who Made a Report of Sexual Assault, at 4 (May 9, 2016) ("Inspector General Evaluation"), https://tinyurl.com/narzxzsj.
- Of 82 retaliation offenses investigated in FY 2019, most involved reprisal—actions that negatively affect professional opportunities—and ostracism. 2019 DOD Annual Report, Appendix B at 38.

These problems are not new. Accounts of military sexual assault date back at least to the Vietnam War era and notably intensified during the wars in Iraq and Afghanistan. *See, e.g.*, Kate O'Hare-Palmer, *Military Sexual Trauma & Women Veterans* Vietnam Veterans of America, https://tinyurl.com/bd2wvrev. And while the military has taken steps to acknowledge the problem of sexual assault and has implemented several reforms over the past two decades, "virtually nothing has been done to address the ongoing harm done to *thousands of veterans* who reported sexual assault *before* reforms took place and lost their military careers as a result of improper administrative discharges." Human Rights Watch, *Booted: Lack of Recourse for Wrongly Discharged US Military Rape Survivors*, 3 (2016) ("*Booted*") (emphasis added), https://tinyurl.com/mbvd89f3.

In addition to being wrong, the Claims Court's decision on liberal consideration would prevent this substantial population of survivors of military sexual assault—*numbering in the thousands*—from receiving favorable treatment in petitions to correct improper administrative discharges. It would thus deny them hope for obtaining the increased benefits of a medical retirement, and the chance to mitigate the stigma associated with an improper administrative separation.

I. The Claims Court's interpretation of DOD's liberal consideration policy is wrong.

The Claims Court "[did] not read either the Hagel or Kurta Memoranda to apply to . . . unfitness or disability retirement determinations." Appx18. That decision is wrong. Protect Our Defenders agrees with Doyon's reasoning on this issue, *see* Doyon's Opening Brief at 32–39, and addresses the Claims Court's holding to emphasize two salient points. First, the Kurta Memo's plain language clearly contemplates the correction of fitness determinations. Second, DOD's dual-processing policy already grants the kind of consideration that Doyon seeks, and should apply retroactively.

A. The Kurta Memo contemplates changes to fitness determinations.

By its own terms, the Kurta Memo contemplates applying liberal consideration to requests to update fitness determinations before the service branches' Boards for Correction of Military Records.

First, the Memo defines "discharge" broadly, providing that the term "*includes* the characterization, narrative reason, separation code, and re-enlistment code." Kurta Memo at 3, ¶ 20 (emphasis added). Thus, not only does the Memo grant liberal consideration to requests beyond just re-characterizations as the Claims Court recognized, *see* Appx17, but the non-exclusive use of the word "includes" indicates that discharge relief goes beyond the four listed terms.

The twenty-fourth paragraph of the Memo confirms this interpretation and is even more specific: "[t]hese guidance documents are not limited to Under Other Than Honorable Condition discharge characterizations but rather *apply to any petition seeking discharge relief including* requests to change the narrative reason, re-enlistment codes, and upgrades from General to Honorable characterizations." Kurta Memo at 3, ¶ 24 (emphasis added). Once again, this provision both announces a broad reading of "discharge upgrade" and leaves the term open-ended by enumerating a non-exclusive list of examples.

But most significantly, in a passage not cited by the Claims Court, the Memo directly addresses the situation where a discharge upgrade would be the appropriate outcome after the application of liberal consideration to the veteran's circumstances:

> Service members diagnosed with mental health conditions, including PTSD; TBI; or who reported sexual assault or sexual harassment *receive heightened screening today to ensure the causal relationship of possible symptoms and discharge basis is fully considered, and*

> *characterization of service is appropriate*. Veterans discharged under prior procedures, or before verifiable diagnosis, may not have suffered an error because the separation authority was unaware of their condition or experience at the time of discharge. However, when compared to similarly situated individuals under today's standards, *they may be the victim of injustice because commanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care*.

Id. at 4, ¶ 26(j) (emphasis added). This paragraph describes the precise predicament facing Doyon and countless survivors of military sexual assault who would benefit from changes to fitness determinations. These veterans were not afforded the "heightened screening" that would safeguard correct decisions about medical retirement. If granted the benefit of such screening, they might be entitled to more "benefits, such as medical care."

Because the plain language of the Kurta Memo's liberal consideration policy specifically contemplates changes to decisions impacting medical care, and because the Memo defines "discharge upgrade" broadly, the Memo applies to Doyon's request for a new medical retirement decision and would also apply to those of countless survivors of military sexual assault.

B. DOD's dual-processing policy demonstrates its commitment to addressing fitness determinations together with discharge processing.

Beyond the Kurta Memo itself, the Court need not look far for evidence that DOD reviews fitness determinations together with discharge upgrades—such

consideration is already a DOD policy for active duty service members. *See, e.g.*, Secretary of the Navy, Memorandum For Chief of Naval Personnel (June 1, 2016), https://tinyurl.com/s8yssrey. DOD's "dual processing" mandate directs the service branches to refer service members recommended for involuntarily separation to the medical retirement Disability Evaluation System ("DES") if they display any signs of a mental health condition. *See id.* This process recognizes that the misconduct that leads to unfavorable administrative discharges is often a predictable result of trauma. Dual processing thus protects service members from potential wrongful termination by providing additional safeguards and a path to full "medical retirement" benefits. In light of the liberal consideration policy, the spirit of dual processing should apply retroactively. *See* Kurta Memo at 4, ¶ 26(j)-(k).

Doyon's experience illustrates this well. At the time of his separation, the PTSD diagnosis did not even exist. Indeed, it did not appear in the Diagnostic and Statistical Manual of Psychological Disorders (DSM-III) until 1980. And only in 2013 did the DSM-V expand the criteria for PTSD stressors to include exposure to "death, threatened death, actual or threatened serious injury, or *actual or threatened sexual violence*." *See* U.S. Department of Veterans Affairs, *PTSD: National Center for PTSD*, https://tinyurl.com/h5t2arzk (emphasis added). Because we now know that Doyon suffered from PTSD, he should receive the full benefit of that diagnosis in any evaluation of his discharge paperwork. While his

military superiors in the 1960s did not view his behavior as conduct warranting a medical retirement, commanders implementing the dual processing program today likely would. *See* Kurta Memo at 4, ¶ 26(j) ("[C]ommanders fully informed of such conditions and causal relationships today may opt for a less prejudicial discharge to ensure the veteran retains certain benefits, such as medical care.").

II. Left uncorrected, the Claims Court's decision will prejudice thousands of military sexual assault survivors.

The Claims Court's decision would deny liberal consideration for a large swath of sexual assault survivors seeking correction of military records, medical retirement benefits, and other changes to their characterization of service. The military historically disproportionately separated sexual assault survivors for "unsuitability" reasons—often before the dark cloud of sexual trauma even began to lift. These kinds of separations have had devastating consequences, blocking vital benefits and stigmatizing veterans for the rest of their lives.

A. Sexual assault survivors disproportionately receive "unsuitability" administrative separations rather than "unfitness" medical retirements.

Survivors of sexual assault and harassment too often leave the military in the immediate wake of a traumatic event. *Booted* at 3 (reporting results of over 270 in-person interviews with survivors). A 2016 Inspector General report found that between 2009 and 2015, the military separated 5,301 service members after they reported sexual assault, representing 34 percent of the reporting population.

Inspector General Evaluation at 4. Other studies corroborate these numbers. *See, e.g.*, Andrew R. Morral, et al., *Effects of Sexual Assault and Sexual Harassment on Separation from the U.S. Military*, 2014 RAND Military Workplace Study at xi (estimating that 5,600 of 21,000 service members sexually assaulted in 2014 left in the following 28 months).

Worse still, many assault survivors received involuntary discharges, or "administrative separations," based on mental health. *Booted* at 19; *see also* Kurta Memo at 4. Like Doyon, these administratively-separated survivors must overcome stigma associated with their mental health discharges, and lose out on the significant benefits of medical retirement—even if the military characterized their discharge as fully honorable. *Booted* at 22, 26–27. While the military administratively separates service members for a variety of reasons, two historic justifications stand out in the context of sexual assault: personality disorder discharges and misconduct discharges.

1. Sexual assault survivors historically received personality disorder discharges at high rates.

Military commanders have the power to justify administrative separations for "conditions and circumstances not constituting a physical disability." *See* DoDI 1332.14. While severe enough to render service members "unsuitable" for military service, these conditions fall short of those warranting a medical retirement. 2016 Inspector General Evaluation at 3. Personality disorder, a mental

health diagnosis characterized by deeply ingrained patterns of behavior, falls into this category.

Before DOD instituted several reforms in 2009, the military "frequently . . . discharge[d] people on the grounds of 'Personality Disorder,'" *Booted* at 32, and the diagnosis earned a reputation as "the fastest and easiest way to get rid of someone" in the military, U.S. Commission on Civil Rights, *Briefing: Sexual Assault in the Military*, Testimony of Major Bridget Wilson, 57 (January 11, 2013), https://tinyurl.com/tra4bwym. Despite the difficulty of diagnosing personality disorder, the military regularly dismissed service members on this basis after a single, cursory interaction with a doctor. *Booted* at 6, 32. Indeed, a 2008 Government Accountability Office Report on personality disorder discharges found that the military failed to follow proper procedures for—and potentially misdiagnosed—an unacceptable proportion of service members. Government Accountability Office, *Defense Health Care: Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements*, 7 (October 2008), https://tinyurl.com/7ae5xf8x. The Report concluded that "DOD does not have reasonable assurance that its key personality disorder separation requirements have been followed." *Id.*

Sexual assault survivors have historically received personality disorder discharges in disproportionate numbers. Of the over 270 survivors interviewed by

Human Rights Watch for its *Booted* report, "[m]ore than half . . . who left the service between 2000 and 2008 . . . had been discharged with [a personality disorder]." *Booted* at 36. Between 2001 and 2010, the military discharged over 31,000 service members for personality disorders. Vietnam Veterans of America, *Casting Troops Aside: The United States Military's Illegal Personality Disorder Discharge Problem*, 2 (March 2012), https://tinyurl.com/yxynhpuu. During that time, "[w]omen accounted for between 25 and 31 percent of PD/AD separations despite constituting only 15 percent of all active duty forces." *Booted* at 36.

And even following increased awareness and reform, personality disorder discharges remain problematic. The DOD Inspector General's 2016 evaluation of service members reporting sexual assault found that the military did not complete 67 percent of separations for personality disorder (and other mental conditions) in accordance with DOD regulations. DOD Inspector General's Evaluation at i. The military branches never even completed or lost 22 percent of such separation records. *Id.*

The personal stories of military sexual assault survivors bring these unsettling numbers to life. For example, while serving in the Navy from June 23, 2004 to March 8, 2005, Elena Giordano was sexually assaulted or raped on four separate occasions by four different servicemen—in one instance after being locked in a pump room on a ship by a male colleague. After being compelled to

disclose her assaults repeatedly to different members of her chain of command, her superiors sent her to meet with a psychologist. Following an evaluation lasting less than an hour, the psychologist diagnosed her with a personality disorder. Although this diagnosis did not immediately justify her separation, she was eventually discharged with a characterization of General Under Honorable conditions.

Jane suffered a similar fate.[1] After joining the Army in 2000, a fellow service member raped her after attending the Marine Corps Ball. She reported the rape to both the civilian police and her military command, and immediately began facing retaliation. In the face of ongoing torment by her peers, the Army closed an investigation into Jane's case after the assailant claimed that their sexual encounter was consensual. Following this ordeal, Jane received a personality disorder diagnosis and was administratively discharged.

2. Sexual assault survivors historically received misconduct discharges at high rates.

In addition to personality disorder discharges, sexual assault survivors also historically have been susceptible to misconduct discharges. Representing one of the most dire outcomes for survivors, these discharges result in an "Other Than

[1] For privacy, "Jane" chose not to publicly disclose her identity.

Honorable" characterization on the veteran's military records that precludes access to almost all military benefits.

Several factors explain why the careers of so many sexual assault survivors end in misconduct discharges. *Booted* at 66. For example, by reporting a sexual assault, survivors may reveal conduct that the Uniform Code of Military Conduct prohibits, like adultery, fraternization, and (until 2011) homosexuality. *Id.* In addition, commanders may view survivors as "troublemakers" and look for opportunities to seize on infractions. *Id.* at 67. Service member accounts collected by Human Rights Watch support this kind of widespread "singling out." *Id.*

In addition, sexual trauma can trigger a pattern of destructive behavior. *Id.* As DOD's Kurta Memo explains, "[m]ental health conditions" including those stemming from sexual assault and sexual harassment, "inherently affect one's behaviors and choices causing veterans to think and behave differently than might otherwise be expected." Kurta Memo at 4. Survivors can suffer from PTSD symptoms that increase risk-taking behaviors, distract them on the job, and increase substance abuse. *Booted* at 67. Lacking empathy or proper context, superiors often view these behaviors as simple infractions rather than symptoms of trauma.

Elena Giordano's case illustrates this tragic cycle. Following her third rape (and fourth assault), Ms. Giordano stopped eating, sleeping, and became very

depressed. After word of her assaults surfaced, she was charged with an Article 92 "Failure to Obey a Lawful Written Order," for "meeting members of the opposite sex behind closed/locked doors and out of the way spaces," and "intimate contact of a sexual nature." Later, she was found guilty of sexual misconduct at a Captain's Mast. Less than a month after this infraction, Ms. Giordano was discharged with "misconduct" listed as the narrative reason.

B. Wrongful administrative separations severely limit the benefits survivors of military sexual assault receive and carry other negative consequences.

As alluded to throughout, wrongful administrative separations can devastate the lives of survivors of military sexual assault by denying them access to important military benefits and post-service assistance. But these separations also take a deeply human toll—stigmatizing survivors and forcing them to endure emotional harms for years after leaving the military.

Involuntary personality disorder discharges, even when characterized as fully honorable, carry several negative consequences for veterans' benefits. For example, for many years Army counseling Form 4856 instructed service members that an "involuntary honorable Discharge . . . will disqualify you from reenlistment for some period of time and may disqualify you from receiving transitional benefits (e.g., commissary, housing, health benefits) and the 9/11 GI Bill." *Booted*

at 26, 28. While the Army has since updated this form,[2] it likely prejudiced many hundreds of involuntarily discharged veterans seeking vital benefits. Moreover, as one expert testified, almost half of all personality disorder discharges occur within the first year of service. U.S. House of Representatives, Committee on Veterans' Affairs, Personality Disorder Discharges: Impact on Veterans' Benefits, testimony of Dr. Jack W. Smith, Deputy Assistant Secretary of Defense for Clinical and Program Policy, U.S. Department of Defense (September 15, 2010) (discussing discharges between 2002 and 2007). Because service members who depart the military before a 24-month period or before the end of an enlistment term receive no disability benefits, service members discharged for personality disorder often cannot access these important resources. *Booted* at 26–27.

Misbehavior discharges wreak even more havoc on access to veteran benefits. The "Other Than Honorable" characterization[3] associated with misbehavior discharges precludes access to health care, disability compensation, accrued leave, unemployment benefits after service, federal hiring preference, burial rights, commissary access, educational assistance, and other resources. *Id.* at 29. These veterans "are also often excluded from a range of important services

[2] *See* https://tinyurl.com/2srytyt2.

[3] In 1968, when Doyon was discharged, a misconduct discharge was more often characterized as "Undesirable."

from the state or from aid organizations including homeless shelters, tuition benefits, or programs offering employers incentives to hire veterans." *Id.*

The negative consequences for service members receiving wrongful administrative separation go far beyond benefits decisions. Service members receiving wrongful personality disorder discharges must cope with the shame of being mistakenly labeled "mentally ill." *See id.* at 4. And those receiving misconduct discharges are all but excommunicated from the military community.

Individual accounts bear out these consequences. To this day, Army veteran Jane (referenced above) is considered "unemployable" as a result of her personality disorder discharge. And for several years Elena Giordano unsuccessfully filed VA claims for PTSD. Only in 2014 did she receive a PTSD disability rating. Like Doyon, both Jane and Elena still miss out on the full benefits of a medical retirement.

C. The Claims Court's decision would deny a crucial avenue for correcting sexual assault survivors' wrongful administrative separations.

As DOD itself recognizes through its current policies, military sexual assault survivors, like combat victims, are entitled to more. But the Claims Court's decision would foreclose an important tool for altering outcomes for historic survivors of assault by denying liberal consideration of requests to update fitness determinations.

In contrast to administrative separation, "service members who are injured or become ill while on active duty (including those who are unable to perform their duties because of PTSD) may be eligible for military disability retirement." *Booted* at 5. This form of separation, also referred to as medical retirement, entitles recipients to disability pay, access to health care (for the entire family), GI Bill education benefits, and more. *Id.* at 5, 30. And medical discharges also carry none of the stigma associated with personality disorder or misconduct discharges. *Id.* In addition, the military's contemporary policies provide service members in the medical discharge track with far greater procedural protections than those in the administrative separation track. *Id.* at 30. As discussed above, there is no basis for failing to retroactively apply the current understanding of mental health and associated attempts to constructively address it. *See supra* § I; Kurta Memo at 4, ¶ 26(j).

In light of the well-documented patterns of wrongful administrative separation for survivors of sexual trauma, a records correction that updates an involuntary, "unsuitability" separation to a "medical retirement" could make a world of difference for survivors. Such a change would unlock a variety of benefits and help address the stigma of personality disorder and misconduct discharges. The veterans who would benefit from such a change likely number in the thousands.

The Claims Court's decision shuts the door on liberal consideration of such correction requests, dooming the vast majority of them. Such a result contradicts the very guidelines that the Claims Court purported to apply. But worse, it would deny a vast population of military sexual assault survivors a fair shot at obtaining the full measure of benefits they earned in the line of duty to their country.

CONCLUSION

For the reasons discussed above, this Court should reverse the Claims Court's erroneous decision to place requests for fitness changes beyond the reach of the DOD's liberal consideration policy.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the requirements of Federal Rule of Appellate Procedure 32(a)(5) and (a)(6) because it has been prepared in 14-point Times New Roman, a proportionally spaced font, and that it complies with the type-volume limitations of Rules 29(a)(5) and 32(a)(7)(B), because it contains 4,120 words, excluding the parts exempted by Rule 32(f), according to the count of Microsoft Word.

/s/ Maya M. Eckstein
Counsel for Amicus Curiae

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2021, I electronically filed this brief with the Clerk of this Court by using the appellate CM/ECF system. The participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ Maya M. Eckstein
Counsel for Amicus Curiae