UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

MARTIN JOHNSON and JANE DOE on behalf of themselves and all others similarly situated,

Plaintiffs,

v.

FRANK KENDALL,
Secretary of the Air Force,

Defendant.

No.: 3:21-cv-01214

September 13, 2021

MEMORANDUM OF LAW IN SUPPORT OF MOTION BY PLAINTIFFS FOR CLASS CERTIFICATION

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INTRODUCTION

Thousands of people join the Air Force every year seeking to serve their country. These individuals are asked to sacrifice a great deal, and some will suffer from mental health conditions or other disabilities as a result of their service. Instead of honoring these efforts and recognizing the effects of these experiences, the Air Force discharges many of these veterans with less-than-Honorable statuses. These discharge characterizations will punish veterans for the rest of their lives.

Recognizing the severe consequences of these discharges, Congress established administrative boards during World War II to allow veterans to later apply for upgrades for improper or inequitable discharges. In recent years, however, these Boards, including the Air Force Discharge Review Board ("AFDRB"), have repeatedly failed to follow the requirements of Congress, the Department of Defense, and the Constitution.

In 2014, then-Secretary of Defense Chuck Hagel directed the Boards to give "liberal" or "special" consideration to applications based on post-traumatic stress disorder ("PTSD") or related conditions. In 2016, Congress codified the "liberal consideration" standard in statute, and in 2017, the Department of Defense ("DoD") ordered that liberal consideration be given to veterans petitioning for discharge relief based on experiences of military sexual trauma or on the basis of an expanded list of mental health conditions. DoD has subsequently issued additional guidance requiring the boards to consider several factors "to ensure fundamental fairness" when making discharge upgrade determinations. Collectively, the Hagel, Kurta, and Wilkie Memoranda seek to recognize the effects of mental health conditions, traumatic brain injury ("TBI"), and military sexual trauma ("MST") in the context of discharge proceedings.

Yet the AFDRB has consistently failed to implement these binding statutes and instructions—denying more than 70% of the mental health applications, and 60% of military sexual trauma-related applications it receives. Moreover, the Board has refused to adjudicate discharge upgrades in a manner consistent with the constitutional requirements of due process or the statutory requirements of the Rehabilitation Act of 1973. Air Force veterans, led by Plaintiffs Martin Johnson and Jane Doe, ask this Court to review the AFDRB's systemic failures. Mr. Johnson and Ms. Doe move for class certification pursuant to Federal Rule of Civil Procedure 23 so that they and other similarly situated veterans may secure a remedy for the persistent structural and constitutional failures at the AFDRB.

This is not the first time that veterans have been forced to sue a service branch for unlawfully denying discharge status upgrade applications and ignoring the effects of PTSD, military sexual trauma, and other mental health conditions. Indeed, Judge Haight and Judge Eginton certified classes bringing similar claims against the Navy and the Army. *See Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018) (certifying class of Navy and Marine Corps veterans); *Kennedy v. Esper*, No. 16-CV-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018) (certifying class of Army veterans). Ms. Doe and Mr. Johnson propose a similar class definition for Air Force veterans suing the AFDRB as the court-approved definitions in these prior cases. Consistent with these prior decisions, the proposed class of Air Force veterans should also be certified.

I. FACTS AND PROCEEDINGS

A. Plaintiffs' Military Service

1. Ms. Doe's Military Service

Plaintiff Doe is a Black woman who currently resides in Connecticut. Complaint, ECF No. 1 ¶ 36. Ms. Doe enlisted in the Air Force in 2013. *Id*. ¶ 37. At the end of basic training, Ms. Doe

began dating a fellow Airman. *Id*. ¶ 38. At least two Airwomen noticed that Ms. Doe's boyfriend was verbally abusive to her. *Id*.

In 2014, shortly before graduating from technical school, Ms. Doe was raped by another Airman during a social gathering. *Id*. ¶ 40. The next month, Ms. Doe failed a physical fitness test and, as a result, received her first low-level reprimand, a letter of counseling. *Id*. ¶ 42.

In late 2014, Ms. Doe was transferred to the base where her boyfriend was stationed. *Id*. ¶ 44. Her boyfriend subjected Ms. Doe to physical and emotional abuse, which continued throughout the remainder of Ms. Doe's time in the Air Force. *Id*. Because Ms. Doe did not initially admit that she was being abused, investigators wrongly determined during a physical altercation that she was the aggressor in the relationship and issued a 30-day no contact order ("NCO"). *Id*. ¶¶ 48-49. Her commander later ordered a three-year military protective order ("MPO") requiring Ms. Doe and her boyfriend to refrain from contact. *Id*.

Because of the stress and trauma caused by Military Sexual Trauma and intimate partner violence ("IPV") that Ms. Doe experienced, as well as her serious mental health symptoms—later diagnosed as PTSD—Ms. Doe's job performance suffered. *Id*. ¶ 50. As a result, she received two letters of reprimand and a nonjudicial punishment for minor infractions. *Id*. Ms. Doe was discharged with a General (Under Honorable Conditions) discharge status in 2016. *Id*. ¶ 54. The narrative reason for her separation was given as "Minor Misconduct." *Id*. Ms. Doe's General (Under Honorable Conditions) status does not accurately reflect the nature of her service, nor does the recorded reason for separation.

In 2020, Ms. Doe received a diagnosis of PTSD from her VA provider. *Id*. ¶ 57. She also received a PTSD diagnosis from forensic psychiatrists. *Id*. The "minor misconduct" that resulted in her discharge was a direct result of the MST she experienced and her resulting PTSD. *Id*. ¶ 59.

2. Mr. Johnson's Military Service

Plaintiff Johnson is a Black man who currently resides in Massachusetts. *Id.* ¶ 71. In 2005, Mr. Johnson enlisted in the Air Force; he began his service in April 2006. *Id.* ¶ 72. Early in his service, he initially struggled to adjust to Air Force norms and was cited for minor infractions, but Mr. Johnson understood, accepted, and complied with his reprimands and committed to making improvements. Indeed, he subsequently received awards and was praised and recommended for promotion by the same superiors who had originally disciplined him. *Id.* ¶¶ 73–76.

In 2007, during Mr. Johnson's first week deployed in Iraq, a bomb exploded near him. *Id.* ¶ 78. To this day, he struggles being near fireworks and loud explosions. *Id.* Mr. Johnson's experience in Iraq placed him in a fragile mental state, which was further strained upon his return home when he discovered that his wife of two years was having an extramarital affair. *Id.* ¶¶ 79–80. The emotional impact of his service coupled with the dissolution of his marriage negatively impacted both his personal and professional life. *Id.*

Because of mental stress caused by PTSD, and depression worsened by learning of his wife's affair, Mr. Johnson's excellent conduct suffered. He was cited for minor behavioral infractions and received an Article 15—a non-judicial reprimand for minor infractions—for failing to keep the cleanliness of his house in order. *Id* ¶¶ 81–82. Receiving reprimands for these relatively minor infractions had a devastating and spiraling effect on Mr. Johnson's depression and general mental health. *Id.* ¶ 82. Despite these challenges, Mr. Johnson continued to accept additional work shifts and volunteer during his time off, and continued to receive praise for his excellent performance. *Id.* ¶¶ 83–84.

Unfortunately, despite Mr. Johnson's efforts to persevere through his mental anguish, the Air Force began separation proceedings in December 2009. *Id.* ¶ 87. The proceedings cited a

"pattern of misconduct consisting solely of minor disciplinary infractions." *Id*. Mr. Johnson was separated with a General (Under Honorable Conditions) discharge in early 2010. *Id*.

Since his discharge, Mr. Johnson has been diagnosed by a VA psychologist with recurrent major depressive disorder, social anxiety disorder, attention deficit/hyperactivity disorder ("ADHD"), and PTSD, as well as other trauma. *Id*. ¶ 89. All of these disorders are a result of events that occurred during his service. *Id*. Despite his mental health struggles, Mr. Johnson has continued to improve himself both professionally and personally; he participates in and has completed programs to treat his PTSD, ADHD, and depression, as well as obtained a culinary certificate. *Id*. ¶ 90-91.

B. AFDRB's Denial of Plaintiffs' Administrative Applications

In August 2020, Ms. Doe applied to the AFDRB, requesting that her discharge status be upgraded to Honorable. *Id*. ¶ 62. She presented substantial documentary and testimonial evidence demonstrating that her minor misconduct was attributable to, and mitigated by, her then-undiagnosed PTSD. *Id*. At the virtual hearing, Ms. Doe was represented by *pro bono* counsel. *Id*. ¶ 63. Ms. Doe provided testimony, as did a psychiatrist who testified about Ms. Doe's PTSD and its effects on her behavior. *Id*.

Despite the psychiatrist's presence at the hearing, the Board did not direct any questions to the doctor. *Id*. ¶ 64. The Board instead asked Ms. Doe to explain how her behavior at the time of her discharge constituted symptoms of PTSD, and why a different diagnosis was not more appropriate. *Id*. On December 28, 2020, the AFDRB denied Ms. Doe's discharge upgrade application in terse, boilerplate language. *Id*. ¶ 65.

In 2020, Mr. Johnson also applied to the AFDRB requesting that his discharge status be upgraded to Honorable. *Id*. ¶ 95. He too presented substantial documentary and testimonial evidence demonstrating that his minor misconduct was attributable to, and mitigated by, his in-

service trauma. *Id*. Like Ms. Doe, Mr. Johnson was represented by *pro bono* counsel throughout his discharge upgrade proceedings. *Id*. ¶ 95. Nevertheless, on May 18, 2021, the AFDRB unanimously denied Mr. Johnson's discharge upgrade application in boilerplate language. *Id*. ¶ 96-97.

C. AFDRB's Failure to Ensure a Fair Discharge Review Process

The AFDRB failed to apply liberal consideration to Ms. Doe's two documented diagnoses of PTSD—one by a VA practitioner and one by private doctors. *Id*. ¶ 66. Further ignoring the requirements of binding agency guidance, the Board did not afford Ms. Doe's application liberal consideration despite evidence of her experiences of MST and IPV. *Id*. ¶ 67; *see also* Complaint, ECF No. 1., Exs. 1-3.

The Board also ignored the Hagel, Kurta, and Wilkie Memos' requirements in finding that Ms. Doe's experiences of MST, IPV, and resulting PTSD did not mitigate her misconduct. *Id*. ¶ 68. The Board merely recited that "the administrative actions taken by [Ms. Doe's] chain of command" gave her "ample opportunities to change her negative behavior." *Id*. The AFDRB did not explain what administrative actions taken by Ms. Doe's chain of command provided her with such opportunities, nor how these administrative actions could have resolved the impact of Ms. Doe's experiences of MST, IPV, and resulting PTSD on her conduct. *Id*. ¶ 69.

The AFDRB also did not explain why it disregarded the evidence from a psychiatrist that Ms. Doe's experiences of MST, IPV, and resulting PTSD symptoms played an instrumental role in the minor infractions she committed. *Id*. ¶ 70. Instead, the Board merely stated that it "found no conclusive indication that any mental health issues had a direct impact on the applicant's misconduct or discharge." *Id*..

Similarly, the AFDRB failed to apply liberal consideration to Mr. Johnson's documented diagnoses of PTSD, depression, and other mental health conditions. *Id*. ¶ 97. The AFDRB's failure

to recognize the VA psychologist's diagnosis of Mr. Johnson's recurring major depressive disorder, social anxiety disorder, PTSD, and other trauma clearly ignores the Hagel and Kurta Memos' requirements. *Id*. ¶ 98. Instead, the Board noted summarily that "most of the misconduct was prior to his deployment," without recognizing that Mr. Johnson was discharged for his post-deployment behavior. *Id*.

The Plaintiffs' experiences before the AFDRB are emblematic of the thousands of veterans who form the putative class and who have been deprived of their statutorily mandated access to the discharge upgrade procedures set forth by Congress and implemented by the Department of Defense.

From 2002 to 2013, over fifteen percent of all service members have left the military with less-than-Honorable discharges. *Id*. ¶ 101. By contrast, approximately seven percent of Vietnam-Era veterans and less than two percent of World War II-Era veterans received less-than-Honorable discharges. *Id*. Many veterans with less-than-Honorable discharges were discharged due to misconduct attributable to PTSD, TBI, or other mental health conditions that they developed because of their military service, or due to experiences of MST. *Id*. ¶ 108.

Despite this crisis, the Board ignores the standards set out by binding guidance and congressional mandate by unlawfully denying the discharge upgrade applications of these veterans in violation of the Constitution, the Administrative Procedure Act, and Section 504 of the Rehabilitation Act.

D. Prior Class Actions on Behalf of Veterans with PTSD in this District

In 2012 and again in 2014, Vietnam War veterans filed proposed class actions in this District to challenge the refusal of military discharge review boards to appropriately consider the effects of PTSD. *Shepherd v. McHugh,* No. 3:11-cv-641-AWT (D. Conn. Am. Comp. filed Oct. 19,

2012);[1] *Monk v. Mabus*, No. 3:14-cv-00260-WWE (D. Conn. filed Mar. 3, 2014). While a motion for class certification was pending in *Monk*, then-Secretary of Defense Chuck Hagel directed the Boards to revise their adjudication procedures, including giving "liberal consideration" to PTSD claims. *See* Hagel Memo. Judge Eginton then remanded the claims of the individual plaintiffs in *Monk,* and on remand, all five *Monk* plaintiffs received discharge upgrades.[2]

Unfortunately, even after issuance of the Hagel Memo, the Discharge Review Boards (DRBs) failed to produce equitable outcomes for veterans with less-than-Honorable discharges and service-connected mental health conditions. As a result, veterans with PTSD and less-than-Honorable discharges returned to court in this District. In 2017, Army veterans of Iraq and Afghanistan sued the Army, *see Kennedy v. Esper*, No. 16-cv-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018) (granting class certification); *see also id.*, ECF No. 223 (Apr. 26, 2021) (granting final approval to class settlement). In 2018, a Marine Corps veteran and a veterans organization sued the Navy, on behalf of recent Navy and Marine Corps veterans. *Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018) (granting class certification); *see also id.,* ECF No. 191 (June 28, 2021) (noting parties have reached an agreement in that case, subject to court approval).

Plaintiffs now move for the certification of a similar class of Air Force veterans pursuant to Fed. R. Civ. P. 23(a), (b)(2).

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[1] The class claims in *Shepherd* were dismissed after the Army agreed to upgrade the discharge status of the single named plaintiff. *Shepherd v. McHugh,* No. 3:11-cv-641-AWT, ECF Nos. 83, 85.

[2] To ensure the Hagel Memo was properly implemented, the *Monk* organizational plaintiffs submitted and litigated Freedom of Information Act requests. *See Vietnam Veterans of America, et al., v. U.S. Dept. of Defense*, No. 3:15-cv-00658-VAB (D. Conn. filed May 4, 2015). The litigation was settled with DoD's agreement to provide quarterly reports for two years regarding applications and adjudications by each service branch. *Id*., ECF No. 23. In 2016, Congress largely codified the *VVA v. DoD* FOIA settlement into statute, requiring the service branches to continue providing data regarding PTSD-based applications and adjudications on a quarterly basis. *See* National Defense Authorization Act of 2017, Pub. L. No. 114-328, § 533(b), 130 Stat. 2000, 2121-22 (Dec. 23, 2016) (codified at 10 U.S.C. § 1553(f)).

II. ARGUMENT

The Court should certify this case as a class action pursuant to Federal Rules of Civil Procedure 23(a) and (b)(2). Plaintiffs seek to certify a class of all Air Force veterans who: (a) received less-than-Honorable discharges from the Air Force (this includes General and Other-than-Honorable discharges from the Air Force and Air Force Reserve; and Bad Conduct discharges from special court-martials, but excludes uncharacterized discharges); (b) were discharged within the last fifteen years or, if discharged more than fifteen years ago, received a discharge upgrade decision from the AFDRB within the last six years; (c) have not received discharge upgrades to Honorable; and (d) have mental health conditions including, but not limited to, PTSD, PTSD-related conditions, or TBI, or experiences of MST or IPV that have resulted in a physical or mental impairment that substantially limits one or more major life activities. The proposed class comprises thousands of individuals, all of whom have faced or will face the same unlawful treatment by the AFDRB—namely the AFDRB's illegal and discriminatory treatment of claims for upgrades based on PTSD, TBI, an experience of MST or IPV, or other mental health conditions.

The proposed class representatives are Ms. Doe and Mr. Johnson. Proposed class representatives will vigorously represent the interests of the class in seeking injunctive relief to remedy violations of law that impact the class as a whole. The AFDRB's illegal conduct includes its failure to comply with the binding Hagel, Kurta, and Wilkie Memos, including as codified in statute; failure to apply consistent standards when deciding discharge upgrade applications; failure to maintain records essential to the fair adjudication of applications; and discrimination against individuals with disabilities. This conduct negatively affects the ability of veterans to have their improper or inequitable discharges corrected, as all members of the proposed class have been or will be denied a fair and non-discriminatory review of their applications. The proposed class

members' injuries derive from a systematic course of conduct, supervised and controlled by Defendant.

Plaintiffs meet the requirements for class certification under Rules 23(a) and 23(b)(2), and the Court should certify this case as a class action.

A. Summary of Applicable Standards

The decision to certify a class must occur "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). For class certification, the Court takes the allegations in the complaint to be true.[3] *Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978); *Matyasovszky v. Hous. Auth.*, 226 F.R.D. 35, 39 (D. Conn. 2005). For certification as a class action to be granted, Plaintiffs must satisfy the requirements of Rule 23(a), including numerosity, commonality, typicality, and adequacy. *See infra*, Section II(C).

Plaintiffs seek certification under Rule 23(b)(2), which requires that the injunctive or declaratory relief sought "is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). Thus, the injunction sought must, on its own, provide relief to "each member of the class." *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 360–61 (2011). Both Rule 23(a) and (b) are given "liberal rather than restrictive construction." *Marisol A. v. Giuliani*, 126 F. 3d 372, 377 (2d Cir. 1997).

Courts, including ones in this district, have previously certified Rule 23 classes challenging the unlawful practices by military boards. *See, e.g.*, *Manker*, 329 F.R.D. 123 (certifying class of Iraq and Afghanistan-era Navy and Marine Corps veterans who had received less-than-Honorable discharges, had not received a discharge upgrade to Honorable, and had diagnoses or other

[3] The facts set forth in this Memorandum are, except where noted, those alleged in the Complaint. If Defendant seeks to challenge the evidentiary basis for Plaintiffs' arguments in this memorandum, Plaintiffs request the opportunity to conduct discovery of facts relevant to class certification. *See In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 40 (2d Cir. 2006) (holding district courts have discretion to allow discovery to address factual disputes relevant to Rule 23 determinations).

indications of PTSD, TBI, other mental health conditions, experiences of MST); *Kennedy v. Esper*, No. 16-cv-2010, 2018 WL 6727353, at *1 (D. Conn. Dec. 21, 2018) (same with respect to Army veterans); *see also Walters v. Sec'y of Def*., 533 F. Supp. 1068, 1069 (D.D.C. 1982), *rev'd on other grounds*, 725 F.2d 107 (D.C. Cir. 1983) (certifying class of former Air Force, Navy, and Marine Corps personnel who had received less-than-Honorable discharges on basis of compelled urinalysis); *Giles v. Sec. of the Army*, 627 F. 2d 554 (D.C. Cir. 1980) (certifying class of enlisted Army personnel who had received less-than-Honorable discharges on basis of compelled urinalysis); *Larinoff v. United States*, 365 F. Supp. 140 (D.D.C. 1973) (certifying class of Navy personnel claiming entitlement to reenlistment bonus).

B. Proposed Class Definition

An order certifying a class action must define the class. *See* Fed. R. Civ. P. 23(c)(1)(B). However, Rule 23(b)(2) classes do not require "precise delineation" where the action "seeks equitable relief as opposed to money damages." *Floyd v. City of New York*, 283 F.R.D. 153, 171 (S.D.N.Y. 2012) (citing *Handschu v. Special Servs. Div.*, No. 71 Civ. 2203, 1979 U.S. Dist. Lexis 12148, at 3 (S.D.N.Y. May 25, 1979) (Haight, J.)).

The proposed class includes all Air Force veterans who:

(a) were discharged with less-than-Honorable discharges from the Air Force (this includes General and Other-than-Honorable discharges from the Air Force, Air Force Reserve, and Air National Guard; and Bad Conduct discharges from special court-martials, but excludes uncharacterized discharges);

(b) were discharged within the last fifteen years or, if discharged more than fifteen years ago, received a discharge upgrade decision from the AFDRB within the last six years;

(c) have not received discharge upgrades to Honorable; and

(d) have mental health conditions such as PTSD and PTSD-related conditions, TBI, or experiences of MST or IPV, that have resulted in a physical or mental impairment that substantially limits one or more major life activities, or have records documenting one or more of the aforementioned experiences or conditions.

Plaintiffs seek an injunction that would require Defendant to adopt review procedures that comply with the Administrative Procedure Act, Rehabilitation Act, and Due Process Clause of the Fifth Amendment for all applications for discharge upgrades submitted by members of this class. The definition proposed by Plaintiffs thus defines the class of persons unjustly burdened by Defendant's actions.

C. Plaintiffs Satisfy the Requirements of Rule 23(a)

Rule 23(a) sets forth four requirements to certify a class: (a) "the class is so numerous that joinder of all members is impracticable;" (b) "there are questions of law or fact common to the class;" (c) "the claims or defenses of the representative parties are typical of the claims or defenses of the class;" and (d) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a). Plaintiffs satisfy all four requirements.

1. Numerosity

Plaintiffs' proposed class plainly satisfies the numerosity requirement because it is "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). "Although there is no magic minimum number that will breathe life into a class . . . [t]he numerosity requirement of Rule 23(a)(1) is presumed satisfied for classes with more than forty members." *Estate of Gardner v. Cont'l Cas. Co.*, 316 F.R.D. 57, 69 (D. Conn. 2016) (internal quotations and citations omitted); *see Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (citing 1 *Newberg on Class Actions* 2d (1985 Ed.) § 3.05); *see also Alexander v. Price*, 275 F. Supp. 3d 313, 325 (D. Conn. 2017).

The AFDRB has received hundreds, and likely thousands, of applications from veterans with mental health conditions in the last fifteen years. *See Boards Statistics*, Dep't of Air Force (2020), www.boards.law.af.mil (last visited Aug. 2, 2021). The AFDRB frequently denies these applications unlawfully. Between 2017 and 2019 alone, the AFDRB denied 341 veterans who demonstrated mental health conditions or experiences of sexual assault or harassment on their discharge upgrade applications. *Id.* This amounts to 39.5 percent of all applications containing such claims.

Assuming representativeness of this sample and assuming all veterans with less-than-Honorable discharges have applied or will apply for an upgrade, the present class includes approximately 39.5 percent of approximately 29,760 Iraq and Afghanistan era Air Force veterans with General or Other than Honorable discharges, for a total of approximately 11,755 veterans, as well as thousands of veterans who will be discharged under similar circumstances in the future. Judge Haight, in ruling on a class certification motion against the Navy's comparable procedures, found that "joinder would likely be burdensome and impracticable" even if there were only eighty-five class members. *Manker*, 329 F.R.D at 117.

In sum, the proposed class is so numerous that joinder is impracticable and there are a sufficient number of proposed class members to give rise to a presumption of numerosity under Second Circuit precedent. *See Consol. Rail Corp.*, 47 F.3d at 483 (finding that "numerosity is presumed" when a putative class is greater than forty members); *see also Alexander*, 275 F. Supp. 3d at 325 ("In the Second Circuit, numerosity is presumed at a level of 40 members." (internal quotation marks omitted)).

2. Commonality

Plaintiffs' proposed class also satisfies the requirement that there be "questions of law or fact common to the class" because the class members "have suffered the same injury" at the hands of the AFDRB. *Dukes,* 564 U.S. at 345, 350; Fed. R. Civ. P. 23(a)(2). Judge Eginton and Judge Haight, respectively, have recognized that the similar institutional practices of the Army and Navy discharge review boards raise common questions of fact capable of class-wide resolution. *Kennedy*, 2018 WL 6727353 at *5; *Manker*, 329 F.R.D. at 120. The Air Force's practices mirror those of the Army and Navy Discharge Review Boards challenged in *Kennedy* and *Manker* and similarly give rise to questions of law that satisfy Rule 23(a)(2)'s commonality requirement.

Specifically, the AFDRB's denial of Plaintiffs' procedural rights to a fair discharge upgrade proceeding gives rise to at least eight common questions "capable of classwide resolution." *See Dukes*, 564 U.S. at 350. "[F]or purposes of Rule 23(a)(2), [e]ven a single [common] question will do." *Id.* at 359 (internal quotation marks omitted):

1. Whether, when reviewing proposed class members' discharge upgrade applications, the Defendant has acted arbitrarily and capriciously, and/or has made decisions unsupported by substantial evidence and contrary to law, in violation of the Fifth Amendment and the Administrative Procedure Act, by failing to consistently apply his agency's own binding rules and procedures—including the Hagel Memo, Kurta Memo, Wilkie Memo, and DoD Instruction 1332.28;
2. Whether the Defendant, by failing to publish or explain evidentiary standards under which discharge upgrade applications are adjudicated, has frustrated proposed class members' ability to prepare successful applications, thereby constituting arbitrary

agency action in violation of the Administrative Procedure Act and the denial of a meaningful opportunity to be heard in violation of the Fifth Amendment;

3. Whether the Defendant's frequent and unlawful failures to maintain records important to the adjudication of proposed class members' discharge upgrade applications denies them a meaningful opportunity to be heard, in violation of the Fifth Amendment and the Administrative Procedure Act's guarantee of agency action consistent with the Constitution;
4. Whether the Defendant's practice of presuming regularity in government affairs, despite evidence of widespread racial disparities and systemic irregularities in mental health treatment and administrative separation processes within the Air Force, amounts to arbitrary and capricious agency action in violation of the Administrative Procedure Act, and whether such practice results in a high risk of erroneous deprivation in violation of the Fifth Amendment and the Administrative Procedure Act;
5. Whether in its widespread denial of discharge upgrade applications involving the proposed class members, Defendant has failed to carry out congressional intent in establishing the Discharge Review Boards and setting forth the governing standards, thereby exceeding its authority, and has fallen short of vindicating the statutory rights Congress created for veterans, in violation of the Administrative Procedure Act;
6. Whether the AFDRB's decision-making process, whereby decisions fail to meaningfully assess or engage with submitted evidence, relying instead on form

language, produces decisions unsupported by substantial evidence, in violation of the Administrative Procedure Act;

7. Whether Defendant discriminates against the proposed class members on the basis of their disabilities, in violation of Section 504 of the Rehabilitation Act, in refusing to apply binding standards that mandate consideration of PTSD, TBI, and other mental health conditions when reviewing their discharge upgrade applications; in unwarranted skepticism of claims of disability that subject applicants with disabilities to a harsher review process than those without disabilities; and in the widespread refusal to upgrade the discharges of veterans with disabilities;
8. Whether Defendant discriminates against the proposed class members on the basis of their disabilities, in violation of the equal protection clause of the Fifth Amendment, in refusing to apply binding standards that mandate consideration of PTSD, TBI, and other mental health conditions when reviewing their discharge upgrade applications; in unwarranted skepticism of claims of disability that subjects applicants with disabilities to a harsher review process than those without disabilities; and in the widespread refusal to upgrade the discharges of veterans with disabilities.

These questions are sufficiently common because they challenge the Defendant's "unitary course of conduct" that has caused injuries to Plaintiffs. *See Sykes v. Mel S. Harris and Associates LLC*, 780 F.3d 70, 84, 85–87 (2d Cir. 2015) (affirming certification of class challenging defendant's practice of obtaining default debt-collection judgments through alleged use of false affidavits and fraudulent service, though each instance of debt collection necessarily involved individual

affidavit and service of process, because core inquiry was into defendant's "unitary course of conduct" in "fraudulently procuring default judgments").

Here, each of the common questions arises from a common course of conduct undertaken by the AFDRB during the evaluation of discharge upgrade applications—a course of conduct which creates a "common injury" for all proposed class members. *Id.* at 84–85. Put simply, plaintiffs allege that the AFDRB has deprived them of "fair *procedures* and standards" in reviewing their discharge upgrade applications—a challenge to Defendant's course of conduct. *See Manker*, 329 F.R.D. at 119 (emphasis added). The harm underlying Plaintiffs' claims is the same for all class members, who "share the 'same injury' of being subject to the [AF]DRB's purportedly unfair review process for characterization upgrade applications." *Id.* at 120.

Judge Eginton and Judge Haight found commonality in similar challenges to the Army and Navy discharge review boards' policies and procedures. This precedent involves questions of law similar to those raised here, and favors certifying the proposed class. Indeed, no material difference exists between the ADRB and NDRB on the one hand, and the AFDRB on the other, that would support a finding of commonality in the former cases but not the latter.

Importantly, as in *Manker*, 329 F.R.D. at 119, and *Kennedy*, 2018 WL 6727353, at *4, the common questions here do not require the Court to determine whether each individual class member is necessarily entitled to a resulting discharge upgrade, but rather can be decided according to the class members' shared right to a fair adjudication process. Thus, variations in veterans' individual circumstances do not defeat class certification. Defendant's procedures, not the merits of individual applications, are the basis of this lawsuit. "There may well be applications from [class members] who would still be denied an upgrade under a 'liberal consideration'

standard, but the merits of any individual [AF]DRB characterization review is not at issue . . . ." *Manker*, 329 F.R.D. at 119.

The common questions in this case are "apt to drive the resolution of the litigation." *Dukes,* 564 U.S. 338 at 350. In determining whether a class is to be certified, the Court may need to "consider how a trial on the merits would be conducted." *Sykes*, 780 F.3d at 86. If this proposed class were certified, the claims could likely be resolved at summary judgment and this Court would determine whether the AFDRB's procedures violate the Administrative Procedure Act, Due Process Clause, or Section 504 of the Rehabilitation Act. Factual disputes that would require a trial would only arise where the Defendant disputes the existence or nature of the policies or procedures. Since each of these issues is common to the class, class certification is appropriate.

3. **Typicality**

Plaintiffs Doe and Johnson, like thousands of other veterans comprising the proposed class, have suffered injuries due to systemic defects in the AFDRB's process for reviewing discharge upgrade applications from veterans with PTSD, TBI, mental-health conditions, or experiences of MST or IPV; thus, their claims are wholly typical of the claims of the class. Typicality is met when each class member's claim "arises from the same course of events" and "makes similar legal arguments to prove the defendant's liability." *Cent. States Se. & Sw. Areas Health & Welfare Fund v. Merck-Medco Managed Care, L.L.C.*, 504 F.3d 229, 245 (2d Cir. 2007). This requirement is "not demanding." *N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 165 (S.D.N.Y. 2011). Since Ms. Doe and Mr. Johnson's claims arise from the same course of events affecting other members of the proposed class, and since members of the proposed class have similar legal arguments, their claims are typical of the class for the purposes of Rule 23(a).

Ms. Doe and Mr. Johnson's claims are sufficiently similar to other class members' claims to warrant certification. Typicality does not require "the representatives' claims be *identical* to those of the class members," *Trief v. Dun & Bradstreet Corp.*, 144 F.R.D. 193, 200 (S.D.N.Y. 1992) (emphasis added); *see also In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 123 (S.D.N.Y. 2001), and minor factual differences are no bar to typicality, *see Robidoux v. Celani*, 987 F.2d 931, 936–37 (2d Cir. 1993). Rather, the central inquiry is whether the class representatives' claims generally share the essential characteristics of the putative class as a whole. *See De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

Here, Ms. Doe and Mr. Johnson's claims arise from the same course of conduct—namely, the AFDRB's alleged general policies and practices. Plaintiffs allege, *inter alia*, an AFDRB policy of non-compliance with the Hagel, Kurta, and Wilkie Memoranda, discrimination on the basis of their disabilities, and denial of due process. These policies amount to a "unitary course of conduct" by a single system. *Sykes*, 780 F.3d at 85 (2d Cir. 2015) (quoting *Marisol A.*, 126 F.3d at 377 (2d Cir. 1997)).

As victims of this "unitary course of conduct," the legal arguments made here are the same as those available to all other members of the proposed class.

Ms. Doe and Mr. Johnson allege that they and other class members have been denied their statutorily mandated access to the discharge upgrade procedures set forth by Congress and implemented by the Department of Defense. *See generally*, Complaint, ECF No. 1. Plaintiffs further allege that the AFDRB's systemic failure to properly adjudicate discharge upgrade applications from veterans with PTSD, TBIs, other mental health conditions, and experiences of MST or IPV violate the Administrative Procedure Act's guarantees of agency actions that are neither arbitrary and capricious, contrary to constitutional right, in excess of statutory authority or

short of statutory right, nor unsupported by substantial evidence. *Id*. Since the proposed class members' claims "arise[] from the same course of events," and "make[] similar legal arguments to prove the defendant's liability," the claims of Ms. Doe and Mr. Johnson are typical. *Cent. States*, 504 F.3d at 245 (2d Cir. 2007).

Further, Ms. Doe and Mr. Johnson themselves share all of the essential characteristics of the proposed class. Like all other members of the proposed class, Ms. Doe and Mr. Johnson have mental health conditions and/or experiences of MST or IPV that resulted in impairment, were discharged because of misconduct attributable to their conditions or experiences, and were denied a discharge upgrade to Honorable. Ms. Doe and Mr. Johnson, like others in the class, experienced "the systemic failure of the [AFDRB] to give proper consideration to the directive of the Hagel [and Kurta] Memo[s] . . . that has prejudiced their upgrade applications." *Kennedy v. Esper*, 16-cv-2010, 2018 WL 6727353, at *5 (D. Conn. Dec. 21, 2018). In short, as go the claims of Mr. Johnson and Ms. Doe, "so go the claims of the class." *See In re Methyl Tertiary Butyl Ether (MTBE) Prod. Liab. Litig.*, 241 F.R.D. 185, 197–98 (S.D.N.Y. 2007).

Moreover, minor differences in proposed class members' circumstances are especially inconsequential where, like here, the relief sought is equitable in nature. *See M.G. v. New York City Dep't of Educ.*, 162 F. Supp. 3d 216, 241 (S.D.N.Y. 2016). In *Manker*, the court rejected the government's argument that NDRB "review of certification upgrades is too individualized for a class-wide resolution" given that the class sought to challenge "general policies allegedly disadvantaging both Named Plaintiffs' and the proposed class members' applications, regardless of their applications' individual merits." 329 F.R.D. at 121. Put simply, the named plaintiffs and the proposed class members "suffered the same injury from the NDRB." *Id.*

Similarly, Ms. Doe and Mr. Johnson do not seek blanket discharge upgrades for all applicants who received deficient discharge upgrade decisions. Rather, Plaintiffs seek a *procedural*, not *substantive*, remedy: class-wide relief from "the [AF]DRB]'s general policies and practices . . . that disadvantag[e] both Named Plaintiffs' and the proposed class members' applications . . . ." *Id*. The individualized nature of the discharge review system is therefore not a barrier to class certification. Ms. Doe and Mr. Johnson, who "suffered the same injury from the [AF]DRB," *id.*, as other members of the proposed class and whose legal arguments are similar to the arguments available to all members of the proposed class, have met the burden of showing typicality.

4. **Adequacy of Representation**

Ms. Doe and Mr. Johnson can "fairly and adequately protect the interests of the class" because they are committed to pursuing the litigation for the benefit of themselves and others and because they have retained qualified counsel. *See* Fed. R. Civ. P. 23(a)(4). To meet this standard, the proposed class representative must have (a) "an interest in vigorously pursuing the claims of the class," and (b) "no interests antagonistic to the interests of other class members." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006). Additionally, class counsel must be "'qualified, experienced and generally able' to conduct the litigation." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). Ms. Doe, Mr. Johnson, and their counsel meet these requirements.

First, Ms. Doe and Mr. Johnson are dedicated to bringing the class claims to successful judgment because they would benefit from the Court's injunction. Ms. Doe and Mr. Johnson fulfill the first prong of the adequacy test if they "stand to benefit from any class-wide injunctive relief that may be ordered." *Robinson v. Metro-North Commuter R.R. Co.*, 267 F.3d 147, 171 (2d Cir.

2001), *abrogated on other grounds by Wal–Mart*, 564 U.S. 338. Ms. Doe and Mr. Johnson would directly benefit from this Court ordering the AFDRB to "establish[] constitutionally and statutorily compliant adjudication procedures . . . [and] . . . consistently appl[y] its own procedural standards in considering the effects of class members' PTSD, other mental health conditions, TBIs, and experiences of MST and IPV when determining whether to upgrade their discharge statuses." Compl., ECF No. 1 at Prayer for Relief (3)-(4). "A change in procedures would benefit both [Ms. Doe and Mr. Johnson] and proposed class members by at least affording them the belief that their applications will be held up to the correct standards." *Manker*, 329 F.R.D. at 122. Thus, Ms. Doe and Mr. Johnson have "an interest in vigorously pursuing the claims of the class." *Denney*, 443 F.3d at 268.

Second, the interests of Ms. Doe and Mr. Johnson align, rather than conflict, with those of other class members. Conflicts of interest must be "fundamental" to defeat class certification. *See Denney*, 443 F.3d at 268; *In re Visa Check/MasterMoney Antitrust Litigation*, 280 F.3d 124, 145 (2d Cir. 2001). Though a conflict is disqualifying only when it "goes to the very heart of the litigation," there is no conflict here. *See Charron v. Wiener*, 731 F.3d 241, 250 (2d Cir. 2013). The injunction sought by Ms. Doe and Mr. Johnson will equally benefit all members of the class. Though not all class members will receive discharge upgrades under the procedures the plaintiffs seek to compel, each class member will be able to access a discharge upgrade process that fairly adjudicates their claims. Since the injunction "sweeps broadly enough to benefit each class member," *Sykes*, 780 F.3d at 97, no conflict is presented, and Ms. Doe and Mr. Johnson are adequate representatives.

Finally, class counsel is "'qualified, experienced and generally able' to conduct the litigation." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d at 291. Plaintiff is represented by

Yale Law School's Veterans Legal Services Clinic and Jenner & Block LLP. The attorneys involved in this case have extensive experience litigating complex civil matters and class actions concerning matters of federal constitutional and statutory law, *see* Ex. 1 Decl. of Susan J. Kohlmann dated September 13, 2021 ("Kohlmann Decl."); Ex. 2, Decl. of Michael J. Wishnie dated September 9, 2021 ("Wishnie Decl."), including class actions specifically challenging the discharge review procedures of other military review boards, *see Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018); *Kennedy v. Esper*, 16-cv-2010, 2018 WL 6727353 (Dec. 21, 2018).

Class counsel also satisfy the criteria of Rule 23(g), which requires that the Court appoint class counsel at the time of certification. In doing so, the Court must consider (1) "the work counsel has done in identifying or investigating potential claims in the action," (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," (3) "counsel's knowledge of the applicable law," and (4) "the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). Class counsel satisfies these requirements. *See* Kohlmann Decl., Ex. 1; Wishnie Decl., Ex. 2. Thus, counsel have met their burden of proving adequacy as they are capable and qualified to litigate this class action and they will zealously represent the interests of the full class without any conflicts.

D. Class Certification is Appropriate under Rule 23(b)(2)

Certification of a class pursuant to Rule 23(b)(2) is appropriate if "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'" *Dukes,* 564 U.S. at 360 (quoting Richard A. Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U.

L. Rev., 97, 132 (2009)); *see also Estate of Gardner*, 316 F.R.D. at 75 (finding that "forward-looking relief" for which "an injunction is required" is "exactly the type of relief Rule 23(b)(2) was designed to facilitate"). "Civil rights cases against parties charged with unlawful, class-based discrimination are prime examples" of the types of class actions permitted by Rule 23(b)(2). *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 614 (1997); *accord Stinson v. City of New York*, 282 F.R.D. 360, 379 (S.D.N.Y. 2012).

In the instant case, the AFDRB's refusal to properly apply binding laws or to clearly explain and justify its evidentiary standards has denied all members of the proposed class their procedural right to a proper review of their discharge upgrade applications. The AFDRB's failure to consistently apply legally required standards affects all proposed class members in the same manner because it deprives all proposed class members of proper consideration of the impact of experiences of MST, TBI, PTSD or other mental health conditions in their applications and denies them adjudications consistent with fundamental due process rights. While the outcome of any single AFDRB proceeding "'may depend to some extent on individual facts, Defendant's systemic failure to apply its own official standards is a general course of conduct uniting the proposed class.'" *Manker,* 329 F.R.D. at 123. This conduct is "unlawful only as to all of the class members." *Dukes,* 564 U.S. at 360.

By the same token, the injunctive relief sought herein "would provide relief to each member of the class," *Sykes*, 780 F.3d at 97. In *Manker*, Judge Haight found that injunctive relief was sufficient to meet this standard because injunctive relief would ensure that each class member would have their applications reviewed under the correct standards. No promise of an upgrade was necessary. *Manker*, 329 F.R.D. at 123. Here, the injunction sought would provide each class member the same opportunity to have their discharge upgrade applications properly reviewed

under the standards set forth in the Hagel, Kurta, and Wilkie Memoranda and pursuant to evidentiary standards and procedures compliant with constitutional due process. The proposed relief will thus benefit each class member by ensuring that AFDRB decisions are not arbitrary, but rather based on the legally required standards set forth in the Hagel, Kurta, and Wilkie Memoranda and related guidance. *See Sykes*, 780 F.3d at 97 ("Relief to each member of the class does not require that the relief to each member of the class be identical, only that it be beneficial.") (internal quotations omitted).

The requirements of Rule 23(b)(2) are satisfied in cases where, as here, "the plaintiffs seek injunctive relief and they predicate the lawsuit on the defendants' acts and omissions with respect to" the proposed class. *Comer v. Cisneros*, 37 F.3d 775, 796 (2d Cir. 1994). In short, the nature of the alleged injuries and the relief requested by Plaintiff applies to all members of the proposed class equally and indivisibly—the key to a proper Rule 23(b)(2) class.

CONCLUSION

Plaintiffs propose to represent a class of Air Force veterans with less-than-Honorable discharges. Defendant has rejected administrative applications by Ms. Doe and Mr. Johnson requesting upgrades of their discharge statuses, and like the members of the class they seek to represent, Ms. Doe and Mr. Johnson have PTSD, TBI, other mental health conditions, or experiences of sexual trauma and IPV arising from their military service. The proposed class members are all affected by the same policies and procedures imposed and improperly applied by Defendant. Plaintiffs meet the requirements of Rules 23(a) and (b)(2) and respectfully request that the Court certify their proposed class.

Dated: September 13, 2021
New Haven, Connecticut

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on September 13, 2021, a copy of the foregoing Memorandum of Law in Support of Plaintiffs' Motion for Class Certification and supporting declarations were filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system and by regular mail to any parties not yet appearing. Parties may access this filing through the Court's CM/ECF system.

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