

No. 14-7115

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

SERVICE WOMEN'S ACTION NETWORK
and VIETNAM VETERANS OF AMERICA,

Petitioners,

– v. –

SECRETARY OF VETERANS' AFFAIRS,

Respondent.

On Petition for Review Pursuant to 38 U.S.C. § 502

**BRIEF OF TWENTY-FOUR MEMBERS OF CONGRESS
AS *AMICI CURIAE*
IN SUPPORT OF PETITIONERS**

Charles A. Rothfeld
Paul W. Hughes
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Amici

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, Paul W. Hughes, counsel for *Amici Curiae* Members of Congress, certifies the following:

1. The full name of the parties represented by me are:

Representative Chellie Pingree

Representative Niki Tsongas

Representative Rosa L. DeLauro

Representative Marcy Kaptur

Representative Dina Titus

Representative Jim McDermott

Representative James P. McGovern

Representative Ann McLane Kuster

Representative Lois Frankel

Representative Alcee L. Hastings

Representative Jan Schakowsky

Representative Julia Brownley

Representative Charles Rangel

Representative Raul Grijalva

Representative Betty McCollum

Representative Sam Farr

Representative Michelle Lujan Grisham

Representative Steve Cohen

Representative Stephen Lynch

Representative Barbara Lee

Representative Mark Pocan

Representative Elizabeth Esty

Representative Alan Lowenthal

Representative David Cicilline

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

3. I do not represent any corporation in this matter.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in this proceeding are: Mayer Brown LLP; Charles A. Rothfeld; Paul W. Hughes.

December 18, 2014

/s/ Paul W. Hughes
Paul W. Hughes
Attorney for *Amici Curiae*

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INTERESTS OF *AMICI CURIAE*

Amici are current Members of Congress.¹ Members of Congress have a particular interest in ensuring that the U.S. Department of Veteran Affairs (“VA”) provides appropriate benefits for service members who are victims of sexual assault. *Amici* are:

Representative Chellie Pingree

Representative Niki Tsongas

Representative Rosa L. DeLauro

Representative Marcy Kaptur

Representative Dina Titus

Representative Jim McDermott

Representative James P. McGovern

Representative Ann McLane Kuster

Representative Lois Frankel

Representative Alcee L. Hastings

Representative Jan Schakowsky

Representative Julia Brownley

¹ Pursuant to Fed. R. App. P. 29(c)(5), *amici* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and its counsel made a monetary contribution to its preparation or submission. The brief is filed pursuant to the Court’s Order of December 10, 2014, which granted *amici* permission to file this brief out of time on December 18, 2014. No party objects to the filing of this brief.

Representative Charles Rangel

Representative Raul Grijalva

Representative Betty McCollum

Representative Sam Farr

Representative Michelle Lujan Grisham

Representative Steve Cohen

Representative Stephen Lynch

Representative Barbara Lee

Representative Mark Pocan

Representative Elizabeth Esty

Representative Alan Lowenthal

Representative David Cicilline

SUMMARY OF ARGUMENT

Congress has established a comprehensive benefits program, administered by the VA, that provides certain medical and financial benefits to members of the military who are injured during their service. “Like other injuries, veterans who suffer from service-connected PTSD [post-traumatic stress disorder] are eligible for benefits.” *Nat’l Org. of Veterans’ Advocates, Inc. v. Sec’y of Veterans Affairs*, 669 F.3d 1340, 1343 (Fed. Cir. 2012). To

obtain benefits as a consequence of suffering from PTSD, a veteran must demonstrate 1) “medical evidence diagnosing” the claimed PTSD, 2) “a link, established by medical evidence, between current symptoms and an in-service stressor,” and 3) “credible supporting evidence that the claimed in-service stressor occurred.” 38 C.F.R. § 3.304(f); *see also Nat’l Org. of Veterans’ Advocates*, 669 F.3d at 1343.

The VA has recognized that proving an “in-service stressor” actually “occurred” can, in some circumstances, be difficult for a veteran to establish via third-party evidence: the veteran may suffer a traumatic incident while alone or the witnesses may not have survived. VA regulations, accordingly, provide that, “in the absence of clear and convincing evidence to the contrary,” a “veteran’s lay testimony alone may establish the occurrence of the claimed in-service stressor” when, for example, the stressor arises from “combat with the enemy,” relates to “fear of hostile military or terrorist activity,” or stems from time being held as a prisoner of war. 38 C.F.R. § 3.304(f)(1)-(4).

But the VA applies a very different rule if the PTSD results from an “in-service personal assault,” which includes military sexual trauma (“MST”). 38 C.F.R. § 3.304(f)(5). For sexual assault claims, the regulations do *not* permit a veteran to establish that the assault occurred through his

or her own lay testimony; instead, the veteran must introduce additional third-party evidence, such as “service records” or other evidence to “corroborate the veteran’s account of the stressor incident,” such as records from “rape crisis centers” or “pregnancy tests or tests for sexually transmitted diseases.” *Id.*

The VA’s differential treatment of similarly situated veterans—and less favorable treatment of veterans who suffered sexual assault than those who suffered other forms of trauma—is arbitrary and capricious. *First*, the VA cannot offer any logical basis for treating veterans with the exact same medical diagnosis, PTSD, quite differently. Indeed, in rejecting petitioners’ request for rulemaking, the VA does not make any serious attempt to do so. The VA’s failure to provide any meaningful justification for this disparity alone renders its policy arbitrary and capricious.

Second, because sexual assault is broadly under-reported, proving a sexual assault via third-party evidence is often *more* difficult than other in-service stressors. The VA’s refusal to provide veterans who suffer sexual assault the same favorable evidentiary standard as other veterans is thus irrational.

Third, the VA's policy is particularly troubling as it denies sexual assault survivors—who are overwhelmingly female—the benefits it provides to combat survivors—who are overwhelmingly male.

For all of these reasons, the Court should hold the VA's existing regulations arbitrary and capricious. And it should compel the VA to adopt petitioners' proposed rule. That is, the Court should compel the VA to treat our veterans whose PTSD is caused by sexual assault with the same favorable evidentiary burden it extends to veterans whose PTSD is caused by combat or fear of terrorist attacks.

ARGUMENT

I. The Occurrence Of Sexual Assault In The Military Is A National Tragedy.

The facts are undeniable: sexual assaults occur in the military with alarming frequency. These assaults often cause lasting trauma. The VA has a sacred obligation to provide for the needs of our veterans who experience continuing medical effects from assaults suffered while in the military. The VA's existing policy, however, fails the needs of these veterans, denying or delaying the care and benefits they require. Continued maintenance of this policy is intolerable.

A. The frequent occurrence of sexual assault in the military requires attention by the VA.

The Department of Defense (“DOD”) has been candid in its assessment: “Sexual assault is a significant challenge facing the United States military.” DOD, *Report to the President on Sexual Assault Prevention and Response 2014*, at 11, <http://goo.gl/yejhJJ> (“DOD 2014 Report”). DOD estimates that in 2012 alone, approximately 26,000 service members experienced some form of unwanted sexual conduct. DOD Annual Report on Sexual Assault in the Military 1 (2013), *available at* <http://perma.cc/65A-FW6Z>.

The numbers are stark: one in five female veterans report that they experienced sexual abuse while in the military, and one in a hundred male veterans report suffering sexual abuse. Government Accountability Office, *Military Sexual Trauma*, at 1 (June 2014), <http://perma.cc/FF3T-4TKM> (“GAO Report”). While the DOD is taking active steps “to prevent this heinous crime” in order “to reduce, with the ultimate goal to eliminate, the crime of sexual assault in the Armed Forces” (DOD 2014 Report at 11), tens of thousands of veterans experienced sexual assault during their service and military sexual assault continues to occur. GAO Report at 1.

The repercussions of sexual assault are often severe. Victims are at a high risk for chronic medical conditions—including PTSD, depression, and

anxiety. GAO Report at 1. Indeed, sexual assault is “one of the two leading risk factors ... for PTSD.” 6 Inst. of Med., *Gulf War and Health: Physiologic, Psychologic, and Psychosocial Effects of Deployment-Related Stress*, at 87 (2008). This Court has recognized the dangers PTSD poses to veterans: veterans with PTSD “suffer from more chronic conditions and have shorter life spans” and also have “higher divorce rates and joblessness.” *Nat’l Org. of Veterans’ Advocates*, 669 F.3d at 1343. Not only do these medical conditions require extensive treatment, they often hinder a veteran’s ability to maintain employment, leaving him or her without means to pay for basic necessities like food, shelter, and transportation to medical care. ACLU & SWAN, *Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma*, at 2 (Nov. 2013), available at <http://perma.cc/R95L-63HA> (“ACLU Report”).

B. The VA’s existing policy fails the needs of veterans who were sexually assaulted during their service.

Because PTSD caused by sexual assault may result in severe medical conditions as well as joblessness, veterans suffering from this condition require extensive support. Federal law obligates the VA to provide this assistance, as it requires the VA to award compensation to honorably discharged service members who suffered injury during their service. *See* 38 U.S.C. § 1110; 38 C.F.R. § 3.4(b). And veterans are seeking these benefits:

between 2008 and 2012, 15,862 veterans filed claims for disability benefits due to MST-related PTSD. ACLU Report at 4.

Despite the well documented problem of military sexual assault, however, the VA is failing in its obligation to provide for veterans who are sexually assaulted while in the military. Of the near 16,000 MST-related PTSD claims filed between 2008 and 2012, relatively few were granted, with grant rates below 33% in 2008 through 2010. ACLU Report at 5 fig.1. Thus, PTSD claims stemming from MST are granted at a much lower rate than other PTSD claims. In 2011, 74.2% of non-MST-related PTSD claims were granted, as opposed to only 44.6% of MST-related PTSD claims. *Id.* at 5. In 2012, 73.3% of non-MST-related PTSD claims were granted, as opposed to only 56.8% of MST-related PTSD claims. *Id.*

Although the disparity in grant rates has been narrowing in recent years, MST-related PTSD claims continue to be denied more often than are other requests for PTSD-related benefits. A6. The reason for this disparity is not hard to discern: the VA imposes a higher evidentiary burden on veterans whose PTSD was caused by sexual assault than it does on veterans whose PTSD has a different cause.

II. The VA's Regulation Is Arbitrary And Capricious.

The VA may “issue regulations which establish the requirements for veterans to qualify for service-connected PTSD injuries.” *Nat’l Org. of Veterans’ Advocates*, 669 F.3d at 1343. Those regulations are subject to review pursuant to *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Accordingly, when Congress has not addressed the precise question at issue, the regulation must be “based on a permissible construction of the statute,” and in all events the VA may not adopt a regulation that is “arbitrary or capricious in substance.” *Nat’l Org. of Veterans’ Advocates*, 669 F.3d at 1349 (quotations omitted).

At bottom, the VA must provide “a logical basis” for its regulations. *Nat’l Org. of Veterans’ Advocates*, 669 F.3d at 1349. The Court is obligated to “reverse an agency policy when [it] cannot discern a reason for it.” *Judulang v. Holder*, 132 S. Ct. 476, 490 (2011).

Here, the VA’s differential treatment of PTSD caused by sexual assault, as opposed to PTSD caused by other stressors, lacks a logical basis and is thus arbitrary and capricious. The VA’s current regulatory scheme permits a veteran to establish through his or her “lay testimony alone” (when there is no “clear and convincing evidence to the contrary”) that the “claimed in-service stressor” occurred, *if* that stressor is “related” to “com-

bat” in which the veteran “engaged” (38 C.F.R. § 3.304(f)(2)), “is related to the veteran’s fear of hostile military or terrorist activity” (*id.* § 3.304(f)(3)), or is “related” to a veteran’s experience being a “prisoner-of-war” (*id.* § 3.304(f)(4)). The same presumption applies if the veteran’s PTSD occurs during his or her military service “and the claimed stressor is related to that service.” *Id.* § 3.304(f)(1). But if the claimed stressor is sexual assault, a veteran must provide independent evidence to “corroborate the veteran’s account of the stressor incident.” *Id.* § 3.304(f)(5).

This disparity is arbitrary and capricious for at least three reasons. *First*, the VA has no logical basis for imposing a heavier burden on veterans whose PTSD is caused by sexual assault than it does for veterans whose PTSD stems from other stressors. *Second*, the VA’s policy is particularly irrational insofar as drastic underreporting of sexual assault in the military makes third-party evidence of such assault especially difficult to obtain. And, *third*, the disparate gender effects of the VA policy highlight its arbitrary nature.

A. The VA lacks a logical basis to impose a higher evidentiary burden on veterans whose PTSD is caused by sexual assault than it does on veterans whose PTSD had other causes.

An agency may not treat comparable individuals differently merely “by flipping a coin.” *Judulang*, 132 S. Ct. at 485. In particular, “[w]here an

agency applies different standards to similarly situated entities and fails to support this disparate treatment with a reasoned explanation and substantial evidence in the record, its action is arbitrary and capricious and cannot be upheld.” *Burlington N. & Santa Fe Ry. v. Surface Transp. Bd.*, 403 F.3d 771, 777 (D.C. Cir. 2005); *see also Northpoint Tech., Ltd. v. FCC*, 414 F.3d 61, 75 (D.C. Cir. 2005) (“[A]n agency must provide adequate explanation before treating similarly situated parties differently, or else be in violation of the APA.”); *Chadmoore Commc’ns, Inc. v. FCC*, 113 F.3d 235, 242 (D.C. Cir. 1997) (“We have long held that an agency must provide an adequate explanation before it treats similarly situated parties differently.”).

Thus, in *Judulang*, the Supreme Court explained that the Board of Immigration Appeals could not treat similarly situated classes of aliens differently for reasons that were not related to “the purposes of the immigration laws or the appropriate operation of the immigration system.” 132 S. Ct. at 485. To treat classes of aliens differently, the Court held, the agency must tether the differential treatment to a legitimate purpose of the immigration system; that is, “agency action must be based on non-arbitrary, ‘relevant factors.’” *Id.*

Under this principle, the VA must proffer some legitimate basis, tethered to the purposes of the veterans' benefits system, for treating veterans with PTSD caused by sexual assault differently than veterans with PTSD stemming from other causes, like participation in combat or fear of terrorist activity. Because the VA has created favorable evidentiary rules for many veterans under Sections 3.304(f)(1)-(4), it must present a logical basis to deny those same protections to veterans whose PTSD was caused by sexual assault.

But the VA has not—and cannot—offer a logical basis for this differential treatment. The VA has articulated no rationale whatsoever, nor can we conceive of one, why a veteran's lay testimony may be adequate to establish that he or she experienced, for example, a stressful combat situation, but not that he or she experienced a stressful sexual assault. The VA has not (and cannot) establish that veterans who seek benefits for PTSD caused by sexual assault are more likely to fabricate claims than other veterans seeking benefits for PTSD. And it has not (and cannot) suggest that providing benefits to veterans with PTSD caused by sexual assault is somehow less important than providing benefits to other veterans with PTSD.

In rejecting petitioners' request for rulemaking, the VA asserts only one brief justification to its very different treatment of similarly situated veterans. It contends that, pursuant to 38 U.S.C. § 1154(a), it must consider the "places, types, and circumstances of the Veteran's service." A6. Section 3.304(f)(3)—which establishes the relaxed evidentiary standard for PTSD stemming from "fear of hostile military or terrorist activity"—"is justified where the circumstances of a Veteran's service are likely to have placed the Veteran in a stressful situation related to fear of hostile military or terrorist activity." A6-A7. But, according to the VA, "sexual assault is not indisputably associated with particular places, types, and circumstances of service." A7. This is not a logical contention.

To begin with, this argument fails in light of 38 C.F.R. § 3.304(f)(1), which permits a veteran's lay testimony alone to establish the existence of a claimed in-service stressor *regardless of the nature of the stressor* so long as the PTSD diagnosis occurred *during* the veteran's service. Section (f)(1) is triggered irrespective of the veteran's particular place, type, or circumstance of service. This provision defeats the VA's assertion that it has logically limited the relaxed evidentiary standard to particularly stressful environments; in fact, it has not done so. The VA's argument cannot, there-

fore, provide a logical basis for refusing to allow veterans who have suffered sexual assault to benefit from the relaxed evidentiary standard.

Setting aside the VA's own inconsistent regulations, the VA has not actually distinguished military sexual assault from the stressors for which it has accorded the "reduced evidentiary burden." A7. The VA asserts that the "reduced evidentiary burden" is appropriate when the nature of the veteran's service places him or her in a position that correlates to an elevated risk for suffering a stressor that could cause PTSD. *Id.* That is undoubtedly a powerful justification for the evidentiary standards contained within Sections 3.304(f)(2)-(4).

But the VA utterly fails to contrast the occurrence of combat related stressors with military sexual assault stressors. Because sexual assault in the military occurs with disturbing frequency, military service *also* correlates—particularly for women—with sexual assault. *See, e.g.,* Jenny K. Hyun et al., *Military Sexual Trauma*, 20 PTSD Research Quarterly (2009), <http://goo.gl/WbBWPf>. Senator Gillibrand, for example, recently explained:

There is zero doubt that sexual violence is occurring at an unacceptable rate within our military. Too often, our service men and women find themselves in the fight of their lives not in a theater of war, but in their own ranks, among their own brothers and sisters.

Sen. Kirsten E. Gillibrand, *The Relationships Between Military Sexual Assault, Post-Traumatic Stress Disorder and Suicide*, and on Department of Defense and Department of Veterans Affairs Medical Treatment and Management of Victims of Sexual Trauma, U.S. Senate, Subcommittee on Personnel, Committee on Armed Services, at 2 (Feb. 26, 2014), <http://goo.gl/UUryiq>.

Academic literature bears out this correlation:

The persistence of sexual violence within the US armed forces is a fact long recognized by military officials, policymakers, health care professionals, and the media. ***The risk of exposure to sexual violence within the military is high.*** The annual incidence of experiencing sexual assault is 3% among active duty women and 1% among active duty men. Sexual coercion (e.g., quid pro quo promises of job benefits or threats of job loss) and unwanted sexual attention (e.g., touching, fondling, or threatening attempts to initiate a sexual relationship) occur at an annual rate of 8% and 27%, respectively, among women and 1% and 5% among men. ***Research on deployment stress finds that such experiences constitute important duty-related hazards.***

Rachel Kimerling et al., *The Veterans Health Administration & Military Sexual Trauma*, 97 Am. J. Public Health 2160 (2007) (emphasis added), <http://goo.gl/cQDdC5>. This point cannot be over-emphasized: at present, a *duty related hazard* for our service members is sexual assault.

The VA has offered no evidence that the correlation between war-zone service and a combat stressor or a terrorist-fear stressor is any

stronger than that between military service and a sexual assault related stressor. Recall, roughly twenty percent of our female service members will experience a sexual assault related stressor. GAO Report at 1. The VA has no evidence or argument that the war-zone risk of suffering PTSD is higher.

At bottom, the VA has conferred appropriate, favorable evidentiary standards on our veterans who seek PTSD benefits stemming from combat activities, terrorist threats, and prisoner-of-war status. It extends this same reduced evidentiary burden to veterans who are diagnosed with PTSD during their service. The VA has not and cannot offer a logical basis for refusing to extend that same evidentiary standard to veterans whose PTSD stems from sexual assault.

B. Because most military sexual assaults are not reported, the VA's heightened evidentiary burden for PTSD caused by sexual assault is irrational.

The VA's regulation fails for a separate reason: the agency's decision does not evince a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quotations omitted). Where, as here, "the result reached is illogical on its own terms," the agency's decision is "arbitrary

and capricious.” *Am. Fed’n of Gov’t Emps. v. FLRA*, 470 F.3d 375, 380 (D.C. Cir. 2006) (quotations omitted).

The VA’s regulation does not account for a basic factual reality: PTSD claims stemming from sexual trauma are often *harder* to prove with third-party, objective evidence than similar claims arising from combat. Just last year, the Court noted “[t]he VA does not dispute that, in the great majority of cases, such incidents are not reported to military authorities, and therefore such records do not exist.” *AZ v. Shinseki*, 731 F.3d 1303, 1312 (Fed. Cir. 2013). Indeed, even in its response here, the “VA has acknowledged the sensitive nature of MST stressors and the reluctance on the part of Servicemembers to report such events during military service.” A4.

Due to its highly sensitive and personal nature—along with the social stigma attached to reporting sexual assault in the military—sexual assault in the military often goes unreported, unmentioned, and thus unidentified. GAO Report at 16. “[S]ervicemembers may fear the repercussions of reporting an experience that was, itself, traumatic,” particularly if “the perpetrator was a colleague or someone in a position of power.” *Id.* at 29.

Again, the DOD recognizes this drastic underreporting. DOD estimates that, in 2012, only one in ten victims in the military reported a sexual assault. DOD 2014 Report at 15. In 2014, DOD estimates that reporting has increased to one in four victims. *Id.* DOD contends that the importance of this increase in reporting—to approximately 25% of victims—“cannot be overstated” as it “signals not only growing trust of command and confidence in the response system, but serves as the gateway to provide more victims with support and to hold a greater number of offenders appropriately accountable.” *Id.* (emphasis omitted). But implicit in these numbers is the reality that the great majority of assaults still are *not* reported. Thousands of sexual assaults a year will continue to go unreported, without official record.

Because sexual assault victims often do not report their attacks to *anyone*, there is often no third party evidence of these assaults at all. The VA’s existing regulation, which permits a veteran to corroborate his or her claim by police reports and statements of family members or roommates (*see* 38 C.F.R. § 3.304(f)(5)), is meaningless for those thousands of veterans who did not report a sexual assault. And while the regulation permits a veteran to introduce a pregnancy test as evidence of a rape, it is preposterous to suppose that significant numbers of sexual assault victims are re-

taining pregnancy tests for use as evidence should PTSD result months or years later.

Even if third-party evidence exists in a case, the personal nature of both a PTSD diagnosis and the underlying sexual assault may discourage a veteran from applying for benefits if doing so requires supplying that evidence. If a veteran confided in a housemate, counselor, or clergy member regarding a sexual assault, the veteran may nonetheless not wish to obtain that testimony for use in a VA benefits proceeding. The veteran may, for example, be embarrassed to disclose the PTSD diagnosis to the third party, which would be the likely result of seeking testimony. By requiring third-party corroboration, the VA's existing rules undoubtedly encourage some veterans not to seek the benefits that they require.

Altogether, the factual circumstances are clear: the VA permits a veteran to corroborate the occurrence of a stressor in *some* circumstances where third-party evidence may be hard to come by—that is, stressors arising from combat, terrorist fears, and prisoner-of-war status. But the VA has ignored the overwhelming evidence that sexual assault is similar insofar as there is often no third-party corroborative evidence. The VA's assertion that it has offered a broad array of potential sources of third-party proof (A5) is thus no answer at all, for it wishes away the factual re-

ality that often *no* evidence will exist. The VA's failure to construct a rational policy in light of the factual circumstances demonstrates that the existing regulation is arbitrary and capricious.

C. The disparate gender effect of the VA policy underscores its irrationality.

Finally, the existing regulations create inappropriate gender disparities in the grant of VA benefits. Although both men and women suffer PTSD stemming from MST (GAO Report at 1 n.2), 66.1% of veterans who filed MST-related PTSD claims between 2008 and 2012 were women, whereas women account for only 4.6% of the non-MST-related PTSD claimants. ACLU Report at 4. The VA's stricter evidentiary burden for MST-related claims thereby has a disparate effect on female veterans.

These gender implications are a "relevant and significant aspect of a problem" that the agency has failed to consider, rendering its decision arbitrary and capricious. *Am. Farm Bureau Fed'n v. EPA*, 559 F.3d 512, 520 (D.C. Cir. 2009). The Court should subject agency determinations that have a discriminatory effect to close scrutiny under the APA. *Cf. Gutzwiller v. Fenik*, 860 F.2d 1317, 1329 (6th Cir. 1988) (decisions that are "made on the basis of an individual's sex" are generally "arbitrary and capricious"). Conforming the VA's treatment of veterans who suffer from PTSD caused by sexual assault to its treatment of veterans whose PTSD

was caused by combat related activities will eliminate these gender disparities.

CONCLUSION

The Court should hold the VA's existing regulation arbitrary and capricious and compel the VA to adopt petitioners' proposed rule.

Respectfully submitted,

/s/ Paul W. Hughes
Charles A. Rothfeld
Paul W. Hughes
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

Counsel for Amici Curiae

Dated: December 18, 2014

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel certifies that this brief:

(i) complies with the type-volume limitation of Rule 29(d) because it contains 4,065 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii); and

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger.

Respectfully submitted,

/s/ Paul W. Hughes

Paul W. Hughes
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

December 18, 2014

CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2014, I served the foregoing brief on all counsel of record via the Court's CM/ECF system.

Respectfully submitted,

/s/ Paul W. Hughes
Paul W. Hughes
MAYER BROWN LLP
1999 K Street, N.W.
Washington, D.C. 20006
(202) 263-3000

December 18, 2014