14-7115

IN THE

United States Court of Appeals

FOR THE FEDERAL CIRCUIT

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

Petitioners,

—v.—

SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR REVIEW OF ACTION BY THE SECRETARY OF VETERANS AFFAIRS PURSUANT TO 38 U.S.C. § 502

CORRECTED BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION, NATIONAL ALLIANCE TO END SEXUAL VIOLENCE, PROTECT OUR DEFENDERS, FUTURES WITHOUT VIOLENCE, AND NATIONAL CENTER ON DOMESTIC AND SEXUAL VIOLENCE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

SANDRA S. PARK
MICHAELA L. WALLIN
LENORA M. LAPIDUS
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, New York 10004
(212) 519-7871
spark@aclu.org

Counsel for Amici Curiae American Civil Liberties Union, National Alliance to End Sexual Violence, Protect Our Defenders, Futures Without Violence, and National Center on Domestic and Sexual Violence

January 7, 2015

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Service Women's Action Network, et al. v. Secretary of Veterans Affairs

No. 14-7115

CERTIFICATE OF INTEREST

Counsel for Amici Curiae, American Civil Liberties Union et al., certifies:

1. The full name of every party or amicus represented by me is:
American Civil Liberties Union, National Alliance to End Sexual Violence, Protect Our Defenders, Futures Without Violence, National Center on Domestic and Sexual Violence

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:
Not applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the amici curiae represented by me are:
None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:
None of the amici curiae appeared before the agency.
Before this court: Sandra S. Park, Lenora M. Lapidus, Michaela Wallin, American Civil Liberties Union Foundation

January 7, 2015
Date

/s/ *Sandra S. Park*
Signature of counsel
Sandra S. Park

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and Regulations

Other Authorities

STATEMENT OF INTEREST OF AMICI

The American Civil Liberties Union (ACLU) is a nationwide, nonprofit, nonpartisan organization with more than 500,000 members dedicated to the principles of liberty and equality embodied in the U.S. Constitution. The ACLU Women's Rights Project works to address civil liberties issues affecting women and girls, such as holding governments accountable for addressing gender-based violence and challenging discrimination faced by survivors, including veterans.

The National Alliance to End Sexual Violence (NAESV) is the voice in Washington for the 56 state and territorial sexual assault coalitions and 1300 local rape crisis centers working to end sexual violence and support survivors. NAESV is concerned about the impact of the VA's regulation on access to vital compensation for veteran sexual assault survivors.

Protect Our Defenders honors, supports, and gives voice to the brave women and men in uniform who have been sexually assaulted during service, and seeks to reform the military systems which consistently fail them. This failure often leaves survivors with little to no proof of a traumatizing assault and should not preclude them from receiving vital care and support they have earned through their service.

Futures Without Violence is a national nonprofit organization that has worked for over thirty years to prevent and end violence against women and children around the world. Futures Without Violence has a particular interest in

ensuring that survivors of military sexual trauma have access to benefits that provide critical services and support without facing discriminatory evidentiary burdens.

The National Center on Domestic and Sexual Violence provides customized training and consulting, influences policy and promotes collaboration with the goal of ending violence. NCDSV hears from many victims of military sexual assault who struggle to obtain VA benefits and fully endorses this effort to improve the process for considering PTSD disability claims.

Pursuant to Rule 29(a), *amici* inform the Court that all parties have consented to the filing of this brief. *Amici* also confirm, pursuant to Rule 29(c)(5), that (a) no counsel to any party authored this brief, in whole or in part; (b) no party or party's counsel contributed money intended to fund preparing or submitting the brief; and (c) no person other than amici and their counsel contributed money intended to fund preparing or submitting this brief.

STATEMENT OF CASE AND SUMMARY OF ARGUMENT

The Department of Veterans Affairs (VA) has long recognized its obligations to provide for the well-being of individuals who face devastating impairments as a result of military service, including those veterans who suffer from PTSD. Yet these benefits are not provided equally. Instead, VA's current regulations, in both their text and application, reflect discredited stereotypes about

sexual assault and impose a heightened and discriminatory burden on survivors of military sexual trauma (MST).

Rape, sexual assault, and sexual harassment are pervasive, enduring problems in the military. VA and the Department of Defense (DoD) have known for decades that sexual violence is prevalent and devastates the lives of servicemembers, veterans, their families, and the military community. One out of every five female veterans and one out of every 100 male veterans who seek healthcare from VA report experiences of MST. A309.[1] While women file only 5% of PTSD-related disability claims, female servicemembers disproportionately experience MST and make up 60-70% of MST-related PTSD disability claims. Nina Sayer et al., *A Qualitative Study of U.S. Veterans' Reasons for Seeking Department of Veterans Affairs Disability Benefits for Posttraumatic Stress Disorder*, 24 J. Traumatic Stress 699, 700 (2011); A176.

MST severely impacts veterans' lives. Survivors often demonstrate markedly poorer overall functioning and higher rates of psychiatric impairment. Maureen Murdoch et al., *Function and Psychiatric Symptoms Among Military Men and Women Exposed to Sexual Stressors*, 172 Military Med. 718, 718, 722-24 (2007). MST is more strongly correlated to PTSD than any other form of trauma, including combat experience. Deborah Yaeger et al., *DSM-IV Diagnosed*

[1] Cites to "A__" refer to the administrative record.

Posttraumatic Stress Disorder in Women Veterans with and Without Military Sexual Trauma, 21 J. Gen. Internal Med. S65, S67 (2006). Individuals suffering from PTSD can subsequently experience related physical health impairments and severe difficulties maintaining work, social, and family networks. Maureen Murdoch et al., *Gender Differences in Service Connection for PTSD*, 41 Med. Care 950, 957-58 (2003).

Recognizing the need to address the debilitating health conditions that result from military service, VA provides compensation to individuals with service-related disabilities. These benefits not only provide needed monetary support, but also can be instrumental to ensuring that veterans attain needed mental health services. *See* Inst. of Med. and Nat'l Research Council of the Nat'l Academies et al., *PTSD Compensation and Military Service* 179-80 (2007) (citing evidence that veterans with PTSD are significantly more likely to access mental-health services after disability benefits are awarded).

However, these benefits are not extended equally. Veterans who submit disability claims based on sexual violence face heightened barriers compared to veterans whose PTSD is based on another stressor. Under 38 C.F.R. § 3.304(f)(5), VA requires corroborating evidence of an incident of sexual violence, along with a medical professional's diagnosis of PTSD and assessment that the condition is connected to the incident. Section 3.304(f)(5) lists examples of corroborating

evidence, including service records, reports to a third party, or evidence of behavior changes. Yet, because MST survivors respond in different ways and often conceal assault due to threat of retaliation or the retraumatization that accompanies reporting, this evidence often does not exist or is difficult to detect.

Conversely, veterans who claim disability benefits based on PTSD related to other stressors may corroborate the existence of an in-service stressor through their own testimony, also known as lay testimony. Veterans who claim disability based on combat, PTSD diagnosis during service, prisoner of war status, or fear of hostile military action are not required to produce additional extrinsic evidence of a claimed stressor at a particular place and time, so long as their claims are consistent with the places, types, and circumstances of their service. 38 C.F.R. § 3.304(f) (2014). Until recently, veterans who claimed fear of hostile military activity faced a similar evidentiary burden to MST survivors. VA eliminated the requirement for corroboration of the stressor in 2010, because few veterans could prove the specific incident causing the fear of enemy activity through service records. A22.

Despite consensus that this change remedied a grave injustice, A304, VA has been unwilling to extend this standard to MST claims. To *amici*'s knowledge, there is no other federal regulation that requires more evidence from claimants for relief or benefits when their claims are based on sexual violence compared to other

grounds. Indeed, even when interpreting a statute that extended new housing protections specifically to victims of sexual violence, the Department of Housing and Urban Development (HUD) concluded that victims could establish eligibility solely based on self-certification of the violence they experienced. HUD Programs: Violence Against Women Act Conforming Amendments, 75 Fed. Reg. 66251, 66251-52 (Oct. 27, 2010).

Following extensive but unsuccessful informal advocacy, the Service Women's Action Network and Vietnam Veterans of America submitted a petition for rulemaking to VA, proposing a rule that would permit survivors' testimony to establish occurrence of the in-service stressor of MST, as long as "a psychiatrist or psychologist confirms that the claimed stressor is adequate to support a diagnosis of a mental health condition and that the veteran's symptoms are related to the claimed stressor, in the absence of clear and convincing evidence to the contrary. . . . " A342. VA denied the petition, and petitioners sought review.

Under the Administrative Procedures Act, this Court must "hold unlawful and set aside agency action" that it finds to be arbitrary, capricious, an abuse of discretion, or not in accordance with law. *See* 5 U.S.C. § 706(2) (West 2014); *see also Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1339 (Fed. Cir. 2003) (quoting 5 U.S.C. § 706(2)). To determine whether an agency's action was improper, the reviewing court must examine the explanation proffered

by the agency and assess whether it considered the relevant factors for the decision and made no clear error in judgment. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). Where the contested action is rulemaking, this Court investigates: "(1) whether the rulemaking record supports whatever factual conclusions underlie the rule; (2) whether the policy determinations behind the rule are rational; and (3) whether the agency has adequately explained the basis for its conclusion." *Mortg. Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1378 (Fed. Cir. 2000) (citations omitted). Finally, the court must consider whether an agency acted contrary to law and if so invalidate this action. *See, e.g.*, *FCC v. NextWave Pers. Commc'ns Inc.*, 537 U.S. 293, 300-04 (2003); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1346 (Fed. Cir. 2003).

VA supported its denial of the petition with conclusions that are fundamentally flawed. It argued that: VA regulations require corroboration of any service-related stressor that causes PTSD and do not impose an additional burden on MST claimants; the regulation's non-exhaustive list of corroborating evidence addresses difficulties MST survivors face in documenting cases; and prior misapplications of 3.304(f)(5) have been remedied. These assertions ignore how both the text of the rule and its application reflect discredited myths about sexual violence and impose a heightened, unpredictable, and discriminatory burden on

MST survivors. As such, VA's denial is not supported by the evidence in the record, fails to consider relevant factors, and results in unlawful sex discrimination.

ARGUMENT

I. ON ITS FACE, 3.304(F)(5) IMPOSES A HIGHER EVIDENTIARY STANDARD ON MST SURVIVORS THAT IS BASED ON DISCREDITED STEREOTYPES ABOUT SEXUAL VIOLENCE.

Historically, many laws and legal responses relating to sexual violence in the U.S. have been rooted in myths about rape. These myths are "attitudes and beliefs that are generally false but are widely and persistently held." Kimberley A. Lonsway & Louise F. Fitzgerald, *Rape Myths In Review*, 18 Psych. of Women Q. 133, 134 (1994). They reflect the legal subordination of women, which included governmental resistance to affording protection against crimes disproportionately committed against them and remedies to survivors. These myths undermine the victim's credibility, excuse the perpetrator's conduct, minimize the occurrence and seriousness of sexual violence, and absolve governments and other institutions from any obligation to respond. They preserve gender-based stereotypes about how sexual assault survivors should – and should not – behave.

The MST-PTSD regulation operates on and spreads several myths or stereotypes about sexual violence. 3.304(f)(5)'s requirement of additional evidence beyond a survivor's lay testimony reflects an overall skepticism of victims' claims and assumption of false reporting. Furthermore, the types of

evidence deemed as sufficient corroboration perpetuate myths that: 1) true victims of sexual assault will report the violence; 2) evidence of forcible violence usually exists; and 3) true victims demonstrate typical external behaviors. In other areas of American law and policy, these stereotypes have been rejected as factually inaccurate and manifestations of sex discrimination. Nevertheless, attainment of compensation under 3.304(f)(5) hinges on survivors' ability to submit forms of evidence that are often non-existent, thus contradicting VA's assertion that it places no additional burden on MST victims compared to other veterans.

A. In requiring corroborating evidence beyond the veteran's lay-testimony for MST claimants but not for other veterans, 3.304(f)(5) presumes untrustworthiness of sexual violence victims.

Section 3.304(f) sets a higher proof requirement for MST survivors than for other veterans disabled by PTSD. Veterans whose PTSD is based on combat or fear of enemy activity are not required to produce additional corroborating evidence of the specific occurrence of the claimed stressor at a particular place and time, so long as their claims regarding combat or hostile military activity are consistent with the circumstances of their service. *See, e.g.*, *Acevedo v. Shinseki*, 25 Vet. App. 286, 291 (2012). In contrast, veterans whose PTSD is based on MST must provide corroborating evidence of the sexual assault, whether through service records or other sources.

This corroboration requirement embodies a central rape myth that has been discredited in U.S. legal responses to sexual violence: the notion that victims frequently lie about sexual assault. With this myth at its core, 3.304(f)(5) places an additional, heavier evidentiary burden on MST survivors. First, the regulation requires corroboration of the claimed stressor beyond the veteran's lay testimony. Second, unlike combat or hostile military activity claims, 3.304(f)(5) will rarely be satisfied by evidence within the government's control, requiring survivors to produce independent evidence. Third, VA ignores that its reasons for relaxing the standard for hostile military activity claims – the high correlation between enemy activity and PTSD and the inability of veterans to produce corroborating evidence of this stressor – are equally present for MST claims.

Reliance in the Anglo-American legal system on the myth that victims routinely make false rape allegations can be traced back to 1680. Sir Matthew Hale, *Historia Placitorum Coronae: The History of the Pleas of the Crown* 634 (Robert H. Small ed., 1847) ("It is true rape is a most detestable crime . . . but it must be remembered, that it is an accusation easily to be made and hard to be proved. . . ."). This stereotype shaped how law and policy responded to sexual violence in the United States. It led many states to change their criminal laws to require corroboration of a sexual assault victim's testimony, even though common law did not so mandate. Michelle J. Anderson, *Diminishing the Legal Impact of*

Negative Social Attitudes Toward Acquaintance Rape Victims, 13 New Crim. L. Rev. 644, 647-50 (2010) [hereinafter Anderson, *Diminishing the Legal Impact*]; Note, *The Rape Corroboration Requirement: Repeal Not Reform*, 81 Yale L.J. 1365, 1366-68 (1972) [hereinafter Note, *Rape Corroboration*]. The law also developed cautionary instructions to jurors in criminal cases involving sexual assault, stating that the testimony of a rape complainant must be weighed with particular circumspection due to the risk of fabricated allegations. Anderson, *Diminishing the Legal Impact, supra*, at 649-50. Yet, research demonstrates that the rate of false allegations for sexual violence is not higher than for other crimes. Only a small percentage of sexual assault allegations are false – estimated at 2-8% by DoD and others. Def. Task Force on Sexual Assault in the Military Servs., *Report of the Defense Task Force on Sexual Assault in the Military Services* 6, 33 (2009); *see also* Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault,* 84 B.U. L. Rev. 945, 953, 984-85 (2004) [hereinafter Anderson, *Prompt Complaint*] (examining empirical date on the incidence of false rape reports to police); David Lisak, et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 Violence Against Women 1318, 1318 (2010) (estimating the false reporting rate at 2-10%, similar to other crimes). Because of the faulty premises underlying criminal laws' assumption of false

reporting, many states enacted explicit legislation providing that corroboration of a sexual offense complainant's testimony is not required and prohibiting cautionary instructions. Anderson, *Diminishing the Legal Impact*, *supra*, at 652; Anderson, *Prompt Complaint*, *supra*, at 970-72.

VA's requirement of corroborating evidence for MST thus does not reflect modern understandings of sexual violence. Most victims do not report the violence they experience, as acknowledged by DoD. Dep't of Defense, *Dep't of Defense Annual Report on Sexual Assault in the Military, Fiscal Year 2012, vol. I* 53 (2013) (estimating that from 2006 to 2012, fewer than 15% of sexual assaults that occur each year are reported to a DoD authority). VA has recognized since 1996 that the underreporting of in-service sexual assaults is a barrier for claimants. *YR v. West*, 11 Vet. App. 393, 398 (1998) (quoting VA Adjudication Procedure Manual M21-1 (Feb. 20, 1996)). As this Court noted, many victims fear the stigma associated with sexual assault reporting. *AZ v. Shinseki*, 731 F.3d 1303, 1313-14, 1320 (Fed. Cir. 2013). Fear of reprisal also accounts for the significant underreporting of MST, and survivors who do make reports overwhelmingly face retaliation. A326. The Associate Director for the VA Center for Women Veterans observed that more sexual attacks are perpetrated against lower ranking women, and are not punished as severely as attacks on women officers. Jennifer C. Schingle, *A Disparate Impact on Female Veterans: The Unintended Consequences of Veterans Affairs*

Regulations Governing the Burdens of Proof for Post Traumatic Stress Disorder Due to Combat and Military Sexual Trauma, 16 Wm. & Mary J. Women & L. 155, 170 (2009). DoD policy that, until 2014, required destruction of confidential reports of MST makes it even more unlikely that the military record of an MST survivor will document an assault. Pet'r's Br. 10.

Beyond the corroboration requirement set out in § 3.304(f)(5), the regulation places an additional evidentiary burden on MST victims because survivors usually must procure evidence from sources outside their service records or other government-maintained documents, unlike other veterans. For combat and hostile military activity cases, VA can examine claims based on service records and determine whether a veteran was stationed near combat or stressful situations related to enemy activity. This usually places no additional burden on the veteran besides providing lay testimony as to the specific stressor. For MST claims, VA could likewise assess whether lay testimony regarding the sexual assault is consistent with the circumstances of the veteran's service (e.g., whether how, where, and when the sexual assault occurred is consistent). Yet, relying on outdated assumptions about victims' credibility, VA refuses to offer MST victims the same accommodation.

Moreover, the justification that VA provides for distinguishing MST claims from hostile military activity claims is not supported by the evidence in the record.

VA chose to replace a corroboration requirement for hostile military activity claims with consideration of whether the places, types, and circumstances of the veteran's service are likely to have placed the veteran in a stressful situation resulting in fear of enemy activity. A22. VA stated that such consideration is insufficient for sexual assault claims because "sexual assault is not indisputably associated with particular places, types, and circumstances of service." A7. At the heart of VA's distinction is the false assumption that sexual violence occurs only rarely in the military. VA did not address evidence that MST is highly associated with military service and with PTSD, just as being present in a zone with enemy activity is. Close to one-third of female servicemembers will be victims of completed sexual assault during service, and that rate increases to 43% when attempted rape is included. A309. Such violence is more highly correlated with PTSD than any other form of trauma, including combat experience. Yaeger, *DSM-IV Diagnosed Posttraumatic Stress Disorder in Women Veterans with and Without Military Sexual Trauma*, *supra* at S67; Pet'r Br. 5. Given this background, an analogous standard for MST claims would evaluate whether a veteran's account of experiencing sexual violence is consistent with the circumstances of service.

B. The types of corroborating evidence listed in § 3.304(f)(5) are based on rape myths that establish additional, arbitrary hurdles to securing benefits.

While the 2002 amendment to § 3.304 expanded the evidence that could corroborate a veteran's MST claim to include non-service records and evidence of behavioral changes, the types of evidence listed in the section reinforce rape myths. VA's illustrative list of evidence wrongly assumes that: 1) victims will promptly report their assault to others; 2) assault often results in physical injury; and 3) victims' behavior predictably exhibits clear signs of trauma. The rule thereby directs adjudicators to look for evidence that often does not exist and to deny claims if they do not match arbitrary models of victim behavior. This contradicts VA's claim that the "variety of sources" admissible to corroborate MST addresses difficulties survivors face in obtaining corroborating evidence. A5.

The assumption that true victims will report sexual violence was long enshrined in rape law. English common law and early American law required a victim to promptly report a rape in order for the case to be prosecuted. The 1962 Model Penal Code was written to require that a victim report within three months of the sexual offense. Model Penal Code § 213.6(4). No other crime in the Model Penal Code requires a similar prompt complaint. Anderson, *Diminishing the Legal Impact*, *supra*, at 648.

Studies have since debunked this myth. Most rape victims do not report sexual violence, promptly or at all, due to the likelihood that they will be met with disbelief or blame. Patricia L. Fanflik, Nat'l Dist. Attorneys Ass'n, *Victim*

Responses to Sexual Assault: Counterintuitive or Simply Adaptive 7-10 (2007); Patricia Tjaden & Nancy Thoennes, U.S. Dep't of Justice, *Extent, Nature, and Consequences of Rape Victimization: Findings from the National Violence Against Women Survey* 35 (2006); Anderson, *Diminishing the Legal Impact*, *supra*, at 650; Note, *Rape Corroboration*, *supra*, at 1374-75. As this Court discussed, DoD has acknowledged that up to 85% of military sexual violence victims do not report. *AZ v. Shinseki*, 731 F.3d 1303, 1314 (Fed Cir. 2013). And given societal attitudes toward sexual violence, many victims will not tell even those closest to them. Indeed, mental health professionals recognize that, depending on the situation, informing survivors' family members or partners can interfere with recovery or itself be dangerous. Judith Herman, *Trauma and Recovery* 162 (1997).

Today, prompt complaint is no longer an element for the prosecution of sexual violence cases. Anderson, *Diminishing the Legal Impact, supra,* at 652. Yet, the primary means of corroboration provided in 3.304(f)(5) centers on reports to third parties such as law enforcement, rape crisis or mental health centers, physicians, family members, roommates, servicemembers or clergy.

3.304(f)(5) deploys another rape myth: that sexual violence will leave evidence of physical injuries. But physical injury from sexual assault is uncommon. Linda E. Ledray, U.S. Dep't of Justice, Office for Victims of Crime, *Sexual Assault Nurse Examiner (SANE) Development and Operation Guide* 69-70

(1999). A Department of Justice study found that 68% of those admitted to emergency rooms for rape suffered no nongenital physical injuries, 26% suffered mild nongenital physical injuries, 5% suffered moderate nongenital physical injuries, and only 0.02% suffered severe nongenital physical injuries. *Id.* Genital injuries are also rare, and many cannot be detected by hospital staff. *Id.* at 70-71. 3.304(f)(5)'s expectation that medical reports will corroborate sexual assault is thus unrealistic for most survivors, even those who seek treatment.

Finally, 3.304(f)(5) instructs adjudicators to look for corroboration in victims' behavior, expecting conformity to a false model of typical victimhood. Under 3.304(f)(5), behavioral markers include: "deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety." This ignores how individual differences determine the form that PTSD takes. Herman, *supra*, at 58. Psychologists observe that traumatized people, such as rape victims, often resume the outward forms of their previous lives, sometimes minimizing or suppressing trauma. Ann Burgess & Lynda Holmstrom, *Adaptive Strategies and Recovery from Rape*, 136 Am. J. Psychiatry 1278, 1280 (1979). Additionally, when "numbing or constrictive" symptoms characterize a patient's PTSD, they are often overlooked. Herman, *supra*, at 48-49.

VA's assertion that 3.304(f)(5) eliminates any additional burden imposed on survivors is not supported by the limited evidence it cites – its list of non-service

records. Instead, the inflection of rape myths throughout 3.304(f)(5)'s list of corroborating evidence leads adjudicators to demand evidence that often does not exist and deny claims that do not reflect a stereotypical notion of credible assault.

II. AS APPLIED, SECTION 3.304(F)(5) LEADS TO INCONSISTENT, BIASED, AND ARBITRARY ADJUDICATIONS OF BENEFITS CLAIMS MADE BY MST SURVIVORS.

3.304(f)(5) fails to overcome the barriers survivors face in documenting sexual trauma and in fact leads to persistent inconsistencies and bias in adjudications. While VA acknowledges that adjudicators have misapplied 3.304(f)(5) and overlooked evidence of MST, it claims it has remedied this problem through additional guidance and training, pointing to increases in approvals of MST-related PTSD as evidence of improvement. This explanation is based on limited, misleading evidence and ignores a factor absolutely relevant to the decision: that, as applied, claims are arbitrarily decided based on discredited myths about rape.

A. 3.304(f) authorizes extensive discretion in weighing evidence that has resulted in an unacceptable degree of arbitrariness in claims determinations.

While 3.304(f) lists a non-exhaustive set of markers that may support a claim, it provides limited direction to adjudicators on how to apply and weigh this evidence. The subjective nature of the assessment invites adjudicators to privilege certain types of evidence while rejecting others. The result is an inconsistent,

arbitrary distribution of benefits in which decisions cannot be disentangled from a given adjudicator's personal biases regarding sexual violence.

VA staff has struggled to apply a consistent interpretation of service connection for MST claims and have not reliably treated the same marker the same way. A235-36. This is true even following VA's most recent guidance and trainings. *See* A41-56. In its June 2014 review of disability claims related to MST, the U.S. Government Accountability Office (GAO) found that adjudicators in four of the five VA regional offices (VAROs) they spoke with "said that – even with better guidance and training – identifying markers remains a difficult task." A235. "The high degree of judgment required for identifying and weighing markers" leads to arbitrary variations in the evidence accepted in adjudications. A236. The subjective nature of assessments invites adjudicators to assess claims according to personal bias and stereotypes about assault. Schingle, *supra*, at 171 (stating that Associate Director for the VA Center for Women Veterans "indicated her belief that adjudicators look for obvious, blatant, and concrete evidence, rather than subtle, nuanced evidence that is more likely to be in the claims file"). Indeed, VA officials acknowledge that "adjudicators could come to opposite conclusions about whether a piece of evidence qualified as a marker, and both decisions might comply with the VA requirements." A236-37. This subjective standard carries through to medical examiners' assessments of whether MST occurred and creates

additional opportunities for bias. A237-38. Concerns of systemic bias are also supported by persistently lower grant rates for MST-related claims made by male veterans, A175-76, A246, whose evidence adjudicators may dismiss because it does not reflect a "typical" female victim response. [2]

Substantial variations in approval rates across VAROs reflect systemic arbitrariness in adjudications. Overall, VAROs' approvals of "MST-related claims varied from about 14 to 88 percent in fiscal year 2013" and half reported rates outside the average range. A234. GAO connected this disparity to inconsistent interpretations of evidence, asserting that, "veterans may have differing chances of getting positive opinions that [an] MST incident occurred, depending on a given examiner's approach." A238.

B. Evidence of inconsistent adjudications based on stereotypes about survivors undermines VA's claim that failures to consider acceptable evidence have been corrected.

Stark inconsistencies in benefits decisions at the individual adjudicator and VARO levels undercut VA's contention that it has remedied misapplications of 3.304(f)(5). VA asserts in its denial that it "is committed to . . . accurately

[2] Male survivors of MST may be even less likely to disclose in the face of extreme social stigma and alienation from support services that are designed for women. *Hearing Examining Sexual Assaults in the Military Before the U.S. Senate Armed Services Subcomm. on Personnel*, 113th Cong., (2013) (testimony of Brian K. Lewis, Former Petty Officer Third Class, U.S. Navy and Board Member, Protect Our Defenders).

adjudicating claims based on MST in a fair, consistent, and thoughtful manner," has developed guidance and trainings, and has directed VAROs to designate experienced adjudicators to assist in MST claims. A5. Yet, the broader picture of the rule's implementation, both over time and following recent reform efforts, reveals the evidence and reasoning on which VA bases its conclusion to be misleading and incomplete.

VA's conclusion that adjudications under 3.304(f)(5) have become more consistent and accurate, A5, is based on an incomplete, flawed representation of available data. VA states that, following training in 2011, approvals for MST-related PTSD claims increased from 38% to 49% in 2013, closer to the 55% rate for all PTSD-related claims. A6. However, Petitioners called on VA to amend 3.304(f)(5) according to the standard contained in 3.304(f)(3) and flagged the discrepancy in approvals between those specific bases of PTSD. VA's simplistic comparison of the grant rate for claims based on MST with overall approvals of all PTSD claims does not adequately respond to these concerns. As such, the only hard evidence that VA cites does not support its assertion.

VA's conclusion that it has addressed misapplications of the standard is also undermined by ample evidence, presented by both Petitioners and GAO, of systemic inconsistencies and biased applications of the standard. Courts have found agencies' decisions arbitrary and capricious where they entirely fail to

consider an important aspect of the problem in its analysis. Important factors may arise or be identified from public comments or criticisms. *See, e.g.*, *Penobscot Air Servs., Ltd. v. FAA*, 164 F.3d 713, 719 n.3 (1st Cir. 1999) (stating that an agency must respond to relevant and significant public comments); *Bedford Cnty. Mem'l Hosp. v. Health & Human Servs.*, 769 F.2d 1017, 1020-21 (4th Cir. 1985) (finding that public comments to a rulemaking action raised "a critical issue," such that it "was essential that the criticism be addressed").

VA ignores evidence that, despite the solicitude extended to veterans' disability claims, MST claimants face systemic bias and persistent hurdles to meeting the evidentiary threshold. 38 U.S.C. § 5107(b) (2013) ("When there is an approximate balance of positive and negative evidence . . . the Secretary shall give the benefit of the doubt to the claimant."); 38 U.S.C. §5103A(a)(1) (2013) ("The Secretary shall. . . assist a claimant in obtaining evidence"); *cf. Reedy v. Evanson*, 615 F.3d 197, 218 (3d Cir. 2010) (disapproving the imposition of value judgments about how victims ought to respond to sexual trauma). Since 1996, VA has recognized that "[v]eterans claiming service connection for disability due to in-service personal trauma face unique problems documenting their claims." *See Patton v. West*, 12 Vet. App. 272, 278 (1999). That same year VA updated its guidance to note that adjudicators may accept "alternative sources" of evidence beyond military records, listing the same sources that are now included in §

3.304(f)(5). A338. Despite this addition, adjudicators continued to ignore this evidence when adjudicating MST-based claims . *See, e.g.*, *Patton*, 12 Vet. App. at 282 (instructing that "the BVA cannot ignore provisions of the Manual M21-1 [regarding secondary evidence] relating to PTSD that are favorable to a veteran when adjudicating that veteran's claim"). VA responded by codifying this guidance in 2002, the last time this rule was amended. A8-10. While VA's denial of rulemaking discusses this change as having eased barriers to MST-related disability eligibility, A4-5, the guidance it codified was already legally recognized as "the equivalent of [VA] [r]egulations." *Patton*, 12 Vet. App. at 277 (alteration in original) (citations omitted).

Unsurprisingly, problems with adjudicators giving appropriate weight to secondary evidence continued under the formal rule in much the same way as they had before. In response, VA issued a series of supplementary guidance memos and trainings in 2005, 2011, and 2013. Each directive instructs adjudicators to consider and seek out secondary evidence in MST claims. But they overwhelmingly fail to address the way in adjudicators' extensive discretion, coupled with the rape myths embedded in 3.304(f)(5), encourage adjudicators to deny claims that do not reflect their personal conceptions of credible assault. This is clear from adjudicators' repeated, consistent dismissal of corroborating evidence that does not reflect rape myths:

- In 2005, 2006 and 2011, a claim was independently denied by two VAROs despite records showing a) a decline in performance following the alleged rape; b) birth of a child nine months after; c) treatment for numerous STDs around the time of alleged assault; d) subsequent abuse of drugs and financial trouble. Systemic VA failure to identify markers suggests skepticism of the claim because there was no prompt report. Bd. Vet. App. 1218474, No. 07-19 622, 2012 WL 2882909 (May 24, 2012).
- In 2009, a VARO denied a disability claim despite non-service medical records of infection, pregnancy, and miscarriage, citing lack of any specific mention of MST or "psychiatric treatment" in the records and absence of any formal report regarding sexual trauma. Bd. Vet. App. 1221324, No. 10-04 780, 2012 WL 3269936, at *2 (June 19, 2012). Even after 2005 guidance stated that corroborating evidence is accepted because veterans often will not report assault, adjudicators informally required such reports.
- In 2006 and 2011, a veteran's claim was denied in the face of military medical records documenting receipt of treatment four days after the rape, consistent reporting of the rape to VA medical facilities, and a PTSD diagnosis based on sexual assault. Bd. Vet. App. 1216676, No. 11-11 873A, 2012 WL 2880197 (May 9, 2012). Despite this evidence, the VARO appears to have assumed a false report. On appeal, the BVA reversed,

stating that "[n]o competent medical professional has found that the Veteran's subjective history was unreliable." *Id.* at *4.

- This Court held in *AZ v. Shinseki* that VAROs, the BVA, and the CAVC all improperly rejected two MST survivors' claims, interpreting lack of service records or formal reports as evidence against the claims. 731 F.3d 1303, 1318 (Fed. Cir. 2013). While the claims were initially made in 2004, VA defended these interpretations through 2012, even following what VA describes as its "aggressive nationwide training initiative" in 2011. A209. In both cases, corroborating evidence was dismissed due to skepticism of credibility of victims' testimony, even when reported by others:
    - Veteran AZ became pregnant from a sexual assault and disclosed assaults to family members. The BVA rejected medical records of the veteran's pregnancy as not corroborative because they did not note that she sought treatment for assault. It also dismissed her family's statements because no one claimed to have witnessed the assault, making their statements "'not as probative as. . . records that do not reflect that the Veteran was assaulted while on active duty.'" *AZ*, 731 F.3d at 1307 (citation omitted). The CAVC affirmed, concluding this biased weighting of evidence was within adjudicators' discretion. *AZ v. Shinseki*, No. 10-2393, 2011 WL 5970973, at *1, *3-4 (Vet. App.

Nov. 28, 2011), *vacated and remanded*, 731 F.3d 1303 (Fed. Cir. 2013).

- Veteran AY provided statements from four people to whom she had disclosed the assault during service, two of whom described AY's consideration of suicide and subsequent suicide attempt. The BVA rejected this evidence, finding that lack of a formal report or record of psychiatric treatment contradicted the lay statements. The BVA concluded that the statements were not credible because they were not eyewitness accounts and they contradicted records commending AY's service and cheerful demeanor. *AY v. Shinseki*, No. 10-2390, 2014 WL 496858, at *2-4 (Vet. App. Feb. 4, 2014).

- In 2012, a veteran's claim was denied based on factors perceived as conflicting with typical victim behavior, including failure to report sexual assault for several years, strong performance reviews, and the veteran's desire to stay in the military. Bd. Vet. App. 1214746, No. 09-34 322, 2012 WL 2316006 (Apr. 24, 2012).
- In 2014, GAO documented numerous examples of adjudicators imposing personal conceptions of credible evidence. A232; A235-36. One adjudicator established an unauthorized prompt reporting requirement, stating that she only approves a marker "if it occurred within 2 months of the

> stated MST incident" despite VA having set no "specific time frame for markers." A236.

Adjudicators' consistent reliance on stereotypes in their assessments, and VA's defense of many of these stereotypes until reversed by this Court, show that mere directives to give more weight to specific types of corroboration cannot effectively subvert the rape myths embedded in 3.304(f)(5).

Nevertheless, VA's most recent memo in 2013 holds fast to this same decision-making model. While it again instructs officers to examine secondary evidence, VA grants explicit discretion to privilege evidence as they see fit: "there is no bright line test," but "[t]he totality of the evidence as it relates to the Veteran's credibility must be considered and weighted by the rater." A50-51. Although one tool in VA's record emphasized that adjudicators must "recognize [their] attitude towards personal assault" so as to "avoid any preconceptions about veterans and decide the case objectively," it does not address how these views affect identification or weighting of markers; the only examples of implicit bias refer to negative inferences about sexual history or dismissals of reports of assaults that do not appear "serious or threatening" to the adjudicator. A283.

Thus, VA's denial of the petition was based only on a conclusory assertion of improvement in decision-making. It did not address the bias and stereotyping

that has resulted in the arbitrary and discriminatory process experienced by many veterans and thereby cannot be upheld as a reasonable weighing of relevant factors.

III. THE VA'S DENIAL OF THE PETITION AND CONTINUED ENFORCEMENT OF § 3.304(F) VIOLATES THE EQUAL PROTECTION GUARANTEE OF THE U.S. CONSTITUTION.

Section 3.304(f) violates the equal protection guarantee. In addition to the equal protection arguments made by Petitioners, Pet'r Br. 37, courts have recognized that governmental policies and practices relating to victims of gender-based violence can constitute unconstitutional sex discrimination when: 1) there is a policy that treats victims differently from others who are similarly situated; 2) discrimination against women is a motivating factor; and 3) the victims were injured by the policy. *See, e.g.*, *Balistreri v. Pacifica Police Dep't,* 901 F.2d 696, 701-02 (9th Cir. 1988*)*; *Hynson v. City of Chester Legal Dep't*, 864 F.2d 1026, 1029-31 (3d Cir. 1988); *Watson v. City of Kansas City, Kan.*, 857 F.2d 690, 696-97 (10th Cir. 1988); *Smith v. City of Elyria*, 857 F. Supp. 1203, 1211-12 (N.D. Ohio 1994); *Thurman v. City of Torrington*, 595 F. Supp. 1521, 1526-29 (D. Conn. 1984); *see also* Julie Goldscheid, *Rethinking Civil Rights and Gender Violence*, 14 Geo. J. Gender & L. 43 (2013). When these elements are met, the government must show that the policy survives heightened scrutiny – i.e., that there is an "exceedingly persuasive justification," and that the policy serves "important governmental objectives and that the discriminatory means employed are

substantially related to the achievement of those objectives." *United States v. Virginia*, 518 U.S. 515, 524 (1996) (citations omitted); *see also Navarro v. Block,* 72 F.3d 712, 715-16 (9th Cir. 1995)*, as amended on denial of reh'g* (9th Cir. Jan. 12, 1996).

Discriminatory intent against women can be established through evidence of gender stereotyping and disproportionate impact of the policy on women. Courts have routinely concluded that governmental actions based on stereotypes about victims are evidence of discriminatory intent. *See, e.g.*, *Balistreri*, 901 F.2d at 701; *Watson*, 857 F.2d at 696; *Smith*, 857 F. Supp. at 1212. Similarly, the Department of Justice has found equal protection violations when police officers investigated sexual violence complaints according to stereotypes about sexual violence, including making statements that assumed complainants were lying and discrediting complaints when there was little physical evidence, a prompt complaint was not filed, alcohol was consumed, or victims could not remember all the details of the incident. U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Missoula Police Department Findings Letter* (2013); U.S. Dep't of Justice, Civil Rights Div., *Investigation of the New Orleans Police Department* 32-33, 43-51(2011); U.S. Dep't of Justice, Civil Rights Div., *Investigation of the Puerto Rico Police Department* 54, 57-58 (2011). Courts also look to discriminatory impact of a policy as further support of a finding of discriminatory intent. *United States v.*

Armstrong, 517 U.S. 456, 467 (1996); *Watson*, 857 F.2d at 696-97; *Smith*, 857 F. Supp. at 1212.

Section 3.304(f)(5) violates the right to equal protection. It places a greater burden on MST claimants and injures them because of the resulting lower grant rate. As discussed *supra*, it adopts rape myths and gender stereotypes about sexual violence victims that support a finding of intentional discrimination against women. The heavier evidentiary burden set out in the MST-PTSD regulation also disproportionately impacts women. Although women account for only about 5% of PTSD-based disability claims, Sayer, *supra*, at 700, and filed about 5% of claims for PTSD related to causes other than MST, A172, women are disproportionately affected when it comes to MST. They filed approximately 66% of all MST-related PTSD claims from fiscal years 2008 to 2012, *id.*, and thus faced the consistently higher denial rates for PTSD disability claims based on MST. A116 (stating that the grant rate for MST-PTSD claims was 38%, and after training initiatives, stood at 52% in February 2013, compared to 59% grant rate for all PTSD claims); *see also* A173 (showing that between fiscal years 2008 and 2012, grant rates for non-MST-related PTSD claims were between 16-29% higher than for MST-PTSD claims). And because nearly all disability claims filed in relation to MST are based on PTSD, A225 (showing that 93.5% of MST disability claims are based on PTSD, 6.5% on other mental health disabilities), the regulation

disproportionately impacts women veterans' claims and thus discriminates based on sex. *See, e.g.*, Dep't of Veterans Affairs Office of Inspector Gen., *Review of Combat Stress in Women Veterans Receiving VA Health Care and Disability Benefits* 65 (2010) (finding that VA denied 49.8% of women's claims for service-connected disability compensation, compared to 37.7% of men's claims).

VA has not offered any exceedingly persuasive justification compelling corroboration. *Amici* are not aware of another federal regulation that demands corroboration of sexual assault survivors, but not others, when extending benefits. Indeed, HUD interpreted the Violence Against Women Act to give access to important housing protections and federally-subsidized housing, such as public housing and Section 8 housing, based on self-certification alone. 24 C.F.R. § 5.2007(b)(1) (2014). While the statute lists forms of third party verification that could prove the occurrence of sexual violence, 42 U.S.C. § 14043e-11(c)(3), HUD concluded that "an individual requesting protection cannot be required to provide third-party documentation." HUD Programs: Violence Against Women Act Conforming Amendments, 75 Fed. Reg. 66251, 66251 (Oct. 27, 2010). VA should likewise accept a veteran's lay testimony rather than continue to discriminate against MST survivors.

CONCLUSION

For the reasons stated above and by Petitioners, the VA should initiate new rule-making.

Respectfully submitted,

Dated: January 7, 2015

/s/ *Sandra S. Park*
Sandra S. Park
Michaela L. Wallin
Lenora M. Lapidus
American Civil Liberties Union Foundation
125 Broad Street – 18th Floor
New York, NY 10004
(212) 519-7871
spark@aclu.org

Counsel for Amici Curiae
American Civil Liberties Union Foundation, National Alliance to End Sexual Violence, Protect Our Defenders, Futures Without Violence, and National Center on Domestic and Sexual Violence

No. 14-7115

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

SERVICE WOMEN'S ACTION NETWORK, et al.

v.

SECRETARY OF VETERANS AFFAIRS

Certificate of Compliance with Type-Volume Limitation, Typeface Requirements and Type Style Requirements

1. This corrected brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

This brief contains 6,998 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(A)(7)(B)(iii).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because:

This brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14 point Times New Roman.

Dated: January 7, 2015

/s/ *Sandra S. Park*
Sandra S. Park
American Civil Liberties Union Foundation
125 Broad St. 18th Floor
New York, NY 10004
(212) 519-7871
spark@aclu.org

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the corrected brief of the American Civil Liberties Union et al. as Amici Curiae In Support of Petitioners with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit using the appellate CM/ECF system on January 7, 2015.

Dated: January 7, 2015

/s/ *Sandra S. Park*
Sandra S. Park
American Civil Liberties Union Foundation
125 Broad St. 18th Fl.
New York, NY 10004
(212) 519-7871
spark@aclu.org