No. 14-7115

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 Pursuant to 38 U.S.C. § 502 and Fed. Cir. R. 47.12 of the Department of Veterans Affairs' Denial of Petition for Rulemaking to Promulgate Regulations Governing Service Connection for Mental Health Disabilities Resulting from Military Sexual Assault

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CORRECTED BRIEF OF AMICUS CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM SUPPORTING PETITIONERS AND GRANTING OF PETITION FOR RULEMAKING TO DEPARTMENT OF VETERANS AFFAIRS

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

SERVICE WOMEN'S ACTION NETWORK ET AL. V. MCDONALD

No. 14-7115

CERTIFICATE OF INTEREST

Counsel for amicus curiae National Veterans Legal Services Program certifies the following:

1. The full name of every party or amicus represented by me is:

National Veterans Legal Services Program

2. The full 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 party or amicus 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:

Morgan, Lewis & Bockius LLP: Marianne Hogan

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DATE: December 11, 2014

/s/ Marianne Hogan
Marianne Hogan

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS CURIAE

National Veterans Legal Services Program (NVLSP) is an independent nonprofit organization that has worked since 1980 to ensure that the United States Government provides our nation's twenty-five million veterans and active duty personnel with the federal benefits they have earned through their service to the country. NVLSP has been instructional in the passage of landmark veterans' rights legislation, and it has successfully challenged unfair practices by the Department of Veterans Affairs (VA) that deprived veterans and their families of hundreds of millions of dollars in benefits. NVLSP also serves as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. NVLSP–produced publications provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled under the law. For the last fifteen years, NVLSP has published an annual edition of the 2100-page *Veterans Benefits Manual*, which has become the leading guide for advocates and attorneys who help veterans and their families obtain benefits from VA.

NVLSP is a veterans' service organization recognized by the Secretary of Defense under 38 U.S.C. § 5902 to assist veterans in the preparation, presentation, and prosecution of VA benefit claims. In this capacity, NVLSP has represented

thousands of veterans in proceedings before VA, the Board of Veterans' Appeals (BVA), and the Court of Appeals for Veterans Claims (CAVC).

Many of the veterans NVLSP has represented before VA, BVA, and CAVC are survivors of rape, sexual assault, and sexual harassment (collectively, military sexual trauma or MST). NVLSP has seen firsthand the unique and substantial obstacles these veterans face in obtaining VA benefits for disabilities related to MST. In response to the often insurmountable barriers MST survivors face in the VA claims process, NVLSP recently started a program specifically focused on the thousands of veterans who are MST survivors and their need for legal assistance in obtaining VA disability benefits.

NVLSP has a strong interest in the outcome of this appeal. For years, NVLSP has fought against VA's disparate treatment of MST survivors. The Petition for Rulemaking to Promulgate Regulations Governing Service-Connection for Mental Health Disabilities Resulting from Military Sexual Assault (the Petition) proposed a rule that would help remove some of the obstacles MST survivors face when pursuing VA benefits and would directly benefit the veterans NVLSP represents.

In accordance with Federal Rule of Appellate Procedure 29(a), NVLSP has obtained the consent of all parties to file this amicus brief.

SUMMARY OF ARGUMENT

VA has acknowledged the prevalence—and life-altering and destructive effects—of military sexual trauma. VA has also acknowledged that one in four women and one in 100 men serving in the United States Armed Forces has reported experiencing MST; these numbers reflect only veterans who sought VA benefits *and* actually reported MST to VA.[1] Post-traumatic stress disorder (PTSD) is the most commonly diagnosed mental disorder among veterans who have experienced a rape or other sexual assault, or repeated threatening sexual harassment, while in the military.[2] Because many survivors are fearful of reporting MST while in the military, a fact VA also acknowledges, these survivors face a high hurdle when trying to obtain disability compensation from VA for PTSD that resulted from MST.[3]

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[1] Dep't of Veterans Affairs, *Military Sexual Trauma* (Oct. 2014) (hereinafter, *VA MST Fact Sheet*), *available at* http://www.mentalhealth.va.gov/docs/mst_general_factsheet.pdf.

[2] *See* Nat'l Ctr. for PTSD, Dep't of Veterans Affairs, *Military Sexual Trauma* (Spring 2009) (hereinafter, *VA MST Study*), *available at* http://www.ptsd.va.gov/professional/newsletters/research-quarterly/v20n2.pdf.

[3] *See VA MST Fact Sheet* at 3 (acknowledging MST survivors' reluctance to disclosure trauma unless asked directly); *see also Battle for Benefits: VA Discrimination Against Survivors of Military Sexual Trauma* (ACLU & SWAN: 2013) (hereinafter *Battle for Benefits*) at 3 (explaining how systemic under-reporting of MST often limits available documentation to corroborate trauma and often makes MST claims difficult), *available at* https://www.aclu.org/sites/default/files/assets/lib13-mst-report-11062013.pdf.

Despite recognizing the high prevalence of MST, the established link between MST and PTSD, and the documentary challenges MST survivors face, VA rejected outright the rule proposed in the Petition—a rule largely patterned on VA's own prior rulemaking. VA departed from its past practice of relaxing evidentiary standards and stopped short of adopting any amendment to its existing rule for MST, the stressor most highly correlated with women. In conflict with its own treatment of veterans with other service-related injuries, VA has regrettably reinforced the well-documented barriers MST survivors face in the VA claims process.

VA's complete rejection of an evidentiary accommodation for MST-related PTSD is an unjustifiable departure from VA's past practice for almost a dozen other kinds of disability claims. In choosing to treat MST survivors differently, VA has ignored the justifications for its prior rulemaking efforts—justifications that apply equally in MST cases. In the past, VA has adopted rules (1) to address the lack of available evidence, (2) in recognition of the proven correlation between a stressor and a medical condition, (3) to relieve administrative burdens on VA and speed up claim processing times, and (4) to promote equity and fairness in the VA claims process. Rulemaking on the evidentiary standards applicable to MST would advance each of these goals, a fact which VA disregards. As a result, and for the

other reasons described in Petitioners' Opening Brief, VA's denial of the Petition is arbitrary, capricious, and discriminatory—and therefore unlawful.

To be consistent with its prior rulemakings, VA should have (1) proposed rules that relax the evidentiary standards for entitlement to service-connected disability benefits based on MST and (2) invited public comment. An opportunity for public comment is particularly important because it would allow all the stakeholders to express their views on whether the evidentiary standards should be relaxed exactly as Petitioners proposed or in some other formulation. Granting the relief petitioners sought with the Secretary and now seek in this Court would not bind VA to adopt as a final rule the exact rule Petitioners proposed. Instead, it would set VA on a course to relax the existing evidentiary standards after considering the views of the stakeholders and other members of the public.

RELEVANT BACKGROUND

A military veteran with service-related disabilities may qualify for VA disability compensation, a monthly tax-free payment the amount of which depends on the severity of the veteran's disabilities. Before VA will evaluate and rate the severity of a veteran's disabilities, the veteran generally must prove that his or her disabilities are service connected. *See* 38 C.F.R. §§ 3.303 & 3.304(f). Service connection requires a veteran to provide evidence of (1) a current disability, (2) the occurrence of an in-service event—a stressor, and (3) a nexus between the in-

service stressor and present disability. *Id.*; *see also Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004).

VA has long been aware of the pervasiveness of rape, sexual assault, and sexual harassment in the military and the debilitating, often permanent, effects of MST. *See, e.g.*, *VA MST Fact Sheet* at 2; *VA MST Study* at 2. VA has also acknowledged the difficulties associated with documenting MST, where many survivors are reluctant to report the trauma they have endured. *See VA MST Fact Sheet* at 3 (recognizing that many MST survivors do not disclose their experiences unless asked directly). Still VA prohibits veterans with PTSD linked to MST from relying on their own testimony to establish the occurrence of the claimed stressor. *See* 38 C.F.R. § 3.304(f)(5) (requiring personal assault survivors, including MST survivors, to present corroborating evidence of sexual trauma in order to show service connection). These veterans, who are disproportionately women, must present corroborating evidence of sexual trauma. *See id.*

In contrast, VA has *removed* similar obstacles faced by other veterans whose in-service injuries are difficult to verify. For example, veterans with PTSD linked to combat or other sources of trauma, and veterans with other conditions linked to their service—all conditions that are more prevalent in men—bear a lower burden of proof than MST survivors. For these veterans, their own testimony is sufficient to prove that their trauma is connected to their military service. *See, e.g.*, *id.* §

3.304(f)(1) (eliminating need for corroborating evidence where PTSD is diagnosed during service); *id*. § 3.304(f)(2) (permitting veteran suffering from combat-related PTSD to establish occurrence of in-service stressor based on his or her testimony alone); *id*. § 3.304(f)(3) (relaxing evidentiary rules applicable to PTSD claims related to veteran's fear of hostile military or terrorist activity where VA psychiatrist or psychologist confirms claimed stressor is adequate to support PTSD diagnosis); *id*. § 3.304(f)(4) (permitting veteran suffering from PTSD related to prisoner-of-war (POW) experience to establish occurrence of in-service stressor based on his or her testimony alone).

Not surprisingly, given the higher burden placed on MST survivors with PTSD, VA denies MST survivors' claims at much higher rates than other PTSD claims. And these denials fall disproportionately on women. *See Battle for Benefits* at 4.

The Petition sought, through a specific proposed rule, to correct the injustice in the way VA treats MST survivors. The Petition asked VA to follow VA's own lead—to permit an MST survivor to rely on his or her own testimony to prove the trauma occurred, as other PTSD sufferers may do. VA's unjustified outright rejection of any rule that would relax the evidentiary standards applicable to MST cases was arbitrary, capricious, and discriminatory and should be reversed.

ARGUMENT

I. VA HAS A LONG HISTORY OF ADOPTING EVIDENTIARY RULES TO ASSIST CLASSES OF VETERANS WITH THE DIFFICULTIES THEY FACE IN PROVING SERVICE CONNECTION.

VA's historic practice of easing evidentiary burdens to assist veterans and the reasons behind that practice are well documented in VA's prior rulemaking efforts. For nearly a century, VA has worked to alleviate the evidentiary standards for many kinds of disabilities. Since 1921, both VA and Congress have implemented dozens of evidentiary accommodations to minimize the time, effort, and evidentiary burden both the government and the veteran must bear to assess and prove service connection. *See* Veterans' Bureau, Pub. L. No. 67-47, 42 Stat. 147 (Aug. 9, 1921) (currently codified as amended at 38 U.S.C. §§ 1101 & 1112) (creating statutory presumption of service connection for active pulmonary tuberculosis and neuropsychiatric disease (later known as psychoses) manifesting to degree of disability of ten percent or more within two years after separation); *see also, e.g.*, 38 C.F.R. § 3.304(f)(3) (fear-related PTSD) (originally promulgated in 75 Fed. Reg. 39,843 (July 13, 2010)); *id.* § 3.304(f)(1) (PTSD diagnosed in service) (originally promulgated in 74 Fed. Reg. 14,491 (Mar. 31, 2009)); *id.* § 3.304(f)(2) (PTSD related to combat) (originally promulgated in 58 Fed. Reg. 29,109 (May 19, 1993) and amended in 64 Fed. Reg. 32,807 (June 18, 1999)); *id.* § 3.304(f)(4) (PTSD related to POW experience) (originally promulgated in

64 Fed. Reg. 32,807 (June 18, 1999)); *id*. § 3.316 (mustard gas exposure) (originally promulgated in 57 Fed. Reg. 33,875 (July 31, 1992) and extended in 59 Fed. Reg. 42,497 (Aug. 18, 1994)); *id*. § 3.310(b) (amputation and cardiovascular disease) (originally promulgated in 44 Fed. Reg. 50,339 (Aug. 22, 1979)). Today, VA presumes service connection for more than 150 health outcomes, including PTSD diagnosed during service, and PTSD related to combat, fear, or experience as a POW. VA adopted many of these presumptions with no statutory obligation to do so. Rather, VA adopted many injury-specific accommodations pursuant to its general rulemaking authority. *See* 38 U.S.C. § 501(a) (establishing Secretary of Veterans Affairs' authority to prescribe all rules and regulations necessary to carry out laws administered by VA).

VA's regulatory presumptions, including those discussed below, demonstrate VA's past practice of adopting regulations to assist VA in processing claims equitably, predictably, and efficiently. These regulatory presumptions also help veterans overcome acknowledged evidentiary obstacles and ensure that disabled veterans receive the benefits they have earned.

A. PTSD Related to Fear of Hostile or Terrorist Activity.

Most recently, VA adopted an evidentiary presumption for fear-related PTSD claims after finding that veterans from the Iraq and Afghanistan wars were returning home with higher rates of PTSD. *See* 38 C.F.R. § 3.304(f)(4)

(hereinafter, the fear-related PTSD rule). This most recent liberalizing rule—also the most relevant to the Petition—was implemented in July 2010. The rule eliminates a veteran's burden to produce corroborating evidence that an in-service stressor occurred if the veteran seeks benefits for PTSD related to fear of hostile military or terrorist activity. *See Stressor Determinations for Posttraumatic Stress Disorder, Final Rule*, 75 Fed. Reg. 39,843, 39,843 (July 13, 2010). The veteran's lay testimony alone is sufficient to establish the claimed in-service stressor. *Id*. The MST rule proposed in the Petition is based primarily on this regulation.

In its notice of proposed rulemaking, VA stated that "[i]improved timeliness, consistent decision-making, and equitable resolution of PTSD claims" were the intended results of the regulation. *Stressor Determinations for Posttraumatic Stress Disorder*, 74 Fed. Reg. 42,617, 42,618 (Aug. 24, 2009). To justify the regulation, VA relied heavily on the strong correlation between exposure to hostile military and terrorist actions and PTSD, citing specific scientific reports linking PTSD and such exposure. *See* 75 Fed. Reg. at 39,843. VA also repeatedly noted that the amendment would improve claim-processing times. Specifically, VA stated that "the amendment will facilitate the timely processing of PTSD claims by simplifying the development and research procedures that apply to these claims" and "will improve the timeliness of the adjudication of claims of all veterans by eliminating the need to search for corroborating evidence." *Id*. at 39,843, 39,845.

On July 12, 2010, the effective date of the final PTSD rule, VA's Office of Public Affairs released a fact sheet explaining the new rule. *See* Office of Public Affairs, Media Relations, Dep't of Veterans Affairs, *Fact Sheet – New Regulations on PTSD Claims* (July 12, 2010) (hereinafter, *PTSD Fact Sheet*), *available at* https://www.co.sherburne.mn.us/veterans/documents/PTSD_QA.pdf. The *PTSD Fact Sheet* reinforces that the fear-related PTSD rule is meant to "simplify," "streamline," and "improve" the PTSD claims process by eliminating the "time-consuming" corroboration requirement—a requirement that is often "very involved and protracted." *Id*. at 1-2. The *PTSD Fact Sheet* also reiterates that the rule is "necessary to make VA's adjudication of PTSD claims both more timely and consistent with current medical science." *Id*. at 2. Addressing the lack of available corroborating records, VA stated that the new regulation would provide "fair evaluation" for veterans whose military records had been "damaged or destroyed." *Id*. The fact sheet touts that "more veterans will become eligible for VA care" and thus be able to receive treatment for mental illness related to their military service. *Id*. at 4.

B. PTSD Diagnosed in Service.

In 2009, VA eliminated the corroborating evidence requirement where a veteran's PTSD is diagnosed in service and the claimed stressor is related to service. *See* 38 C.F.R. § 3.304(f)(1). VA's 2009 rule amended Section 3.304(f) by

adding a paragraph to address the situation where PTSD is actually diagnosed during active service. The amendment provides that if evidence establishes a diagnosis of PTSD during service and "the claimed stressor is related to that service, . . . [then] the veteran's lay testimony alone may establish the occurrence of the claimed in-service stressor." *Id*. This new paragraph was expressly intended to "relax" the requirements for establishing PTSD diagnosed in service by eliminating the stressor corroboration requirement. *Posttraumatic Stress Disorder, Final Rule*, 74 Fed. Reg. 14,491, 14,492 (Mar. 31, 2009). By adopting this amendment, VA "intend[ed] to more quickly adjudicate claims for service connection for PTSD." *Id*. at 14,491.

C. PTSD Related to Combat.

Based on the same considerations behind the fear-related PTSD rule, *see supra* Section I.A, VA has adopted presumptions for combat veterans with PTSD. *See* 38 C.F.R. § 3.304(f)(2). In 1993, VA established a rule making service department records indicating that a veteran engaged in combat sufficient to show that a claimed stressor that occurred during combat service is related to the combat experience; VA eliminated the need for the veteran to develop additional evidence of the specific, claimed stressor. *Direct Service Connection (Post-traumatic Stress Disorder), Final Rule*, 58 Fed. Reg. 29,109, 29,110 (May 19, 1993). VA adopted the rule in recognition that many combat-related experiences "can never be

documented" and that combat exposure indisputably could lead to PTSD. *Direct Service Connection (Post-traumatic Stress Disorder), Proposed Rule*, 57 Fed. Reg. 34,536, 34,536 (Aug. 5, 1992). Even under the new rule, however, VA still required a veteran to produce service records to corroborate combat exposure in order to prove service connection. 58 Fed. Reg. at 29,109.

Congress later amended 38 U.S.C. § 1154(b), the statutory authority for Section 3.304(f), to eliminate the corroboration requirement. Under Section 1154(b), if a veteran engaged in combat with the enemy, then the veteran's own testimony is enough to establish that the in-service stressor occurred unless there is evidence to the contrary. VA amended Section 3.304(f) in 1999 to implement this statutory standard. *See* 38 C.F.R. § 3.304(f)(2); *see also Direct Service Connection (Post-traumatic Stress Disorder, Final Rule*, 64 Fed. Reg. 32,807, 32,808 (June 18, 1999) (eliminating need for service records evidencing combat to establish in-service combat stressor and instead permitting veteran to rely on lay testimony alone to establish in-service stressor).

D. PTSD Related to Prisoner of War Experience.

In the same 1999 rulemaking, VA amended the regulation governing service connection for POW stressors. The new rule permitted a veteran to establish an in-service stressor based on his or her own testimony alone. In adopting the rule, VA noted that POW experience is a "situation where events often can never be fully

documented and therefore warrants . . . relaxed adjudication requirements for service connection." 64 Fed. Reg. at 32,808.

E. Mustard Gas and Lewisite Exposure.

By regulation in 1992, VA created a service connection presumption for seven diseases associated with certain veterans' exposure to mustard gas, a chemical weapon. *See* 38 C.F.R. § 3.316. Recognizing that some World War II veterans were exposed to mustard gas experiments, VA proposed the regulation to establish presumptive service connection for laryngitis, bronchitis, emphysema, asthma, conjunctivitis, keratitis, and corneal opacities, conditions associated with mustard gas exposure. *Claims Based on Chronic Effects of Exposure to Mustard Gas, Proposed Rule*, 57 Fed. Reg. 1699 (Jan. 15, 1992). VA relied on the lack of documentary evidence related to the testing or any effects of the testing, and the resulting disadvantage to these veterans, to justify the regulation. *Claims Based on Chronic Effects of Exposure to Mustard Gas, Final Rule*, 57 Fed. Reg. 33,875 (July 31, 1992). VA determined that some veterans may not have filed VA claims, or may have faced challenges in pursuing VA claims, because the experimental tests were classified, participants were instructed not to discuss their involvement, medical records associated with the tests are generally unavailable, and no long-term follow-up examinations were conducted. *Id*. VA acknowledged that these special circumstances put veterans at a disadvantage when attempting to establish

entitlement to compensation for a disability resulting from experimental mustard gas exposure. *Id*. In 1993, VA expanded the list of conditions to which the mustard gas presumption applies. *Claims Based on Chronic Effects of Exposure to Mustard Gas or Lewisite*, 59 Fed. Reg. 42,497, 42,498 (Aug. 18, 1994). VA relied on a National Academy of Science (NAS) study, which found a relationship between mustard gas exposure and these conditions, to justify the expanded presumption. *Claims Based on Chronic Effects of Exposure to Vesicant Agents, Proposed Rule*, 59 Fed. Reg. 3532, 3532 (Jan. 24, 1994). VA also clarified that the presumption applies to Lewisite exposure; Lewisite is another kind of chemical weapon used primarily in the World War I and World War II eras. 59 Fed. Reg. at 42,498.

F. Amputation and Cardiovascular Disease.

Also by regulation, VA created a service-connection presumption applicable to veterans suffering from cardiovascular disease following certain amputations. 38 C.F.R. § 3.310(b). VA pointed again to an NAS study that found that a veteran who has suffered an amputation of both legs or one leg at or above the knee faces a significantly higher risk of death from cardiovascular disease. *Veterans Benefits; Proximate Results, Secondary Conditions, Proposed Regulatory Development*, 44 Fed. Reg. 26,762 (May 7, 1979).

These regulations demonstrate that, on its own initiative, VA has liberalized evidentiary standards for dozens of medical conditions linked to military service,

including PTSD. *See* 38 C.F.R. §§ 3.304-309, 3.310(b), 3.316. For decades, VA has adopted or modified regulations to account for the difficulty certain veterans face in proving their claims, to eliminate the need for additional evidence where scientific evidence supports the link between a stressor and a medical condition, to improve administrative processing of VA claims, and to promote equity and fairness in the VA claims process.

This long history evidences a trend toward loosening the standards for establishing service connection, particularly for PTSD and especially when documentation of the in-service stressors is perceived as difficult, if not impossible, to obtain. Despite facing similar evidentiary challenges for MST-related PTSD claims, and despite the opportunity for improved equality, predictability, and efficiency, VA has refused to protect MST survivors by adopting a similar accommodation. In denying the Petition seeking a rulemaking to consider a similar evidentiary accommodation for MST-related PTSD, VA has abandoned almost 100 years of history. Instead, VA has chosen to leave in place rules that prevent many MST survivors from obtaining benefits—rules that are arbitrary, capricious, and discriminatory.

II. VA'S ARTICULATED REASONS FOR LIBERALIZING EVIDENTIARY RULES FOR OTHER CLAIMS APPLY EQUALLY TO MST CLAIMS.

Each of VA's stated justifications for lowering the evidentiary standard in other contexts applies equally to MST claims. In the past, VA has lowered evidentiary standards (1) to address the lack of available evidence, (2) in recognition of the proven correlation between a stressor and a medical condition, (3) to relieve administrative burdens, and (4) to promote equity and fairness in the VA claims process. In choosing to treat MST survivors differently than veterans who have experienced other traumas, VA has ignored these justifications.

First, MST is inherently difficult to prove due to lack of documentation, a justification VA has repeatedly relied on in liberalizing evidentiary rules for other kinds of claims, including PTSD claims related to combat, POW experience, and fear. The barriers to MST reporting are well known. VA has acknowledged that "many incidents of [MST] are not officially reported, and veterans may find it difficult to produce evidence of [an MST stressor]." *Post-Traumatic Stress Disorder Claims Based on Personal Assault, Proposed Rule*, 65 Fed. Reg. 61,132, 61,132 (Oct. 16, 2000) (acknowledging under-reporting and lack of documentation but still requiring corroborating evidence of sexual trauma). Because of these barriers, many MST cases do not generate the same kind of evidence or documentation as other traumatic events servicemembers face. Until the barriers to

reporting are addressed, MST can never be fully documented the way VA demands it to be documented.

Second, like combat, POW experience, and fear of hostile or terrorist activity, rape is strongly correlated with PTSD. In a spring 2009 report, the National Center for PTSD, a research and education agency within VA, acknowledged a "*strong association* between MST and PTSD, with *stronger effects observed for women than men*." *VA MST Study* at 3 (emphasis added). According to VA, servicemembers who experience MST are at a significantly higher risk of PTSD than servicemembers who do not experience MST. *Id*. at 2. PTSD is the most common health condition observed among veterans who report MST. *Id*.

Third, the proposed rule would relieve administrative burdens on VA and speed up claim-processing times, key justifications for VA's prior rulemakings easing evidentiary burdens. For example, VA adopted the fear-related PTSD rule to "improve[] timeliness" of claims decisions by simplifying the procedures that apply to such claims. 74 Fed. Reg. at 42,617; *see also* 75 Fed. Reg. at 39,843 (noting, in adopting final rule, that amendment will facilitate timely processing by simplifying development and research procedures applicable to claims). VA specifically described the now-abandoned corroborating evidence requirement as often being "very involved and protracted." *PTSD Fact Sheet* at 2. A liberalized

evidentiary rule would also streamline the claims process—specifically by addressing the "very involved and protracted" corroborating evidence requirement MST survivors continue to face and minimizing appeals related to denied claims.

Finally, the proposed rule promotes reliable and equitable resolution of MST claims. In adopting the fear-related PTSD rule, VA noted that the rule would improve "consistent decisionmaking" and "equitable resolution of PTSD claims." 74 Fed. Reg. at 42,618. The same is true here. VA is aware that MST claim grant rates lag behind the grant rates for other PTSD claims. VA is also aware of the differences in MST grant rates among VA Regional Offices. A rule relaxing the evidentiary standards would help to eliminate these inconsistencies and inequities and advance the recognized goal of improving equitable resolution of PTSD claims.

III. VA PROVIDES NO JUSTIFICATION FOR ITS DEPARTURE FROM PAST PRACTICE, INCLUDING ITS SPECIFIC STATED RATIONALES FOR PRIOR LIBERALIZING RULES.

VA offers no reason for departing from its past practice of reducing the evidentiary burden for veterans pursuing hard-to-prove claims. VA's primary reason for refusing to provide MST survivors an evidentiary accommodation consistent with previously implemented presumptions is that MST purportedly is not "indisputably associated with particular places, types, and circumstances of service." Pet'rs' Opening Br., Addendum at 4. As explained in Petitioners'

Opening Brief, however, the rule authorizing VA rulemaking requires "due consideration" of the "places, types, and circumstances" of a veteran's service as shown by various information sources including service records and all pertinent lay evidence. Pet'rs Opening Br. at 17, 35-36. Nowhere does the statute require an "indisputable" association with the "particular" places, types, or circumstances of the veteran's service. *Id*. VA appears to have created this "indisputable" association requirement in order to escape its own past practice of liberalizing evidentiary requirements to prove service connection.

CONCLUSION AND RELIEF SOUGHT

In rejecting the Petition outright and refusing to consider rulemaking related to MST evidentiary standards, VA departed significantly from its past practice and ignored its own justifications for prior efforts to liberalize evidentiary standards applicable to other kinds of claims. To be consistent with its own prior rulemakings, VA should have proposed a rule to relax the evidentiary standards for entitlement to service-connected disability benefits based on MST *and* invited public comment. VA did neither, eliminating the opportunity for important public comment on whether the MST evidentiary standards should be relaxed exactly as Petitioners proposed or in some other manner. The Court should grant Petitioners' request for relief and remand the matter to VA to institute a new rulemaking and consider the views of key stakeholders and other members of the public.

In view of the foregoing and the reasons discussed in Petitioners' Opening Brief, amicus curiae NVLSP respectfully requests that the Court find that VA's denial of the Petition to conduct a rulemaking proceeding was arbitrary, capricious, and discriminatory. In the alternative, NVLSP requests that the Court vacate and remand the denial to VA for a reasoned explanation.[4]

Dated: December 11, 2014

Respectfully submitted,

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[4] Counsel for amicus curiae authored this brief in whole. No party or party's counsel authored this brief in any respect, and no party, party's counsel, or person—other than the amicus curiae, its members, or its counsel—made a monetary contribution to the preparation or submission of this brief.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(d) and 32(a)(7)(B) because this brief contains 4434 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

/s/ Marianne Hogan
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CERTIFICATE OF SERVICE

It is hereby certified that on January 8, 2015 the foregoing document was electronically filed with the Clerk of the Court by using the ECF system. Counsel for Petitioners and Respondent are registered ECF users and will be served by the ECF system.

/s/ Marianne Hogan
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