BRIEF FOR RESPONDENT

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

2014-7115

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

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel states that she is unaware of any other appeal in or from these actions that was previously before this Court or any other appellate court under the same or similar title. Respondent's counsel also states that she is not aware of any cases pending before this Court that may directly affect or be directly affected by this Court's decision in this case.

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INTRODUCTION

Title 38, section 3.304(f)(5) of the Code of Federal Regulations governs veterans benefits claims for posttraumatic stress disorder (PTSD) based upon in-service personal assaults, including military sexual trauma (MST). Recognizing the pervasiveness of MST in the military, the sensitive nature of MST claims, and service members' reluctance to report such assaults during military service, the Department of Veterans Affairs (VA) promulgated § 3.304(f)(5) to provide that evidence other than a veteran's service records may corroborate the alleged in-service occurrence of a personal assault. The wide variety of potentially corroborating evidence includes, but is not limited to, lay testimony, statements from family members or roommates, and post-service medical opinion.

VA struck a balance in § 3.304(f)(5) between the burden on claimants in MST claims and the Congressional mandate in 38 U.S.C. § 1154(a) to ensure that benefits are awarded only when the alleged in-service event is consistent with the "places, types, and circumstances" of service. This requirement relates to the context, or historical facts, used to determine whether a stressor actually occurred. Because MST is not tied to any "places, types, and circumstances" of service, but can occur to anyone at virtually any place and at any time in service, § 3.304(f)(5) addresses the statutory requirement through its expansive and non-exclusive list of the types of corroborating evidence that may be consistent with MST. This Court previously held that § 3.304(f)(5) (then codified at § 3.304(f)(3)) "is not contrary to 38 U.S.C. § 1154(a); nor is it arbitrary or capricious." *Nat'l Org. of Veterans' Advocates* (*NOVA*) *v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1351 (Fed. Cir. 2003).

Still dissatisfied with § 3.304(f)(5), petitioners asked the Secretary to eliminate the corroborating evidence requirement for MST claims, and instead promulgate a rule accepting a claimant's lay testimony *alone* to establish that he or she experienced MST in service. Although petitioners purport to model their proposed rule after other PTSD regulations, those regulations do not permit VA to rely upon a claimant's testimony alone to establish the in-service occurrence of a stressor. Rather, a claimant must first make a factual showing establishing the

context of the in-service stressor, such as service in an area where hostile military or terrorist activities were ongoing, and only then may the claimant's own lay statement establish that he or she experienced a *specific stressor* in service.

Petitioners' proposed rule eliminates the requirement to make any factual showing. Agreeing with the Secretary that MST is not tied to any "places, types, and circumstances" of service, petitioners would simply have VA read that statutory requirement out of the law. Their proposed rule would prohibit VA in most cases from ever considering the factual basis of a veteran's claim that MST occurred, and would create an even more lenient PTSD standard than applies to combat veterans and prisoners of war.

Exercising his policy expertise and discretion, the Secretary denied petitioners' rulemaking request. Pursuant to Supreme Court precedent, the precedent of this Court, and Congressional intent, this Court's review of that decision is "extremely limited," and petitioners face a "daunting" burden. The Secretary's decision is consistent with 38 U.S.C. § 1154(a) and embodies a reasonable balance between the need for flexibility in the types of evidence that may be used to corroborate MST and the need to ensure proper payment of disability payments.

STATEMENT OF THE ISSUES

1. Is the Secretary's decision declining petitioners' request to eliminate the corroborating evidence requirement in 38 C.F.R. § 3.304(f)(5) arbitrary and capricious under the most deferential level of Administrative Procedure Act (APA) review?

2. Does the Secretary's decision – which petitioners allege discriminates against *both* men and women, and which rationally distinguishes between PTSD claims based upon MST and claims based upon other in-service events such as combat with the enemy – violate the equal protection clause of the Fifth Amendment?

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

Petitioners, the Service Women's Action Network (SWAN) and the Vietnam Veterans of American (Vietnam Veterans), seek review under 38 U.S.C. § 502 of the Secretary's July 2014 denial, A4-7, of their petition to liberalize the regulation governing claims for compensation for PTSD as a result of MST, A299-359.[1]

I. VA Promulgated The In-Service Personal Assault Regulation, 38 C.F.R. § 3.304(f)(5), In Recognition Of The Sensitive Nature Of MST Stressors And The Reluctance To Report Such Assaults During Service

Pursuant to 38 U.S.C. § 501(a), the Secretary of Veterans Affairs is authorized to prescribe "regulations with respect to the nature and extent of proof

[1] "A__" refers to pages in the joint appendix to be filed by petitioners.

and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws." In doing so, the Secretary must give "due consideration to" both "the places, types, and circumstances of [a] veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, [and] such veteran's medical records," as well as "all pertinent medical and lay evidence." 38 U.S.C. § 1154(a).

Pursuant to its authority under these statutes, VA promulgated 38 C.F.R. § 3.304(f) to establish the extent of evidence necessary to prove service connection for PTSD. 58 Fed. Reg. 29,109 (May 19, 1993). The regulation requires: (1) "medical evidence diagnosing" PTSD; (2) medical evidence establishing a link, or "nexus," between a veteran's 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).

Regarding the third requirement, VA recognized, as it does today, the sensitive nature of MST stressors and service members' reluctance to report such events during military service. 65 Fed. Reg. 61,132 (Oct. 16, 2000) (proposed rule). VA therefore promulgated § 3.304(f)(5) (originally codified at § 3.304(f)(3))

to provide that evidence other than a veteran's service records may be sufficient to establish occurrence of a personal assault, including MST.[2] A10 (final rule).

To help claimants establish that an alleged in-service MST is consistent with the places, types, and circumstances of service, § 3.304(f)(5) provides a non-exclusive list of almost 20 "examples" of the types of evidence that may be used to corroborate an alleged in-service stressor, such as statements from family members, roommates, or clergy, episodes of depression or panic attacks, or behavioral changes.[3] 38 C.F.R. § 3.304(f)(5). Thus, corroborating evidence of MST may in some situations be provided by lay evidence. *See AZ v. Shinseki*, 731 F.3d 1303, 1310 (Fed. Cir. 2013) (citing *NOVA*, 330 F.3d at 1352). However, a veteran's lay testimony *alone*, without any corroboration, is not sufficient to establish the occurrence of an in-service personal assault, including MST. 38 C.F.R. §§ 3.304(f), (f)(5).

Section 3.304(f)(5) further provides that medical opinion evidence can provide an additional means of corroborating an alleged MST event. Recognizing that an opinion from a medical or mental health professional could "be helpful in"

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[2] The 2002 regulation codified provisions in the Veterans Benefits Administration Adjudication Procedure Manual. *See Patton v. West*, 12 Vet. App. 272, 283 (1999); 65 Fed. Reg. at 61,132.

[3] Although the *amici* Members of Congress now find the inclusion of pregnancy tests in the list of potentially corroborating evidence "preposterous," Members Cong. Br. at 18, that example was added to the regulation at the suggestion of petitioner, Vietnam Veterans. A360.

determining whether a stressor occurred by "corroborat[ing] the [claimant's] account of the stressor incident" or helping the VA decisionmaker interpret and understand the evidence, A8, § 3.304(f)(5) permits VA to "submit any evidence that it receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred." 38 C.F.R. § 3.304(f)(5). And a medical opinion based upon a post-service examination of a veteran can provide yet another means of corroborating an alleged in-service MST. *Menegassi v. Shinseki*, 638 F.3d 1379, 1382, 1382 n.3 (Fed. Cir. 2011).

Finally, section 3.304(f)(5) imposes a special notice requirement. VA will not deny a MST-based PTSD claim without first advising the claimant that "evidence from sources other than the veteran's service records or evidence of behavior changes may constitute credible supporting evidence of the stressor," and giving the claimant an opportunity to provide, or direct VA to, "potential sources of such evidence." 38 C.F.R. § 3.304(f)(5).

II. VA Issued Guidance, Instituted Training, And Readjudicated Claims To Help Ensure Sensitive, Accurate, And Consistent Application Of § 3.304(f)(5)

Starting in 2005, VA has engaged in an effort to improve the adjudication of MST-related claims beyond promulgation of § 3.304(f)(5), by issuing guidance and instituting a number of training programs to help ensure sensitive, accurate,

and consistent adjudication of such claims. These efforts are working, and continue today.

In 2005, the Veterans Benefits Administration (VBA), which adjudicates claims for disability compensation, issued Training Letter 05-04, which contained background information regarding MST and set forth requirements for developing and deciding MST-related PTSD claims. A11-21; *see* 38 U.S.C. §§ 7701 and 7703. In 2010, VBA issued Fast Letter 10-25, which provided additional guidance on MST and authorizes (but does not require) use of certain military reports as corroborating evidence. A32-40.

Around 2011, VBA found that MST-related PTSD claims suffered from both high rates of adjudicatory error and low grant rates. A review of the accuracy of decisions in MST-related claims showed that, in about 25 percent of randomly selected claims, adjudicators erred by, for example, denying claims when they should have identified evidence of personal assault and ordered a medical examination. A228. And the grant rate for MST-related PTSD claims was only about 38 percent. A6, 116.

As a result, VBA contacted veterans whose MST-related PTSD claims had been denied between September 2010 (when VA began systematically tracking MST-related PTSD claims) and April 2013, offering them the opportunity to submit additional evidence and have their claims reviewed to ensure that they were

properly developed and decided.[4] A6, 231; *see also* A52-56, A65-75, 270. As of November 2013, VA had granted 38 percent of these previously denied claims. A270.

VBA thereafter intensified its training efforts. VBA Letter 20-11-23 reminded claims examiners of the "liberal policy" applicable to in-service personal assault claims, and "reiterate[d]" the need to "apply proper flexibility and sensitivity in evaluating evidence of service connection in" claims involving MST. A41. The letter also reiterated that VA does not require claimants to have made any official complaint of MST, and instructed adjudicators to accept both a veteran's lay statement and "secondary evidence of changes in behavior" as evidence of MST, and "err on the side of the Veteran" when determining whether to schedule a VA examination. A42. Consistent with these instructions, VBA also revised the guidance in its Manual. A287-89.

VBA also issued Training Letter 11-05, providing information and guidelines "to ensure consistency and fairness through a liberal approach when adjudicating PTSD claims based on MST." A43-56. After that Training Letter was issued, VBA held nationwide training sessions focused on developing evidence of in-service MST, and emphasizing the importance of a "thorough and open-minded" review of the record. A81; *see* A229-30. Among other methods,

[4] Veterans whose claims were denied prior to September 2010 were also eligible to resubmit their claims, but did not receive letters. A231.

this training described actual cases in which VA adjudicators "missed" corroborating evidence of MST. A229-30. VA also revised a VBA Manual provision governing the development of MST-related PTSD claims, A290-98, and issued additional rating guidance for adjudicators, including the instruction to "[m]ake your motto 'Grant if you can, deny if you must.'" A283-86. And VBA created a template letter to be sent to all claimants alleging PTSD based on MST, explaining the many types of evidence that can be used to establish occurrence of the stressor. A275-82.

Finally, VBA reorganized its workforce so that the most experienced and skilled adjudicators develop and rule upon MST-related claims. A82, 117, 217. VBA also requires all new adjudicators to receive special training on MST claims, A82, and has worked with the Veterans Health Administration to develop training for clinicians who conduct PTSD compensation examinations of veterans alleging MST. A230; *see* A217.

III. VA's Guidance And Training Initiatives Have Improved Adjudication Of MST-Related PTSD Claims, And VA Is Continuing Its Efforts

As noted above, prior to VA's training initiatives, the grant rate for MST-related PTSD claims was about 38 percent and the error rate was about 25 percent. A6, 116, 228. Following training, both the grant rate and the error rate for MST-

related PTSD claims improved by more than a third, to 52 percent[5] and 15 percent, respectively. A6, 116.

Although there is no reason to expect that grant rates for MST-related claims will or should be the same as the overall grant rate for all PTSD claims (especially considering recent increases in combat-related PTSD claims, *see, e.g.,* A6, 210), VA's training efforts increased the grant rate for MST-related claims to within six percentage points of the grant rate for all other PTSD claims by the end of fiscal year 2013. A210.

Despite these improvements, VA recognizes that additional work needs to be done. In addition to variations described above, there is still variation in grant rates between regional offices, *see* A217, a fact not restricted to MST-related claims. And although none of these variations necessarily indicates inaccuracy, *see* A217, 247, 262, VA is continuing its efforts to ensure sensitive, accurate, and consistent adjudication of MST-related claims. Among other efforts, VBA is creating a new online refresher training program; instituting twice yearly reviews of MST claims; reviewing approval rates by regional office and veteran gender; and collecting data to identify, and creating targeted training to rectify, specific points in the claims process at which approval rates begin to vary. A261-64. In addition, the Veterans Health Administration is requiring all examiners who

[5] This improvement held relatively steady in fiscal year 2013, when VA approved approximately 49 percent of claims. A6, 210.

conduct MST-related exams to complete mandatory MST training. *See* A217. The results of the majority of these initiatives were not expected until after the Secretary's decision on petitioners' request. *See* A261-64.

IV. The Secretary Denied Petitioners' Rulemaking Request

SWAN and Vietnam Veterans filed a petition for rulemaking requesting VA to promulgate a broad new MST regulation governing claims for compensation for mental health conditions (not just PTSD) incurred or aggravated as a result of MST, including sexual harassment. A302-3. Petitioners asked VA to eliminate the corroborating evidence requirement in § 3.304(f)(5) and instead allow a claimant's lay testimony alone to establish the occurrence of an alleged MST stressor. *Id*.

The Secretary, through the Acting General Counsel, denied the rulemaking petition. A4-7. The Secretary concluded that petitioners' proposed rule is inconsistent with the statutory requirement to consider the places, types, and circumstances of service, and the existing regulation, together with VA's training efforts, provides for the accurate, fair, and sensitive adjudication of MST claims. *Id.*

In response to petitioners' contention that the list of sources of corroborating evidence in § 3.304(f)(5) is deficient because not all victims respond in the same manner, the Secretary explained that, according to the plain language of the regulation, that list is not exclusive, but makes clear that other types of evidence

may establish in-service MST. A5. The Secretary also summarized the numerous measures that VA has taken to ensure that MST claims are adjudicated consistently and with sensitivity to the unique circumstances of each claim. *Id.* The Secretary reported that, as a result of this training, the overall grant rate for all MST-related PTSD claims increased, and the gap between grant rates for male and female veterans narrowed. A6.

Contrary to petitioners' assertion that combat veterans "do not have to present any threshold evidence of [a] specific stressor," the Secretary explained that combat veterans filing PTSD claims must establish that they "'engaged in combat with the enemy,' *i.e.* 'personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality.'" A6 (quoting 38 C.F.R. § 3.304(f)(2)). Only *after* such a showing is made can a veteran's testimony alone establish occurrence of a combat-related stressor. *Id.*

Finally, the Secretary rejected petitioners' attempt to analogize their proposed regulation to § 3.304(f)(3), which governs PTSD claims based upon fear of hostile military or terrorist activity. A6-7. That regulation provides that a veteran's lay statement may establish the occurrence of an in-service stressor only if, among other requirements, the claimed stressor is consistent with the places, types, and circumstances of the veteran's service. 38 C.F.R. § 3.304(f)(3). This requirement is absent from petitioners' proposed MST rule. *See* A302.

Moreover, the Secretary explained, the fear-based regulation is based upon an Institute of Medicine finding that "military personnel deployed to [a] war zone, even if they do not experience direct combat, experience other potent stressors as a result of the circumstances of their service." A6-7. Thus, VA concluded that the reduced evidentiary burden in § 3.304(f)(3) still fulfills the statutory requirement to consider the "places, types, and circumstances" of a veteran's service because service in a war zone is likely to place a veteran in a stressful situation related to fear of hostile military or terrorist activity. *Id.* MST, on the other hand, is not similarly associated with places, types, and circumstances of service. A7.

Accordingly, the Secretary denied petitioners' rulemaking request. *Id.* This appeal followed.

SUMMARY OF THE ARGUMENT

VA recognizes the pervasiveness of MST in the military, the sensitive nature of MST claims, and service members' reluctance to report such assaults during military service, and takes seriously the concerns expressed by petitioners in their rulemaking request. Beginning in 2005, VA provided updated guidance and training initiatives to ensure the sensitive, accurate, and consistent application of § 3.304(f)(5) to MST-based PTSD claims, and the Department's work has not ceased with regard to these claims. VA continues to devote resources to, and monitor the adjudication of, MST claims to achieve these goals. Notwithstanding

these efforts, petitioners have suggested that the regulation itself should be altered, but petitioners fail meet their "daunting" burden of demonstrating that the Secretary's denial of their rulemaking petition was arbitrary and capricious.

Petitioners asked the Secretary to promulgate a broad new regulation to eliminate the corroborating evidence requirement in MST-related claims, and permit a veteran's lay testimony alone to establish the in-service occurrence of MST. Their proposed rule would distinguish MST-related claims from all other PTSD claims, including those filed by veterans who feared hostile military or terrorist activity, those who engaged in combat, and those who were prisoners of war. The Secretary's decision rejecting this proposal easily passes muster under this Court's "extremely limited" and "highly deferential" standard of review.

The Secretary adequately explained his decision. He acknowledged the difficulties service members face when attempting to establish that MST took place in service; explained how § 3.304(f)(5) and VA guidance and training initiatives address those concerns; and explained the important differences between the PTSD regulations based upon MST, combat, and fear of hostile military or terrorist activity. Most important, the Secretary concluded that petitioners' proposed rule is contrary to the statutory requirement to consider the "places, types, and circumstances" of a veteran's service. In short, the Secretary explained why he chose to do what he did, and nothing more is required.

Finally, this appeal raises no constitutional concerns. Petitioners fail to cite any evidence in support of their contention that facially neutral § 3.304(f)(5) intentionally discriminates against women; petitioners themselves allege that the regulation discriminates against *both* men and women. To the extent petitioners claim that § 3.304(f)(5) unconstitutionally discriminates between veterans with MST-related PTSD and those with PTSD stemming from other stressors, petitioners fail to carry their heavy burden of demonstrating no rational basis for that distinction. Among other reasons, petitioners themselves advocate not for equal treatment for all PTSD claimants, but for more preferential treatment for those with MST-related PTSD, which is exactly what § 3.304(f)(5) provides. This is not one of those "rarest and most compelling of circumstances" under which the Court should overturn an agency's denial of a rulemaking request.

ARGUMENT

I. Standard Of Review

Contrary to petitioners' position that this case is subject to the same "arbitrary and capricious" standard applicable to rulemaking challenges, this Court's review of *denials* of rulemaking petitions is even more "highly deferential" and "extremely limited." *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007).

Section 502 of title 38, United States Code, grants this Court exclusive jurisdiction to review certain rulemaking actions by the Secretary of Veterans

Affairs, such as the promulgation or amendment of a rule. 38 U.S.C. § 502; *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 (Fed. Cir. 2000). Section 502 also permits this Court to review VA's denial of a petition for rulemaking. 38 U.S.C. § 502 (authorizing review of actions under 5 U.S.C. § 553, which includes "the right to petition for the issuance, amendment, or repeal of a rule"); *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1351-52 (Fed. Cir. 2011).

This Court reviews petitions under section 502 in accordance with the standard set forth in the APA, 5 U.S.C. §§ 701-706. *See Nyeholt v. Sec'y of Veterans Affairs*, 298 F.3d 1350, 1355 (Fed. Cir. 2002). As petitioners correctly observe, that standard permits this Court to review whether the Secretary's denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law. 5 U.S.C. § 706(2)(A); *Preminger*, 632 F.3d at 1353.

But petitioners fail to recognize that not all section 502 cases are subject to the same level of scrutiny by this Court. "Review under the 'arbitrary and capricious' tag line . . . encompasses a range of levels of deference to the agency." *Am. Horse Prot. Ass'n, Inc. v. Lyng*, 812 F.2d 1, 4 (D.C. Cir. 1987) (citations omitted). "[A]n agency's refusal to institute rulemaking proceedings is at the high end of the range." *Id.*

The APA standard, which already is "highly deferential," is "rendered even *more* deferential by the treatment accorded by the courts to an agency's

rulemaking authority." *Preminger*, 632 F.3d at 1353 (emphasis added). Judicial review of refusals to promulgate rules "is 'extremely limited' and 'highly deferential.'" *Massachusetts*, 549 U.S. at 527-28 (quoting *Nat'l Customs Brokers & Forwarders Assn. of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989), and citing *Am. Horse*, 812 F.2d at 3-4). "Such a refusal is to be overturned 'only in the rarest and most compelling of circumstances,'" *Am. Horse*, 812 F.2d at 401, such as "plain error of law or a fundamental change in the factual premises previously considered by the agency." *WildEarth Guardians v. EPA*, 751 F.3d 649, 653 (D.C. Cir. 2014) (citations omitted).

Not only does the precedent of the Supreme Court and this Court require application of this particularly deferential standard, but Congress also has expressed its intent that judicial review of VA's refusal to engage in rulemaking be limited. When Congress last amended § 502 in 2008, the Senate Committee on Veterans' Affairs specifically addressed "challenges . . . in response to a denial by VA of a request for rulemaking." Veterans' Notice Clarification Act of 2008, S. Rep. 110-449, at 14 (2008). The Committee described the burden facing petitioners in cases like this one as "daunting." *Id.* Citing the Supreme Court's decision in *Massachusetts v. EPA* and cases cites therein, the Committee concluded that, "the general authority that would be provided by [§ 502] would likely afford

veterans relief under *only very limited circumstances* in a matter involving a denial on VA's part to engage in rulemaking." *Id.* at 14-15 (emphasis added).

The reasons for this highly-deferential standard of review are especially germane in this case. As an initial matter, the time to directly challenge § 3.304(f)(5) has long passed. *See* Fed. Cir. R. 47.12(a). Indeed, when VA first proposed promulgating the regulation, petitioner Vietnam Veterans suggested two changes, both of which VA adopted. *Compare* A360, *with* A8. Vietnam Veterans did not bring a Rule 502 challenge at that time or assert, as it does now, that VA should eliminate the corroborating evidence requirement in § 3.304(f)(5).[6] *See NOVA*, 330 F.3d 1345.

Moreover, the extremely limited and highly deferential standard of review respects VA's policy expertise and discretion in determining how best to strike a balance between Congress's direction to consider the places, types, and circumstances of a veteran's service and the unique challenges facing MST claimants. *See Preminger*, 632 F.3d at 1353. Judgments of this nature are, respectfully, ill-suited to judicial determination, and the Court cannot "substitute its judgment for that of the agency." *Motor Vehicles Mfrs. Ass'n of the United*

[6] Petitioner SWAN appears to have been founded after section 3.304(f)(5) was promulgated. *Service Women's Action Network*, LinkedIn, *available at* https://www.linkedin.com/company/service-women's-action-network.

States, Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983); *Mortg. Investors Corp. of Ohio v. Gober*, 220 F.3d 1375, 1378 (Fed. Cir. 2000).

II. This Court Should Affirm The Secretary's Decision Denying Petitioners' Request To Eliminate The Requirement To Corroborate That An Alleged In-Service Personal Assault Occurred

Petitioners fail to carry their "daunting" burden in this appeal. S. Rep. 110-449, at 14. The Secretary adequately explained the facts and policy matters underlying his denial of petitioners' rulemaking request, and that explanation is not arbitrary and capricious. In short, petitioners' proposed rule would read the statutory "places, types, and circumstances" requirement out of the law; to the extent that requirement may have been inconsistently applied under the existing regulation, that is a training issue, not a reason to rewrite § 3.304(f)(5). Petitioners' assertions to the contrary are based largely upon incorrect premises, or simply express disagreement with the Secretary's policy choices, and do not demonstrate any reversible error in the Secretary's decision.

A. The Secretary Properly Provided "A Brief Statement Of The Grounds For Denial," As Required By The APA

1. The Secretary's Decision Explains Why He Did What He Did

The Secretary adequately explained his decision by providing petitioners with "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The D.C. Circuit, which frequently decides APA cases, has described this requirement as

"minimal." *Butte Co. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010). A detailed discussion is not necessary. Rather, this Court's review is "limited to ensuring that the [agency] has adequately explained the facts and policy concerns it relied on and to satisfy [the Court] that those facts have some basis in the record.'" *Preminger*, 632 F.3d at 1353 (citation omitted). "At its core, this requirement simply forces the agency to explain 'why it chose to do what it did.'"[7] *Ark Initiative v. Tidwell*, 895 F. Supp. 2d 230, 242 (D.D.C. 2012) (quoting *Tourus Records, Inc. v. DEA*, 259 F.3d 731, 737 (D.C. Cir. 2001)).

The Secretary's denial explains why he chose to do what he did. Among other reasons, the Secretary:

- acknowledged the difficulty service members face when attempting to establish that a personal assault, including MST, took place during service, A4;
- responded to petitioners' concern that not all victims of MST will respond to the trauma in the same manner by explaining that § 3.304(f)(5) does not limit the types of evidence that may be used to corroborate an alleged in-service MST, A5;

[7] "The agency explanations that the D.C. Circuit has branded too brief seem to be limited to single, conclusory sentences." *Ark Initiative*, 895 F. Supp. 2d at 242 (collecting cases).

- responded to petitioners' assertion that "VA adjudicators often misapply the current evidentiary standard" by summarizing VA's training efforts and explaining that those efforts are working, *id.*;
- explained the differences between §§ 3.304(f)(5) and (f)(3), which applies to claims based upon fear of hostile military or terrorist activity and claims, A6-7; and
- explained that, because MST can occur virtually at any time, in any place, and to anyone in service, eliminating the corroborating evidence requirement in § 3.304(f)(5) would be inconsistent with the statutory requirement that an in-service stressor be consistent with the "places, types, and circumstances of service," A7.

The Secretary fulfilled the "minimal" requirements of the APA.

2. Petitioners Fail To Demonstrate That Any Further Explanation Was Needed

Although petitioners challenge the depth of the Secretary's discussion in response to the arguments set forth in their rulemaking petition, they fail to demonstrate that anything more was needed. For example, petitioners emphasize that the Secretary's denial letter was just three and a half pages long, and challenge the Secretary's alleged reliance upon a "single statistic" and alleged failure to "mention" variations in claims approval rates between regional offices. Pet. Br. at 14, 29, 31. But the APA does not require the Secretary to respond to each and

every argument set forth in petitioners' 59-page rulemaking petition. Rather, the APA imposes only the "minimal" requirement to issue "a brief statement of the grounds for denial." 5 U.S.C. § 555(e); *Butte Co.*, 613 F.3d at 194.

Moreover, review of the Secretary's denial is not, as petitioners seem to suggest, limited to the four corners of the denial letter. Rather, contemporaneous documents in the administrative record also inform this Court's review. *Butte Co.*, 316 F.3d at 203; *see also Friends of the Bow v. Thompson*, 124 F.3d 1210, 1220 (10th Cir. 1997) ("[T]he 'brief statement' required by § 555(e) . . . should be read in light of previous documents prepared to justify the particular decision at issue."); *Estate of L.D. French v. FERC*, 603 F.2d 1158, 1162 (5th Cir. 1979) (holding that a more "general" statement is justified under 555(e) where court has before it a "record which formed the basis for the [agency's] action").

The Secretary's denial and the accompanying record are not as shallow as petitioners portray. For example, the Secretary did not "exclusive[ly] rel[y] on a single statistic" to deny petitioners' rulemaking request. Pet. Br. at 29. The Secretary's denial specifically references more than one training statistic. A6 (citing grant rates for MST-related PTSD claims for two fiscal years, the difference between grant rates for MST-related and all other PTSD claims for two fiscal years, and the difference between grant rates for male and female claimants). Moreover, the administrative record contains additional evidence that VA's

training programs are working to reduce variations in grant rates. *See, e.g.,* A81-82, 116, 173, 175, 210, 244-45. The Secretary's failure to specifically cite these additional statistics in his denial does not somehow negate the evidence that he did cite. *See* ACLU Br. at 21.[8] And although petitioners question VA's reported statistics, their own research concurs. A173 ("The grant rate for MST-related PTSD disability claims has improved" and "the gap between the grant rates" for MST-related and other PTSD claims "narrowed").

Nor does the Secretary's failure to specifically discuss in the denial letter differences in grant rates between regional offices indicate a failure to consider that issue. As petitioners acknowledge, the record contains evidence acknowledging the differences in grant rates between regional offices. Pet. Br. at 31 (citing A211). Petitioners are displeased with VA's plan to "conduct additional training that will . . . ensure greater nationwide consistency in MST/PTSD claim decisions." A211. But the record makes clear that the Secretary did not ignore this aspect of the problem. Instead, the Secretary has responded by, among other efforts, reviewing approval rates by regional office, providing additional training to adjudicators and veterans service representatives, and instituting twice yearly reviews of MST claims. A261-63. These efforts were still underway when the Secretary declined petitioners' rulemaking request. *See id.*

[8] "ACLU Br. at __" refers to pages in the brief filed by *amici* the American Civil Liberties Union and other organizations.

Moreover, petitioners do not, and cannot, contend that variation in grant rates between regional offices is unique to MST-related claims. *See* Pet. Br. at 31-32. Rather, because adjudication of disability claims often requires adjudicators to use their professional judgment to apply statutory and regulatory requirements to the unique facts of an individual case, such consistency is a more systemic challenge that VA is, and has been, working to address. And in cases where an individual claimant believes that VA has improperly adjudicated a claim, the claimant may seek further review by the regional office, the Board of Veterans' Appeals, the Court of Appeals for Veterans Claims, and this Court.

Finally, the Secretary did not ignore the potential for "re-traumatization" in the claims process. Pet. Br. at 29; *see also* Pub. Health Br. at 13-14.[9] The Secretary explained in his decision that VA's training has focused, in part, on ensuring that adjudicators develop claims in a "sensitive manner," and noted that, since 2011, VBA's most experienced and sensitive adjudicators now process MST-related claims. A5. The training materials in the record similarly emphasize the importance of sensitivity by, for example, reminding adjudicators that the severity of an assault is "in the 'eye of the victim,'" and instructing adjudicators to avoid using certain potentially offensive words. A283. And the Veterans Health Administration is requiring all examiners who conduct MST-related exams to

[9] "Pub. Health Br. at __" refers to the brief filed by *amici* public health and mental health specialists.

complete mandatory MST training. *See* A217. The Secretary's brief statement of the grounds for his denial of petitioners' rulemaking request fulfills the requirements of the APA.

B. Petitioners Fail To Carry Their "Daunting" Burden Of Proving That The Secretary's Denial Is Arbitrary And Capricious

Turning to the merits of the Secretary's decision, petitioners fail to carry their "daunting" burden of proving that the Secretary's explanation based upon current 38 C.F.R. § 3.304(f)(5), the requirements of 38 U.S.C. § 1154(a), and VA's training efforts is arbitrary and capricious. S. Rep. 110-449, at 14. The Secretary's denial is consistent with statute, past practice, and the other PTSD regulations, and strikes a reasonable balance between the need for flexibility in the types of evidence that may be produced to corroborate in-service MST, and the need to ensure proper payment of disability payments.

1. The Secretary's Decision Is Consistent With The Other PTSD Regulations

The Secretary's reasons for declining to liberalize § 3.304(f)(5) are sound and consistent with the regulations applicable to PTSD claims based upon combat with the enemy, prisoner-of-war status, fear of hostile military or terrorist activity, and an in-service PTSD diagnosis. These latter regulations – like the evidentiary presumptions that Congress has established to assist veterans in proving the in-service incurrence of a disease or injury under certain circumstances – do not rely

upon the veteran's lay testimony *alone* to the exclusion of any consideration of the facts surrounding a claimed in-service injury or event. Rather, as petitioners recognize, the regulations lower the evidentiary burden on claimants only *if* the in-service stressor is consistent with the places, types, and circumstances of the claimant's service. Pet. Br. at 39; *see* 38 C.F.R. §§ 3.304(f)(1)-(4) (incorporating "places, types, and circumstances" or equivalent "circumstances, conditions, or hardships" language).

The "places, types, and circumstances" requirement comes from 38 U.S.C. § 1154(a), and must be considered before disability benefits can be awarded:

> The Secretary shall include in the regulations pertaining to service-connection of disabilities . . . additional provisions in effect requiring that in each case where a veteran is seeking service-connection for any disability due consideration shall be given to the places, types, and circumstances of such veteran's service as shown by such veteran's service record, the official history of each organization in which such veteran served, such veteran's medical records, and all pertinent medical and lay evidence. . . .

38 U.S.C. § 1154(a).

The "places, types, and circumstances" requirement relates to the second element of a PTSD claim, the in-service incurrence of a stressor.[10] 38 C.F.R.

[10] We note that much of the information presented by the public and mental health *amici* relates to the additional two elements of service connection: (1) a present disability and (2) a nexus between the present disability and in-service disease or injury. *See* Pub. Health Br. at 6-11, 14-16.

§ 3.304(f). The requirement "deals with historical facts – whether 'the claimed stressor is consistent with the places, types, and circumstances of the veteran's service' – used to determine whether the stressor actually occurred." *Sanchez-Navarro v. McDonald*, 774 F.3d 1380, 1384 (Fed. Cir. 2014).

The combat, prisoner-of-war, and fear-based PTSD regulations all incorporate this requirement. They do not award service connection based solely upon "lay testimony and a medical diagnosis." Pet. Br. at 24. Rather, each requires the claimant to make a predicate showing of historical fact establishing the *context* of the in-service stressor, such as combat with the enemy, and only then permits lay testimony to establish the *specific stressor*, such as small arms fire.

Accordingly, a combat veteran must first "establish that he or she 'engaged in combat with the enemy,' *i.e.* 'personally participated in events constituting an actual fight or encounter with a military foe or hostile unit or instrumentality.'" A6 (quoting *Moran v. Peake*, 525 F.3d 1157, 1159 (Fed. Cir. 2008); *Stone v. Nicholson*, 480 F.3d 1111, 1113 (Fed. Cir. 2007)); 38 C.F.R. § 3.304(f)(2). Once that showing is made, the veteran's lay testimony regarding experiences related to that combat, such as being wounded, can establish an in-service stressor.[11] *See id.*

[11] Notably, the "places, types, and circumstances" requirement still applies to combat-based PTSD claims even though such claims are by statute subject to more relaxed evidentiary standards applicable to combat veterans under 38 U.S.C. § 1154(b).

Accordingly, "[c]onforming the VA's treatment of veterans who suffer PTSD caused by sexual assault to its treatment of veterans whose PTSD was caused by combat related activities," Members Cong. Br. at 20-21, would still require proof other than a veteran's own lay testimony that an in-service MST occurred.[12]

Similarly, a veteran seeking PTSD benefits as a result of a prisoner of war experience must still establish that he or she "was a prisoner-of-war under the provisions of § 3.1(y)," which describes the factors to be used to determine prisoner of war status. 38 C.F.R. §§ 3.1(y), 3.304(f)(4). Once that showing is made, the veteran's lay testimony regarding his or her prisoner-of-war experience can establish an in-service stressor. *See id.*

And a veteran seeking benefits based upon fear of hostile military or terrorist activity must still establish that his or her service is consistent with the occurrence of hostile military or terrorist activities. 38 C.F.R. § 3.304(f)(3); *see NOVA v. Sec'y of Veterans Affairs*, 669 F.3d 1340, 1344 (Fed. Cir. 2012) (citing 74 Fed. Reg. 42,617 (Aug. 24, 2009)). Once that showing is made, the veteran's lay testimony regarding the circumstances of such activity, such as experiencing small arms fire, can establish an in-service stressor. *See* 38 C.F.R. § 3.304(f)(3).

Amici are wrong when they state that the remaining subsection of § 3.304(f), which applies to claims involving an in-service PTSD diagnosis, "is triggered

[12] "Members Cong. Br. at __" refers to pages in the *amicus* brief filed by a group of Members of Congress.

irrespective of the veteran's particular place, type, or circumstance of service." Members Cong. Br. at 13 (emphasis added). Although § 3.304(f)(1) does not use that precise phrase, it requires an equivalent showing that "the claimed stressor is consistent with the circumstances, conditions, or hardships of the veteran's service." 38 C.F.R. § 3.304(f)(1). Only after this finding is made, and there is evidence of an in-service diagnosis of PTSD, can the veteran's lay testimony establish the occurrence of an in-service stressor. *Id.*

In each of these situations, veterans are relieved from the requirement of presenting corroborating evidence of an in-service stressor only after it is first established that that stressor is supported by a predicate historical fact and, therefore, is consistent with the "places, types, and circumstances of service." *Sanchez-Navarro*, 2014 WL 7332767 at *2.

There is no equivalent predicate historical fact associated with MST. As the Secretary explained, MST is not consistent with any particular places, types, and circumstances of service, as required by 38 U.S.C. § 1154(a). A7. Accordingly, Section 3.304(f)(5) addresses the "places, types, and circumstances" requirement through an expansive and non-exclusive list of the types of corroborating evidence that may be consistent with MST. And this Court previously has held that the evidentiary burdens in § 3.304(f), including sub-section (f)(5), are consistent with 38 U.S.C. § 1154(a), and are not arbitrary or capricious. *NOVA*, 330 F.3d at 1351.

2. Petitioners Fail To Demonstrate How Their Proposed Rule Is Consistent With The Statutory "Places, Types, And Circumstances" Requirement

Tellingly, petitioners do not directly challenge the Secretary's conclusion regarding the "places, types, and circumstances" requirement. To the contrary, petitioners and *amici* appear to agree that MST is *not* tied to "places, types, and circumstances" of service, but can happen anywhere and at any time during a veteran's service.[13] *See, e.g.,* Pet. Br. at 4; Pub. Health Br. at 8. Indeed, the only "place, type, or circumstance" associated with the in-service occurrence of MST is "military service" itself, Members Cong. Br. at 14 – a definition that swallows the rule. Unlike claims involving PTSD based upon combat, prisoner-of-war experience, fear, or an in-service PTSD diagnosis, MST-related claims place the predicate historical fact – MST – itself at issue.

Instead of attempting to demonstrate how MST is consistent with any "places, types, and circumstances" of service, petitioners misread the Secretary's denial as "respond[ing] that it *lacks authority*" under that statute to modify standards of evidence under § 3.304(f)(5). The denial makes no such claim. *See* A4-7. VA clearly recognizes its authority to relax evidentiary burdens in § 3.304(f). After all, it relaxed the burden applicable to PTSD claims based upon

[13] Contrary to the ACLU's conjecture, VA's statement that sexual assault is not associated with any particular places, types, and circumstances of service does not "assum[e] that sexual violence occurs only rarely in the military." ACLU Br. at 14. VA's statement relates to the nature, not the frequency, of MST.

in-service personal assault to permit the use of a post-service medical or mental health opinion to corroborate the occurrence of MST in service. Petitioners want further changes to the evidentiary burden. The Secretary simply concluded that petitioners' proposed changes to § 3.304(f)(5) would be inconsistent with the statutory "places, types, and circumstances" requirement. A6-7.

Petitioners next challenge the Secretary's wording, asserting that the reference to "indisputable" and "particular" in the conclusion that "sexual assault is not indisputably associated with particular places, types, and circumstances of service" shows that the Secretary applied an incorrect standard. Pet. Br. at 35; Nat'l Vet. Legal Svc. Br. at 20.[14] Petitioners do not dispute the accuracy of the Secretary's statement. Nonetheless, the Secretary had just parroted the requirements of § 1154(a) three sentences earlier. A6. That he varied the wording to emphasize that MST can occur at any time during service does not reflect any misunderstanding of law.

Although petitioners and *amici* assert that MST is more closely correlated with PTSD than are combat, prisoner of war experience, and fear of hostile military or terrorist activity, Pet. Br. at 5, ACLU Br. at 4, Members Cong. Br. at 15, the strength of the connection between MST and PTSD is not the issue.

[14] "Nat'l Vet. Legal Svc. Br. at __" refers to pages in the *amicus* brief by the National Veterans Legal Services Program.

Petitioners challenge the means by which a service member can establish that MST *occurred*, not that the MST caused PTSD.

By contrast, the relaxed evidentiary burden for combat, prisoner of war, and fear-related PTSD claims is based, at least in part, upon expert medical reports or other evidence connecting the type of stressor at issue with particular places, types, and circumstances of service. For example, the fear-based regulation to which petitioners most closely analogize "acknowledges the inherently stressful nature of the places, types, and circumstances of service in which fear of hostile military or terrorist activities is ongoing." 75 Fed. Reg. 39,843 (Jul. 13, 2010); *see also* A6-7 (discussing findings of Institute of Medicine report prepared at the request of Congress). Accordingly, "VA concluded that a reduced evidentiary burden 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." A7.

Petitioners and *amici* do not attempt to make a similar connection between MST and any "places, types, and circumstances" of service but instead propose a rule that reads that requirement out of the law. *See* A302-03. Under that proposed rule, VA in most cases would be unable to seek to corroborate a veteran's claim that MST occurred in service. *See Mariano v. Principi*, 17 Vet. App. 305, 312 (2003) (requiring VA to provide an adequate statement of reasons or bases for its

decision to pursue further development in cases where doing so reasonably could be construed as obtaining additional evidence against an appellant's case). This might be reasonable if MST was not the type of stressor that can occur to any service member at any time and in any place, but instead was tied to places, types, and circumstances of service, as is, for example, the fact of being a prisoner of war. Petitioners' proposed rule, not the Secretary's denial of their rulemaking request, departs from past practice.

3. None Of Petitioners' Remaining Assertions Demonstrates That The Secretary's Denial Was Arbitrary And Capricious

None of petitioners' remaining assertions demonstrates that the Secretary's decision was in any way arbitrary and capricious. First, the provision in § 3.304(f)(5) permitting VA to "submit any evidence that [VA] receives to an appropriate medical or mental health professional for an opinion as to whether it indicates that a personal assault occurred" does not heighten, but makes it easier for claimants to fulfill, the corroborating evidence requirement. This provision provides an additional means to corroborate an alleged in-service personal assault.

As an initial matter, petitioners' assertions are contrary to the position petitioner Vietnam Veterans took in response to VA's 2000 notice of proposed rulemaking. Vietnam Veterans "essentially concur[red]" with the regulation as originally proposed, but recommended referring to "both 'medical and mental health professionals' with respect to the VA's solicitation of expert opinions to

corroborate the existence of a personal assault." A360. Vietnam Veterans concluded, "[t]he option of referring relevant evidence to a mental health professional for an expert opinion should be expressly provided in the regulation." *Id*.

Contrary to petitioners' current view, § 3.304(f)(5) does not "expressly direct[] VA to seek outside review of evidence to prove that an in-service stressor occurred," nor does it "subject survivor testimony to yet another layer of review." Pet. Br. at 25; *see also* Pub. Health Br. at 3-4. The regulation uses the word "may," indicating that submission of evidence to a medical or mental health professional is optional, not mandatory. 38 C.F.R. § 3.304(f)(5). Second, as VA's initial rulemaking materials make clear, this provision does *not* introduce an additional layer of review; rather, such opinions are "weighed along with all the evidence provided," and the ultimate "determination as to whether a stressor occurred is a factual question that must be resolved by VA adjudicators." A8. To the extent that VA departed from its past practice in any way by promulgating § 3.304(f)(5), VA did so to make it *easier* for claimants to prove service connection for PTSD when it results from MST.

Second, petitioners' assertions that VA has not done *enough* to train VA employees who develop and adjudicate MST-related claims, Pet. Br. at 30-33, do not undermine the Secretary's decision. As demonstrated above, VA's training

efforts have improved adjudication of MST-related claims. A5-6; *see also* A81-82, 116, 173, 175, 210, 244-45. Even assuming, without conceding, that "perfect" adjudication of MST claims would result in equal grant rates between men and women, between MST-related and other PTSD claims, and between regional offices, VA's failure to have achieved that "perfect" result does not make the Secretary's decision denying petitioners' rulemaking request arbitrary or capricious.[15]

Exercising his policy expertise and discretion, the Secretary concluded that any inconsistencies in the application of the corroborating evidence requirement in § 3.304(f)(5) do not justify eliminating that requirement from the law, but are more properly addressed through training programs that are demonstrating proven success in ensuring more even-handed application of § 3.304(f)(5). *See* A5-6. Petitioners fail to demonstrate that that decision renders the Secretary's rulemaking denial arbitrary and capricious.

Finally, we note that the Secretary's denial does not "deny[] treatment to veterans with MST-related PTSD." Pub. Health Br. at 5. Veterans are not required to prove that a MST-related disability is service connected before they can

[15] It is more realistic to expect some degree of variation between grant rates for certain groups. "[V]ariations in approval rates do not necessarily mean that decisions were inaccurate, as they could be attributed to actual differences among claims and their levels of evidence." A247. Moreover, different adjudicators reviewing the same evidence can make differing, but reasonable, judgments on the meaning of that evidence.

receive care and treatment for psychological trauma associated with MST. As petitioners acknowledged in their rulemaking request, VA "screens all veterans for MST and offers free healthcare," without regard to service connected status. A308. Even in cases where a claimant might not qualify for monetary benefits under § 3.304(f)(5), VA is otherwise authorized to provide treatment and counseling to overcome psychological trauma resulting from "a physical assault of a sexual nature, battery of a sexual nature, or sexual harassment." *See* 38 U.S.C. § 1720D(a)(1); Veterans Health Admin. Directive 2010-033, ¶ 2.b (Jul. 14, 2010) (stating that veterans "do not need to have filed a disability claim, be service connected, or provide evidence of the sexual trauma to receive MST-related care").

The Secretary has decided against eliminating the corroborating evidence requirement in MST-related PTSD claims. This decision does not indicate his "refus[al] to care for MST survivors," Pet. Br. at 27, but reflects a reasoned balance between the statutory requirement to ensure that claimed stressors are consistent with the places, types, and circumstances of a veteran's service, and the unique challenges that MST survivors face. This Court should uphold the Secretary's denial under the APA.

III. The Secretary's Denial Of Petitioners' Rulemaking Request Does Not Violate The Equal Protection Component Of The Fifth Amendment

The Secretary's decision denying petitioners' rulemaking request raises no constitutional concerns. As an initial matter, petitioners may not attack the

constitutionality or validity of current § 3.304(f)(5) in this suit challenging the Secretary's determination not to engage in rulemaking. *See Preminger*, 632 F.3d at 1350, 1352-53. In any event, § 3.304(f)(5) is plainly constitutional.

Petitioners' suggestion that § 3.304(f)(5) violates Equal Protection by discriminating along gender lines cannot be squared with either long-standing equal protection principles or petitioners' own arguments. A facially neutral provision – one that does not implicate a classification such as race, national origin, or sex – is constitutional so long as it has some rational basis. *Heller v. Doe*, 509 U.S. 312, 319-20 (1993).

Petitioners appear to concede that § 3.304(f)(5) is facially neutral. *See* Pet. Br. at 38 (setting forth standard of review for facially neutral regulation). On its face, the regulation says nothing about the gender of any claimant. Nonetheless, petitioners contend that rational basis review does not apply. They do not make this claim based upon any allegedly disparate impact between men and women because they cannot; it is "well established" that facially neutral classifications are not subject to heightened scrutiny merely because they have a disparate impact on men and women. *Totes-Isotoner Corp. v. United States*, 594 F.3d 1346, 1356 (Fed. Cir. 2010); *see also Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 271-272 (1993); *Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 273-75 (1979).

Rather, petitioners make the rather startling assertion that the Secretary has *intentionally* discriminated against women because § 3.304(f)(5) was "'motivated by discriminatory animus and its application results in discriminatory effect.'" Pet. Br. at 38 (quoting *Berkley v. United States*, 287 F.3d 1076, 1084 (Fed. Cir. 2002)); *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 264-65 (1977). Discriminatory animus, or intent, "implies more than mere awareness of consequences – it implies that [VA promulgated § 3.304(f)(5)] 'because of, not merely in spite of, [its] adverse effects upon an identifiable group.'" *Rack Room Shoes v. United States*, 718 F.3d 1370, 1376 (Fed. Cir. 2013) (quoting *Feeney*, 442 U.S. at 279). Petitioners bear the burden of demonstrating discriminatory intent. *Vill. of Arlington Heights*, 429 U.S. at 265.

Petitioners fail to carry this burden. Indeed, petitioners themselves do not consistently argue that VA discriminates against women, but allege that it also discriminates against men. *See, e.g.,* Pet. Br. at 11 ("disparity" in grant rates for MST-related PTSD "was especially high for men"); *id.* at 30 (men's "claims are denied at higher rates than" women's); *id.* (asserting a "disparate impact on both men and women"); Pet. for Rev. at 6, Docket No. 1 ("VA's denial of the rulemaking petition also discriminates against men, whose MST-related claims VA denied even more often than claims submitted by women veterans.").

Petitioners' own observations are thus sufficient to deny their equal protection challenge. When a regulation "disadvantages both men and women, then an inference of discriminatory purpose is not permitted."[16] *Ricketts v. City of Columbia, Mo.*, 36 F.3d 775, 781 (8th Cir. 1994).

Petitioners' remaining assertions simply repeat arguments made in connection with their APA challenge, and do not demonstrate discriminatory intent or effect. Section 3.304(f)(5) does not "create[] a higher evidentiary burden on servicewomen," Pet. Br. at 40, but plainly imposes the exact same burden on male and female claimants. That women might bring more MST-related claims does not require heightened scrutiny nor demonstrate intentional discrimination on the part of VA. *See Feeney*, 442 U.S. at 273-74 (applying rational basis review to facially neutral veterans' preference statute despite adverse effect on women that resulted from fact that "over 98 [percent] of the veterans . . . were male"); *Washington v. Davis*, 426 U.S. 229, 242 (1976) ("[W]e have not held that a law, neutral on its face and serving ends otherwise within the power of government to pursue, is invalid under the Equal Protection Clause simply because it may affect a greater

[16] Petitioners fail to cite any authority for the proposition that a regulation that discriminates against both men and women is constitutionally deficient. Of course, a law might discriminate against both men and women in *different ways*, *see, e.g, Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980), but § 3.304(f)(5) does not distinguish between claimants based upon sex.

proportion of one race than of another.").[17] Facially neutral § 3.304(f)(5) is constitutional.

Likewise, the Secretary's distinction between PTSD claims based upon in-service personal assault and those based upon other in-service stressors – and his decision not to revisit that distinction at this time – is constitutional. The rational basis standard requires only that there be "a rational relationship between the [challenged Government action] and some legitimate governmental purpose." *Heller*, 509 U.S. at 320. There is a "strong presumption of validity" and the classification must be sustained if "there is any reasonably conceivable state of facts" that would support it. *Id.*

Again faltering on their own arguments, petitioners fail to establish an Equal Protection violation. Petitioners do not object to VA's decision to treat veterans with MST-related PTSD claims as "a distinct class" separate from all other veterans with service-connected PTSD. Pet. Br. at 49. Petitioners would appear to endorse treating veterans with MST-related PTSD differently (more leniently) than all other PTSD claimants. Petitioners' real challenge is to VA's decision to treat

[17] Contrary to petitioners' suggestion, Pet. Br. at 42 n.6, the Supreme Court in *Dothard v. Rawlinson*, did not find purposeful discriminatory motive on the basis that an employment statute affected 41 percent of women and less than one percent of men. 433 U.S. 321, 328-30 (1977). "The gist of the claim [in *Dothard*] . . . d[id] not involve an assertion of purposeful discriminatory motive." *Id.* at 328. Rather, the Court affirmed the finding that the disparate impact of the challenged law established a prima facie case of a Title VII violation under the burden-shifting framework applicable to such claims. *See id.* at 330.

MST-based PTSD claims differently from claims based upon combat with the enemy, prisoner-of-war experience, an in-service diagnosis of PTSD, and fear of hostile military or terrorist activity.

As demonstrated above, VA's differentiation between these claims is more nuanced than petitioners would have this Court believe, and is wholly rational. Applying the statutory "places, types, and circumstances" requirement to MST-related claims raises challenges not applicable to other PTSD claims because MST can occur at any place, at any time, and to anyone. This non-arbitrary distinction, not gender discrimination or bias against MST victims, explains the differences between sub-sections of § 3.304(f).

Finally, overlooking statutory compliance as a "legitimate government interest," petitioners suggest that the "only plausible objectives" for the Secretary's denial are the preservation of resources or prevention of fraud. Pet. Br. at 45. The Secretary did not identify either of these objectives in his decision denying petitioners' claim. *See* A4-7. But to the extent that the statutory requirement that regulations under which benefits are awarded require consideration of the "types, places, and circumstances" of service reflects a Congressional intent to prevent fraud, the Secretary's decision furthers that intent. Although petitioners contend that "fraudulent claims are not likely to be a problem," their arguments in support of this contention provide no comfort. Pet. Br. at 47.

Petitioners' leading argument is that "MST survivors face high costs to making fraudulent claims, such as professional fall-out, social alienation, and the likelihood of re-traumatization." *Id.* But claimants who file *fraudulent* MST claims, are not MST survivors and, therefore, these considerations will not stand as deterrents.

Second, petitioners suggest that fraud will be unlikely because the consequences for fraud are high. Pet. Br. at 47. To be sure, most claimants do not and will not commit fraud. But fraud has been found in connection with claims for VA benefits, despite the harsh penalties that apply.[18]

More specifically, the safeguards that are in place to minimize the risk of fraudulent claims for fear-related PTSD benefits, Pet. Br. at 48, do apply to MST-related claims. As VA explained with respect to its fear-based PTSD regulation, "[t]he reduced evidentiary standard provided by the rule is not applicable *solely* because a veteran reports that he or she experienced fear." 75 Fed. Reg. at 39,845 (emphasis added). By contrast, under petitioners' proposed rule, the reduced evidentiary standard for proving in-service incurrence of MST would apply solely because a veteran reports that he or she experienced MST. A342.

[18] *See, e.g., United States v. Swisher*, 771 F.3d 514, 518-19 (9th Cir. 2014)*; United States v. Hamilton*, 699 F.3d 356, 362 (4th Cir. 2012); *Roberts v. Shinseki*, 647 F.3d 1334, 1337-39 (Fed. Cir. 2011).

Finally, petitioners explain that, according to the Department of Defense, estimates for false reports of MST are similar to those for other felonies. Pet. Br. at 48; *see also* ACLU Br. at 11. From this, petitioners conclude that "[t]here is no reason to believe that fraudulent claims would be submitted to VA at a higher rate than to [the Department of Defense]." *Id.* But one reason is obvious. There are few incentives and, as the Secretary has recognized, significant barriers to reporting MST during military service. But VA compensation and related benefits clearly provide an incentive to submit a claim for service-connected benefits, and the unfortunate reality is that some of these claims will be fraudulent. This Court should hold that the Secretary had a rational basis for denying petitioners' rulemaking request.

CONCLUSION

For the foregoing reasons, this Court should deny petitioners' challenge to the Secretary's decision denying their rulemaking petition.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that, pursuant to Fed. R. App. Procedure 32(a)(7)(B), this brief complies with the type-volume limitation. This brief was prepared using Microsoft Word Times New Roman 14-point font. In making this certification, I have relied upon the word count function of the Microsoft Word processing system used to prepare this brief. According to the word count, this brief contains 9,911 words.

s/Allison Kidd-Miller
Allison Kidd-Miller
March 13, 2015

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 13th day of March, 2015, a copy of the foregoing "BRIEF FOR RESPONDENT" was filed electronically.

X This filing was served electronically to all parties by operation of the Court's electronic filing system.

___/s/Allison Kidd-Miller___

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