No. 14-7115

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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

– v. –

SECRETARY OF VETERANS' AFFAIRS,
Respondent.

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

PETITONERS' REPLY BRIEF

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CERTIFICATE OF INTEREST

Counsel for the Petitioners certifies the following:

1. The full name of every party or amicus represented by me is:
   Service Women's Action Network
   Vietnam Veterans of America

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

3. All parent corporations and any publicly held corporations that own 10 percent or more of the stock the party or amicus curiae represented by me are:
   None. No publicly-held corporation owns 10 percent or more of Service Women's Action Network or Vietnam Veterans of America.

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:
   Jerome N. Frank Legal Services Organization; Michael Wishnie, Supervising Attorney; Margaret Middleton, Supervising Attorney.

/s/ Michael J. Wishnie
April 20, 2015 Michael J. Wishnie

PRELIMINARY STATEMENT

Unable to defend its denial on the merits, the Department of Veterans Affairs (VA) devotes the majority of its brief to technical arguments instead of addressing its continued failure to meet the needs of military sexual trauma (MST) survivors. Despite this pretext, however, VA's brief concedes several points made by Petitioners Service Women's Action Network (SWAN) and Vietnam Veterans of America (VVA). VA does not dispute that the agency has adopted numerous presumptions in the past, including for post-traumatic stress disorder (PTSD) based on other stressors, *see* Resp't's Br. at 6-7; that MST is more closely correlated with PTSD than any other service-related stressor, including combat, *see id*. at 32; that grant rates for MST-related PTSD claims have historically lagged behind all other PTSD claims, *see id.* at 8; that there is a gap in the grant rates between men and women who apply for MST-related PTSD benefits, *see id*. at 13; nor that grant rates vary wildly from 14% to 88% depending on geographic location, *see id*. at 11, 24.

Instead, in violation of the Administrative Procedure Act (APA), VA disputes whether MST survivors deserve the same evidentiary accommodations as veterans suffering from fear-related PTSD. VA strains to find reasons to distinguish the law and history of the fear-related PTSD presumption from that of the proposed evidentiary accommodation. But neither the language nor the

legislative history of VA's substantive statute requires a "predicate historical fact," as VA argues. *See* 38 U.S.C. § 1154(a)(1). In fact, Congress intended the statute to *ease* evidentiary requirements as part of a general statutory scheme that favors veterans, *see infra* Part I.A.1, not to entrench obstacles. VA's denial flies in the face of congressional intent.

Moreover, VA did not include a "predicate historical fact" requirement in the fear-related PTSD presumption. *See id*. Nor was the medical research that supported the fear-related PTSD presumption any more robust than the research presented in the Petition for Rulemaking and Petitioners' brief. *See id.* The very report upon which VA relied for its fear-related PTSD presumption includes research on MST, demonstrating that the sole difference between the two is the stressor. VA only refuses to fix its discriminatory claims adjudication system for survivors of rape and sexual assault. This refusal is the height of arbitrariness.

VA's remaining arguments are also unavailing. First, VA's justifications for failing to address the drastic graphic disparities in its denial letter are inadequate. The agency attempts to deflect attention away from this failure by proposing a standard of unmitigated deference, relying on a concocted standard of review pulled from a Senate report rather than the applicable precedent. Finally, VA erroneously reframes Petitioners' request for a rulemaking *process* into a request for promulgation of *specific languag*e. Consequently, VA's denial is defective in

substance and does not provide reasonable grounds for denial.

At the same time, VA fundamentally misunderstands Petitioners' constitutional claim. VA overlooks the different forms of discrimination that its denial perpetrates against men and women, relying exclusively on the constitutionally impermissible purpose of reducing fraud. VA's unexplained departure from past practices and failure to give reasoned consideration for veterans seeking benefits for the sexual assault they endured in service is arbitrary and capricious under the APA and unconstitutional under the Fifth Amendment.

ARGUMENT

I. VA's Unreasoned Refusal to Undertake a Rulemaking Process for Survivors of MST Violates the APA

VA and its predecessors have responded to each major conflict of the twentieth and twenty-first centuries by promulgating presumptions that streamline the disability benefits application process for veterans—with one noteworthy exception. *See* Pet'rs' Br. at 6-7, 26-27. In an unexplained departure from past practice, VA refuses to acknowledge or explain why MST survivors suffering from PTSD, who are disproportionately women, must be held not only to a different evidentiary standard than their peers, but also to a standard that has proven to undermine consistent application.

Instead, VA resorts to dissecting the language of the rule proposed in the Petition for Rulemaking rather than engaging in reasoned consideration of the

facts: disparate grant rates, wide geographic variation, and the disproportionate impact on both men and women. The agency argues that the text of the proposed rule is inconsistent with the statute and past practice, *see* Resp't's Br. at 26-30, that its denial adequately explained why the proposed rule was deficient, *see id*. at 15, 21-22, and, regardless, that the agency should be subject to only cursory review, *see id.* at 16-19. Even if the verbatim text of the proposed rule offered by Petitioners were at issue here—which it is not, *see infra* Part I.B.2—VA's arguments are unavailing.

A. VA's Unexplained Departure from Its Consistent Use of Evidentiary Accommodations is Unreasoned

It is undisputed that VA has promulgated dozens of presumptions covering over 150 health outcomes throughout its history. Faced with this reality, the agency suggests both that its refusal to undertake a rulemaking procedure regarding MST claims is not a departure from past practice *and* that, if it is a departure, it is justified. *See* Resp't's Br. at 26-30.

1. VA Fails to Distinguish Its Fear-Related PTSD Presumption

The underlying justifications for adopting the fear-related PTSD regulations apply with equal force to the proposed MST presumption. *See* Pet'rs' Br. at 7-8. VA falsely suggests in its denial, and again in its brief, however, that the fear-related PTSD presumption met the statutory requirements because *deployment* is

the predicate historical fact.[1] *See* Resp't's Br. at 14. VA's suggestion is unfounded.

Neither the text nor purpose of VA's substantive statute require that MST be linked to a predicate historical fact before a rulemaking process is undertaken or a regulation can be promulgated. The plain language of VA's governing statute does not oblige regulations to include a "predicate historical fact" requirement. *See* 38 U.S.C. § 1154(a)(1)**.** Instead, the statute directs VA to promulgate rules that "in each case" give "due consideration" to the places, types, and circumstances of that veteran's service. *Id*. The statute does not suggest that giving "due consideration" in "each case" requires that a specific stressor be inextricably linked or unique to specific places, types, and circumstances of service. *See id.*

The language of the statute suggests only that within "each case" the stressor claimed must be internally consistent with the places, types, and circumstances of that veteran's service as demonstrated "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." *Id*.

In other words, the statute requires only consistency between a veteran's

[1] Attempting to fit a square peg in a round hole, VA suggests that the "places, types, and circumstances" requirement in the fear-related PTSD presumption, *see* 38 C.F.R. § 3.304(f)(3), is essentially a requirement that the veteran establish a predicate historical fact, *see* Resp't's Br. at 33. Merely including the statutory language in the text of the regulation does not create a requirement for the showing of a predicate historical fact.

account of her in-service injury and the military's own records, where they exist. The veteran does not need to establish any sort of predicate historical fact, such as deployment; rather, it is incumbent upon VA to review a veteran's application for internal consistency. *See, e.g.*, *McVeigh v. Shinseki*, No. 12-3067, 2014 WL 519265, at *3 (Vet. App. Feb. 11, 2014) (finding a veteran's claimed stressor on a Russian border was not "consistent with the places, types, and circumstances of [his] service" where his service records indicated that he was not stationed near a Russian border); *Simpson v. Shinseki*, No. 10-3206, 2012 WL 614567, at *3 (Vet. App. Feb. 28, 2012) (finding veteran's claimed stressor in Vietnam was not "consistent with the places, types, and circumstances of [his] service" where service records indicated that he served overseas in Europe).

The legislative history of 38 U.S.C. § 1154(a)(1) confirms that Congress did not require a predicate historical fact. Congress promulgated § 1154(a)(1) to ensure that determination of whether a disability was incurred in service is "a question of fact to be determined *upon the evidence in each individual case*. It is desired to overcome the adverse effect of a lack of official record of incurrence or aggravation of a disease or injury and treatment thereof." H.R. Rep. No. 77-1157, at 2 (1941) (emphasis added); S. Rep. No. 77-902, at 2 (1941) (same). Congress never intended to restrict the promulgation of presumptions to only those disabilities that flow from specific places, types, and circumstances of military

service, but only to ensure that "the evidence in each individual case" be internally consistent.

VA itself has said that deployment is not a necessary predicate historical fact for the fear-related PTSD presumption. As VA explained during the rulemaking process, the fear-related PTSD presumption extends to "domestic as well as foreign activity" and is "not limited to events or circumstances perpetrated by a foreign enemy." 75 Fed. Reg. 39,843, 39,844 (July 13, 2010). In fact, "the rule has no geographic requirement." *Id*. Contrary to VA's current claim, therefore, the fear-related PTSD presumption does not require veterans to demonstrate a showing of deployment or any other predicate historical fact. VA cannot now claim that a MST-related PTSD presumption requires a showing of a predicate historical fact when it previously did not require the same for other presumptions, including fear-related PTSD.

Even if the statute were ambiguous and VA's litigation position were reasonable—which they are not— this Court need not reach the question of whether MST is linked to any predicate historical facts. Where veterans' claims for benefits are concerned, ambiguous statutes should be construed in favor of the veteran. *See Brown v. Gardner,* 513 U.S. 115, 118 (1994) (holding that "interpretative doubt is to be resolved in the veteran's favor"); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 694 (Fed. Cir. 2000) (resolving "the ambiguity in

38 U.S.C. § 7111 [setting forth the clear and unmistakable error standard for review of benefit determinations] in favor of the veteran"). Accordingly, any ambiguity in § 1154(a)(1) should be resolved to require merely internal consistency with an individual applicant's military record. As such, VA's new and prohibitive interpretation of its substantive statute should be rejected. *See, e.g.*, *Price v. Stevedoring Servs. of Am., Inc*., 697 F.3d 820, 826 (9th Cir. 2012) (refusing to extend deference to a litigation position).

In a final effort to justify its failure to give due consideration to veterans with MST-related PTSD, VA suggests that, unlike an MST accommodation, the fear-related presumption was supported by the findings of an Institute of Medicine report "and other evidence connecting the type of stressor at issue with particular places, types, and circumstances of service." Resp't's Br. at 33. In so doing, VA hangs its hat on an IOM report that is marginally related to the fear-related PTSD regulation[2] and ignores numerous scientific studies that link military life with alarmingly high incidences of MST, *see* Pet'rs' Br. at 4-5, and additional findings that stressors specific to the military context exacerbate the debilitating PSTD symptoms of sexual assault survivors, *see* Public Health and Mental Health

[2] That the IOM report provides only moderate support for the fear-based PTSD regulation in no way undermines the validity of that regulation, which was properly promulgated through notice and comment rulemaking. The statute does not require scientific or medical findings to promulgate presumptions. *See* 38 U.S.C. § 1154(a)(1).

Specialist Br. 6-11, ECF No. 55 [hereinafter "Mental Health Br."].

The Institute of Medicine Report upon which the fear-related regulation is allegedly based, *see* Resp't's Br. at 14, does not detail original research related to fear of hostile military or terrorist activity. *See* 6 Inst. of Med., *Gulf War and Health, Physiologic, Psychologic, and Psychosocial Effects of Deployment-Related Stress* (2008) [hereinafter "2008 IOM Deployment-Related Stress Report"]. The report merely aggregates and outlines primary and secondary studies of the medical and psychiatric effects of *deployment* to a war zone. *See id.* at 1 ("[T]he Department of Veterans Affairs (VA) requested that IOM comprehensively review, evaluate, and summarize the peer-reviewed scientific and medical literature regarding the association between deployment-related stress and long-term adverse health effects in Gulf War veterans."). As previously mentioned, however, the fear-related PTSD regulation is not limited to veterans who have deployed to a war zone. *See supra* Part I.A.1, at 7.

Even if the 2008 IOM Deployment-Related Stress Report was critical to VA's decision to promulgate a rulemaking on fear-related PTSD, the contents of the report demonstrate that the fear-based PTSD rule cannot be distinguished from the proposed MST-based PTSD rule on the basis of IOM findings. The more than 300-page IOM report exhaustively catalogues the health effects of *deployment*, such as cancer, endocrine diseases, psychiatric disorders, chronic fatigue

syndrome, respiratory disorders, and skin disorders. *See* 2008 IOM Deployment-Related Stress Report, at 115-261. But the report provides little information about fear responses to stressors, much less scientific support linking specific stressors to various types, places, and circumstances of service. *See id.* at xvii (discussing IOM's purpose to "evaluat[e] the scientific literature regarding an association between *deployment-related stressors and health effects*," not to connect the type of stressor at issue with particular places, types, or circumstances). Moreover, as the report acknowledges, its general exploration of the health effects of deployment was limited by the lack of scientific studies directly on point. *See id.* at 5, 28.

The IOM Report does, however, discuss military sexual harassment and assault as a stressor. Like numerous other studies indicating the prevalence of MST within the military, the report acknowledges that MST for women, in and of itself, is consistent with military service and even more likely to occur within the theatre of war. *See id.* at 37-38. That conclusion is exhaustively supported by other research, which IOM itself has similarly aggregated and reviewed for VA's benefit. *See* Inst. of Med., *Returning Home From Iraq and Afghanistan: Assessment of Readjustment Needs of Veterans, Service Members, and Their Families* 73-74, 111-120 (2013); Pet'rs' Br. at 4-5. As such, VA's failure to provide an adequate explanation for distinguishing MST-related PTSD from fear-

based PTSD renders the denial arbitrary and capricious in violation of the APA.

2. VA Fails to Address the Wide Geographic Disparity in Its Grant Rates

In violation of the APA's requirement that agencies give reasoned consideration to all relevant factors, VA's denial ignores the geographic lottery plaguing MST survivors seeking benefits. VA itself now acknowledges its failure to address geographic variation, *see* Resp't's Br. at 24-25, but has yet to explain why a presumption is an appropriate way to resolve inconsistent application of claims for other PTSD claims, *see* 74 Fed. Reg. 42,617, 42,618 (Aug. 24, 2009) (explaining that "consistent decision-making[] and equitable resolution of PTSD claims are the intended results of the [fear-related PTSD presumption]"), but *not* PTSD claims based on sexual trauma. This failure is the very type of arbitrary agency action the APA protects against.

Nevertheless, VA asks this Court to overlook its failure because "the record contains evidence acknowledging the differences in grant rates between regional offices" and VA has begun training efforts to address problems in claim adjudications, including grant-rate disparities between offices. Resp't's Br. at 24. Neither argument excuses VA from its duty to consider relevant factors.

VA attempts to minimize the significance of the geographic disparities by noting that other types of claims suffer from geographic inconsistencies as well. *See id.* at 25. That VA's claims adjudication process is wildly inconsistent across

geographic offices for *other* types of claims does not exempt the agency from the obligation to address this argument in the instant rulemaking petition.

VA also trumpets its training initiatives. *See id.* at 7-12. But reliance on such training is inadequate for three reasons. First, while VA cites a modest increase in grant rates since training efforts began in 2010, a significant gap still exists. *See* Pet'rs' Br. at 11. In fact, the grant rates for MST-related PTSD *declined* in 2013, a fact that VA buries in a footnote. *See* Resp't's Br. at 11, n.5. Second, as demonstrated in Petitioner's opening brief, VA training has had no impact on the wild geographic variation in its adjudication of MST-related PTSD claimants. *See* Pet'rs' Br. at 16. The geographic disparity has only worsened. *Compare* A202-03 (finding that grant rates across VA regional offices ranged from 25.8% to 87.5% in fiscal year 2012) *with* A234 (finding that grant rates across VA regional offices ranged from 14% to 88% in fiscal year 2013).

Finally, neither Petitioners nor this Court have had the opportunity to test VA's assertions with respect to its training methods. Absent discovery, this Court lacks the ability to determine the frequency, efficacy, or even the existence of such training.[3] This is particularly troubling given the strong reasons to doubt VA's

[3] The Court may permit Petitioners to test the validity of these assertions by appointing a special master to "hold hearings, if necessary, and to recommend factual findings and disposition in matters ancillary to proceedings in the court." Fed. R. App. P. 48; 28 U.S.C. § 2347(b).

record keeping. *See* U.S. Gov't Accountability Office, GAO-14-477, *Military Sexual Trauma*, at A217 (2014) (noting need for improvement in VA data-collection and analysis); *see also* Richard A. Oppel, Jr. & Michael D. Shear, *Severe Report Finds V.A. Hid Waiting Lists at Hospitals,* N.Y. TIMES, May 28, 2014 (describing VA's criminal falsification of records).[4]

Failure to address the wide geographic disparity is an especially egregious violation of the APA given the special needs and vulnerabilities of MST survivors. Where an "agency has not considered all relevant factors . . . the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985).

B. VA Misstates the Standard of Review for an Agency Refusal to Initiate Rulemaking

VA misstates the standard of review in three ways. First, VA asks the Court to apply a "daunting" standard that is required by neither the APA nor the case law and runs counter to the congressional intent underlying veterans benefit laws. *See* Resp't's Br. at 3, 15, 18, 20. Second, VA misapplies that incorrect standard to the language of Petitioners' proposed *rule* and not the rulemaking *process* that

[4] VA suggests that the position of Petitioner VVA in this suit is inconsistent with its 2000 comments regarding VA's notice of proposed rulemaking. Resp't's Br. at 34-35. VVA's position has understandably changed given the gross discrimination and inconsistency perpetuated by VA over the last fifteen years in its adjudication of MST claims.

Petitioners' sought. Resp't's Br. at 3, 20. Finally, VA's denial does not meet the APA's "brief statement" requirement.

1. The Arbitrary and Capricious Standard Applies to VA's Refusal

Petitioners' brief establishes that agency actions, including refusals to initiate rulemaking, are evaluated under the arbitrary and capricious standard. *See* Pet'rs' Br. at 21; 5 U.S.C. § 706(a)(2). VA is wrong to contend otherwise.[5]

A court will overturn a refusal to initiate rulemaking when, as here, it is "arbitrary and capricious." *See, e.g.*, *Horne v. U.S. Dep't of Agric.*, 494 F. App'x 774 (9th Cir. 2012) (holding that the USDA failed to provide petitioners with sufficiently reasoned explanation for its refusal to initiate rulemaking); *Am. Horse Prot. Ass'n v. Lyng,* 812 F.2d 1, 7 (D.C. Cir. 1987) (remanding to institute rulemaking proceedings where Secretary of Agriculture had "not presented a reasonable explanation of his failure to grant the rulemaking petition of the Association, particularly in light of [the agency's own study]"); *Shays v. Fed.*

[5] Despite VA's attempts to paint such denials as effectively unreviewable, Resp. Br. at 16-20, *Massachusetts v. EPA* stands for the proposition that denials of petitions for rulemaking *are* subject to judicial review, clearly distinguishing refusals to initiate rulemaking from presumptively unreviewable enforcement decisions, 549 U.S. 497, 527-28 (2007). Agency refusals to initiate rulemakings "arise out of denials of petitions for rulemaking which . . . the affected party had an undoubted procedural right to file in the first instance." *Id.* at 527-28. This Court has confirmed the availability of judicial review of denials of requests for rulemaking by the Secretary of VA. *See Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353 (Fed. Cir. 2011).

Election Comm'n, 424 F. Supp. 2d 100, 117 (D.D.C. 2006) (remanding to FCC to explain its decision or institute a new rulemaking).

There is only one arbitrary and capricious test, which is, at its core, an inquiry about whether the agency's decision is reasonable. *See, e.g.*, *Massachusetts*, 549 U.S. at 527-28 (rejecting EPA denial of petition for rulemaking as arbitrary and capricious after explaining that review of agency refusals to initiate rulemakings are "highly deferential, [but] discretion is at its height when the agency decides not to bring an enforcement action."); *Am. Horse Prot. Ass'n,* 812 F.2d at 4-5, 7 (holding that the agency had not presented a "reasonable explanation of [its] failure to grant the rulemaking petition," after stating that "[r]eview under the 'arbitrary and capricious' tag line . . .encompasses a range of levels of deference to the agency . . . .").[6]

Moreover, Congress has directed—as courts have repeatedly acknowledged—VA to act in the best interests of veterans whenever possible. *See, e.g.*, 38 U.S.C. § 5107(b) (directing that "the Secretary shall give the benefit of the

[6] Nothing in the case law suggests that parties face a "daunting burden" when they challenge agency denials of rulemaking petitions. VA invents a standard that does not exist, ignoring that the Report from which it pulls the term supported the *expansion* of judicial review of VA rulemaking—the *opposite* of what VA asks the Court to do here. S. Rep. 110-449, at 14 (2008); *see* Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, 4148 (2008) (removing from 38 U.S.C. § 502 the prior ban on judicial review of ratings schedules promulgated by the VA).

doubt to the claimant" when reviewing claims); 38 U.S.C. § 5108 (requiring the Secretary to reopen disallowed claims when new evidence surfaces); 38 U.S.C. § 5103A (outlining Secretary's duty to assist claimant in obtaining evidence for a claim); *see also Brown v. Gardner,* 513 U.S. 115, 118 (1994) (holding that ambiguous statutes should be construed in favor of the veteran); *United States v. Oregon*, 366 U.S. 643, 647 (1961) (recognizing that "[t]he solicitude of Congress for veterans is long standing"); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."); *Trilles v. West*, 13 Vet. App. 314, 325-26 (2000) (discussing "the pro-claimant environment created by the general VA statutory scheme"). In the context of VA's refusal to correct rules that discriminate against veterans, courts should be wary of agency abdication of Congress's specific mandate to VA to assist veterans in securing the benefits they have earned through their service.[7] Under the proper standard and in light of this Congressional mandate, VA's denial of Petitioners' request for a rulemaking process is arbitrary and capricious.

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[7] *Preminger*, the only case in which this Court has reviewed the VA Secretary's denial of a rulemaking petition, did not give the Court reason to explore these congressional directives because Mr. Preminger, chairman of a local political organization, sought amendment to a rule governing the conduct of visitors to property under VA control, thereby preventing him from conducting voter registration. 632 F.3d at 1347. Mr. Preminger was not himself a veteran and therefore benefits and service connection were not at issue.

2. In Denying Petitioners' Proposed *Rule,* VA Misconstrues Its Duty to Respond to a Request for a Rulemaking *Process*

VA confuses the question before this Court by focusing on the verbatim *text* of the rule Petitioners offered for illustrative purposes, instead of responding to their request to commence a rulemaking *process* to improve the adjudication of MST-related PTSD claims. *See* Resp't's Br. at 3, 31-33. *But see* National Veterans Legal Services Program Br. 20, ECF No. 48 [hereinafter "NVLSP Br."] (arguing that VA erred by "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*") (emphasis added). Since VA's denial and corresponding brief attempt to answer a question Petitioners' did not ask, the agency's arguments are unresponsive to the Petition for Rulemaking and its denial should be reversed.

Petitions for rulemaking call for the agency to begin a *process*—not necessarily to reach a specific result. To undertake a rulemaking procedure, agencies follow a well-established process: first, they publish a notice of proposed rulemaking in the Federal Register; second, they must afford interested persons the opportunity to comment on the proposed rule; and third, if warranted, they may issue a final rule, often after publishing another notice of proposed rulemaking with more finalized language. *See* 5 U.S.C. § 553.

The APA requires agencies to afford every "interested person the right to

petition for the issuance, amendment, or repeal of a rule." *Id.* § 553(e). The right to petition does not displace the procedural requirements of rulemaking, including notice and comment. *See Joseph v. U.S. Civil Serv. Comm'n*, 554 F.2d 1140, 1146 n.10 (D.C. Cir. 1977) (holding that the right to petition under §553(e) "is not a substitute for, or an alternative to, compliance with" the other requirements for rulemaking under § 553); *Wagner Elec. Corp. v. Volpe*, 466 F.2d 1013, 1020 (3d Cir. 1972) (same); *cf. Alabama Envtl. Council v. Adm'r, U.S. E.P.A.*, 711 F.3d 1277, 1286 n.8 (11th Cir. 2013) (holding that because the APA does "not limit or repeal additional requirements imposed by statute or otherwise recognized by law," authorizing citizen petitions "does not displace the procedural requirements [of rulemaking]"). Thus, petitions for rulemaking seek a *process* to which they are legally entitled, not a specific result.

SWAN and VVA petitioned VA to initiate a rulemaking *process* to address the inadequacy of the regulations that currently govern MST-related PTSD claim adjudication. The Petition for Rulemaking requests that VA "initiate a rulemaking proceeding pursuant to Administrative Procedure Act, 5 U.S.C. § 553" and proposed an amended rule to that end. A301. Petitioners' goal, restated in their opening brief, has always been for the agency to exercise its rulemaking authority by undergoing the routine notice and comment procedures prescribed by 5 U.S.C. § 553. *See* Pet'rs' Br. at 50 (requesting "that the Court hold VA's denial unlawful

and reverse the agency's decision . . . . [or, i]n the alternative, . . . that the Court vacate and remand the decision to VA to provide reasoned explanation or to institute a new rulemaking"); *see also* NVLSP Br. at 20 ("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."). The regulatory amendment proposed by Petitioners was but one possible solution, serving to illustrate the flaws in the current system.

Finally, despite VA's assertion to the contrary, *see* Resp't's Br. at 3, 20, 33, Petitioners have never sought to read the requirement that the Secretary consider "places, types, and circumstances" out of the law*, see supra* Part I.A.1. In fact, Petitioners have no objection to a rule that itself includes the "places, types, and circumstances" language of the statute, similar to how it exists in the regulation governing fear-related PTSD. *See* 38 C.F.R. § 3.304(f)(3). Petitioners simply implored, and now request this Court to compel, VA to start the *process* of seriously evaluating the flawed regulatory scheme that has erected substantial and discriminatory obstacles that uniquely target MST survivors seeking benefits for PTSD. *See infra* Part II.

Responding to the Petition's request to initiate a rulemaking procedure regarding MST claim adjudications by quibbling with the proposed language is neither responsive nor reasoned and cannot justify the VA's denial in this case.

3. VA's Unreasoned Denial Violates the APA's "Brief Statement" Requirement

VA's denial letter also violates the APA's requirement that an agency provide "a brief statement of the grounds for denial." 5 U.S.C. § 555(e). The "brief statement" provision requires agencies to provide a statement "of 'reasoning'; it must not be just a 'conclusion'; it must 'articulate a satisfactory explanation' for its action." *SecurityPoint Holdings, Inc. v. Transp. Sec. Admin*., 769 F.3d 1184, 1187-88 (D.C. Cir. 2014) (quoting *Butte Cnty., Cal. v. Hogen,* 613 F.3d 190, 194 (D.C. Cir. 2010)). "The core requirement is that the agency explain why it chose to do what it did." *Tourus Records, Inc. v. Drug Enforcement Admin*., 259 F.3d 731, 737 (D.C. Cir. 2001). The cases VA cites to emphasize the brevity of denials found arbitrary are unavailing. VA's denial is defective for its inaccurate and misleading content rather than its length.

In an attempt to distract the Court from its lack of a reasoned explanation for denying survivors of sexual assault the evidentiary accommodations other veterans enjoy, VA focuses on the length of its response. *See* Resp't's Br. at 20-22. As an initial matter, however, courts have invalidated denials of various lengths. *See, e.g.*, *Horne*, 494 F. App'x at 776 (holding that a one-page denial of a rulemaking petition failed to provide reasoned explanation); *Ark Initiative v. Tidwell*, 895 F. Supp. 2d 230, 242 (D.D.C. 2012) (collecting cases where D.C. Circuit has invalidated statements of a single sentence).

Moreover, VA ignores the settled principle that an agency denial founded upon a misunderstanding of the facts or law, or one that fails to address important factors, violates 5 U.S.C. § 555(e). *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 658 (2007) (finding fatal defects where an agency "entirely failed to consider an important aspect of the problem").[8] VA's decision is defective on both counts. First, the stated rationale is based on a false distinction between the fear-related PTSD rule and the proposed MST-related PTSD rule that it claims put the amendments Petitioners request outside of VA's statutory authority. *See supra* Part I.A.1. Second, it fails to acknowledge that its vaunted training has not cured the geographic lottery that sexual assault survivors confront. *See supra* Part I.A.2. For both of these reasons, the substance of the denial cannot be considered reasoned and is therefore arbitrary and capricious.

II. VA's Discrimination Against MST Survivors Violates Equal Protection

VA's denial fails both heightened scrutiny and rational basis review. *See* Petr. Br. at 37-50. In its response, VA's brief fails to establish a rational, much less an exceedingly persuasive justification for its denial. Instead, VA's unjustified

[8] The cases VA cites do not alter the general rule that courts primarily rely on the language of the denial itself. Resp't's Br. at 23. In *Butte Cnty.*, after finding that the Secretary's denial violated the brief statement rule of § 553(e), the Court considered other documents that allegedly "supplied the missing reasoning" and *still* set aside the agency's decision. 613 F.3d at 195-96. Moreover, *Friends of the Bow v. Thompson* was explicitly limited to the environmental context in which agency decisions are "made against a backdrop of extensive documentation due to the NEPA requirements." 124 F.3d 1210, 1220 (10th Cir. 1997).

concerns about fraudulent claims reveal the discriminatory motive underlying its denial.[9]

A. VA's Distinct Discrimination Against Male and Female MST Survivors Does Not Survive Heightened Scrutiny

VA claims that when a regulation "disadvantages both men and women, then an inference of discriminatory purpose is not permitted." Resp't's Br. at 40. This is false, as VA itself acknowledges, because official action can unconstitutionally discriminate against both men and women in different ways. *See* Resp't's Br. at 40 n.16 (citing *Wengler v. Druggists Mut. Ins. Co.*, 446 U.S. 142 (1980)). VA's denial of the rulemaking petition does just that.

As Petitioners have explained, VA uniquely discriminates against women through the disproportionate impact the regulation has on the claims of female veterans. *See* Pet'rs' Br. at 4-5. VA does not dispute that servicewomen are disproportionately burdened by the high evidentiary standards VA has imposed for

[9] VA also argues—incorrectly—that Petitioners are precluded from bringing their constitutional claim. Resp't Br. at 37-38. Petitioners do not attack the "constitutionality or validity of current § 3.304(f)(5) in this suit," a regulation adopted *in 2002*. Resp't Br. at 38. Petitioners instead challenge the constitutionality of VA's refusal *in 2014* to initiate a rulemaking, in light of such severe, uncontested discrimination in the adjudication of MST-related PTSD claims. *See* Pet'rs' Br. at 37-50. The portions of *Preminger* to which VA refers do not stand for the proposition that a party "may not attack the constitutionality or validity of current § 3.304(f)(5)." Resp't Br. at 37-38. Rather, that case merely reiterates the statute of limitations for challenging a newly promulgated rule. *Preminger*, 632 F.3d at 1352-53 ("[A]n action for judicial review under § 502 'must be filed with the clerk within 60 days . . . .'").

MST-related PTSD claims. *See* Resp't's Br. at 40. Nor does VA contest that because women are more likely than men to become victims of MST, women are uniquely affected by the denial of the petition.

Meanwhile, the failure to engage in a rulemaking process discriminates against men—a fact VA also does not dispute—in a discrete and different way. In 2013, VA granted 55% of MST-related PTSD claims made by former servicewomen, but only 42% of such claims made by male veterans *See* Pet'rs' Br. at 30. Male sexual assault survivors have consistently faced unique burdens from reporting in large part because of the deeply engrained stigma about what it means to be a survivor of sexual violence. *See* Nat'l Defense Research Inst., *Sexual Assault and Sexual Harassment in the U.S. Military: Top-Line Estimates for Active-Duty Service Members from the 2014 RAND Military Workplace Study*, Dep't of Defense 21 (2014) (finding that 32% of men reported professional retaliation; 53% reported social retaliation; 35% reported adverse actions; and 11% reported punishments after reporting their trauma).[10]

VA's suggestion that Petitioners fail to demonstrate discrimination by

[10] This discrimination is particularly acute given historic exclusion of men from MST-related protections. For instance, when Congress authorized VA to provide counseling services to female veterans struggling with the psychological trauma caused by sexual assault, it took two years of lobbying efforts and public awareness campaigns to extend these services to men. *See* Veterans Health Programs Extension Act of 1994, Pub. L. No. 103-452, § 101, 108 Stat. 4783, 4784 (1994) (amending statute by replacing "women" with "individuals").

claiming merely that "women might bring more MST-related claims," Resp't's Br. at 40, ignores the extensive discrepancies in adjudications for sexual assault survivors detailed at length in the opening brief, *see* Pet'rs' Br. at 31-34, including the wide disparities in grant rates between regional offices, *see supra* Part I.A.2. Petitioners have established, and VA does not dispute, the unique and discriminatory burdens male and female MST survivors face, such that the denial of the rulemaking gives rise to claims of intentional discrimination subject to, and failing, heightened review.

B. VA's Fixation on Potential MST Claims Fraud is Irrational

Petitioners have also demonstrated that there is no rational basis for VA's refusal to undertake the proposed rulemaking process. *See* Pet'rs' Br. at 44-50. In response, VA neglects to provide any legitimate government interest for VA's action. Rather, VA insists that if it adopted a presumption, "some of [the] claims will be fraudulent" and incorrectly asserts that a presumption would be inconsistent with the governing statute. Resp't's Br. at 42-44. These explanations fail rational basis review.

First, VA has failed to establish that fraud is a meaningful concern, especially given that the potential for fraud has not prevented VA from properly adopting more than a dozen other presumptions covering over 150 health outcomes. *See* Pet'rs' Br. at 47-48; 38 C.F.R. § 3.301-3.309. In its brief, VA even

notes that it has the capacity to establish safeguards to minimize the risk of fraudulent claims, as it has done for the fear-related PTSD presumption, but offers no reasons why such safeguards could not be implemented for MST claims. *See* Resp't's Br. at 43. In response to Petitioners' assertion that veterans are unlikely to file fraudulent MST-related claims because of the high professional and social costs they would face, VA maintains that "claimants who file *fraudulent* MST claims are not MST survivors and, therefore" will not be deterred by the above costs.[11]

VA fundamentally misses the point: any veteran, regardless of whether he or she has survived MST, would face severely damaging professional and social consequences merely by asserting such a claim. *See* A355-56. Even if a veteran were to file a fraudulent disability claim, the stigma associated with MST would deter a veteran from claiming he or she had been sexually assaulted. In fact, this stigma is significantly greater than that associated with filing a false claim under VA's many other presumptions. In the end, VA's brief illustrates its blindness to the legitimate barriers that discourage victims from reporting MST, including

[11] VA's stated concerns about fraudulent reports are based on pervasive gendered stereotypes and a belief that survivors are likely to make false rape accusations. *See* American Civil Liberties Union Br. 8, 11, ECF No. 45; Pet'rs' Br. at 47-48. Sex-based classifications rooted in stereotypes violate equal protection. *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 565 (1996).
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shame; fear of physical, professional, and social retaliation; and policies that have historically discouraged reporting. *See* Pet'rs' Br. at 9-10, 47-48; ACLU Br. at 12-13; Mental Health Br. 18. VA's reliance on fraud prevention as a justification for discriminatory treatment cannot stand.

Second, as explained *supra* Part I.A.1, the "places, types, and circumstances" statute that VA now claims bars a rulemaking process on MST claims does no such thing. VA's unusual departure in its brief from its longstanding interpretation of this statute is a litigation position to which no deference is due. *See Romer v. Evans*, 517 U.S. 620, 632-33 (1996) ("Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."). VA's statute simply requires internal consistency within a veteran's service records and his or her claim—a "predicate historical fact" need not demonstrate a specific place, type, or circumstance of service. *See supra* Part I.A.1.

Third, VA provides no justification for, and in fact does not dispute the existence of the wide variations in adjudication of MST claims across VA Regional Offices. *See supra* Part 1.A.2. Maintaining a system in which benefits adjudication depends more on a geographic lottery than on the merits of the claim is, by definition, irrational.

VA's failure to provide any rational justifications for it refusal to institute a

rulemaking process regarding MST-related PSTD claims given the existence of comparable presumptions for other hard-to-prove claims fails even rational basis review.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that the Court hold VA's denial of their rulemaking petition unlawful and reverse the agency's decision. In the alternative, Petitioners request that the Court vacate and remand the decision to VA to provide reasoned explanation or to institute a new rulemaking.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e).

□ The brief contains 6,511 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) or Federal Rule of Appellate Procedure 28.1(e) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

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

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PROOF OF SERVICE

I hereby certify under penalty of perjury, that on this 20th day of April, 2015, a copy of the foregoing PETITIONERS' REPLY BRIEF was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/ Michael J. Wishnie
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