UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF CONNECTICUT

CONLEY MONK, KEVIN MARRET, GEORGE SIDERS, JAMES COTTAM, JAMES DAVIS, VIETNAM VETERANS OF AMERICA, VIETNAM VETERANS OF AMERICA CONNECTICUT STATE COUNCIL, and NATIONAL VETERANS COUNCIL FOR LEGAL REDRESS, on behalf of themselves and all others similarly situated, Plaintiffs, v. RAY MABUS, Secretary of the Navy, JOHN McHUGH, Secretary of the Army, and DEBORAH LEE JAMES, Secretary of the Air Force, Defendants.	Civil No.: 3:14-cv-00260-WWE June 30, 2014

MEMORANDUM IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Plaintiffs respectfully move this Court to enter an Order certifying this case as a class action pursuant to Fed. R. Civ. P. 23. Named Plaintiffs Conley Monk, Kevin Marret, George Siders, James Cottam, and James Davis (collectively, "Named Plaintiffs"), and membership organization plaintiffs Vietnam Veterans of America, Vietnam Veterans of America Connecticut State Council, and National Veterans Council for Legal Redress (collectively, "Organizational Plaintiffs") have brought suit on behalf of themselves and the proposed class, seeking declaratory and injunctive relief for the violation of Plaintiffs' rights under the Administrative Procedure Act, the Fifth Amendment to the United States Constitution, and Section 504 of the Rehabilitation Act of 1973. For the reasons described herein, Plaintiffs' case is well suited for

class treatment and the proposed class meets all the requirements of Fed. R. Civ. P. 23. Plaintiffs therefore respectfully ask the Court to certify the proposed class in this matter.

I. INTRODUCTION AND SUMMARY

This case challenges the systematically unlawful manner in which the record correction boards of the Navy, Army, and Air Force adjudicate cases of Vietnam veterans who have received other-than-honorable ("OTH") discharges based on misconduct attributable to undiagnosed, service-related Post Traumatic Stress Disorder ("PTSD"). Because PTSD was not recognized by the medical community until 1980, well after the completion of the Vietnam War, many individuals who served in combat during the Vietnam War and developed PTSD have been discharged under other-than-honorable conditions due to an inability to perform their assigned military duties, not attributable at the time—but appropriately attributed today—to their medical condition.

Defendants, the Secretaries of the Navy, the Army, and the Air Force, have undertaken an unlawful course of conduct with respect to consideration of PTSD for veterans who served in the Vietnam War, resulting in the categorical denial of nearly every application by a Vietnam veteran with PTSD. *See* Rebecca Izzo, Comment, *In Need of Correction: How the Army Board for Correction of Military Records is Failing Veterans with PTSD*, 123 Yale L. J. 1587, 1592 (2014) ("the ABCMR's policies make it nearly impossible for a veteran with a bad discharge caused by undiagnosed PTSD to obtain a discharge upgrade").

Updating board review standards is necessary so that the boards may properly determine whether a discharge upgrade is necessary to "correct an error or remove an injustice," 10 U.S.C. § 1552(a), by taking into account how PTSD affected the abilities of Vietnam Era service members to perform their duties. The application of outdated and medically inappropriate review standards leads to simply absurd results, such as the denial of Vietnam veterans'

applications because their records did not show that they were diagnosed with PTSD before discharge, which was a medical impossibility before 1980. *See id.* at 1596 ("the ABCMR has repeatedly explained the denial of Vietnam veterans' applications by noting that their records did not show that they were *diagnosed* with PTSD before discharge. Such statements … fail to recognize, however, that it was medically impossible to have a PTSD diagnosis before 1980"). Named Plaintiffs, members of the Organizational Plaintiffs, and members of the proposed class have applied to have their discharge statuses upgraded by their respective branch's record correction board, yet the policies and procedures implemented by Defendants in managing these boards have made it nearly impossible for these individuals' applications to be given due consideration.

Other parts of the military have made progress in recent years to recognize that PTSD is a wound of war, including discharge protections for service members who may have PTSD. Yet the Vietnam generation continues to be denied the benefit of today's procedures, as the record correction boards have refused to extend the same medically appropriate consideration to Vietnam veterans that is extended to veterans of more recent wars. Plaintiffs' and proposed class members' other-than-honorable discharges attributable to PTSD have kept them from receiving disability compensation and other crucial benefits that they should have earned for their military service. By filing this case, the Named Plaintiffs seek simply to ensure that Defendants review the applications for discharge status upgrades with the same medically appropriate policies and procedures used for more recent and current veterans diagnosed with PTSD.

II. ARGUMENT

The Court should certify this case as a class action pursuant to Federal Rule of Civil Procedure 23(a) and (b)(2). Plaintiffs seek to certify a class of all Vietnam War veterans given other-than-honorable discharges, who have been diagnosed with PTSD attributable to their

service yet have not had their discharge statuses upgraded. The proposed class comprises tens of thousands of individuals, all of whom face the same unlawful treatment by the boards—*i.e.*, the boards' illegal and discriminatory treatment of claims for upgrades based on service-related PTSD. The proposed class representatives include five Vietnam Era veterans who applied for discharge upgrades and faced precisely the same unlawful practices that confront the rest of the class. The Organizational Plaintiffs count among their members many individuals who might qualify for a discharge upgrade but for the boards' illegal practices. Proposed class representatives will vigorously represent the interests of the class in seeking injunctive relief, which will remedy violations of law that impact the class as a whole.

Defendants' illegal conduct includes their refusal to apply medically appropriate standards and other protections—such as failure to hold in-person hearings, lengthy delays in considering applications, refusal to reconsider based on evidence of service-related PTSD diagnosis, and the lack of review by a person qualified to evaluate medical evidence. This conduct negatively affects the ability of Vietnam War veterans to have their discharge statuses upgraded wholesale; all members of the proposed class are currently being denied a fair and non-discriminatory review of their applications. The proposed class members' injuries derive from a unitary course of conduct by a centralized system supervised and controlled by Defendants.

Because, as explained further below, all of the requirements for class certification under Rule 23(a) and 23(b)(2) are satisfied here, this Court should certify this case as a class action.

A. Summary of Applicable Standards

The decision to certify a class must occur "[a]t an early practicable time after a person sues or is sued as a class representative." Fed. R. Civ. P. 23(c)(1)(A). To be certified as a class action, Plaintiffs must satisfy the requirements of Rule 23(a). Rule 23(a) has four requirements: (1) "the class is so numerous that joinder of all members is impracticable," (2) "there are

questions of law or fact common to the class," (3) "the claims or defenses of the representative parties are typical of the claims or defenses of the class," and (4) "the representative parties will fairly and adequately protect the interests of the class." Fed. R. Civ. P. 23(a)(1)-(4).

Plaintiffs must also satisfy the requirements of one of the three types of class actions under Rule 23(b). *Brown v. Kelly*, 609 F.3d 467, 476 (2d Cir. 2010). A class action may be maintained pursuant to Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2).

When determining whether the requirements of Rule 23 have been met, "'[t]he Second Circuit has instructed district courts that Rule 23 is to be given a liberal rather than a restrictive interpretation.'" *Austen v. Catterton Partners V, LP*, 268 F.R.D. 146, 148 (D. Conn. 2010) (quoting *Cashman v. Dolce Int'l/Hartford, Inc.*, 225 F.R.D. 73, 90 (D. Conn. 2004)); *see Marisol A. v. Giuliani*, 126 F. 3d 372, 377 (2d Cir. 1997) (same). Additionally, "courts should consider the allegations in the complaint as true."[1] *Matyasovszky v. Hous. Auth.*, 226 F.R.D. 35, 39 (D. Conn. 2005) (*citing Shelter Realty Corp. v. Allied Maint. Corp.*, 574 F.2d 656, 661 n.15 (2d Cir. 1978)).

Courts have not hesitated to certify Rule 23 classes in suits challenging unlawful practices by military boards, including record correction boards. *See, e.g., Giles v. Sec. of the Army*, 627 F. 2d 554 (D.C. Cir. 1980) (certifying a class of enlisted Army personnel who had received other-than-honorable discharges on the basis of a compelled urinalysis); *Larinoff v.*

[1] The facts set forth in this memorandum are, except where noted and included in the accompanying declaration, those alleged in the Complaint. If, contrary to this Circuit's precedents, Defendants seek to challenge the evidentiary basis for Plaintiffs' arguments in this memorandum, Plaintiffs may seek an order from this Court to compel Defendants to provide expedited discovery focused solely on facts relevant to class certification. Information regarding the number and identities of Vietnam veterans with PTSD who have applied for discharge status upgrades, as well as that regarding the medical standards, if any, applied by Defendants in considering such applications, is within Defendants' exclusive control and is not otherwise available to Plaintiffs.

United States, 365 F. Supp. 140 (D.D.C. 1973) (certifying a class of Navy personnel claiming entitlement to a reenlistment bonus despite the Navy's argument that the case should be before the BCNR); *see also Sabo v. United States*, 102 Fed. Cl. 619 (2011) (certifying a class of service members challenging determinations by the military's Physical Evaluation Boards that they were unfit to serve due to PTSD); *Berkeley v. United States*, 287 F.3d 1976 (Fed. Cir. 2002) (certifying a class of junior officers challenging a decision of the Air Force Reduction in Funding (RIF) Board under the Equal Protection Clause); *Christensen v. United States*, 49 Fed. Cl. 619 (2001) (certifying a class of officers challenging their forced retirement by the Air Force Early Retirement Board).

As discussed below, because Plaintiffs satisfy the requirements of Rule 23(a), and class certification is appropriate under Rule 23(b)(2), Plaintiffs' motion for class certification should be granted.

B. Proposed Class Definitions

An order certifying a class action must define the class. *See* Fed. R. Civ. P. 23(c)(1)(B). Plaintiffs' proposed class consists of the following:

> all veterans of the Vietnam War Era who served in the Vietnam Theater as part of any of the four service branches (Army, Navy, Air Force, and Marine Corps) and
>
> (a) were discharged under other-than-honorable conditions (also referred to as an undesirable discharge);
> (b) have not received discharge upgrades to honorable or to general (affirmed under uniform standards); and
> (c) have been diagnosed with PTSD attributable to their military service.

Should the Court ultimately grant the injunctive and declaratory relief Plaintiffs seek, Defendants would be obligated to adopt suitable review procedures, including the application of medically appropriate standards, to their consideration of all applications for a discharge status

upgrade submitted by members of this class. The definition proposed by Plaintiffs thus defines the class of persons discriminated against by Defendants' actions.

C. Plaintiffs Satisfy the Criteria of Rule 23(a)

1. Numerosity

Plaintiffs meet the numerosity requirement of Rule 23(a)(1). To be maintained as a class action, the class must be "so numerous that joinder of all members is impracticable." Fed. R. Civ. P. 23(a)(1). This is the case here. The National Vietnam Veterans Readjustment Study estimates that 30.9% of Vietnam veterans have suffered from PTSD. Complt. ¶ 135; *see* Kohlmann Decl. ¶¶ 9-10. This number is based on outdated diagnostic standards; current standards would likely put the number even higher. Complt. ¶136. Approximately three percent of those who served during the Vietnam War Era, amounting to more than 260,000 veterans, received other-than-honorable discharges. Complt. ¶ 127. Thus, approximately one third or more of the Vietnam veterans who received an other-than-honorable discharge—tens of thousands of veterans—likely have PTSD. Complt. ¶ 137.

This estimate meets the numerosity requirement for class certification. *See Consol. Rail Corp. v. Town of Hyde Park*, 47 F.3d 473, 483 (2d Cir. 1995) (finding that "numerosity is presumed" when a putative class is greater than forty members); 1 *Newberg on Class Actions* at § 3:12 ("As a general guideline … a class of 40 or more members raises a presumption of impracticability of joinder based on numbers alone."); *see also* 1 *Newberg on Class Actions* at § 3:13 ("[A] good faith estimate of the class size is sufficient when the precise number of class members is not readily ascertainable."); *Robidoux v. Celani*, 987 F.2d 931, 935 (2d Cir. 1993) ("Courts have not required evidence of exact class size or identity of class members to satisfy the numerosity requirement.").

2. Commonality

Plaintiffs also satisfy the requirement that "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). "Commonality requires the plaintiff to demonstrate that the class members 'have suffered the same injury.'" *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011) (quoting *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 (1982)). "[F]or purposes of Rule 23(a)(2), [e]ven a single [common] question will do." *Id.* at 2556 (internal quotation marks omitted; first bracket added). The commonality requirement is satisfied if the question "is capable of classwide resolution—which means that determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke." *Id.* at 2551; *see, e.g.*, *Morrison v. Ocean State Jobbers, Inc.*, 290 F.R.D. 347, 354 (D. Conn. 2013) (finding commonality where "plaintiffs … identified a common contention capable of classwide resolution … central to the validity of [their] claim").

This case presents numerous common questions, such as:

a. Whether the Defendants have failed to utilize consistent and medically appropriate standards when assessing how PTSD affected proposed class members' abilities to perform their duties when considering whether to upgrade their discharge statuses (either upon application or the Defendants' own initiative), in violation of the Fifth Amendment, the Administrative Procedure Act, and Section 504 of the Rehabilitation Act of 1973;

b. Whether the Defendants have abused their discretion and acted arbitrarily and capriciously, in a manner unauthorized by law, by refusing to give appropriate consideration to proposed class members' allegations that their misconduct was the result of undiagnosed and untreated PTSD, and therefore failing to upgrade

proposed class members' discharge statuses, in violation of the Administrative Procedure Act;

c. Whether the Defendants' refusal and failure to recognize the effects of proposed class members' PTSD, attributable to service have deprived class members of their property and liberty rights in violation of the Fifth Amendment;

d. Whether the Defendants have, by reason of the proposed class members' disability (PTSD), excluded them from participation in, denied them the benefits of, or subjected them to discrimination under any program or activity receiving federal financial assistance, in violation of Section 504 of the Rehabilitation Act of 1973;

e. Whether the Defendants have failed to make reasonable modifications in their policies, practices, and procedures that are necessary to avoid discrimination against proposed class members on the basis of their PTSD, in violation of Section 504 of the Rehabilitation Act of 1973; and

f. Whether proposed class members have suffered impermissibly the stigmatizing effects of other-than-honorable discharges related to untreated PTSD, which Defendants have refused to upgrade.

These legal questions are common both to the claims of the Named Plaintiffs and to the claims of the unnamed proposed class members, including those who are also members of the Organizational Plaintiffs' organizations. Defendants' actions affect all class members equally by erecting the same obstacles to members' proper access to a discharge status upgrade and by ensuring that they suffer the same enduring stigma of an other-than-honorable discharge.

Moreover, commonality is found where, as here, the plaintiffs' injuries derive from a defendant's systematic course of conduct. *See, e.g.*, *Marisol*, 126 F. 3d at 377 (upholding district court's finding of commonality in suit brought against child welfare system where "plaintiffs allege[d] that their injuries derive[d] from a unitary course of conduct by a single system"). Plaintiffs in this case satisfy the commonality requirement, as Defendants' failure, on a systematic level, to fairly and adequately consider discharge status applications of Vietnam veterans, including the failure to apply medically appropriate standards, is central to all proposed class members' claims.

3. Typicality

The third requirement of Rule 23(a) is that "the claims or defenses of the representative parties are typical of the claims or defenses of the class." Fed. R. Civ. P. 23(a)(3). For the same reasons that Plaintiffs' claims meet the commonality requirement, they also meet the typicality requirement. Indeed, the Supreme Court has noted that the typicality, adequacy of representation, and commonality requirements "tend[] to merge." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 626 n.20 (1997) (quotation marks omitted).

The typicality requirement is satisfied when "each class member's claim arises from the same course of events, and each class member makes similar legal arguments to prove the defendant's liability." *In re Drexel Burnham Lambert Grp., Inc.*, 960 F.2d 285, 291 (2d Cir. 1992). Typicality, however, "does not require a complete identity of claims." 5 *Moore's Federal Practice* § 23.24 (3d ed. 2014); *see Robidoux*, 987 F.2d at 936-37; *In re Oxford Health Plans, Inc. Sec. Litig.*, 199 F.R.D. 119, 123 (S.D.N.Y. 2001); *see also N.J. Carpenters Health Fund v. Residential Capital, LLC*, 272 F.R.D. 160, 165 (S.D.N.Y 2011) ("Courts in this circuit have held that the typicality requirement is not demanding.") (quotation marks omitted). Instead, the central inquiry is whether the class representative's claims generally share the essential

characteristics of the putative class as a whole. *Moore's Federal Practice*, *supra*, at § 23.24; *see Koch v. Hicks*, 241 F.R.D. 185, 197-98 (S.D.N.Y. 2007) ("'The premise of the typicality requirement is simply stated: as goes the claim of the named plaintiff, so go the claims of the class."' (*quoting Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 340 (4th Cir. 1998)).

The Named Plaintiffs' claims are entirely typical of those of the proposed class members. Each Named Plaintiff developed PTSD as a result of his service in the Vietnam War, yet still suffers under the burden of an other-than-honorable discharge. Named Plaintiffs seek injunctive and declaratory relief that would require Defendants to update their policies and procedures relating to the review of Vietnam veterans' discharge status upgrade applications, including the application of medically appropriate standards for considering the effects of PTSD. The relief they seek is identical to that sought by all proposed class members, and will address the claims of all proposed class members equally. The typicality requirement is thus satisfied.

4. Adequacy of Representation

The final requirement of Rule 23(a) is that "the representative parties will fairly and adequately protect the interests of the class," Fed. R. Civ. P. 23(a)(4), and this inquiry overlaps with the inquiry into commonality and typicality, *see Amchem*, 521 U.S. at 626 n.20. "The adequacy inquiry under Rule 23(a)(4) serves to uncover conflicts of interest between named parties and the class they seek to represent." *Id*. at 625. Minor or speculative conflicts alone will not defeat class certification; instead, conflicts must be "fundamental." *Denney v. Deutsche Bank AG*, 443 F.3d 253, 268 (2d Cir. 2006) (internal quotation marks omitted); *see In re Flag Telecom Holdings, Ltd. Sec. Litig.*, 574 F.3d 29, 35 (2d Cir. 2009).

In this case, the Named Plaintiffs do not have *any* conflict—let alone a fundamental one—with the other members of the class. The injunctive relief they seek will benefit the entire

proposed class in the same manner—requiring Defendants to, for example, use medically appropriate standards relating to PTSD when reviewing discharge status upgrade applications across the board. Furthermore, the Named Plaintiffs are knowledgeable about the facts, the litigation, and the obstacles Vietnam veterans with PTSD face, and are dedicated to actively participating in the litigation on behalf of all class members.

"The adequacy [requirement] also factors in competency and conflicts of class counsel." *Amchem*, 521 U.S. at 626 n.20. Class counsel in this case easily meet the adequacy requirement of Rule 23(a)(4). "The adequacy of counsel prong of Rule 23(a)(4) asks whether counsel are qualified, experienced and generally able to conduct the litigation and whether counsel will vigorously prosecute the interests of the class." 1 *Newberg on Class Actions* at § 3.72 (internal quotation marks and citations omitted). Plaintiffs are represented by attorneys and law student interns from Yale Law School's Veterans Legal Services Clinic and Jenner & Block LLP. The counsel involved in this case have extensive experience litigating complex matters and class actions, including class actions involving matters of federal constitutional and statutory law. *See* Kohlmann Decl. ¶¶ 2-7.

For the same reasons, class counsel satisfy the requirements of Rule 23(g), which requires that the Court appoint class counsel at the time of certification, and that in doing so the Court consider (1) "the work counsel has done in identifying or investigating potential claims in the action," (2) "counsel's experience in handling class actions, other complex litigation, and the types of claims asserted in the action," (3) "counsel's knowledge of the applicable law," and (4) the resources that counsel will commit to representing the class." Fed. R. Civ. P. 23(g)(1)(A)(i)-(iv). *Id.; see also id.* at ¶ 8.

Plaintiffs have met their initial burden to demonstrate adequacy of representation, 3 *Newberg on Class Actions* at § 7.24, and absent any evidence to the contrary, the Court should thus presume the adequacy requirement has been satisfied. *Id.*

D. Class Certification is Appropriate Under Rule 23(b)(2)

A class action may be maintained pursuant to Rule 23(b)(2) when "the party opposing the class has acted or refused to act on grounds that apply generally to the class, so that final injunctive relief or corresponding declaratory relief is appropriate respecting the class as a whole." Fed. R. Civ. P. 23(b)(2). The Supreme Court has noted that certification under Rule 23(b)(2) is particularly appropriate in "[c]ivil rights cases against parties charged with unlawful, class-based discrimination." *Amchem*, 521 U.S. at 614; *Stinson v. City of N.Y.*, 282 F.R.D. 360, 379 (S.D.N.Y. 2012) ("Class certification under Rule 23(b)(2) is particularly appropriate in civil rights litigation."); *Moore's Federal Practice*, *supra*, at § 23.43(1)(b) ("Rule 23(b)(2) was promulgated in 1966 essentially as a tool for facilitating civil rights actions."). "The key to the (b)(2) class is 'the indivisible nature of the injunctive or declaratory remedy warranted—the notion that the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them.'"[2] *Wal-Mart*, 131 S. Ct. at 2557 (quoting Nagareda, *Class Certification in the Age of Aggregate Proof*, 84 N.Y.U. L. REV. 97, 132 (2009)).

As noted already, here Defendants' failure to use medically appropriate standards and other violations of law relating to the review of applications by proposed class members for discharge status upgrades affects all proposed members in the same destructive manner. By the same token, the relief sought by Plaintiffs would provide equally to the entire proposed class the

[2] Indeed, in Rule 23(b)(2) class actions where the relief sought is injunctive and "therefore does not require distribution to the class" but rather "defendants are legally obligated to comply" with any relief the court orders, "it is usually unnecessary to define with precision the persons entitled to enforce compliance. Therefore, it is not clear that the implied requirements of definiteness should apply to Rule 23(b)(2) class actions at all." 1 *Newberg on Class Actions* § 3.7 (5th ed.) (internal quotation marks omitted).

same opportunity to have their applications considered with such standards newly in place. In short, the nature of the alleged injuries and the requested relief apply to all members of the proposed class equally and indivisibly.

III. CONCLUSION

Plaintiffs represent a unified proposed class of Vietnam War veterans given other-than-honorable discharges, who have been diagnosed with PTSD attributable to their service yet have not had their discharge statuses upgraded. The proposed class members are all affected by the same policies and procedures imposed and improperly applied by Defendants. Plaintiffs have met their burden to satisfy the requirements of Rule 23(a) and (b)(2), and the Court should therefore certify Plaintiffs' proposed class.

Dated: June 30, 2014
New Haven, Connecticut

Respectfully Submitted,

By: /s/ Michael J. Wishnie
Michael J. Wishnie, Supervising Attorney, ct27221
Jonathan Manes, Supervising Attorney
Grady Lowman, Law Student Intern
Jennifer McTiernan, Law Student Intern
V Prentice, Law Student Intern
Veterans Legal Services Clinic,
Jerome N. Frank Legal Services Organization
Yale Law School
P.O. Box 209090
New Haven, CT 06520-9090
Telephone: (203) 432-4800
Facsimile: (203) 432-1426

By: /s/ Susan J. Kohlmann
Jenner & Block LLP
Susan J. Kohlmann
Jeremy M. Creelan
Jared F. Davidson
Ava U. McAlpin
919 Third Avenue

New York, NY 10022-3908
Telephone: (212) 891-1600
Facsimile: (212) 891-1699

Marina K. Jenkins
Jenner & Block LLP
1099 New York Avenue NW, Suite 900
Washington, DC 20001-4412
Telephone: (202) 639-6000
Facsimile: (202) 639-6066

Counsel for Plaintiffs