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.	)	Civil Action No. 3:14-CV-00260 (WWE)
RAY MABUS, Secretary of the Navy, JOHN MCHUGH, Secretary of the Army, and DEBORAH LEE JAMES, Secretary of the Air Force, Defendants.	)	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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INTRODUCTION

Congress has created a comprehensive and exclusive system through which members of the armed forces can request correction of their military records. *See* 10 U.S.C. §§ 1551-1559. Under this system, each Secretary of a military department has the discretion to correct a military record "when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a). Congress has mandated, moreover, that these record-correction determinations "shall be made under procedures established by the Secretary concerned." *Id.* § 1552(a)(3). As pertinent to this case, the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force have established, through regulation, boards for the correction of military records which provide an administrative avenue for members of the armed services to correct potential errors in their records. *See* 32 C.F.R. § 581.3 (Army); 32 C.F.R. § 723.2 (Navy); 32 C.F.R. § 865 (Air Force). A particular board's decision on an individual's application is subject to judicial review under the Administrative Procedure Act ("APA"), although the law establishes that the standard of review is unusually deferential. *See*, *e.g.*, *Dibble v. Fenimore*, 545 F.3d 208, 216 (2d Cir. 2008).

Here, five individual veterans – Conley Monk, Kevin Marret, George Siders, James Cottam, and James Davis – have petitioned their respective correction boards to upgrade their characterization of discharge pursuant to this administrative system. The five individual Plaintiffs are veterans of either the United States Marine Corps or the United States Army who served in the Vietnam War and were found to have committed various acts of misconduct during their service in the late 1960s and early 1970s. These acts of misconduct led their respective military departments to discharge each of them under other than honorable conditions. Recently, Plaintiffs filed individual applications with their respective correction boards arguing, among

other things, that the acts of misconduct they committed during their service were attributable to post-traumatic stress disorder ("PTSD"), and thus their other than honorable discharge statuses constitute errors or injustices that should be upgraded under 10 U.S.C. § 1552. With the exception of Plaintiff Conley Monk, who has not received a decision on his application at this point, the correction boards have reviewed the unique circumstances presented in each individual application and concluded that each Plaintiff did not meet his burden of demonstrating that his other than honorable discharge status was in error or unjust.

The five individual Plaintiffs thereafter filed this lawsuit, alleging that the decision of their respective correction board violates the APA, the Fifth Amendment of the United States Constitution, and Section 504 of the Rehabilitation Act. Plaintiffs' claims lack merit.

Plaintiff Davis's APA and Fifth Amendment claims should be dismissed because the administrative record shows that the Army Board for Correction of Military Records conducted an individualized review of his application, considered the pertinent evidence, and articulated a reasonable explanation for its conclusion that Davis had not met his burden of demonstrating that his other than honorable discharge status was the result of probable material error or injustice.

Plaintiff Monk's APA and Fifth Amendment claims should be dismissed for lack of jurisdiction and the failure to state a claim because the Board for Correction of Naval Records has not issued a final decision on his application to amend his military records. As a result, there is no "final agency action" for the Court to review.

Plaintiff Marret's, Sider's, and Cottam's APA and Fifth Amendment claims are the subject of a pending motion to remand. ECF No. 18. For the reasons discussed therein, the Secretary of the Army and the Secretary of the Navy request that the Court voluntarily remand those claims for further administrative consideration.

Plaintiffs' claims asserted under Section 504 of the Rehabilitation Act should be dismissed for two independent reasons. First, a claim under Section 504 of the Rehabilitation Act is precluded by the comprehensive and exclusive scheme Congress has established for members of the armed services to request correction of their military records. Second, Section 504 of the Rehabilitation Act does not provide a private cause of action against federal agencies for alleged disability discrimination in federally conducted programs.

In addition to the claims asserted by the individual Plaintiffs in this case, three organizational Plaintiffs – Vietnam Veterans of America ("VVA"), Vietnam Veterans of America Connecticut State Council ("VVA-CT"), and National Veterans Council for Legal Redress ("NVCLR") seek to assert claims under the APA, Section 504 of the Rehabilitation Act, and the Fifth Amendment of the United States Constitution against three separate Defendants – the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. All claims should be dismissed for lack of jurisdiction, however, because these organizational entities lack standing to assert claims seeking judicial review of an individual's application to amend his or her military record.

Finally, the Secretary of the Air Force should be dismissed as a Defendant in this action because no individual in this case has ever served in the Air Force and applied to the Air Force Board for Correction of Military Records. As a result, no Plaintiff has established a case or controversy with the Secretary of the Air Force.

STATUTORY AND REGULATORY BACKGROUND

Congress has created a comprehensive and exclusive system through which members of the armed forces can request correction of their military records. *See* 10 U.S.C. §§ 1551-1559. Congress has directed the Secretary of each military department to establish, in consultation with

the Secretary of Veterans Affairs, a discharge review board, consisting of five members, to review the discharge or dismissal of any former member of an armed force under the jurisdiction of the Secretary's department. *See* 10 U.S.C. § 1553. These Discharge Review Boards have the authority to change a discharge or dismissal, or to issue a new discharge. *Id.* § 1553(b). A motion to a particular Discharge Review Board, however, must be made within fifteen years after the date of the discharge or dismissal. *Id.* § 1553(a); *see also Blassingame v. Sec'y of Navy*, 811 F.2d 65, 66 (2d Cir. 1987) (discussing function of Discharge Review Boards). Here, the individual Plaintiffs were all discharged in the late 1960s and early 1970s, following their service in Vietnam. Several individual Plaintiffs allege that they filed applications with their Discharge Review Board, which were denied, *see* Compl. ¶ 38 (Monk), ¶ 57 (Siders), while other individual Plaintiffs do not contend that they ever filed such an application. In any event, the Discharge Review Boards, with their fifteen-year statute of limitation, no longer have jurisdiction over Plaintiffs' Vietnam-era discharges, and thus the proceedings before these administrative bodies are not directly at issue in this case.

In addition to petitioning the pertinent Discharge Review Board, a veteran can also obtain review of his or her discharge status by applying to the pertinent board for correction of military records. *See* 10 U.S.C. § 1552. These are the administrative proceedings at the center of this case. Under Section 1552, each Secretary of a military department has the discretion to correct a military record "when the Secretary considers it necessary to correct an error or remove an injustice." *Id.* § 1552(a). A veteran must submit a request to the respective correction board within three years of discovering the error or injustice, unless the board waives the three-year limitation in the "interest of justice." *Id.* § 1552(b). Here, the five individual Plaintiffs allege that their military records contain errors and injustices dating back to their service in the Vietnam

War, and thus their claims are well outside the three-year limitation in Section 1552(b). Nonetheless, the correction boards have agreed to waive the three-year limitation and substantively review Plaintiffs' applications.

Congress has mandated that the decision to correct a military record under Section 1552 "*shall* be made under procedures established by the Secretary concerned." 10 U.S.C. § 1552(a)(3) (emphasis added). Defendants Secretary of the Army, Secretary of the Navy, and Secretary of the Air Force have established specific regulatory procedures governing the entire record-correction process.

The Secretary of the Army has established the Army Board for Correction of Military Records ("ABCMR") to correct errors in, and remove injustices from, the records of current and former members of the Army, the U.S. Army Reserve, and, in certain cases, the Army National Guard and other military and civilian individuals affected by an Army military record. *See* 32 C.F.R. §§ 581.3(a)-(i). Likewise, the Secretary of the Navy has established the Board for Correction of Naval Records ("BCNR") to correct errors in, or remove injustices from, the records of current and former members of the Navy and Marine Corps. *See* 32 C.F.R. § 723.2. And, similarly, the Secretary of the Air Force has established the Air Force Board for Correction of Military Records ("AFBCMR") to correct errors in, or remove injustices from, the records of current and former members of the Air Force. *See* 32 C.F.R. §§ 865.

The ABCMR, BCNR, and AFBCMR each consist of at least three civilians who are appointed by and serve at the pleasure of the Secretary concerned. 32 C.F.R. § 581.3(c)(1); 32 C.F.R. § 723.2(a); 32 C.F.R. §865.1. The ABCMR, BCNR, and AFBCMR consider each case on the merits in an executive session, or the boards can authorize a hearing in a particular case if justice so requires. 32 C.F.R. § 581.3(e)(3)(ii); 32 C.F.R. § 723.3(e)(1); 32 C.F.R. § 865.2(c).

The ABCMR, BCNR, and AFBCMR are not investigative bodies. 32 C.F.R. § 581.3(c)(2)(iii); 32 C.F.R. § 723.2(b); 32 C.F.R. § 865.2(c). Instead, they consider individual applications that are properly brought before them and decide cases on "the evidence of record." 32 C.F.R. § 581.3(c)(2)(iii); 32 C.F.R. § 723.3(e)(1); 32 C.F.R. § 865.2(c). The ABCMR, BCNR, and AFBCMR begin each case with the "presumption of administrative regularity" and thus the applicant has the burden of proving an error or injustice by a preponderance of the evidence. 32 C.F.R. § 581.3(e)(2); 32 C.F.R. § 723.3(e)(2); 32 C.F.R. § 865.4(a).

PROCEDURAL HISTORY

On March 3, 2014, five individual Plaintiffs – Conley Monk, Kevin Marret, George Siders, James Cottam, and James Davis – and three organizational Plaintiffs – Vietnam Veterans of America ("VVA"), Vietnam Veterans of America Connecticut State Council ("VVA-CT"), and National Veterans Council for Legal Redress ("NVCLR") – filed a Complaint against the Secretary of the Navy, the Secretary of the Army, and the Secretary of the Air Force. *See* ECF No. 1, Compl., ¶¶ 12-22. The five individual Plaintiffs are veterans of either the United States Marine Corps or the United States Army who served in the Vietnam War and were later discharged under other than honorable conditions. *Id.* ¶¶ 23-111. Each individual Plaintiff has applied to their respective correction board seeking an upgrade in their discharge status. *Id.* ¶¶ 40, 60, 80, 94, 108. Plaintiff Monk has not received a final decision on his application from the BCNR. *Id.* ¶ 42. As for the other four individual Plaintiffs, the correction boards, or their staff, have reviewed the merits of each individual application and, for reasons specific to each application, have determined that each Plaintiff did not meet his burden of demonstrating that his military records were in error or unjust. *See id.* ¶ 60, 80, 94, 109. The five individual Plaintiffs each claim that, by declining to upgrade their discharge statuses, the correction boards violated

the Administrative Procedure Act, the Fifth Amendment of the United States Constitution, and Section 504 of the Rehabilitation Act. *See* Compl. ¶¶ 186-203 (Counts Four, Five, Six). The three organizational Plaintiffs allege the same causes of action. *See id.* ¶¶ 166-185 (Counts One, Two, Three).

For relief, the individual Plaintiffs ask, among other things, that the Court order the Secretary of the Army and the Secretary of the Navy to upgrade their individual discharge statuses to Honorable or to General (Under Honorable Conditions). *Id.*, Prayer for Relief (4). The Complaint also asks the Court to "[d]irect, by issuance of an injunction, measures sufficient to ensure that Defendants utilize consistent and medically appropriate standards" in determining whether an individual's discharge status should be upgraded. *Id.*, Prayer for Relief (2).[1]

On June 11, 2014, Defendants Secretary of the Army and Secretary of the Navy filed a motion to remand the claims of three individual Plaintiffs in this action. *See* ECF No. 18. As discussed more fully in Defendants' motion to remand, the Secretary of the Navy requests that the Court remand the claims of Plaintiffs Siders and Marret to the BCNR so that the board members themselves can consider the substance and materiality of their reconsideration requests. *Id.* at 3-6. The Secretary of the Army requests that the Court remand the claims of Plaintiff James Cottam to the ABCMR so that it can consider certain separation documents and medical records that were not before the board when it denied his application. *Id.* at 7-8.

[1] The Complaint also includes class action allegations. *See* Compl. ¶¶ 156-165. Plaintiffs seek to represent every Vietnam veteran who was discharged under other than honorable conditions and has been diagnosed with PTSD attributable to their military service. *See* Compl. ¶ 158. While not the subject of the current motion, Plaintiffs' proposed class is not eligible for certification. The review process under 10 U.S.C. § 1552 requires an individualized, fact-intensive inquiry such that there is no "common" question suitable for class-wide resolution. Indeed, a particular veteran's eligibility for a service characterization upgrade depends on facts unique to that individual, including among other things the circumstances surrounding his or her military service, the nature of his or her medical condition, and the differing degrees of misconduct at issue.

Defendants now file the current motion to dismiss and for summary judgment, asking the Court to dismiss the individual Plaintiffs' claims that are not subject to the remand motion, which include Plaintiff Davis's and Plaintiff Monk's APA and Fifth Amendment claims; all claims asserted under Section 504 of the Rehabilitation Act; and all claims asserted by the three organizational Plaintiffs.

STATEMENT OF FACTS

Defendants respectfully refer the Court to Defendants' Statement of Material Facts attached to this Motion.

STANDARDS OF REVIEW

A. Lack of Subject Matter Jurisdiction Under Rule 12(b)(1)

On a motion to dismiss under Federal Rule of Civil Procedure 12(b)(1), this Court is required to dismiss any claim over which it lacks subject matter jurisdiction. As federal courts are courts of limited jurisdiction, the law presumes that "a cause lies outside this limited jurisdiction." *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377 (1994). On a Rule 12(b)(1) motion, the Court is not limited to the allegations of the complaint, but may consider materials outside the pleadings to resolve the question of jurisdiction. *State Employees Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 77 n.4 (2d Cir. 2007); *Kuck v. Danaher*, 822 F. Supp. 2d 109, 124 (D. Conn. 2011). Additionally, the party invoking the court's jurisdiction bears the burden of proof to demonstrate that subject matter jurisdiction exists. *Kuck v. Danaher*, 822 F. Supp. 2d at 124.

B. Failure to State a Claim Under Rule 12(b)(6)

A case must be dismissed pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted if the complaint does not plead "enough facts to state a claim to relief

that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A complaint is plausible on its face "when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). This amounts to a "two-pronged approach" through which a court first identifies the factual allegations entitled to an assumption of truth and then determines "whether they plausibly give rise to an entitlement to relief." *Id.* at 664. The Court's review on a motion to dismiss pursuant to Rule 12(b)(6) is "generally limited to 'the facts as asserted within the four corners of the complaint, the documents attached to the complaint as exhibits, and any documents incorporated in the complaint by reference.'" *Kuck*, 822 F. Supp. 2d at 124 (quoting *McCarthy v. Dun & Bradstreet Corp.*, 482 F.3d 184, 191 (2d Cir. 2007)). In addition, "the Court may also consider 'matters of which judicial notice may be taken' and 'documents either in plaintiff's possession or of which plaintiffs had knowledge and relied on in bringing suit.'" *Kuck*, 822 F. Supp. 2d at 124 (quoting *Brass v. Am. Film. Techs., Inc.*, 987 F.2d 142, 150 (2d Cir. 1993)).

C. Summary Judgment Pursuant to the Administrative Procedure Act[2]

Under the APA, the "rulings of a Board for the Correction of Military Records can be set aside only if they are arbitrary, capricious, or unsupported by substantial evidence." *Dibble v. Fenimore*, 545 F.3d 208, 216 (2d Cir. 2008) (citing *Chappell v. Wallace*, 462 U.S. 296, 303 (1983)); *see also* 5 U.S.C. § 706(2)).

[2] The present motion is a motion to dismiss or, in the alternative, for summary judgment. Adjudication of an APA claim is proper on either a motion to dismiss for failure to state a claim under Rule 12(b)(6), or a motion for summary judgment under Rule 56(c), provided that the full administrative record is available for review, as is the case here. *See, e.g., Univ. Med. Ctr. v. Shalala*, 173 F.3d 438, 440 n.3 (D.C. Cir. 1999).

The district court's review is confined to the administrative record that was before the agency at the time the agency made its decision, and in determining whether agency action is arbitrary or capricious, "a court may not assess the wisdom of an agency's choice; inquiry is limited instead to whether the Board has made a clear error of judgment." *Dibble*, 545 F.3d at 216 (quoting *Falk v. Secretary of the Army*, 870 F.2d 941, 945 (2d Cir. 1989)); *see also Smith v. U.S. Dep't of the Army*, 159 F.3d 1348 (2d Cir. 1998) (unpublished) (citing *Falk*, noting: "[w]e are not permitted to review the wisdom of the Board's decision."); *see also Metz v. United States*, 466 F.3d 991, 998 (Fed. Cir. 2006) (noting that review of agency action is necessarily limited "to the administrative record."). Arbitrary and capricious review is "narrow" and "particularly deferential." *Envtl. Def. v. United States E.P.A.*, 369 F.3d 193, 201 (2d Cir. 2004). Under the arbitrary and capricious standard, a court's task is "to determine whether the agency has considered the pertinent evidence, examined the relevant factors, and articulated a satisfactory explanation for its action including whether there is a rational connection between the facts found and the choice made." *Gully v. Nat'l Credit Union Admin. Bd.*, 341 F.3d 155, 163 (2d Cir. 2003) (internal quotations omitted); *see also Henley v. Food and Drug Admin.*, 77 F.3d 616, 620 (2d Cir. 1996).

In addition to affording deference to agency decisions under the APA, courts must give *increased* deference to those that occur in a military context. *Falk*, 870 F.2d at 945; *Dibble*, 545 F.3d at 216. Judicial deference to military personnel decisions is "calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings, a result that would destabilize military command and take the judiciary far afield of its area of competence." *Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000) (citing *Orloff v. Willoughby*, 345 U.S. 83, 94 (1953)). Judicial deference to military personnel decisions, such as the decision

to upgrade an individual's discharge status, stems from the fact that "[t]he military constitutes a specialized community governed by a separate discipline from that of the civilian. Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate [military] matters as the [military] must be scrupulous not to intervene in judicial matters." *Chappell*, 462 U.S. at 301 (citing *Orloff*, 345 U.S. at 94).

The increased deference shown to the military agencies does not mean that the decisions of military correction boards cannot be reviewed by federal courts, but rather that "only the most egregious decisions may be prevented under such a deferential standard of review." *Kreis v. Sec'y of Air Force*, 866 F.2d 1508, 1515 (D.C. Cir. 1989); *see also Falk*, 870 F.2d at 945 (noting that judicial review of a "decision made by the Records board is tightly circumscribed by the confluence of A.P.A. § 706 and its military setting.").

ARGUMENT

I. THE ABCMR'S DENIAL OF PLAINTIFF DAVIS'S APPLICATION DID NOT VIOLATE THE ADMINISTRATIVE PROCEDURE ACT OR THE FIFTH AMENDMENT OF THE UNITED STATES CONSTITUTION.

A. The ABCMR's Decision Did Not Violate the APA.

Plaintiff Davis alleges that the ABCMR violated the standards of the APA, 5 U.S.C. § 706, by denying his request to upgrade his other than honorable discharge status. Compl., ¶¶ 186-189 (Count Four). A review of the administrative record, however, shows that the ABCMR conducted an individualized review of his application, considered the pertinent evidence, and articulated a reasonable explanation for its conclusion that Davis had not met his burden of demonstrating that his other than honorable discharge status was the result of probable material error or injustice. The ABCMR's decision thus passes the exceptionally deferential standard of

judicial review afforded to decisions of military correction boards. *Falk*, 870 F.2d at 945; *Dibble*, 545 F.3d at 218.

The ABCMR carefully reviewed all evidence of record, which primarily consists of those documents which Plaintiff Davis submitted to the Board through his attorney. *See* Administrative Record ("AR") 5, 12-94. Those documents include a signed affidavit from Mr. Davis (AR 18-21); a brief from Mr. Davis's attorney submitted in support of his application (AR 14-17); numerous exhibits to that brief, which include, among other things, documentation showing Mr. Davis committed various offenses in violation of the Uniform Code of Military Justice ("UCMJ") (AR 26-41); discharge-related documents, including DD-Form 214 showing Davis was discharged under other than honorable conditions in February 1974 (AR 23, 58); a therapist letter dated February 2012 (AR 44); a psychiatric evaluation dated August 2011 (AR 45-47); and letters of appreciation from Davis's commanding officer (AR 24-25).

With this evidence before it, the Board began its decision by recounting Mr. Davis's enlistment history and his period of service in Vietnam. AR 5, at ¶ 2. Mr. Davis enlisted in the Army in February 1970, and thereafter trained as a supply soldier. *Id.* He reenlisted in the Army in October 1970 before deploying for service in Vietnam. *Id.* Mr. Davis served in Vietnam for about one year – from January 1971 to December 1971. *Id.*

The Board then considered the numerous instances of misconduct Mr. Davis committed following his return from Vietnam. AR 5-6, at ¶¶ 3-4. Specifically, Mr. Davis committed various offenses in violation of the UCMJ on five separate occasions in a nine-month period, from April to December of 1972: He neglectfully lost government funds in April 1972 (AR 32-35); was absent without leave ("AWOL) for two weeks in June 1972 (AR 26-28); slept on a sentinel post in August 1972 (AR 29-31); absented himself without leave on two other occasions,

in November 1972, for a period of nine hours and eight hours (AR 36-38); and absented himself without leave again for four days in December 1972. (AR 39-41). For these offenses, Mr. Davis received non-judicial punishment under Article 15, UCMJ. The punishments included a reduction in service grade, forfeiture of several months of pay, and imposition of extra duties. *See*, AR 27, 30, 33, 37, 40. Despite this punishment, Mr. Davis remained undeterred and again absented himself without leave, this time for over ten months – from January to November of 1973. AR 6, at ¶ 4; AR 55-57. This tenth-month AWOL incident prompted the filing of court-martial charges in December 1973. AR 55-57.

Two months after the filing of court-martial charges, on February 8, 1974, Plaintiff Davis was discharged under other than honorable conditions pursuant to Chapter 10 of Army Regulation 635-200. AR 6, at ¶ 5; AR 58; *see also* Ex. 1, Army Reg. 635-200, at 10-1 through 10-10. As the Board noted, under this chapter, a member who is facing a court-martial may affirmatively request a discharge for "the good of the service," and, if the request is accepted, the member can avoid potential criminal conviction, confinement, and a punitive discharge. AR 6, at ¶ 9; Army Regulation 635-200, 10-1. In exchange, however, a member who requests separation under Chapter 10 generally receives an other than honorable discharge and a reduction to the lowest enlisted grade. AR 6, at ¶ 9; Army Reg. 635-200, 10-1.

After recounting the factual evidence of record, the Board addressed the two principal arguments Plaintiff Davis raised, through counsel. AR 7-8, ¶¶ 1-5. Davis first argued that, under principles of equity, his discharge status should be upgraded because his numerous acts of misconduct leading up to his other than honorable discharge were caused by his later-diagnosed PTSD. *See* AR 7, at ¶ 1 (Board decision); AR 14-16 (counsel's brief).

The Board considered this argument, along with documentation showing that a physician at the Department of Veterans Affairs diagnosed Mr. Davis with PTSD in August 2011, but ultimately concluded that Mr. Davis had not met his burden of demonstrating that his other than honorable discharge status was unjust. AR 7, at ¶ 1. The Board reasoned that, although Mr. Davis had submitted documentation showing that he was diagnosed with PTSD recently, in August 2011, Mr. Davis did not produce any evidence showing that he was diagnosed with, or manifested any symptom of, any mental condition prior to his separation in 1973. *Id*. The Board also found that Mr. Davis did not produce any evidence showing that he was having mental problems in 1972 to 1973 that interfered with his ability to perform his military duties. *Id.* And the Board found that Mr. Davis did not produce any evidence showing that his mental condition was the underlying cause of the misconduct that led to his discharge. *Id.* Given the lack of evidence bearing on these key issues, the Board reasonably determined that Plaintiff Davis had not met his burden of showing by a preponderance of the evidence that his discharge status was unjust.

Plaintiff Davis also argued to the Board that his other than honorable discharge status was in error because he was not afforded access to counsel or fully informed of the consequences of accepting his Chapter 10 discharge. AR 7, at ¶ 5 (board decision); AR 16-17 (counsel's brief). In support of this contention, Mr. Davis submitted an affidavit, in which he attempts to recount the procedural circumstances surrounding his discharge in 1974. He states that "an officer handed me some papers and told me to sign"; that he was "not given much of an explanation"; and that he was "never given access to an attorney during the process." AR 20, at ¶ 11.

The Board considered Plaintiff Davis's contention but ultimately concluded that the record evidence did not demonstrate that his discharge status was the result of probable material

error. AR 7 at ¶ 5; AR 8. Under its governing regulations, the ABCMR is required to consider each case "with the presumption of regularity" and thus the applicant alone "has the burden of proving an error or injustice by a preponderance of the evidence." 32 C.F.R. § 581.3(e)(2). Consistent with this administrative presumption and burden of proof, the Board presumed that Plaintiff Davis's Chapter 10 separation proceedings, which a service member must affirmatively request, were administratively correct and in conformance with applicable regulations, which provide that a commanding officer will advise the member of the offenses charged, the type of discharge normally given, the loss of VA benefits, and the possibility of prejudice in civilian life because of the characterization of such a discharge. AR 6, ¶ 9; AR 7, ¶ 5; *see also* Army Reg. 635-200, 10-1(b).

Further, the Board recognized that, while certain separation documents from the 1970s either were not in Davis's administrative file or were not signed, the absence of certain documents and the omission of a signature do not demonstrate by a preponderance of the evidence that Plaintiff Davis's other than honorable discharge status was in error. AR 7-8; *see also Blassingame*, 811 F.2d at 72 ("[T]he absence of documents and witnesses reasonably unavailable is not a basis for a court to set aside a Board decision because under the APA, the court should assess the lawfulness of the Board decision in light of the factual record at the time of the decision."). The Board thus properly applied its regulation regarding the presumption of administrative regularity and the burden of proof, and its decision to deny Plaintiff Davis's application meets the highly deferential standard of judicial review applicable to a military record correction decision. The Secretary of the Army therefore requests that the Court enter summary judgment in his favor on Plaintiff Davis's APA claim.

B. The ABCMR's Decision Did Not Violate the Fifth Amendment.

Plaintiff Davis also alleges that the ABCMR's denial of his application violated his constitutional right to procedural due process and to equal protection of the law. Compl. ¶¶ 191-196 (Count Five). These claims are without merit and summary judgment should be granted in favor of the Secretary of the Army.[3]

1. The ABCMR Did Not Violate Plaintiff Davis's Procedural Due Process Rights.

"'Due Process,' unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances." *Cafeteria and Rest. Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 895 (1961). Whether the government has afforded an individual all the process constitutionally due before depriving him of a liberty or property interest is determined by balancing private and public interests:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Mathews v. Eldridge, 424 U.S. 319, 335 (1976). The "essential principle" of procedural due process is that a deprivation of life, liberty, or property be preceded by notice and an opportunity to be heard. *Id.* at 348-49; *see Ciambriello v. County of Nassau*, 292 F.3d 307, 323 (2d Cir. 2002).

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[3] The Complaint fails to identify a waiver of sovereign immunity for the Fifth Amendment claims. *See* Compl. ¶¶ 170-175 (Count Two), ¶¶ 191-196 (Count Five). It is beyond contention that a claim under the Fifth Amendment "faces the obstacle of sovereign immunity." *Adeleke v. U.S.*, 355 F.3d 144, 151 (2d Cir. 2004). In the absence of another specified waiver, the Government presumes that Counts Two and Five proceed on the APA's waiver of sovereign immunity implicated in Counts One and Four.

Assuming without conceding that Plaintiff Davis has a property or liberty interest in his discharge status, the administrative record clearly demonstrates that Plaintiff received adequate procedural protections. Plaintiff had the opportunity to submit evidence and argument to the Board, and he did so with the assistance of counsel. AR 12-94; AR 3, 14. Consistent with all pertinent regulations, the Board considered Plaintiff's evidence and addressed Plaintiff's contentions of error in a reasoned, written opinion. AR 3-8. Plaintiff was notified of the Board's decision, and afforded the opportunity to seek timely reconsideration of that decision. AR 1-2. Plaintiff, accordingly, was afforded the opportunity to present his side of the story, and thus summary judgment should be entered in favor of the Secretary of the Army on Plaintiff Davis's procedural due process claim.

2. The ABCMR Did Not Violate Plaintiff Davis's Equal Protection Rights.

Plaintiff Davis also alleges that the ABCMR deprived him of equal protection of the law by declining to upgrade his discharge status. Compl. ¶ 195. Plaintiff Davis, who is African-American, argued to the Board that he believes he was denied psychiatric treatment on the basis of his race at Fort Bragg after he returned from Vietnam. AR 15, 19. The Board considered this argument but concluded that "there is no evidence of record which shows the applicant was a victim of racial discrimination." AR 7, at ¶ 3. The Board's conclusion is reasonable and consistent with the bedrock principle of constitutional law that "[p]roof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977); *see also Roberts v. United States*, 741 F.3d 152, 160 (D.C. Cir. 2014) (affirming military board's dismissal of equal protection claim for failure to submit evidence of discriminatory intent); *Mindes v. Seaman*, 501 F.2d 175, 176 (5th Cir. 1974) (same). Given the lack of evidence showing that Davis was

discriminated against on the basis of his race while stationed at Fort Bragg, the Board reasonably decided that he had not met his burden of showing that his discharge under other than honorable conditions was unjust. The ABCMR's decision accordingly complies with the APA and Defendant Secretary of the Army should be granted summary judgment on Plaintiff Davis's equal protection claim.

II. PLAINTIFF MONK'S APA AND FIFTH AMENDMENT CLAIMS SHOULD BE DISMISSED BECAUSE THE BCNR HAS NOT ISSUED A FINAL DECISION ON HIS APPLICATION.

The APA permits judicial review of only "final agency action." 5 U.S.C. § 704. As a general matter, two conditions must be met for agency action to be final: "First, the action must mark the consummation of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which rights or obligations have been determined or from which legal consequences will flow." *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations and internal quotation marks omitted); *see also Top Choice Distributors, Inc. v. United States Postal Service*, 138 F.3d 463, 466 (2d Cir. 1998).

Here, Plaintiff Monk recognizes in the Complaint that the BCNR has not issued a decision on his application to change his military records. Compl. ¶ 42. As a result, there is no agency action – and certainly no final agency action – for the Court to review under the APA. Plaintiff Monk's APA and Fifth Amendment claims accordingly should be dismissed for lack of subject matter jurisdiction and the failure to state a claim. *See, e.g.*, *Walsh v. Hagee*, 900 F. Supp. 2d 51, 60 (D.D.C. 2012) ("Because there is no final decision for this court to review, [Plaintiff] fails to state a cause of action to review an agency decision relating to his request to correct his military record.").[4]

[4] Several decisions suggest that the Second Circuit considers the APA's threshold requirement of final agency action to be jurisdictional. *See Air Espana v. Brien*, 165 F.3d 148, 152 (2d Cir.

Plaintiff suggests in the Complaint that the Court has jurisdiction to review the BCNR's decision on his application (which at this point does not exist) because an unspecified "statutory deadline for decision" has passed. Compl. ¶ 42. This contention is without legal basis. It is true that Congress has established timeliness standards for disposition of applications before correction boards. *See* 10 U.S.C. § 1557. In particular, Section 1557(b) requires the correction boards to take final action on applications within eighteen months of receipt. *See* 10 U.S.C. § 1557(b). However, Congress has specifically provided that "[f]ailure of a Corrections Board to meet the applicable timeliness standard for any period of time under [Section 1557(b)] does not confer any presumption or advantage with respect to consideration by the board of any application." 10 U.S.C. § 1557(d). As a result, "the failure to meet the timeliness standard cannot be the basis for finding error in the BCNR's decision." *Lewis v. United States*, 476 F. App'x 240, 245 (Fed. Cir. 2012).

III. ALL CLAIMS ASSERTED UNDER SECTION 504 OF THE REHABILITATION ACT SHOULD BE DISMISSED.

In Counts Three and Six, Plaintiffs plead a wholly inapplicable claim under Section 504 of the Rehabilitation Act. Compl., ¶¶ 176-185, 197-203. These claims should be dismissed for two independent reasons. First, Plaintiffs' claims under Section 504 of the Rehabilitation Act are precluded by the comprehensive and exclusive scheme Congress has established for members of the armed services to request correction of their military records. Second, Section 504 of the Rehabilitation Act does not provide a private cause of action against federal agencies for alleged

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1999) ("The APA ... requirement of finality is jurisdictional."); *Riverkeeper, Inc. v. EPA*, 475 F.3d 83, 130 (2d Cir. 2007) (accord). Nonetheless, citing the Supreme Court's decision in *Arbaugh v. Y & H Corp.*, 546 U.S. 500 (2006), the Circuit has recognized that it is "uncertain" whether the final agency action requirement is a jurisdictional requirement properly raised under Rule 12(b)(1) or an essential element of an APA cause of action properly raised under Rule 12(b)(6). *See Sharkey v. Quarantillo*, 541 F.3d 75, 87 & n.10 (2d Cir. 2008). That issue need not be decided here, however, because Defendants move to dismiss Plaintiff Monk's claim pursuant to Rule 12(b)(1) and Rule 12(b)(6).

disability discrimination in federally conducted programs – like the record-correction programs at issue here. Instead, individuals pursuing Section 504 claims against federal agencies first must exhaust administrative remedies under the agency's Section 504 administrative process (here, 32 C.F.R. §§ 56.1-56.10) and, after obtaining a final agency decision, seek review under the APA.

A. The Rehabilitation Act Claim is Foreclosed by the Comprehensive and Exclusive Congressional Scheme for the Correction of Military Records.

Plaintiffs' claims under Section 504 of the Rehabilitation Act should be dismissed because they are precluded by the comprehensive and exclusive statutory and regulatory system for the correction of military records, codified at 10 U.S.C. § 1552 and implemented by the Secretary of the Army at 32 C.F.R. § 581.3(a)-(i), by the Secretary of the Navy at 32 C.F.R. § 723.2, and by the Secretary of the Air Force at 32 C.F.R. § 865.[5]

The plain language of 10 U.S.C. § 1552 makes clear that Congress intended for the correction of military records to be conducted in accordance with specific statutory and regulatory provisions. Subsection (a)(1) expressly delegates authority to the Secretary of a military department, acting through the respective correction board, to correct "any military record . . . when the Secretary considers it necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). Most importantly, Subsection (a)(3) mandates that these record-

[5] Section 1552 is one of several interrelated statutory provisions that create the administrative system for correcting a military record under a variety of circumstances. *See* 10 U.S.C. §§ 1551-1559. For instance, Section 1551 establishes procedures for correcting one's name after separating from service; Section 1553 creates specific procedures for an individual to challenge a discharge determination before the Discharge Review Board; Section 1554 establishes procedures for reviewing decisions regarding retirement or separation without pay for physical disability; and Section 1557 establishes timeliness standards for deciding applications for the correction of military records. Because Plaintiffs challenge board decisions under Section 1552, the above discussion focuses on that statutory section, and its implementing regulations, to show that Congress created a specific procedure for correcting a military record under the circumstances of this case. Nonetheless, these other interrelated provisions further demonstrate that Congress intended for record correction determinations to be made through specific statutory procedures and not through lawsuits under general civil rights statutes like Section 504 of the Rehabilitation Act.

correction determinations "*shall* be made under procedures established by the Secretary." 10 U.S.C. § 1552(a)(3) (emphasis added). The Secretaries of the Army, Navy, and Air Force, moreover, have established thorough and detailed rules governing the entire record-correction process. *See* 32 C.F.R. §§ 581.3(a)-(i) (Army); 32 C.F.R. § 723.1-10 (Navy); 32 C.F.R. § 865 (Air Force). For example, all three Secretaries have established rules on the composition and establishment of the correction boards; the boards' administrative functions and responsibilities; application procedures, including time limits for filing an application; decisional criteria, including a specific burden of proof; hearing rights; and the settlement of claims. *See generally id.*; *see also Blassingame*, 811 F.2d at 66-67 (describing statutorily-established roles of correction boards and discharge review boards).

These statutory provisions show that Congress has created a specific and exclusive system for the correction of military records and did not intend for individuals to collaterally challenge record-correction decisions through lawsuits under Section 504. It is, therefore, not appropriate for Plaintiffs to challenge the ABCMR's, BCNR's, and AFBCMR's decisions regarding the accuracy of their military records outside of the specific framework of 10 U.S.C. § 1552. *See*, *e.g.*, *Walsh*, 900 F. Supp. 2d at 60 (holding that the "proper means by which to seek a substantive change in [plaintiff's] military records . . . was through a proceeding . . . under 10 U.S.C. § 1552(a)" and therefore dismissing a claim under the Privacy Act because it is "an improper means by which to seek to amend [a] military record"); *Cargill v. Marsh*, 902 F.2d 1006, 1007–08 (D.C. Cir. 1990) (same). Indeed, numerous courts have held that a general civil rights claim under Section 504 is precluded when another statute specifically provides for the pertinent procedures for review. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1025 (9th Cir. 2012) (holding that 38 U.S.C. § 511, which prescribes specific procedures for

reviewing veteran-benefits decisions, precludes claim under Section 504); *Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1353 (10th Cir. 1987) (holding that Section 504, as a "general civil rights statute," should not apply in the presence of a "much more specific statute with an articulated program"); *Save Our Summers v. Washington State Dep't of Ecology*, 132 F. Supp. 2d 896, 900 (E.D. Wash. 1999) (ruling that claim under Section 504 is precluded by comprehensive remedial scheme in Clear Air Act); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994); *Middlesex County Sewerage Auth. v. Nat'l Sea Clammers Ass'n*, 453 U.S. 1 (1981).

The substantial deference afforded to military record-correction decisions further underscores why Plaintiffs' attempt to circumvent 10 U.S.C. § 1552 is inappropriate. It is well-established that courts adopt an unusually deferential application of the APA's "arbitrary and capricious" standard in the context of reviewing a Section 1552 proceeding. *See, e.g.*, *Kreis*, 866 F.2d at 1514; *Escobedo v. Green*, 602 F. Supp. 2d 244, 248-49 (D.D.C. 2009) ("A court must apply an unusually deferential standard when reviewing an action of the ABCMR.") (citation omitted). Such substantial deference "is calculated to ensure that the courts do not become a forum for appeals by every soldier dissatisfied with his or her ratings, a result that would destabilize military command and take the judiciary far afield of its areas of competence." *Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000). Moreover, Section 1552 itself grants special discretion to the Secretary of a military department to determine whether to correct a record "when the Secretary considers it necessary to correct an error or remove an injustice." *See* 10 U.S.C. § 1552(a)(1). A plaintiff should not be able to avoid the unusually deferential standard of judicial review for Section 1552 proceedings simply by repackaging the claim as one under the Rehabilitation Act. Such a result would not only nullify Section 1552, but also fail to accord the

programs of the departments of the United States military, including the military boards of correction, the deference they have traditionally been accorded. *See, e.g.*, *Escobedo*, 602 F. Supp. 2d at 248 ("Military boards are entitled to even greater deference than civilian administrative agencies.").

In short, Congress has required that an individual seeking to correct his or her military record must do so through the procedures implemented by the Secretary of a military department under 10 U.S.C. § 1552. Congress accordingly did not intend for individuals to collaterally challenge the accuracy of their military records through lawsuits under Section 504 the Rehabilitation Act. Plaintiffs' claims under the Rehabilitation Act (Counts Three and Six) should be dismissed.[6]

B. Section 504 of the Rehabilitation Act Does Not Provide for a Private Cause of Action Against a Federal Agency Conducting a Federal Program.

Plaintiffs' claims under Section 504 of the Rehabilitation Act also should be dismissed because that statutory provision does not afford Plaintiffs a private cause of action against the Secretaries of the Army, Navy, and Air Force for alleged disability discrimination in their programs for the correction of military records. The Rehabilitation Act authorizes judicial remedies against *nonfederal defendants* for violations of § 504, *see Barnes v. Gorman*, 536 U.S. 181, 184–85 (2002), but it "treat[s] federal Executive agencies *differently* from other § 504(a) defendants for purposes of remedies," *Lane v. Peña*, 518 U.S. 187, 197 (1996). The Act does not create a private right of action to sue a federal agency when it is conducting programs. Instead,

[6] The next section explains why Section 504 does not contain a private cause of action against a federal agency conducting a federal program. This basis for dismissal, however, need not be addressed if the Court concludes that the comprehensive system for the correction of military records, codified in 10 U.S.C. § 1552 and its implementing regulations, precludes Plaintiffs' Section 504 claim.

when Congress extended the nondiscrimination mandate of § 504 to federal agencies in 1978, it authorized only administrative remedies for § 504 violations by federal agencies.

In the Rehabilitation, Comprehensive Services, and Developmental Disabilities Amendments of 1978, Congress added to § 504 a prohibition against discrimination in "any program or activity conducted by any Executive agency." Pub. L. No. 95-602, 92 Stat. 2955, 2982. While the Act creates a right of action against federal employers (via § 505(a)(1) and Title VII) and nonfederal recipients of federal funds (via § 505(a)(2) and Title VI), Congress placed the remedy for alleged violations of the Act in federally conducted programs in § 504 itself, which added a requirement that federal agencies promulgate regulations "to carry out" the changes to § 504 made by the 1978 amendments. 92 Stat. at 2982. This requirement is carefully worded to "authorize[] administrative regulations to implement only [the changes made to § 504 by] this amendment." *Se. Cmty. Coll. v. Davis*, 442 U.S. 397, 411 n.11 (1979). The only such change (other than the insertion of the requirement to promulgate regulations) was the extension of § 504 to programs run by Executive agencies. Hence, Congress expressly made claims of § 504 violations in federal programs subject to an administrative regimen.

The text and structure of the Rehabilitation Act make clear that there is no right of action under § 504 against federal agencies for disability discrimination in federally-run programs, as most courts have held. *See e.g.*, *Kinneary v. City of New York*, 358 F. Supp. 2d 356, 359–60 (S.D.N.Y. 2005); *Cousins v. Sec'y of the U.S. Dep't of Transp.*, 880 F.2d 603, 605–06 (1st Cir. 1989) (en banc) (Breyer, J.); *Clark v. Skinner*, 937 F.2d 123, 125–26 (4th Cir. 1991); *Maynard v. United States*, No. 06-2331, 2008 WL 4453199, at *1 n.3 (M.D. Pa. Sept. 30, 2008); *Krumel v.*

City of Fremont, No. 01-259, 2002 WL 808633, at *2–5 (D. Neb. Jan. 2, 2002); *Crayton v. Shalala*, No. 94-1689, 1995 WL 605599, at *3–4 (N.D. Ala. May 3, 1995).[7]

Accordingly, Section 504(a) does not provide for an express cause of action against a federal agency that conducts programs.[8] Section 504(a) authorizes federal agencies to establish administrative processes to remedy Section 504 violations in federal programs ("The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978"), but says nothing about obtaining relief for such violations in federal court. Defendants, moreover, have established an administrative process for review of claims of disability discrimination in its programs. *See* 32 C.F.R. §§ 56.1-56.10.

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[7] Two nonbinding Ninth Circuit cases have concluded that a private right of action against federal agencies operating federal programs is available under Section 504. *See J.L. v. Soc. Sec. Admin.*, 971 F.2d 260, 264 (9th Cir. 1992); *Doe v. Attorney Gen.*, 941 F.2d 780, 794–95 (9th Cir. 1991). Defendants submit that these two cases were wrongly decided, especially in light of the Supreme Court's subsequent explanation in *Lane v. Pena*, 518 U.S. 187, 197 (1996), that the text of the Rehabilitation Act "treat[s] federal Executive agencies *differently* from other § 504(a) defendants for purposes of remedies[.]" Furthermore, when Congress amended the Rehabilitation Act in 1998, it expressly affirmed that filing an administrative complaint (not a judicial complaint) is the means of "resolving allegations of [§ 504] discrimination in a federally conducted program or activity." 29 U.S.C. § 794d(f)(2).

[8] Section 504(a) (codified at 29 U.S.C. § 794) provides, in pertinent part:

> No otherwise qualified individual with a disability in the United States . . . shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance or under any program or activity conducted by any Executive agency or by the United States Postal Service. The head of each such agency shall promulgate such regulations as may be necessary to carry out the amendments to this section made by the Rehabilitation, Comprehensive Services, and Developmental Disabilities Act of 1978.

Congress's deliberate choice to create an administrative enforcement regime forecloses any private right to judicial relief.

Similarly, Section 505(a)(2), which is the remedies provision for Section 504, does not supply a private right of action.[9] Section 505(a)(2) authorizes remedies against only "federal providers" (federal agencies providing financial assistance), and is silent as to any remedies against federal agencies conducting federal programs. This wording led the Supreme Court to hold unanimously that § 505(a)(2) applies only to federal agencies that provide funds to nonfederal entities, not to federal agencies conducting programs. *Lane*, 518 U.S. at 193; *id.* at 209 (Stevens, J., dissenting); *accord Doe v. Garrett*, 903 F.2d 1455, 1460–61 (11th Cir. 1990) ("[T]he language of section [505(a)(2)] . . . applies Title VI remedies and procedures only to claimants suing 'any recipient of Federal assistance or Federal provider of such assistance under section [504].' This would seem to encompass private or state recipients of federal funds and their federal providers, but not federal agencies themselves.").[10]

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[9] Section 505(a)(2) (codified at 29 U.S.C. 794a(a)(2)) provides, in pertinent part:

> The remedies, procedures, and rights set forth in title VI of the Civil Rights Act of 1964 . . . shall be available to any person aggrieved by any act or failure to act by any recipient of Federal assistance or Federal provider of such assistance under section [504] of this title.

[10] In the Complaint, Plaintiffs suggest that they are asserting a claim under Section 504 on the theory that the correction boards are recipients of federal financial assistance. Compl. ¶ 179. The correction boards are not recipients of federal financial assistance as that term is used in Section 504. As the Supreme Court has made clear, the federal funding of entities "that the Federal Government manages itself," like the correction boards, does not qualify as the provision of financial assistance under § 504 of the Rehabilitation Act. *Lane v. Pena*, 518 U.S. 187, 194-95 (1996); *see also United States Dept. of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 612 (1986).

Nor is there an implied cause of action against federal agencies conducting programs under Section 504. There must be clear evidence of congressional intent to find an implied cause of action. *See Health Care Plan, Inc. v. Aetna Life Ins. Co.*, 966 F.2d 738, 740 (2d Cir. 1992); *In re BISYS Group Inc. Derivative Action*, 396 F.Supp.2d 463, 464 (S.D.N.Y. 2005) ("Over the years, the Supreme Court has come to view the implication of private remedies in regulatory statutes with increasing disfavor."). And where Congress has expressly designated "an integrated system of procedures for enforcement" – like those in the Rehabilitation Act – the judiciary "may not, in the face of such comprehensive legislative schemes, fashion new remedies that might upset carefully considered legislative programs." *Nw. Airlines v. Transp. Workers Union*, 451 U.S. 77, 97 (1981). *See also Alexander v. Sandoval*, 532 U.S. 275, 290 (2001); *Karahalios v. Nat'l Fed'n of Fed. Emps., Local 1263*, 489 U.S. 527, 533 (1989).

Although the Rehabilitation Act does not authorize suits against federal agencies for Section 504 violations, a person who encounters disability discrimination in a federal program may lodge an administrative complaint, which the agency will investigate and resolve. Defendants have passed regulations implementing Section 504 and providing for a complaint procedure should an individual encounter disability discrimination. *See* 32 C.F.R. §§ 56.1-56.10. Once the agency's resolution is final, judicial review of the agency decision is available under the Administrative Procedure Act ("APA"). *See* 5 U.S.C. §§ 702, 704; *Krumel*, 2002 WL 808633, at *4 (holding that Krumel has no § 504 cause of action against the Postal Service because "[t]he complaint procedure defined in the U.S. Postal Service regulations is available to Krumel, . . . there is no reason to believe that it would be ineffective," and judicial review of the administrative decision is available through the APA); *Maynard*, 2008 WL 4453199, at *1 (following *Krumel*).

The availability of review under the APA reinforces the conclusion that direct review under Section 504 is unavailable. The APA is the presumptive mechanism for reviewing agency action. *See Douglas v. Indep. Living Ctr. of S. Cal., Inc.*, 132 S. Ct. 1204, 1210–11 (2012). As then-Judge Breyer explained in rejecting the availability of a private right of action to enforce Section 504: "the APA's review procedures seem an appropriate way for [the plaintiff] to challenge the agency action here at issue. There is no reason to strain to find an implied right of action against federal agencies under § 504." *Cousins*, 880 F.2d at 610; *see also NAACP v. Sec'y of Hous. & Urban Dev.*, 817 F.2d 149, 152 (1st Cir. 1987). District courts in the Second Circuit have adopted Judge Breyer's reasoning and held that, when APA review is available, there is no reason to read into a statute an implied right of action against a federal agency. *Marinoff v. U.S. Dep't of Hous. and Urban Dev.*, 892 F. Supp. 493, 496 (S.D.N.Y. 1995); *Pleune v. Pierce*, 697 F. Supp. 113, 119 (E.D.N.Y. 1988).

For all of these reasons, Plaintiffs lack a private right of action under Section 504, and Counts Three and Six therefore should be dismissed.

IV. ALL CLAIMS ASSERTED BY THE THREE ORGANIZATIONAL PLAINTIFFS SHOULD BE DISMISSED BECAUSE THEY LACK STANDING.

In addition to the individual claims in this case, three organizational Plaintiffs – Vietnam Veterans of America ("VVA"), Vietnam Veterans of America Connecticut State Council ("VVA-CT"), and National Veterans Council for Legal Redress ("NVCLR") seek to assert claims under the APA, Section 504 of the Rehabilitation Act, and the Fifth Amendment of the United States Constitution against three separate Defendants – the Secretary of the Army, the Secretary of the Navy, and the Secretary of the Air Force. *See* Compl. ¶¶ 166-185 (Counts One, Two, and Three). These claims should be dismissed for lack of subject matter jurisdiction because the three organizational Plaintiffs do not have standing to challenge a decision of the

correction boards determining whether a particular individual's military records contain errors or injustices.[11]

"Article III of the Constitution limits federal courts' jurisdiction to certain 'Cases' and 'Controversies.'" *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1146 (2013). "One element of the case-or-controversy requirement is that plaintiffs must establish that they have standing to sue." *Id.* (internal quotation marks and citation omitted). When an organizational plaintiff, like VVA, VVA-CT, and NVCLR, is not itself "the object of the government action or inaction [it] challenges, standing is not precluded, but it is ordinarily 'substantially more difficult' to establish." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 562 (1992) (citation omitted).

An organization may have standing to sue either on behalf of its members ("representational" or "associational" standing) or on its own behalf ("organizational" standing). *See, e.g., New York Civil Liberties Union v. New York City Transit Auth.*, 684 F.3d 286, 294 (2d Cir. 2011). VVA, VVA-CT, and NVCLR appear to allege that they have both representational and organizational standing in this case. *See* Compl., ¶¶ 11, 12, 121, 125. These Plaintiffs, however, cannot meet the requirements for either type of standing.

A. VVA, VVA-CT, and NVCLR Lack Representational Standing to Bring Claims on Behalf of Their Members.

An association has representational standing to bring suit on behalf of its members when (1) its members would have standing to sue on their own; (2) the interests it seeks to protect are germane to its purpose; and (3) its claim and requested relief do not require the participation of individual members in the lawsuit. *See Hunt v. Wash. Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977); *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998).

[11] The causes of action asserted by the three organizational Plaintiffs (Counts One, Two, and Three) are the same as the causes of action asserted by the five individual Plaintiffs (Counts Four, Five, and Six). As a result, the bases for dismissing the Rehabilitation Act claim, discussed in Section III, above, apply equally to all Plaintiffs.

VVA, VVA-CT, and NVCLR's bid for representational standing fails because they have not identified a single member who would have standing to sue on their own. To establish standing, each entity would have to establish that a specific member has suffered injury in fact, that this injury is traceable to a specific decision of the ABCMR, BCNR, or AFBCMR, and that the injury can be redressed by a favorable judicial decision. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992); *Lee v. Board of Governors of the Fed. Res. Sys.*, 118 F.3d 905, 910 (2d Cir.1997). Here, VVA, VVA-CT, and NVCLR have completely failed to provide any allegations showing that a specific member meets these standing requirements. In fact, VVA, VVA-CT, and NVCLR specifically do not allege that the five individual Plaintiffs are members of their organizations. *See* Compl. ¶¶ 116, 121, 125. They accordingly have not met the requirement that a plaintiff organization must "make *specific allegations establishing that at least one identified member* had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 497-98 (2009) (emphasis added). This task, which should not be difficult where an organization claims that many of its members will be injured, is necessary to assist the Court in fulfilling its "independent obligation to assure that standing exists." *See* 555 U.S. at 499-500.

In addition, even if Plaintiffs could establish facts showing that a specific individual member would have standing on his or her own to sue one of the three correction boards over a particular decision, they still could not establish representational standing because participation of that specific individual member would be necessary. An organization "lacks standing to assert claims of injunctive relief on behalf of its members where 'the fact and extent' of the injury that gives rise to the claims for injunctive relief 'would require individualized proof,' or where 'the relief requested would require the participation of individual members in the lawsuit."

Bano v. Union Carbide Corp., 361 F.3d 696, 714 (2d Cir. 2004) (citing *Warth v. Seldin*, 422 U.S. at 515–16 and *Hunt*, 432 U.S. at 343) (internal alternations omitted).

Here, the nature of the organizational Plaintiffs' claims requires the participation of a specific individual veteran. VVA, VVA-CT, and NVCLR each allege that three separate departments of the United States military, acting through their respective correction boards, have issued individual record correction decisions under 10 U.S.C. § 1552 that are arbitrary, capricious, or otherwise contrary to law, in violation of the APA, the Fifth Amendment, and the Rehabilitation Act. In order for the Court to review the ABCMR's, BCNR's, or AFBCMR's determination of whether a specific individual's military records are in error or unjust, the participation of the actual veteran who applied to their correction board and received a denial of his or her application is crucial. Without the participation of the individual veteran, the Court has no specific administrative decision to review. Further, the decision of each correction board is highly individualized and depends on the facts presented in a specific veteran's application, which can vary in numerous respects. For example, individual participation is the only way to determine the circumstances of a veterans' history of service, which will vary in length and accomplishment; the nature of a veteran's misconduct, which can vary in severity and frequency; the causal relationship between the veteran's alleged combat-related mental illness and the instances of misconduct; the degree to which an individual's mental illness rendered him or her unfit for their specific duty; the veteran's medical history; the type of discharge a veteran received when separated from service; and the procedural facts surrounding both separation and the proceedings before the correction board. For numerous reasons, therefore, the "individual participation of each injured party" would be "indispensable to proper resolution of the cause." *Warth*, 422 U.S. at 511.

B. VVA, VVA-CT, and NVCLR Lack Organizational Standing to Bring Claims on Their Own Behalf.

The organizational Plaintiffs' claims fare no better to the extent that the groups seek to assert standing in their own right. As a general rule, every plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Federal jurisdiction, thus, does not extend to "organizations or individuals who seek to do no more than vindicate their own value preferences," *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972), or to those who seek to assert "generalized grievances more appropriately addressed in the representative branches." *Elk Grove Unified Sch. Dist. v. Newdow*, 542 U.S. 1, 12 (2004). Thus, a mere policy "interest in a problem, no matter how longstanding the interest and no matter how qualified the organization is in evaluating the problem" is insufficient to create standing. *Sierra Club*, 405 U.S. at 739 (internal quotation marks and citation omitted).

Instead, for an organization to sue on its own behalf, it must meet "the same standing test that applies to individuals." *Irish Lesbian & Gay Org.*, 143 F.3d at 649. Each organization therefore must establish "an injury-in-fact that is fairly traceable to the challenged action of the defendant, and which is likely to be redressed by the requested relief." *Jenkins v. United States*, 386 F.3d 415, 417 (2d Cir. 2004). The organizational Plaintiffs cannot establish any of these three standing elements.

VVA, VVA-CT, and NVCLR cannot establish injury in fact. An organization has no legally cognizable right to correct an individual's military record pursuant to 10 U.S.C. § 1552. Unless a particular member is incapable of acting on his or her own behalf, missing, or deceased (which is not the case for any individual in this action), the regulations of each of the three correction boards specifically provide that the request to change a military record is personal to

the applicant and thus the proper applicant is the individual affected by the particular military record. *See* 32 C.F.R. § 581.3(d)(ii) (Army); 32 C.F.R. § 723.3(a)(2) (Navy); 32 C.F.R. § 865.3(a)(1) (Air Force). The organizational Plaintiffs thus have no statutory or regulatory right to correct another individual's military record, and thus the organizational Plaintiffs cannot establish an injury in fact. *See, e.g. Salt Inst. v. Leavitt*, 440 F.3d 156, 159 (4th Cir. 2006) ("Because the statute upon which appellants rely does not create a legal right to access to information or to correctness, appellants have not alleged an invasion of a legal right and, thus, have failed to establish an injury in fact sufficient to satisfy Article III.").

Nor can the organizational Plaintiffs establish injury in fact by alleging in conclusory fashion that they "must expend resources advocating for VVA members and other Vietnam veterans who are harmed by Defendants' actions." *See* Compl. ¶ 113. As an initial matter, VVA has pled no facts showing that it will expend specific resources in the future as a result of a particular decision from a specific correction board. Instead, VVA alleges that it "has been injured" by unidentified, past decisions of each correction board. *See, e.g.*, Compl. ¶¶ 113, 116. It is black letter law, however, that a "plaintiff seeking injunctive or declaratory relief cannot rely on past injury to satisfy the injury requirement but must show a likelihood that he or she will be injured in the future." *Deshawn E. by Charlotte E. v. Safir*, 156 F.3d 340, 344 (2d Cir. 1998) (citing *City of Los Angeles v. Lyons*, 461 U.S. 95, 105–06 (1983)).

Further, even if organizational Plaintiffs could plead facts showing that they each will expend a specific resource as a result of a specific board decision, that expense still would not establish injury in fact. The organizations themselves are, by the allegations of the Complaint, dedicated to advocating on behalf of Vietnam veterans through various means, including litigation. For example, VVA alleges that its organizational purpose is to "advocate[e] for the

rights of Vietnam veterans with PTSD and other mental health disabilities through policy advocacy, legislative advocacy, and litigation." Compl., ¶ 112. And NVCLR alleges that its organizational purpose is to "assist veterans with less than honorable discharge statuses and to educate the public about the stigma and struggles these veterans face." *Id.* ¶ 122. In light of these stated organizational purposes, any expenses incurred by VVA, VVA-CT, and NVCLR in this case do not "involve[] a diversion of organizational resources from core organizational activities toward legal efforts." *Small v. Gen. Nutrition Companies, Inc.*, 388 F. Supp. 2d 83, 95 (E.D.N.Y. 2005).

Finally, even if the expenditure of unspecified resources could constitute injury in fact, organizational Plaintiffs have failed to establish that this purported injury is fairly traceable to a discrete administrative action of a particular correction board, and that the alleged injury will be redressed by their requested injunctive relief. *See Lujan*, 504 U.S. at 560–61; *Lee*, 118 F.3d at 910. In fact, other than alleging in general fashion that the correction boards do not "utilize consistent and medically appropriate standards," Plaintiffs do not identify any particular agency conduct that is causing their alleged injury and that could be redressed by their requested injunctive relief. The organizational Plaintiffs, therefore, cannot establish standing to assert claims on their own behalf and thus their claims should be dismissed for lack of subject matter jurisdiction.

C. VVA, VVA-CT, and NVCLR's Claims Do Not Fall Within the Zone of Interests Protected by Section 1552 and its Implementing Regulations.

VVA, VVA-CT, and NVCLR's claims also should be dismissed because they do not fall within the zone of interests protected by 10 U.S.C. § 1552. Indeed, Congress did not intend for organizational entities to challenge individual record-correction decisions made pursuant to 10 U.S.C. § 1552. In addition to satisfying constitutional standing requirements, organizational

plaintiffs must also demonstrate that their "complaint falls within the zone of interests protected by the law invoked." *See Elk Grove*, 542 U.S. at 12. A plaintiff cannot meet this test merely by alleging that a regulatory scheme protects or regulates someone else's interests in a way that might indirectly affect its own. *See Air Courier Conference v. Am. Postal Workers Union*, 498 U.S. 517, 522-31 (1991); *Lujan*, 497 U.S. at 883. Instead, the plaintiff must show that "the procedures in question are *designed* to protect [or regulate] some concrete interest of his that is the ultimate basis of his standing." *Ctr. for Law & Educ. v. Dep't of Educ.*, 396 F.3d 1152, 1157 (D.C. Cir. 2005) (quoting *Lujan*, 504 U.S. at 573 n.8) (emphasis in *Ctr. for Law*). The "breadth of the zone of interests varies according to the provisions of law at issue, so that what comes within the zone of interests of a statute for purposes of obtaining judicial review of administrative action under the 'generous review provisions' of the APA may not do so for other purposes." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 134 S. Ct. 1377, 1389 (2014) (citations omitted). Thus, in determining the "zone of interest," the relevant provision is the "statutory provision whose violation forms the legal basis for [plaintiffs'] complaint." *Lujan*, 497 U.S. at 883.

Here, the organizational Plaintiffs cannot show that they fall within the zone of interests that Section 1552 and its implementing regulations were designed to protect. As noted, by regulation, the Secretary of the Army, Secretary of the Navy, and Secretary of the Air Force have established that a military record is personal to the applicant and thus the proper applicant is the individual affected by the particular military record. *See* 32 C.F.R. § 581.3(d)(ii) (Army); 32 C.F.R. § 723.3(a)(2) (Navy); 32 C.F.R. § 865.3(a)(1) (Air Force). Section 1552 and its implementing regulations make no "mention of advocacy organizations' interests." *Ctr. for Law*,

396 F.3d at 1157. Nor do they regulate the conduct of advocacy groups. The organizational concerns of Plaintiffs, therefore, are not within the zone of interests of the relevant statute.

V. THE SECRETARY OF THE AIR FORCE SHOULD BE DISMISSED AS A DEFENDANT BECAUSE THERE ARE NO ALLEGATIONS OR CLAIMS ASSERTED AGAINST THE AIR FORCE BY A SPECIFIC INDIVIDUAL PLAINTIFF.

The Secretary of the Air Force, Deborah Lee James, is named as a Defendant in her official capacity in this case. *See* Compl. ¶ 22. However, this case does not involve any actual person who has served in the Air Force and applied to the Air Force Board for Correction of Military Records ("AFBCMR"). *See* Compl. ¶¶ 12-16. In fact, the only semi-substantive allegation in the Complaint that even mentions the Air Force is buried in Paragraph 154 on page 27. There, the Complaint alleges that a "John Doe" served in the Air Force and applied for, and was denied, an upgrade to his other than honorable discharge status. Compl. ¶ 154. These "John Doe" allegations, however, fundamentally fail to establish standing to sue the Secretary of the Air Force. No actual individual has established an injury in fact traceable to an actual AFBCMR decision that is redressable by judicial decision. *See Lujan*, 504 U.S. at 560–61; *Lee*, 118 F.3d at 910. As a result, the Secretary of the Air Force should be dismissed as a Defendant.[12]

CONCLUSION

Given this case involves five individual Plaintiffs and three organizational Plaintiffs who presumably each attempt to assert multiple claims against three separate Defendants, the following is chart noting the basis for dismissal, or for remand, of each claim:

[12] To the extent the three organizational Plaintiffs bring claims against the Secretary of the Air Force (which is not clear given the complete absence of allegations regarding the Air Force and the absence of any Air Force veteran who has actually submitted an application to the AFBCMR), those claims fail for lack of standing as explained in Section IV. In addition, the fact that the Complaint includes class action allegations does not relieve Plaintiffs of the burden of establishing that a specific named Plaintiff has established a case or controversy with each one of the Defendants. *See O'Shea v. Littleton*, 414 U.S. 488, 494 (1974); *Warth*, 422 U.S. at 502.

Plaintiffs	**Claims**	**Basis for Dismissal or Remand**
Siders Marret Cottam	APA (Count Four) Fifth Amendment (Count Five) Rehabilitation Act (Count Six)	Remand Remand Dismiss (Rule 12(b)(1) and Rule 12(b)(6))
Davis	APA (Count Four) Fifth Amendment (Count Five) Rehabilitation Act (Count Six)	Dismiss (Rule 12(b)(6) and Rule 56) Dismiss (Rule 12(b)(6) and Rule 56) Dismiss (Rule 12(b)(1) and Rule 12(b)(6))
Monk	APA (Count Four) Fifth Amendment (Count Five) Rehabilitation Act (Count Six)	Dismiss (Rule 12(b)(1) and Rule 12(b)(6)) Dismiss (Rule 12(b)(1) and Rule 12(b)(6)) Dismiss (Rule 12(b)(1) and Rule 12(b)(6))
Organizational Plaintiffs (VVA, VVA-CT, NVCLR)	APA (Count One) Fifth Amendment (Count Two) Rehabilitation Act (Count Three)	Dismissed (Rule 12(b)(1)) Dismissed (Rule 12(b)(1)) Dismissed (Rule 12(b)(1) and Rule 12(b)(6))

Dated: June 30, 2014

Respectfully submitted,

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CERTIFICATION OF SERVICE

I hereby certify that on June 30, 2014 the foregoing motion was filed electronically. Notice of this filing will be sent by e-mail to all parties by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

/s/ Matthew A. Josephson
Matthew A. Josephson