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 August 8, 2014

MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS AND FOR SUMMARY JUDGMENT

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INTRODUCTION

Plaintiffs in this case are three veterans' advocacy organizations and five Vietnam veterans suffering from service-related Post-Traumatic Stress Disorder ("PTSD") that, in turn, led to their other than honorable discharges ("OTH"s). Plaintiffs seek on behalf of themselves and a proposed class of thousands of such veterans to challenge the unlawful standards used by record correction boards to review applications to upgrade their discharge status. By those challenged standards, these boards have systematically denied virtually every application filed by the members of this group of veterans, including that of each individual plaintiff. The record correction boards of each military service branch have either ignored PTSD claims entirely or have employed Catch-22-like policies and practices to deny claims—for instance, by requiring a diagnosis of PTSD before discharge even though PTSD was not a medically recognized diagnosis until 1980. *See, e.g.*, Compl. ¶¶ 152-155. In short, this case is not simply about an individual veteran's application for a discharge status upgrade; it is a challenge to Defendants' unlawful and discriminatory approach to *any and all* of such veterans' applications.

In their motion to dismiss, Defendants do not even address the unlawfulness of their boards' challenged standards for adjudicating discharge upgrade applications. Instead, they attempt to avoid entirely the Court's consideration of the merits of Plaintiffs' claims.[1]

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[1] Defendants move on a variety of grounds, making different motions as to different Plaintiffs. Their motion provides as follows: (1) Defendants move to dismiss Count One of Plaintiffs' Complaint, alleging violation of the APA, under Rule 12(b)(1) with respect to Organizational Plaintiffs; (2) Defendants move to dismiss Count Two, alleging violation of the Fifth Amendment, under Rule 12(b)(1) with respect to Organizational Plaintiffs; (3) Defendants move to dismiss Counts Three and Six, alleging violation of the Rehabilitation Act, under Rules 12(b)(1) and 12(b)(6) with respect to all Plaintiffs; (4) Defendants move to dismiss Count Four, alleging violations of the APA, under Rule 12(b)(6), and move for summary judgment under Rule 56, with respect to Plaintiff Davis; (5) Defendants move to dismiss Count Four under Rules 12(b)(1) and 12(b)(6) with respect to Plaintiff Monk; (6) Defendants move to dismiss Count Five, alleging violations of the Fifth Amendment, under Rule 12(b)(6), and move for summary judgment under Rule 56, with respect to Plaintiff Davis; (7) Defendants move to dismiss Count Five under Rules 12(b)(1) and 12(b)(6) with respect to Plaintiff Monk. Even if Defendants are successful in knocking out the claims of Plaintiffs Davis and Monk, Plaintiffs' proposed class will have surviving claims. Defendants' motion does not deal with the claims of Plaintiffs Siders, Marret, or Cottam, but refers the Court to the pending motion to remand regarding those Plaintiffs. *See* ECF No. 18. Nor does Defendants' motion address the claims of the

First, Defendants cast Plaintiffs' Rehabilitation Act claims as an end-run around the existing statutory regime for record correction applications. But these claims challenge the very standards against which such applications are considered by Defendants. Plaintiffs seek redress for concrete and consistently-implemented standards and policies that discriminate against all class members in violation of the Rehabilitation Act. It is well established that the Rehabilitation Act properly supports such collateral challenges to federal agency policies and procedures, and that a private right of action exists to make such a claim.

Next, Defendants attack the Named Plaintiffs' individual applications for discharge upgrades in order to eliminate them as class representatives. Defendants assert that Mr. Monk's claims should fail for the absence of "final agency action;" that the Court should remand the claims of Messrs. Marret, Siders, and Cottam because the relevant board now wishes to "re-consider" those applications; and that Mr. Davis' application was properly resolved. For the reasons set forth herein, these Named Plaintiffs' claims are properly before this Court and should not be dismissed.

Further, Defendants challenge the Organizational Plaintiffs' standing on numerous grounds. Defendants suggest that no individual members of these organizations would have standing, the organizations themselves have not suffered any injury, and that the organizations cannot bring suit without, in effect, forcing the Court to re-try every individual member's application. In fact, both the Complaint and the declarations submitted with this memorandum establish the injuries suffered by the organizations' individual members and by the organizations

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proposed class members with respect to Counts One and Two, which allege violations of the Administrative Procedure Act and the Fifth Amendment, respectively, on behalf of the proposed class. The survival of these claims notwithstanding this motion provides further reason that all of Plaintiffs' claims should be resolved on the merits, and not before.

themselves on account of the challenged standards. And the Court would not be required to resolve *any* individual's application in order to have jurisdiction over the organizations' claims.

Finally, Defendants assert that the Secretary of the Air Force should be dismissed as a Defendant because none of the Named Plaintiffs served in that branch. But the Organizational Plaintiffs have alleged that many of their members served in the Air Force and are members of the proposed class who are injured by the Secretary's challenged standards. Moreover, discovery in this matter will reveal the identities of those particular Air Force veterans—information that is now solely within the Secretary's possession.

Tellingly, Defendants nowhere challenge the Plaintiffs' claims on behalf of the proposed class brought pursuant to the Administrative Procedure Act and Due Process Clause, as set forth in Counts I and II of the Complaint. Accordingly, even if the Court were to remand or dismiss all claims of all Named Plaintiffs (Counts IV – VI), conclude that no cause of action was cognizable under the Rehabilitation Act for any Plaintiff (Count III), and hold that the Organizational Plaintiffs lack standing—none of which would be supported by the law—this case should still proceed to discovery, with leave granted to add additional Named Plaintiffs.

In sum, Defendants' efforts to cast this case as a series of individual applications for discharge upgrades that this Court is powerless to hear should be rejected. Plaintiffs seek to represent themselves and a class of thousands of Vietnam veterans with PTSD. They have one modest but critical objective: to require Defendants to adopt and faithfully apply lawful standards for hearing applications from such veterans. Plaintiffs respectfully submit that they should be allowed to develop their claims through discovery concerning, among other things, Defendants' current standards and practices in such cases, and that their claims should be resolved on the merits by this Court.

FACTS AND PROCEEDINGS

This case is about the unlawful course of conduct the Secretaries of the Navy, the Army, and the Air Force have undertaken in reviewing applications for discharge upgrades brought by Vietnam veterans on the basis of service-related PTSD, a diagnosis that did not exist in the Vietnam War Era. Since World War II, Congress has directed each Secretary, acting through civilian boards, to revise any record when it is "necessary to correct an error or remove an injustice." 10 U.S.C. § 1552(a)(1). The boards regularly exercise this power to upgrade the discharge status of a former service member. Yet when it comes to reviewing applications for discharge upgrades brought by Vietnam veterans with PTSD claims, the boards consistently fail to apply medically appropriate standards and, as a result, issue arbitrary, capricious, and discriminatory decisions.

More than 260,000 veterans, about three percent of those who served during the Vietnam War Era, received OTHs. Compl. ¶ 127. Approximately one third of Vietnam veterans who received an OTH, or more than 80,000 persons, have suffered PTSD. *Id.* ¶ 137. Many, including the individual Plaintiffs, struggle with PTSD to this day. *See, e.g.*, Benedict Carey, *Combat Stress Among Veterans is Found to Persist Since Vietnam,* N.Y. TIMES, Aug. 7, 2014. Yet Defendants have categorically denied nearly all upgrade applications by this group. Compl. ¶ 147.

Specifically, when Vietnam veterans have sought discharge upgrades on the basis of service-related PTSD from the record correction boards, the boards summarily deny their applications, ignoring their PTSD claims entirely or discrediting their wounds because PTSD was not diagnosed prior to discharge. *Id.* ¶ 152. Crucially, however, these Vietnam veterans could not have been diagnosed with PTSD at the time of their discharges because the medical diagnosis did not even exist until 1980. *Id.* ¶¶ 134, 152.

Although the diagnosis did not yet exist, the effects of PTSD were deeply felt by these veterans, predictably causing behaviors that led to their OTHs. Under procedures for *current* service members, prior to discharge the military provides a medical examination, diagnoses individuals with PTSD as appropriate, and provides medical discharges. *See* Compl. ¶¶ 39, 59, 79, 92, 107. Instead of benefitting from this medically appropriate approach, Vietnam veterans, including the Plaintiffs in this case, received OTH discharges notwithstanding their condition.

Consequently, Plaintiffs and members of the proposed class have unjustly borne the stigma of PTSD and OTH discharges for decades. Defendants' failure to apply medically appropriate standards furthers this stigmatization, interferes with Plaintiffs' employment prospects, and bars them from receiving U.S. Department of Veterans Affairs ("VA") disability, housing, and education benefits and critically important mental health treatment.

On March 3, 2014, Plaintiffs filed their Complaint against the Secretary of the Navy, the Secretary of the Army, and the Secretary of the Air Force in this Court on behalf of themselves and a proposed class of "all veterans of the Vietnam War Era who served in the Vietnam Theater 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." Compl. ¶ 158. Plaintiffs ask this Court *inter alia* to issue an injunction ordering the boards to apply consistent and medically appropriate standards that recognize the effects of PTSD when determining whether to upgrade the discharge statuses of these veterans. Compl., *Prayer for Relief*, ¶ 2.[2]

[2] In addition to the instant motion, Defendants have moved to remand the claims of three Plaintiffs, ECF No. 18, and Plaintiffs have moved for class certification, ECF No. 24.

Plaintiffs Vietnam Veterans of America ("VVA"), Vietnam Veterans of America – Connecticut State Council ("VVA-CT"), and the National Veterans' Council for Legal Redress ("NVCLR") (collectively, "Organizational Plaintiffs") offer support to Vietnam veterans suffering from PTSD. VVA and VVA-CT advocate for the rights of Vietnam veterans with PTSD and other mental health disabilities through policy advocacy, legislative advocacy, and litigation. NVCLR assists veterans with OTH discharge statuses, providing support to them and their families, and educating the public about the stigma and struggles that these veterans face. Many members of these organizations, including veterans from each department of the military (Army, Navy, Marines, and Air Force), received OTHs based on conduct attributable to their undiagnosed PTSD from service in Vietnam. *See* Ex. A, Decl. of VVA ¶ 6; Ex. B, Decl. of VVA-CT ¶ 4; Ex. C, Decl. of NVCLR ¶ 2.[3] These members have applied to their respective record correction boards for a discharge upgrade on the basis of PTSD, but these applications have been summarily denied. Compl. ¶ 147; *see, e.g.*, Ex. D, Decl. of F. Dyer ¶¶ 29-33; Ex. E, Decl. of R. Hill ¶¶ 16-19; Ex. F, Decl. of M. Mitchell ¶¶ 2, 17-18; Ex. G, Decl. of T. Sewell ¶¶ 13, 15-16; Ex. H, Decl. of M. Shealey ¶¶ 2, 31-33; Ex. I, Decl. of O. Yancy ¶¶ 2, 30-38 .

The five individual Named Plaintiffs—Conley Monk, Kevin Marret, George Siders, James Cottam, and James Davis—are veterans who served in the Vietnam War and, during their service in the Vietnam Theater, developed PTSD. They each received OTH discharges as a result of behavior attributable to PTSD and each man has applied unsuccessfully one or more times to the board of his respective service branch.

[3] The Court should consider these declarations to resolve disputed fact issues related to the 12(b)(1) issue regarding whether the Court has subject matter jurisdiction. *See Robinson v. Gov't of Malaysia*, 269 F.3d 133, 140–41 & n.6 (2d Cir. 2001).

Conley Monk

Conley Monk joined the U.S. Marine Corps in 1968 and was deployed to Vietnam from July 1969 until November 1969. Compl. ¶¶ 23-24. Mr. Monk served valiantly through mortar attacks, guerilla warfare, and gassings. *Id.* ¶¶ 25-28.

In November 1969, Mr. Monk's station was moved to Okinawa. *Id.* ¶ 31. While Mr. Monk was in Okinawa, symptoms of PTSD began to manifest due to the traumatic experiences he survived. He suffered flashbacks and displayed hyper-vigilance and a constant state of fear. *Id.* ¶¶ 32-34. As a result, he went absent without leave ("AWOL") for several short periods and one longer period of 35 days, seeking drugs to self-medicate and to cope with his symptoms. *Id.* ¶ 33. He also had two altercations, including one with a commanding officer, who mistakenly accused him of stealing. The officer approached the hyper-vigilant Mr. Monk one night, grabbing him by surprise and spawning a fight. *Id.* ¶ 34. Mr. Monk was put in the base brig and received an OTH discharge. *Id.* ¶ 35.

Mr. Monk returned to the U.S. in September 1970, and sought disability benefits from the Veterans Administration in 1971. His application was denied due to his OTH discharge. *Id.* ¶¶ 37-38. Mr. Monk applied for discharge upgrades in 1971 to the Naval Discharge Review Board ("NDRB") and in 1976 to the Board for Correction of Naval Records ("BCNR"). In each instance, his application was denied. In April 1979, he requested secretarial review of the NDRB's adverse decision and was denied yet again. *Id.* ¶ 38.

Mr. Monk was diagnosed with PTSD in December 2011. The psychiatrist who diagnosed Mr. Monk concluded he suffered PTSD attributable to his service in Vietnam, which had resulted in the misconduct that led to his OTH discharge. *Id.* ¶ 39. Mr. Monk applied to the BCNR for a discharge upgrade again in July 2012, citing his newly discovered diagnosis of PTSD. *Id.* ¶ 40. When the instant action was filed, more than 18 months had passed since Mr.

Monk applied to the BCNR, and he had still not received a decision, in violation of the statutory deadline for a decision. As of this filing, he has still not received a decision. *Id.* ¶ 42.

James Davis[4]

Mr. Davis was deployed to Vietnam from January 1971 to December 1971. Compl. ¶ 96. In Vietnam, he experienced multiple traumatic events, including being tasked with identifying, sorting and bagging bodies and body parts. Compl. ¶ 99; AR 14. In addition to this gruesome task, Mr. Davis experienced regular shelling by the North Vietnamese and also witnessed, while eating breakfast, a First Lieutenant's brain blown to bits by a sniper. Compl. ¶¶ 98, 100; AR 14. These experiences caused Mr. Davis great mental anguish. As a result of experiencing these horrifying events, Mr. Davis struggled to sleep and to perform his assigned duties during the rest of his time in Vietnam. Mr. Davis's sleep struggles, which included intense nightmares and insomnia, continued after he returned to the United States. *Id.* ¶¶ 101-104. By June 1972, Mr. Davis's symptoms and resulting substance dependence worsened, and he received non-judicial punishment on five occasions in seven months, for sleeping on post, brief unauthorized absences, and negligent loss of property. AR 15. Mr. Davis sought treatment at Fort Bragg, but the military would not give him an appointment with a doctor or psychologist. *Id.* ¶ 103. Sleep-deprived and unable to perform his military duties, Mr. Davis left Fort Bragg without authorization in an effort to find another job. *Id.* ¶ 104. When the military apprehended Mr. Davis in 1973, he was discharged under other than honorable conditions. *Id.* ¶ 105. Mr. Davis received an undesirable discharge in 1972 for misconduct attributable to his invisible wound. In 2011, the VA diagnosed Mr. Davis with PTSD, and in 2012, Mr. Davis applied to the

4 "The disputed and undisputed facts concerning Mr. Davis are provided in Plaintiffs' Local Rule 56(a)(2) Statement submitted with this memorandum."

ABCMR for a discharge upgrade because "the events leading to [his] undesirable discharge were caused by PTSD." AR 12. The ABCMR denied his application.

Kevin Marret

Mr. Marret joined the U.S. Marine Corps in 1969 and served in the Vietnam Theater from October 1969 to October 1970. Compl. ¶ 43. The firefights and mortar attacks he survived in Vietnam caused him to suffer blackouts, hyper-vigilance, panic attacks, anxiety, and abdominal cramps. *Id.* ¶¶ 47, 49. When he returned from Vietnam, he struggled with assigned tasks and would leave the base without permission in order to seek treatment for his symptoms. *Id.* ¶¶ 51-52. He received an OTH due to his periods away from the base. *Id.* ¶ 54.

Mr. Marret was diagnosed with PTSD in 1994. A psychiatrist who examined Mr. Marret in 1997 concluded that Mr. Marret's mental condition likely resulted from his service in Vietnam and had caused the AWOL that led to his OTH. *Id.* ¶¶ 58-59. Mr. Marret applied to the BCNR in 1999, 2007, 2010, and 2012, asserting that his OTH resulted from his PTSD. *Id.* ¶¶ 58, 60. The BCNR denied each application and failed to correct Mr. Marret's OTH discharge. *Id.* ¶ 60.

George Siders

George Siders joined the U.S. Army at 18 and served in the Vietnam Theater from May 1968 until January 1969. *Id.* ¶¶ 63, 68. Mr. Siders participated in approximately 26 major operations, during which he experienced many horrific events. *Id.* ¶ 65. His company often came under heavy artillery fire and was involved in hand-to-hand combat. *Id.* ¶ 66. Mr. Siders was required to retrieve the bodies of enemies he killed. *Id.* When he returned to the U.S., Mr. Siders began to suffer from nightmares, anxiety, and anger as a result of undiagnosed PTSD, and he struggled to perform his duties. *Id.* ¶¶ 69, 70. As a result, he twice left his base without permission, but voluntarily returned to the base each time. *Id.* ¶¶ 71-73. He received an OTH in 1971. *Id.* ¶ 74.

Mr. Siders applied to the BCNR for a discharge upgrade in 2003. *Id.* ¶ 75. He began receiving treatment for PTSD in 2004, and submitted a request for reconsideration to the BCNR again in 2012. *Id.* ¶¶ 77-78, 80. The BCNR has failed to upgrade Mr. Siders' discharge. *Id.*

James Cottam

James Cottam enlisted in the Army in 1968 and served in the Vietnam Theater from October 1969 to November 1970. *Id.* ¶ 83. Among the many traumatic events Mr. Cottam witnessed, he was particularly disturbed by the death of a Vietnamese child from U.S. artillery fire. *Id.* ¶ 85. He watched as the child's mother, screaming and crying, dragged the child's body away. *Id.* Upon returning to the U.S., he began suffering from severe nightmares, night sweats, and heightened irritability. *Id.* ¶¶ 86, 89. As a result, he left base without permission in January 1974; he voluntarily returned in May 1974. *Id.* ¶ 89. He received an OTH in August 1974. *Id.*

The VA diagnosed Mr. Cottam with PTSD in 1982 and again in 1985. *Id.* ¶ 90. In 2002, the VA gave Mr. Cottam a 100% disability rating for service-connected PTSD. *Id.* ¶ 91. In 2009, he applied to the ABCMR for a discharge upgrade, asserting his discharge was the result of service-connected PTSD. *Id.* ¶ 94; ECF No. 18-3 at 2. The ABCMR denied his application without addressing the impact Mr. Cottam's PTSD may have had on his discharge. *Id.* at 5-6.

STANDARD OF REVIEW

If the allegations in the complaint and the undisputed facts support jurisdiction, or if discovery is necessary to determine jurisdiction, the Court may not grant Defendants' 12(b)(1) motion to dismiss. *See State Emps. Bargaining Agent Coal. v. Rowland*, 494 F.3d 71, 76-77 (2d Cir. 2007). In a 12(b)(6) motion to dismiss, the Court must "construe[] the complaint liberally, accept[] all factual allegations in the complaint as true, and draw[] all reasonable inferences in the plaintiff's favor." *Aegis Ins. Svcs., Inc. v. 7 World Trade Co., L.P.*, 737 F.3d 166, 176 (2d Cir. 2013) (quotation marks omitted). "Dismissal is inappropriate unless it appears beyond

doubt that the plaintiff can prove no set of facts which would entitle him or her to relief." *Id.* (quotation marks omitted). "The issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims." *Villager Pond, Inc. v. Town of Darien*, 56 F.3d 375, 378 (2d Cir. 1995) (quotation marks omitted).

Federal Rule of Civil Procedure 56 provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). Just as with the review of a motion to dismiss, in a motion for summary judgment, the Court must "view[] the facts in the light most favorable to the non-moving party." *Aegis*, 737 F.3d at 176.

ARGUMENT

I. Plaintiffs' Section 504 Claims Should Not Be Dismissed.

Defendants move to dismiss Plaintiffs' claims under Section 504 of the Rehabilitation Act of 1973 ("Section 504"), Pub. L. No. 93-112, 87 Stat. 355, 29 U.S.C. § 791 *et seq.*, on the grounds that the existence of a regulatory system for the correction of individual military records precludes Plaintiffs' claims, and that there is no private cause of action against federal agencies for alleged disability discrimination in federally conducted programs.

Defendants' motion should be denied. Section 504 does indeed provide Plaintiffs with a private cause of action to sue a federal agency in federal court, and is not precluded by the existence of an administrative regime for seeking individual relief.

A. Plaintiffs Have A Private Cause Of Action Under Section 504 Of The Rehabilitation Act.

Contrary to Defendants' contention, Section 504 provides a private cause of action for Plaintiffs to bring suit. Under Section 505 of the Act, the remedies available under Section 504 are the same as those available under Title VI of the Civil Rights Act of 1964. *Barnes v.*

Gorman, 536 U.S. 181, 185 (2002) ("[T]he remedies for violations of … § 504 of the Rehabilitation Act are coextensive with the remedies available in a private cause of action brought under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq*., which prohibits racial discrimination in federally funded programs and activities."). Federal courts have unanimously held that Congress created a private cause of action for enforcing § 601 of Title VI, the provision upon which Section 504's text was modeled. *Lane v. Pena*, 518 U.S. 187, 201-02 (1996) (J. Stevens, dissenting) (citing *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979)). The corollary is that Section 504, too, provides a private cause of action. Indeed, "Section 504's private right of action derives—through Congress's use of parallel language, incorporation of Title VI's remedies in the 1978 amendments, and ratification of *Cannon*—from the right of action that exists to enforce Title VI." *Three Rivers Center for Indep. Living v. Hous. Auth. of City of Pittsburgh*, 382 F.3d 412, 426 (3d Cir. 2004).[5]

Courts directly addressing the question have consistently confirmed the existence of this private right of action. *Schultz v. Young Men's Christian Ass'n of U.S.*, 139 F.3d 286, 290 (1st Cir. 1998) ("[B]y judicial construction a private cause of action for injunctive relief and damages now exists under section 504, qualified by the general assertion that the remedy must be 'appropriate.'") (citing *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60 (1992)); *Pandazides v. Va. Bd. of Educ.*, 13 F.3d 823, 828 (4th Cir. 1994) ("Although the Supreme Court has avoided directly deciding the question of the availability of a private right of action under § 504 … every circuit that has addressed this question … has held that a private right of action exists." (internal

[5] This analysis is consistent with the Second Circuit's approach to determining whether Congress intended an Act to be enforceable by a private right of action. *See Abrahams v. MTA Long Island Bus*, 644 F.3d 110, 118 (2d Cir. 2011) ("In this Circuit, '[t]o discover whether Congress intended that the Act be enforceable by a private right of action, we look to the text and structure of the statute.'") (quoting *George v. N.Y.C. Dep't of City Planning*, 436 F.3d 102, 103 (2d Cir. 2006)); *see also Olmsted v. Pruco Life Ins. Co. of N.J.*, 283 F.3d 429, 432 (2d Cir. 2002) ("The Supreme Court has established that courts must look to the intent of Congress in determining whether a federal private right of action exists for violations of a federal statute.").

citations omitted); *Milbert v. Koop*, 830 F.2d 354, 356 (D.C. Cir. 1987) ("[B]y its 1978 amendments to the Rehabilitation Act, Congress clearly recognized both in section 501 and in section 504 that individuals now have a private cause of action to obtain relief for handicap discrimination on the part of the federal government and its agencies."); *Morgan v. U.S. Postal Serv.*, 798 F.2d 1162, 1164 n.2 (8th Cir. 1986) ("The Eighth Circuit recognizes a cause of action against federal agencies under both [Section 501 and Section 504].").

This right to sue includes suits against federal agencies, including those against the heads of federal agencies in their official capacities, such as Plaintiffs' action. *See, e.g.*, *Lane v. Pena*, 518 U.S. at 190 (recognizing private cause of action against Department of Transportation and noting government concession in lower court that § 504 claim is available against Secretary of Transportation); *Traynor v. Turnage*, 485 U.S. 535 (1988) (adjudicating § 504 claim against Administrator of VA); *J.L. v. Soc. Sec. Admin.*, 971 F.2d 260, 269 (9th Cir. 1992) (recognizing private cause of action against Social Security Administration), *overruled in part on other grounds*, *Lane v. Pena*, 518 U.S. 187 (1996); *Gray v. Golden Gate Nat'l Recreational Area*, 279 F.R.D. 501, 503 (N.D. Cal. 2011) (same, National Park Service), *recons. denied in part*, 866 F Supp. 2d 1129 (N.D. Cal. 2011); *Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d 51 (D.D.C. 2006) (adjudicating § 504 claim against Secretary of Treasury), *aff'd*, 525 F.3d 1256 (D.C. Cir. 2008).[6]

[6] Defendants' reliance on *Lane* for the purported principle that the Rehabilitation Act treats federal agencies differently from other § 504(a) defendants is misplaced. ECF No. 26-1 at 23-26. In *Lane*, the Supreme Court dismissed a claim against the Secretary of Transportation on the grounds that Congress has "not waived the Federal Government's sovereign immunity *against monetary damages awards*." 518 U.S. at 190 (emphasis added). The *Lane* Court's assertion that agencies ought to be treated differently *with respect to the availability of monetary damages* is not at odds with a finding that § 504 creates a private cause of action; the questions are analytically distinct. *See Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 65-66 (1992) ("'[T]he question whether a litigant has a 'cause of action' is analytically distinct and prior to the question of what relief, if any, a litigant may be entitled to receive.'"). The *Lane* Court focused on what relief was available *given the existence* of that cause of action. In fact, the Court's analysis in *Lane* supports Plaintiffs' § 504 claims for injunctive relief. The *Lane* Court neither challenged the district court's award of injunctive relief nor suggested that injunctive relief is unavailable to

Congress authorized a private right of action for injunctive relief under § 504, and Defendants' motion to dismiss on this ground should be denied.

B. Plaintiffs' Section 504 Claims Are Not Precluded By The Administrative System For Correcting Individual Military Records.

Defendants argue that judicial review of Plaintiffs' Section 504 claims is precluded based on the language of 10 U.S.C. § 1552, which delegates authority to the Secretary of a military department, acting through its respective board, to correct errors or injustice in military records.[7] But Defendants' arguments here miss the point. Plaintiffs are not seeking, by way of their Section 504 claims, to circumvent the remedial scheme provided by 10 U.S.C. § 1552 for the consideration and resolution of individual status upgrade applications. Rather, Plaintiffs' Section 504 claims collaterally seek redress for the boards' arbitrary and discriminatory standards, as applied across the entire proposed class of applicants—a challenge that is both different from and also unavailable to an individual applicant in the agency's administrative process.

The Supreme Court has upheld cases allowing review of claims when those claims are collateral to a statute's review provisions and are outside the agency's expertise, especially where preclusion would foreclose meaningful judicial review. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-13 (1994) (citing cases); *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496-97 (1991) (permitting due process challenge despite Immigration and Nationality Act provision expressly limiting judicial review of certain status determinations, where statutory

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plaintiffs suing federal agencies under § 504. *Lane*, 518 U.S. at 196 ("Congress is free to waive the Federal Government's sovereign immunity against liability without waiving its immunity from monetary damages awards."); *see also Am. Council of the Blind v. Paulson*, 463 F. Supp. 2d at 58 ("The Court's reasoning in *Lane* indeed supports the view that injunctive relief is available against the sovereign under this provision.").

[7] Defendants do not argue that judicial review of the actions of record correction boards is entirely unavailable—nor could they. Under 10 U.S.C. § 1552, decisions of military record correction boards are subject to judicial review, as governed by § 706 of the APA. *Dibble v. Fenimore*, 488 F. Supp. 2d 149, 154 (N.D.N.Y. 2006), *aff'd* 545 F.3d 208 (2d Cir. 2008); *see also Blassingame v. Sec'y of the Navy*, 811 F.2d 65, 69 (2d Cir. 1987) (finding district court had subject matter jurisdiction to review record correction board's decision under 10 U.S.C. § 1552(b) and explaining that "the availability of judicial review of decisions of the Correction Board[s] is not in doubt").

language did not evidence intent to preclude broad "pattern and practice" challenges to program); *Traynor*, 485 U.S. at 544-45 (statutory prohibition on judicial review of VA benefits determinations did not preclude jurisdiction over collateral § 504 claim); *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 675-76 (1986) (upholding collateral attack of regulation governing payment of Medicare payments, despite contention that sections of the Social Security Act barred judicial review of the validity of such regulation, based on difference between review of individual determinations and a challenge to the procedures for making such determinations). Preclusion is appropriate only where the statute in question already allows a plaintiff to protect the same rights.[8] While Plaintiffs, under military regulations, are entitled to board decisions that articulate a rational connection between the facts and conclusions, based on evidence that a reasonable mind might accept as adequate to support its conclusion, Section 504 provides the additional right to a decision that is not discriminatory.

The separate treatment of collateral claims reflects the Supreme Court's concern that administrative or judicial review of an agency decision is usually confined to the record made in the underlying proceeding at the initial decision-making level, leaving no room for the necessary additional evidence required to establish or identify flaws with the procedure itself. *See McNary*, 498 U.S. at 496. Indeed, Section 504 claims often necessitate discovery to expose discriminatory action. *See, e.g.*, *McElwee v. Cnty. of Orange*, 700 F.3d 635, 639 (2d Cir. 2012) (noting discovery on § 504 claim). Importantly, the differences in how these claims are reviewed further bolster the appropriateness of separate judicial review, where review of agency procedures is "sufficiently independent" of particular agency decisions. *See Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1034 (9th Cir. 2012) (confirming jurisdiction over plaintiffs' Due

[8] *See, e.g., Smith v. Robinson*, 468 U.S. 992, 1021 (1984) (holding that plaintiff's EHA claim on behalf of a handicapped child precluded its § 504 claim despite the fact that the latter provided additional remedies because "§ 504 adds nothing to the substantive rights of a handicapped child").

Process claims regarding the VA's procedures because "consideration of the constitutionality of the procedures … is different than a consideration of the decisions that emanate through the course of the presentation of those claims").

Plaintiffs' Section 504 claims regarding the manner in which Defendants conduct the review of applications for discharge status upgrade (and the standards used), through their respective record correction boards, are collateral to the facts and circumstances of each individual's application, and will require new and different discovery regarding those standards in order to provide meaningful judicial review of the agencies' actions. Defendants' motion to dismiss Plaintiffs' Section 504 claims should be denied.

II. Defendants' Motion To Dismiss Named-Plaintiff Monk Should Be Denied.

A. Mr. Monk's Claims Are Ripe And The BCNR's Undisputed Violation Of Its Statutory Deadline Cannot Divest This Court Of Jurisdiction.

The Defendants concede, as they must, that the BCNR has a statutory obligation to adjudicate Mr. Monk's application within 18 months of receipt, ECF No. 26-1 at 19, which obligation the board has violated. Defendants likewise do not dispute that Mr. Monk has been seriously prejudiced by the BCNR's delay. For more than forty years, Mr. Monk has lived with the wrongful stigma of an OTH and been deprived of educational, housing and disability benefits his service has earned him. Since the filing of this lawsuit, moreover, counsel advises the Court that a fire severely damaged the modest home Mr. Monk had shared with his sister in New Haven, forcing his emergency relocation and near-homelessness, and Mr. Monk was hospitalized with emergency renal failure. Mr. Monk's OTH status has prevented him from receiving VA housing and disability benefits that would materially help him cope with these crises. Remarkably, Defendants now contend that the BCNR's failure to decide Mr. Monk's application within its statutory deadline divests this Court of jurisdiction to review Mr. Monk's case because,

they claim, there has not yet been any "final agency action" and his claims are not ripe. ECF No. 26-1 at 18. Defendants are wrong.

Congress directed that the record correction boards decide all applications within 18 months of receipt, 10 U.S.C. § 1557(b), a mandate which BCNR has violated.[9] More than two years have passed since Mr. Monk submitted his application to the BCNR in July 2012, Compl. ¶ 40, and the BCNR has not issued a decision. The delay is prejudicial to Mr. Monk because it keeps him from the discharge upgrade and accompanying benefits to which he is entitled. Further, it is well established that courts will deem agency inaction to be a functional or constructive denial "when the delay is unreasonable and results in serious prejudice to one of the parties." *Houseton v. Nimmo*, 670 F.2d 1375, 1377-78 (9th Cir. 1982) (holding EEOC delay in adjudicating motion to reconsider finding that VA had engaged in unlawful racial and gender discrimination "amounted to" and was "equivalent of" denial of motion).[10] Mr. Monk's claims are thus ripe for this Court's review. Defendants cannot use their violation of the statutory deadline as a justification to frustrate this Court's review of Mr. Monk's application.[11]

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[9] The language of the statute and its legislative history make clear the congressional purpose to ensure timely and fair adjudication of applications. *See* 10 U.S.C. § 1557; *see also* H.R. Rep. No. 105-532 at 300 (1998) (in report accompanying enactment of § 1557, explaining "[t]he committee is very sensitive to the many complaints from constituents about the timeliness of actions and perceived problems concerning the independence and fairness of decisions by the boards for the correction of military records").

[10] *See also Sierra Club v. Thomas*, 828 F.2d 783, 793 (D.C. Cir. 1987) ("when [agency] inaction has precisely the same impact … as denial of relief, an agency cannot preclude judicial review by casting its decision [as] inaction" (quotation marks omitted)).

[11] Defendants also assert that the BCNR's violation of it statutory deadline "does not confer any presumption or advantage." ECF No. 26-1 at 19 (quoting 10 U.S.C. § 1557(d)). This argument is inapposite. Mr. Monk does not contend that he is entitled to any special advantage by virtue of the BCNR's violation of § 1557(d), but rather that the BCNR's failure to act is a constructive denial now ripe for review. *See* Compl. ¶ 42.

III. Dismissal, Or In The Alternative Summary Judgment, Should Be Denied With Respect To Named-Plaintiff Davis.

A. The ABCMR's Denial Of Mr. Davis' Application Was Arbitrary, Capricious, And Unsupported By Substantial Evidence.

Plaintiff James Davis would have received a discharge upgrade if the Army Board for the Correction of Military Records ("ABCMR") applied medically appropriate standards. Despite Mr. James' diagnosis, attributable to his service, the ABCMR denied his application for a discharge status upgrade, as it has nearly every single application submitted by a Vietnam veteran with PTSD, by tersely claiming that "the Board addressed the two principal arguments Plaintiff Davis raised." ECF No. 26-1 at 13. In fact, the ABCMR ignored substantial evidence, failed to adequately or reasonably address Mr. Davis' arguments, and failed to apply medically appropriate standards in violation of the Administrative Procedure Act ("APA").

1. The ABCMR's Failure To Address And Rejection Of Mr. Davis' PTSD Claim Was Arbitrary And Capricious.

Failure by a military record correction board to address a non-frivolous argument raised by a plaintiff is, by default, arbitrary. *See Pettiford v. Sec'y of the Navy*, 774 F. Supp. 2d 173, 185 (D.D.C. 2011); *Roberts v. Harvey*, 441 F. Supp. 2d 111, 122 (D.D.C. 2006) (granting summary judgment because the ABCMR "failed to grapple with what appears to be a substantial issue"); *Calloway v. Brownlee*, 366 F. Supp. 2d 43, 55 (D.D.C. 2005) (same).

Defendants contend, incorrectly, that the ABCMR "conducted an individualized review of [Mr. Davis'] application, considered the pertinent evidence, and articulated a reasonable explanation for its conclusion." ECF No. 26-1 at 11. However, the ABCMR nowhere addressed Mr. Davis' argument that his PTSD diagnosis explains his misconduct and justifies a record correction. AR 4-5. Because the ABCMR did not address the diagnosis and psychiatric findings central to his application, the board did "not meet the requirement that the agency adequately

explain its result." *Dickinson v. Sec'y of Defense*, 68 F.3d 1396, 1407 (D.C. Cir. 1995) (internal quotation marks omitted).

Instead, the board merely stated that there "is no evidence which shows the applicant was diagnosed with PTSD or any other mental condition prior to discharge on 12 February 1974" and that there is "no evidence that shows he was having mental problems in 1972/1973." AR 7. This is incorrect. First, PTSD was not recognized as a medical condition until 1980, thus the rejection of Mr. Davis' application for lack of evidence of a PTSD diagnosis "prior to discharge" is patently arbitrary. Second, there *was* evidence that showed Mr. Davis was having mental health problems. In the affidavit Mr. Davis submitted with his application, he stated that he suffered from nightmares and insomnia during 1973, and was unable to think properly after an officer sitting beside him was shot by a sniper and part of the officer's skull landed in Mr. Davis' breakfast. AR 19. Mr. Davis' application to the ABCMR included a letter from the Brooklyn Vet Center, which stated that Mr. Davis' PTSD resulted from numerous combat traumas in 1971-1972. AR 44. The ABCMR's statements are conclusory, inaccurate, "counter to evidence before the agency," and do not establish a "rational connection between the facts found and the choice made." *Motor Vehicle Mfrs. Ass'n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted).

The record demonstrates that the traumas Mr. Davis suffered in combat caused him to develop PTSD and ultimately resulted in his discharge. *See generally* Pltfs' Local Rule 56(a)2 Statement; *see, e.g.*, AR 5 (evidence Mr. Davis excelled during basic training, received outstanding marks during his first year of service, and was honorably discharged); *id.* (no disciplinary problems after re-enlisting and prior to deployment to Vietnam); AR 14 (Mr. Davis experienced multiple traumatic events in Vietnam, including sorting and handling body parts and

witnessing death of officer beside him); AR 15 (by June 1972, Mr. Davis's symptoms worsened, and he received non-judicial punishment on five occasions in seven months). As Mr. Davis' counsel wrote to the ABCMR, this evidence of "a sudden and precipitous decline in his ability to perform his duties" makes it "reasonable to attribute the sudden increase in disciplinary issues to the decline in Mr. Davis's mental state." AR 15. The timing and nature of Mr. Davis' disciplinary problems and the psychiatric evaluation confirm that Mr. Davis' PTSD led to his discharge, and the ABCMR points to nothing in the record to contradict this assertion. Accordingly, the rejection of this claim violated the APA. *See Robinson v. Resor*, 469 F.2d 944, 949 (D.C. Cir. 1972) (where circumstances of separation were "lacking … both procedural due process and substantive justice," Army "must not be allowed to reach, step by technical step, a result which, viewed in its entirety, constitutes an overreaching leap into the arbitrary and inequitable").

When Congress created these record correction boards, it could not have expected them to deny an application like that of Mr. Davis—a man with a heroic service record until he suffered an injury unknown to medical science at the time and diagnosed years thereafter.[12] This Court should deny Defendants' motion to dismiss and for summary judgment on the individual APA claim of Mr. Davis. *Robinson*, 469 F.2d at 951 n.22 (enjoining refusal to upgrade OTH but allowing discharge review board to decide "in first instance" whether to upgrade to honorable or general discharge).[13]

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[12] *See also* S. 2410, Carl Levin National Defense Authorization Act for Fiscal Year 2015, § 525(a) (113th Cong., 2d Sess.) (approved 25-1 by Senate Armed Services Committee on June 2, 2014) (expressing sense of Senate that boards "should give all due consideration" to upgrade from OTH for Vietnam veterans with subsequent diagnosis of service-connected PTSD).

[13] Defendants do not separately move to dismiss Mr. Davis' Rehabilitation Act claim, other than on the grounds, applicable to all Plaintiffs, that relief is redundant and there is no private right of action. As discussed above, *supra* at I.A and I.B, the Defendants are mistaken. Moreover, as discovery in this case will show, the boards systematically deny such applications by applying standards that do not account for service-related PTSD and virtually guarantee an unlawful outcome.

2. The ABCMR's Denial Of Mr. Davis' Claims Of Procedural Irregularity Was Arbitrary And Capricious.

An agency's failure to address a non-frivolous procedural claim is arbitrary and capricious.[14] Here, Mr. Davis asserted that his discharge was improper under Army Regulations because he "was never fully informed of his rights, nor afforded access to counsel," AR 16, both of which are required for administrative discharge under Chapter 10 of Army Regulation 635-200. "[D]ue process does require that if the secretary concerned prescribes certain regulations under which Army personnel can be discharged, those regulations must be complied with." *May v. Gray*, 708 F. Supp. 716, 722-23 (E.D.N.C. 1988). Moreover, the presumption of administrative regularity is rebuttable. *See Frizelle v. Slater*, 111 F.3d 172, 177 (D.C. Cir. 1997).

Mr. Davis provided evidence that the Army improperly denied his rights to notice and access to counsel. *See, e.g.*, AR 56 (document "inform[ing] the accused of the charges against him" is unsigned). The Army submitted nothing to rebut that evidence. Accordingly, any presumption of administrative regularity should not apply.

Rather than consider Mr. Davis' evidence, the ABCMR stated summarily that "[i]n absence of evidence to the contrary, [Mr. Davis] is presumed to have voluntarily, willingly, and in writing, requested discharge from the Army in lieu of trial by court-martial." AR 7. The ABCMR's decision did not reflect the evidence, which showed that his separation was "lacking … both procedural due process and substantive justice," *Robinson*, 469 F.2d at 949, 951

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[14] "[A]n administrative discharge may be found void if it ignores procedural rights or regulations, exceeds applicable statutory authority, or violates minimum concepts of basic fairness." *Rudo v. Geren*, 818 F. Supp. 2d 17, 26 (D.D.C. 2011) (internal quotation marks omitted) (plaintiff's argument, that Army's failure to inform him of stigmatizing impact of OTH, prior to signing waiver of counsel, alleged non-frivolous procedural violation), *subsequent determination*, 931 F. Supp. 2d 132 (D.D.C. 2013).

(vacating Army Discharge Review Board order that refused to upgrade OTH).[15]

B. The Denial Of Mr. Davis' Application Violates The Fifth Amendment.

Defendants assert that no due process violation occurred because Mr. Davis "was afforded an opportunity to present his side of the story," ECF No. 26-1 at 17, and that no equal protection violation occurred because of a "lack of evidence showing that Davis was discriminated against on the basis of his race." *Id.* at 17-18. They are wrong on both points.

1. **The ABCMR Violated Procedural Due Process.**

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976). Defendants assume, but do not concede, that Mr. Davis has a liberty or property interest in his discharge status. ECF No. 26-1 at 17.[16] The parties thus dispute only what process is due upon deprivation of this interest.

To determine what process is due, *Mathews* requires a balancing of (1) the private interest affected, (2) the risk of erroneous deprivation under current procedure and the probable

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[15] *See also Sawyer v. United States*, 18 Cl. Ct. 860, 868 (1989) ("when a correction board fails to "correct" an injustice clearly presented in the record, it is acting in violation of its mandate," and "courts will correct it on judicial review."), *rev'd on other grounds*, 930 F. 2d 1577 (Fed. Cir. 1991).

[16] Mr. Davis has a liberty interest in his discharge status because a bad discharge carries a social stigma. *See Bland v. Connally*, 293 F.2d 852, 858 (D.C. Cir. 1961) ("any discharge characterized as less than honorable … results in an unmistakable social stigma which greatly limits the opportunities for both public and private civilian employment."); *Denton v. Seamans*, 315 F. Supp. 279, 282 (N.D. Cal. 1970), *aff'd sub nom. Denton v. Sec'y of Air Force*, 483 F.2d 21 (9th Cir. 1973) (same); *Casey v. United States*, 8 Cl. Ct. 234, 243 (1985) ("military separation codes are known, understood and available to the part of society that count—i.e., prospective employers"). Mr. Davis also has a property interest in the benefits that accompany the discharge upgrade to which he is entitled. When "the statutory scheme in question mandates award of [a] benefit upon satisfaction of specified criteria," the applicant has a "sufficient interest in the receipt of that benefit." *Kapps v. Wing*, 404 F.3d 105, 116 (2d Cir. 2005). Here, "*the Secretary is obligated* … to properly determine the nature of any error or injustice, … to take 'such corrective action as will appropriately and fully erase such error or compensate such injustice.'" *Strickland v. United States*, 69 Fed. Cl. 684, 699 (2006) (quotation marks omitted) (emphasis in original), *subsequent determination*, 73 Fed. Cl. 631 (2006).

value of additional safeguards, and (3) Defendants' interest, including potential fiscal or administrative burdens of additional safeguards. 424 U.S. at 335.

Here, Mr. Davis' interests far outweigh Defendants'. First, Mr. Davis has strong interests in freedom from the social stigma attached to his OTH status and in the proper receipt of numerous benefits that his service has earned. Second, there is a high and demonstrable risk of erroneous deprivation under current procedures, based on the huge volume of Vietnam veterans who received OTHs and have suffered PTSD and the record correction boards' categorical denial of nearly every such application. Compl. ¶¶ 147-150. Third, Defendants have articulated no interest—much less a compelling one—in keeping the boards from giving proper weight to medical opinions and applying medically appropriate standards in its evaluation of evidence. Nor do Defendants have any significant interest in failing to address Mr. Davis' PTSD and procedural irregularity arguments. It will not impede the boards' efficiency or impose any financial burden. Thus, the ABCMR's failure to apply medically appropriate standards and to address Mr. Davis' PTSD and procedural irregularity arguments constitute a violation of procedural due process.[17]

2. The ABCMR Denied Mr. Davis Equal Protection By Refusing To Correct His Discharge Status, Which Resulted From Racial Prejudice.

To establish an equal protection violation, Mr. Davis must establish that the ABCMR's denial of his application (1) has a racially disparate impact and (2) may be "ultimately … traced to a racially discriminatory purpose." *Washington v. Davis*, 426 U.S. 229, 240 (1976).

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[17] The ABCMR also violated procedural due process by rejecting Mr. Davis' request to appear in person. By regulation, the ABCMR has the discretion to hold an in-person hearing, but like other record correction boards, it appears to have ceased doing so in the past few decades. *See* Eugene R. Fidell, *The Boards for Correction of Military and Naval Records: An Administrative Law Perspective*, 65 Admin. L. Rev. 499, 502 (2013) (ABCMR "conducted no live hearings in fiscal year 2012" and BCNR "has not conducted one in the last twenty years"). Both the blanket denial of in-person hearings to all applicants, and the denial in this case, fail the *Mathews v. Eldridge* balancing test for the same reasons as do refusal to apply medically appropriate standards and to address non-frivolous arguments.

First, discharge practices of the Vietnam Era unquestionably had a disparate impact on black soldiers. The "institutionalized racism of the military" was a harsh reality during the Vietnam War, and as a result, "disproportionate amounts of black soldiers received bad discharge statuses."[18] In 1972, the Secretary of Defense commissioned a task force to assess racial discrimination in the military. The task force found that "intentional" and "systemic" discrimination were present in the military, and that "the administrative discharge has impacted to the detriment of minority group servicemen."[19] In particular and across all branches, "black service members received in Fiscal Year 1971 a lower proportion of honorable discharges and a higher proportion of general and undesirable discharges than whites of similar aptitude and education."[20] Discovery in this case will demonstrate this fact in even greater detail.[21]

In his application, Mr. Davis asserted that "race played a significant factor" in his inability "to obtain psychiatric care," which ultimately led to his discharge. AR 15. Mr. Davis' assertion that "white soldiers at Ft. Bragg at the time were able to obtain [the] psychiatric care," AR 15, is fully consistent with the DoD task force's findings. Defendants argue that the "Board's conclusion is reasonable" because it considered and rejected Mr. Davis' argument for lack of evidence. ECF No. 26-1 at 17. Yet the board's refusal to credit Mr. Davis' well-founded assertion was not explained and not supported by any contrary evidence. The board's refusal to

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18 David F. Addlestone and Susan Sherer, *Battleground: Race in Vietnam*, 293 CIVIL LIBERTIES 1 (Feb. 1973).

19 DEP'T OF DEF., *Report of the Task Force on the Administration of Military Justice in the Armed Forces* 18-19, 109 (Nov. 30, 1972).

20 *Id.*

21 The race discrimination that pervaded discharge practices in the Vietnam Era has been recognized as having legal consequence. *See Dozier v. Chupka* 395 F. Supp. 836, 850 (S.D. Ohio 1975) (fire department may not award bonus points to prior service members with honorable discharges because it would create an adverse racial impact); *Equal Employment Opportunity Comm'n*, EEOC Dec. No. 74-25 at 5 (1973) (finding honorable discharge requirement for employment violated Title VII because "a substantially disproportionate percentage of those persons rejected for lack of an honorable discharge will be Black").

address or correct the ultimately discriminatory purpose behind Mr. Davis' underlying discharge satisfies the second prong of *Washington v. Davis*.[22]

IV. VVA, VVA-CT And NVCLR Have Standing To Challenge The Boards' Unlawful Practices.

An association can have standing in two ways: it may "assert the rights of its members under the doctrine of associational standing" (also termed representational standing) or "file suit on its own behalf to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy" (termed organizational standing). *Irish Lesbian & Gay Org. v. Giuliani*, 143 F.3d 638, 649 (2d Cir. 1998) (internal quotation marks omitted). Defendants contend that VVA, VVA-CT, and NVCLR have neither "representational standing" nor "organizational standing." ECF No. 26-1 at 29, 32. This is incorrect.

The Organizational Plaintiffs have representational standing because each has members who would have individual standing to challenge these unlawful procedures and because their individual participation is not indispensable. They also have organizational standing in their own rights because Defendants' systematic failure to properly consider PTSD in discharge upgrade proceedings has perceptibly impaired each organization by causing each one to divert resources toward helping members seeking upgrades, to provide services to those unlawfully denied upgrades, and to advocate to end Defendants' discriminatory treatment of Vietnam veterans with PTSD, instead of toward other critical activities.

At the pleading stage, "standing will be upheld where a plaintiff provides some support for his claim of standing" and where it is possible "to imagine facts consistent with [the] complaint and affidavits that will show plaintiffs' standing." *Baur v. Veneman*, 352 F.3d 625,

[22] Discovery will also show that the record correction boards have denied all or nearly all applications by black Vietnam veterans to upgrade their OTH, including all or nearly all applications in which veterans like Mr. Davis expressly raised race discrimination in their applications.

642 (2d Cir. 2003) (internal quotation marks omitted) (bracket in original). Plaintiffs rely on both the detailed allegations in their complaint as well as declarations from each Organizational Plaintiff and individual members of those organizations.[23] *See* Ex. A, Decl. of VVA; Ex. B, Decl. of VVA-CT; Ex. C, Decl. of NVCLR; Ex. D, Decl. of F. Dyer; Ex. E, Decl. of R. Hill; Ex. F, Decl. of M. Mitchell; Ex. G, Decl. of T. Sewell; Ex. H, Decl. of M. Shealey; Ex. I, Decl. of O. Yancy; *see also* Ex. J., Decl. of J. Owens.

A. Organizational Plaintiffs Have Representational Standing To Sue For Declaratory And Injunctive Relief On Behalf Of Their Injured Members.

An association has representational standing to bring suit when: "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Defendants claim that the first prong fails because Organizational Plaintiffs "have not identified a single member who would have standing to sue on their own," ECF No. 26-1 at 30, and that the third prong fails because "Plaintiffs' claims requires the participation of a specific individual veteran." *Id.* at 31. Neither argument has merit. As detailed below, the Organizational Plaintiffs readily satisfy the *Hunt* test.

1. VVA, VVA-CT, And NVCLR Have Members With Standing To Sue In Their Own Right.

Defendants contend that Organizational Plaintiffs have not made "specific allegations establishing that at least one identified member had suffered or would suffer harm" from the boards' procedures. *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009). But an association need not "'name names' in a complaint in order properly to allege injury in fact to its

[23] In response to a motion to dismiss for lack of standing under Rule 12(b)(1), Plaintiffs may offer—and this Court may properly consider—evidence outside the pleadings without converting the motion into one for summary judgment. *See Makarova v. United States*, 201 F.3d 110, 113 (2d Cir. 2000).

members." *Bldg. & Const. Trades Council of Buffalo v. Downtown Dev., Inc.*, 448 F.3d 138, 145 (2d Cir. 2006). Instead, plaintiffs at this stage in the litigation need only "allege that one or more of its members has suffered a concrete and particularized injury." *Id.*

Here, each of the Organizational Plaintiffs has many members who would have standing had they themselves brought suit.[24] The Complaint specifically alleges that each Organizational Plaintiff has at least one member who (a) is a Vietnam War veteran (b) with an other than honorable discharge based on conduct attributable to his undiagnosed PTSD who (c) has applied to the relevant board for a discharge upgrade based on PTSD attributable to service but (d) has been denied an upgrade. Compl. ¶¶ 116, 120, 124, 166-185. Each such member has suffered an injury at the hands of the boards—*i.e.*, being subjected to the unlawful board practices challenged in this lawsuit and consequent denial[25]—and these injuries would be redressed by the relief sought here.[26] Nothing more is required to establish this prong of the representational standing test. *See Bldg. & Constr. Trades Council*, 448 F.3d at 145.

As documented in the declarations submitted with this memorandum, Named Plaintiffs Monk, Marret, Siders, Cottam, and Davis are members of VVA and VVA-CT. *See* Ex. A, Decl. of VVA ¶ 6; Ex. B, Decl. of VVA-CT ¶ 4. Each man has had his upgrade application denied (or constructively denied) by the boards as a result of the arbitrary and capricious, procedurally unsound, and discriminatory procedures challenged by the Organizational Plaintiffs. *See* Ex. A,

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[24] *See Warth v. Seldin*, 422 U.S. 490, 511 (1975) (organization "must allege that its members, or *any one of them*, are suffering immediate or threatened injury as a result of the challenged action" (emphasis added)).

[25] Injury due to unlawful practice or policy (sometimes termed procedural injury) is sufficient to confer Article III standing. *See LaFleur v. Whitman*, 300 F.3d 256, 271 (2d Cir. 2002); *Town of Babylon v. Fed. Hous. Fin. Agency*, 699 F.3d 221, 229 (2d Cir. 2012) (noting that a litigant may allege "procedural or substantive injury").

[26] In particular, Plaintiffs ask this Court to order Defendants to adopt "measures sufficient to ensure that Defendants utilize consistent and medically appropriate standards for considering the effects of class members' PTSD when determining whether to upgrade their discharge statuses," and that they cease to discriminate on the basis of disability and "make reasonable modifications in their policies, practices, and procedures that are necessary to avoid discrimination against Vietnam veterans with PTSD attributable to service." Compl., Prayer for Relief, ¶ 2; ¶ 184.

Decl. of VVA ¶ 5; Ex. B, Decl. of VVA-CT ¶ 3; Ex. C, Decl. of NVCLR ¶ 4. Plaintiff Monk is also a member of NVCLR. *See* Ex. C, Decl. NVCLR ¶ 2; Compl. ¶ 123. All three Organizational Plaintiffs thus have representational standing because each counts among its members at least one named plaintiff in this action, each of whose standing Defendants have not challenged.

Moreover, many other members of the Organizational Plaintiffs have been directly injured by the unlawful practices of the boards and would likewise benefit from a favorable decision. Plaintiffs submit declarations of six such proposed class members: Francis Dyer, Robert Hill, Melvin Mitchell, Thomas Sewell, Matthew Shealey, Jr., James Owens, and Olympus Yancy.

Organizational Plaintiffs have thus amply demonstrated that they have members who would have standing to bring suit on their own behalf, satisfying the first prong of *Hunt*.

2. **Plaintiffs' Claims Are Germane To The Mission Of Each Organization And Individual Participation Of Each Organization's Members Is Not Required.**

The second and third prongs under *Hunt* require that "an organization's litigation goals be pertinent to its special expertise and the grounds that brings its membership together," *Bldg. & Const. Trades Council*, 448 F.3d at 148 (quotation marks omitted), and that "the nature of the claim and of the relief sought does not make the individual participation of each injured party indispensable to [the] proper resolution of the cause," *Warth v. Seldin*, 422 U.S. 490, 511 (1975). Defendants do not contest the second prong, presumably because the mission and expertise of all three Organizational Plaintiffs includes advocating against discriminatory practices that harm veterans, precisely the goal of this litigation. *See* Ex. A, Decl. of VVA ¶¶ 2-4; Ex. B, Decl. of VVA-CT ¶ 2; Ex. C, Decl. of NVCLR ¶¶ 2-3.

Plaintiffs also satisfy the third prong of *Hunt* because it is unnecessary for individual members to participate in this litigation, which is not only properly litigated by the Organizational Plaintiffs on behalf of their affected members, but is, indeed, appropriate for class-wide resolution. *See* ECF No. 24-1 at 13.[27] Defendants allege that the claims raised in this suit would require individual participation of each injured veteran because in order for a court to review "whether a specific individual's military records are in error or unjust," the participation of that individual veteran would be crucial. ECF No. 26-1, at 30-31.

Defendants' argument misconstrues the nature of the Organizational Plaintiffs' claims and the relief they seek. The Organizational Plaintiffs do not challenge particular decisions in individual cases, nor do they ask the Court to order upgrades in the cases of their affected members. They instead challenge the systematically unlawful *policies and practices* of the boards, so that individuals' upgrade applications may subsequently be considered by the record correction boards in a lawful manner.[28] These practices of the boards are part of a unitary course of conduct under a centralized system supervised and controlled by the Defendants, and it is these practices—not the individual decisions they produce—that Plaintiffs challenge here.[29]

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[27] Plaintiffs note that courts "possess a degree of discretion in applying" this prong of the associational standing test, as it is a prudential one that is "best seen as focusing on … matters of administrative convenience and efficiency", not on elements of a case or controversy within the meaning of the Constitution. *Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 229 (2d Cir. 2011) (internal quotation marks omitted), *aff'd*, 133 S. Ct. 2321 (U.S. 2013).

[28] This is the key distinction between Counts I – III of the Complaint, which challenge the record correction boards' general policies and systemic practices, and Counts IV – VI, of the Complaint, which challenge the boards' decisions for each of the five Named Plaintiffs, including illegal application of the boards' general policies and practices to the individual Plaintiffs. It is also the difference between Plaintiffs' second and third prayers for relief, which seek injunctions directing the boards to modify their policies and practices, and the fourth prayer for relief, which seeks discharge upgrades for the five individual Plaintiffs.

[29] *See, e.g.*, Compl. ¶ 182 ("Defendants' criteria and methods of administration of their programs for reviewing military records to determine whether to upgrade the discharge statuses of former servicemembers violate the implementing regulations by failing to utilize consistent and medically appropriate standards for consideration of Plaintiffs' PTSD."); *see also id.* ¶ 144 ("The Secretary of each military branch is statutorily required to establish procedures for the correction of military records. The Secretary of each military branch also exercises centralized control over its Board.").

In these circumstances, there is no question that individual members need not participate in the present litigation. As the Supreme Court has recognized, associational standing under this final prong "depends in substantial measure on the nature of the relief sought," and if "the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured." *Warth*, 422 U.S. at 515. Of course, Plaintiffs here seek precisely these forms of relief.

In particular, the Organizational Plaintiffs seek to ensure that Defendants apply medically appropriate standards when reviewing applications for discharge status upgrades of Vietnam veterans with PTSD. *See* Ex. A, Decl. of VVA ¶ 5; Ex. B, Decl. of VVA-CT ¶ 3; Ex. C, Decl. of NVCLR ¶ 4; Compl. ¶¶ 139-140. The relief sought would redress the harms of thousands of Vietnam veterans, including affected members of the Organizational Plaintiffs, by requiring the Boards to consider discharge upgrade applications in a lawful and nondiscriminatory manner. It would not guarantee each affected member an upgrade, only a fair opportunity to seek an upgrade.

Moreover, that Plaintiffs have sought to rely upon allegations and evidence regarding the experiences of individual members before the Boards does not mean that individual participation of those members is necessary. Rather, the most directly relevant evidence is that pertaining to the standards Defendants' boards apply when they consider an upgrade application from *any* Vietnam veteran with PTSD, not the unique facts and circumstances of particular applicants. Facts from proceedings of individual members of the Organizational Plaintiffs simply shed more light on the systemically unlawful conduct of the boards. *See Alliance for Open Soc'y Int'l, Inc. v. U.S. Agency for Int'l Dev.*, 651 F.3d 218, 230 (2d Cir. 2011) ("[T]hat a limited amount of

individuated proof may be necessary does not in itself preclude associational standing." (quotation marks omitted)), *aff'd*, 133 S. Ct. 2321 (2013).[30]

The unjust and unlawful procedures routinely used by the Defendants' record correction boards are at the core of the Organizational Plaintiffs' claims and prayers for relief. Individual members of each organization subject to these policies need not be parties to this litigation in order for the Court to determine that those procedures are unlawful.

B. VVA, VVA-CT And NVCLR Have Organizational Standing To Sue For Declaratory And Injunctive Relief On Their Own Behalf.

In addition to suing on behalf of their members, the Organizational Plaintiffs have standing to represent their own interests. It is well-settled that organizations may "sue on their own behalf for injuries they have sustained," *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 n.19 (1982), and need only "meet [] the same standing test that applies to individuals … [by] show[ing] actual or threatened injury in fact that is fairly traceable to the alleged illegal action and likely to be redressed by a favorable court decision." *Irish Lesbian & Gay Org.*, 143 F.3d at 649 (quotation marks omitted) (alterations in original). The Organizational Plaintiffs satisfy these requirements.

An organization suing on its own behalf need only establish a "perceptible impairment" of its activities in order to establish it has suffered a cognizable injury. *Ragin v. Harry Macklowe Real Estate Co.*, 6 F.3d 898, 905 (2d Cir. 1993) (citing *Havens Realty Corp.*, 455 U.S. at 379); *see, e.g.*, *Nnebe v. Daus*, 644 F.3d 147, 156-57 (2d Cir. 2011) (organization suffered

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[30] Defendants incorrectly rely on *Bano v. Union Carbide Corp.*, 361 F.3d 696 (2d Cir. 2004), *see* ECF No. 26-1 at 30-31, where no standing existed for organizations seeking individualized relief, including damages and reimbursements, because the associations' individual members would need to establish their own, individualized claims of personal bodily harm or property damage. *Bano*, 361 F.3d at 714-15. But the Organizational Plaintiffs here do not seek individualized relief for their members, but declaratory and injunctive relief that would inure to the benefit of all class members. Indeed, the court in *Bano* specifically contrasted the monetary relief sought there with a situation—like the one presented in the present case—"where the organization seeks a purely legal ruling without requesting that the federal court award individualized relief to its members." *Id.*

sufficient injury to establish standing because it "expended resources to assist its members … by providing initial counseling, explaining the … rules to … [members], and assisting [its members] in obtaining attorneys"). This impairment need not meet a certain volume in order to suffice. 644 F.3d at 157. (allocation of resources sufficient to confer standing "[e]ven if only a few suspended drivers are counseled by NYTWA in a year" because "there is some perceptible opportunity cost expended" constituting an "expenditure of resources that could be spent on other activities").

All three organizations in this case have expended significant resources as a result of the boards' challenged policies and thereby suffered economic effects resulting in "perceptible impairment." Each organization has expended staff time and money that could have been focused elsewhere in order to help Vietnam veterans with PTSD and OTH seeking discharge upgrades under the challenged board procedures. *See* Ex. A, Decl. of VVA ¶¶ 7-10; Ex. B, Decl. of VVA-CT ¶¶ 5-8; Ex. C, Decl. of NVCLR ¶¶ 5-8. They also expend resources assisting veterans who have been denied upgrades as a result of these procedures and cannot obtain VA benefits due to continued OTH status. *Id*.

VVA chapters across the country have spent an estimated $1,550,500 in resources to help Vietnam veterans prepare and apply for discharge upgrades. *See* Ex. A, Decl. of VVA ¶ 8. Such expenditures are sufficient in this Circuit to establish standing. *See, e.g.*, *Nnebe*, 644 F.3d 157-58; *Transp. Workers Union of Am., Local 100, AFL-CIO v. New York City Transit Auth.*, 342 F. Supp. 2d 160, 167 (S.D.N.Y. 2004) (union had standing to sue on its own behalf for injury of expending resources to represent employees in arbitration and grievance hearings).

Similarly, both VVA-CT and NVCLR have suffered an impairment of their organizational activities by expending resources to counsel veterans who have OTH discharges

and are unable to obtain upgrades as a result of the challenged policies of the boards. In fact, over the past 10 years, NVCLR has expended at least 500 hours providing counseling and assistance to such veterans, as well as at least 3,000 hours to support advocacy work on behalf of such veterans. *See* Ex. B, Decl. of VVA-CT ¶¶ 6-7; Ex. C, Decl. of NVCLR ¶¶ 6-7.

Instead of being able to focus on their mission by helping veterans with education, employment, housing and life skills, both VVA-CT and NVCLR have had to divert resources to help veterans suffering from PTSD navigate a world in which they are stigmatized and barred from much-needed VA benefits as a result of their inability to upgrade their discharge statuses. *See* Ex. B, Decl. of VVA-CT ¶ 8; Ex. C, Decl. of NVCLR ¶ 8. These injuries, too, are sufficient to confer standing. *See, e.g.*, *Havens Realty Corp.*, 455 U.S. at 379 (finding impairment of ability to provide counseling and other services a sufficient injury); *Nnebe*, 644 F.3d at 157 (same).

Defendants' contention that "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," ECF No. 26-1 at 33, is false. Not only have VVA, VVA-CT and NVCLR alleged and affirmed that they have suffered concrete harms in the past as a result of the discriminatory practices of the boards, but the Complaint and declarations also establish that these organizations will continue to help Vietnam era veterans with OTH discharges due to PTSD so long as the boards continue to refuse to give their upgrade applications lawful and medically appropriate consideration. *See* Ex. A, Decl. of VVA ¶ 11; Ex. B, Decl. of VVA-CT ¶ 9; Ex. C, Decl. of NVCLR ¶ 9.

Defendants further argue that VVA, VVA-CT, and NVCLR suffer no injury because they are "dedicated to advocating on behalf of Vietnam veterans through various means, including litigation" and so "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.'" ECF No. 26-1 at 33-34 (quoting *Small v. Gen. Nutrition Companies, Inc*., 388 F. Supp. 2d 83, 95 (E.D.N.Y. 2005)). This argument misconstrues both the nature of the injury Organizational Plaintiffs suffer, and the applicable law in this Circuit.

First, it is not the case that the only injury suffered by the Organizational Plaintiffs is the expenditure of resources "in this case." As described above, the organizations devote significant resources counseling and representing veterans with PTSD seeking upgrades, and helping them with the consequences of the denials that inevitably follow as a result of the boards' unlawful practices. This is therefore not a case like *Small v. GNC*—the only case cited by Defendants—in which standing is based solely on the litigation expenses incurred challenging the policies in question. ECF No. 26-1 at 34 (citing *Small*, 388 F. Supp. 2d at 95).[31]

Second, the standing inquiry does not depend on whether the economic costs incurred by an organization fall outside the organization's usual mission; instead, the courts consider whether the organization has expended resources addressing the challenged policy that could otherwise have been spent on other programmatic activities.[32] Here, each organization would be able to devote more resources to their other priorities if the boards ceased their unlawful practices. *See* Ex. A, Decl. of VVA ¶ 10; Ex. B, Decl. of VVA-CT ¶ 8; Ex. C, Decl. of NVCLR ¶ 8.

Finally, Defendants argue that "Plaintiffs have failed to establish that this purported injury is fairly traceable to a discrete administrative action of a particular correction board, and

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[31] In any event, the Second Circuit has since "explicitly rejected the argument that litigation expenses are insufficient to demonstrate an injury in fact for the purposes of Article III standing." *Mental Disability Law Clinic, Touro Law Ctr. v. Hogan*, 519 F. App'x 714, 717 (2d Cir. 2013) (citing *Nnebe*, 644 F.3d at 157). Instead, in *Nnebe*, the Court made clear that an organization, like Plaintiffs here, can establish standing where they assist individuals in administrative proceedings and seek to challenge the procedures that apply in those proceedings. 644 F.3d at 158 (organization has standing where it "brings … suit so that when it expends resources to assist [its members], it can expend those resources on hearings that represent bona fide process").

[32] *See Nnebe*, 644 F.3d at 156-57 ("expenditure of resources that could be spent on other activities" was cognizable harm even where district court found that organization "ha[d] not identified the priorities on which it was unable to focus as a result of the summary suspension procedures") (internal quotation marks omitted) (bracket in original).

that the alleged injury will be redressed by their requested injunctive relief." ECF No. 26-1 at 34. But it is apparent on the face of the Complaint, as well as in the declarations of each organization, that the time, money, and other resources that each organization expends assisting veterans with service-related PTSD seeking upgrades—and assisting those who suffer the consequences of the unlawful denials that follow—flow directly from the record correction boards' discriminatory practices that they challenge in this lawsuit. If Plaintiffs succeed in obtaining relief directing the boards to modify their practices, they will have to expend far fewer resources assisting such veterans, who will have a greatly improved chance of obtaining an upgrade and veterans benefits. The Organizational Plaintiffs' injuries are both traceable to the challenged practices of the boards, and could be redressed by a favorable decision. *See Nnebe*, 644 F.3d at 158 (association's own injuries were fairly traceable to challenged procedures of administrative board and redressable by a favorable decision).

C. The Organizational Plaintiffs' Claims Fall Within The Zone Of Interests Protected By The Applicable Statutes.

Where an organization asserts representational standing on behalf of its members, the zone-of-interests test is properly applied to the organizations' members rather than the organizations themselves. *See Boston Stock Exch. v. State Tax Comm'n*, 429 U.S. 318, 321 n.3 (1977) ("*[M]embers* therefore suffer an actual injury within the zone of interests … and … satisfy the requirements for representational standing." (emphasis added)).[33]

[33] Defendants' argument to the contrary is not supported by the two cases cited. In *Lujan*, the Court found that the alleged aggrievement "met the 'zone of interest' test," *Lujan v. National Wildlife Federation*, 497 U.S. 871, 886 (1990), but that plaintiff organization's members failed to show they were actually affected. *Id.* at 889. In *Air Courier of America v. American Postal Workers Union, AFL-CIO*, 498 U.S. 517 (1991), there were two competing statutes—private express statutes ("PES") and the Postal Reorganization Act ("PRA"). Plaintiffs attempted to establish a claim on the merits under PES and simultaneously rely on PRA for standing, but since "the relevant statute … is the statute whose violation is the gravamen of the complaint," *id.* at 529 (quotation marks omitted), the Court refused to allow plaintiffs to "leapfrog from their asserted protection under the labor-management provisions of the PRA to their claim on the merits under the PES. *Id.* at 530. No such competing statutes are present here.

The proper question is therefore whether members of VVA, VVA-CT, and NVCLR are within the "zone of interest" of the relevant statutes, here 10 U.S.C. § 1552 and § 504 of the Rehabilitation Act.[34] They are.

The members of VVA, VVA-CT, and NVCLR—former service members seeking correction of military records—are within the "zone of interest" of 10 U.S.C. § 1552. Its purpose is "avoiding a large number of 'private' bills in Congress by which formerly discharged service men sought to have the nature or character or type of discharge certificate corrected." *Sims v. Fox*, 492 F.2d 1088, 1094 (5th Cir. 1974). In 1947, Attorney General Clark issued an opinion elaborating this purpose of the statute: "If, for example, one is given a dishonorable discharge and it is later established that he should have been given an honorable discharge he has suffered an injustice," to "change the record so as to show that (as now determined) he should have been given an honorable discharge can well come within the meaning of [§ 1552]." *Correction of Military & Naval Records*, 40 Op. Att'y Gen. 504, 507 (1947). In enacting § 1552, Congress plainly intended to "regulate or protect" the interests of former service members, like the members of the Organizational Plaintiffs, who seek to correct their military records.

The Organizational Plaintiffs' members—former service members with PTSD—also fall within the zone of interest of § 504 of the Rehabilitation Act, which provides that no one with a disability 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." 29 U.S.C. § 794(a). The purpose of the statute is "to empower individuals with disabilities to maximize employment, economic self-sufficiency, independence, and inclusion and integration into society." 29 U.S.C. 701(b)(1). PTSD has been

[34] Defendants' zone-of-interests argument only addresses 10 U.S.C. § 1552, and is silent as to Section 504 of the Rehabilitation Act and Plaintiffs' claims under the Fifth Amendment.

recognized as a disability under the Rehabilitation Act.[35] Numerous members of VVA, VVA-CT, and NVLSC, have PTSD, and Defendants discriminate against them "on the basis of their disability by refusing and failing to utilize consistent and medically appropriate standards for consideration of PTSD when reviewing the military records." Compl. ¶ 180. This type of harm is precisely what the Rehabilitation Act seeks to prevent.[36]

But even on the Defendants' view that the Organizational Plaintiffs themselves must fall within the zone of interest, there is no obstacle to standing. In *Procurador De Personas Con Impedimentos v. Municipality of San Juan*, 541 F. Supp. 2d 468, 473 (D.P.R. 2008), the court held that an advocacy group for the disabled had organizational standing and fell within the zone of interest of the ADA and Rehabilitation Act because "they seek to remedy the type of harm the ADA and Rehabilitation Act seek to prevent." Here, Organizational Plaintiffs fall within the zone of interest of Section 1552 because they seek to remedy the type of harm the statute seeks to prevent—injustice in military records.[37] Similarly, Organizational Plaintiffs fall within the zone of interests under § 504 of the Rehabilitation Act because they seek to remedy the type of harm the statute seeks to prevent—disability discrimination in federal programs.

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[35] *See Schmidt v. Bell*, No. 82-1758, 1983 WL 631 (E.D. Pa. Sept. 9, 1983).

[36] *See Lloyd v. Illinois Reg'l Transp. Auth.*, 548 F. Supp. 575, 588 (N.D. Ill. 1982) (holding handicapped plaintiff's interest in not being discriminated against regarding access to and use of public transportation was within Section 504 of the Rehabilitation Act). Additionally, claims under Section 504 of the Rehabilitation Act and Title II of the Americans with Disabilities Act ("ADA") are generally treated identically in the Second Circuit. *See Henrietta D. v. Bloomberg*, 331 F.3d 261, 272 (2d Cir. 2003); *Weixel v. Bd. of Educ.*, 287 F.3d 138, 146 n.6 (2d Cir. 2002); *Cercpac v. Health & Hosps. Corp.*, 147 F.3d 165, 167 (2d Cir. 1998). And both individuals with disabilities and advocacy organizations fall within the "zone of interest" of Title II of the ADA. *See Transp. Workers Union of Am., Local 100, AFL-CIO*, 342 F. Supp. 2d at 165.

[37] It is particularly clear that VVA, VVA-CT, NVCLR and other veterans service organizations come within the zone of interests protected by 10 U.S.C. § 1552, because such organizations are permitted, often by regulation, to serve as representatives for veterans in a number of forums, including before a record correction board. *See, e.g.*, 32 C.F.R. § 724.4(c) ("accredited representatives of veterans' organizations" allowed to represent applicants before the BCNR); *see also* 38 U.S.C. § 5902(a)(1) ("The Secretary may recognize representatives of [veterans service organizations] in the preparation, presentation, and prosecution of claims under laws administered by the Secretary."). Moreover, Congress has recognized that veterans' organizations like VVA, VVA-CT and NVCLR play a unique role in protecting the interests of veterans, granting such organizations congressional charters to advocate on behalf of individual veterans and veterans as a whole in a variety of forums. *See* 36 U.S.C. § 230503.

V. Plaintiffs Have Standing To Sue The Secretary Of The Air Force.

Plaintiffs have sufficiently alleged standing against the Secretary of the Air Force, Deborah Lee James, as is required at this stage in litigation. Specifically, the Organizational Plaintiffs have alleged that the Secretary of the Air Force has harmed them in their representational role, as well as in their organizational capacity. *See* Compl. ¶¶ 113-114, 116, 121, 124-125. As argued above, the Organizational Plaintiffs have established standing to bring such claims under either theory.

In order for an organization to plead representational standing in a manner sufficient to overcome a motion to dismiss, the organization need not identify the individual organizational member whom defendant harmed.[38] *Bldg. & Constr. Trades Council*, 448 F.3d at 145 (holding that an association need not "name names" in a complaint to plead standing properly). The organization may simply "allege that one or more of its members has suffered a concrete and particularized injury." *Id.*

Plaintiffs have done so. They allege that there are VVA members who have applied for a discharge upgrade to the Boards, including the AFBCMR, based on service-related PTSD, and that these VVA members' claims have been summarily denied by the Boards, including the AFBCMR. Compl. ¶ 116. In other words, Plaintiffs have alleged that there is at least one VVA member who would have standing to bring suit against the Secretary of the Air Force.

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[38] Defendants rely on *Summers v. Earth Island Institute*, 555 U.S. 488, 497-98 (2009), for the proposition that plaintiffs must identify at least one member who has suffered or would suffer harm. ECF No. 26-1 at 30. Their reliance is misplaced at this stage in the litigation prior to any discovery to determine the identities of applicants for discharge status upgrades from each branch of the U.S. Military. That information is within Defendants' sole possession. *Summers* was decided after the underlying dispute had been adjudicated on the merits. 555 U.S. at 492. The Supreme Court has repeatedly affirmed the principle from *Lujan* that each element of standing must be supported "with the manner and degree of evidence required at the successive stages of litigation," *Lujan*, 504 U.S. at 561, and in fact most recently cited to *Defenders of Wildlife* for this principle this past term. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2342 (2014) (quoting *Defenders of Wildlife*, 504 U.S. at 561).

As the Second Circuit has noted, to require more of plaintiffs at such an early stage in litigation would be premature. Where discovery has not yet occurred, as is the case here, it is too early to challenge the evidentiary adequacy of Plaintiffs' allegations on the basis that they have not named an individual member of VVA. *See Bldg. & Constr. Trades Council*, 448 F.3d at 144-45 ("The defendants' argument that the persons allegedly injured must be identified by name might have some validity if this litigation were at the summary judgment stage. Discovery on the issue would therefore be substantially complete, and the evidentiary adequacy of the Trades Council's standing allegations could be tested.").

This conclusion rings particularly true in this case, where the Secretary of the Air Force is in a unique position to provide Plaintiffs with information about the identities of Air Force Vietnam veterans suffering from PTSD who have been injured by the Secretary of the Air Force. Defendants challenge Plaintiffs' allegations regarding "John Doe," who served in the Air Force and applied for, and was denied, an upgrade to his OTH status on the basis of PTSD. ECF No. 26-1 at 36 (citing Compl. ¶ 154). This "John Doe" is an actual individual, despite what Defendants argue. The AFBCMR decision denying "John Doe's" application for a discharge upgrade on the basis of PTSD, however, does not provide "John Doe's" name. *Id.* As discovery has been stayed in this action, Plaintiffs have not yet had the opportunity to request further information about this and other applicants to the AFBCMR. *See* ECF. No. 20.

CONCLUSION

Based on the foregoing, the Court should deny Defendants' Motion to Dismiss and for Summary Judgment.

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New Haven, Connecticut

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[39] This brief does not purport to express the view of Yale Law School, if any.