**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF CONNECTICUT**

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| 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,<br><br>Plaintiffs,<br><br>v.<br><br>RAY MABUS, Secretary of the Navy, JOHN McHUGH, Secretary of the Army, and DEBORAH LEE JAMES, Secretary of the Air Force,<br><br>Defendants. | Civil No.: 3:14-cv-00260-WWE<br><br>September 5, 2014 |

**REPLY IN SUPPORT OF PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Named plaintiffs Conley Monk, Kevin Marret, George Siders, James Cottam, and James Davis ("Named Plaintiffs"), and membership organization plaintiffs Vietnam Veterans of America, Vietnam Veterans of America Connecticut State Council, and the National Veterans Council for Legal Redress ("Organizational Plaintiffs") submit this reply brief in support of their motion for class certification.[1]

[1] Defendants argue that this Court should decide their motions to dismiss and remand before Plaintiffs' motion for class certification, even though that is not the order in which the motions were filed. As Defendants acknowledge, this Court has the power to "control the disposition of the causes on its docket with economy of time and effort for itself, for counsel, and for litigants." ECF No. 33, at 3 (quoting *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936)). Plaintiffs trust the judgment of the Court to decide the pending motions in the order it deems best.

## INTRODUCTION

This action seeks to cure Defendants' systematic denial of Vietnam veterans' applications for discharge upgrades on the basis of PTSD. ECF No. 1 (hereafter "Compl."), at ¶¶ 146-155.[2]

Two days ago, Secretary of Defense Chuck Hagel issued policy guidance to the record correction boards regarding adjudication of applications of almost precisely the class Plaintiffs have moved to certify—Vietnam veterans seeking to "upgrad[e] their discharges based on claims of previously unrecognized Post-Traumatic Stress Disorder (PTSD)." *See* Secretary of Defense, Mem. for Sec'ys of the Military Dep'ts, OSD009883-14 (Sept. 3, 2014), attached hereto as Exhibit 2. Secretary Hagel's memorandum instructs the boards to give "liberal consideration" to these applications, consider in-service and post-service medical evidence such as PTSD diagnoses by non-military physicians, and imposes reporting requirements on each service branch. In ordering each Defendant to implement some of the types of class-wide procedural relief sought by Plaintiffs, it is clear that Defendants' opposition to class certification is baseless, class-wide relief is entirely feasible, and neither individual veterans' circumstances nor nominal differences among the boards' practices preclude this Court from certifying the class.

Defendants rely upon gross mischaracterizations of Plaintiffs' claims in order to suggest that the Court would be mired in a series of individual trials rather than an efficient class-wide hearing if the proposed class were certified, at which time the Court would consider whether federal statutes or the Constitution require class-wide procedural relief similar to what Secretary

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[2] The factual background and procedural history are more fully described in Plaintiffs' Motion for Class Certification, Plaintiffs' Response to Defendants' Motion to Remand, and Plaintiffs' Response to Defendants' Motion to Dismiss and For Summary Judgment. *See* ECF Nos. 24-1, 27, 34. Since Plaintiffs moved for class certification on June 30, 2014, the BCNR denied Named Plaintiff Conley Monk's request for correction of his naval record. A copy of the denial is attached as Exhibit 1. Defendants moved to dismiss Mr. Monk's APA and Fifth Amendment claims solely on the ground that there was no agency action for this Court to review. *See* ECF No. 26-1, at 18. These arguments are now moot. Accordingly, even were the Court to dismiss or remand all other claims by the other Plaintiffs, this case could proceed as a proposed class action (with Mr. Monk as Named Plaintiff) and as to Mr. Monk's individual claims.

Hagel directed two days ago. Defendants' arguments are specious and Plaintiffs' motion for class certification should be granted. Alternatively, the Secretary's recent guidance to the boards confirms that pre-certification discovery is appropriate in this case, and this Court should permit Plaintiffs to take pre-certification discovery if it denies Plaintiffs' motion without prejudice.

## ARGUMENT

### I. THIS COURT HAS JURISDICTION TO REDRESS PLAINTIFFS' CLAIMS.

Defendants attempt to defeat Plaintiffs' motion for class certification solely by questioning the Court's authority to issue one of the forms of relief requested (an injunction directing the boards to adopt medically appropriate standards and procedures to avoid discrimination) in response to only one of Plaintiffs' claims (Defendants' violations of the APA).[3] *See* ECF No. 33, at 7-9. Even if the Court were persuaded by Defendants' arguments regarding Plaintiffs' APA claim, dismissal of the APA claim alone is not an independent basis for dismissing the entire complaint and denying Plaintiffs' motion for class certification.[4] Plaintiffs would still have standing to assert their claims under the Fifth Amendment and Section 504 of the Rehabilitation Act.[5] Thus, the Court should reject Defendants' argument.

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[3] Plaintiffs have also requested that the Court: (1) grant all appropriate equitable relief to address past injury and to restrain future injury of Plaintiffs and members of the proposed class by Defendants; (2) issue an injunction to stop Defendants from discriminating against Vietnam veterans with PTSD solely on the basis of disability; and (3) direct that individual Plaintiffs' discharge statuses be upgraded to Honorable or General affirmed under uniform standards, or alternatively to vacate and remand the cases of each individual Plaintiff. ECF No. 1, *Prayer for Relief*, ¶¶ 1, 3, 4.

[4] *Cf. Eye Encounter, Inc. v. Contour Art, Ltd.*, 81 F.R.D. 683, 689 (E.D.N.Y. 1979) (noting motion to dismiss may be aimed at separate counts in complaint or complaint as a whole complaint, and motion to dismiss complaint as whole should be denied if one count is sufficient). Standing must be assessed on a claim-by-claim basis. *See Monsanto Co. v. Geerston Seed Farms*, 561 U.S. 139, 153 (2010).

[5] In arguing that Article III courts are without power to refashion agency procedures in granting relief, Defendants focus only on the Court's power to grant such an injunction under the APA. ECF No. 33, at 6. Yet Article III courts have power to grant this form of injunctive relief under §504 of the Rehabilitation Act as well as pursuant to the Fifth Amendment. *See, e.g.*, *Franco-Gonzalez v. Holder*, No. CV 10-02211, 2013 WL 8115423 (C.D. Cal. Apr. 23, 2013) (declaring that defendants violated Section 504 of the Rehabilitation Act and issuing a permanent injunction requiring that class members be afforded qualified representatives as detailed in a concurrently issued order); *Rodriguez v. Robbins*, No. 2:07-cv-03239, 2012 WL 7653016 (C.D. Cal. Sep. 13, 2012), *aff'd*, 715 F.3d 1127 (9th Cir. 2013) (issuing a preliminary injunction requiring bond hearings before an immigration judge for a class of detainees who have been detained for six months or longer in order to provide due process); *cf. Henrietta D. v.*

In any event, Plaintiffs have standing to assert their APA claims. A litigant demonstrates redressability if a favorable decision is likely to remedy the alleged injury. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc.*, 528 U.S. 167 (2000). Where, as here, the alleged injury is procedural, the standard for redressability is relaxed. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 573 n.7 (1992) ("The person who has been accorded a procedural right to protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy."). Plaintiffs allege that they have been deprived of procedural rights protecting their concrete interest in a medical or honorable discharge. Compl. ¶¶ 187-89. Defendants have caused this injury by issuing decisions that are arbitrary, capricious, unsupported by substantial evidence, contrary to law, and an abuse of discretion. *Id*. Sec. Hagel's September 3, 2014 directive is an implicit acknowledgment that the record correction boards have neither fairly adjudicated nor applied lawful standards to class member applications.

A litigant seeking vindication of a procedural right "has standing if there is some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant," and the litigant need not demonstrate that the substantive result would be different. *Massachusetts v. EPA*, 549 U.S. 497, 517-18 (2007). In *Massachusetts v. EPA*, petitioners similarly challenged an agency decision they argued was based on flawed reasoning. The Supreme Court held that injury could be redressed via remand to the agency for further proceedings consistent with the Court's opinion demanding that the agency ground its reasoning in the law. *See id.* at 526, 534. Similarly, even simply vacating and remanding the Boards' decisions would redress Plaintiffs' injuries by prompting Defendants to reconsider their denials of Plaintiffs' discharge upgrades. *See id.* at 517-18.

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*Giuliani*, 119 F. Supp. 181 (E.D.N.Y. 2000), *aff'd sub nom. Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003) (court may order declaratory relief and supervise compliance with terms of order in a case involving § 504 claims).

Further, Defendants' objection to class certification and the requested relief proceeds as if Rule 23 does not or should not apply to cases involving the record correction boards. But there is nothing unusual about such a suit. Courts have certified numerous class actions brought by former servicemembers challenging the illegal procedures of various military boards and have enjoined the service branches to grant relief to such classes. *See Giles v. Sec'y of the Army*, 84 F.R.D. 374, 376-77 (D.D.C. 1979), *aff'd and modified by* 627 F.2d 554 (D.C. Cir. 1980) (certifying class of Army veterans discharged under OTH conditions and ordering automatic upgrades to honorable discharges for all class members, with the option for the Army to initiate new administrative proceedings to review certain class members' discharges); *Sabo v. United States*, 102 Fed. Cl. 619, 624-25 (2011) (approving settlement agreement ordering record corrections for certified class of veterans claiming that boards operated by the Army, Navy, and Air Force improperly assigned them disability ratings for PTSD at the time of discharge).[6]

## II. PLAINTIFFS SATISFY THE REQUIREMENTS OF RULE 23.

Defendants claim that Plaintiffs have failed to establish two of the four required elements of Federal Rule of Civil Procedure 23: commonality (requiring "questions of law or fact common to the class"), Fed. R. Civ. P. 23(a)(2); and typicality (requiring that "the claims or defenses of the representative parties are typical of the claims or defenses of the class"), Fed. R. Civ. P. 23(a)(3).[7] As Defendants note, the commonality and typicality requirements tend to merge. "The crux of both requirements is to ensure that 'maintenance of a class action is economical and [that] the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence.'" *Marisol A. v. Giuliani*,

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[6] *See also Christensen v. United States*, 49 Fed. Cl. 165 (2001); *Berkley v. United States*, 45 Fed. Cl. 224 (1999); *Larionoff v. United States*, 365 F. Supp. 140 (D.D.C. 1973).

[7] "Rule 23 is given liberal rather than restrictive construction, and courts are to adopt a standard of flexibility … ." *Marisol v. Giuliani*, 126 F.3d 372, 377 (2d Cir. 1997) (internal quotation marks and citation omitted).

126 F.3d 372, 376 (2d Cir. 1997) (quoting *Gen. Tele. Co. of Sw. v. Falcon*, 457 U.S. 147, 157 n.13 (1982)). As explained below, Plaintiffs satisfy both requirements.

**A. Plaintiffs Have Established Commonality and Typicality Under Rule 23(a).**

At issue in this case is Defendants' uniform practice of failing reasonably to take into account Vietnam War veterans' PTSD diagnoses when determining whether to alter class members' discharge statuses.[8] Defendants argue that the proposed class cannot satisfy Rule 23's commonality and typicality requirements because the Plaintiffs' claims require "individualized, fact intensive" inquiries. ECF No. 33, at 11. None of Defendants' arguments are availing.

Rule 23 requires that the determination of a common question "resolve an issue that is central to the validity of each one of the claims in one stroke." *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541, 2551 (2011). This, however, "does not require the plaintiff to conclusively demonstrate the existence of common answers at the time of class certification." *Mahon v. Chi. Title Ins. Co.*, 296 F.R.D. 63, 73 (D. Conn. 2013). The questions posed in this case are appropriate for class-wide resolution.

First, Plaintiffs challenge the standards used by a unified and centralized system for correcting military records. Each military department is directed under 10 U.S.C. § 1552 to promulgate regulations to effectuate the correction of military records where necessary. That each service branch implements this directive separately does not negate the unitary purpose and

[8] Even based on the limited materials to which Plaintiffs have access, the Defendants' illegal practices are well documented. Review boards have either ignored PTSD claims entirely or have employed Catch-22-like policies 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. ¶¶ 152-55; Rebecca Izzo, Comment, *In Need of Correction: How the Army Board for Correction of Military Records is Failing Veterans with PTSD*, Yale L. J. 1587, 1592, 1596 (2014). Additionally, there is a statistically significant disparity between the rates of discharge upgrades for Vietnam veterans suffering from PTSD and all other veterans. Compl. ¶¶ 147-51.

control of this statutory provision. *See, e.g.*, *Sabo*, 102 Fed. Cl. at 624-25.[9] The Department of Defense (DoD) issues directives that apply equally to each branch and, in fact, provide the guidance used in hearing the discharge upgrade applications at issue. For example, DoD Directive 1332.41 "assigns responsibilities … for correcting any military record … when the Secretary concerned deems necessary in accordance with [10 U.S.C. § 1552]."[10] The DoD also provides a single form application for the correction of military records under 10 U.S.C. § 1552.[11] Most importantly, the Hagel Memorandum shows that the DoD can provide guidance to adjudicate the common claims of veterans across all three service branches in a single document.

Likewise, the fact that the Boards' merits decisions reflect each applicant's case to some degree is not the relevant question for this Court in its Rule 23 analysis. Rather, the question is whether a class-wide approach is appropriate because the plaintiffs' claims are targeted at remedying institutionalized and pervasive practices and procedures followed *by the defendant*. *See Dukes*, 131 S. Ct. at 2551, 2553 (common question would have existed had plaintiff class challenged a uniform policy, such as an overarching discriminatory policy). The focus in such cases is, appropriately, on the defendant's conduct as a whole, not on the plaintiffs' individual circumstances. *See, e.g.*, *Saravia v. 2799 Broadway Grocery LLC*, No. 12 Civ. 7310, 2014 U.S. Dist. LEXIS 67831, at *10 (S.D.N.Y. May 16, 2014) (commonality related solely to defendants' conduct and not class members' individual characteristics). This is so even if the defendant institutes the challenged policy or practice in different places and at different times. *Adames v. Mitsubishi Bank, Ltd.*, 133 F.R.D. 82, 90 (E.D.N.Y. 1989) (finding commonality despite fact that

[9] To the extent this Court determines that there are central issues impacting some class members and not others, "Rule 23 gives the district court flexibility to certify subclasses as the case progresses and as the nature of the proof to be developed at trial becomes clear." *Marisol A.*, 126 F.3d at 379; *see also* Fed. R. Civ. P. 23(c)(5).

[10] DoDD 1332.41 (March 8, 2004), *available at* http://www.dtic.mil/whs/directives/corres/pdf/133241p.pdf (last viewed Aug. 26, 2014).

[11] *See* DoD Form 0149 (Nov. 2012). *available at* http://www.dtic.mil/whs/directives/infomgt/forms/eforms/dd0149.pdf (last viewed Aug. 26, 2014).

discriminatory practices impacted class members differently); *Ventura v. N.Y.C. Health & Hosps. Corp.*, 125 F.R.D. 595, 599-600 (S.D.N.Y. 1989) (commonality existed despite differences in impact on class members).

Contrary to Defendants' mischaracterization, Plaintiffs have not simply asserted that they have all suffered a violation of the same provision of law. Rather, Plaintiffs point to questions *about Defendants' policies* that have been applied consistently and commonly to the Named Plaintiffs and the proposed class members.

Even the limited information that Plaintiffs possess without the benefit of discovery demonstrates that the Boards routinely apply the same flawed policy in denying putative class members' discharge upgrades. The Boards summarily deny veterans' claims by issuing at least four versions of essentially the same opinion—none of which afford proper weight or more than terse treatment to the applicants' diagnosed PTSD stemming from their time in the Vietnam Theater, and all of which discriminate against applicants on the basis of their PTSD:

- The applicant raises PTSD, but the Board does not mention PTSD at all in its Discussion. *See* Compl. ¶ 152. If the Board mentions PTSD anywhere, it is only in a generic paragraph about PTSD in the Evidence section. *See, e.g.*, Exs. 3-5.

- The Board rejects the applicant's Vietnam-related PTSD diagnosis simply by citing the absence of a medical diagnosis of PTSD or other mental illness prior to separation. *See* Compl. ¶ 152; *see, e.g., id.* ¶ 109 ("[T]here is no evidence which shows the applicant was diagnosed with PTSD or any other mental condition prior to discharge on 12 February 1974"); Exs. 6-8.

- The Board rejects evidence of PTSD/mental health diagnosis, finds the evidence does not demonstrate applicant suffered an impairment that led him not to be able to "tell wrong from right and adhere to right." Compl. ¶ 152.; *see, e.g.*, Exs. 9-11.

- The Board acknowledges applicant's PTSD claim as a possible explanation, but finds it an insufficient basis to warrant a discharge upgrade. *See, e.g.*, Exs. 12-14.

All the members of the proposed class face the same barrier to a discharge upgrade: the Boards' application of medically inappropriate standards that fail to give proper weight to the PTSD

incurred by the applicant as a result of his service in Vietnam and only later diagnosed (because PTSD did not exist as a diagnosis until 1980). Through discovery, Plaintiffs anticipate developing a full evidentiary record that documents this common and consistent application of medically inappropriate standards to these applications.

Even those allegations regarding the impact of Defendants' policies on the proposed class involve impacts that are common across the class. For example, Plaintiffs' allegations of injury suffered because of their OTH status—loss of employment opportunities and health benefits—are central to this case and appropriately considered on a class-wide basis.[12]

Consequently, the commonality and typicality requirements present no barrier to class certification or to this Court's jurisdiction in this case.

**B. Plaintiffs Meet the Requirements Under Rule 23(b)(2).**

Defendants' arguments that Plaintiffs fail to meet the requirements of Rule 23(b)(2) are wrong for many of the same reasons. The focus of the inquiry under Rule 23(b)(2) is whether "the conduct is such that it can be enjoined or declared unlawful only as to all of the class members or as to none of them." *Dukes*, 131 S.Ct. at 2557. Where a systemic problem needs addressing, a judge may issue a single injunction against multiple defendants, and still meet the requirements of Rule 23(b)(2). *See Kenneth R. ex rel. Tri-County CAP, Inc./GS v. Hassan*, 293 F.R.D. 254, 271 (D.N.H. 2013) (a single injunction could be issued against multiple defendants).

Because Defendants belong to a unitary and centralized system and exhibit the same unlawful conduct, a single injunction applicable to all class members may be directed at all Defendants. If Defendants' actions are declared unlawful as to one class member, such a ruling applies to all class members. *See Dukes*, 131 S.Ct. at 2557. Further, even if Defendants were to

[12] The existence of different statute of limitations issues does not bar certification. "Courts have consistently held that a statute of limitations defense as to some class members does not defeat certification." *Healthcare Strategies, Inc. v. ING Life Ins. & Annuity Co.*, No. 3:11-CV0282(JCH), 2012 WL 10242276, at *7 (D. Conn. Sept. 27, 2012).

establish that this Court lacks jurisdiction to grant an injunction (which they have not), this Court still retains the authority to grant the other relief requested. Such relief may form the basis for a Rule 23(b)(2) class certification because it would redress the same systemic deficiencies. *Id.*

**CONCLUSION**

Based on the foregoing, this Court has jurisdiction to grant the requested relief and Plaintiffs have met their burden to satisfy the requirements of Rule 23(a) and (b)(2). The Court should therefore certify Plaintiffs' proposed class.

Dated: September 5, 2014
New Haven, Connecticut

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