No. 2021-2095

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT L. DOYON,

Plaintiff - Appellant,

v.

UNITED STATES,

Defendant - Appellee.

Appeal from the United States Court of Federal Claims in Case No. 1:19-cv-1964

CORRECTED BRIEF OF AMICUS CURIAE CONNECTICUT VETERANS LEGAL CENTER IN SUPPORT OF APPELLANT AND IN FAVOR OF REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-2095

Short Case Caption *Doyon v. United States*

Filing Party/Entity Connecticut Veterans Legal Center

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 8/31/2021

Signature: /s/Alexander O. Canizares

Name: Alexander O. Canizares

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ ✔ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☐ ✔ None/Not Applicable
Connecticut Veterans Legal Center	N/A	N/A

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☑ None/Not Applicable ☐ Additional pages attached

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

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STATEMENT OF INTEREST OF AMICUS CURIAE

The Connecticut Veterans Legal Center (CVLC) created the nation's first medical-legal partnership co-located with the Department of Veterans Affairs (VA). CVLC's mission is to remove legal barriers to health care, housing, and income for veterans in recovery from homelessness and mental illness. As part of this work, CVLC attorneys assist veterans in VA service-connected disability claims, VA character of discharge determinations, and discharge upgrade petitions to the Department of Defense (DoD). CVLC also runs the Veterans Inclusion Project, an initiative focused on advocating for policy changes to create a more inclusive veterans benefit system for the most vulnerable low-income veterans: those who are living with mental illness, trauma, substance dependence, and homelessness; as well as those who have experienced military sexual trauma and those who have been harmed by discrimination or other injustices in the DoD and VA systems.

The issues in this appeal lie at the core of CVLC's experience and expertise. CVLC has extensive experience representing veterans seeking corrections to their military records and is intimately familiar with DoD's relaxed standard in this regard concerning requests from individuals suffering from PTSD and related mental health issues. CVLC has a strong interest in the pro-claimant standard adopted by DoD and ratified by Congress and in challenging decisions, such as the decision on appeal, that undermine this standard.

INTRODUCTION

Plaintiff-appellant Robert Doyon, a Vietnam veteran who indisputably suffers from Post-Traumatic Stress Disorder (PTSD) due to tragedies he witnessed serving this country, brought this litigation to have his military records corrected to show that it was the effects of this PTSD, and not a misdiagnosed "personality disorder," that caused his discharge from the Navy in 1968. The Board for Correction of Naval Records (BCNR), despite agreeing that Mr. Doyon has PTSD, denied his application, thereby depriving him of a medical retirement, back pay, and other benefits, and leaving his military record with an incorrect and stigmatizing reason for discharge. The Court of Federal Claims (CFC) upheld the BCNR's holding, concluding, among other things, that the BCNR did not err by declining to apply the binding guidance set forth in two documents to Mr. Doyon's application: (1) a September 3, 2014 memorandum from Secretary of Defense Charles Hagel requiring that "liberal consideration" be given to requests for changes in service records based on PTSD (the "Hagel Memorandum"), Appx1232-1235, and (2) an August 25, 2017 memorandum from Undersecretary of Defense Anthony Kurta clarifying the broad reach of "liberal consideration" to be applied to PTSD-related changes in service records (the "Kurta Memorandum"), Appx1940-1945.[1] The CFC based its ruling on

[1] Both the Hagel Memorandum and the Kurta Memorandum are binding on the BCNR. *See Fisher v. United States*, 402 F.3d 1167, 1177 (Fed. Cir. 2005) ("[T]he military is bound to follow its own procedural regulations should it choose to promulgate them.").

its conclusion that the Hagel Memorandum and the Kurta Memorandum did not apply to Mr. Doyon's application because his challenge was neither a challenge to the characterization of his discharge from the Navy, nor a challenge to the narrative reason for his discharge. Appx15-18. In effect, the CFC held that the memoranda constrained the circumstances in which "liberal consideration" of a request for changes in services records due to PTSD is warranted to only those in which a veteran seeks to upgrade his *characterization* of discharge, despite its acknowledgement that the Kurta Memorandum applied to "any petition seeking discharge relief." Appx17.

As Mr. Doyon has demonstrated, the CFC's holding is wrong as a matter of law. This is true for several reasons. Among those is the CFC's failure to recognize that the BCNR's enabling statute requires it to give liberal consideration to applications like Mr. Doyon's that seek discharge relief related to service-connected PTSD. 10 U.S.C. § 1552(h). That requirement applies to any "former member of the armed forces whose claim under this section for review of a discharge or dismissal is based in whole or in part on matters relating to [PTSD] . . . as supporting rationale . . . and whose [PTSD] . . . is related to combat." *Id.* § 1552(h)(1). For such applications, the BCNR must "review the claim with liberal consideration to the claimant that [PTSD] . . . potentially contributed to the circumstances resulting in the discharge." *Id*. § 1552(h)(2)(B). This statute is remedial in nature and provides

broad authority for corrective action to ensure Mr. Doyon receives complete relief, which in this case would require a medical retirement. *See Caddington v. United States*, 147 Ct. Cl. 629, 632 (1959) (Section 1552 "is remedial in nature," and "imposes on the Secretary the twofold duty to properly evaluate the nature of any error or injustice and, in addition, to take such corrective action as will appropriately and fully erase such error or compensate such injustice."). Mr. Doyon's application and requested relief fall directly within the plain meaning of these provisions. The BCNR and CFC also erred as a matter of law by concluding that the liberal consideration required by the Hagel and Kurta Memoranda is irrelevant to Mr. Doyon's application, restricting the scope of these binding documents in a manner contrary to their plain text.

In this brief, we wish to highlight three additional reasons why the CFC's judgment cannot stand. First, the CFC's ruling misconstrues DoD's "liberal consideration" standard and ignores the concerns underlying it, which were to address situations precisely like Mr. Doyon's, *e.g.*, to remedy the long-term effects to the large numbers of service members who most likely experienced PTSD during service but were instead separated with a disparaging discharge. Second, the CFC's ruling ignores DoD's application of the "liberal consideration" standard since it was announced in 2014, which shows DoD's repeated efforts to broadly apply the standard—including to situations similar to Mr. Doyon's—and to remedy the

unfairness presented by narrow constructions such as the CFC's. Third, the specific facts of Mr. Doyon's case demonstrate precisely why DoD adopted the "liberal consideration" standard and the unfairness that would result if it were not applied in cases such as his.

Accordingly, this Court should reverse the judgment below.[2]

ARGUMENT

I. From the Vietnam Era to the Present, the Branches of the U.S. Military Have Erroneously Discharged Service Members with "Personality Disorders" When They Truly Suffered from PTSD.

PTSD is a disabling mental health condition that affects some individuals who experience a traumatic stressor. *See, e.g.*, Mayo Clinic *Post-traumatic stress disorder (PTSD)*, https://www.mayoclinic.org/diseases-conditions/post-traumatic-stress-disorder/symptoms-causes/syc-20355967. Service members can develop PTSD after experiencing a traumatic stressor during service, such as engaging in combat, witnessing accidents, or suffering a military sexual trauma. PTSD is common among veterans of the US military. The Department of Veteran Affairs (VA) estimates that 11-20% of recent Iraq and Afghanistan veterans, 12% of Gulf War veterans, and 30% of Vietnam veterans have had PTSD in their lifetime. U.S. Dep't of Veterans Affairs, *How Common*

[2] Counsel for appellant consented to the filing of this brief and counsel for appellee indicated that the United States does not oppose the filing of this brief. No party's counsel authored this brief in whole or in part, and no party, party's counsel, or other person contributed money that was intended to fund the preparation or submission of this brief.

is PTSD in Veterans?, https://www.ptsd.va.gov/understand/common/common_veterans.asp. A service member who is diagnosed with PTSD that interferes with his or her ability to continue in service is entitled to service-connected benefits and, if their PTSD is severe enough, a medical retirement.

Historically, the military has repeatedly discharged service members who develop PTSD symptoms in a manner that disqualifies them from these benefits. In some cases, service members who develop untreated PTSD commit misconduct and receive a misconduct-based discharge. In other cases, such as Mr. Doyon's, the military inaccurately deems the service member's conduct as evidence of a personality disorder, and discharges the service member on that basis, with the characterization of Honorable or General. Either way, the service member is given a certificate of discharge or release from duty (DD-214) containing pejorative and stigmatizing language, with serious adverse consequences.

The information on a veteran's DD-214 has profound impacts on his or her future and civilian life. For example, problematic language on a DD-214 can have a disastrous financial impact for veterans, as the circumstances surrounding a veteran's discharge have implications for his or her eligibility for a whole range of benefits, including—among other things—disability compensation, pensions, educational or housing assistance, health care, and unemployment benefits. Umar Moulta-Ali & Sidath V. Panangala, *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility*,

Congressional Research Service (Mar. 6, 2015), https://fas.org/sgp/crs/misc/R43928.pdf. The DD-214 is also frequently requested by prospective employers, and veterans with "personality disorder" listed on their DD-214 find it difficult to obtain a job even if they are able to work. *See, e.g.*, *Personality Disorder Discharges: Impact on Veterans' Benefits: Hearing Before the H. Comm. on Veterans' Affairs*, 111th Cong. 7-8 (2010) ("2010 Hearing"). Service members discharged with personality disorders may also be required to repay a portion of their enlistment bonus, causing them to reenter civilian life not only with mental illness and no disability or retirement benefits, but in debt to the military that ejected them. *Id*. at 12.

And the consequences for veterans with undiagnosed PTSD are not merely financial. Veterans with unrecognized PTSD are more likely to develop substance use disorders and alcohol use disorders. *See* U.S. Dep't of Veterans Affairs, *PTSD and Substance Abuse in Veterans*, **Error! Hyperlink reference not valid.**https://www.ptsd.va.gov/understand/related/ substance_abuse_vet.asp. Veterans with PTSD are also more at risk of suicide than other veterans or the general population. *See* U.S. Dep't of Veterans Affairs, *The Relationship Between PTSD and Suicide*, https://www.ptsd.va.gov/professional /treat/cooccurring/suicide_ptsd.asp#three. And the manner of their discharge only exacerbates these veterans' problems; they are shut out from benefits they would otherwise receive for their PTSD and, as a result, their

PTSD frequently goes untreated.

Although the consequences of involuntarily separating a service member with PTSD can be severe for the individual, investigations have revealed that historically the service branches have not taken care when diagnosing personality disorders, resulting in possible wrongful discharges of tens of thousands of veterans with PTSD symptoms. Congress began to focus on this problem after investigative reporting in 2007 shined a spotlight on the dramatic overdiagnosis of personality disorder among veterans who had symptoms of PTSD from combat. Joshua Kors, a reporter for *The Nation* and *ABC News*, published an investigative report in March 2007 showing that from 2001 to 2007 the military had discharged over 5,600 soldiers for personality disorders, with the number steadily rising. Joshua Kors, *How Specialist Town Lost His Benefits*, The Nation (March 29, 2007), https://www.thenation.com/article/archive/how-specialist-town-lost-his-benefits/. Mr. Kors's reporting suggested that DoD's increasing use of personality disorder diagnoses may be driven by an effort to save the military money, because a diagnosis of personality disorder—a preexisting condition—would prevent veterans from collecting disability payments. *Id*.

Mr. Kors' article sparked subsequent reporting which revealed over 20,000 similar cases over recent years, prompting a hearing before the House Committee of Veterans' Affairs in July 2007, *Post Traumatic Stress Disorder and Personality Disorders: Challenges for the U.S. Department of Veterans Affairs: Hearing Before the*

H. Comm. on Veterans' Affairs, 110th Cong. 1 (2007) (statement of Chairman Filner), as well as proposed legislation in both the House and the Senate to address overdiagnosis of personality disorder in veterans suffering from PTSD. *See id.* at 3 (describing proposed legislation by then-Senator Obama to halt discharges for personality disorders); *id.* at 4 (describing H.R. 3167, the "Fair Mental Health Evaluation for Returning Veterans Act"). In the July 2007 hearing, both Mr. Kors and Jonathan Town (an Iraq war veteran highlighted in Mr. Kors's reporting) testified, with Mr. Town describing how—like Mr. Doyon—he had been discharged with a personality disorder by the military and had received a diagnosis of PTSD by the VA as soon as he had been seen by a psychiatrist. *Id.* at 16. Mr. Kors explained how, in a subsequent review, the military asserted that Mr. Town and many soldiers like him were properly diagnosed with personality disorders, *id.* at 13, and how his reporting had revealed that this type of misdiagnosis had been an issue since the Vietnam era. *Id.* at 21. The Committee also heard from experts who described how a personality disorder (unlike PTSD) tends to show up in late adolescence or early adulthood rather than after a traumatic event, how there is generally evidence of a behavior pattern consistent with a personality disorder prior to adulthood—and prior to military service—and how PTSD can lead to behaviors that may look similar to a personality disorder, and therefore PTSD must be affirmatively ruled out. *Id.* at 42-43. From the testimony provided, it was not clear that DoD psychologists and psychiatrists had thoroughly and appropriately assessed service

members' symptoms before discharging them with a personality disorder.

The increased focus on—and awareness of—PTSD and misdiagnosis of personality disorders began to prompt changes. The Fiscal Year 2008 National Defense Authorization Act required DoD to study discharges for personality disorders and issue a report to Congress on the issue. National Defense Authorization Act for Fiscal Year 2008, PL 110–181, 122 Stat 3 § 597 (January 28, 2008); 2010 Hearing at 1-2 (Opening Statement of Chairman Filner). While DoD's report claimed—incredibly—that its review determined that *none* of the 22,600 service members who had been discharged for personality disorders from 2002 to 2007 were wrongly diagnosed or wrongly discharged, 2010 Hearing at 2, increased governmental scrutiny did appear to have an impact on the way in which service members were diagnosed. First, a subsequent GAO report identified that the military services were not appropriately following DoD's requirements for personality disorder separations and recommended that DoD direct the Army, Navy, Air Force, and Marine Corps "to develop a system to ensure that personality disorder separations are conducted in accordance with DOD's requirements." U.S. Gov't Accountability Off., GAO-09-31, DEFENSE HEALTH CARE: Additional Efforts Needed to Ensure Compliance with Personality Disorder Separation Requirements at 19 (2008). Second, from 2008 to 2009 the number of personality disorder diagnoses of service members dropped significantly while diagnoses for PTSD soared. 2010 Hearing at 18, 24.

But DoD's continued lack of responsiveness to concerns about personality disorder and PTSD nonetheless prompted a second hearing before the House Committee on Veterans' Affairs in September 2010, focusing on the issue of misdiagnosed personality disorder and PTSD. *See generally* 2010 Hearing. Service members testifying before the committee told harrowing stories of being denied benefits due to misdiagnosis of personality disorders based on cursory examinations. *Id*. at 12. Doctors told the Committee that such disorders exhibited symptoms that remain "relatively constant" and can be traced back to childhood or adolescence such that they would have shown up before military service. *Id.* at 17. The Committee also heard testimony calling into question the thoroughness of DoD's review of records of personality disorder discharges and indicating that DoD was still maintaining its diagnoses were correct even when soldiers—similar to Mr. Doyon—received drastically different diagnoses once they saw VA doctors rather than military service physicians. *Id.* at 19.

Although DoD has improved the procedures commanding officers must use prior to issuing a personality disorder discharge, it has not proactively reviewed the tens of thousands of personality disorder discharges from the post-September 11, 2001 era, much less those discharges issued during prior conflicts. For veterans who believe they were wrongly issued a personality disorder discharge instead of medically retired for PTSD, the only remedy is to seek review from the Boards of Correction for Military/Naval Records.

II. The CFC Misapprehends DoD's "Liberal Consideration" Standard, the Purpose of Which is to Remedy the Errors Stemming from Unfair Discharges of Service Members with PTSD

"Liberal consideration" emerged as the standard for boards of correction and discharge review boards when reviewing cases involving previously-undiagnosed PTSD precisely because of concerns that service members like Mr. Doyon were being unfairly discharged without military and VA benefits. In 2014, DoD began to realize the inadequacy of its existing procedures for correcting records involving claims based on PTSD in the context of misconduct discharges. In that year, a group of Vietnam veterans with PTSD brought a class action suit against each of the military services after having been denied relief when they sought discharge upgrades, and their action finally spurred the issuance of the Hagel Memorandum. In that case, *Monk v. Mabus*, five Vietnam veterans along with the Vietnam Veterans of America and other veterans' organizations sought an injunction requiring that, among other things, the Army, Navy, and Air Force utilize consistent standards when considering the effects of PTSD on Vietnam veterans' requests for discharge upgrades. *See* Complaint at 36, *Monk v. Mabus*, No. 3:14-cv-00260 (D. Conn. 2014) (filed March 3, 2014).

In direct response to the *Monk* lawsuit, then-Secretary of Defense Hagel issued the Hagel Memorandum. Appx1232-1235; *See* Andrew Tilghman, *DoD Willing to Reconsider Discharges of Vietnam Vets with PTSD*, MIL. TIMES (Sept. 3, 2014), https://www.militarytimes.com/news/pentagon-congress/2014/09/03/dod-willing-to-

reconsider-discharges-of-vietnam-vets-with-ptsd/ ("The Pentagon's new rule comes in response to a federal lawsuit filed on behalf of several veterans . . . that claimed the Defense Department was wrongfully denying discharge upgrade applications from veterans with claims and evidence of PTSD."). The Hagel Memorandum made plain that it was issued in response to recent attention on "petitions of Vietnam veterans to Military Department Boards for Correction of Military/Naval Records (BCM/NR) for the purposes of upgrading their discharges based on claims of previously unrecognized Post Traumatic Stress Disorder" and specifically noted that "[l]iberal consideration will be given in petitions for changes in characterization of service . . . which document one or more symptoms which meet the diagnostic criteria for [PTSD] or related conditions," and that "[s]pecial consideration [] be given to Department of Veterans Affairs (VA) determinations which document PTSD or PTSD-related conditions connected to military service." Appx1232, Appx1234.

Because the claims of the *Monk* plaintiffs centered on their petitions to upgrade Other Than Honorable characterizations of their Vietnam service, so too the Hagel Memorandum focused on Vietnam-era misconduct-based discharges and upgrade claims based on PTSD. However, DoD subsequently recognized that veterans with PTSD had been unfairly discharged in circumstances beyond the facts at issue in *Monk*—for example, veterans who served later or earlier than the Vietnam conflict, veterans whose symptoms were best described as traumatic brain injury or a related

mental health condition and not strictly PTSD, and veterans whose traumatic stressor was not combat or accident in the service, but military sexual trauma. Faced with these issues, DoD has repeatedly issued guidance to combat overly narrow applications of the "liberal consideration" standard, and has assured Congress that "liberal consideration" should apply in situations similar to Mr. Doyon's. The CFC's narrow reading of the applicability of "liberal consideration" is precisely the type of construction that DoD has repeatedly sought to combat through these post-Hagel Memorandum clarifications, including through the Kurta Memorandum itself.

DoD's binding "liberal consideration" standard was meant to provide relief to veterans suffering from PTSD by increasing the rates of upgrades and other changes to their military records, but the standard initially proved to have limited effect due to inconsistent and inadequate use. While there was an initial increase in discharge upgrades following the Hagel Memorandum, "liberal consideration" was inconsistently and inadequately applied. *See* Jessica Lynn Wherry, *Kicked Out, Kicked Again: The Discharge Review Boards' Illiberal Application of Liberal Consideration for Veterans with Post-Traumatic Stress Disorder*, 108 Cal. L. Rev. 1357, 1382-83 (2020). Numerous statistics concerning the military services following the Hagel Memorandum confirm this. First, statistics provided by the Naval Discharge Review Board (NDRB) demonstrate a failure to properly apply the "liberal consideration" standard where appropriate. In 2015, for example, there were 116 "liberal consideration claims" and

only 19 were granted. *Id*. at 1387 n.197. And independent analyses of military board decisions in the years following the Hagel Memorandum in ongoing litigation show these same issues. In *Kennedy v. Speer*, for example, the plaintiffs—challenging the Army's inconsistent consideration and use of the Hagel Memorandum—undertook an analysis of a random sample of 200 Army Discharge Review Board (ADRB) decisions from 2015 and showed that they "cited the Hagel Memo in only 58 percent of cases involving allegations or indications of PTSD and in only 67 percent of cases involving allegations or indications of PTSD or a PTSD-related condition." Am. Compl. at 23, *Kennedy v. Speer*, No. 3:16-cv-02010-CSH (D. Conn. 2016) (filed April 17, 2017).[3] The plaintiffs further explained that "[e]ven when the ADRB does list the Hagel Memo as a citation, the Board still frequently ignores the standards actually set out by the Hagel Memo," citing the fact that not once in these decisions "did the Board explicitly use any of the language from the Hagel Memo (*e.g.*, 'liberal consideration,' 'special consideration') or otherwise indicate that they had applied 'liberal' or 'special' consideration to applicants' circumstances." *Id*. In a settlement with the *Kennedy*

[3] The plaintiffs in *Manker v. Spencer* make similar allegations concerning the Naval Discharge Review Board. *See* Complaint ¶ 183, *Manker v. Spencer*, No, 3:18-cv-00372-CSH (D. Conn 2018) (filed March 2, 2018) ("However, in a sample of 299 NDRB decisions issued since 2015, randomly selected from all decisions issued by the NDRB in that period and published in the NDRB's online reading room, the NDRB cited the Hagel Memo in only 66 percent of cases involving allegations or indications of PTSD or TBI and in only 44 percent of cases involving allegations or indications of PTSD, TBI, or other related mental health conditions."). That case is currently ongoing.

plaintiffs, the ADRB, without conceding any error, agreed to reopen cases seeking discharge upgrades or alterations to narrative reasons involving PTSD, traumatic brain injury, military sexual trauma, or other behavioral health issues going back to 2011, and to give veterans with older cases the option to re-apply to have their matters re-evaluated. *See* Stipulation and Agreement of Settlement at 10-12, *Kennedy v. McCarthy*, No. 3:16-cv-02010-CSH (D. Conn. 2016) (filed November 17, 2020).

The military services' incorrect and inconsistent usage of the "liberal consideration" standard in the years following the Hagel Memorandum ultimately spurred DoD to issue further binding guidance clarifying that the "liberal consideration" standard is to be broadly applied, even in circumstances in which the language of the original memoranda might suggest otherwise. First, a year and a half after announcing the "liberal consideration" standard with the Hagel Memorandum, DoD issued guidance in February 2016 to clarify that "liberal consideration" applies to all veterans (not just Vietnam veterans) and to both records correction and discharge review boards, despite the Hagel Memorandum's specific reference to Vietnam veterans and sole address to records correction boards. *See* Mem. from Brad Carson, Acting Principal Deputy Under Sec'y of Def., to Secretaries of the Military Dept's (Feb. 24, 2016), http://veteransclinic.law.wfu.edu/files/2017/09/Carson-Memo.pdf; Wherry, 108 Cal. L. Rev. at 1381. Then, following a further review of its policies for upgrading discharges, DoD issued the Kurta Memorandum.

The Kurta Memorandum was, once again, not meant to offer a new standard, but instead to "resolve lingering questions and potential ambiguities" concerning the application of the "liberal consideration" standard, and to ensure that the services' review and discharge boards applied "liberal consideration" broadly to cases involving PTSD. Appx1940. The Kurta Memorandum emphasizes that "liberal consideration" is necessary when considering PTSD-related applications because "[i]nvisible wounds . . . are some of the most difficult cases [boards] review and there are frequently limited records for the boards to consider, often through no fault of the veteran, in resolving appeals for relief" and that, because of this, "[s]tandards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the . . . mental health condition was not diagnosed until years later." *Id*. The "liberal consideration" standard is meant to apply broadly and be grounded in leniency, as a Pentagon official described when the Kurta Memorandum was issued:

> It's in our interest to ensure those who have suffered injustice or believe their discharge is unfair, that they have a reasonable opportunity . . . to establish the basis for their discharge was precipitated by things outside their control. This clarifying guidance is intended to ease those burdens and make it easier for an applicant to establish that.

Wherry, 108 Cal. L. Rev. at 1384-85 (quoting Air Force Lieutenant Colonel Reggie Yagel, Under Secretary Kurta's point of contact in the Office of Legal Policy). Indeed, DoD clarified the standard's broad application in subsequent testimony before Congress

in 2017, emphasizing that "liberal consideration" was meant to ease the burden of veterans in all cases involving PTSD. Robert L. Woods—the then-Assistant General Counsel for the Assistant Secretary of the Navy for Manpower and Reserve Affairs, testifying for all Naval review boards (including the BCNR)—told the House Armed Services Committee's Subcommittee on Military Personnel that

> Over the past few years, we have paid particular attention to petitions involving invisible wounds. We have conducted outreach sessions with veteran service organizations, provide[d] professional training for our staffs, prioritized the processing of these cases, obtain[ed] medical review and input, and appl[ied] liberal consideration principles to ease the burdens of proof for the veterans.

Overview of Military Review Board Agencies: Hearing Before the Subcomm. On Military Personnel of the H. Comm. On Armed Services, 115th Cong. 5 (2017) (statement of Robert L. Woods, Assistance General Counsel for the Assistant Secretary of the Navy for Manpower and Reserve Affairs).

Even more notably, in that same hearing DOD testified to Congress that liberal consideration applies to requests for medical disability—Mr. Doyon's exact request here. Francine C. Blackmon, the then-Deputy Assistant Secretary of the Army (Review Boards), offered the following example:

> MR. COFFMAN. . . . And lastly, can you explain how you apply quote/unquote, "liberal consideration"? Ms. Blackmon, we will start with you.
>
> MS. BLACKMON. . . . On the converse side of the house, we had a situation where there was an individual that came in, that

> essentially said, you know, "the Army separated me with a disability separation. I was a rape victim." She says, "I think it should have been a disability to retirement."
>
> Unfortunately, the perpetrator had individuals that could corroborate his story. But as we looked at the case, we kind of looked at the behavior of the applicant and we could see that there was a downward spiral in behavior after this particular incident had happened. We saw the applicant had become indrawn, inwards, sullen.
>
> And so with that, we said there has to be a nexus. And so with that, we basically took her from a 20 percent disability separation to a 60 percent disability retirement and paid her back pay to 2002.

Id. at 13-14. In other words, armed services officials explained to Congress following the Kurta Memorandum that they understood "liberal consideration" to apply to all petitions involving "invisible wounds" such as PTSD, citing as an example a situation involving reopening an honorable discharge to consider whether a service member should have been properly medically retired based on a service-acquired disorder—precisely the relief that Mr. Doyon seeks here.

Since its announcement of "liberal consideration" in the Hagel Memorandum, DoD has repeatedly issued guidance to ensure that this standard is broadly and consistently applied to cases involving "invisible wounds" such as Mr. Doyon's. Contrary to the CFC's analysis, the "liberal consideration" standard is not meant to only address requests to change a characterization of service to "honorable" with commensurate adjustments to additional fields on the DD-214. Instead it is DoD's

attempt to ensure veterans who developed PTSD in service are returned to the position they would have been in, had their PTSD been properly recognized prior to their discharge. *See Caddington*, 147 Ct. Cl. At 632. The CFC's confining of "liberal consideration" to certain narrowly defined categories of cases ignores the policy considerations that undergird the standard and motivated its adoption. The CFC's decision was contrary to the standard and its stated purpose, and the failure of the BCNR and the CFC to properly apply "liberal consideration" to Mr. Doyon's case was incorrect and should be reversed.

III. Mr. Doyon's Misdiagnosis and the Unfairness it Produced Are Precisely the Circumstances That "Liberal Consideration" Was Intended to Remedy and Prevent.

Mr. Doyon's case is exactly the situation for which "liberal consideration" was intended, and the CFC's narrow reading of the standard's applicability would result in manifest unfairness for him and thousands of veterans like him. Mr. Doyon exhibited no symptoms of a personality disorder prior to his service in the Navy, and had no issues growing up that would indicate any such disorder. Br. of Appellant at 8. A personality disorder was not diagnosed in his initial medical screening for Naval service. *Id.* at 9. He served with honor and without incident until the occurrences which gave rise to his PTSD. *Id.* at 9-15. Mr. Doyon was discharged with a personality disorder after an observation by a psychiatrist in 1968 (before PTSD was a recognized medical diagnosis) due to symptoms—including agitation, hostility, "excitability and ineffectiveness when

confronted with stress," and conflicts with other service members—which overlap between personality disorders and PTSD. *Id*. at 55. He suffered from PTSD in his post-military life, and self-medicated with drugs and alcohol. *Id*. at 16-18.

Like so many service members seeking to correct their service records for whom "liberal consideration" is intended, Mr. Doyon was diagnosed with PTSD as soon as he sought care at the VA, which first occurred in 2013. *Id*. at 18. Since 2013, he has been evaluated by three separate doctors—two at the VA, one a civilian psychiatrist—each of whom has diagnosed Mr. Doyon with PTSD, and none of whom has identified a personality disorder. *Id*. at 18-19. The Hagel Memorandum specifically states that "[s]pecial consideration [] be given to [the VA's] determination[] which document[s] PTSD or PTSD-related conditions connected to military service." Appx1234. It was meant exactly for cases such as Mr. Doyon's.

Yet, disregarding these unambiguous, binding directives, the BCNR did not apply the standards laid out in the Hagel Memorandum or Kurta Memorandum to Mr. Doyon's case, instead placing more credibility on the 1968 diagnosis "since the Navy medical providers personally observed [Mr. Doyon] rather than relied on medical records and [his] assertions 40+ years after [his] discharge." Appx1050. This runs directly contrary to the appropriate standard under the Hagel Memorandum, which stressed that "[i]n these cases, PTSD was not recognized as a diagnosis at the time of service, and, in many cases, diagnoses were not made until decades after service was completed." Appx1232.

The Hagel Memorandum instructs the Board, in such a case, to give "special consideration" to VA determinations "which document PTSD or PTSD-related conditions connected to military service." Appx1234; *see also* Appx1940 ("[s]tandards for review should rightly consider the unique nature of these cases and afford each veteran a reasonable opportunity for relief even if the . . . mental health condition was not diagnosed until years later."). Yet the CFC inexplicably blessed the board's determination that Mr. Doyon deserved neither "liberal consideration" of his case nor "special consideration" for the VA diagnoses in his favor. This overly restricted reading of DoD's binding guidance places veterans who were erroneously discharged based upon a personality disorder on wholly uneven footing with veterans who were discharged for misconduct, even though both base their applications on their PTSD.

The CFC's ruling puts Mr. Doyon and thousands of other veterans like him in an invidious position. Mr. Doyon cannot prove he had PTSD other than through his recent medical records and his recollections because he served this country before the disorder was understood and acknowledged. But every indicator—the lack of any pre-service personality disorder reflected in his medical records, his experiences during combat, and his medical diagnoses since receiving care from the VA—demonstrates that he has PTSD, and that he was misdiagnosed with a personality disorder in 1968. This is precisely the evidence to which the Boards should have given "liberal consideration." There is nothing—whether in the Hagel and Kurta Memoranda, 10 U.S.C. § 1552, or in

the policies underlying the law—that dictates that Mr. Doyon should receive no "liberal consideration" merely because the Navy discharged him honorably after they misdiagnosed his PTSD as a personality disorder in 1968. "Liberal consideration" of such evidence compels a finding that Mr. Doyon suffered from service-incurred PTSD/psychosis/psychoneurosis that caused him to be unfit for duty, and thus entitles him to back pay and retirement benefits. Indeed, such a result is precisely what DoD intended by directing that "liberal consideration" should apply broadly to cases like Mr. Doyon's involving invisible wounds, including veterans who left the service decades before and cannot have a doctor evaluate them for potential PTSD close in time to their service.

DoD's "liberal consideration" standard was not meant to narrowly cover only challenges to the characterization of discharge and related challenges to the narrative reason for separation, but rather to broadly right the injustices veterans with invisible wounds suffered as a result of both their wounds and the misdiagnosis of those wounds. Narrowing the guidance in the manner embraced by the CFC does the opposite, piling yet another indignity upon Mr. Doyon and thousands of servicemen and women like him, including those misdiagnosed with personality disorders and discharged during this country's more recent conflicts. This Court should accordingly reverse and remand.

CONCLUSION

For these reasons, we respectfully request that this Court reverse the judgment

below.

Dated: August 31, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all counsel of record on September 2, 2021 by electronic means. This filing was served electronically to all parties by operation of the Court's electronic filing system.

Dated: September 2, 2021

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a). The brief contains 5,594 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using MS Word in a 14-point Times New Roman font.

Dated: August 31, 2021

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