No. ____

IN THE
Supreme Court of the United States

LYNN BROWN, as appointed successor and representative of now-deceased Howard M. Berry,
PETITIONER,
v.
CHRISTINE E. WORMUTH, Secretary of the Army and LLOYD J. AUSTIN, III, Secretary of Defense,
RESPONDENTS.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia

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PETITION FOR A WRIT OF CERTIORARI

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Dated: June 28, 2022

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QUESTION PRESENTED

Whether the Administrative Procedure Act ("APA") incorporates a presumption of "unusual deference" in all cases involving the military.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE STATEMENT

Petitioner-Appellant, Lynn Brown, became the appointed successor and representative of the original plaintiff, Howard M. Berry, upon Mr. Berry's death. Mr. Berry was the father of U.S. Army Staff Sargent Joshua Berry, a combat veteran who was injured during the attack at Fort Hood, Texas on November 5, 2009.

Respondents are Defendants Christine Wormuth, in her official capacity as the Secretary of the U.S. Army and Lloyd J. Austin, in his official capacity as the Secretary of Defense.

No parties are corporations.

STATEMENT OF RELATED CASES

Pursuant to Supreme Court Rule 14.1(b)(iii), all proceedings in the lower courts directly related to this case are:

- *Brown v. Wormuth*, No. 21-5230 (D.C. Circuit) (judgment and order issued March 31, 2022, mandate issued May 27, 2022)

- *Brown v. Wormuth*, No. 17-2112 (D.D.C.) (opinion and final judgment issued August 31, 2021)

- *Berry v. Esper*, No. 17-2112 (D.D.C.) (opinion and order issued August 22, 2018)

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PETITION FOR A WRIT OF CERTIORARI

Lynn Brown respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia ("D.C. Circuit"), summarily affirming the judgment of the U.S. District Court for the District of Columbia.

DECISIONS BELOW

The D.C. Circuit issued a summary affirmance on March 31, 2022 and it is reported at 2022 U.S. App. LEXIS 9330 (D.C. Circuit 2022). A copy of the March 31, 2022 summary affirmance and order are reproduced at App. 1a-3a.

The District Court's August 31, 2021 memorandum opinion is reported at 2021 U.S. Dist. LEXIS 165114 (D.C. Aug. 31, 2021) and is reproduced at App. 4a-24a.

JURISDICTION

The court of appeals issued its final opinion on March 31, 2022. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RELEVANT STATUTES AND REGULATIONS

The scope of judicial review section of the Administrative Procedure Act, Pub.L. 79–404, 60 Stat. 237, 5 U.S.C. § 706, states as follows:

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and
(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
(B) contrary to constitutional right, power, privilege, or immunity;
(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
(D) without observance of procedure required by law;
(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title [5 USCS §§ 556 and 557] or otherwise reviewed on the record of an agency hearing provided by statute; or
(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

The Army Regulation governing the Purple Heart Award, AR 600-8-22, 2-8 is reproduced at App. 25a-32a.

STATEMENT OF THE CASE

I. Factual Background

This case involves Staff Sargent Joshua Berry ("SSG Berry") who, after serving two tours in Afghanistan, returned home to Fort Hood, Texas. SSG Berry was awaiting his transfer on November 5, 2009, when Nidal Hasan ("Hasan") opened fire on base, murdering 13 people and injuring more than 30. SSG Berry was in the building beside the Soldier Readiness Center where Hasan began his rampage. After Hasan exited the Solider Readiness Center, he attempted to enter SSG Berry's building. SSG Berry helped secure the doors right before Hasan attempted to enter the building. First Hasan attempted to kick the door in and, when that failed, he fired three shots at the door. SSG Berry was standing on the other side of the door as the shots hit the door. SSG Berry dove to take cover and in doing so, severely injured his shoulder. Civilian law enforcement shot Hassan and prevented further deaths.

SSG Berry's injury was entered into the military medical system and documented as having been incurred in the line of duty. SSG Berry's superiors documented that SSG Berry was a casualty of the mass shooting. SSG's injury required surgical intervention to repair it.

The U.S. Army Criminal Investigation Division, the Texas Rangers, and the Federal Bureau of Investigation conducted a joint investigation of the shooting and subsequently found probable cause to believe Hasan committed the offense of attempted murder when he fired at SSG Berry.

Following the shooting, SSG Berry's physical and mental health suffered dramatically, and he was released from active duty and placed on the temporary disability retired list. Tragically, SSG Berry took his own life on February 13, 2013.

Two years after SSG Berry's death, Congress rectified the travesty of referring to the Fort Hood rampage as "workplace violence," and Hasan's actions were deemed an "international terrorist attack." This change allowed both the fallen and the injured service members to be awarded the Purple Heart. SSG Berry's father, Howard Berry ("Mr. Berry") applied for the posthumous award for his son, hoping to be able to save it for his granddaughter as a memento of her father's honorable service and sacrifice.

On April 17, 2016, the Army Board for Correction of Military Records ("ABCMR") voted 2-1 to recommend that the Purple Heart be awarded to

SSG Berry. The ABCMR found that SSG Berry's injury was caused by Hasan's actions because SSG Berry would not have dove for cover had there not been an active shooter. The Deputy Assistant Secretary of the Army rejected this recommendation and denied the award. Mr. Berry filed suit, alleging a violation of the Administrative Procedures Act ("APA").

II. Procedural Background

Mr. Berry's APA case alleged that the Deputy Secretary of the Army's rejection of the ABCMR's recommendation to award the Purple Heart to SSG Berry was arbitrary, capricious, an abuse of discretion, not in accordance with law, and unsupported by substantial evidence.

Between 2018 and 2020, the Army filed and lost two motions for summary judgment. Each time the court sent the case back to the Army with instructions to better clarify how the facts of the case fit the denial of the Purple Heart.

On the Army's third try, the court granted its motion and held that the Deputy Assistant Secretary of Army's denial was a "valid exercise of [ ] authority." The court relied on language from *Kreis v. Sec'y of the Air Force,* 866 F.2d 1508, 1514 (D.C. Cir. 1989) ("*Kreis I")* granting review of a military board's decision, an "unusually deferential application of the arbitrary and capricious standard." The court failed to acknowledge or weigh the effect of *Kreis v. Sec'y of the Air Force* ("*Kreis III*"), 406 F.3d 684 (D.C. Cir 2005)

which denied the use of unusual deference in cases relating to regulations and procedures.

On June 17, 2020, Howard Berry passed away after a courageous fight with cancer. His sister, the Petitioner, stepped in as plaintiff/appellant.

Despite its duty to review *de novo*, the D.C. Circuit summarily affirmed the D.C. District Court's opinion. Like the district court, it presumed the military was accorded unusual deference and did not address *Kreis III*.

REASONS FOR GRANTING THE PETITION

This case presents an exceptionally important issue regarding the presumption of unusual deference toward the military in APA cases. The Court should grant this petition for four reasons.

First, for decades, the D.C. Circuit, the uncontested hub for administrative law precedent, has issued inconsistent and confusing holdings regarding the use of unusual or heightened deference in APA cases involving the military. These cases involve confusing and even contradictory holdings, running the gamut from some cases always presuming unusual deference toward the military to cases that reject the presumption. This judicially created chaos results in inconsistent case law and a failure of all members of the military being treated equally.

Second, under the APA, as intended by Congress, there is a single uniform application of ordinary deference for judicial review across all agencies. Courts should not excuse from review military agency actions altogether based on an "unusual deference" doctrine that has no "basis in the text of the statute." *See FCC v. Fox TV Stations, Inc.*, 556 U.S. 502 (2009) ("*Fox TV*"). Unusual deference is a judicially created standard and cannot be presumed under the APA. By employing unusual deference to military APA cases, the courts abdicate their duty of judicial review and permit a federal agency to by-pass an act of Congress.

Third, in *Fox TV,* 556 U.S. 502 (2009), this Court confirmed the importance of the language and Congressional intent of the APA in rejecting a heightened arbitrary or capricious standard for agencies enacting policy changes. There the Court held that the APA "makes no distinction between independent and other agencies, neither in its definition of agency, nor in the standards of reviewing agency action." *Id*. at 525 (internal citation omitted).

This case is the flip side of *Fox TV* and would enable the Court to complete its holding: in the same way the APA does not require heightened review for certain agencies, the APA also does not reduce the standard for certain agencies. In the same way that the APA does not distinguish the standard of review between dependent and independent agencies, the APA does not distinguish the military from other federal agencies in its definition of agency or in its standards of review.

Fourth, the Court should take this petition and clarify the presumption of unusual deference in military APA cases because without a clarification, U.S. servicemembers will continue to be treated unfairly and unequally. Like all other U.S. citizens, U.S. servicemembers should be able to rely on the courts to apply laws consistently. By permitting the D.C. Circuit to presume unusual deference for the military, U.S. servicemembers face an extra uphill battle not imposed on civilians seeking APA review. This unequal treatment has no place in law.

The Court should grant this petition to bring coherence and clarity to cases involving military deference, protect important constitutional principles, foster dependability in APA cases, and protect the rights of U.S. servicemembers.

I. The D.C. Circuit Precedent Regarding Military Deference in APA Cases Is Confusing and Unreliable.

Traditionally, this Court's involvement stems from a split among the federal judicial circuits. This case presents a nontraditional "split" in that it originates mostly from one circuit: the D.C. Circuit. The importance of the D.C. Circuit to administrative law, however, makes the split an issue of national importance. As explained by a non-D.C. Circuit court, "the D.C. Circuit's influence in administrative law is head and shoulders above that of the other Courts of Appeals, probably combined, and it does more to shape administrative law nationally than the

Supreme Court." *Diné Citizens Against Ruining Our Environment v. Jewell*, 2015 U.S. Dist. LEXIS 109986, *77, n. 11 (D.N.M. Aug. 14, 2015). *See also* Antonin G. Scalia, Vermont Yankee: The APA, the D.C. Circuit, and the Supreme Court, 1978 Sup. Ct. Rev. 345, 371.

The reasons for the D.C. Circuit's dominance in administrative law are practical as "most agencies are based in the District of Columbia, agency appeals nationwide can almost always be brought before the D.C. Circuit; additionally, the United States Code designates the D.C. Circuit as the exclusive venue for challenging many important agency actions." *Diné*, 2015 U.S. Dist. LEXIS 109986 at 76; *see also* Gary Lawson, *Federal Administrative Law* 245 (4th ed. 2007). As such, courts outside the D.C. Circuit generally look to the D.C. Circuit for legal guidance in administrative law issues. And when, as is the case here, the body of precedent is so jumbled and unreliable, it falls to this Court to clarify the issue.

The APA does not articulate that any specific level of deference be given and does not differentiate any level of deference. *See infra* § II. Nevertheless, the D.C. Circuit has created an "unusual" or heightened deference given toward the military as a federal agency under the APA. This appears to have originated in its present form in *Kreis v. Secretary of Air Force*, 866 F.2d 1508 ("*Kreis I*") (D.C. Cir. 1989). In *Kreis I*, the D.C. Circuit held that because the governing statute involved discretion, judicial review of the military board for correction of records was limited to "whether the Secretary's decision making

process was deficient" and was reviewable by an "unusually deferential application of the 'arbitrary or capricious standard.'" *Kreis I,* 866 F.2d at 1513-1514.

The D.C. Circuit acknowledged that the terms of the APA applied "nominally" to all agencies alike but forged ahead to carve out an exception for the military. *Id*. at 1514. Operating contrary to both the plain language of the APA as well as congressional intent, the D.C. Circuit grabbed onto this Court's opinion in *Orloff v. Willoughby*, 345 U.S. 83 (1953) for its legal foundation. In *Orloff*, the Court held that "it is not within the power of this Court by habeas corpus to determine specific assignments to duty." *Id*. at 93. Following that holding, in dicta quoted often by the military as a defense from meeting clear statutory requirements, the Court expounded on the interplay between the military and the courts and the roles of each. *Id*. Rather than establish a presumption of heightened deference for the military, this Court simply acknowledged that "judges are not given the task of running the Army. The responsibility for setting up channels through which such grievances can be considered and fairly settled rests upon the Congress and upon the President of the United States and his subordinates." *Id*. at 93-94.

Unlike a writ of habeas corpus, the APA is a specific act of Congress which provides the only source for those aggrieved by agency decisions an avenue to challenge those decisions by way of judicial review. *Orloff* does not therefore, support the D.C. Circuit's *Kreis I* holding of setting the military apart

and establishing a presumption of unusual deference standard.

Despite this, *Kreis I*'s "unusual deference" standard was repeatedly used with increasing regularity by the military in APA cases and became a presumption. *See e.g., Cone v. Caldera*, 223 F.3d 789, 793 (D.C. Cir. 2000) ("Although we have jurisdiction to review the decisions of the Correction Board, we do so under an 'unusually deferential application of the arbitrary or capricious standard.'")

Perhaps realizing that the unusual deference presumption had taken on a life of its own, the D.C. Circuit attempted to remedy the *Kreis I* holding. In *Kreis v. Secretary of the Air Force ("Kreis III"),* 406 F.3d 684 (D.C. Cir. 2005), the D.C. Circuit differentiated types of military decisions "that do not involve a military judgment requiring military expertise, but rather review of the Board's application of a procedural regulation governing its case adjudication process." *Id*. at 686.

While *Kreis III* did not explicitly overturn *Kreis I,* it clearly modified it by removing the presumption of unusual deference. *Id*. Yet, some courts in the D.C. Circuit, continue to apply the *Kreis I* presumption of unusual deference to the military without the *Kreis III* modification – often, never even acknowledging *Kreis III*. *See e.g*., *Mueller v. Winter*, 485 F.3d 1191 (D.C. Cir. 2007); *Jackson v. Spencer*, 313 F. Supp. 3d 302 (D.D.C. 2018); *Lind v. McHugh*, 2014 U.S. Dist. LEXIS 108593 (D.D.C. Aug. 7, 2014); *Haselwander v. McHugh*, 774 F.3d 990 (D.C. Cir. 2014); *Reilly v. Sec'y*

of the Navy, 12 F. Supp. 3d 125 (D.D.C. 2014); *Weingartner v. Wynne*, 2007 U.S. Dist. LEXIS 22175 (D.D.C. March 28, 2007). This is also the case for other federal courts relying on the D.C. Circuit for administrative law guidance. *See e.g.*, *Wannamaker v. Mabus*, 2018 U.S. Dist. LEXIS 25872 (D. Idaho Feb. 15, 2018); *Thompson v. U.S.*, 119 F. Supp. 3d 462 (E.D. Va. 2015); *Bienias v. Donley*, 2014 U.S. Dist. LEXIS 137558 (N.D. Ill. Sept. 30, 2014); *Washington v. Donley*, 802 F. Supp. 2d 539, 546 (D. Del. 2011). This results in the presumption being applied in some cases, denied in some cases, and in some cases, the courts try to avoid the issue altogether. *See e.g.*, *Sissel v. McCarthy,* 2021 U.S. Dist. LEXIS 244406 (D.D.C. Dec. 22, 2021); *White v. U.S.*, 2020 U.S. Dist. LEXIS 80939 (D.D.C. May 7, 2020); *Code v. Esper*, 285 F. Supp. 3d 58 (D.D.C. 2017); *Manning v. Fanning*, 211 F. Supp. 3d 129 (D.D.C. 2016). This inconsistency has a corrosive effect on the law.

It is an axiomatic principle of justice that similar parties must be treated similarly. *See e.g., Balt. Gas & Elec. Co. v. FERC,* 954 F.3d 279, 286 (D.C. Cir. 2020). The D.C. Circuit's unusual deference standard for the military has instead created a crapshoot for servicemembers seeking judicial review under the APA. Some courts will extend unusual deference according to *Kreis III*, only in cases where military expertise is required. And some courts, like the courts below here, ignore *Kreis III* and extend *Kreis I*'s presumption of unusual deference in *any* case involving the military – even cases of pure law and procedure – "even in the face of 'undisputed error' or "conceded injustice.'" *McDonough v. Mabus*, 907 F.

Supp. 2d 33, 43 (D.D.C. 2012). It is critical and necessary that the Court clarify the role of unusual deference in APA cases involving the military.

II. The Presumption of Unusual Deference Applied to the Military by the D.C. Circuit Raises a Federal Question That Requires This Court's Clarification.

In 1946, Congress passed the Administrative Procedure Act with the intent of holding all federal agencies uniformly accountable and ensuring all agencies did not abuse the extensive authority wielded to them. Congress spent 17 years considering, deliberating, compromising and finally adopting (with overwhelming support) the APA thereby codifying the basic principles of administrative law. The APA remains legislatively in full form and force, largely unchanged over 76 years, today. Christopher J. Walker, "Modernizing the Administrative Procedure Act," 69 Admin. L. Rev. 629, 633-38 (2017). Its application by the judiciary does not.

Today the military, the largest federal administrative agency, enjoys an unusually deferential standard of judicial review in APA cases. However, there is no basis for this heightened standard of unusual deference in the text of the statute, nor in the legislative history of the APA. Statutory construction shows Congress made a deliberate decision to subject all agencies – including the military - to a single standard of review:

"arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 701(b)(1)(G).

Looking at the plain language of the APA, the statute does not articulate a specific level of deference be given to agencies and does not differentiate the level of deference among the different agencies.

A presumption of unusual deference also cannot be inferred from the statute. Congress enacted the APA during a time when demand and awareness for a strong, unfettered military was at its highest having just ended World War II. Yet the Act's legislative history reveals Congress carefully articulated its intent to insulate only core military functions from judicial review under the APA. Congress specifically rejected pleas to exempt the War Department, the Army, and the Navy from the APA altogether. *See* Kovacs, Kathryn E., "A History of the Military Authority Exception in the Administrative Procedure Act," 62 Admin. L. Rev. 673, n. 208-11 (2010). Instead, Congress purposefully addressed the military's role during wartime and created an exception for "military or naval authority exercised in the field in time of war or in occupied territory" from the confines of the statute. 5 U.S.C. §§ 551(1)(G), 701(b)(1)(G). Inclusion of this specifically narrow military agency exception in the text itself, indicates Congress intended for all other military agency matters – those that do not fall within the scope of the military authority exception – be subject to the same standard of review as all other agencies.

Unusual deference is a judicially created doctrine developed from courts' recognition that certain issues remain in the purview of military expertise. *Orloff*, 345 U.S. at 93 (1953); *Parker v. Levy*, 417 U.S. 733, 758-59 (1974); *Chappell v. Wallace*, 462 U.S. 296, 302 (1983); *Wilhelmus v. Geren*, 796 F. Supp. 2d 157, 162 (D.D.C. 2011); *Kreis III,* 406 F.3d at 686. However, while some issues are best left for military determination, many others fall well within judicial competency. *See Garco Const., Inc. v. Speer*, 138 S. Ct. 1052 (2018) (Thomas, J., dissenting). ("While the military is far better equipped than the courts to decide matters of tactics and security, it is no better equipped to read legal texts. Pointing to the military's policy expertise 'misidentifies the relevant inquiry.'" (*quoting Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 128 (2014)).

If the military is to be afforded any application of unusual deference on military matters, it cannot be presumed. Because the APA itself provides no basis for a presumption of unusual deference toward the military, courts' imposition of the judge-made doctrine requires at least a threshold inquiry on the military-expertise or standard administrative agency action distinction. Recognizing the unique nature of the military agency and the scope and expertise sometimes required in agency action, courts should engage in a threshold inquiry determining the nature of the issue, whether the issue involves "military judgment requiring military expertise" or whether the issue is procedural or legal in nature and well within the realm of judicial competence to review, before it can determine the level of deference owed in

reviewing an APA claim. *Kreis,* 406 F.3d at 686; *see also Wilhelmus*, 796 F. Supp. 2d at 162. As can be seen by the plethora of military APA cases, the judiciary is quite capable of assessing military regulations and applying those regulations to the facts in the record. The cases requiring true military expertise should be few and far between by carefully applying the military authority exception.

This court is well-versed in "judge-made doctrines of deference." *Perez,* 575 U.S. at 109-10 (2015) (Scalia, J., concurring); *see also Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945); *Chevron U.S.A., Inc. v. NRDC,* 467 U.S. 837 (1984); *Auer v. Robbins*, 519 U.S. 452 (1997). As in *Perez* where the Court addressed the APA's notice-and-comment procedures for interpretive rules contrary to the clear text of the APA's rulemaking provisions, the unsupported heightened standard of review for the military, contrary to congressional intent, has "developed a doctrine of deference that has taken on a life of its own." *Perez*, 575 U.S. at 114 (Thomas, J., concurring). This steady march toward deference developed a presumption of unusual deference afforded the military in all of its actions, military-minded or not, that requires this Court's attention and resolution.

Affording the military a presumption of unusual deference across the board gives the military more protection than Congress intended and more protection than required to safeguard the agency's interests. In turn, a presumption of unusual deference to the military diminishes the protection

against behemoth agency action Congress intended under the APA and diminishes protection from arbitrary agency action. The APA was Congress's way of providing judicial authority to review agency actions and check on agencies' authority to act within its own rules and regulations. Courts' application of unusual deference to the military imports a judicially created standard inconsistent with statutory text and congressional intent of the APA and raises separation-of-powers concerns.

III. This Case Mirrors the Holding in *FCC v. Fox TV Stations, Inc.*

As highlighted above, there is no basis in the APA for a heightened standard of unusually deferential judicial review to the military. *See supra* at § II. First and foremost, courts must look to the APA as the primary source of authority for agency action and judicial review accountability. *Fox TV*, 556 U.S. at 514-15. These are the principles this Court employed in *Fox TV* when it found "no basis in the Administrative Procedure Act or in our opinions for a requirement that all agency change be subjected to a more searching review." *Id.*

In his concurring opinion, Justice Kennedy further considered the role of administrative agencies and their "unique constitutional position." *Id.* at 536 (J., Kennedy, concurring).

> [T]he role and position of the agency, and the exact locus of its powers, present questions that are delicate, subtle, and

> complex. … Congress passed the Administrative Procedure Act (APA) to ensure that agencies follow constraints even as they exercise their powers. … To achieve that end, Congress confined agencies' discretion and subjected their decisions to judicial review.

Id. at 536-37.

The APA confines agency discretion not simply "nominally" as the *Kreis I* court held, but practically and without distinction. This is the holding of *Fox TV*, 556 U.S. 502. And in the same way *Fox TV* recognizes the plain meaning of the APA in protecting agencies from judicially created heightened standards of review, the Court should grant this petition to prevent the military and courts from relying on the judicially created unusual deference standard. In the same way that agencies should be able to rely on the APA as their source for consistent and predictable authority in taking agency action, so too should servicemembers be able to rely on the APA as the source for consistent and predictable application of judicial oversight. *See Vermont Yankee Nuclear Power Corp. v. NRDC*, 435 U.S. 519, 546 (1978) (internal citation omitted). However, judicial review over military actions under the APA today is anything but consistent and predictable. *See supra* at § I. Granting this petition reinforces the Court's *Fox TV* holding.

IV. The D. C. Circuit's Unusual Deference Presumption Has Devasting Effects on U.S. Servicemembers That Will Remain Without This Court's Intervention.

Without clarification of the *Kreis* fiasco, U.S. servicemembers will continue to be treated unfairly and unequally. The consequences are both conceptual and tangible. Conceptually, the ability to rely on the judiciary to fully and fairly review their APA claims has been lost. Some servicemembers will luck out and draw judges who acknowledge the *Kreis III* narrowing and only apply deference to claims that require true military expertise. Other servicemembers will draw judges that increase their burden by always giving the military unusual deference – even in cases of pure law and procedure. Putting on a uniform should not relegate a person to a world of judicial uncertainty.

Tangibly, U.S. servicemembers who cannot overcome a presumption of unusual deference are suffering the loss of promotions, GI Bills, awards, disability ratings, and life insurance. *See e.g.*, *Hill v. Geren*, 597 F. Supp. 2d 23 (D.D.C. 2009) (promotion); *Thompson,* 119 F. Supp. 3d 462 (E.D. Va. 2015) (GI Bill); *Haselwander*, 774 F.3d 990 (awards); *Sissel,* 2021 U.S. Dist. LEXIS 244406 (disability rating); *White*, 2020 U.S. Dist. LEXIS 80939 (life insurance). Many of these losses mean financial losses and involuntary retirements. U.S. servicemembers have also lost the ability to correct their records and remove undisputed errors such as false criminal charges and reprimands in violation of whistleblower protection and protected communications. *See e.g.*,

Remmie v. Mabus, 898 F. Supp. 2d 108 (D.D.C. 2012); *Rodriguez v. Penrod,* 2020 U.S. Dist. LEXIS 23330 (D.D.C. Feb. 11, 2020); *Brezler v. Mills*, 220 F. Supp. 3d 303 (E.D.N.Y. 2016). Already having a high standard to meet, overcoming an additional presumption of unusual deference often means the loss of either a military career or the loss of future security for the servicemembers or their families. Many of these cases – even those involving promotions and awards – are based on legal and procedural violations.

This should not continue, and the Court can rectify this unequal treatment by clarifying *Kreis III*'s narrowing as the proper application of unusual deference to the military.

CONCLUSION

For the foregoing reasons, Petitioner respectfully requests that the Court grant this petition for certiorari.

Respectfully submitted,

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