No. 24-1121

In the Supreme Court of the United States

ROBERT S. CARLBORG, PETITIONER,

v.

UNITED STATES, RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether petitioner was deprived of the property interest right in his military retirement under the Due Process Clause of the Fifth Amendment when the court of appeals, without comment or analysis, did not follow *stare decisis* and apply binding precedent when affirming the trial court decision.

2. Whether petitioner was deprived of the property interest right in his military retirement under the Due Process Clause of the Fifth Amendment when the court of appeals did not consider petitioner's arguments as the court's decisional path is not found in its opinion.

RELATED PROCEEDINGS

United States Court of Federal Claims (Fed. Cl.):

Carlborg v. United States, No. 21-1994C (Nov. 6, 2023)

United States Court of Appeals (Fed. Cir.):

Carlborg v. United States, No. 2024-1339 (Nov. 4, 2024)

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Petitioner Robert S. Carlborg respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra,* 1a-12a) is unreported. The opinion of the Court of Federal Claims (App., *infra,* 13a-44a) is reported at 168 Fed. Cl. 371 (2023).

JURISDICTION

The judgment of the court of appeals was entered on November 4, 2024. A petition for rehearing and rehearing en banc was denied on January 27, 2025 (App., *infra*, 45a-46a). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional and statutory provisions are reprinted in the appendix to this petition. App., *infra*, 47a-80a.

STATEMENT

Petitioner is a former United States Marine Corps (USMC) officer who in February 2015 was charged with and plead guilty to misconduct at Article 15 under the Manual for Courts-Martial United States, an administrative hearing commonly referred to as non-judicial punishment (NJP). In March 2015, anticipating being directed to show cause for retention on active duty at a Board of Inquiry (BOI), petitioner submitted a request to the Secretary of the Navy (SECNAV) to voluntarily retire that simultaneously waived a BOI and the legal protections it provided if the request was granted. On the same day petitioner submitted the retirement request, he was notified by the Alternate Show Cause Authority (ASCA) to show cause for retention at a BOI. The notification letter signed by the ASCA identified petitioner in the present tense as

being "retirement-eligible." Even though submitted well in advance of the scheduled BOI date, petitioner did not receive a response to his retirement request from the SECNAV's lawful Separation Authority (SA), the Assistant Secretary of the Navy, Manpower and Reserve Affairs.

The BOI was convened in May 2015 and upon its conclusion, a report was drafted summarizing the proceedings along with the findings and recommendations of the BOI members and forwarded up the chain of command for a final determination by the SA. The report concluded that the majority of the allegations that prompted the BOI were sustained, that petitioner should not be retained on active duty, and that he should be separated with an other-than-honorable (OTH) characterization of service.

In September 2015, petitioner made an inquiry to his command's Staff Judge Advocate office as to the status of the report of BOI and his previously submitted retirement request. Petitioner additionally requested copies of the chain of command endorsements to both the retirement request and the report of BOI. It was at this time that petitioner was first made aware his retirement request from six months earlier that waived the BOI had only received a first endorsement by his command and had never been forwarded to the SA for a formal decision prior to the BOI taking place. Instead, the retirement request was included as an enclosure to the report of BOI. The reasoning provided in the endorsement was that petitioner's command did not believe he was eligible for voluntary retirement. That same month the SA approved the chain of command recommendations to not retain petitioner on active duty

and separate him with an OTH characterization of service.

On October 9, 2015, petitioner was involuntarily separated from the USMC with 19 years, 11 months, and 14 days of active duty service.

A. Legal framework

1. Pursuant to 10 U.S.C. § 1181, petitioner was directed to show cause for retention on active duty due to substandard performance of duty and for certain other reasons. Pet. App. 58a. The formal action to show cause at a BOI was brought under 10 U.S.C. § 1182. Pet. App. 59a. Pursuant to 10 U.S.C. § 1186(a), an officer being considered for removal from active duty by a BOI may be granted voluntary retirement by the Secretary of that officer's military department if the officer is qualified for retirement. Pet. App. 62a. Officers within the Department of the Navy (DoN) requesting to be retired after accruing 20 years of active duty service do so pursuant to 10 U.S.C. § 8323[1]. Pet. App. 63a. As allowed under 10 U.S.C. § 1186(a) and as procedurally specified in Secretary of the Navy Instruction (SECNAVINST) 1920.6C, Administrative Separation of Officers, and Marine Corps Order P5800.16A, Marine Corps Manual for Legal Administration (LEGADMINMAN), petitioner submitted a request for retirement in lieu of further administrative processing for cause utilizing the required template found within

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[1] 10 U.S.C. § 6323 was renumbered to § 8323 per Public Law 115–232, 132 Stat. 1840 (2018). All citations will use § 8323 for uniformity.

the LEGADMINMAN. Petitioner identified the request as one for dual-retirement consideration under 10 U.S.C. § 8323, 20-year officer retirement, or through the Temporary Early Retirement Authority (TERA) under the same statute as modified by Section 4403 of Public Law 102-484 (Pet. App. 74a) and subsequently reinstated by Section 504(b), Public Law 112-81. Pet. App. 79a.

2. When a veteran believes they have suffered an error or injustice while on active duty, they can seek redress through an application to their respective military service records correction board. For DoN personnel this is the Board for Correction of Naval Records (BCNR). If the veteran has not been granted the requested relief, then a cause of action may be brought as "Board decisions are subject to judicial review and can be set aside if they are arbitrary, capricious, or not based on substantial evidence." *Chappell v. Wallace,* 462 U.S. 296, 303 (1983).

3. In petitioner's case, he filed suit in the United States Court of Federal Claims (Claims Court) which has exclusive jurisdiction when the United States has waived its sovereign immunity for certain suits through the Tucker Act, 28 U.S.C. § 1491 (Pet. App. 65a) that exceed $10,000 in damages. While the Tucker Act waives the sovereign immunity of the United States to allow a suit for money damages, *United States v. Mitchell,* 463 U.S. 206 (1983), it does not confer any substantive rights, *United States v. Testan,* 424 U.S. 392 (1976). Therefore, in seeking to invoke the court's Tucker Act jurisdiction, an independent source of a substantive right to money damages from the United States arising out of a contract, statute, regulation, or

constitutional provision must be identified. *Jan's Helicopter Serv., Inc. v. Fed. Aviation Admin.*, 525 F.3d 1299 (Fed. Cir. 2008).

4. The Military Pay Act, 37 U.S.C. § 204 (Pet. App. 68a), is such an independent source of a substantive right to money damages. It "confers on an officer the right to the pay of the rank he was appointed to up until he is properly separated from the service." *Holley v. United States,* 124 F.3d 1462, 1465 (Fed. Cir. 1997) (quoting *Sanders v. United States,* 594 F.2d 804, 810 (Ct. Cl. 1979) (en banc)). Accordingly, the Military Pay Act "provides for suit in [the Court of Federal Claims] when the military, in violation of the Constitution, a statute, or a regulation, has denied military pay." *Antonellis v. United States,* 723 F.3d 1328, 1331 (Fed. Cir. 2013) (quoting *Dysart v. United States*, 369 F.3d 1303, 1315 (Fed. Cir. 2004)).

B. Procedural history

On October 8, 2018, petitioner applied for relief from the BCNR raising several errors identifying where his record should be corrected. On April 23, 2021, petitioner received the BCNR decision denying him relief pertaining to the matters that are the subject of this writ. On October 8, 2021, petitioner filed suit in the Claims Court under the Tucker Act and the Military Pay Act.

The BCNR typically will solicit advisory opinions related to the specifics of a case they are reviewing in which an applicant has the statutory right to provide a rebuttal if they so desire. Due to petitioner's then counsel not having received copies of the legal and

medical advisory opinions used by the BCNR that formed the basis of its April 2021 decision, a joint motion requesting a remand to the BCNR was granted to consider petitioner's rebuttal input.

On August 31, 2022, the BCNR issued its second decision taking into consideration the rebuttal matters, but did not grant any new relief. Afterward a stay was granted by the Claims Court as petitioner's then attorney had to withdraw for medical reasons necessitating petitioner retaining new counsel. Due to the stay, a modified schedule was issued by the court and petitioner filed his motion for judgment on the administrative record (MJAR) on August 21, 2023. The government filed its opposition and cross MJAR on September 20, 2023. On November 6, 2023, while petitioner was still drafting his response to the government's cross MJAR per the schedule, the Claims Court without providing notice vacated the remaining briefing schedule and the oral arguments while simultaneously issuing its decision denying petitioner's MJAR and granting the government's MJAR.

On January 9, 2024, petitioner filed a notice of appeal with the United States Court of Appeals for the Federal Circuit and submitted his opening brief on May 2, 2024. The government filed its brief on May 28, 2024. Subsequently petitioner's counsel withdrew from the case, petitioner continued *pro se,* and filed his reply brief on July 3, 2024. The court of appeals affirmed the decision of the Claims Court on November 4, 2024. Petitioner filed a combined petition for rehearing and rehearing en banc on December 17, 2024, which was denied on January 27, 2025.

REASONS FOR GRANTING THE PETITION

I. The Federal Circuit's Decision is Incorrect

A. *Stare Decisis* and Binding Precedent Were Not Applied

1. The Claims Court agreed with the BCNR that it was harmless error to not forward petitioner's voluntary retirement request for 20-year retirement and proceeding with processing for separation without the lawful SA first having reviewed and denied petitioner's retirement. Pet. App. 39a-42a. As a matter of law, the Claims Court's opinion should not have been affirmed by the court of appeals as the Claims Court under *stare decisis* was obligated to apply the binding precedent in *Wagner v. United States*, 365 F.3d 1358 (Fed. Cir. 2004), which the court did not do, and the court of appeals did not correct.

The facts in petitioner's case are similar to those in *Wagner* and the decision by the court of appeals in that case recognized that if the military does not follow its own procedures, then any conclusion reached from not doing so is improper speculation and an error that is not harmless. "The nature of the procedural error involved requires our conclusion that harmless error review is inappropriate . . . as the magnitude of the effect of the error on the proceeding defies assessment by a reviewing body." *Wagner v. United States*, 365 F.3d 1358, 1364 (Fed. Cir. 2004).

In the *Wagner* trial court, the cause of action brought "[c]laims that the DAADB [Department of the Army Active Duty Board] violated military

regulations by processing him for discharge without the prior approval of the Secretary of the Army." *Wagner v. United States*, 56 Fed. Cl. 634, 635 (2003). The trial court denied the claim by referencing the retroactive endorsement of Plaintiff's discharge proceedings signed by the Acting Assistant Secretary of the Army as the SA. "This is strong evidence. It suggests that the ABCMR [Army Board for Correction of Military Records] believed that the Secretary would have endorsed the initiation of Wagner's discharge, since the Secretary was willing to confirm Wagner's discharge following the DAADB proceedings; a very reasonable assumption." *Id.*, at 639.

Here in the instant case, the Claims Court concurred with the BCNR that an error did not occur by not suspending the BOI and first forwarding petitioner's retirement request for a determination by the SA as the SA's September 29, 2015, directive to involuntarily separate petitioner simultaneously denied his retirement request. The BCNR decision stated that "the ultimate decision to deny this retirement request and to approve Petitioner's involuntary separation would have rendered such a failure harmless *since this action informed what the decision would have been.*" (emphasis added). This analysis by the BCNR is the identical reasoning that the *Wagner* trial court used in its opinion which the court of appeals reversed establishing the binding precedent. *supra.*

The Claims Court here turned a blind eye to this precedent which required the court of appeals as the reviewing body to apply it and correct this error. To not do so deprives petitioner's property interest in his

military retirement that is protected by the Due Process Clause in the Fifth Amendment. Pet. App. 47a. See *Weiss v. United States*, 510 U.S. 163, 194 (1994) ("men and women in the Armed Forces do not leave constitutional safeguards and judicial protection behind when they enter the military service." (Ginsburg, J., concurring)).

Cleveland Bd. Of Edu. v. Loudermill, 470 U.S. 532, 538 (1985) ("Property interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source' ") (quoting *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972)). The independent source is the same Military Pay Act that petitioner's cause of action was brought under the Tucker Act. 10 U.S.C. § 8323 is a nondiscretionary and statutorily mandated benefit for 20-year voluntary retirement that petitioner applied under and has been denied.

On March 12, 2015, petitioner was notified to show cause by the ASCA in which the ASCA identified petitioner as being retirement-eligible in the present tense. *supra.* 10 U.S.C. § 1186 provides the right for petitioner to submit his retirement request when subject to show cause proceedings "(a) At any time during proceedings under this chapter with respect to the removal of an officer from active duty, the Secretary of the military department concerned may grant a request by the officer-(1) for voluntary retirement, if the officer is qualified for retirement-". Pet. App. 62a.

As a retirement-eligible officer, once petitioner submitted his retirement request under 10 U.S.C. §

8323 as was his right pursuant to 10 U.S.C. § 1186, the SA must first deny the request before the USMC could continue with any show cause proceedings. A show cause proceeding is initiated under the authority of 10 U.S.C. § 1181 when "(b) . . . the Secretary of the military department concerned [prescribes] for the review . . . of the record of any commissioned officer . . . to show cause his retention on active duty." Pet. App. 58a. The purpose of a BOI convened under 10 U.S.C. § 1182(a) is "to receive evidence and make findings and recommendations as to whether an officer who is required under section 1181 of this title to show cause for retention on active duty should be retained on active duty." Pet. App. 59a. Petitioner's retirement request makes moot the statutory purpose of §§ 1181 and 1182 as petitioner did not wish to be retained on active duty. The only avenue for 10 U.S.C. § 1181 to once again become lawful against petitioner was for the SA to deny the retirement, thus leaving petitioner on active duty to continue to be directed to show cause.

Utilizing the required template from the LEGADMINMAN, the subject line of petitioner's retirement request was for "Voluntary Retirement In Lieu of Further Administrative Processing for Cause [the BOI] in the Case of [petitioner]" and its plain meaning must be adhered to. "Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997).

Nowhere in statute or military policy does the government provide evidence that petitioner's

command had a discretionary decision to not forward the retirement request. SECNAVINST 1920.6C, Enclosure (6) ¶ 2(a) "Any officer being considered for administrative show cause proceedings per this instruction who is eligible for voluntary retirement under any provision of law may request voluntary retirement." This policy further states that "the request *shall* be forwarded with appropriate command endorsements." (emphasis added) *Id.* at ¶ 2(c). A decision on petitioner's request to retire without going through the BOI process must first have been made by the SA. By not doing so, the waiver serves no purpose.

2. The Claims Court opinion stated that the BCNR primarily weighed two considerations.

a. "First the BCNR found 'it was reasonable for the [USMC] to wait for the BOI recommendation since a retirement grade recommendation was required before the Assistant Secretary of the Navy would process the request.' " Pet. App. 41a. This argument is nullified by the SECNAVINST in that the retirement request shall include "a statement that the officer understands that ***a BOI will not be convened*** to make a recommendation to SECNAV on retirement grade." (emphasis added). *Id.* at ¶ 2(a)(1). This required statement was included in petitioner's retirement request.

b. The second consideration the Claims Court opinion concurred with was that since the BOI provided petitioner an opportunity " 'to argue for an appropriate retirement grade, the BCNR determined that [it wasn't prejudicial]' " (Pet. App. 41a) is equally unavailing for the same reason. *Id.* Petitioner's appellate briefs included arguments providing

additional support on these points.

c. Other collateral evidence that the SA must first decide on a retirement request after a BOI is waived is found in the option to waive a BOI without simultaneously requesting resignation or retirement and leaving the entire decision up to the SA. LEGADMINMAN ¶ 4008(4)(a)(1) "A statement that the officer understands that a BOI will not be convened to make a separation recommendation to SECNAV *if the request is approved.*" (emphasis added). It must follow that once a BOI waiver is submitted, the SA is required to disapprove it before any BOI may be convened. One cannot put the cart before the horse.

This Court's recent decision in *Loper Bright Enterprises v. Raimondo,* 603 U.S. ___ (2024) required the court of appeals to apply a much more rigorous review of the agency interpretation of the statutes at issue and not to apply the deference afforded under the overturned *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.,* 467 U.S. 837 (1984). For the USMC to withhold petitioner's retirement request from moving forward at the time he submitted it contravenes his rights under 10 U.S.C. § 1186 and is inapposite of the military policies implementing this statute. These actions have resulted in petitioner being illegally discharged as only a procedurally valid BOI can involuntarily remove him from active duty service. This illegal discharge has denied petitioner the property interest right in his military retirement under the Military Pay Act that is protected by the Due Process Clause in the Fifth Amendment. Pet. App. 47a

B. Appropriate Consideration was Not Given to Petitioner's Arguments

Petitioner's March 12, 2015, dual retirement request was not initially forwarded for decision by the SA for the sole reason that petitioner "[w]as clearly not eligible for TERA" and referenced the administrative message published by the USMC implementing TERA to justify this reasoning. The court of appeals precedent in *Clary v. United States,* 333 F.3d 1345 (Fed. Cir. 2003) was also cited as additional support.

Petitioner provided two arguments respective to this cause of action. First, the language used in the TERA message was interpreted and applied incorrectly when viewed in the context of the plain meaning rule. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). Second, legislation passed post-*Clary* implies that the legislative intent of Congress was for a court not to apply the ineligibility criteria the way that the *Clary* court did which is the crux of that decision used to deny petitioner's cause of action.

The Claims Court opinion addressed petitioner's first argument but did so in error within the analysis the same as the BCNR did. This error was affirmed in the decision by the court of appeals specific to petitioner being "subject to both legal and administrative separation proceedings at the time he requested retirement." Pet. App. 9a. This statement is the error as petitioner identified in his merits briefs. As to the second argument, the Claims Court provided no analysis at all on the congressional intent of legislation passed post-*Clary* and how the intent would affect precedent. This issue was also not

addressed in the decision by the court of appeals.

1. Plain Meaning. On September 18, 2012, in compliance with the National Defense Authorization Act (NDAA) for Fiscal Year (FY) 2012 (Public Law No. 112-81, 125 Stat. 1390 (2011)) the SA promulgated a memorandum delegating authority to the USMC to establish and manage an early retirement program under TERA for the Marine Corps. This delegation of authority was to be available through December 31, 2018, and required the USMC to "administer this early retirement program in strict accordance with Section 4403 of the NDAA for FY 1993 (P.L. 102-484) as amended by Section 504 of the NDAA for FY 2012 (P.L. 112-81)."

When TERA was passed by Congress, it amended 10 U.S.C. § 8323 to permit an officer with at least 15, but less than 20 years of service, to be voluntarily retired. As amended by TERA, the updated 10 U.S.C. § 8323 provided that "An officer of the Navy or the Marine Corps who applies for retirement after completing more than [at least][2] *15 years* of active service . . . may, in the discretion of the President, be retired on the first day of any month designated by the President." (emphasis added). Petitioner was qualified for early retirement under strict application of the statutory criteria.

After petitioner submitted his retirement request on March 12, 2015, his command stated that he was not eligible for TERA due to his being "the subject of

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[2] "at least" is the verbiage used in the P.L., but those words are not found within the statute while "more than" is the term that has been utilized since the creation of Title 10 in 1956.

administrative separation proceedings". Where the command and subsequently the government errored is that this is not how the TERA message was worded.

The message says that "Officers pending legal action or proceedings, administrative separation, or disability separation are not eligible for TERA." The message does not assert "subject of administrative separation proceedings" or "potential administrative separation." The message clearly states "pending . . . administrative separation," a definitive point in time affected by the SA signature. On the day petitioner submitted his voluntary retirement request, he was not then pending any legal actions or proceedings and was not pending administrative separation until the SA approved such discharge on September 29, 2015. It is also within the SA's plenary authority to retain an officer even if the USMC recommends separation.

The BCNR states that "Here, Mr. Carlborg was subject to both legal and administrative separation proceedings at the time he requested early retirement." This is erroneous as petitioner has identified throughout the history of this case. Under the Uniform Code of Military Justice, the legal actions against petitioner fixed once the NJP was adjudicated on February 5, 2015. Unlike a court-martial conviction there is no right of appeal upon a finding of guilt resulting from NJP.

The government refers to precedent in *Clary v. United States*, 333 F.3d 1345 (Fed. Cir. 2003) that officers pending administrative separation proceedings are ineligible for TERA. While that was the decision, the Navy in *Clary* wrote their Naval Administrative Message (NAVADMIN) with more

specificity in that "an officer who is under adverse disciplinary or administrative action may not apply for early retirement until the action is resolved in favor of the member." *Id.* at 1350 (quoting NAVADMIN 133/94). The language the USMC chose to use in the TERA message it published is not equivalent under the plain meaning construct. The USMC TERA message discusses "proceedings" only as they relate to legal action which had been finalized in petitioner's case on February 5, 2015. s*upra*. The fact that the USMC did not incorporate this same word as it relates to administrative, or disability separation is the error. See *Wronke v. Marsh* 787 F.2d 1569, 1575 (Fed. Cir. 1986) ("But the Army did not write its regulation that way. On the contrary, it wrote a single sentence, easily understood as standard English usage.").

2. Congressional Intent. In any event, legislation that was passed post-*Clary* calls into question whether the eligibility criteria defined in the TERA statute as interpreted by the government meets legislative intent. The court of appeals in *Clary* advanced the idea that the Navy published eligibility criteria specific to which competitive categories, grades, rates, and ratings were eligible for TERA as a force management tool to affect the drawdown of military personnel. The *Clary* appellate court also agreed that the Navy properly added additional eligibility criteria by defining who was ineligible even when that sailor met eligibility criteria specific to the competitive categories requirement that had been established.

In subsequent years, two statutes were added to

the NDAA, 10 U.S.C. § 638b, the Voluntary Retirement Incentive (VRI) (Pet. App. 48a) and 10 U.S.C. § 1175a, Voluntary Separation Pay and Benefits (VSPB). Pet. App. 51a. Within each of these statutes, Congress defined specific eligibility criteria related to years of service, skill rating, military specialty or competitive category, grade/rank, and remaining period of obligated service. Additionally, both statutes list specific ineligibility criteria.

The ineligibility criteria for the VRI in 10 U.S.C. § 638b(c)(2)(E) is "An officer subject to pending disciplinary action or subject to administrative separation or mandatory discharge under any other provision of law or regulation." Pet. App. 49a. The ineligibility for the VSPB in 10 U.S.C. § 1175a(b)(2)(E) articulates "Members who are subject to pending disciplinary action or who are subject to administrative separation or mandatory discharge under any other provision of law or regulations." Pet. App. 52a.

Compare this to the TERA language in Section 4403 of the NDAA FY 1993 to be applied to retirement for 15-20 years of service "(d) REGULATIONS. The Secretary of each military department may prescribe regulations and policies regarding the criteria for eligibility for early retirement. Such criteria may include factors such as grade, years of service, and skill." Pet. App. 76a.

The TERA section has no ineligibility criteria identified as there are in these other two sections within the NDAA, thus it was always the legislative intent to not authorize its use if the military Secretary chose to implement TERA. Congressional intent was

to apply the statutory schema in 10 U.S.C. § 8323 for 20-year retirement in the same vein for those Service members with 15-20 years of service when the Service member met the grade, years of service, and skill criteria set out by the military Secretary if TERA was to be authorized. Notably 10 U.S.C. § 8323 does not have any ineligibility criteria as it relates to administrative separation processing and except in limited circumstances not applicable in this case, an officer with more than 20 years of service can only be retired if the SA directs the officer to separate. ("Indeed, at oral argument, the government was incapable of distinguishing between the applicability of section 1186(a)(1) to issues of retirement after twenty years pursuant to [8323](a)(1) and fifteen years pursuant to TERA.") *Clary v. United States*, 333 F.3d 1345, 1349 (Fed. Cir. 2003).

All TERA did was change 20 to 15 years and authorize the military services to establish the eligibility for TERA to certain manpower limits which in petitioner's case, he met. More particularized support of legislative intent are the consecutive sub-sections of P.L. 112-81 section 504 "Voluntary Retirement Incentive Matters." Section 504(a) titled "Additional Voluntary Retirement Incentive Authority" is 10 U.S.C. § 638b (Pet. App. 48a) and Section 504(b) is the "Reinstatement of Certain Temporary Early Retirement Authority." Pet. App. 79a. See *Russello v. U.S.*, 464 U.S. 16, 23 (1983) ("'[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the

disparate inclusion or exclusion.'") (quoting *United States v. Wong Kim Bo*, 472 F.2d 720, 722 (CA5 1972)). ("We refrain from concluding here that the differing language in the two subsections has the same meaning in each. We would not presume to ascribe this difference to a simple mistake in draftsmanship.") *Id.* Had Congress intended for the *Clary* interpretation of TERA that eligibility criteria may include what is exclusive, then they presumably would have done the same when drafting statutes 10 U.S.C. §§ 638b and 1175a as passed in the NDAA or added the same or similar ineligibility language to update TERA.

II. The Federal Circuit's Decision Warrants This Court's Review

In *Kisor v. Wilkie, Secretary of Veterans Affairs,* 588 U.S. 558, 559 (2019) this Court highlighted that "Adherence to precedent is 'a foundation stone of the rule of law,' *Michigan v. Bay Mills Indian Community,* 572 U.S. 782, 798, and any departure from the doctrine demands 'special justification,' *Halliburton Co. v. Erica P. John Fund, Inc.*, 573 U.S. 258, 266." Here the court of appeals and the trial court have departed from this doctrine and have provided no justification, special or otherwise. To not correct this error would set aside the common law principle of *stare decisis* and open the door for any court to ignore any precedent supporting a party's cause of action that a court does not want to sustain simply by not acknowledging the existence of the precedent even when argued in a merits brief.

The record here does not reflect if the court of appeals or trial court ever considered petitioner's arguments and citations to binding precedent. Additionally, there is nothing in the record to reflect that either of the lower courts considered petitioner's arguments on plain meaning and congressional intent. "The Claims Court failed to include in its analysis any language which is clearly dispositive of the . . . issue, only citing to and recounting what the Board had done and said." *Arens v. U.S.*, 969 F.2d 1034, 1038 (Fed. Cir. 1992). Due to these actions, the court of appeals has departed from the accepted and usual course of judicial proceedings and has sanctioned the same departure from the trial court. This has violated petitioner's Due Process rights under the Fifth Amendment.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Pro Se

APRIL 2025