**No. 21-1553**

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

**ALLEN H. MONROE,**

***Plaintiff-Appellee*,**

**v.**

**THE UNITED STATES**

***Defendant-Appellant*.**

Appeal from the United States Court of Federal Claims, No. 18-0159C
Judge Campbell-Smith

**Brief of National Veterans Legal Services Program as *Amicus Curiae* in Support of the Plaintiff-Appellee**

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# CERTIFICATE OF INTEREST

**Case Number** 2021-1553
**Short Case Caption** Monroe v. US
**Filing Party/Entity** National Veterans Legal Services Program

**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: May 27, 2021

Signature: /s/ *Doris Johnson Hines*

Name: Doris Johnson Hines

| **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. | 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 | ☐ None/Not Applicable | ☐ None/Not Applicable |
| National Veterans Legal Services Program | None | None |

**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

| None | | |
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**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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| None | | |
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<tr><td colspan="3">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).<br>☐ None/Not Applicable ☐ Additional pages attached</td></tr>
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## INTEREST OF AMICUS CURIAE

The National Veterans Legal Services Program (NVLSP) is a 501(c)(3) nonprofit organization that has worked since 1981 to ensure that the government delivers our nation's twenty-two million veterans and active-duty personnel the benefits to which they are entitled because of disabilities resulting from their military service to our country.[1]

Part of NVLSP's work includes representing veterans with their medical retirement applications to the Board for Correction of Military Records (BCMR) and with their appeals of adverse military correction board determinations to federal courts. In 2020, NVLSP joined with law firm *pro bono* practices to file over 100 briefs in support of applications to the BCMR, the Physical Disability Board of Review (PDBR), the discharge review boards, and the federal courts. NVLSP files this brief as *amicus curiae* in support of the decision of the Court of Federal Claims and to ensure that legal resources remain available to our nation's injured veterans when they challenge a BCMR decision.

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amicus curiae* certifies that no part of this brief was authored by counsel for any other party to this case and no party in this case, counsel for a party in this case, or person other than *amicus curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. All parties to this case have consented to this filing.

## SUMMARY OF THE ARGUMENT

Like many of NVLSP's clients, Mr. Monroe filed his initial application *pro se*. After an adverse board determination, almost *three years* later, and only then with the assistance of counsel, Mr. Monroe filed a complaint in the Court of Federal Claims. Mr. Monroe pressed his claim through two government-initiated voluntary remands with no concession of government error. More than eighteen months later, his medical records were finally corrected to reflect a disability rating entitling him to medical retirement. Having succeeded in obtaining medical retirement, Mr. Monroe then sought Equal Access to Justice Act (EAJA) fees, which are the subject of this appeal, for the work of his counsel.

Access to EAJA fees is especially important in medical retirement cases like Mr. Monroe's. The relief awarded to a successful veteran is almost entirely non-monetary, including lifetime health insurance for the veteran and his family. NVLSP is especially concerned that if EAJA fees are not awarded here or are substantially reduced, the legal resources available to veterans to appeal adverse board decisions will be substantially diminished. Without access to EAJA fees, a disabled veteran seeking relief from a court would likely face a substantial economic barrier in procuring a legal advocate, and such veterans would be unable, ultimately, to obtain correction of their military records and the resulting benefits to which they are entitled.

## ARGUMENT

### I. EAJA Fees Are for Veterans to Correct Their Military Records and Obtain Military Retirement

#### A. The Establishment of Military Record Correction Boards

After World War II, Congress enacted laws requiring the Secretaries of the Army, Air Force, Navy (including the Marine Corps), and Coast Guard to establish boards within each military department to consider applications for correction of an individual's military records to remedy an error or injustice. 10 U.S.C. §§ 1552–1559 (2018). There is a Board of Correction of Military Records (BCMR) for the Army, called the ABCMR, the Air Force, called the AFBCMR, the Navy, also including the Marine Corps, called the BCNR, and the Coast Guard, called the BCMR.

Correction boards provide a valuable service to veterans but are not without their challenges. In NVLSP's experience, veterans have low success rates before corrections boards. Before the BCNR, in the first quarter of fiscal year 2017 and in fiscal year 2016, discharge upgrade requests, reflecting the "character" of a veteran's discharge, were successful for, respectively, six percent and nine percent of veterans. *See* 1 Veterans Benefits Manual at § 21.6. The rates of discharge upgrades before the ABCMR and AFBCMR were generally higher, though, concerned with the rates, Congress recently increased the reporting requirements of the corrections boards. *See id*.

Not only are the rates of veteran success before corrections boards low, but the process is also slow. Although Congress mandated that final action on applications be completed within ten months of receipt for ninety percent of applications and within eighteen months of receipt for one hundred percent of applications and established reporting requirements if that timing is not met, 10 U.S.C. § 1557, correction boards have consistently failed to meet the statutory timeliness requirements. *See Calhoun v. McCarthy*, Case No. 1:19-cv-03744-EGS (D. D.C.) at DI 21, 11–12 (the corrections boards reporting in 2018: (1) a six-year backlog of applications before the ABCMR; (2) only two percent of applications decided within ten months by the AFBCMR; and (3) the BCNR will *never* be able to clear its backlog without additional resources). Mr. Monroe's application confirms that the process before corrections boards is slow. He initially filed his application in November 2014; it was not finally denied until September 2017, almost three years later. Gov't Br. at 9–10.

**B. Medical Retirement Through Correction of Military Records**

Before corrections boards, military records can be corrected so a disabled veteran will meet the requirements for medical retirement. Such retirement, also called "disability retirement," is a monthly benefit awarded to service members who are deemed medically unfit for continued service and have a disability rating, as

assigned by the Physical Evaluation Board, of thirty percent or more.[2] *Qualifying for a Disability Retirement*, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/retiredmilitary/disability/disability/ (last visited May 4, 2021). Veterans can be either permanently or temporarily retired.

If a service member is deemed medically unfit for continued service but receives a combined disability rating of twenty percent or less, he is discharged from the military and may receive a lump sum severance pay rather than being medically retired. *Disability Severance Pay*, DEF. FIN. AND ACCT. SERV., https://www.dfas.mil/retiredmilitary/plan/separation-payments/disabilityseverance-pay/ (last visited May 9, 2021). Thus, the degree of disability rating is determinative of whether a veteran is medically retired or discharged with severance.

Medically retired veterans are entitled to all of the rights and privileges that a military retiree receives. Such veterans may receive disability pay but are also entitled to "a host of benefits to which no monetary value can be attached," including healthcare for themselves and their families, "priority access to Walter Reed Army Medical Center, access to base facilities, space available travel on military aircraft, the right to wear the uniform on appropriate public occasions, military funeral

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[2] If the veteran has twenty or more years of active service, retirement will be recommended regardless of the disability rating that is assigned by the Physical Evaluation Board. *Qualifying for a Disability Retirement*, Def. Fin. and Acct. Serv., https://www.dfas.mil/retiredmilitary/disability/disability/ (last visited May 4, 2021).

arrangements, and preferential burial privileges in national cemeteries." *Smalls v. United States*, 471 F.3d 186, 190 (D. D.C. 2006).

### C. Applying for Correction of Military Records is Challenging for *Pro Se* Veterans

The process by which a veteran asks a board to correct his military records to reflect medical retirement begins with a deceptively simple form, called DD Form 149. DD Form 149 (Dec. 2019), available at https://www.esd.whs.mil/Portals/54/Documents/DD/forms/dd/dd0149.pdf. The form is two pages and includes one page of accompanying instructions. *Id*. In addition to filling in blanks and checking boxes, the veteran must identify an "error or injustice" in his military records with no explanation of what those terms mean or the effect of that identification on his application. *Id.* The form provides the applicant with a one-and-one-quarter by eight-inch blank space for him to identify the correction and relief requested "for this error or injustice" and a similar space for explaining why the correction should be made. *Id*. The veteran is not warned that the "relief" they request may be used against them later. If the board denies the request, the veteran can seek reconsideration or file a claim with the Court of Federal Claims following an unfavorable board decision. 28 U.S.C. § 1491 and 37 U.S.C. § 204.

Veterans are advised that the process is simple, the form stating that "[t]he public reporting burden for this collection of information is estimated to average 30 minutes per response, including the time for reviewing instructions, searching

existing data sources, gathering and maintaining the data needed, and completing and reviewing the collection of information." DD Form 149. Veterans are not encouraged to obtain counsel, the form stating only that "[y]ou may want counsel if your case is complex," without any explanation of what may make a case complex. *Id*. Veterans are also advised that "[s]ome veterans and service organizations furnish counsel without charge. Contact your local post or chapter." *Id*.

The form also identifies website links for "detailed information on application and Board procedures."[3] The different services separately have websites providing varying levels of additional information. The ABCMR website provides a twenty-two-page guide to applicants seeking to correct military records,[4] as well as separate "Application Procedures," and various "Publications."[5] The AFBCMR website[6] directs potential applicants to visit a portal for information, which was not available.[7]

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[3] Of the four websites cited, www.hq.navy.mil/bcnr/bcnr.htm (last visited May 24, 2021) and www.afpc.randolph.af.mil/safmrbr (last visited May 24, 2021) linked to dead webpages.

[4] *Army Board for Correction of Military Records (ABCMR): Applicant's Guide to Applying to the Army Board for Correction of Military Records (ABCMR)*, ARMY REV. BDS. AGENCY, https://arba.army.pentagon.mil/documents/ABCMRApplicantsGuide20160601.pdf (last visited May 24, 2021).

[5] *The Army Board for Corrections of Military Records*, ARMY REV. BDS. AGENCY, https://arba.army.pentagon.mil/abcmr-overview.html (last visited May 24, 2021).

[6] *Military Personnel Records*, AIR FORCE'S PERS. CTR., https://www.afpc.af.mil/Career-Management/Military-Personnel-Records/ (last visited May 24, 2021).

[7] The link provided, https://afrba-portal.cce.af.mil/#board-info/bcmr/navbar (last visited May 24, 2021), linked to a dead webpage.

The BCNR provides information, including a video,[8] which advises applicants to, in the small space provided, identify the specific relief they are requesting and to identify the error or injustice, without explaining or providing examples of what those terms mean.

Veterans who apply for correction of their military records already suffer from one or more disabilities, have limited access to care and resources as a result of their erroneous denial of a medical retirement in service, and overwhelmingly navigate the complex process *pro se.* Attempting to blunt this reality, the government notes *six times* that Mr. Monroe runs marathons. Gov't Br. at 8, 15, 21, 37, 38. While Mr. Monroe's disability is Type I diabetes mellitus, a severe physical disability, in NVLSP's experience, many veterans who apply for correction of their military records in order to qualify for military retirement are seriously cognitively impaired, including many suffering from Post-Traumatic Stress Disorder (PTSD) or traumatic brain injury. All the inherent barriers injured veterans face when submitting an application to a correction board, whether mental or physical, should be considered when assessing the entries written by a veteran regarding the type of relief originally requested and in determining whether to penalize a veteran seeking EAJA fees for not formulating their request for relief in the proper legal terms.

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[8] *FAQ and Key Information*, BD. FOR CORR. OF NAVEL RECS., https://www.secnav.navy.mil/mra/bcnr/Pages/FAQ_and_Key_Information.aspx#0 (last visited May 24, 2021).

### D. The Importance of the Availability of EAJA Fees in Medical Retirement Cases

The Equal Access to Justice Act, or EAJA, was enacted in 1980 "to diminish the deterrent effect of seeking review of, or defending against, government action by providing in specified situations an award of attorney fees, expert witness fees, and other costs against the United States," and to create a "statutory exception to the 'American rule' respecting the award of attorney fees." Pub. L. No. 96-481 § 202(c) (1980). When the EAJA statute was amended to make it applicable to cases before the Court of Appeals for Veterans Claims, Congress observed that "[v]eterans are exactly the type of individuals the statute was intended to help." S. Rep. No. 342, 102d Cong., 2d Sess. 39 (1992).

This Court has recognized that "[o]ne purpose of EAJA [i]s to enable citizens to vindicate their rights against the government, particularly where, due to the government's greater resources and expertise and the limited amount at stake in relation to the cost of litigation, there otherwise would be no effective remedy, even in situations where the government was not justified in its refusal to provide relief." *Norris v. Sec. and Exch. Comm'n*, 695 F.3d 1261, 1262 (Fed. Cir. 2012). Through EAJA's "substantial justification" standard, "Congress sought to discourage the government from initiating litigation that was not substantially justified." *Id.* at 1264–65. Congress determined that, because of its unique position, the government must be held to a higher standard in litigation than private parties, both as defendant

and plaintiff." *Id.* The EAJA statute thus "discourages the government from asserting or defending claims where the claim or defense might not be frivolous but nevertheless should not have been brought or defended in the first place." *Id*. at 1265.

This is particularly important in the context of veterans' pursuit of medical retirement benefits, which typically are primarily non-monetary in nature, including, for example, lifetime health insurance for the veteran, and their spouse and children. Because of the nature of the relief, veterans cannot enter into contingency fee relationships with counsel as they often do when monetary benefits are sought. *See* 38 C.F.R. § 14.636(f).

In NVLSP's experience, the non-monetary nature of medical retirement benefits reduces the pool of assistance for veterans. Most members of the private bar and most law firm and law school *pro bono* programs do not routinely assist veterans in medical retirement cases. The availability of EAJA fees are therefore even more critical, so that veterans have counsel available to assist them with seeking this benefit. Indeed, EAJA was enacted for the very circumstances presented in medical retirement cases: a veteran-applicant often needs counsel to secure the benefits owed and would be deterred from obtaining representation without the possibility of recovering reasonable fees under EAJA.

## II. Voluntary Remand Without a Government Concession of Error Should Not Be Used Against Veterans Seeking EAJA Fees

### A. Voluntary Remands Are Common in Medical Retirement Cases

When agency action is reviewed by the courts, the government is permitted to seek remand for several reasons, including "to reconsider its previous position." *Yang v. United States*, 149 Fed. Cl. 277, 279 (2020), *citing SKF USA Inc. v. United States*, 254 F.3d 1022, 1028 (Fed. Cir. 2001).

Voluntary remands are generally granted as a matter of course, courts preferring to "allow agencies to cure their own mistakes rather than wasting the courts' and the parties' resources reviewing a record that both sides acknowledge to be incorrect or incomplete." *Keltner v. United States*, 148 Fed. Cl. 552, 558 (2020) (*quoting Ethyl Corp. v. Browner*, 909 F.2d 522, 524 (D.C. Cir. 1993)). Specifically with respect to corrections boards, "civilian courts are reluctant to second-guess decisions of the military authorities" and the "the military is entitled to great deference in the governance of its affairs." *Rahman v. United States*, 149 Fed. Cl. 685, 688 (2020) (*quoting Dodson v. United States*, 988 F.2d 1199, 1204 (Fed. Cir. 1993)).

The court in *Keltner* recently considered "the largely unexplored jurisprudence of voluntary remands," *Keltner*, 148 Fed. Cl. at 555, and noted that the "majority of courts apparently have read [this Court's decision in *SKF*] as

solidifying in the law the presumption in favor of voluntary remands." *Id*. at 561 (citations and internal quotes omitted). Courts will thus generally grant a government request for voluntary remand so long as it would serve a useful purpose, is not frivolous or in bad faith, and would not unduly prejudice the veteran. *Yang*, 149 Fed. Cl. at 279–80; *Rahman*, 149 Fed. Cl. at 689.

In seeking such a remand, the government does not need to confess error but "ordinarily does at least need to profess intention to reconsider, re-review, or modify the original agency decision that is the subject of the legal challenge." *Keltner*, 148 Fed. Cl. at 562. The government may seek remand for the agency to provide an explanation or direct the agency to assess the facts in a different way. *Yang*, 149 Fed. Cl. at 277. In fact, even when the request for voluntary remand instructs the agency to reconsider or change how it reviews the issues, the government need not concede error. *SKF USA*, 254 F.3d at 1028–29 (noting that the government may request a remand without confessing error); *Limnia, Inc. v. United States Dep't of Energy*, 857 F.3d 379, 387 (D.C. Cir. 2017) (noting that an agency need not confess error or impropriety to obtain a voluntary remand); *Rahman*, 149 Fed. Cl. at 688–691 (granting the government's motion for voluntary remand without concession of error over opposition from plaintiff and noting that "[a]lthough the [government] does not confess error in the Army's treatment of the [service member], the [government's] brief tiptoes up to that line before stepping back a little in its reply brief"). Where

the government does not wish to reconsider its original decision but instead seeks to bolster its reasons for denying a claim, remand is not appropriate. *Keltner*, 148 F.3d at 564.

In NVLSP's experience, voluntary remands without the government conceding error are extremely common in medical retirement cases. But such remand does not mean that there was no error. *See Yang*, 149 Fed. Cl. at 279 (without conceding error, voluntary remand was granted to consider two of the three required criteria used to determine fitness for service). Indeed, where remand is for legitimate review of the agency's previous decision, which the government will not defend, there is likely government error even without a concession.

### B. Voluntary Remand Can Benefit Both the Veteran and the Government

The government and the veteran both have an incentive to agree to a voluntary remand "to save the expense of further litigation." David E. Boelzner, *EAJA Fees for Reasons-and-Bases Remands: The Perspective of a Veterans' Lawyer*, 7 VETERANS L. REV. 1, 11 (2015). Remand also permits further development of the record and application of law to the facts, which can improve the quality of the decision. *Veterans Benefits Manual* (Barton F. Stichman et al., eds., 2020-2021 ed.) at 1060. Remands can allow the board to address required and correct criteria. *Yang*, 149 Fed. Cl. at 279; Monroe Br. at 20, 22. Remands often increase the speed of reaching an outcome—in some cases allowing a veteran to obtain benefits more

quickly while conserving judicial resources. *Rahman*, 149 Fed. Cl. at 690 (explaining that "even if the [c]ourt were to agree with the [veteran] and find him entitled to relief, the determination of the parameters of that relief would require a remand to the [board]" for consideration and that "a remand . . . might produce a quicker ultimate decision on the merits, making a remand now a more efficient means of resolving the [service member's] claim promptly" than the court issuing a decision).

Unsurprisingly, therefore, veterans rarely oppose such motions because remand provides the opportunity for the agency to grant the service member what he seeks. Joshua Revesz, *Voluntary Remands: A Critical Reassessment*, 70 Admin. L. Rev. 361, 381 (2018) (noting that "private parties rarely oppose[] voluntary remand"); *cf. Rahman*, 149 Fed. Cl. at 691 (noting that the plaintiff opposed a remand in part because of "the time he fears he will lose in obtaining the monetary relief he is seeking and needs").

### C. Government-Requested Voluntary Remands Without Concession of Error Should Not Be Held Against Veterans When Seeking EAJA Fees

In considering whether EAJA fees are appropriate, courts consider the totality of the proceedings. *Comm'r, Immigr. and Naturalization Serv. v. Jean*, 496 U.S. 154, 161–62 (1990) ("While the parties' postures on individual matters may be more or less justified, the EAJA—like other fee-shifting statutes—favors treating a case

as an inclusive whole, rather than as atomized line-items."). To obtain such fees, an applicant must show that "that the position of the United States was not substantially justified." 28 U.S.C. § 2412(d). When assessing "substantial justification," the result of the remand, rather than any stated reason for the remand or the fact that there is no stated reason, should be considered.

The government here repeatedly characterizes the two remands it requested as the result of "interim, non-prejudicial errors." Gov't Br. at 21, 32; *see also id.* at 31, 35. The government presumably still agrees that it was entitled to the remands it requested and that its bases for them both were substantial and justified. To argue now that its errors were "interim" suggests the opposite, however. When the government represents that its bases for seeking remand are appropriate, as it did here, *id.* at 12 (first remand "predicated upon the interests of justice"); *id.* at 13 (second remand "in the interests of justice" and to ensure relevant factors considered), veterans like Mr. Monroe have little choice but to agree to remand, especially when remand may be their fastest route to obtaining relief. It would be fundamentally unfair and contrary to the very purpose of the EAJA statute for the government to use the remand process to correct its mistakes but later characterize those mistakes as interim or non-prejudicial when trying to avoid altogether or substantially reduce an EAJA award.

In these situations, it is apparent that a voluntary remand is predicated on government error even with no concession. This is particularly true when the agency ultimately grants the service member some form of relief. Some courts have recognized this inconsistency. *See*, *e.g.*, *Yang*, 149 Fed. Cl. at 280 n.6 (granting the government's motion for voluntary remand but noting in a footnote that the Court was "puzzled why the Navy hasn't confessed error"); *Keltner*, 148 Fed. Cl. 552 at 556–68 (denying the government's motion for voluntary remand due, in significant part, to the government's representations regarding its reasons for a remand, and discussing the history and use of voluntary remands).

A remand without a concession of government error should not be used to support that the government was "substantially justified" when assessing EAJA fees. A remand is an opportunity for the government to correctly and completely assess a service member's entitlement to benefits and would be unnecessary if there was not a mistake in the previous determination. Absent intervening events, there are few, if any, reasons for a remand in the absence of a previous mistake or error. Thus, a remand without a concession of error does not necessarily support that the government's position was substantially justified.

### D. Precluding or Reducing EAJA Fees Because of a Voluntary Remand Without Concession of Error Would Negatively Impact a Veteran's Ability to Obtain Legal Representation

As NVLSP has noted, the nature of the non-monetary relief awarded in medical retirement cases means there are few members of the private bar and few law firm or law school *pro bono* programs that routinely assist veterans in such cases. In this environment, EAJA fees are critical to ensure that injured veterans have access to free legal representation in seeking the medical retirement to which they are entitled. Precluding or reducing available EAJA fees because the government's position was "substantially justified" based on a government-requested voluntary remand without a concession of error would harm veterans' ability to obtain legal representation when their requests to correct their military records are improperly denied.

## III. A Veteran's Initial Request for Relief Should Not Be Determinative in Assessing EAJA Fees Because They Are Encouraged to Apply *Pro Se*, and It Would Be Inequitable to Use Their Initial Requests Against Them

In the DD Form 149 veterans use to request correction of military records, they are directed to identify the "relief" they are requesting. Veterans are not warned, however, that the words in their response can use used against them later. Indeed here, the government challenges the grant of EAJA fees by arguing that Mr. Monroe's initial request for relief was different from the relief he was granted. *See* Gov't Br. at 2 (stating that initially before the AFBCMR, Mr. Monroe "challenged

the Air Force's unfitness determination" but that he did not initially "challenge his disability rating"); *id.* at 10 (stating that in "his AFBCMR application, Mr. Monroe" challenged "the determination that he was unfit" but "did not request an increased disability rating or disability retirement"); *id.* at 22 (arguing "distinctly different claims for relief"); *see also id.* at 35. Indeed, in the face of the AFBCMR medically retiring Mr. Monroe, the government argues that Mr. Monroe *waived* disability retirement because those words were not on his application form. *Id.* at 40.

The government's EAJA fee challenge and harsh waiver allegation based on the words in Mr. Monroe's application highlights how fraught with unintended consequences the process can be for disabled veterans when filling out DD Form 149 and initially identifying the relief they request. The verbatim relief initially requested by a *pro se* veteran, however, should not be determinative of whether the government's position was "substantially justified" in assessing EAJA fees. Many veterans seeking to correct their medical records to qualify for medical retirement are cognitively disabled. And most are completely unfamiliar with BCMR procedures and nothing in the form or elsewhere advises them of the potential consequences of the words they use on the form. It is unfair and inequitable to hold disabled veterans to the exact relief requested in their initial application. Instead, courts should find it sufficient for the purposes of EAJA fees for veterans to broadly and generally allege error.

## CONCLUSION

In the context of awarding EAJA fees in medical retirement cases, the totality of a veteran's claim should be considered; veterans should not be penalized for an initial *pro se* request for relief that is not ultimately awarded. Likewise, the totality of the government's actions should be considered; government-requested voluntary remands without concession of error should not justify denial or reduction of an EAJA award.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE**

This brief complies with the type-volume limitation of FRAP 29(a)(5) and Fed. Cir. R. 32(b) because it contains 4,297 words, excluding the parts of the brief exempt by FRAP 32(f) and Fed. Cir. R. 32(b)(2).

This brief complies with the typeface requirements of FRAP 32(a)(5) and the type style requirements of FRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office 365 Word in 14 point Times New Roman font.

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