No. 21-1432

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT J. LABONTE, JR.,

Plaintiff-Appellant,

versus

UNITED STATES,

Defendant-Appellee.

On Appeal from the United States Court of Federal Claims
The Honorable Richard A. Hertling
Federal Claims Court Case No. 1:18-cv-01784-RAH

BRIEF FOR MILITARY LAW PRACTITIONERS AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT

Kathleen R. Hartnett
Julie Veroff
COOLEY LLP
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
khartnett@cooley.com
jveroff@cooley.com

Elias S. Kim
COOLEY LLP
1299 Pennsylvania Ave. NW, Ste. 700
Washington, DC NW 20004-2400
Telephone: (202) 842-7800
ekim@cooley.com

Counsel for Amici Curiae *Military Law Practitioners*

March 26, 2021

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* Military Law Practitioners certifies:

1. The full name of every party or amicus represented by me:

John W. Brooker, Eugene R. Fidell, Hugh B. McClean, Eleanor Morales, Brian Schenk, Raymond Toney

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

See above.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the *amici* represented by me are:

Not applicable.

4. The names of all law firms and the partners or associates that appeared for the amicus curiae now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Not applicable.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal is:

Not applicable.

/s/ *Elias S. Kim*
Elias S. Kim
COOLEY LLP
1299 Pennsylvania Ave. NW, Ste. 700
Washington, D.C. 20004
Phone: (202) 842-7800
ekim@cooley.com

Counsel for Amici Curiae *Military Law Practitioners*

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases

Statutes and Legislative Materials

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

Regulations and Administrative Guidance

TABLE OF CONTENTS
(continued)

Page

Other Authorities

TABLE OF CONTENTS

(continued)

Page

INTEREST OF AMICI CURIAE

Amici respectfully submit this brief in support of Mr. LaBonte's appeal.[1] *Amici* are military law practitioners with extensive experience in court-martial cases and matters before the discharge review boards and boards for correction of military records. *Amici* have a significant interest in ensuring that the boards retain their broad authority to grant discharge-related relief, including modifications to DD-214s, for servicemembers subjected to court-martials.

Lieutenant Colonel John W. Brooker, U.S. Army (Retired), is a Clinical Associate Professor at the University of North Carolina School of Law and directs the school's Military and Veterans Law Clinic. He served over 20 years in the Army, including over 15 as a judge advocate, and earned the Army's Expert Military Justice Practitioner Additional Skill Identifier because of his extensive experience trying court-martial cases.

Eugene R. Fidell is an Adjunct Professor at New York University Law School, a Senior Research Scholar at Yale Law School, and of counsel at Feldesman Tucker Leifer Fidell LLP. He has taught military justice courses and written

[1] All parties have consented to the filing of this brief. No party's counsel has authored this brief in whole or part; no party or party's counsel has contributed money intended to fund the preparation or submission of this brief; and no other person has contributed money intended to fund the preparation or submission of this brief.

extensively about record corrections and military justice. He has served as a prosecutor and defense counsel in courts-martial and has litigated military record correction cases in federal courts. He was president of the National Institute of Military Justice from 1991 to 2011 and served on the Advisory Council of the Court of Federal Claims.

Hugh B. McClean is an Assistant Professor and Director of the Bob Parsons Veterans Advocacy Clinic at the University of Baltimore School of Law. He previously taught military justice at the Air Force Academy. McClean served for 11 years in the Air Force Judge Advocate General Corps, where he was a prosecutor, defense attorney, professor, and assistant general counsel. He has also served as a public defender.

Eleanor Morales is an Assistant Clinical Professor at Wake Forest University School of Law and directs the school's Veterans Legal Clinic. She has served in the Army as a judge advocate since 2011, including as a prosecutor while on active duty at Fort Hood, Texas. She continues to serve as a Major in the Army Reserves. The views expressed herein are made solely in her capacity as a faculty member of Wake Forest University.

Brian Schenk is the owner of Midwest Military & Veterans Law, PLLC and has practiced military personnel law since 2010. He represents service members before military administrative boards, including the discharge review boards and

boards for correction of military records. He also represents clients in federal court cases challenging military personnel decisions, many of which involve underlying UCMJ, disability, and discharge issues.

Raymond Toney represents clients in matters involving administrative discharge boards, other separations, and corrections of military records. He has litigated federal court cases involving violations of military regulations and has promoted changes to the practices of the boards for the correction of military records. He was a member of the first class of cadets to be commissioned through the Army ROTC program at the University of Alabama, Birmingham, and is a member of the Advisory Board to the National Institute of Military Justice.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Department of Defense Form 214 ("DD-214"), entitled "Certificate of Release or Discharge from Active Duty," is the Department's universally used form for documenting the separation of a servicemember. As a matter of practice, the DD-214 has vital consequences for a servicemember's receipt of post-discharge benefits, including medical care.

This case raises an important question about the power of the Army Board for Correction of Military Records ("Board") to correct errors that appear on a veteran's DD-214. Congress has provided the Board with broad, general remedial authority: to "correct any military record" of the Army. 10 U.S.C. § 1552(a)(1), 32 C.F.R. § 581.3. It also has provided, as an exception to this authority, that the Board (subject to limited exceptions) cannot correct "records of courts-martial and related administrative records pertaining to court-martial cases." 10 U.S.C. § 1552(f). The purpose behind this limitation, added in the Military Justice Act of 1983, Pub. L. No. 98-209, 97 Stat. 1407, is to prevent the Board from overruling courts-martial determinations, *see* S. Rep. No. 98-53 at 36–37 (1983).

The Court of Federal Claims wrongly held that because Appellant's history with the military included a court-martial—for which he was granted clemency—Appellant's DD-214 is a record "related" to a court-martial under Section 1552(f) and a portion of his DD-214 thus could not be corrected by the Board to reflect his

clemency (even though another portion had been updated accordingly). The Court interpreted "related" broadly—and without regard to legislative history or purpose—determining that "related administrative record" includes "any administrative document that is connected or has a relationship with a court-martial." J.A. 12–13. According to the Court, because DD-214 provides a space to note the reason for a veteran's discharge, which could be a court-martial conviction, DD-214 is "related" to a court-martial. J.A. 13.

That conclusion reflects both a fundamental misconception of the purpose of Section 1552(f) and of the relationship (or lack thereof) between DD-214 and the court-martial system. DD-214 is a universally used military personnel record, a primary purpose of which is to memorialize the details of service so that the former servicemember may establish eligibility for veterans' benefits. It is not "related" to the court-martial system in any specific way. Indeed, a servicemember's court-martial proceeding is not memorialized on their DD-214 unless they were convicted and sentenced to a punitive discharge. Meanwhile, the complex set of regulations and procedures governing the court-martial system produce in any given case both a formal "record" of the court-martial proceeding—a transcript, the evidence, and briefs—as well as other records that are not "records of court-martial" but are "related administrative records pertaining to court-martial cases." 10 U.S.C.

§ 1552(f). It is these additional records that constitute Section 1552(f)'s "related" category, not universally used personnel forms like DD-214.

Including DD-214 within the scope of Section 1552(f) would prevent the Board from accomplishing its congressionally mandated purpose to correct errors and do justice. The trial court's construction of Section 1552(f) could be read to prevent the Board from correcting minor clerical errors and from modifying DD-214s to reflect seismic shifts in military law, such as the 2013 repeal of Article 125 of the Uniform Code of Military Justice—the provision that criminalized consensual sodomy and, along with the "Don't Ask, Don't Tell" policy, was used to discharge gay, lesbian, and bisexual individuals from the military and prevent them from receiving veterans benefits.

This Court should reverse the Court of Federal Claims' ruling, which is directly contrary to congressional intent.

ARGUMENT

DD-214 is not an administrative record "related" to "records of court-martial" that "pertain[s] to court-martial cases." 10 U.S.C. § 1552(f). The trial court's decision to the contrary contravenes congressional intent and rests on a fundamental misunderstanding of the purposes of DD-214 and of the court-martial system. Left uncorrected, the decision will frustrate these purposes and cause injustice.

I. DD-214 IS A PERSONNEL DOCUMENT THAT WAS DEVELOPED TO STANDARDIZE ENTRY INTO VETERANS' BENEFITS PROGRAMS.

DD-214 is a standardized personnel document that all servicemembers receive when they are "discharged or released from active duty." 10 U.S.C. § 1168. Because DD-214 is simply a "summary of the [servicemember's] most recent period of continuous active duty," it has no independent "legal effect on termination." Department of the Army, Army Regulation 635-8, *Personnel Separations: Separation Processing and Documents* § 5-1 (Sept. 17, 2019). But DD-214 has a critical function—it is the "one authoritative document to verify a servicemember ha[s] served on active duty." Michael Schwille, et al., *Service Member Separation: Updating the DD Form 214*, RAND Corporation at 3 (2019), https://perma.cc/V5SA-G4HY. Accordingly, DD-214s enable veterans to access benefits programs and reduce the costs of managing those programs. A brief review of DD-214's history and modern-day usage elucidates this function.

A. History Of DD-214

Near the end of World War II, Congress began planning for more than ten million servicemembers leaving active-duty service. With the goal of helping these individuals readjust to civilian life, Congress enacted several statutes that created robust veterans' benefits programs and placed these programs under the aegis of the Veterans' Administration (the precursor to the Department of Veterans Affairs) ("the VA"). The most well-known of these statutes was the Servicemen's Readjustment

Act of 1944, Pub L. No. 346, 58 Stat. 284—*i.e.*, the GI Bill—which established hospitals, paid for veterans to attend college, provided access to low-interest mortgages, and expanded the availability of unemployment compensation.

The end of World War II also prompted a reorganization of the military's basic structure. In a 1945 address, President Truman informed Congress that the lack of organic coordination between the War and Navy Departments had made the war effort more costly and recommended that "Congress adopt legislation combining the War and Navy Departments into one single Department of National Defense." Harry S. Truman, *Special Message to the Congress Recommending the Establishment of a Department of National Defense* (Dec. 19, 1945), https://perma.cc/XKW6-LE8D. Two years later, Congress created the "National Military Establishment"[2]—comprising the Department of the Army, the Department of the Navy, and the Department of the Air Force—and the position of Secretary of Defense. National Security Act of 1947, Pub. L. No. 80-253, 61 Stat. 495, 499–500. Congress gave the Secretary broad authority to "[e]stablish general policies and programs for the National Military Establishment and for all of the departments and agencies therein" and to "[e]xercise general direction, authority, and control over" them. *Id.* at 500.

[2] Congress later renamed the "National Military Establishment" the "Department of Defense." National Security Act Amendments of 1949, Pub. L. No. 81-216, 63 Stat. 579.

The expansion of veterans' benefits and the centralization of military command in the late 1940s led directly to the development of DD-214. In the first years of the new benefits regime, the VA had a major administrative problem. To distribute benefits, the VA had to determine whether applicants were actually veterans, but the lack of coordination between the branches meant that the VA had to "use[] various service-specific documents to establish veteran status" and that it "was often time-consuming to process the paperwork and make the determination." Schwille, *supra* at 2. In 1950, the Secretary of Defense addressed this problem by using his newly acquired authority to issue DoD Instruction 1336.01 ("DoDI 1336.01"), entitled "Standardization of Forms for Report of Transfer or Discharge of Members of the Armed Forces of the United States." In this instruction, the Secretary established that DD-214 would be the "one authoritative document to verify a service member had served on active duty." Schwille, *supra* at 3. Shortly thereafter, Congress made the Secretary's instruction binding law, providing in the Veterans' Benefits Act of 1957, Pub. L. No. 85-56, 71 Stat. 83 that "[n]o person may be discharged or released from active duty in the Armed Forces until his certificate of discharge or release from active duty and his final pay (or a substantial portion of his final pay) are ready for delivery to him or to his next of kin or legal representative." 71 Stat. 160; *see* 10 U.S.C. § 1168.

B. Modern Usage Of DD-214

Today, DD-214s are prepared and distributed via a joint effort between the office of the Under Secretary of Defense for Personnel and Readiness, the personnel offices of the branches, and the Defense Manpower Data Center ("DMDC"). The latest edition of DoDI 1336.01 gives the "Secretaries of the Military Departments and the Commandant of the Coast Guard" primary responsibility for "[p]rovid[ing] active duty Service members who are separated a complete, accurate DD Form 214." DoDI 1336.01 at 8. Pursuant to this command, each of the branches has developed a comprehensive set of regulations to ensure the accuracy of DD-214s. *See, e.g.*, Army Regulation 635-8; Department of the Navy, Commandant of the Marine Corps, Marine Corps Order P1900.16 (Feb. 15, 2019). After preparing a DD-214, the service sends it to DMDC—"DoD's single enterprise distribution point for interagency information sharing of Service personnel information"—which prepares eight copies and provides them to the servicemember, the relevant service, the VA, the Department of Labor, and the Director of Veterans Affairs of a state designated by the servicemember. DoDI 1336.01 at 2, 15.

The original copy of a DD-214, which is provided to the servicemember, comprises twenty-two "boxes" of information, some of which are further divided into subcategories. For example, Box 12's "Record of Service" displays a servicemember's "date entered [active duty] this period," "separation date this

period," "net active service this period," "total prior active service," "total prior inactive service," "foreign service," "sea service," "initial entry training," and "effective date of pay grade." Other boxes are more open-ended, such as "Remarks."

All copies of a DD-214 other than the original include an additional section captioned "Special Additional Information," which comprises seven boxes: "type of separation," "character of service (*including upgrades*)," "separation authority," "separation code," "reentry code," "narrative reason for separation," and "dates of time lost during this period." For servicemembers like Mr. LaBonte who were discharged pursuant to a court-martial, "court-martial" is entered as the "narrative reason for separation."

Because DD-214 provides a comprehensive summary of a veteran's service, submitting a DD-214 has become necessary for accessing the core benefits programs administered by the VA. For example, a veteran seeking wartime disability compensation must establish an injury or disease "contracted in line of duty" and an "other than dishonorable" discharge. 38 U.S.C. § 1110. Unsurprisingly, the VA thus requires applicants for disability compensation to submit their DD-214s.[3]

DD-214s also provide access to programs outside the auspices of the VA. When a veteran enrolls in college, they may typically obtain GI Bill benefits by

[3] *Evidence needed for your disability claim*, Department of Veterans Affairs, https://perma.cc/5XDY-GT8X (last updated June 22, 2020).

providing a DD-214 to the college's registrar.[4] And when a veteran passes away, their family can arrange a military funeral, *see* 10 U.S.C. § 1491(a), by providing the funeral director with a DD-214.[5]

DoD and the services have expressly recognized the role of DD-214 as a passport for navigating the return to civilian life. DoDI 1336.01 states that the DD-214 has "considerable value" for servicemembers in "obtaining veterans benefits, reemployment rights, and unemployment insurance." DoDI 1336.01 at 10. Similarly, several services have emphasized in their regulations the importance of accurate DD-214s. *See, e.g.*, Army Regulation 635–8 § 1-11(o) ("The DD Form 214 is of vital importance to the separating Soldier and must be properly prepared according to prescribed guidance."); Marine Corps Order P1900.16 § 1202(1) ("This is the most important document of service a Marine possesses.").

II. THE COURT-MARTIAL SYSTEM CREATES THE FORMAL "RECORDS" AND "RELATED ADMINISTRATIVE RECORDS" ENCOMPASSED WITHIN SECTION 1552(F).

Courts-martial are military trial courts established pursuant to Congress's powers under Article I, Section 8 of the Constitution. *Solorio v. United States*, 483

---

[4] *Veterans and Military Benefits: VA Status*, Stanford University, https://perma.cc/S95R-GLGX (last visited Mar. 26, 2021); *Veterans Benefits and Financial Aid*, Vassar College Student Financial Services, https://perma.cc/JSB2-CQM5 (last visited Mar. 26, 2021).

[5] *Military Funeral Honors*, National Funeral Directors Association, https://perma.cc/5XS3-W58X (last visited Mar. 26, 2021).

U.S. 435, 438 (1987). Whereas every servicemember eventually receives a DD-214, only a small subset of servicemembers ever face a court-martial. Fewer still are convicted, and not all who are convicted are sentenced to punitive discharges (*i.e.*, a bad-conduct or dishonorable discharge or, in the case of officers, a dismissal).

Numerous records are created during the court-martial process leading to a servicemember's punitive discharge. Those records constitute both the "records of courts-martial" and "related administrative records pertaining to court-martial cases" referred to in Section 1552(f). An overview of the structure of the military justice system and the records generated therein (for which the decision below did not account) indicates the universe of records captured—and excluded from—Section 1552(f)'s two categories.

A. Types Of Courts-Martial

The modern military justice system was created in 1950, when Congress enacted the Uniform Code of Military Justice, Pub. L. No. 81-506, 64 Stat. 107 (May 5, 1950) ("UCMJ") (now codified at 10 U.S.C. §§ 801–941). The Department of Defense has implemented the UCMJ through the Manual for Courts-Martial ("MCM"),[6] which contains the Rules for Courts-Martial ("R.C.M.") (the equivalent

[6] This brief references the current version of the MCM, which went into effect on January 1, 2019. *See* MCM (2019 ed.), https://perma.cc/SR9D-EJZR. Although this version of the MCM was not in effect during Mr. LaBonte's court-martial proceeding, none of the changes made since Mr. LaBonte's proceeding are material to the statutory interpretation question at issue or the arguments in this brief.

of the Federal Rules of Criminal Procedure); the Military Rules of Evidence; and the punitive articles of the UCMJ (specific offenses that can result in punishment by court-martial). Each service branch supplements the MCM. *See, e.g.*, Department of the Army, Army Regulation 27-10, *Legal Services: Military Justice* (Nov. 20, 2020); Manual for the Judge Advocate General (Navy and Marine Corps).

Courts-martial "adjudicate charges against service members . . . involving a wide range of offenses, including crimes unconnected with military service," and "levy appropriate punishment." *Ortiz v. United States*, 138 S. Ct. 2165, 2170–71 (2018). There are three types of courts-martial: general, special, and summary. 10 U.S.C. § 816. Each type has a different jurisdiction and is authorized to adjudge different punishments. Generally, the seriousness of the offense determines the type used.

Summary courts-martial are non-criminal fora that are composed of one commissioned officer and "adjudicate minor offenses under a simple procedure." R.C.M. 1301(b); 10 U.S.C. §§ 816(d), 820(b); *see also Middendorf v. Henry*, 425 U.S. 25, 42 (1976) ("[A] summary court-martial is not a 'criminal prosecution' for purposes of the Sixth Amendment"). Because they consider only minor offenses, summary courts-martial can impose only relatively minor punishments: up to 30 days' confinement; hard labor or restriction to specified limits (*e.g.*, base, barracks, mess hall) for up to 45 days; forfeiture of two-thirds' pay for one month; and

reduction in pay grade. 10 U.S.C. § 820(a). Summary courts-martial cannot punitively discharge a servicemember. *Id.*

Special courts-martial—the type that tried Mr. LaBonte—usually adjudicate offenses equivalent to misdemeanors. *See* 10 U.S.C. § 819(a); Jennifer K. Elsea et al., Cong. Rsch. Serv., RS21850, Military Courts-Martial: An Overview 4 (2005). Composed of a military judge alone or together with four panel members (servicemembers who function like jurors), 10 U.S.C. § 816(c), R.C.M. 502, special courts-martial can adjudge maximum punishments of confinement for one year; hard labor for up to three months; forfeiture of two-thirds' pay for one year; reduction in pay grade; and a bad-conduct discharge, 10 U.S.C. § 819(a).[7]

General courts-martial adjudicate serious criminal offenses comparable to felonies. Composed of a military judge sitting alone or together with eight members (twelve in a capital case), *see* 10 U.S.C. §§ 816(b), 825(a), general courts-martial can impose a range of punishments, including confinement; reprimand; forfeiture of pay and allowances; fines; reduction to the lowest enlisted pay grade; bad-conduct or dishonorable discharge; dismissal; and death, *id.* § 818, R.C.M. 1003.

[7] If composed of a military judge alone because the case was so referred by the convening authority, and not because the accused servicemember so requested, a special court-martial cannot adjudge confinement, or forfeiture of pay for more than six months, or a bad-conduct discharge. 10 U.S.C. §§ 816(c)(2)(A); 819(b).

B. Court-Martial Process

Any person may report an offense subject to court-martial to a military authority, such as law enforcement personnel or an immediate commander. R.C.M. 301. After an offense is reported, a preliminary inquiry or other investigation is conducted, typically by the servicemember's commanding officer. R.C.M. 303. Once the investigation is complete, the commanding officer decides whether to take no action; initiate administrative action; impose a non-judicial punishment; formally charge the servicemember (called preferral of charges); or forward the matter to another authority. R.C.M. 306–307; 10 U.S.C. § 815.

If the commanding officer decides to prefer charges, the commanding officer, assisted by a judge advocate, must prepare a sworn charge sheet that lists the charged offenses and essential facts. R.C.M. 307, 308; 10 U.S.C. § 830. The commanding officer submits this charge sheet to the convening authority—usually, the commander of the accused servicemember's unit—who decides whether to refer the charges to a court-martial. 10 U.S.C. §§ 822–824; R.C.M. 103(6).

Before charges are referred, however, a military judge or, in certain cases, a magistrate, may conduct "pre-referral proceedings," including review of requests for investigative subpoenas and search warrants; the appointment of an individual to represent a victim's interests; and issues related to pretrial confinement, the accused's mental capacity to stand trial, and counsel. 10 U.S.C. § 830a; R.C.M. 309.

A record of pre-referral proceedings must be prepared and, if charges are referred, included in the record of trial. R.C.M. 309(e).

General courts-martial require an additional step before charges are referred: a preliminary hearing, which is like a grand jury and designed to ensure that there is a basis for prosecution. 10 U.S.C. § 832; R.C.M. 405(a). During a preliminary hearing, which must be recorded, the accused servicemember can examine the evidence, cross-examine witnesses, and present argument; all parties, including victims, can submit additional materials for consideration. 10 U.S.C. §§ 832(c)(3), (d); R.C.M. 405(f), (j)(5).

After the preliminary hearing, the hearing officer—an impartial commissioned officer and typically a judge advocate—issues a report to the convening authority's legal advisor with recommendations about whether to move forward with the charges. R.C.M. 405(d)(l), 406(a). The legal advisor then provides the convening authority with a formal written recommendation on how to proceed, R.C.M. 406(b), and the convening authority decides whether to refer or to dismiss the charges, R.C.M. 504; 10 U.S.C. §§ 833–835.

For both general and special courts-martial, after the referral is made but before the trial begins, the parties' counsel exchange documents. From the prosecutor, these include the convening order, charge sheet, and accompanying papers; documents, tangible objects, or reports to be used at trial; a witness list;

records of any prior convictions; information to be presented at sentencing; and evidence favorable to the defense. R.C.M. 701(a). Defense counsel provides evidence, a witness list, and a description of certain intended defenses. R.C.M. 701(b).

Every court-martial trial begins with an arraignment. R.C.M. 1304(b)(2)(B). General and special court-martial trials also include an opening session and, if the servicemember chooses to be tried before members, a process equivalent to *voir dire*, R.C.M. 901, 10 U.S.C. § 841. Each side may then present evidence and examine witnesses. R.C.M. 912–13. After the presentation of evidence and rulings on questions of law by the military judge, the court-martial makes its findings. R.C.M. 918(a). If the court-martial finds the servicemember guilty, it then adjudges a sentence. The parties can present arguments as to the appropriate sentence, including mitigating or aggravating evidence. R.C.M. 1001(a)(1).

After a general or special court-martial issues its verdict and sentence, the military judge enters into the record a Statement of Trial Results ("STR"), which includes each plea entered by the servicemember, the findings, any sentence imposed, and other information required by regulation. 10 U.S.C. § 860(a). The convening authority reviews the STR and statements by the servicemember and victim. *Id.*; *id.* § 860a(e). In certain cases, the convening authority may disapprove a finding or conviction, or reduce, commute, or suspend a sentence. 10 U.S.C.

§ 860a(b)–(d). It must provide a written explanation if it does so. *Id.* § 860a(f)(2). The case then returns to the military judge, who enters the judgment, which consists of the findings, sentence, and any post-trial modifications or supplements. *Id.* § 860c.

A conviction that results in a bad-conduct discharge, dishonorable discharge, or certain other sentences is automatically appealed to a service Court of Criminal Appeals. 10 U.S.C. § 866. If the conviction is affirmed, the servicemember may request review by the Court of Appeals for the Armed Forces and then petition the U.S. Supreme Court for a writ of certiorari. *Id.* § 867; 28 U.S.C. § 1259. All other court-martial convictions are reviewed by a judge advocate and, as necessary, a general court-martial convening authority and Judge Advocate General. 10 U.S.C. § 864.

C. Records Generated In Courts-Martial

As the prior section shows, the court-martial process generates voluminous records. Such records are divided into two categories: (1) the court-martial record, which is a transcript or recording of the proceedings, the evidence admitted, the briefs filed, and a handful of other records related to the composition of the court-martial, and (2) other materials generated during the course of the court-martial. Together, these categories constitute the "records of courts-martial and related administrative records pertaining to court-martial cases tried or reviewed under

chapter 47 of [10 U.S.C.]" referred to in Section 1552(f). Notably, the Court of Federal Claims did not examine the structure of the court-martial system or the guidance provided by the MCM, and so failed to identify this universe of records.

"Record of court-martial" or "court-martial record" is a term-of-art used throughout the MCM to describe a narrow, defined set of materials: a transcript or recording of the open sessions of the court-martial, the evidence admitted, and the appellate exhibits. R.C.M. 1106(c); *see also* Army Regulation 27-10 ¶ 5-45*b*.[8] Appellate exhibits include written offers of proof or preliminary evidence; briefs submitted at trial; any request to be tried by military judge alone; any election of members; any statement by the convening authority explaining why the servicemember's request for certain members cannot be obtained; and any election for sentencing by members. Army Regulation 27-10 App. E-2*x*. The record of court-martial can be generated as soon as the court-martial proceedings have concluded and therefore can be used, for example, by the defense "to submit matters to the convening authority for consideration in deciding whether to take action on either the findings or the sentence." R.C.M. 1106 (Discussion).

In contrast, a "record of trial is not certified until after entry of judgment."

[8] This same meaning is reflected in 10 U.S.C. § 801(14), which provides: "The term 'record,' when used in connection with the proceedings of a court-martial, means (A) an official written transcript, written summary, or other writing relating to the proceedings; or (B) an official audiotape, videotape, or similar material from which sound, or sound and visual images, depicting the proceedings may be reproduced."

R.C.M. 1106 (Discussion). Its contents, which are prescribed by regulation, 10 U.S.C. § 854(c), include the court-martial record and multiple other records. The MCM also requires certain records to be attached to the record of trial. R.C.M. 1112(f); Army Regulation 27-10 ¶ 5-53*c*, App. E-2. The record of trial (other than the court-martial record itself) and the records attached to it constitute the "related administrative records pertaining to a court-martial case."

In a general or special court-martial, the record of trial includes, in addition to the record of court-martial: the charge sheet; the convening order and any amending order; the Statement of Trial Results; any reduction, modification, commutation, or suspension of a sentence by the convening authority; any change of finding(s) or order of rehearing by the convening authority; and the judgment entered into the record by the military judge. R.C.M. 1112(b). In a summary court-martial, the record of trial includes the UCMJ articles alleged to have been violated, the sentence adjudged, and confirmation that the servicemember received notice of various rights. MCM App. 9.

Documents attached to or otherwise allied with the record of trial include: materials concerning pretrial confinement, *e.g.*, the magistrate's memorandum approving or disapproving pretrial confinement; the preliminary hearing officer's report; the formal written recommendation from the convening authority's legal advisor regarding disposition of charges; the record of any former hearings; requests

by counsel concerning matters like delay, witnesses, depositions, and actions of the convening authority taken in response; written special findings by the military judge; exhibits marked for and referred to on the record but not received in evidence; post-trial briefs; clemency papers; requests made by the servicemember or victim for copies of the court-martial record; any deferment request and the resulting action; congressional inquiries and replies; conditions of suspension; waiver or withdrawal of appellate review; records of proceedings in connection with a vacation or suspension of the sentence; and any redacted materials. R.C.M. 1112(f); Army Regulation 27-10 ¶ 5-53*c*, App. E-2.

As this recitation shows, Congress was not writing on a blank slate when it used the terminology in Section 1552(f). It was specifying two known universes of documents—the technical court-martial record on one hand, and the record of trial and affiliated documents on the other. Indeed, the MCM has long distinguished between and described records considered to be "records of courts-martial" and all other records considered to relate to a court-martial case. The first MCM issued after enactment of the UCMJ discussed these records, as did the version in use when Congress enacted Section 1552(f). *See* MCM at 133–134 (1951 ed.) (stating that the "record of the proceedings" is "a verbatim transcript," and that "[a]ccompanying" records include the charge sheet; investigation report; record of former hearings; clemency recommendations and related papers; exhibits deemed inadmissible;

proceedings held outside the presence of the members of a general court-martial; proposed instructions; and a medical officer's certificate of the servicemember's physical condition); *id.* at 524–530 (guide for preparing the verbatim court-martial record and related records); MCM at 16-1–16-2 & App. 9 (1969 ed.) (same).

Congress was aware of these administrative interpretations and can be presumed to have incorporated them into Section 1552(f). *See Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it.") (citation omitted). And Congress has reenacted Section 1552 many times without modification, including after the most recent version of the MCM—from which all the previous paragraphs' citations derive—was issued. *See* National Defense Authorization Act for FY 2020, Pub. L. No. 116-92, 133 Stat. 1198; *Lorillard v. Pons*, 434 U.S. 575, 580 (1978) ("Congress is presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.").

III. DD-214S ARE NOT RELATED ADMINISTRATIVE RECORDS PERTAINING TO COURT-MARTIAL CASES.

Unlike the records just discussed, DD-214 is not a court-martial-related record within the meaning of Section 1552(f). Rather, it is a generic form applicable to all servicemembers and has no specific connection to the military justice system. The statutory basis for the DD-214 is in a different chapter of Title 10 from the UCMJ,

compare 10 U.S.C. § 1168 (Chapter 59) *with* 10 U.S.C. Chapter 47, and neither the UCMJ nor the nearly 800-page-long MCM mentions DD-214. Likewise, DoDI 1336.01, which establishes and implements policy for DD-214, says not a word about courts-martial. *Amici* have collectively tried and reviewed hundreds of courts-martial cases and cannot recall ever having come across a DD-214 in such proceedings.

As explained, DD-214 is a personnel document issued to all servicemembers upon their separation from active duty. *See* Section I, *supra*. It provides a summary of service, capturing everything from the servicemember's date of birth and social security number to their primary specialty and military education to the date, place, and type of separation. Such a sweeping document, created and issued for reasons wholly distinct from the purpose and process of the military justice system, is not a record "related" to "records of courts-martial" and "pertaining to court-martial cases." 10 U.S.C. § 1552(f). When viewed next to the documents that *are* courts-martial-related records, *see* Section II, *supra*, no other conclusion can be drawn.

Moreover, because few servicemembers are court-martialed and fewer still receive punitive discharges, a DD-214 typically makes no reference to a court-martial. In 2014, for example, of the nearly 207,000 servicemembers who left the military, just 793 received punitive discharges. *See* Jim Salter, *Some levels of military discharge can mean no benefits for former service members*, U.S. News

(Dec. 24, 2015).[9]

Further, even if a servicemember has been court-martialed, that fact is not necessarily captured by the servicemember's DD-214. If a servicemember is charged but not tried; tried but not convicted; convicted by a summary court-martial; or convicted by a general or special court-martial and sentenced to something other than a punitive discharge, their DD-214 will not reference the court-martial. Only if a servicemember is referred to a general or special court-martial, convicted, and sentenced to a punitive discharge will the court-martial conviction appear on the form. This disconnect between the court-martial system and DD-214 is more evidence that DD-214 is not encompassed by Section 1552(f).

Additionally, correcting a technical error or removing an injustice on a DD-214 does not implicate Section 1552(f)'s purpose, which is to protect the court-martial process from collateral review through the record-correction process. S. Rep. No. 98-53 at 36–37 (1983). Because a DD-214 has no "legal effect on termination," Army Regulation 635-8 § 5-1, correcting a DD-214's narrative reason for separation to reflect clemency granted on a court-martial sentence does not encroach on any "issues of law concerning the court-martial process"—it does not

[9] *See also* Department of Defense, Memorandum for Office of General Counsel of the Department of Defense Re: Reports of the Services on Military Justice for FY 2018 at 13 (Aug. 26, 2019), https://perma.cc/9QJA-3N4Y (In FY 2018, the Army had 618 courts-martial trials, 540 convictions, and 312 punitive discharges or dismissals).

"modify, as a matter of law, findings or sentences of courts-martial." S. Rep. No. 98-53 at 36–37. Both before and after the correction, the conviction—and any record of it in federal and state criminal databases[10]—stands undisturbed.

In fact, failing to remove mention of a court-martial from the narrative reason for separation after the Board has granted clemency on the sentence renders the DD-214 inaccurate and undermines the purpose of clemency. As noted, a court-martial conviction does not itself trigger a servicemember's discharge; the servicemember must be sentenced to a punitive discharge, and that discharge must be ordered executed. If the punitive-discharge portion of a sentence is commuted, as Mr. LaBonte's was, then the conviction can no longer be the reason for separation.

Some issues of military law are complex. This one is not. DD-214 is not a "record of court-martial." It is not the transcript or recording of the court-martial proceeding, the evidence submitted, or an appellate exhibit. Nor does it "relate[]" to records of courts-martial and "pertain[] to court-martial cases tried or reviewed under chapter 47." 10 U.S.C. § 1552(f). It has no inherent connection to court-martial proceedings, and even servicemembers who are tried by courts-martial do not necessarily have DD-214s that reflect those courts-martial. Indeed, the trial court

[10] *See, e.g.*, Department of the Navy, Office of the Judge Advocate General, Post-Trial Processing (Sept. 6, 2019), Encl. 2: Post-Trial Checklist, https://perma.cc/MMU2-WTHC (listing reporting requirements following a court-martial conviction); *id.* Encl. 5: Post-Trial Gun Control Act of 1968 Reporting Requirements.

did not conclude that *all* DD-214s fall within Section 1552(f)—just the small fraction belonging to servicemembers discharged pursuant to court-martial convictions. But nothing in the statutory text, structure, or legislative history indicates that Congress wanted the Board to individually assess every official paper for any reference to courts-martial. Section 1552(f) specifies two categories of records connected to courts-martial. And as a categorical matter, the DD-214 has nothing to do with courts-martial.

IV. THE TRIAL COURT'S CONSTRUCTION FRUSTRATES THE PURPOSE OF THE STATUTE AND LEADS TO INJUSTICE.

Regardless of whether the text of Section 1552(f) and the structure of the UCMJ can bear the trial court's construction, that construction would frustrate the purpose of the statute and lead to unjust results and should be rejected on that basis alone. Specifically, if read broadly, the trial court's construction could prevent the Board from fixing clerical errors and from implementing monumental changes to the military justice system.

A. Clerical Errors

Under one reading of the trial court's construction of Section 1552(f), the Board cannot fix any aspect of a DD-214 that notes a court-martial conviction—even basic details like a servicemember's name or birthday. Section 1552(f)'s prohibition is aimed at certain "records," not at specific information within records. Thus, following the trial court's position to its natural conclusion, the presence of

the word "court-martial" in Box 28 of a DD-214 renders the *entire* DD-214 uncorrectable. Because DD-214 is the only proof of a servicemember's active-duty service, it would be illogical and unjust if the Board—which is expressly empowered to "correct any military record," 10 U.S.C. § 1552(a)—could not correct a scrivener's error like a mistyped name, birthday, or station of service simply because the servicemember had been tried by a court-martial.

Even if the trial court's decision is read to prohibit the Board only from correcting court-martial-specific information within a record, that reading would prevent the Board from fixing a DD-214 which incorrectly indicates that a servicemember was discharged by a court-martial. Although Mr. LaBonte sought to correct his DD-214 in conjunction with his (successful) effort to upgrade his discharge, a veteran could seek an identical DD-214 correction for a much simpler reason: the veteran was not discharged by a court-martial. It is not hard to imagine a scenario where a servicemember is convicted by a special court-martial but the sentence does not include a bad-conduct discharge, and the servicemember later leaves active duty pursuant to an administrative discharge that relies on findings of fact made in the court-martial. The official responsible for preparing that veteran's DD-214 might misread this timeline and incorrectly record on the DD-214 that the servicemember was separated pursuant to a court-martial. Under the trial court's construction of Section 1552(f), the servicemember could not ask the Board to

correct the DD-214—an indisputably unjust result.

B. Changes To The Military Justice System

The trial court's construction of Section 1552(f) also could thwart major changes to the military justice system, such as the repeal of UCMJ Article 125.

Until 2013, Article 125 of the UCMJ prohibited "unnatural carnal copulation with another person of the same or opposite sex or with an animal." UCMJ, 64 Stat. 141. Although this provision purported to prohibit only sex acts, historically it was used to prohibit gay, lesbian, and bisexual individuals from serving in the military entirely. By the mid-1970s, it was settled that "in-service homosexuality" would be punished with a "general discharge" and "homosexual acts" would be punished with an "undesirable discharge." Bradley K. Jones, *The Gravity of Administrative Discharges: A Legal and Empirical Evaluation*, 59 Mil. L. Rev. 1, 3 (1973).

In 1993, the Clinton Administration adopted "Don't Ask, Don't Tell," which provided that a "person's sexual orientation is considered a personal and private matter, and is not a bar to service entry or continued service unless manifested by homosexual conduct"—which was defined to include "a statement by a member that demonstrates a propensity or intent to engage in homosexual acts." Department of Defense Directive 1304.26 § E1.2.8.1-2 (Dec. 21, 1993). Although the Clinton Administration specified that discharges for homosexual conduct would be honorable unless certain aggravating circumstances were present, *see* Department of

Defense Directive 1332.14 § 1-10 (Dec. 21, 1993), for those discharged administratively (rather than by court-martial), corresponding DD-214s still indicated homosexual conduct as the narrative reason for separation, *see* Jennifer McDermott, *Few vets expelled under 'don't ask' seek remedy*, Military Times (June 24, 2016).

By the time "Don't Ask, Don't Tell" and Article 125 were repealed,[11] around 114,000 servicemembers had been discharged because of their sexual orientation. *See* Harvard Law School Legal Service Center, et al., *Pursuing Justice for LGBTQ Military Veterans: A Summary Report from a Two-Day Summit Held at Harvard Law School* at 5 (Apr. 19, 2018), https://perma.cc/S8PM-XHWQ. For servicemembers discharged via court-martial prior to "Don't Ask, Don't Tell," obtaining discharge upgrades—and concomitant corrections of their DD-214s—has allowed them to receive veterans' benefits for the first time. *See, e.g.*, *id.* at 14–18; Matthew S. Bajko, *Vets kicked out for being gay can upgrade their discharges*, The Bay Area Reporter (Feb. 19, 2020); Robert D. McFadden, *Melvin Dwork, Once Cast from Navy for Being Gay, Dies at 94*, N.Y. Times (June 17, 2016).[12] Preventing

[11] *See* Don't Ask Don't Tell Repeal Act of 2010, Pub. L. No. 111-321, 124 Stat. 3515; National Defense Authorization Act for FY 2014, Pub. L. No. 113-66, 127 Stat. 672, 961.

[12] Although servicemembers discharged under "Don't Ask, Don't Tell" are not categorically excluded from veterans' benefits, some have sought to correct their DD-214s as well. *See* McDermott, *supra*; *see also* Clifford L. Stanley, Under

these servicemembers from correcting their DD-214s would be unjust—but that is precisely what the trial court's decision could do. In other words, under the trial court's construction of Section 1552(f), servicemembers who were convicted and punitively discharged for violating Article 125 and therefore were most wronged by the military's criminalization of homosexual conduct—conduct that was deemed constitutionally protected for years before Article 125's repeal, *see Lawrence v. Texas*, 539 U.S. 558, 578-79 (2003)—could not ask the Board to correct the reference to their court-martial conviction in the narrative reason for separation on their DD-214 even if they obtained clemency on their sentence. Left undisturbed, the trial court's decision thus could prohibit the Board from correcting DD-214s when a sea change in the military justice system calls into question past court-martial convictions.

CONCLUSION

The Court of Federal Claims' conclusion that DD-214 is a "related administrative record pertaining to court-martial cases" fundamentally misunderstands the role of DD-214, the military justice system, the universe of

---

Secretary of Defense for Personnel and Readiness, Memorandum for Secretaries of the Military Departments Re: Correction of Military Records Following Repeal of Section 654 of Title 10, United States Code (Sept. 20, 2011), https://perma.cc/MP8D-B8HX (permitting the boards to consider the repeal of "Don't Ask, Don't Tell" in evaluating requests by servicemembers discharged under the policy "to change the narrative reason for a discharge").

records that actually constitute a record of court-martial or pertain to courts-martial cases, and the plain language and purpose of Section 1552(f). That decision should be reversed.

Respectfully submitted,

Dated: March 26, 2021

By: */s/ Elias S. Kim*

Kathleen R. Hartnett
Julie Veroff
COOLEY LLP
101 California Street, 5th Floor
San Francisco, CA 94111-5800
Telephone: (415) 693-2000
khartnett@cooley.com
jveroff@cooley.com

Elias S. Kim
COOLEY LLP
1299 Pennsylvania Ave. NW, Ste. 700
Washington, DC NW 20004-2400
Telephone: (202) 842-7800
ekim@cooley.com

Counsel for Amici Curiae *Military Law Practitioners*

CERTIFICATE OF SERVICE

I hereby certify that on March 26, 2021, I caused the foregoing brief to be electronically filed with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the CM/ECF system which caused a copy of the foregoing to be delivered by electronic means to counsel of record.

/s/ Elias S. Kim
Elias S. Kim
Cooley LLP
1299 Pennsylvania Ave. NW, Ste. 700
Washington, D.C. 20004
Phone: (202) 842-7800
ekim@cooley.com

Counsel for Amici Curiae *Military Law Practitioners*

CERTIFICATE OF COMPLIANCE

I hereby certify that:

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) and 32(a)(7)(B) and Federal Circuit Rule 32(a) in that the brief contains 7,000 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

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

/s/ Elias S. Kim
Elias S. Kim
Cooley LLP
1299 Pennsylvania Ave. NW, Ste. 700
Washington, D.C. 20004
Phone: (202) 842-7800
ekim@cooley.com

Counsel for Amici Curiae *Military Law Practitioners*