STATEMENT OF

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BEFORE THE
THE HOUSE COMMITTEE ON VETERANS' AFFAIRS

REGARDING H.R. 5083

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EXECUTIVE SUMMARY

The VA Appeals Modernization Act of 2016, H.R. 5083, provides a far-reaching restructuring of the VA administrative appeals process. It contains many positive features that are likely to decrease appeal times while providing claimants with various options for pursing their appeals. As with any substantial change to a complex system, there will clearly be effects that we cannot now predict. But given that the current appeals process is not functioning well, we have ultimately concluded that the proposed legislation – even without being able to predict all of its effects – is a necessary step, with two important caveats.

First, an amendment to the proposed legislation is needed to avoid the litigation and disruption of the appeals process that will be generated by the way VA officials are interpreting the proposed legislation. According to VA officials, including Secretary McDonald, after a Board of Veterans' Appeals decision disallowing a claim, the veteran would be required under the proposed legislation to make a choice between (i) appealing to the Court of Appeals for Veterans Claims and (ii) filing a supplemental claim with the regional office, in order to preserve the date of filing the initial claim as the potential effective date. Before this legislation is passed, Congress should amend the proposal to prevent VA's interpretation, since the choice VA wishes to impose on veterans is contrary to the interests of justice and the pro-claimant process that Congress long ago created.

Second, amendments are necessary to provide (a) an effective date for the streamlined appeals process set forth in H.R. 5083 and (b) guidelines for how VA will integrate the new appeals process contained in the bill with the inventory of more than 450,000 currently pending VA appeals. We urge Congress to appropriate a significant amount of additional money on a temporary basis for VA to use exclusively to tackle the backlog of currently pending appeals. We also recommend that before further action is taken on this bill, the VA should propose -- and veterans organizations and other stakeholders be given an opportunity to comment on -- both VA's proposed effective date for H.R. 5083 and provisions containing the formula VA will use to allocate its adjudication resources (i) between appeals on the hearing docket and appeals on the non-hearing docket created by H.R. 5083 and (ii) between appeals that are pending on the proposed effective date and appeals docketed after that effective date.

Mr. Chairman and Members of the Committee:

Thank you for inviting both of our organizations to submit written testimony concerning H.R. 5083, the VA Appeals Modernization Act of 2016, an important legislative effort to reform the veterans claims and appeals process in the United States Department of Veterans Affairs (VA).

The National Veterans Legal Services Program (NVLSP) is a nonprofit veterans service organization founded in 1980 that has been providing free legal representation to veterans and assisting advocates for veterans for the last 36 years. NVLSP has represented veterans and their survivors at no cost on claims for veterans benefits before the VA, the U.S. Court of Appeals for Veterans Claims (CAVC), and other federal courts. As a result of NVLSP's representation, the VA has paid more than $4.6 billion in retroactive disability compensation to hundreds of thousands of veterans and their survivors.

NVLSP publishes numerous advocacy materials, recruits and trains volunteer attorneys, trains service officers from such veterans service organizations as The American Legion, the Military Order of the Purple Heart and the Military Officers Association of America in veterans benefits law, and conducts local outreach and quality reviews of the VA regional offices on behalf of The American Legion. NVLSP is one of the four veterans service organizations that comprise the Veterans Consortium Pro Bono Program, which has, since 1992, recruited and trained volunteer lawyers to represent veterans who have appealed a Board of Veterans' Appeals decision to the CAVC without a representative. In addition to its activities with the Pro Bono Program, NVLSP has trained thousands of veterans service officers and lawyers in veterans benefits law, and has written educational publications that thousands of veterans advocates regularly use as practice tools to assist them in their representation of VA claimants.

Stetson University is a private liberal arts education located in Florida. As part of its College of Law, Stetson University established the Veterans Law Institute (VLI) in 2012. The VLI is committed to serving the needs of veterans in Florida and across the nation. It does so through various means including engaging in public policy debates, arranging for pro bono legal services for veterans, and operating a clinic in which Stetson Law students represent veterans concerning claims for benefits before the Department of Veterans Affairs and the federal courts. Professor Allen is a member of the faculty at the College of Law and also serves as the College of Law's Associate Dean for Academic Affairs. He is the Director of the VLI and speaks and writes frequently about veterans' benefits matters.

H.R. 5083

Over the last several months, NVLSP has participated with a workgroup of veterans service organizations convened by the VA to find common ground on a set of reforms to address the serious dysfunctions that exist in the current VA appeals process. The text of H.R. 5083 is the same as the text of the draft bill that VA has developed during this discussion.

We believe H.R. 5083 is a welcome attempt to address the serious problems veterans and their dependents face in processing appeals in the VA. We are generally favorable to the bill, with several important caveats discussed below. To be clear, we believe the problems we have

identified below can be addressed now. If they are, we support this bill as an innovative means of addressing the systemic delays claimants face in the dealing with their VA appeals.

Before we address the merits of the H.R. 5083 in more detail, we begin with a general point that is important to remember. The proposed structuring of the administrative appeals process envisioned under the bill is far-reaching. As with any change to a complex system, there will clearly be effects that we cannot now predict. We have considered this reality quite seriously. If the system were functioning generally well, a concern with unintended consequences might be sufficient to oppose such a comprehensive change in the system. But we are not dealing with a well-functioning system. Given that state of affairs, we have ultimately concluded that the proposed legislation – even without being able to predict all of its effects – is a necessary step. We support it with the changes we discuss below.

I. POSITIVE FEATURES OF THE PROPOSED LEGISLATION

We briefly highlight the significant positive features of the changes envisioned under H.R. 5083. Taken together, we believe these features of H.R. 5083 will decrease appeal times while providing claimants with various options for pursing their appeals. The most significant positive features in the proposed legislation are:

- H.R. 5083 provides for enhanced "notice letters" to veterans and other claimants concerning the denial of their claims. Enhanced notice is critically important to veterans as they make determinations about how to proceed when they are dissatisfied with a VA decision.

- H.R. 5083 also eliminates the requirements under current law concerning the preparation of a Statement of the Case (SOC), the veteran's corresponding need to complete an additional step to perfect an appeal to the Board (i.e., VA Form 9) and VA's subsequent need to certify the appeal by completing VA Form 8. While there may have been a time at which the SOC served a useful function in this system, the enhanced "notice letters" required by the proposal eliminate the need for an SOC. Thus, the SOC process serves only to delay the processing of claims.

- H.R. 5083 lowers the standard necessary for re-opening a claim under Section 5108. The current standard of "new and material evidence" is replaced with "new and relevant evidence." While we address below two concerns – one involving supplemental claims and one involving the wording of the new lower standard -- the lowering of the standard is critically important. In addition, and as we discuss in more detail below, the revised Section 5108 will allow veterans to obtain earlier effective dates in many circumstances than they would be able to do under the current version of this provision.

- H.R. 5083 allows veterans a meaningful choice when they appeal to the Board of Veterans' Appeals (Board). A veteran may elect to forgo the submission of new evidence and a hearing in cases in which he or she determines such an approach is best. This would provide for more expeditious treatment of such appeals. On the other hand, a veteran can elect to proceed on a track in which the submission of new evidence and a

hearing is allowed. This dual-track approach recognizes the reality that not all appeals are alike.

- H.R. 5083 allows a claimant to seek the assistance of a lawyer for pay after an initial denial but before the filing of a Notice of Disagreement (NOD). This is a change from current law in which a lawyer may not charge a fee before the filing of an NOD. While seemingly a small change, we believe this is significant because the structure of the proposed new system provides claimants with myriad ways in which to proceed. Advice to such claimants will be critical and the proposed change allows more options for that advice.

- We believe H.R. 5083 also reduces the means by which the VA can "develop to deny." NVLSP has reviewed many regional office and BVA cases in which the existing record before the VA supports the award of benefits, but instead of deciding the claim based on the existing record, VA has delayed making a decision on the claim by taking steps to develop additional evidence for the apparent purpose of denying the claim. Certain aspects of the current proposal – for example, the restriction on the application of the duty to assist at the Board – will likely reduce such actions.

II. PROBLEM ONE: The Need to Clarify the Right to Both Appeal to the CAVC and File a Supplemental Claim Simultaneously to Protect the Claimant's Effective Date

NVLSP's support of the critically important positive changes to the administrative appeals process contained in H.R. 5083 comes with several critical caveats. The first caveat is contained in this part of our testimony.

Currently, after a Board decision that disallows a claim, the claimant may file both (i) an appeal with the Court of Appeals for Veterans Claims (CAVC) under Chapter 72 and (ii) a claim with the Agency of Original Jurisdiction (AOJ) under Section 5108 to "reopen the claim" disallowed by the Board "and review the former disposition of the claim," when the claimant submits "new and material evidence." In other words, the claimant does not have to choose between appealing to the CAVC and filing a claim with the AOJ to reopen under Section 5108. The claimant may freely take both actions.

H.R. 5083 renames a Section 5108 claim as a "supplemental claim" and lowers the threshold requirement to obtain readjudication of the previously disallowed claim by substituting the language "new and relevant evidence" for "new and material evidence." In addition, no language in H.R. 5083 indicates an intent to change existing law allowing a claimant, after a Board decision that disallows the claim, to file simultaneously both a timely appeal with the CAVC and a Section 5108 claim with the AOJ.

Nonetheless, VA officials have repeatedly represented to the veterans service organizations that if H.R. 5083 is enacted as currently worded, the options available to a claimant will change. According to these VA officials, including Secretary McDonald, after a Board decision disallowing a claim, the claimant would now be required by law to make a choice

between appealing to the CAVC and filing a supplemental claim with the RO in order to preserve the date of filing the initial claim as the potential effective date if the claim disallowed by the Board is ultimately granted. As background, after a Board decision disallowing a claim, the claimant may file under the proposed bill a Section 5108 supplemental claim within one year of the Board decision disallowing the claim. If that supplemental claim were ultimately granted, the proposed bill's amendment to Section 5110 would enable the claimant to be assigned the date of filing the initial claim, rather than the date of filing the supplemental claim, as the effective date of the award, as long as the other Section 5110 criterion for assignment of that early effective date is satisfied.

We strongly support this part of H.R. 5083. Nonetheless, VA officials have repeatedly represented that under H.R. 5083, if a claimant, after a Board decision disallowing a claim, were to file a timely appeal of the Board decision with the CAVC and lose on appeal, the claimant would incur the following penalty: the claimant could not lawfully be assigned the date of filing the initial claim as the effective date even if the claimant filed a Section 5108 supplemental claim within one year of the Board decision and the VA granted the supplemental claim.

If H.R. 5083 is enacted without a change in language to clarify this matter, and VA continues to insist that a claimant must choose between an appeal to the CAVC and a supplement claim under Section 5108 in order to preserve the date of filing the initial claim as the potential effective date, this matter will inevitably have to be resolved by the federal courts. Final judicial resolution would likely take years. To be clear, we believe the VA's currently articulated approach is not consistent with H.R. 5083. But we also realize that it is difficult to predict how courts will resolve legal disputes. No matter how this legal dispute is ultimately resolved, during the years this litigation is pending in court, there would likely be a significant disruption to the VA claims adjudication process and further delays experienced by VA claimants.

Congress should clarify this matter before passing H.R. 5083 to avoid litigation and a disruption to the claims adjudication process. We suggest adding the following clarifying language. First, add the following to the end of line 25 on page 6 of amended Section 5108:

> After a decision of the Board of Veterans' Appeals that disallows a claim, nothing in this title shall be construed to limit the right to pursue at the same time both (i) an appeal of such Board decision to the United States Court of Appeals for Veterans Claims under chapter 72 of this title, and (ii) a supplemental claim under this section seeking readjudication of the claim disallowed by such Board decision.

Second, on line 19 of page 8, redesignate subsection (a)(3) as subsection (a)(4) and add a new subsection (a)(3) containing the following language:

> (3) For purposes of subsection (a)(2), a claim is continuously pursued by filing a supplemental claim under section 5108 of this title within one year of a decision of the Board of Veterans' Appeals without regard to either (i) the filing under chapter 72 of this title of a notice of appeal of such Board decision or (ii) the final decision of the Court of Appeals for Veterans Claims under chapter 72 of this title.

It is contrary to the interests of justice and the pro-claimant process that Congress has created to require claimants to make a choice between filing an appeal with the CAVC and filing

a supplemental claim with the RO within one year of the Board decision in order to preserve the date of filing the initial claim as the potential effective date. Each of these two options serves an entirely different purpose. Claimants appeal to the CAVC to correct a prejudicial legal error that they believe the Board made in disallowing the claim, such as a misinterpretation of the law or a violation of the statutory duty to assist by failing to provide the claimant with an adequate medical examination or medical opinion. Claimants file a Section 5108 claim for an entirely different reason. They file a Section 5108 claim in an effort to add positive evidence to the record so that the weight of the positive evidence is equal to or greater than the weight of the negative evidence of record, in an attempt to convince VA that the claim should be granted even under VA's existing view of its legal requirements.

What VA seeks is to force veterans whose claims are disallowed by the Board to make an unfair choice between two options. According to VA's interpretation of H.R. 5083, each choice alone has a potentially fatal consequence. If the veteran chooses the option of appealing to the CAVC, the veteran cannot add evidence to the record and is essentially limited to arguing that the Court should vacate and remand the Board's decision due to legal error. A fatal consequence occurs if the Court upholds the Board's interpretation of law (as it does in approximately 30% of all appeals). The veteran's right to the date of filing of the initial claim as the potential effective date is lost forever. While the veteran may be able to file a Section 5108 supplemental claim with new and relevant evidence despite the Court defeat, VA's position is that success on that supplemental claim cannot validly lead to an award of benefits retroactive to the date of filing the initial claim that was disallowed by the Board.

On the other hand, if the veteran gives up the right to appeal to the CAVC to challenge the Board's interpretation of the law by choosing the other option -- filing a Section 5108 supplemental claim within a year of the Board decision -- the veteran enjoys the benefit of being able to add new positive evidence to the record. But the VA's view of what the law requires will most likely be the same as the Board's view of the law when it disallowed the initial claim. Thus, the veteran must shoulder the burden of attempting to convince VA that it should award benefits under an unfavorable view of the law with which the veteran disagrees. Thus, the chance of success is obviously lower than it would be if VA was required to adjudicate the supplemental claim under the veteran's more favorable view of what the law requires.

To be clear then, under the VA's proposed approach, a veteran would need to decide between preserving his or her effective date by filing a supplemental claim or potentially correcting a legal error in the Board's decision through the judicial process. A veteran should not be put in such a position. The interests of justice and maintenance of the pro-veteran claims process that Congress has nurtured for decades should lead Congress to clarify H.R. 5083 by adding language that makes it plain that after a Board decision disallowing a claim, the veteran has the right to protect the date of filing the initial claim as the effective date by both filing an appeal with the CAVC to correct a prejudicial legal error made by the Board and filing a Section 5108 supplemental claim in an effort to convince VA that the newly added evidence shifts the weight of the evidence so that VA awards benefits even under its unfavorable view of its legal requirements.

III. PROBLEM TWO: H.R. 5083 Needs to be Amended to Provide An Effective Date and for Handling the Inventory of Pending Appeals

H.R. 5083 lacks an effective date. In addition, it does not address how VA should integrate the streamlined appeals process contained in the draft bill with the inventory of more than 450,000 currently pending VA appeals. H.R. 5083 needs to be amended to address both of these issues.

During the ongoing discussions between the VA and the veterans service organizations and other stakeholders regarding the reforms contained in H.R. 5083, the VA recently staked out a position on both of these two important issues. Under the VA's proposal, it appears that the VA would ultimately issue decisions on many new appeals filed after the effective date of the draft bill ***before*** it issues decisions on many of the 450,000 currently pending appeals. Indeed, it appears to us that under VA's recent proposal, many of the currently pending appeals would be decided by VA ***years*** after many new appeals are decided by the VA. NVLSP and the VLI object to such an unfair system.

We have three suggestions regarding the effective date and the need to address the existing inventory of pending appeals. First, we urge Congress to appropriate a significant amount of additional money on a temporary basis for VA to use exclusively to tackle the backlog of currently pending appeals.

Second, the VA should propose in advance both an effective date for H.R. 5083 and provisions that address the following two issues regarding VA allocation of its resources under H.R. 5083:

(1) The formula that VA will use to allocate its resources between adjudicating appeals on the non-hearing option Board docket versus adjudicating appeals on the hearing option Board docket under H.R. 5083's amendment to Section 7107 of Title 38. It is important to address this issue to ensure that BVA decisions on hearing docket cases are not unduly delayed in comparison to cases on the non-hearing option docket due to over allocation of BVA resources to deciding appeals on the non-hearing docket. Transparency in this matter is very important.

(2) Before H.R. 5083 is passed, it should be amended to provide the formula VA will use to allocate its resources between adjudicating appeals pending at the VA prior to the proposed effective date of the draft bill and appeals docketed after that effective date. It is important to address this issue to prevent the unfairness to veterans with appeals already pending when the bill goes into effect. It would be fundamentally unfair if these appellants have to wait many years longer to receive a BVA decision than do veterans who file appeals after the draft bill goes into effect because the VA assigned most of its resources to deciding appeals filed after the draft bill goes into effect.

Third, after VA submits its proposal on these matters, veterans service organizations and other stakeholders should be given an opportunity to provide Congress with their views on the VA proposal.

Conclusion

Thank you for this opportunity to present our views, and we would be pleased to respond to any questions that Members of the Committee may have.

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