WILMERHALE LEGAL SERVICES CENTER
OF HARVARD LAW SCHOOL

**Statement of Peter Perkowski**
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**before an Open Session Legislative Hearing, covering**
**H.R. 1596, H.R. 2385, H.R. 2806, H.R. 3930, H.R. 4845,**
**and several Discussion Drafts**

**of the Subcommittee on Oversight and Investigations of the**
**U.S. House of Representatives' Committee on Veterans' Affairs**
**September 22, 2021**

Chairman Pappas, Ranking Member Mann, and Distinguished Members:

My name is Peter Perkowski, and I am a Clinical Instructor at the Veterans Legal Clinic (VLC), one of six clinical offerings of the Legal Services Center (LSC) of Harvard Law School, the school's oldest and largest clinical teaching facility. At the VLC, my colleagues and I represent veterans and their families before state and federal agencies, including the Department of Veterans Affairs, using creative legal strategies to vindicate the rights of individual veterans as well as to pursue systemic reforms within the institutions and programs that are designed to support the veteran community. The VLC is at the front lines of the effort to improve the lives of our neediest veterans and their loved ones.

Previously, I served as the Legal & Policy director of OutServe-SLDN (now known as the Modern Military Association of America), a non-profit civil-rights organization dedicated to fighting inequality and injustice against military personnel and veterans based on sexual orientation, gender identity, or HIV status.

Over years of advising and assisting service members and veterans with direct legal services and advocacy, I have witnessed the many ways in which past discrimination based on sexual orientation, gender identity, and HIV status continues to affect veterans' ability to access VA programs and services. I therefore appreciate the platform this Committee is affording me, and the VLC, to discuss these issues. I am grateful for the opportunity to contribute to the work you are doing on behalf of LGBTQ veterans and all veterans.

**Commission to Study Inequity for LGBTQ Servicemembers and Veterans Act (H.R. 1596)**

We support Chairman Takano's proposal to study the continuing effect on LGBTQ veterans of the history of discrimination, criminalization, and exclusionary military policies. Many LGBTQ veterans carry around trauma from their experiences under these policies. A recent report by the LSC of Harvard Law School (and others) documents some of the harms, their effects on LGBTQ veterans, and the challenges of correcting the wrongs.[1] But no report has comprehensively studied the lasting effects of the inequity—and certainly no government agency or commission has examined these issues and reported on them. Accordingly, to contextualize Chairman Takano's proposal, and our response to it, we believe some historical background would be helpful.

### *A. Institutionalized discrimination against non-heterosexual conduct and identity*

For much of recent history, same-sex sexual activity was uniformly criminalized across much of the world, including the United States. Military law was especially intrusive and punitive. From the Articles of War of 1916 through the Uniform Code of Military Justice (U.C.M.J.) in 1951, the military outlawed "unnatural carnal copulation."[2] As interpreted by military courts, the sodomy prohibition in Article 125, U.C.M.J., applied to "sodomy whether it is consensual or forcible, heterosexual or homosexual, public or private."[3] As a practical matter, this interpretation subjected every sexually active LGBTQ person in the Armed Forces to criminal conviction, regardless of circumstances.

For civilians, laws criminalizing private consensual sexual activity between members of the same sex were not struck down as unconstitutional until 2003.[4] But even afterward, the military criminal justice system continued to punish consensual sodomy in some situations.[5] The proscription against consensual sodomy lasted until 2013, when Article 125, U.C.M.J., was amended to cover only sodomy by force or without consent and bestiality.[6] Three years later, sodomy was removed from the U.C.M.J., and its offenses were incorporated into the "Rape and Sexual Assault" article.[7]

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[1] *Do Ask, Do Tell, Do Justice*: *Pursuing Justice for LGBTQ Military Veterans* (June 2018), available at https://legalservicescenter.org/wp-content/uploads/2012/10/Do-Ask-Do-Tell-Do-Justice-Summit-Report-June-2018.pdf.

[2] *See* Art. 125, U.C.M.J., 10 U.S.C. § 925 (since repealed).

[3] *U.S. v. Marcum*, 60 M.J. 198, 202 (C.A.A.F. 2004).

[4] *See Lawrence v. Texas*, 539 U.S. 558 (2003).

[5] *See Marcum*, 60 M.J. at 206-08.

[6] *See* National Defense Authorization Act for Fiscal Year 2014, Pub. L. 113-66, § 1707, 127 Stat. 672, 961 (2013), *codified at* 10 U.S.C. § 925 (Art. 125, U.C.M.J.) (since repealed).

[7] *See* National Defense Authorization Act for Fiscal Year 2017, Pub. L. 114-328, § 5430 (Article 120, rape and sexual offenses), § 5439 (Article 125, kidnapping), 130 Stat. 2000, 2949, 2953 (2016).

In addition to policing queer sexuality, military law de facto criminalized non-heterosexual *identity*. From 1993 to 2011, federal law declared that homosexuality was incompatible with military service, providing that "[t]he presence in the armed forces of persons who demonstrate a propensity or intent to engage in homosexual acts would create an unacceptable risk to the high standards of morale, good order and discipline, and unit cohesion that are the essence of military capability."[8]

### *B. Regulatory pathologizing of transgender service members*

Similarly, for 70 years the military dealt with transgender people by pathologizing identity. It began in 1953, when President Eisenhower declared "sexual perversion" and "treatment for serious mental or neurological disorder" as security risks, and thus grounds for denying federal employment.[9] The Executive Order was used to exclude transgender people from military service.

The first regulations directed to non-conforming gender identities—which were improperly referred to as transvestitism, cross-dressing, or transsexualism—appeared in 1963, when Army Medical Standards disqualified people with "behavioral disorders," including "as evidenced by … transvestism [sic]." [10] Regulations later declared transgender people disordered and abnormal, physically and mentally: For example, a DOD Directive established as grounds for rejection "[t]ranssexualism and other gender identity disorders." [11] Medical standards classified gender identity and gender transition as "paraphilia"—that is, an abnormal or "deviant" sexual practice.[12] The same regulations characterized some medical transition treatments as "abnormalities."[13] Many of these regulations existed until 2016.[14]

### *C. Resulting historical mistreatment of LGBTQ service members*

The policies and regulations summarized above created a perilous environment for LGBTQ

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[8] 10 U.S.C. § 654 (since repealed).

[9] *See* Exec. Order No. 10,450, 18 Fed. Reg. 2,489, 2,491 § 8(a)(1)(iii), (iv) (Apr. 27, 1953).

[10] AR 40-501 ¶ 6-32(b) (May 17, 1963).

[11] DoDD 6130.3 ¶ 2-34(b) (Mar. 31, 1986).

[12] *See* DoDI 6130.4 Encl. 1 ¶ E1.25.15 (Jan. 18, 2005) ("Current or history of psychosexual conditions … , including, but not limited to transsexualism, exhibitionism, transvestism [sic], voyeurism, and other paraphilias, are disqualifying.").

[13] *See id.* ¶¶ E1.12.5, E1.13.10 ("History of major abnormalities or defects of the genitalia such as change of sex … is disqualifying.").

[14] The Obama Administration modernized accession and retention standards applicable to transgender people in 2016. *See* Directive Type Memorandum ("DTM") 16-005 (June 30, 2016). The policy briefly changed again in 2018, *see* DTM 19-004 (Mar. 12, 2019), then reverted back in 2021. *See Executive Order on Enabling All Qualified American to Serve Their Country in Uniform*. Exec. Order No. 14,004, 86 Fed. Reg. 7,471 (Jan. 25, 2021).

service members, frequently resulting in unjust and punitive outcomes.

Article 125, U.C.M.J., was frequently used to punish mutually consenting LGBTQ adults, meaning that LGBTQ service members bore the brunt of the military's efforts to regulate sex. The criminalization of non-heterosexual identity combined with the policing of sexuality was disastrous: the military often leveraged the threat of criminal sanction—court martial and confinement—to impose severe discipline and involuntary separation with "bad paper" (that is, "Undesirable" or "Other Than Honorable" characterizations). Service members who fought charges or held out for better service characterizations often lost their administrative separation boards, and some service members—including at least one of my clients, A.E.—were denied the option of administrative separation "in lieu of" court martial and were forced to fight a losing battle a criminal court. These veterans often came away with Bad Conduct or Dishonorable characterizations. In addition, minor infractions were often deemed to involve aggravating circumstances—even when no sex was involved, such as (with some of our clients) kissing, holding hands, or sharing a bunk—and some anti-LGBTQ commanders used repeated minor misconducts unrelated to sex-based offenses—such as being late, uniform violations—as a pretext to attack and separate LGBTQ service members for a "pattern of misconduct."[15]

Military policy also created a climate that pit LGBTQ servicemembers against each other when career or survival was at stake—as it often was. Self-interest caused accusations to fly, often untrue but necessary as a matter of self-preservation. False accusations were also weaponized by heterosexuals, emboldened by command climates that fostered anti-LGBTQ attitudes, as a way to rid the service of "homosexuals," or those perceived to be. Victims of these efforts were lucky if they came away with an Honorable service characterization.

Transgender service members were targeted as well. Historically, transgender service members have been punished under Article 134, U.C.M.J., for dressing in attire consistent with their gender identity, and there are instances of transgender people being court-martialed (or discharged in lieu of court-martial) with a Bad Conduct characterization for gender-nonconforming behavior, such as "cross-dressing," even when such behavior took place in private and off-base.[16]

More recently, transgender service members are unfairly diagnosed by medical professionals

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[15] LGBTQ service members' fear of pretextual arm is discussed in a recent publication: *See generally* Kathleen A. McNamara et al., *"You Don't Want to Be a Candidate for Punishment": A Qualitative Analysis of LGBT Service Member "Outness,"* Sexuality Research and Social Policy (2020), available at https://link-springer-com.ezp-prod1.hul.harvard.edu/article/10.1007/s13178-020-00445-x.

[16] *See U.S. v. Davis*, 26 M.J. 445 (C.M.A. 1988); *U.S. v. Guerrero*, 33 M.J. 295 (C.M.A. 1991).

or labeled by commanding officers as unstable, anti-social, over-anxious, histrionic, paranoid, or depressed—all because they reported incidents of gender-identity-based sexual harassment, complained of harassing language or misgendering, actively sought and insisted on receiving medical care they were entitled to, or because they were feeling traumatized by unsupportive commands or colleagues. I have had a transgender service member client denied transition-related care that was part of an approved transition plan—not by a medical professional, but by commanders with "safety concerns" about the service member's "mental state." I have even assisted transgender veterans who were (we believe) misdiagnosed, possibly intentionally, with conditions that would make them unfit for continued service.[17]

These issues have caused some of transgender people to voluntarily leave service, and many more have been involuntarily separated with "bad paper." For some, their discharge certificates reflect pathologizing language as a reason for discharge: "psychosocial disorder," "psychiatric disorder," "behavioral disorder," "condition unfitting of continued service," "non-medical disqualification," "psychological unsuitability and physical unfitness," and the like. For decades, these policies and practices—working alongside anti-trans bias, ignorance, or misinformation—have produced unjust and punitive outcomes for transgender veterans.

### *D. Historical effect on LGBTQ veterans*

This historical legacy, and its lasting effects, is documented in a 2018 report co-authored by the VLC: *Do Ask, Do Tell, Do Justice: Pursuing Justice for LGBTQ Military Veterans*.[18] One lasting effect is psychosocial:

> The psychological impact of the DADT policy is noteworthy because of the manner in which it created "internal" and "external" conflicts. The internal conflict was "taking an oath of honesty and integrity and subsequently being forced to conceal one's true identity." The external conflict was "feared reactions of heterosexual counterparts and military command that could result in retaliation up to and including discharge from the service."[19]

LGBTQ veterans also face ongoing medical issues: "[M]edical studies of LGBTQ veterans have revealed risks of smoking, phobias, panic attacks, and substance abuse, and other mental health

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[17] *See generally* Jack Harrison-Quintana and Jody L. Herman, *Still Serving in Silence: Transgender Service Members and Veterans in the National Transgender Discrimination Survey*, LGBT Policy Journal at Harvard Kennedy School (2013), available at https://lgbtq.hkspublications.org/wp-content/uploads/sites/20/2015/10/LGBTQ-2013.pdf.

[18] *Supra* note 2.

[19] *Do Ask, Do Tell, Do Justice*, *supra* note 2, at 9 (footnotes omitted).

conditions independent of the already substantial risks that all veterans face … ."[20] LGBTQ veterans, particularly transgender veterans, also have a heightened risk of suicide.[21]

Despite the heightened need for VA programs, LGBTQ veterans are among the vulnerable veteran populations facing sometimes insurmountable barriers to accessing them. The reasons are evident: because of the criminalization of orientation and conduct described above, LGBTQ veterans are disproportionately saddled with service records that are presumptively disqualifying for VA benefits and programs: Other Than Honorable discharge characterizations (or worse), discharges "in lieu of" court martial, and court martial convictions for offenses that no longer exist. Another recent publication from LSC (and others), from just last year, documents these access and eligibility issues in detail: *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges*.[22]

Even when LGBTQ veterans avail themselves of existing processes to upgrade their discharge paperwork or eliminate barriers to VA access, they often find that they still do not qualify because of eligibility issues that cannot be corrected at all. Below are some examples of how these issues affect some clients of mine and of the VLC at Harvard.

- J.G., a straight man, was separated with an Undesirable characterization in the 1950s after a false accusation that he had sex with another service member. Ashamed of his service and the circumstances of his discharge, he hides the fact that he is a veteran. And despite almost three years of service, he is ineligible for VA benefits.
- J.B., a fifteen-year veteran of the Navy and Marines with an "exceptional" service record, was discharged with a General characterization after he was "outed" to his superiors by an anonymous person who delivered printed copies of the veteran's profile from a gay dating site. The Board denied J.B.'s discharge upgrade request because his conduct—putting his picture on a gay dating site—was deemed to be "conduct unbecoming" and "service discrediting."
- M.M.-S. was discharged from the Air Force after one year and nine months of service; although he was upgraded to an Honorable characterization, he was denied the VA Home Loan benefit because he did not meet the minimum 24-months of service required for that benefit.
- B.B. voluntarily left Army service while questioning his sexuality and fearing for his life after the murder of PFC Barry Winchell, a friend of his while at

[20] *Id.* (footnotes omitted).

[21] *Id.*

[22] Available at https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf.

Fort Campbell.[23] Though he was granted a discharge upgrade, B.B. still suffers from post-traumatic stress from his time in the Army.

- B.B.T. was separated from the Marine Corps as a Corporal in 1991, with an OTH characterization, after being discovered having a consensual relationship with another Marine who was a Lance Corporal. He had nearly unanimous support from his commanders for an Honorable or General discharge (and some favored retention), but an administrative discharge board awarded Other Than Honorable instead. The Board for Correction of Naval Records refused to upgrade the discharge in 2018, so B.B.T. is ineligible for VA benefits and services.
- B.T., a trans woman helicopter pilot, was a two-time non-promote while on Inactive Ready Reserve in the Navy Reserves because she could not obtain orders due to regulations that prevented trans people from serving. She now seeks an appointment to the California National Guard, which desperately needs pilots to fight devastating wildfires, but so far the Board has not acted on her request for discharge-upgrade relief, the only way to make her eligible.
- Both L.A. and A.R., women in the Marines, were separated while DADT repeal was imminent. While L.A. received an Honorable characterization, and A.R.'s OTH characterization was later upgraded to Honorable, both women were discharge just a few months short of two-years in service and therefore cannot access many VA benefits and services, such as VA Home Loan and educational benefits.
- W.J.C., a WWII veteran, now deceased, received an Undesirable discharge based on homosexuality in 1944, in the midst of the war. He was in service at Pearl Harbor when it was attacked and surviving the sinking of the U.S.S. Helena. His family seeks to restore the honor and dignity of his service.
- A.E. was court-martialed for "indecent acts" after placing his hand on a fellow service member's clothed leg and giving him a "peck" on the cheek. He requested a discharge "in lieu of" court martial, but his commander forced him to undergo a trial. A.E. was convicted and given a Bad Conduct discharge, and the Board refused his clemency request.
- T.I. was separated from the Navy in 1995 a mere two weeks before he reached two years of service time. Although the Board upgraded his discharge, it refused his request to recognize constructive service time. He therefore will be ineligible for most VA benefits.

There are many more examples, including one where a woman was discharged for being found alone on another woman's bunk, another where a female Sailor was discharge with "aggravating factors" after admitting under interrogation that she had had sex with another woman aboard ship, and another where a male Sailor was discharged—and later denied a discharge upgrade—after

[23] PFC Winchell was perceived as gay, and subject to harassment based on that perception, because he was dating a transgender woman. On July 6, 1999, PFC Winchell was murdered by another Soldier who was motivated at least in part by hostility to PFC Winchell's perceived sexual orientation. *See* https://en.wikipedia.org/wiki/Murder_of_Barry_Winchell.

merely asking another Sailor if he wanted to engage in sex. These are the clients we see every day. Proposed legislation should bear in mind these realities when designing solutions meant to benefit this population.

### *E. Comments and recommendations*

The proposed legislation would be the first step in fully exploring and understanding the harms caused by the military's discriminatory policies, and to determine harm-mitigating next steps.

We have the following thoughts and comments:

Sec. 2(b)(1): The investigation should relate not just to military policy concerning sexual orientation but also to gender identity, to include non-gender-conforming identity and behavior.

Sec. 2(b)(4)-(6): In addition to the topics of study identified in these subparagraphs, we suggest one more: examining the lasting effects on access to and eligibility for VA benefits that military policy had on veterans and service members who were discharged due to sexual orientation or gender identity. The question is not just an issue of disqualification or ineligibility, of which the Committee is well-aware; it also relates to how LGBTQ veterans purposefully avoid accessing VA programs and facilities because they feel unwelcome, unentitled, unworthy, or unsafe.

Sec. 2(b)(4): We suggest that this paragraph be expanded to include not just the impacts of the discriminatory policies but also the impacts of the military's actions under those policies. In our experience, many of our LGBTQ veteran clients carry around trauma from how the military treated them: brutal and lengthy investigations; invasive, humiliating, abusive, and emotionally devastating interrogations; witch hunts; threats of court martial and retaliation; harassment and verbal abuse; sexual assault and even "corrective rape" (without consequence to the offenders), and criminal trials, convictions, and confinement. So many of our clients have been traumatized not just by the policies, but by their treatment by the military itself.

Sec. 2(b)(6): Consider changing this subparagraph so that it expressly references not just Don't Ask Don't Tell but all policies that policed non-heterosexual identity and sexuality, and not just the transgender service ban but also prior regulations that pathologized non-gender-conforming identities and behaviors, as described above.

Sec. 2(b)(8)(E): We suggest a slight modification to state "health care and other benefits."

Sec. 3: In this section, the Committee may want to also include a provision calling for the appointment of members by the Secretary of Homeland Security (or their designee) so as to represent the views and inputs of the Coast Guard.

**Justice for Women Veterans Act (H.R. 2385)**

As with Chairman Takano's LGBTQ Commission proposal, we also support Congresswoman Brownley's proposal to investigate how previous discriminatory policies of the Armed Forces have affected women discharged due to pregnancy. We have only minor comments:

Sec. 4(a): We suggest including "total service time" as a data point to be investigated. As the Committee knows, several VA benefit categories have eligibility criteria, or benefit scales, based on a veteran's time in service. Including this information in the GAO's research and report may reveal important information or put other data into context.

Sec. 4(a)(1)(B): Given the difference in how the Service branches label and track members, we suggest that this paragraph read "rank, grade, or office" rather than just "grade."

**Honoring All Veterans Act (H.R. 2806)**

We appreciate Congresswoman Rice's effort to modernize and improve the Department's mission statement by eliminating exclusive language. Although President Lincoln's famous quote is both laudatory and aspirational, it was made in a time when strict gender roles dictated that all veterans were men and their spouses were women. Even if true then—and it probably wasn't, given that transgender veterans have always existed—it is no longer true today. Updating the mission statement to be gender neutral is an important step in properly recognizing the contributions of all veterans and the effect that their service has had on all family members and caregivers.

**Voices for Veterans Act (H.R. 3930)**

**- and -**

**To establish an LGBTQ Advisory Committee (H.R. 4845)**

We support proposals by Chairman Pappas and Congresswoman DelBene to establish or broaden platforms for LGBTQ-veteran voices to address issues related to accessing VA programs. Advisory Committees play an important role in addressing the needs of marginalized populations as they pertain to the VA's administration of benefits and provision of services. This is vital for the LGBTQ veteran population: The experiences of our clients have shown that LGBTQ veterans are less likely to access VA benefits and services and, when they do attempt to do so, they encounter unique barriers to eligibility and qualification as well as staff and providers that lack cultural competence or are outright hostile or biased. Creating an Advisory Committee that focuses on LGBTQ issues, or adding LGBTQ veterans to the existing Advisory Committee on Minority Veterans, would give voice to this underserved veteran population, formalizing the process for them to advise the VA and Congress and make recommendations to them.

As to the language of the proposed legislation, we have the following comments:

### *A. To establish an LGBTQ Advisory Committee – Recommendations*

Sec. 1, § 548(b)(1)(A): We suggest that more clarity is needed regarding "representatives of LGBTQ veterans," unless the choice of words is deliberately broad. An alternative would be to specify "individuals from nonprofits, research institutions, or legal or advocacy organizations that represent LGBTQ veterans."

Sec. 1, § 548(b)(1)(E): Prohibitions against the open service by LGBTQ people have existed in various forms for more than a century. Veterans from different eras, who served under different policies, likely experienced service in different ways. We suggest deleting the word "recently" so that membership is open to LGBTQ veterans from all eras.

Sec. 1, § 548(b)(2): As ex officio members of the Committee, the legislation may want to include the Secretary of Homeland Security (or their designee) so as to represent the views and inputs of the Coast Guard.

### *B. Voices for Veterans Act – Comments*

We have no comments on this proposed legislation.

## Every Veteran Counts Act (Draft)
## - and -
## VA Inclusion, Diversity, Equity, and Access Data Improvement (VA IDEA Data Improvement) Act (Draft)

We welcome Congresswoman Brownley's effort to consistently investigate the condition and needs of the veteran population so as to inform the actions of legislators and policymakers.

### *A. Every Veteran Counts Act – Recommendations*

Sec. 3(a)(1): The term "biological sex" is disfavored and, in this context, potentially confusing.[24] It does not fully capture the complex biological, anatomical, and chromosomal variations that can occur among humans.[25] In addition, if the use of "biological sex" is intended to delineate a

[24] Katrina Karkazis, *The Misuses of "Biological Sex,"* The Lancet (Nov. 23, 2019), available with free registration at https://www.thelancet.com/journals/lancet/article/PIIS0140-6736(19)32764-3/fulltext.

[25] *See* Kim Elsesser, *The Myth of Biological Sex*, Forbes (June 15, 2020), available at https://www.forbes.com/sites/kimelsesser/2020/06/15/the-myth-of-biological-sex/?sh=7f1de61a76b9; *see also* Planned Parenthood, *Sex and Gender Identity*, available at https://www.plannedparenthood.org/learn/gender-identity/sex-gender-identity.

status based on biology and genetics—as distinct from gender identity, which includes personal, cultural, and social conceptions—the effort may be misguided: the scientific evidence suggests that gender identity is understood to have a biological component,[26] so drawing distinctions based on biology versus social constructs can lead to confusion. The term "biological sex" has also been co-opted by anti-trans people to advance policies and legislation across the nation that target the transgender community, particularly transgender youth.[27]

We therefore suggest the following as alternatives: "birth sex," "assigned sex," "birth-assigned sex," or "sex assigned at birth." The Department of Veterans' Affairs already uses these alternatives.[28] In fact, the most recent VA Welcome Kit Quick Start Guide for LGBTQ veterans, issued this week, uses the term "birth sex."[29]

Sec. 3(a)(2): For completeness, we suggest that the gender-identity disaggregation include "transgender male" and "transgender female" instead of just "transgender."

Sec. 3(a)(6): Since "transgender" is an identity, not an orientation, we suggest removing it from the list of disaggregated sexual orientations. In addition, given that the language for describing humanity's sexual orientations continues to expand—for example, pansexual, bisexual+, omnisexual, polysexual, and sexually fluid—we suggest adding a category for "other."

Sec. 3(a)(24): We suggest adding "suburban" to this category.

### *B. VA IDEA Data Act – Recommendations*

We have no comments on the language of this proposed legislation.

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[26] *E.g.*, *Karnoski v. Trump*, 2018 WL 1784464, at *6 n.5 (W.D. Wash. Apr. 13, 2018) (using term "biological sex" to refer to sex assigned at birth was "misleading" because gender identity "is also widely understood to have a 'biological component'"), *vacated and remanded on other grounds by Karnoski v. Trump*, 926 F.3d 1180 (9th Cir. 2019).

[27] See Simón(e) D Sun, *Stop Using Phony Science to Justify Transphobia*, Scientific American, available at https://blogs.scientificamerican.com/voices/stop-using-phony-science-to-justify-transphobia/ (discussing pseudo-intellectual and unscientific resort to "basic biology" as grounds to "claim a scientific basis for the dehumanization of trans people").

[28] *E.g*, VHA, Transgender Vets, the VA, and Respect (using "assigned sex"), available at https://www.va.gov/health/newsfeatures/2017/january/transgender-vets-the-va-and-respect.asp.

[29] U.S. Department of Veterans Affairs, *Getting Started with Services for LGBTQ+ Veterans*, available at https://www.va.gov/files/2021-09/lgbtq%2B-quick-start-guide.pdf.

**SERVE Act (Draft)**

We support Chairman Pappas's effort to eliminate long-standing barriers that the LGBTQ veteran population has faced in accessing VA benefits and services. Historically, LGBTQ people have been medically underserved; this is especially true for LGBTQ veterans because military policies have burdened them with circumstances that impose eligibility hurdles, if not outright disqualification.

The SERVE Act is an important step in healing those wounds and dismantling those barriers. We believe that more will be required, however.

### *A. Background*

The military's criminalization of LGBTQ identity and sexuality is recounted above. Those policies did more than just remove LGBTQ people from the Armed Forces, they did so in ways that created continuing harm—namely, by making people ineligible for VA benefits and services or, even when eligible, imposing administrative and procedural burdens on veterans as a condition for access.

Common access and eligibility barriers that LGBTQ veterans encounter can be considered in two categories. The first category comprises circumstances in which the veteran was separated before accruing enough service time to be eligible for some VA benefits. This includes:

- Entry-level separations. Veterans who did not serve at least 90 days will not be eligible for any benefits (except possibly for any service-connected injuries or conditions).
- Separations that occurred before the accrual of 24 months of service, the minimum amount for most VA benefits to vest. Many LGBTQ veterans are in this category and have found that obtaining a discharge upgrade to an Honorable characterization does not make them benefit-eligible because they do not meet minimum time-in-service requirements.
- Separations that occurred before the accrual of 36 months of service, the amount required for some educational benefits to be awarded at 100%. Even when eligible, some LGBTQ veterans have found that they do not qualify for the maximum benefit.
- Separations that occurred before the service member accrued the minimum service time for retirement eligibility.

The second category comprises circumstances in which the veteran was separated in ways that potentially disqualify them VA benefits and services. This includes:

- Punitive discharges—the result of courts martial—which produce Bad Conduct or Dishonorable discharge characterizations. Courts martial were a common tool used against LGBTQ service members, particularly since even consensual sodomy was a crime under the U.C.M.J. until recently.

- Administrative discharges with an Other Than Honorable or Undesirable characterization. OTH/Undesirable characterizations were frequently imposed, and at times they were even required by regulation, when separating LGBTQ service members.
- Misconduct-related discharges. Same-sex sexual activity was considered misconduct, sometimes major misconduct, and provided adequate grounds for separating LGBTQ service members based on "misconduct" rather than "homosexuality." In addition, transgender people often received misconduct, such as failure to follow orders, for gender non-conforming behavior.
- Medical and behavioral disqualifications. Transgender veterans often were diagnosed with and separated due to the misdiagnosis of unfitting conditions, or non-medical disqualifications that resulted in OTH characterizations.
- Discharges in lieu of court martial, which usually occur with an Other Than Honorable or Undesirable characterization. Again, because sexual activity was criminalized, LGBTQ veterans were often threatened with court martial and would escape trial and potential conviction and confinement by accepting OTH separation instead.

### *B. Draft Bill – Comments and Recommendations*

With these issues in mind, we have several comments and recommendations on the draft bill.

#### *1. VA compensation benefits*

The current draft of the SERVE Act does not address eligibility for VA compensation and pension programs. After discussions with staff, however, we understand that future drafts will include provisions that address these benefits.

#### *2. Sec. 2(a)(7)(H): eligibility definition*

The draft bill effectively addresses the first category of eligibility issues summarized above but may not eliminate the barriers in the second category. We see several ways in which this proposed new subparagraph of 38 U.S.C. § 1710(a)(2) might not adequately achieve the bill's intended purpose.

a. <u>"By reason of"</u>

The language "by reason of sexual orientation or gender identity (including a diagnosis of gender dysphoria)" is potentially problematic because is it subject to interpretation and could be construed narrowly. A narrow construction would leave behind many LGBTQ veterans, including many who are most in need of this eligibility, thus undermining the purpose of the Act.

*First*, the VA may interpret the statute to apply only to veterans who were separated *solely* because of sexual orientation or gender identity. This would exclude veterans who were separated

because of misconduct, even if the alleged misconduct is a proxy for sexual orientation (such as "homosexual acts") or a proxy for gender identity (such as "cross-dressing" or other gender non-conforming activity), or is a pretext altogether, as with misconduct charges that were in fact motivated by bias. This narrow interpretation would also exclude LGBTQ veterans with service records that include criminal charges and convictions, or the threat of them—even if only as leverage to bring about an administrative separation.

Our experience with the Discharge Review Boards (DRBs) and Boards for Correction of Military/Naval Records (BCMRs) bears this out as well. Under guidance from the Under Secretary of Defense for Personnel & Readiness issued after the repeal of DADT, these Boards have the authority to change the characterization, narrative reason, separation and reentry codes, and separation authority on a veteran's DD214.[30] Yet the guidance is conditional: a presumption in favor of granting relief exists only if "(1) the original discharge was based ***solely*** on DADT or a similar policy … and (2) there were no aggravating factors in the record, such as misconduct."[31] These conditions operate to exclude a significant number of LGBTQ veterans because, as discussed above, they have service records that reflect misconduct—even though that misconduct is entire due to the military's criminalization of LGBTQ identity and sexuality. In our experience, the Boards use the two conditions to deny relief to some veterans, and we are concerned that the VA would too, if the proposed eligibility definition weren't carefully phrased to prevent this abuse.

*Second*, the proposed eligibility definition might not assist transgender veterans at all. There was no single accepted way in which transgender service members were discharged. What's more, due to bias toward and misunderstanding of transgender people, they were often separated under medical or behavioral regulations. As discussed above, their DD214 discharge certificates reflect pathologizing language as a reason for discharge: "psychosocial disorder," "psychiatric disorder," "behavioral disorder," "condition unfitting of continued service," "non-medical disqualification," "psychological unsuitability and physical unfitness," and the like. Because of this, transgender veterans may have to "prove up" the reason behind their discharge—showing that the true reason was due to gender identity—in order to avail themselves of the benefits of this proposed legislation.

Recommendation: Because of these issues, we recommend that language be added to prevent the VA from interpreting the proposed new eligibility definition in ways contrary to its intent. Taking

[30] *See* Clifford L. Stanley, USDP&R, *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) (instructing Boards on applications from LGB veterans post-repeal of DADT).

[31] *Id.* (emphasis added).

the above reality into consideration, a suggested approach would be as follows:

- When it is clear from the veteran's record that the separation occurred because of the veteran's sexual orientation or gender identity or under circumstances related to sexual orientation or gender identity, then the veteran should be eligible.
- Eligibility may not apply if it is clear from the record that the separation was for reasons unrelated to sexual orientation or gender identity, such as misconduct, or for unfitting medical conditions that are not associated with gender dysphoria. In making this determination, however, the VA should be mindful of the history of the military's treatment of LGBTQ people and should recognize that the records of such veterans may reflect or be colored by anti-gay or anti-trans bias, judgment, ignorance, and misunderstanding. Accordingly, the VA should look favorably upon evidence and argument that some aggravating factors—including activity that was deemed to be misconduct and subject to discipline, as well as courts martial (or discharges in lieu of courts martial) due to same-sex or gender-affirming behavior that the military previously found to be punishable—should be disregarded or excused. Such evidence or argument should be deemed sufficient to overcome the presumption of regularity in the military records.
- Even when record reflects aggravating factors or other misconduct that is unrelated to sexual orientation or gender identity, eligibility should not be denied when the record shows the aggravating factors or misconduct did not factor into the decision to separate such that the discharge was due solely to the sexual orientation or gender-identity reasons.

We would be happy to work with the Committee on developing and refining such language.

b. Discharge characterization limitations

The proposed eligibility definition is limited based on discharge characterization. Only veterans who received the following discharges would be eligible: (i) entry-level separation, (ii) a discharge under honorable conditions, or (iii) a discharge under conditions other than honorable.

In our view, these conditions are unnecessarily restrictive and inconsistent with other statutory provisions that govern eligibility for VA benefits. Generally, to receive VA benefits and services, a veteran is eligible if the characterization of their service is "other than dishonorable."[32] Though the VA has interpreted this statutory provision narrowly—and, as discussed below, incorrectly—we believe that the Act's proposed new eligibility should not be more restrictive than this existing statutory provision.

[32] *See* 38 U.S.C. § 101(2) (defining "veteran" as "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable"). Some benefits, like burial and GI Bill, require an honorable characterization.

Recommendation: We suggest deleting subsections (i) through (iii) of Sec. 2(a)(7)(H) and rephrasing the provision as follows: "a former member of the Armed Forces who was separated, discharged, or resigned from service because of sexual orientation or gender identity, or under circumstances related to sexual orientation or gender identity, unless the member received or should have received a Dishonorable characterization [or the member's conduct would have merited a dishonorable discharge characterization]."

#### *3. Sec. 2(d): educational assistance*

Subject to the issues discussed above, this subsection is effective to grant Post-9/11 educational benefits to the veterans defined in new § 1710(a)(2). We're unsure if other educational programs, such as the Montgomery GI Bill, were deliberately excluded. But if not, the same approach could be taken for those programs.

The proposed bill solves only one part of the eligibility issue, though: it does not address benefit expiration. Although the Harry W. Colmery Veterans Educational Assistance Act of 2017[33] eliminated the 15-year expiration period for educational benefits, that part of the law applies only to veterans who left military service after January 1, 2013 (and certain children of deceased service members).[34] This would not help veterans who were discharged based on sexual orientation, all of whom left service before 2011, when DADT was repealed.[35] Consequently, the vast majority of veterans that this eligibility change is meant to assist will find their educational benefits expiring in no more than five years, and for many those benefits have already expired. To make the eligibility change meaningful, we suggest that the Committee consider adding an extension of the expiration for those who still have some eligibility, and a restoration for those for whom the benefit has expired.

### *C. Unresolved issues*

Though it makes some LGBTQ veterans eligible for VA benefits and programs, the SERVE Act leaves the same veterans open to continuing harms from the circumstances of their discharges.

#### *1. The DD214*

The DD214 is the discharge document that proves veteran status and is therefore used to access VA health care and benefits, to obtain veteran's preference in some job opportunities, to

[33] Pub. L. 115-48, 131 Stat. 973.

[34] Pub. L. 115-48, § 112, 131 Stat. 984, *codified at* 38 U.S.C. § 3321(a), (b)(4).

[35] Gender-identity-based separations continued through the middle of 2015, when the Obama Administration placed a hold on such separations pending an ultimate change in regulations applicable to transgender military service.

qualify for some government positions, to obtain security clearances, and to enter into some law-enforcement or security-related jobs. The SERVE Act does not correct the veteran's DD214. Unless additional legislative actions are taken, many LGBTQ veterans will continue to be harmed by DD214s that reflect the injustice of the discriminatory policies under which they were discharged.

More specifically, for many LGBTQ veterans, the DD214 contains language and codes that are offensive to the honor and dignity of their service. As discussed above, many have discharge characterizations of Other Than Honorable or worse. The "narrative reason" for discharge often reads "homosexual acts" or "homosexual admission," or similar words. Separation codes, reentry codes, and separation authority citations often convey clues about the reason for discharge—that is, homosexuality. The same is true for transgender veterans, as discussed above.

In our experience, many veterans with DD214s containing these offensive codes and language rarely use them because of the shame and indignity associated with them. These veterans forgo veterans-preference programs and even hide their veteran status rather than present their DD214s. Some of our clients have decided not to apply for jobs—good jobs, for which they clearly qualify—because they know that they will have to produce a DD214 and be either embarrassed or rejected. Many more refuse to go to the VA—even if eligible for benefits and services—for fear that they will be shamed or rejected. For example, one client recounted the following to me: He went to the VA seeking care and treatment for post-traumatic stress and military sexual trauma. When he presented a DD214 with an Other Than Honorable characterization and a Reason for Discharge that stated "Homosexual Acts," the VA staff rudely told him to leave, saying "You're lucky you didn't get worse."

### *2. The discharge-upgrade process*

Currently, the only way to remove the offensive codes and language, and restore honor and dignity to these veterans, is to use the DRBs and BCMRs to obtain a discharge upgrade.[36] After ten years of experience using this process for LGBTQ veterans after the repeal of DADT, we have learned that it is flawed and needs improvement.

*First*, it is lengthy. Currently, the Boards are taking up to two years to decide discharge-upgrade petitions. This does not include the time it takes for the veteran or their representative to obtain copies of the Official Military Personnel File, which itself takes at least six months or more.

*Second*, it is difficult. As discussed above, only veterans meeting two conditions are entitled to a presumption that relief will be granted: that discharge was "solely" based on sexual orientation,

[36] *See* 10 U.S.C. § 1552.

and that there are no "aggravating factors" in the record. For LGBTQ veterans who were unlucky enough to be subject to aggressive prosecutors or biased commanders, and therefore have to argue away "aggravating factors"[37] or criminal charges for offenses that no longer exist, they face an uphill climb. Because of the "presumption of administrative regularity," the Boards will rarely second guess the process that led to discharge. It is exceeding hard to overcome "misconduct" or "aggravating factors," even when they are based solely on discriminatory regulations that existed at the time.

*Third*, it is inconsistent. Decisions among the four Boards (Army, Navy, Air Force, Coast Guard) often reach different decisions based on similar circumstances. Worse, the Boards have even issued decisions that are internally inconsistent for similarly situated LGBTQ veterans. The standards are a black box, and outcomes cannot be confidently predicted.

### *D. Proposals for consideration*

We hope the Committee will consider modifying the legislative drafts to address these issues more aggressively. Some proposals follow.

#### *1. Exemption from statutory minimum time-in-service requirement*

In addition to the SERVE Act's proposed new eligibility definition, the Committee may consider modifying existing eligibility statutes to achieve some or all of its goals.

For example, existing law contains a minimum time-in-service requirement: For veterans who entered service after September 1, 1980, anyone who did not serve 24 months of continuous active duty, *or* the full period for which they were called or order to active duty, is "not eligible" for "any benefit."[38] There are exceptions, though, including for certain types of involuntary discharges "for the convenience of the government."[39]

The Committee should consider adding another exception to the minimum time-in-service requirement, for example by exempting "a person who was discharged in accordance with policies regulating or prohibiting the service of individuals based on sexual orientation or gender identity."[40]

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[37] The "aggravating factors" themselves are discriminatory based on sexual orientation, as they never apply to heterosexuals or are interpreted differently for homosexual conduct. For example, the aggravating factor of "sexual activity aboard a vessel or aircraft" is currently treated only as minor misconduct for which heterosexuals receive non-judicial punishment. The aggravating factor of "sexual activity in a public setting" as been interpreted to include same sex couples kissing, holding hands, sharing a bunk (while clothed) as well as sex in private rooms in a barracks.

[38] 38 U.S.C. § 5303A(b)(1).

[39] 38 U.S.C. § 5303A(b)(3)(F).

[40] Similar exceptions would have to be made to the provisions governing educational benefits, 38 U.S.C. § 3011.

Along with the language already proposed in the Act, these changes would ensure that LGBTQ veterans who were wrongly discharged before becoming eligible for VA benefits have their eligibility restored.

### *2. Directions to the Boards*

The Committee should consider legislating directions to the Boards so as to eliminate unnecessary barriers imposed on LGBTQ veterans requesting discharge upgrades.

We are aware of prior proposals to address this issue, such as the Restore Honor to Service Members Act.[41] Among other things, this proposed legislation would have directed the Boards to review the discharge characterization of any veteran discharged based on sexual orientation and, absent any aggravating circumstances, upgrade the characterization to Honorable. This legislative instruction is inadequate, though: as noted above, the Boards already employ this standard pursuant to guidance from the Under Secretary of Defense for Personnel & Readiness.[42] The problem, in our experience, is that the records of too many LGBTQ veterans contain aggravating factors due to the criminalization of non-heterosexual orientation and sexuality as well as bias toward or misunderstanding of gender-nonconforming identities and behaviors. The Boards need more explicit instructions that address the reality of the regulatory framework that led to the discharge of many LGBTQ veterans during the relevant periods.

Proposal: Because of these issues, we suggest that the Committee consider legislation to instruct the Boards on how to handle applications from LGBTQ applicants. Similar to above with respect to eligibility definition, we suggest the following rubric:

- When it is clear from the veteran's record that the separation occurred because of the veteran's sexual orientation or gender identity, or under circumstances related to sexual orientation or gender identity, then the veteran is entitled to a presumption in favor of an upgrade.
- The presumption may not apply if it is clear from the record that the separation or discharge was for reasons unrelated to sexual orientation or gender identity, such as misconduct. In making this determination, however, the VA should be mindful of the history of the military's treatment of LGBTQ people and should recognize that the records of such veterans may reflect or be colored by anti-gay or anti-trans bias, judgment, ignorance, and misunderstanding. Accordingly, the Boards should look favorably upon evidence and argument that some aggravating factors—including activity that was deemed to be misconduct and subject to discipline, as well as courts martial (or discharges in lieu of courts martial) due to same-sex sexual activity or gender non-conforming behavior that the military

[41] H.R. 3517, 116th Cong. (2019, Pocan), S. 1991, 116th Cong. (2019, Schatz).

[42] *See supra* note 30 and accompanying text.

previously found to be punishable—should be disregarded or excused because it is related to sexual orientation or gender identity. Such evidence or argument should be deemed sufficient to overcome the presumption of regularity in the military records.

- Even when record reflects aggravating factors or other misconduct that is unrelated to sexual orientation or gender identity, relief should not be denied when the record shows the aggravating factors or misconduct did not factor into the decision to separate such that the discharge was due solely to the sexual-orientation or gender-identity reasons.

We would be happy to work with the Committee on developing and refining such language.

### *3. Eliminate VA eligibility gatekeeping that is contrary to Congressional intent*

Congress has defined "veteran" to mean "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable."[43] Veterans with "dishonorable" service are ineligible for VA benefits and services.

As set forth in a petition for rulemaking by petitioners represented by the LSC of Harvard Law School,[44] Congress intended the "dishonorable conditions" requirement to exclude only veterans whose conduct merited a dishonorable discharge characterization by military standards. Congress authorized the VA to exclude people who did receive or should have received a dishonorable characterization, but not to exclude those who did not deserve a dishonorable characterization.[45]

Yet this is exactly what the VA does. Currently, only veterans with Honorable or General (Under Honorable Conditions) discharge characterizations are presumptively entitled to VA benefits (subject to statutory bars). Veterans with Other Than Honorable, Bad Conduct, or Dishonorable characterizations bear the burden of proving that statutory or regulatory bars do not apply, or that they were "insane at the time of the offense."[46] Thus, the eligibility scheme looks like this:

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[43] 38 U.S.C. § 101(2).

[44] Petition for Rulemaking to Amend 38 C.F.R. §§ 3.12(a), 3.12(d), 17.34, 17.36(d) Regulations Interpreting 38 U.S.C. § 101(2) Requirement for Service "Under Conditions Other Than Dishonorable," available at https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5efed0ac6dc9fc718786414b_Petition%20to%20amend%20regulations%20implementing%2038%20USC%20101(2).pdf [hereinafter "Petition for Rulemaking"].

[45] *Id.*

[46] *See* 38 U.S.C. § 5303; 38 C.F.R. § 3.12.

| DISCHARGE STATUS | EXPLANATION | VA BENEFITS ELIGIBILITY |
|---|---|---|
| Honorable | No misconduct or minor misconduct | Eligible* |
| General Under Honorable Conditions | Minor misconduct | |
| Uncharacterized | Due to entry level separation | |
| Uncharacterized | Due to void enlistment or dropped from the rolls | VA Character of Discharge Determination needed |
| Other than Honorable (OTH) | Service record shows some misconduct, but not separated due to court martial conviction | |
| Bad Conduct | From conviction of a special court martial (misdemeanor-level) | |
| Bad Conduct | From conviction of a general court martial | Barred from VA benefits** |
| Dishonorable | From conviction of a general court martial | |

* Unless a statutory bar applies. See 38 U.S.C. § 5303.10
** Unless the claimant was found insane at the time of the misconduct, per VA definition of insanity at 38 CFR § 3.354

The middle area, where a character of discharge determination is needed, is where the VA's unjust and outdated regulations disproportionately exclude veterans or color, veterans with mental health conditions, veterans at risk of suicide, and LGBTQ veterans.[47]

But the VA's regulatory scheme is contrary to statute and legislative intent. The plain language of the statute and the legislative history establish that veterans should be excluded from VA only if they received (or should have received) a Dishonorable discharge.[48] The legislative history of the Servicemen's Readjustment Act of 1944[49]—also known as the GI Bills of Rights, the statute that created the "other than dishonorable" standard—demonstrates Congress's expansive and generous attitude toward veterans, including those with less-than-honorable discharges.[50]

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[47] *See generally* Petition for Rulemaking, *supra* note 44.

[48] 38 USC § 101(2); *see*, *e.g.*, S. Rep. No. 78-755, at 15 (1944) ("Many persons who have served faithfully and even with distinction are released from the service for relatively minor offenses. . . . It is the opinion of the committee that such discharge should not bar entitlement to benefits otherwise bestowed unless the offense was such, as for example those mentioned in section 300 of the bill, as to constitute dishonorable conditions.").

[49] Pub. L. No.78-346, 58 Stat. 284.

[50] S. Rep. No. 78-755, at 15 ("A dishonorable discharge is affected only as a sentence at a court-martial, but in some cases offenders are released or permitted to resign without trial—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to dishonorable discharge by court-martial."); *see also* Hearings Before the H. Comm. on World War Veterans' Legislation on H.R. 3917 and S. 1767 to Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War Veterans, 78th Cong. 415-16 (1944); President's Comm'n of Veteran Pensions

Congress chose the "dishonorable" term deliberately. All the services had used intermediary characterizations between "honorable" and "dishonorable" for decades, including "without honor," "bad conduct," "undesirable," "ordinary," and "under honorable conditions." The drafters therefore knew about this range of discharge characterizations and knew that an "other than dishonorable" standard would create eligibility for service members with service that was not honorable. Congress could easily have adopted any of those lesser standards for eligibility, but it did not.[51]

Recommendation: We strongly recommend that the Committee legislate to reaffirm its original meaning of "dishonorable conditions" and disapprove of the VA's improper interpretation. This action would be the single most effective action that Congress could take to improve the health and well-being of LGBTQ veterans, which are among the populations that have been disproportionately affected by the VA's regulatory interpretation that excludes too broadly.

We propose amending the term "veteran" in 38 U.S.C. § 101(2), with alternatives in brackets: "The term 'veteran' means a person who served in the active military, naval, air, or space service, unless such person was discharged or released therefrom [with a Dishonorable characterization or the person's conduct would have merited a dishonorable discharge characterization] [under conditions other than dishonorable, as defined in section 5303 of this title]."[52]

* * *

Our feedback on the proposed legislation discussed in this Hearing is meant to help ensure this Committee, and Congress, continues to live up to the standards that they have been charged with in service to our veteran communities. Our comments reflect the experiences of many LGBTQ veteran clients (and other veterans in underserved communities) who have been excluded from the VA's programs and services. Working together, we can ensure that all veterans can benefit from the work this Committee is doing on their behalf.

Once again, I thank you for the opportunity to submit this written testimony and to provide oral testimony at the Hearing. My colleagues and I look forward to working with you and your offices, and to support your efforts in serving our nation's LGBTQ+ and other marginalized and underserved veteran populations. If we can be of further assistance, please feel free to contact me directly.

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(Bradley Comm'n), Staff of H. Comm. on Veterans Affairs, Discharge Requirements for Veterans Benefits, Staff Report No. 12, (Comm. Print. 1956).

[51] *See generally* Petition for Rulemaking, *supra* note 44, Section II.B.

[52] We suggest that 38 U.S.C. § 5303 also be amended to add "compelling circumstances" as a factor for consideration to excusing all statutory bars. *See* Appendix A.

## Appendix A

**Reforming VA's Character of Discharge Regulations to Accord with Congressional Intent**
Draft Legislative Language (38 U.S.C. §§ 101(2), 5303)

Title 38
*Section 101. Definitions*
(2) The term "veteran" means a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable, as defined in section 5303 of this title.

*Section 5303. Definition of veteran and certain bars to benefits*
(a) A discharge or release from a period of service due to one of the following reasons is considered to have been issued under dishonorable conditions --

(i) the sentence of a general court-martial;

(ii) to avoid trial by general court-martial if such person was discharged under conditions other than honorable;

(iii) treason, mutiny, spying, rape, sabotage, murder, arson, burglary, kidnapping, or the attempt of any of these offenses;

(iv) desertion;

(v) an absence without authority from active duty for a continuous period of at least one hundred and eighty days if such person was discharged under conditions other than honorable;

(vi) as a conscientious objector who refused to perform military duty or refused to wear the uniform or otherwise to comply with lawful orders of competent military authority;

(vi) of an officer, by the acceptance of such officer's resignation for the good of the service; or

(vii) during a period of hostilities as an alien, unless the service of that individual was honest and faithful, and that individual was not discharged on the individual's own application or solicitation as an alien. No individual shall be considered as having been discharged on the individual's own application or solicitation as an alien in the absence of affirmative evidence establishing that the individual was so discharged.

(b) The reasons listed in subsection (a) shall not preclude an individual from benefits if it is established to the satisfaction of the Secretary that there were compelling circumstances that mitigate, explain, or outweigh the circumstances that led to the discharge, to include mental or behavioral health conditions, physical health conditions, family or personal problems, military sexual trauma or intimate partner violence, discrimination, or other such circumstances, and taking account of the individual's age, maturity, and intellectual capacity; or if it is established to the satisfaction of the Secretary that the individual contributed substantial favorable service, to include overseas deployment, hardship service, medals and awards for merit, or other such honest and faithful service.

(c) Any former member who was administratively separated from the armed forces, unless separated in lieu of general court-martial, is presumed to have been discharged or released under conditions other than dishonorable.