LEGISLATIVE HEARING ON H.R. 1083; H.R. 2911; H.R. 3651; H.R. 7100; H.R. 7150; H.R. 7777; H.R. 7793; H.R. 7816; H.R. XXXX; H.R. XXXX; H.R. XXXX; AND H.R. XXXX,

HEARING

BEFORE THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

OF THE

COMMITTEE ON VETERANS' AFFAIRS

U.S. HOUSE OF REPRESENTATIVES

ONE HUNDRED EIGHTEENTH CONGRESS

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C O N T E N T S

WEDNESDAY, APRIL 10, 2024

Page

APPENDIX—CONTINUED

STATEMENTS FOR THE RECORD

LEGISLATIVE HEARING ON H.R. 1083; H.R. 2911; H.R. 3651; H.R. 7100; H.R. 7150; H.R. 7777; H.R. 7793; H.R. 7816; H.R. XXXX; H.R. XXXX; H.R. XXXX; AND H.R. XXXX,

WEDNESDAY, APRIL 10, 2024

SUBCOMMITTEE ON DISABILITY ASSISTANCE & MEMORIAL AFFAIRS,
COMMITTEE ON VETERANS' AFFAIRS,
U. S. HOUSE OF REPRESENTATIVES,
Washington, DC.

The subcommittee met, pursuant to notice, at 2:34 p.m., in room 360, Cannon House Office Building, Hon. Morgan Luttrell (chairman of the subcommittee) presiding.

Present: Representatives Luttrell, Self, Pappas, and McGarvey.

Also present: Representatives Bost, and Duarte.

OPENING STATEMENT OF MORGAN LUTTRELL, CHAIRMAN

Mr. LUTTRELL. This subcommittee will come to order. Good afternoon. Good afternoon, everybody. Not very responsive, right?

We are here today to discuss 12 bills that would benefit veterans and their survivors. These bill would ensure that veterans receive faster, more accurate decisions on their claims for Department of Veterans Affairs (VA) benefits from VA Board of Veterans' Appeals (BVA) and the Veterans Benefits Administration (VBA), provide veterans with more choices to control how and when their claims are processed by VA, thus building on the Veterans Appeals Improvement and Modernization Act of 2017, make the VA claims and appeals process more understandable for our veterans and their survivors by providing them with clear updates and instructions.

It will decrease the number of unnecessary disability compensation examinations that are causing delays in claims processing, improve access to VA benefits for veterans, spouses after their loss—after the loss of their loved one and increase their compensation that survivors are eligible for and ensure the VA gives equal attention to the needs of our Nation's veterans as well as their survivors.

I am proud to introduce two bills today. My bill H.R. 7777, the Veterans Compensation Cost of Living Adjustment Act of 2024 would give a cost-of-living adjustment to veterans and survivors receiving certain VA benefits. This increase would be the same as what Social Security recipients gets. In the face of rampant inflation, these bills—this bill is vital for ensuring that our veterans are

able to pay their bills and put food on their tables for their families. I appreciate Ranking Member Pappas for co-leading this important bill. Thank you, air.

H.R. 7919, Veterans Claims Quality Improvement Act of 2024 would ensure that veterans receive accurate and fair decisions on their claims from the VA Board of Veterans' Appeals. The Board claims to have quality rates of over 90 percent however in November 2023 the subcommittee on oversight hearing revealed that those rates are slightly inflated or inflated and the Board's quality control and training programs are ineffective.

As a result, each year thousands of veterans receive Board decisions that are filled with legal error. To correct these errors veterans must appeal those Board's decisions to the U.S. Court of Appeals for Veterans Claims (CAVC) which adds more months or even years of waiting for an accurate final decision on their claims. We have heard that the Board often unnecessarily sends veterans cases back to VBA instead of actually deciding their claims.

This bill will ensure that the Board leadership and low performing Board judges are held accountable for the errors that the Board makes over and over again. Further robust quality control and adequate training are crucial for ensure that if the Board does its job of issuing accurate decisions this bill would ensure that the Board implements effective quality control and training programs.

Veterans wait years for a final decision from the Board and each veteran deserves a high-quality decision when they finally get one. I would like to thank Representatives Stefanik and Bilirakis for signing on as cosponsors to this bill.

I look forward to working with Chairman Bost and my colleagues on the subcommittee to advance these important proposals today. Chairman Bost and I have gone through the disabilities claims process ourselves and it is the top priority for us to ensure that the process works for ever single veteran. I know my colleagues have worked hard on each of these bills to improve the claims process and to increase access to VA benefits for veterans and their survivors. I look forward to discussing these bills on our agenda and hearing from the witnesses who have joined us today.

I now yield to the ranking member for his opening remarks.

OPENING STATEMENT OF CHRIS PAPPAS, RANKING MEMBER

Mr. PAPPAS. Thank you very much, Chairman Luttrell, and I appreciate you holding this hearing today on pending legislation as we can all tell there is a lot of pent-up legislating to do in this place so let us get to it. I want to say, Mr. Chairman, I appreciate you including so many priorities from our side on the aisle on the agenda today. It is terrific.

I want to thank all of our witnesses both governmental and non, who are attending today. We take your testimony incredibly seriously and it helps inform the important work that is left ahead of us. With that said, Mr. Chairman, there is a great deal of policy contained in the bills today and I think we can find common ground on a host of issues.

For example, I think it is clear that the Appeals Modernization Act (AMA) has not moved the needle as far and as fast as the Board of Veterans' Appeals and Congress had hoped. I think we

also agree that the Veterans Benefits Administration is ordering too many Compensation and Pension (C&P) exams which can have the effect of slowing down claims processing.

Mr. Chairman, I think where we lack consensus both in Congress and with stakeholders is on the scope of those problems and any potential fixes to them. There are a lot of proposals on the agenda today to address these issues but as we can see from the testimony there is very little agreement on which solutions are needed, which are not and which could actually make things even worse.

I worry that because of the aggressive timeline we will be on between this hearing, next week's subcommittee markup, and the full committee markup in May, we may not be able to arrive at the kind of consensus that also passes muster with stakeholders on these key issues. I urge thoughtfulness and caution as we move ahead, and I humbly suggest that it may be more important to take our time to get the policy right rather than to be fast and risk any unintended consequences.

I thank you for holding this hearing. Look forward to testimony from our witnesses. I yield back.

Mr. LUTTRELL. We have got a very full agenda today, so I will be holding everyone to 3 minutes per bill so we can get through this all this morning. We are joined by several of our colleagues both on and off the committee. We are going to, and are going to, be testifying on their bills that they have cosponsored to provide testimony for the—let us see.

Chairman Bost, is he present?

Mr. Duarte, you are recognized, sir.

STATEMENT OF JOHN DUARTE

Mr. DUARTE. Thank you, Mr. Chairman, Committee, it is an honor to be before you. Recently in preparation for this hearing I had a meeting in my district with veterans' groups from all over the Central Valley of California to learn more about the realities of being a veteran help veterans helping veterans around the valley and what some of their interests and frustrations were.

This bill, the Clear Communication for Veterans Act is H.R. 7186 as the veterans claims process is broken. Veterans are getting letters from the VA pertaining to their claims, they are lengthy letters, they are confusing letters, they are very hard to decipher and very difficult for the veteran to move forward and know what the course of action to remedy the claims disputes or get the services they deserve, and they very desperately need in many cases. The veterans deserve a smooth claims process for VA benefits that they have always fully earned.

Right now, the guidance I receive from the VA is so comprehensible they often abandon pursuing the benefits they deserve and, you know, that is not acceptable. VA notice letters are critical to ensuring veterans understand to how they pursue their claims for VA benefits that they have earned, and the veterans should not be subjected to letters that are overly complex and confusing.

This is a bipartisan bill. The Clear Communication for Veterans Act is simply access to bring in an outside, nonpartisan professional research and development corporation to look through the entire Veterans Claims Processing Act, the veterans letters and

how these communications go forward and bring us a professional outside opinion on how these can be better handled.

There is no partisan element to this bill. It is very commonsense. Takes it out of the VA where they have failed to improve these letters over years. We have charged them for that as I understand from your committee. Now it is time to move it to the professionals and see if an outside group can help improve these veterans claims letters. It is really that simple.

I thank you for that and I am open to any questions.

Mr. LUTTRELL. Thank you, sir. Mr. Duarte, give me 1 second please. We are going to do a round robin, Mr. Duarte. We will come back to you.

Mr. Self, you are recognized, sir.

STATEMENT OF KEITH SELF

Mr. SELF. Thank you. Mr. Chairman, Chairman Luttrell, Ranking Member Pappas, I am pleased to sponsor the Toxic Exposures Examination Improvement Act, which aims to address a significant flaw in the disability compensation claims process.

We have been told repeatedly that VA is scheduling too many, unnecessary toxic exposure related disability examinations. These so-called Toxic Exposure Risk Activity (TERA) exams are intended to determine whether a veteran's claimed disability is related to toxic exposure. TERA exams are more complicated than regular disability compensation exams.

My bill would cut down on unnecessary TERA exams that waste time and resources for both the veterans and VA. It does this in two keyways. First, it proposes that the VA should only obtain a TERA exam when the evidence is insufficient to make a decision on the claim of compensations. Veterans whose disabilities are objectively unrelated to any toxic exposures should not have to attend unnecessary TERA exams.

I must emphasize however that even if a TERA exam is unnecessary to support a veteran's claim, VA must still get a regular, less complicated, disability compensation exam when a veteran's disability might be related to any in-service event other than toxic exposure.

Second, the bill provides VA clarity by defining injury into the Department of Defense (DOD) Individual Longitudinal Exposure Record (ILER) system as any injury indicating toxic exposure. By removing ambiguity stemming from the current lack of definition, which is the problem.

We enable the VA to accurately identify veterans who may have been exposed to harmful agents during their service. By saving time and resources for both veterans and the VA my bill would allow VA to prioritize the needs of those who have served our Nation while maintaining the integrity and efficiency of our veteran's benefits system.

I urge my colleagues to join me in supporting this important piece of legislation and I yield back the balance of my time. Thank you.

Mr. LUTTRELL. Thank you, Mr. Self.

Chairman Bost, sir, you are recognized for 3 minutes.

STATEMENT OF MIKE BOST

Mr. BOST. Thank you, Chairman. Before I would start, if I could, I want to give a shout out to Andrew Tangen, who flew in from my home State of Illinois to testify today, and I wanted to give that shout out.

I want to let you know that I am proud to have introduced two bills on the agenda today. Both bills continue my personal goal to provide veterans with more choices and faster decisions when it comes to their disability compensation benefits. Just like the Veterans Appeals Improvement and Modernization Act of 2017 has done.

First, H.R. 7793, the Veterans Appeals Options Expansion Act of 2024, would lock in the date of an incorrect claim form for the purpose of veterans being eligible to receive back payments. Right now, VA does not pay veterans all the way back to the date of their incorrect claim form. Veterans should not have to be punished because it is hard to figure out which VA claim form to use and how to navigate the VA appeals process.

My bill would also allow a veteran more time to switch one VA Board of Veterans' Appeals docket to another. This is a key fix to improve the appeals process that we have heard firsthand from veterans. My bill would also lock in the date of the veteran's original appeal.

The Board sends back to the VBA 50 percent of the veterans' appeals. When a veteran's appeal ends up back at the Board that veteran gets kicked back to the end of the Board line. All of this bureaucracy adds years of waiting. Veterans should not be punished because the Board could not or would not make a decision on their claim the first go around.

My bill would also guarantee that the Board judge who held a hearing will decide a veteran's claim. The judge who best knows a veteran should be the one to issue the decision. Finally, when Congress enacted the AMA we stated that we intended and expected that the VA would develop robust policies for addressing untimely evidence. Six years later, VA has not done that.

My bill would rightfully force VA to ensure that the Board is promptly telling veterans when they a have submitted untimely evidence so that they can act on that information. Now my second bill, H.R. 7917, the Veterans Appeals Efficiency Act of 2024 would ensure that the VA Board of Veterans' Appeals issues faster decisions.

Right now, even the massive investment that Congress has made in the Board, veterans are still waiting 2 to 5 years for a Board's decision on their AMA appeals, and there are currently over 200,000 pending appeals before the Board. We cannot keep giving millions of dollars to the Board to simply hire more staff when the Board realizes that it will take years to deplete its inventory at today's rate.

We must authorize additional tools and processes for the Board to modernize, whether they want to or not, and so that it can be issued faster decisions in the veterans' claims. We know that class actions can be powerful tools for processing claims and case effectively. The real world does it every day. Even the veterans court recently rose to the challenge and began doing class actions.

My bill would authorize the Board to decide large groups of veteran appeals all with similar evidence and themes at the same time. We must ensure that this process would work for veterans and for the VA. This is why my bill would require VA to obtain recommendations on how class actions could work at the VA.

My bill would also authorize veterans' courts to include far more veterans cases in class action before the court. Under current law the veteran court can allow only veterans who have received a Board decision to join a class action. Not a lot of veterans have received a Board decision the Board's current class action authority is currently not effective.

Also, the Board often overlooks key evidence. When that happens, the Court send the entire case back to the Board. The court should be requiring the Board to quickly address the specific things the Board overlooked. Instead, the Board is issuing an entirely new decision on the whole case. That is government bureaucracy at its worst.

Now, I know from the personal experience how complicated and slow VA claims appeals process can be. My bill would ensure that the process works for, not against, veterans and their families. I look forward to discussions on both of these proposals and I would like to thank Representative Stefanik and Bilirakis for co-leading on both of my bills.

With that I yield back, Mr. Chairman.

Mr. LUTTRELL. Thank you, Chairman Bost. Mrs. Hayes, thank you for joining us. You are now recognized.

STATEMENT OF JAHANA HAYES

Ms. HAYES. Thank you, Mr. Chairman. While I do not serve on the House Veterans' Affairs Committee, I thank you for allowing me to speak here today. I am committed to honoring the men and women who serve our country by ensuring veterans and their families can access the benefits they have earned.

My district office in Waterbury, Connecticut, is the only congressional office in New England to be recognized as a Purple Heart Office of Distinction by the Military Order of the Purple Heart and to be listed on the Purple Heart Trail because of our work support veterans. My legislation to support veterans has been signed into law by both Democrat and Republican administrations, so I appreciate your consideration today.

Today I am here to speak in support of my bill, the Caring for Survivors Act, which would support thousands of military and veteran survivors who feel their current benefits are less than they have earned and have not been adjusted over time.

When a service member dies in the line of duty or a veteran dies from service-related injuries their surviving family members receive a monthly cash payment known as dependency and indemnity compensation, or DIC. The United States has compensated surviving families for the death of their loved ones since the Revolutionary War.

Unfortunately, the DIC rate has been minimally adjusted since 1993 and is nearly 12 percent lower than the rate of other Federal survivor programs like the Federal Employees Retirement Systems or FERS. DIC beneficiaries receive 43 percent of the current rate

given to a totally disabled veteran. Beneficiaries for Federal civilian employees can receive up to 55 percent of the insurance annuity for their deceased loved ones.

Also, if a veteran dies because a nonservice-connected injury left him totally disabled for less than 10 years, current DIC law limits the number of survivors who can qualify for these benefits. This provision ignores the years of sacrifice by families who have cared for their disabled veterans often putting their own lives on hold.

My legislation does two things to correct these problems. First my bill raises DIC to 55 percent of the rate given to a totally disabled veteran instead of the current rate of 43 percent. By bringing DIC to a level consistent with other Federal survivor programs, survivors will receive an average increase of about $400 per month.

Second, my bill reduces the 10-year disability rule to 5 years and allows more survivors to quality for DIC benefits. This provision expedites DIC support for beneficiaries. This legislation is supported by Tragedy Assistance Program for Survivors (TAPS), Gold Star Wives of America, the Military Officers Association of American, Paralyzed Veterans of America, Veterans of Foreign Wars (VFW), Disabled American Veterans, and the National Military Family Association.

I want to thank Chairman Tester and Senator Boozman for their support of this legislation in the Senate. I also want to thank Chairman Luttrell and Ranking Member Pappas for allowing me to speak here today in support of my legislation. I want to take a moment also to recognize the thousands of surviving spouses around the country for their advocacy to make these important and necessary changes.

The Caring for Survivors Act recognizes the importances of timely and substantial benefits for survivors ensuring their families receive the benefits they have earned through their service. I encourage all of my colleagues to support this legislation and move it not only through committee, but to the floor for consideration and a vote. We must honor the promise we made to our servicemembers, veterans, and survivors that have been left behind.

Again, I thank you for allowing me to be here and ask you again to consider this legislation and the impact on the families who are left behind.

Thank you. I yield back.

Mr. LUTTRELL. Thank you, Mrs. Hayes.

We will forgo a round of questioning for the members. Any questions may be submitted for the record.

In accordance with committee rules I ask unanimous consent to Representative Duarte of California be permitted to participate in today's subcommittee.

Mrs. Hayes, you are welcome to join us as well if you wish. You are now excused.

I invite our second panel to the table. Are you guys ready? It was not a loaded question. Are you guys ready? Okay. Joining us today from the Department of Veterans Affairs, The Honorable Jaime Areizaga-Soto? Did I nail it?

Mr. AREIZAGA-SOTO. Yes, sir.

Mr. LUTTRELL. Outstanding, thank you. Chairman of the VA Board of Veterans' Appeals. He is accompanied by Ms. Brianne

Ogilvie, Assistant Deputy Undersecretary for the Office of Policy and Oversight at the Veterans Benefits Administration; Ms. Jessica Pierce, assistant director for Compensation Service Policy staff at the VBA.

Also joining us from the U.S. Court of Appeals for Veterans Claims is Colonel Tiffany Wagner, Clerk of the Court. I now recognize the—who did I forget? Mr. Daniel Shedd, I apologize. I did not leave you out because you are on the end, I promise.

Will all the witnesses please stand and raise your right hand.

[Witnesses sworn.]

Mr. LUTTRELL. Thank you, and let the record reflect that all witnesses answered in the affirmative.

Mr. Chairman, you are now recognized for 5 minutes to present the Department's testimony.

STATEMENT OF JAMIE AREIZAGA-SOTO

Mr. AREIZAGA-SOTO. Good afternoon, Chairman Luttrell, Ranking Member Pappas, Congressman Self, and other members of the subcommittee, Congressman Duarte. Thank you for the opportunity to appear before you today. With me today are Brianne Ogilvie and Jessica Pierce, both from VBA. Secretary McDonough's mission is to provide more care and more benefits to more veterans.

As the son of a Korean War veteran and as a veteran and National Guard officer who has been wearing the uniform for over 36 years, I view my role in the VA as a sacred duty. My philosophy at the Board is to be veteran-centric in everything we do whether our work, improvements, or new initiatives.

It is an honor to work with so many dedicated veteran law judges, decision writing attorneys and administrative professionals who all share the same objective, to swiftly and fully resolve appeals for veterans and their families to the fullest extent of the law with fair and final decisions by a judge.

I want to thank the committee and Congress for adopting the Appeals Modernization Act and providing subsequent budget support. It has enabled us at the Board to build capacity during the past 2 years and through this year. It is paying huge dividends for veterans. Last year was the first time in 5 years since AMA implementation that the Board's pending case load dropped. With Congress's support we plussed-up our judges' corps by over 30 percent are on pace to do the same with our attorneys.

A year ago, the Board's pending workload was almost 216,000 appeals. Today it is under 206,000 appeals. A year ago, we were averaging 1,900 cases per week. During the past few months, we have averaged over 2,300 decisions per week and that will continue to grow over the next year as we reach full capacity.

It takes time to hire right and train right, to ensure high quality and we are doing it. Quality assurance (QA) rates have never been higher consistently around 95 percent each month. That is veteran-centric. AMA adjudication it is also growing exponentially. Last year at this time only a little over 25 percent of the Board's output was AMA adjudications.

Today, it is consistently over 60 percent each week and growing. This is significant because AMA cases have 20 percent lower remand rates and 10 percent higher grant rates compared to legacy

cases. In short, we are able to fully resolve AMA cases 3 to 4 years faster than legacy cases. That gap is growing.

We set a record last year with 103,245 decisions and we will set another record this year with at least 111,000 decisions. That is veteran-centric. The Board is concerned with any legislation that stifles this veteran-centric progress. Some of these proposals return to legacy type rules while others add unnecessary administrative burdens that will only make us go slower with no discernible benefits for veterans.

I am concerned that some of today's witnesses appear to support recreating legacy type rules in the AMA. This will have a dramatic and adverse impact on wait times for veterans with pending appeals. Incentives matter and slowing down the line does not help veterans.

VA supports H.R. 3651, the Love Lies Lives On Act, if amended. VA all supports—well, VA supports the removal of remarriage restriction requirements for surviving spouses. VA also supports H.R. 1083, the Caring for Survivors Act, if amended. VA has provided suggested edits for clarity in our testimony. This concludes my testimony. My colleagues and I stand ready to respond to any questions you may have.

[THE PREPARED STATEMENT OF JAMIE AREIZAGA-SOTO APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, Mr. Chairman.

Colonel Wagner, you are now recognized for 5 minutes.

STATEMENT OF TIFFANY WAGNER

Ms. WAGNER. Good afternoon, Chairman Luttrell, Ranking Member Pappas, members of the committee. The Court limits its testimony to two of the bills under consideration, specifically three sections within those bills that directly impact the Court.

Respectfully, the Court does not support passage of these provisions for the following reasons. First, proposed section 5(d)(2) of the Medical Disability Examination Improvement Act of 2024 would add an additional element to the Court's annual workload report directing the Court to summarize recurring issues it believes could be resolved by better VA training or by increased oversight or clarification from the Department or Congress.

Respectfully such an executive function rests with the Secretary. As a judicial body with exclusive jurisdiction to review individual Board decisions the Court is not in a position to opine generally on internal VA process or suggest how the agency could or should better manage resources or train personnel. Like all courts the veterans' courts must speak through it is individual juridical decisions and does not issue advisory opinions.

Respectfully, as a recipient of every decision that is reversed or remanded by the Court the Board is responsible for and is in the best position to evaluate error trends in its decisions, allocate resources, and develop corrected strategies and training.

The second bill I will address is the Veterans Appeals Efficiency Act of 2024 and two specific provisions within it. The first would give the Court supplemental jurisdiction to review eligible claims that are pending a final agency decision. The Court is concerned that as written the proposed statutory language lacks clarity and

could result in unintended broad construction that could significantly grow the Court's caseload and in turn require reevaluation of the Court processes and resource needs.

Finally, the second provision of the Veterans Appeals Efficiency Act would statutorily authorize the Court to order a limited remand to the Board while retaining jurisdiction of the remanded matter.

Respectfully, the Court already has the authority to take the actions contemplated in this proposal and indeed the proposal may inadvertently limit the Court's current authority. In conclusion, the Court takes seriously its mission to afford veterans and their families and survivors full, fair, and prompt judicial review of final Board decisions.

We are open to ways to improve the Court's functioning and sincerely appreciate the subcommittee's continued interest and effort in this shared goal. I am happy to answer any questions.

[THE PREPARED STATEMENT OF TIFFANY WAGNER APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, Colonel.

Mr. Shedd, you are recognized for 5 minutes, sir.

STATEMENT OF DANIEL SHEDD

Mr. SHEDD. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, my name is Daniel Shedd and I am an legislative attorney in the American Law Division with the congressional Research Service.

Thank you for the opportunity to testify on the proposed legislation entitled the Veterans Appeals Efficiency Act of 2024. My oral testimony will focus on the proposal to authorize the Chairman of the Board of Veterans' Appeals or BVA to aggregate appeals pending before the Board.

Aggregation involves grouping together claims or appeals that have similar questions of law or fact for collective resolution or processing. Aggregation can take different forms. One of the most well-known devices for aggregation is the class action lawsuit. It provides a good example of what claim aggregation seeks to achieve.

A class action allows a large group of similar situated claimants known as a class to challenge a defendant's unlawful conduct in a single lawsuit rather than through numerous suits initiated by individual plaintiffs. A single plaintiff can file a claim not only for himself but on behalf of the class as a whole. The outcome of the case binds the defendant and the entire class even if the other class members do not participate in the proceeding.

The Supreme Court has explained that one of the principal purposes for allowing class actions is to promote judicial efficiency. For example, if you have 1,000 people that have been wronged in essentially the same way the thinking is that it is more efficient use of adjudicatory resources for one judge to determine the answer once for all 1,000 people instead of multiple judges hearing the same factual and legal arguments 1,000 times over.

Achieving this adjudicatory efficiency is one of the purported goals of all forms of aggregate procedures. They also provide for consistent outcomes for similarly situated parties because all par-

ties are bound by the same decision. On the other hand, aggregate procedures may also have potential drawbacks.

Although aggregation may provide for some judicial efficiencies from a big picture perspective, some commentators suggest that aggregation also adds increased complexity to individual cases subject to those proceedings.

Courts and agencies that have used class action proceedings note that these aggregate adjudications can occupy significant adjudicatory resources and time. As a consequence, individuals involved in a class action may be delayed in obtaining justice.

Further legal commentators note that there may be fairness concerns with regards to aggregate procedures. From the perspective of a person that can be bound by a judicial proceeding that they never took part in it might seem antithetical to one of the quintessential American understandings of justice, that is everyone gets their day in court.

Currently the BVA has no procedures in statute regulation or practice that provide for the aggregation of appeals. The Veterans Appeals Efficiency Act of 2024 would permit but not require the chairman of the Board to aggregate similar claims. This broad permissive authority in the bill appears to comport with congressional delegation of broad powers to agencies in order to allow them to develop policies and practices that best fit their adjudicatory model.

I thank you for the opportunity to testify today and I look forward to your questions.

[THE PREPARED STATEMENT OF DANIEL SHEDD APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, Mr. Shedd.

We will move to questioning. Colonel Wagner, in your opening statement you said that some of the legislation—you disagree with some of the legislation that this body has put forward and that the Court itself has the ability to act on the issues without this legislation being pushed forward. Yes?

Ms. WAGNER. That is correct, for limited remains. The Court already has the authority to take limited remands.

Mr. LUTTRELL. My issue is this legislation was created for the Court's inability to act on those issues. We have presented this to you. With you all saying that you have the ability to do so, but our constituents are the ones saying that this is an issue, now we are in, we are in conflict.

I am going to need you to explain to me when that is-because if the Court itself would actually, would have, could acted on this without it being raised up to the congressional level here at this committee today we would not be having this conversation but here we are. I cannot really sit here and say I agree with what you are saying because it is not holding water.

Ms. WAGNER. Understood, Chairman Luttrell. The Court does currently have the authority to issue limited remands. However, it has not been used—it has been used sparingly by the Court.

Mr. LUTTRELL. Why?

Ms. WAGNER. That is an issue of judicial discretion. Each judge may look at an issue as the cases, as they come up on an individual basis looking at the veteran's claims and they make the decision whether or not to do a limited remand.

One of the reasons that judges may choose not to order a limited remand is a concern that it is going to disrupt the claims already in queue at the Board. When a court issues a limited remand, they send it back for readjudication. If it is limited, they are going to retain the jurisdiction. If they send it back the veterans claim at the queue, that will be disrupted because there are parameters put on that limited remand, time constraints if they would take priority over the other traditional remands. That may just be one of the reasons.

I cannot talk for all of the judges. I am just giving an example of what maybe a thought process that the judges have on that. It is really comes down to judicial discretion and the tools that they use in their toolbox.

Mr. LUTTRELL. Imagine us having to explain that to our base. Okay. Mr. Chairman, do you believe that the Board's quality rate should reflect all errored data coming from the veterans' courts including data on joint motions for remand? Yes.

Mr. AREIZAGA-SOTO. Let me go ahead and—we take quality very serious, Mr. Chairman, and the data that is done now, it is basically we do a sample of cases before we even assign them. We say we are going to take all these cases and follow them and review them when they come out. That is the pool that we review.

It is not being—it is being done generally. Remember we have been doing more legacy cases than AMA cases. We are now focusing on AMA cases. Going forward we are reviewing more AMA cases not only because it is a majority of the cases we are doing now but also because we want to ensure the AMA quality. That is how the quality process works now, Mr. Chairman.

Mr. LUTTRELL. In your opening statement you said there is going to be folks in the crowd that are going to try to defend the legacy process? Is that how you put it?

Mr. AREIZAGA-SOTO. What I said is—what I said is a number of the provisions in the options act in that bill open and bring back in a number of concepts that were existing under legacy. All the stakeholders got together, Mr. Chairman, and came with what we believe is a much better process which AMA. For example, one concept is following that the judge that does the hearing is the judge that gives you the decision.

Mr. LUTTRELL. Yes.

Mr. AREIZAGA-SOTO. As you know, I have been in this position for 2 years. I came in and that sounded very reasonable to me. I have instructed for that to be done whenever possible. To make it a requirement like it was under legacy could have very negative effects. You have a judge that goes on extended leave. I am going to have to hold that case because that judge was the one that did the hearing and then the judge-we need to wait for that judge to do the decision.

That is the commonsense changes and veteran-centric. It is all about the veteran experience.

I understand if we can match it, we will match it, Mr. Chairman. We do not want to have it a requirement as in the case of legacy. A number of—to ensure the line moves if you get a case and the case goes through the court and the case has to be remanded back——

Mr. LUTTRELL. Yes, sir.

Mr. AREIZAGA-SOTO [continuing]. you get back in the line. Under legacy you would keep your place in line so that is what would generate a lot of churn and remember, cases that come back from the Court, the veteran does not necessarily get, does get a change in benefits but many of those Joint Motion for Remands (JMR) are, they just go back in the system without a decision by the Court.

Mr. LUTTRELL. Okay. Thank you, sir. Ranking Member. You may be recognized, sir.

Mr. PAPPAS. Thank you, Mr. Chairman. I do think there is consensus among members and stakeholders as well that the full benefits of the Appeals Modernization Act have not yet been realized and I think one of the reasons is these legacy appeals which the Board has not cleared out as quickly as you had initially projected you would.

I think there is also this feedback look between VBA and BVA regarding quality that is not working as well as it could, and I think that has slowed things down as well. Claims have gotten stuck in a feedback loop with multiple remands. Mr. Chairman, you were talking about the success story here over the last few years. You talked about building capacity, pending caseloads dropping, QA rates improving.

I am really concerned about the challenges, the areas that are not going well. We are not just on this glide path that is going to continue. Where do you see the challenges ahead? Very importantly, what kind of feedback are you getting from attorneys, from Veterans Service Organizations (VSO), from stakeholders about challenges and progress and where things need to go as we look out into the future?

Mr. AREIZAGA-SOTO. Thank you for—thank you for your question, Ranking Member Pappas. It is definitely a half full glass story, and I am an optimist so I recognize that. I do think that the AMA, it is now finally coming into full implementation because as you know over these 5 years, we have had to operate under two systems.

We had a majority inventory of legacy cases that continue to operate under the legacy rules and then we had a new AMA so we have been managing those two. Fortunately, we are at the end of legacy and for the first time we are full, we are in a majority AMA world and that is showing the benefits of AMA. Challenges, one of the challenges has been raised by the committee and we take it very seriously is to ensure training.

One of the questions that has been raised by the committee is what we are doing on the training side. I can tell you that we are head on with training. Just last week we had all the judges for a week of training here together for only the second time in the history of the Board. The reality is that we are scheduling and hosting over 300 trainings per year for our team members whether judges or attorneys. That is one challenge.

The other challenge, Mr. Ranking Member, has been the remands. I recognize that the remands are a challenge because you get in line, you get for a decision, and you do not get a decision in a high number of cases. We have been laser focused in identifying why are we having remands? I have been telling the judges,

I cannot force you to make a decision, military, undue command influence.

I can tell them, hey, you are not doing any good for our veterans. Veterans want finality. We are—we are doing training and we are doing a whole system to ensure that we reduce remands. Just last week out of those 24 hours of training we gave the judges, 8 hours were dedicated to implement the Government Accountability Office (GAO) recommendations. We have already implemented the first two, that is recommendation number 3, to ensure consistency and a reduction of remands. That is what we are doing, Ranking Member Pappas to deal with that challenge.

Mr. PAPPAS. Thanks for those comments. I want to move on to a different issue and, Ms. Pierce, maybe I can direct this to you. We are considering a couple of bills to address issues communicated to us directly from VA's frontline employees regarding over utilization of toxic exposure risk activity exams specifically for claims that are seemingly unrelated to toxic exposure.

The exams and subsequent memos Veterans Service Representatives (VSR) must create as a result of them have the effect of slowing down the processing of a claim. According to your testimony VA is largely rejecting both of those proposals.

In your opinion, Ms. Pierce, what can Congress do to alleviate the increased workload extraneous toxic exposure exams have imposed on employees? Is it possible to preserve VA duty to assist while also narrowing the scope of TERA exams?

Ms. PIERCE. Thank you for the question. There are a large variety of different things that could be done to impact the mandatory requirements for the TERA exams. Both of these bills take different approaches to doing so.

We have identified some operational challenges ourselves with claims related to TERA taking approximately 33 days longer than other types of claims and the large volume of TERA exams that are being requested, resulting in a relatively low grant rate related to all other claims.

We have identified that there are some limitations in our data, how we are collecting data on TERA and we have heard perspectives from our employees, from VSO and other stakeholders. We have set up a TERA data workgroup to analyze the data, look at potential policy and procedural changes or system updates that could enhance how we are providing benefits to this population. We want to make sure we are taking a deliberate approach, so I do not have any concrete recommendations on what could be specifically done.

I would draw attention to the provision in the toxic exposure examination improvement Act that would amend the definition of TERA in 38 USC 1710, specifically adding a qualifier that a TERA would be established for an entry in an exposure record tracking system that specifically indicates the veteran was subjected to toxic exposure.

We do not support that because it limits both health care and eligibility for examinations because that is a health care statute. Amendments to potentially make changes to the mandatory requirements for TERA exams should consider any unintended consequence on also limiting health care eligibility.

Mr. PAPPAS. Thanks for those comments. I am way over my time but I hope we can continue talking about this. I yield back.

Mr. LUTTRELL. Thank you, sir.

Mr. Self, you are recognized for 5 minutes.

Mr. SELF. Thank you, Mr. Chairman. Mr. Chairman, before I get to my questions how many legacy cases are remaining?

Mr. AREIZAGA-SOTO. Sir, some of the—some of the inventory is at the—at the BVA and some of it is at the Court. At the Board we have 12,000, sir.

Mr. SELF. Twelve thousand, okay, thank you.

Mr. Chairman, accountability is often an issue in our hearings with VA in every area. If I understood your testimony correctly for decades the Board has held the VA, the VBA accountable for failing to comply with the Board's orders. Did I understand your testimony correct, that the Board should stop doing that?

Mr. AREIZAGA-SOTO. Thank you for your question, Congressman Self. The Board does not hold accountable. What the Board does it reviews, so under the AMA, under, you know, between legacy and AMA, in legacy the veteran only had one option if they did not accept the decision of VBA and it was to appeal to the Board.

Under AMA as it is veteran centric and it looks for veteran choices, the veteran has an option to a higher-level review appeal at VBA. That is working very well. Many veterans are taking that choice. VBA has grown exponentially their number of decisions, up to 2.4 million a year. We are still seeing the same number of appeals, Mr. Congressman.

When it comes to us the judge reviews it, he can grant it, he can deny it, or he can say there is the information is not enough or there is another issue that needs to be reviewed——

Mr. SELF. Okay.

Mr. AREIZAGA-SOTO [continuing]. and it remands it back to, back to VBA, sir.

Mr. SELF. Okay. That is the process. I am talking about accountability. Who is holding VBA accountable for Board orders, is the bottom line?

Mr. AREIZAGA-SOTO. Sir, that is—that is the system. We are. That is the system because by going back it goes back to their inventory and they need, and they act upon it and we would expect that, you know, in this——

Mr. SELF. It is a self-policing process?

Mr. AREIZAGA-SOTO. It is but let me go and turn it over to Ms. Ogilvie because we have created a Tiger Team to coordinate issues and work through interfacing.

Mr. SELF. Okay. Ms. Ogilvie.

Ms. OGILVIE. Yes.

Mr. SELF. You have been very patient.

Ms. OGILVIE. As to remand and VBA's adherence to the remand instructions that are sent from the Board, that is overseen by VBA, yes. It is self-policing. It is through our quality system, so we have in progress reviews and we have reviews that happen after the fact quality reviews.

We also, as the chairman mentioned, we have a Tiger Team within VBA and at the Board that looks at the instructions themselves as well as the adherence to those instructions. We have a

feedback between BVA and VBA to discuss any problematic instructions that need—cause concerns or if VBA is not adhering to those instructions.

Mr. SELF. Who ultimately holds the authority to hold VBA accountable? Is it within VBA?

Ms. OGILVIE. Yes. It is within VBA.

Mr. SELF. I thought that might be the answer. Okay. Ms. Ogilvie, for you again, does DOD consistently classify entries in ILER as toxic even though they may or may not be toxic?

Ms. OGILVIE. I am going to actually defer that to Ms. Pierce.

Mr. SELF. Okay.

Ms. PIERCE. Thank you. The ILER system collects a lot of different information. There is a lot of surveillance of exposure events that takes place. Typically——

Mr. SELF. Okay. My question is very narrow. Let us narrow to the question. Do you over classify—my question is, do you over classify toxic versus nontoxic? I am trying to get to the number of TERA exams that we have.

Ms. PIERCE. Yes, there are definitely entries in ILER that are not related to toxic exposures, related to just routine and monitoring of substances at locations as well as just health assessments that are totally unrelated.

Mr. SELF. As the The Sergeant First Class Heath Robinson Honoring our Promise to Address Comprehensive Toxics (PACT) Act requires a TERA exam if they see an entry that is toxic, is that correct?

Ms. PIERCE. As we have interpreted essentially any entry in ILER would trigger both eligibility to health care and an exam under Section 1168 based on TERA.

Mr. SELF. Any entry, is that what you said?

Ms. PIERCE. Yes.

Mr. SELF. I think we have identified the problem. Mr. Chairman, I yield back.

Mr. LUTTRELL. Thank you, Mr. Self.

Mr. Duarte, sir, you are recognized for 5 minutes.

Mr. DUARTE. Thank you, Mr. Chairman. It is great to be here with the committee today. I appreciate your time, appreciate the panel.

Colonel Wagner described the veterans' courts and remands and some judges do it some way and some judges do not do it as much and it seems like—is that based in a vagary of the law itself or a vagary of the understanding of the law or judge's preference?

Ms. WAGNER. Congressman Duarte, I believe it is really a judicial discretion issue. When a case comes in front of a judge, the judge has a decision when they review the decision of the Board—the final decision of the Board whether or not they are going to affirm, reverse, or remand.

One of the reasons there is a high remand issue of case is that there are two ways that Board decisions are remanded back to the Board. One is by judges remanding it back where they find an error, or they find that the Board is not clearly laying out the facts or developing the facts.

The Court does not have the authority to fact-find in the first instance. If there is a fact that needs to be resolved, it must be sent

back. There is no other alternative but to send it back for readjudication to develop those facts.

Mr. DUARTE. Sure.

Ms. WAGNER. Then also when a case comes to the Court on appeal, the first process is that the veterans counsel as well as the Secretary's counsel attend the conference where they are mediated by a court's staff, and they discuss the summary of the issues before the Court. The parties agree that there are errors in the Board's decisions.

In 76 percent of the cases that are conferenced are remanded back where the attorneys agree that there is an error by the Board and that is big chunk.

Mr. DUARTE. Okay. Thank you. That is—Mr. Shedd, you have done a lot of research on this type of stuff. I have seen a couple of your documents. In your opinion, is the caselaw crystal clear as to whether veterans court can issue limited remands?

Mr. SHEDD. Thank you for the question. Most recently the Court in Kisor v. Wilkie issued a limited remand where it sent the case back to the BVA with instructions to hear additional evidence with a strict timeline as this bill would clarify that it can do.

The dissenting and concurring opinions made it difficult to determine whether or not when limited remands should be used. The majority opinion did not—although it indicated that it is appropriate in certain circumstances, it did not indicate when those circumstances or what those circumstances are.

Mr. DUARTE. Okay. Well, thank you. That is enough, sir. Ms. Pierce, so I have a Clear Communication for Veterans Claims Act and I understand the Veterans Administration has some concerns about the bill.

If Congress compelled a third party to collaborate with the VA, would that alleviate the VA's concern that the entity's recommendation for improving notice letters might be noncompliant with the law? Is the law clear enough to where even the VA itself can give clear direction as to what is certain in terms of clarity and consistency with the law?

Ms. PIERCE. I will defer that question to Ms. Ogilvie.

Ms. OGILVIE. Thank you for the question. Yes, so VA believes that legislative action here is not required for a comprehensive letter review. VBA's business line already engage in continuous improvement of notification letters. There is an existing governance process in place. There is—the concerns that we have with this bill specifically are about the legal issues that you mentioned.

Mr. DUARTE. Well I think that is the essence of our problem with not having the bill, with not having a reformed Clear Communication for Veterans Act because these letters are so full of legal concerns and self-protections of the agency that they can get up to 20 pages long and, I mean, I, as a layman, not familiar with veterans' affairs, I am lost in your jargon and lingo to some degree today. That is my problem. I jumped in on the committee.

These veterans have serious life issues hanging on their end. I do not think they need more legalese. I think these veterans need clear communications that is focused around themselves, their cases, their needs, and the resources available from the Veterans Administration to get it to them.

I have a feeling if I left every legal issue to be clarified by the VA itself, these letters would go from 20 to 30 pages, not from 20 to 2 pages.

Ms. OGILVIE. Our concern with the bill is that it leaves no room for VA to clarify or refine some of the language that the Federally Funded Research and Development Centers (FFRDC) would recommend. We have no issue with an FFRDC looking at letters and suggesting improvements. The language as written makes it mandatory for VA to accept that language and there are legal issues that must—the law does lay out things that we must tell the veteran in every letter especially notice letters.

We do not want that to be something that will be a risk for veterans as well because they do need to be aware of their rights.

Mr. DUARTE. Do these letters have an executive summary at the front that tells them what their issue is and what they can do and then all the boilerplate and legal mumbo jumbo, as we generally call it when we are buying a car or a house, an insurance policy, or whatever can be at the back?

My understanding is these letters are coming to the veteran where this stuff is more front and center and comingled with the useful information than it is put as a disclosure as is the case in most transactions.

Ms. OGILVIE. Yes. In some—in some letters, like notification letters, there is kind of a bottom-line up front about whether there has been a grant or denial of the claim and what kind of payment that the veteran can expect and the appellate rights and other rights are at the back.

Mr. DUARTE. That is in some letters?

Ms. OGILVIE. In some letters. Yes.

Mr. DUARTE. We do not—we are not confident that that is—that is consistent, that every veteran is going to have that luxury of having a clear set of information up front versus comingling it and hiding it to some perspectives within the body of long legalese and confusing letter?

Ms. OGILVIE. Yes, that is correct, sir.

Mr. DUARTE. If you have involvement to make sure all of your legal disclaimers are there somewhere I think a company that has skills in bureaucratic engineering and informing for customer satisfaction, because that is ultimately what we are trying to do is going to know what to put up front and what to put in back.

I do not think they will limit your legalese. I think they will just get it out of the way and kind of where everybody else puts it.

Thank you, Chairman. I yield back.

Mr. LUTTRELL. Thank you, Mr. Duarte. Mr. Duarte, do you have another question, sir, for a second round?

Mr. DUARTE. Not for this panel, no. Thank you, sir.

Mr. LUTTRELL. Okay. Ms. Ogilvie, just to piggyback off of from what Mr. Duarte was saying, is there a specific regulation or reason why every member does not receive, as you said, the bottom-line up front on the front page of every letter that is sent to them? That just seems like that would work so much better than the letters that do not have that. Is there something in place that is preventing that from happening?

Ms. OGILVIE. No, there is not. And——

Mr. LUTTRELL. Outstanding.

Ms. OGILVIE [continuing]. I would just note that also we, after the recent hearing on letters, we have also been working very closely with VSOs and other attorney representatives to get their feedback about letters that are——

Mr. LUTTRELL. Great. I am pretty sure I asked you guys to do that.

Ms. OGILVIE. Yes. And——

Mr. LUTTRELL. Outstanding.

Ms. OGILVIE [continuing]. we are looking forward to the May roundtable to discuss this further.

Mr. LUTTRELL. Okay. Perfect. All right. On behalf of the subcommittee, I thank you for your testimony and joining us for today. You are now excused.

Third panel, you may approach. Good afternoon. I am assuming Ms. Pierce is not joining us with this panel, is that correct? Just so I do not mess—Okay.

Our third panel includes Ms. Candace Wheeler, director of government and legislative affairs for the Tragedy Assistance Program for Survivors; Christopher Macinkowicz, deputy director for the National Veterans Service at Veterans of Foreign Wars of the United States; and Mr. Andrew Tangen, first vice president of the National Association of County Veteran Service Officers; and Ms. Renee Burbank, director of Litigation of the National Veterans Legal Service Programs.

Would the witnesses please stand and raise your right hand?

[Witnesses sworn.]

Mr. LUTTRELL. Please be seated. Thank you and let the reflect that all witnesses answered in the affirmative.

Ms. Wheeler, you are now recognized for 5 minutes to present the testimony of the Tragedy Assistance Program for Survivors.

STATEMENT OF CANDACE WHEELER

Ms. WHEELER. Chairman Luttrell and Ranking Member Pappas, and distinguished committee members, the Tragedy Assistance Program for Survivors is grateful for the opportunity to testify today on behalf of over 120,000 surviving families, TAPS is honored to service.

A top legislative priority for TAPS is ensuring surviving spouses are allowed to remarry at any age and retain their benefits. Current law penalizes them if they remarry before age 55. Given that many post 9–11 surviving spouses are widowed in their 20's or 30's, we are asking them to wait 20-plus years to remarry and retain benefits.

Surviving spouses should not have to choose between remarrying and financial security. Regardless of their marital status, they will always be the widow or widower of someone who served and sacrificed and our country. TAPS is proud to work with Representatives Phillips and Hudson on the Love Lives On Act to address this important issue and we urge its swift passage.

We also request that Congressional Budget Office (CBO) reconsider its scoring of this bill based on VA's much lower cost projection and the fact that surviving spouses who remarry do not retain

their TRICARE or CHAMPVA insurance, which is a major cost savings to the government.

Another priority for TAPS and the survivor community is strengthening Dependency and Indemnity Compensation. Stringent limitations on DIC payments to surviving families have financial and widespread impacts. As surviving spouse Katie Hubbard states, "Increasing DIC would allow me to be able to afford groceries and childcare, medical expenses and home and car maintenance while just trying to survive."

We strongly support the Caring for Survivors Act and thank Representatives Hayes and Fitzpatrick for reintroducing this important bill. Raising DIC from 43 to 55 percent of the compensation rate paid to 100 percent disabled veterans will provide parity with other Federal survivor programs.

In addition, we thank Chairman Luttrell and Ranking Member Pappas for introducing the Veterans Compensation and Cost of Living Adjustment Act which will help increase DIC. TAPS appreciates Congressman Ciscomani and Chairman Bost for introducing the Prioritizing Veterans Survivors Act which would return the Office of Survivor Assistance (OSA) to its previous location within the Office of the VA Secretary.

OSA was established by law in 2008 to serve as a principal advisor to the secretary and as a resource for surviving families regarding benefits, care, and memorial services. In its current placement within Pension and Fiduciary Services, survivors lack daily representation before the secretary depriving critical insights and perspectives.

With more than 505,000 survivors eligible for DIC, OSA staffing should be significantly increased to better serve surviving families. OSA should be the official entry point into VA for survivors with the authority, bandwidth, expertise, and access needed to address any challenges that survivors face regarding all VA benefits and services.

TAPS also recommends creating a dedicated survivor help line within the veterans call center to provide access to trained agents with the cultural competency and compassion to address survivor issues enterprise wide. We appreciate VA recently holding a survivor summit to gain valuable insight and input from survivors and key stakeholder organizations to ensure survivors receive the highest quality of services and support they deserve.

TAPS thanks Ranking Member Takano for introducing the Survivor Benefits Delivery Improvement Act to improve access to VA survivor benefits through the collection of demographic data and to ensure necessary resources for survivors. TAPS recommends adding cause of death as a tracked demographic.

This data would be incredibly important to understand the different types of losses survivors face as well as creating programming and resources that are relevant for all survivors. In closing TAPS thanks Congresswoman Strickland for introducing the Fairness for Service Members and Their Families Act.

We appreciate the importance of reviewing the automatic maximum coverage of the service members and veterans group life insurance programs and would ideally like to see both the Servicemembers' Group Life Insurance (SGLI) and Veterans' Group

Life Insurance program (VGLI) fully tied to cost of living adjustments and inflation to ensure it maintains the intended rate long term. On behalf of our Nation's surviving families, we thank this committee and I look forward to your questions. Thank you.

[THE PREPARED STATEMENT OF CANDACE WHEELER APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, Ms. Wheeler.

Mr. Macinkowicz, you are now recognized for 5 minutes to present the testimony of the Veterans of Foreign Wars of the United States.

STATEMENT OF CHRISTOPHER MACINKOWICZ

Mr. MACINKOWICZ. Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States and its auxiliary, thank you for the opportunity to provide testimony with regard to this pending legislation.

As the former VFW training and quality assurance director, I am keenly aware of how quickly and often VA regulations change as well as the need to ensure that updated regulations are understood by those who use them. Recently I was representing a veteran from Maryland who had a claim for a mental health condition denied by VA. The veteran had claimed Post-Traumatic Stress Disorder (PTSD) on the initial application for benefits, however during the C&P examination the examiner diagnosed a different mental health condition and provided a medical opinion linking the condition to active military service.

Though there is a 2009 Court of Appeals case that directly references this type of situation and VA's own regulation states that raters are required to consider all the mental diagnoses in the record, a VA rating officer denied the claim because the veteran did not have PTSD. Though the referenced court case and the regulation both state that the rater was supposed to consider all mental health diagnoses of record without proper training in plain language this regulation is often confused, thus causing an unnecessary appeal.

The VFW supports the Veterans Claims Quality Improvement Act of 2024 which would provide much needed training and oversight for those deciding VA claims. However, addition of more oversight often comes with delays and timeliness if the program is not properly funded. This bill instructs the general counsel to review each updated VA regulation and develop a training program to ensure that those writing the regulations are properly trained.

It also instructs the Board of Veterans' Appeals to create a training quality insurance program. While training and oversight is essential, without proper funding for these programs the development and execution could be severely impacted thus limiting the effectiveness of these programs.

Since the creation of the VA National Work Queue in 2016, VFW accredited representatives have seen numerous instances of claims and appeals that have been sent to the National Work Queue where they sit unassigned and unworked by VA staff. In a recent VA meeting, VSOs were briefed that once a claim is in the National

Work Queue it is not uncommon to be untouched still at the 6-month mark.

The VFW can definitely corroborate this. In fact, one of our service officers submitted a claim for an increased rating more than 10 months ago, but it is still sitting the National Work Queue untouched. This is one of many examples of claims in remanded appeals that are waiting in this queue.

The Veterans Appeals Efficiency Act of 2024 would require the secretary to track claims in the National Work Queue, submit an annual report, and provide notice to veterans of the reasons why their claim is still waiting in the National Work Queue.

The VFW supports this intent but feels that there needs to be more guidance regarding the delivery and language of the notifications to veterans. During the claims process veterans are often inundated with different notifications from VA which can be confusing, overwhelming, and repetitive. Simply sending another notification to the veteran that their claim is pending in the National Work Queue will not answer the question as to why their claim is waiting in the National Work Queue.

Therefore, we recommend that accredited VSOs be included in the development process to ensure that the messaging and notifications is clear and effective. The VFW also supports H.R. 7816, the Clear Communication for Veterans Claims Act. One of the primary challenges veterans encounter when reviewing their disability notification letters is the intricate language and terminology used.

Far too often accredited representatives spend a great deal of time explaining the letters that make sense to the trained eye but not to anyone else. The VA disability system involves a multitude of regulations, policies, and procedures. Unfortunately, these guidelines can be subject to interpretation resulting in inconsistencies and notification letters and frustration on the part of the veteran.

Understanding the full spectrum of benefits associated with the disability rating is another hurdle for veterans. Most notification letters include information on additional benefits but veterans may struggle to connect these pieces of information to effectively assess the services to which they are entitled. This lack of clarity can impede veterans' ability to make informed decisions about their health care and overall well-being.

The VFW supports effective notification and believes that veterans should not be penalized for not understanding the complex laws of the VA process.

Chairman Luttrell, Ranking Member Pappas, this concludes our testimony and I am happy to answer any questions that you may have.

[THE PREPARED STATEMENT OF CHRISTOPHER MACINKOWICZ APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, Mr. Macinkowicz.

Mr. Tangen, you are recognized for 5 minutes, sir, to present the testimony of the National Associations of County Veterans Service Officers (NACVSO).

STATEMENT OF ANDREW TANGEN

Mr. TANGEN. Chairman Luttrell, Ranking Member Pappas, and distinguished members of the subcommittee, the National Associa-

tions of County Veterans Service Officers would like to thank you for the opportunity to submit our views on pending legislation impacting the Department of Veterans Affairs before the subcommittee.

My name is Andrew Tangen and as a first vice president of NACVSO, I am honored to speak to you—before you today. Due to the highly complex and technical nature of these pending bills I would like to focus my oral testimony on the importance of Congress's continued efforts to improve the appeals process for veterans and survivors specifically surrounding the Board of Veterans' Appeals.

Many times, veterans and survivors are trapped in a cycle of repeated denials for benefits owed to them. It starts with a decision at the VA regional office (RO), it is sent to review by the Board, then returned to the regional office for a denial. It is appealed and then reviewed again by the Board and then sent back to the regional office for another denial. Then another appeal, another denial, another appeal, and denial, becoming an endless loop that can take years to complete.

I can spend days describing individual cases where we as Government Veterans Service Officers (GVSO) have seen this exact scenario play out. In the interest of time, I will speak on one of the most egregious cases I have personally witnessed.

My office represented the widowed spouse of a Vietnam era veteran through multiple appeals and readjudication of a veteran who died of Methicillin-resistant Staphylococcus aureus (MRSA) without ever being diagnosed with it. The veteran was experiencing left side weakness and loss of balance, so he went to his primary care physician in November 2007.

A Computed Tomography (CT) scan found an abnormal finding, so he was admitted to Edward Hines VA Medical Center (VAMC) for a brain biopsy, chemotherapy, and radiation to reduce the size of a tumor he had and needed surgery on. However, this veteran was found unresponsive 1 month later. He looked incredibly sick and was running a high-grade fever. The veteran also immediately began to lose the ability to speak and could not open his eyes and passed away a week later.

The widow began attempting to uncover what happened to her husband and reached for help from former Congressman and Senator Mark Kirk. Congressman Kirk sent two requests for lab results to the VAMC regarding the veteran's death. The results showed the veteran had been diagnosed with MRSA but that was never recorded in his medical records in Hines VAMC.

Following the diagnosis the Hines employees gave the widow a pamphlet explaining the contamination procedures the widow needed to know because the veteran had tested positive for MRSA. Unfortunately, the veteran was already dead. You would think that would be enough but it is not.

The spouse was denied benefits twice under a 1151 claim based on VA negligence. Upon appeal the widow and her daughter testified about the lack of care provided to the veteran to such an extent that the daughter specifically testified that she had to wear a gown and protective equipment when she went to see the veteran 2 days before he passed and that her father's tongue and mouth

were blackened like a hotdog that had been left far too long on a grill. The Board still denied the case, stating it remained an unestablished fact that the medical evidence existed that the VA hospitalization medical or surgical treatment resulted in the veteran's death.

My office stepped in to represent the widow in 2020 at the Court of Appeals for Veterans Claims, where we pointed out medical treatment was not provided correctly. We also retained an internist with 40 years of medical experience and 35 years of medical malpractice expertise who determined VA providers negligently treated this veteran's MRSA infection.

The case once again went to the Board, was remanded to the regional office for a new forensic examination where the testimony of our expert witness was completely ignored, and the claim denied again. We again appealed the case, correctly pointing out the failure to consider our expert witness 5 more times.

On the 6th remand the VA finally ordered an examination, this time by a high-level VA provider who immediately determined the VA failed to treat the veteran's MRSA infection, failed to follow VA procedures as well as failed to follow guidelines from the Infectious Disease Society of America and the American Thoracic Society.

It took 15 years, 15 long, unnecessary years of constant back-and-forth between the regional office and the Board before the widow was finally awarded benefits for the death of her husband. Unfortunately, this is not an uncommon occurrence. This happens repeatedly and consistently, whether in the legacy appeals or the Appeals Modernization Act.

Ultimately, it should never take 15 years for a widow to receive benefits she rightly deserves.

Chairman, Ranking Member, and members of the subcommittee, on behalf of NACVSO, thank you for the opportunity to submit our views on some of these bills pending before—being considered today and we look forward to working with you on the legislation and would be happy to take any questions for the record.

[THE PREPARED STATEMENT OF ANDREW TANGEN APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Thank you, sir.

Ms. Burbank, you are now recognized for 5 minutes to present the testimony of the National Veterans Legal Services Program (NVLSP).

STATEMENT OF RENEE BURBANK

Ms. BURBANK. Good afternoon. Thank you, Chairman Luttrell, Ranking Member Pappas, and the esteemed members of the Disability Assistance and Memorial Affairs Subcommittee.

On behalf of the National Veterans Legal Services Program, thank you for the opportunity to testify before you today on ways to improve the claims adjudication and in particularly the appeals process at the Department of Veterans Affairs and the Court of Appeals for Veterans Claims.

NVLSP is a nonprofit veterans services organization founded in 1981 and we are dedicated to ensuring that our Nation's 18 million veterans and their families receive the benefits that they need and

deserve for disabilities resulting from their military service to our country.

For the sake of time, I would like to focus, though, on just a couple of issues and particularly the Veterans Appeals Efficiency Act of 2024 and the provisions relating to the Court of Appeals of Veterans Claims. This is not a one fix, one piece of legislation is not going to fix everything about the delays, the inefficiency, the inconsistency of decisions. These tweaks will make a difference and NVLSP supports taking a multifaceted approach as reflected in the legislation you are considering today.

The Veterans Appeals Efficiency Act will provide to the CAVC several tools for its toolbox that will make sure that the Veterans Court has the same kind of authorities as other Federal courts do when they review other Federal agencies' actions. The Veterans Court should not be hampered in its ability to act efficiently and craft effective and timely relief for veterans.

In particular NVLSP strongly supports codifying the Court's authority to issue limited remands to the Board. Basically this means that the Court can, when it thinks it is appropriate, send a case back to the Board to answer a narrow question that the Court needs answered before making its decision. Limited remands can help reduce the churn that occurs when a case go back to the Board and then back to the RO and then back to the Board and then back to the Court.

Instead with a limited remand the Board can get—the Court, excuse me, the Court can get the Board to act narrowly and quickly and then the case comes right back to the Court to resolve the case, hopefully for the last time. Other courts routinely do this when they are reviewing agency actions. They do not use it all the time but where the Court is particularly skeptical of the agency getting it right on remand or is concerned about undue delay this is a useful tool to have.

The Veterans Court should have and we believe does have this authority but it should be clear and it should be clear that this is an appropriate tool for the Court to use. NVLSP also supports the CAVC's ability to use its class action authority for aggregating claims in the way that other courts do. Right now, the CAVC's ability to use its class action authority is narrower than any other Federal Court's class action authority because of the way the Federal Circuit, the court that reviews CAVC decisions recently interpreted the CAVC's limited jurisdiction to prevent considering common questions of law on claims that do not yet have final Board decisions.

Giving CAVC the power to issue class action decisions that affect all veterans with the same issue is vital to make decisions fair, consistent, and improve efficiency by deciding a common legal issue for everyone at the same time.

With that I will restrain myself from talking about all of the other provisions and therefore just thank you for time, thank you for the opportunity to testify, and we welcome any questions.

[THE PREPARED STATEMENT OF RENEE BURBANK APPEARS IN THE APPENDIX]

Mr. LUTTRELL. Yes, ma'am. Keep going.

Ms. BURBANK. All right. I will keep going. In particular the discussion from the previous panel, there was a discussion about whether the Veterans Court has this limited remand authority. The clerk of the Veterans Court stated in written testimony that this provision could inject uncertainty into the law and restrict the authority that they already have.

With all due respect, NVLSP position is that this bill will inject certainty. There is some lack of clarity between a couple of cases. Mr. Shedd discussed Cleary and for——

Mr. LUTTRELL. We can appreciate the argument from the other side, I Am sure.

Ms. BURBANK. Excuse me?

Mr. LUTTRELL. You can appreciate the argument from the other side?

Ms. BURBANK. I think the key is that the provision as written does not require using limited remands in a way different from how the Court already sees its authority. The problem is that several of the judges on the Court have said explicitly in decisions, we are not sure how this works with our other caselaw that says we do not have the ability to just keep jurisdiction on certain cases and send them back. The ability to——

Mr. LUTTRELL. They do not say that. From what I understand from the previous panel is that they have absolute understanding that that belongs to them.

Ms. BURBANK. They have not used that authority that they are now saying they have. Right? We agree that they have the authority. They do not use it very often. And——

Mr. LUTTRELL. You can appreciate that I have to take what you are saying, what the previous panel said, because I am looking at you as the subject matter expert and the previous panel, they are subject matter experts, but I was not there. I did not witness this.

Now here we are once again in conflict. Is this a widespread, wide casted net problem? Are these singularities that we are dealing with because the legislation that we are pushing across is exactly what you are—is why—what you are saying is why we are doing it.

Ms. BURBANK. Right. For example, there are two cases and they are called Best and Mahl, M-a-h-l, and it is—they are often referred to together, Best and Mahl. What happens with the veterans court now is that when there are say five issues that come in one case and there is one issue that should be remanded to the Board. It is very clear that it should be remanded.

There is some issue maybe the Board has not decided—has not explained it is reasons for its decision. Under the case law that exists right now that case has to go back. You take the low-hanging fruit. The Court takes the low-hanging fruit and sends the whole case back.

This would provide an opportunity and clarity that what the Court could do instead is say if there is just one issue that needs, the Board needs to just cleanup part of its decision, it can come straight back to the Court to decide an important issue—to decide an important legal question that otherwise may never come back to the Court or may take years to come back to the Court.

Mr. LUTTRELL. Mr. Tangen, do you got anything for that?

Mr. TANGEN. I would say, Chairman, I agree with NVLSP. We also agree with NVLSP on what they were saying as well. I will also point out that there are many cases that come from the Court of Appeals to veterans' claims back down to the Board that the Board is not tracking the data on why they were sent back to them through remands, through joint motions for remands.

Mr. LUTTRELL. Like an individual or like the entire Court itself?

Mr. TANGEN. The Board itself is not tracking what the reasons that their decisions were sent back through a joint motion for remand on those.

Mr. LUTTRELL. Okay. Hang on for a second. I do not think anybody likes to beat up the VA more than I do. I also can appreciate what they are and everything that they are trying to accomplish. I do appreciate the struggles that we all—that you all are experiencing with the veterans that you are helping. Right?

I am a veteran myself. I get it. I am not going to blame the entire Board. I am not going to—the Court system, I would not do that. I find that really hard to believe and I am not—I am not getting on to you about this, but what I am saying is I find it hard to believe that the entire Court itself would not know that or cannot—would not understand exactly what came back down to you all. That does not make any sense to me on how that would happen.

You tell me it went up into the system. Nobody took a look at it and they sent it right back down to you and you went up there and said, hey, what is the problem? They are like, we do not have any idea. We have never seen it?

Mr. TANGEN. No, Chairman, what I am specifically referencing is that we had the AMA summit at the beginning of February and the question was specifically asked to the Board there out of the 9,000 joint motions for remands or returns from the Court to the Board does the Board track those reasons for remand from the Court and do they provide any training? The Board said, no.

Mr. LUTTRELL. Okay. It is just a documentation thing?

Mr. TANGEN. Correct.

Mr. LUTTRELL. Okay. Mr. Duarte, sir, you are recognized.

Mr. DUARTE. Thank you, Mr. Chairman. Thank you to the panel for being here today. Ms. Wheeler, thank you for being here. Can you elaborate on why TAPS supports the clear communication for veterans Act?

Ms. WHEELER. Yes, I would be happy to. First of all, thank you so much for introducing this piece of legislation. We have seen that survivors often struggle as well with clear communication. Oftentimes these letters, as we have all been discussing today, are down in the weeds and very hard for the layman to understand. Especially add a surviving spouse that is grieving on top of that and trying to be able to understand what is being said to them, it would be very helpful to have it in very clear, layman's terms up front as we were all discussing earlier.

What we also find with the whole letter type of back-and-forth between our survivors is that often it is asking them to prove that they have done something or to respond back. In the case of remarriage, a letter is sent to them that says, have you remarried? If

they have not remarried they are still supposed to send the letter back, which is wasting time for both the VA and the survivor.

We would like that communication not only to be clear but also thoughtful in the sense of what you are asking. You may not need to have that reply. If they indeed need to respond back to the VA, then they can do so at that time. That is one of the things that we hear repeatedly from survivors in terms of communication.

We also believe it is important for our veterans as well, making sure that it is in laymen's terms up front, understanding that the VA does need to put different types of legalese toward the back but it would be very helpful, so thank you so much.

Mr. DUARTE. Thank you. Thank you very much for that answer.

Ms. Burbank, do you think that the veterans would receive faster decision if we authorized class actions at the VA Board of Veterans' Appeals?

Ms. BURBANK. I am sorry, at the—I am sorry, at the BVA or at the Court?

Mr. DUARTE. At the VA Board of Veterans' Appeals. Do you think the class action lawsuit is going to help veterans access their outcomes and their benefits faster by allowing class action?

Ms. BURBANK. Class actions as a rule whether it is a courts or a board, they are a tool of efficiency. They are designed to make claims go faster because you are dealing with issues once rather than dozens, hundreds, thousands of times. It relieves not just the one—it makes one case more complex certainly, but it means that you are not having 100 cases, 1,000 cases.

Mr. DUARTE. Sure, the class action as you understand, as we understand them in business, you have a giant business that is going to be sued with a number of, a myriad of small claims from similar from similar plaintiffs. You assume an adversarial position.

You assume they need to unite through a big law firm who is going to take a very large percentage of the outcome of the award. In the case of veterans where they have us here providing oversight, where they have veterans advocacy groups on the ground, do class actions make the same sense when the defendant often times is the government represented by this committee and the Congress itself.

Ms. BURBANK. Class actions against the government in other circumstances also exists. The whole idea is, yes, they are a tool that again not every case is one that is amenable to class actions. Right?

Mr. DUARTE. Sure.

Ms. BURBANK. You have to have a common question of law and fact that is going to make it faster and more efficient to deal with all at once rather than every single time.

Mr. DUARTE. Thank you. Great. Mr. Tangen, I will take your comments on either the Communication for Veterans Claims Act. Do you see these letters as frequently and are they more obstructive than they have to be to the veterans getting access to their benefits without services from someone like yourself?

Mr. TANGEN. I will give a real quick story to answer your question. My office represented a veteran, a Vietnam veteran diagnosed with Parkinson's. He was an elected official in our county. He wanted to give up because of the amount of paperwork that he got

from the VA. And came into my office with a box of paperwork and said I do not want to do this anymore, keep reading this stuff. I looked at him and I said, stop reading the letters. That is why you have me.

Mr. DUARTE. It was virtually impossible for him to get his services and benefits that he deserved without an attorney as yourself?

Mr. TANGEN. That is correct.

Mr. DUARTE. Does that need to be that way?

Mr. TANGEN. I do not think so. No.

Mr. DUARTE. It has not corrected itself as of yet through the Veterans Administration directly?

Mr. TANGEN. That is correct.

Mr. DUARTE. You have given them some input over the years?

Mr. TANGEN. That is correct, I have.

Mr. DUARTE. I assume veteran groups have given them some input over the years and it has not been fixed yet?

Mr. TANGEN. That is correct.

Mr. DUARTE. Thank you. Appreciate it.

Yield back, Mr. Chairman.

Mr. LUTTRELL. Thank you, sir.

Ms. Wheeler, I have a follow-on question for you about the spouses and the letters that they receive asking if they had been remarried because current law states that if you are remarried before 55 you lose your benefits by law until this current legislation that we are trying to push through if that is enacted and passed.

Now, the VA sitting in this room with us their job is to reach out to those spouses and ask those questions. I get it. Every time I get a letter from the VA, I am not going to say what happens to it, but I am a nonresponsive guy. If they do not ask those questions and they do not have those answers when they come to sit before us with a full committee, we are going to hold them accountable.

My question is how do we fix that problem? Do not say pass the law because we are not there yet. The way we engage with the spouses is by mail, snail mail, email. I dare not say the VA's launching out folks to go knock on doors. I do not know that for certain. I do not think that would be the case. Here is the problem.

When talking with the spouses have you in your engagements have they responded in a way that said I would prefer this to happen? Or are they just okay with like, I am not responding? There is two sides to this coin.

Ms. WHEELER. That is true. We do understand that the VA is contractually obligated to ask that question and we understand that, and we agree with that. The problem is it is not consistent. These letters come but not every year. Oftentimes a survivor may get one every year. They may have a lapse in time between that so they do not always know that they are coming and to expect them. If they had remarried, we encourage survivors to proactively reach out to the VA.

Mr. LUTTRELL. Is there a timeframe that is more—and I do not mean for this to sound in anyway disrespectful, but is there a timeframe that they would appreciate, like is the VA, they reach out every 5 years or VA reach out every year? Is there a—I am trying to solve a problem where it lives right now.

Ms. WHEELER. It would be helpful if it was consistent. If they are going to do it every year in a particular timeframe then the spouse knows to expect it. We also encourage surviving spouses to reach out to the VA to inform them that they have remarried. I think that is a very important part of this as well.

Mr. LUTTRELL. Okay. Thank you. Mr. Tangen, I have a question Mr. Self asked me to address to you. Do you agree that VA is obtaining too many unnecessary toxic exposure related disability compensation exams?

Mr. TANGEN. Chairman, I do absolutely believe that. What we have seen is, and this is part of our written testimony that was submitted, it appears to us that it is almost become a sixth theory of entitlement, namely being the five ones that under law are direct aggravated secondary presumptive and VA negligence.

In some situations, it feels like the VA is using TERA as a method of proving by a theory of service connection and we have seen C&P exams where veterans who have not even filed for TERA go through a TERA exam and the box is checked, no, this is not a TERA and none of the other five theories of entitlement are checked off.

It goes to the RO and is then denied and then we have to take the claim through supplemental or a higher-level review or up to the Board in order to get another C&P examination, a forensic examination to have it be done the right way.

Mr. LUTTRELL. Okay. Thank you. Ranking Member had to step away. I look forward to working with these issues with the Department and the rest of my colleagues on this subcommittee. These bills discussed today would provide important improvements for veterans and survivors navigating the VA claims and appeals process. They would also improve access to benefits for veterans and their surviving loved ones.

The written statement of our witnesses will entered into the hearing record. I ask unanimous consent that statements for the record, for the record we have received be entered into the hearing record. Hearing no objection, so ordered.

I ask unanimous consent that all members have 5 legislative days to revised extended remarks including extraneous material. Hearing no objections, so ordered. Thank you all for attending today.

[Whereupon, at 4:12 p.m., the subcommittee was adjourned.]

A P P E N D I X

PREPARED STATEMENTS OF WITNESSES

Prepared Statement of Jaime Areizaga-Soto

STATEMENT OF THE HONORABLE JAIME AREIZAGA-SOTO
CHAIRMAN, BOARD OF VETERANS' APPEALS
DEPARTMENT OF VETERANS AFFAIRS (VA)
BEFORE THE
COMMITTEE ON VETERANS' AFFAIRS
DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS SUBCOMMITTEE
U.S. HOUSE OF REPRESENTATIVES
APRIL 10, 2024

Good afternoon, Chairman Luttrell, Ranking Member Pappas, and Members of the Subcommittee. I appreciate the opportunity to appear before you today to discuss several bills that would affect the Department of Veterans Affairs (VA) programs and services. Accompanying me today is Brianne Ogilvie, Assistant Deputy Under Secretary, Office of Policy and Oversight, Veterans Benefits Administration and Jessica Pierce, Assistant Director, Compensation Service Policy Staff.

H.R. 2911 The Fairness for Servicemembers and their Families Act of 2023

The proposed legislation would create a new section under title 38 of the United States Code that requires the Secretary of Veterans Affairs to periodically review the automatic maximum coverage under the Servicemembers' Group Life Insurance (SGLI) program and the Veterans' Group Life Insurance (VGLI) program.

Section 2(a) of the bill would require the Secretary to review the automatic maximum coverage under these programs every 3 years by measuring the statutory maximum against the Consumer Price Index (CPI) for the fiscal year (FY) ending during the preceding calendar year compared to the average of the Consumer Price Index for fiscal year 2005.

VA does not support unless amended. VA suggests revising the bill to clarify that the results of the analysis submitted to Congress should be used as a leading indicator for coverage increases, rather than for an exact amount of coverage, for the following reasons:

First, there are other measures of coverage comparison, such as coverage available in other large employer plans and military benefit associations. For many Service members, the SGLI program offers more than a typical employer plan would offer already.

Second, the SGLI program was never intended to be the sole source of life insurance coverage for Service members, but rather as foundational coverage that can be added to through commercially available supplemental coverage if desired. VA and private insurers have worked in tandem since the establishment of SGLI in 1965 to meet the needs of Service members.

Third, the administrative simplicity of offering coverage in $50,000 coverage increments, as currently provided for by law, is critical in ensuring Service members understand the coverage they have and for the uniformed services in collecting premiums. Offering coverage outside of the current increment structure would significantly increase administrative costs both for the services and for the program's primary insurer, Prudential Insurance Company of America, who administers SGLI. As the program is self-supporting, any administrative cost increases would be borne by the insureds.

Additionally, the proposed legislation does not take into consideration that coverage amount for SGLI/VGLI was increased to $500,000 on March 1, 2023. H.R. 2911 still references the prior coverage maximum amount of $400,000 and the CPI for FY 2005 when coverage was increased from $250,000 to $400,000.

Estimated General Operating Expenses (GOE) Costs: The GOE estimate for FY 2024 is $2,000 and includes salary, benefits, rent, travel, supplies, other services, and equipment. 5-year costs are estimated at $4,000 and 10-year costs are estimated to be $8,000.

H.R. 3651 The Love Lives On Act of 2023

The proposed legislation would amend titles 10 and 38 of the United States Code to improve benefits and services for surviving spouses, and for other purposes.

Section 2 of the bill would remove the delimiting date for spouses under the Marine Gunnery Sergeant John David Fry Scholarship by removing paragraph (2) from 38 U.S.C. § 3311(f). It would also allow a surviving spouse to retain Fry Scholarship benefits even after remarriage.

Section 3(a) of the bill would amend section 103(d) of title 38 of the United States Code by making structural modifications and inserting a new clause which reads "[n]otwithstanding clause (ii), the remarriage of a surviving spouse shall not bar the furnishing of benefits under section 1311 of this title to the surviving spouse of a Veteran." Then within paragraph 103(d)(5), subparagraph (A) would be struck, and the remaining subparagraphs would be renumbered.

Section 3(b) provides that, beginning the first day of the first month after the date of the enactment of the bill, dependency and indemnity compensation (DIC) payments shall be resumed under section 1311 of title 38, United States Code, to an individual who is: (1) the surviving spouse of a Veteran; and who (2) remarried before reaching age 55 and the date of the enactment of this Act.

Section 7 of the bill would amend the definition of a surviving spouse for Veterans benefits under paragraph 3 of section 101 of title 38, United States Code. The bill would remove the language that requires a marriage be between members of the opposite sex. It would also remove language within the same paragraph that reads "or

(in cases not involving remarriage) has not since the death of the Veteran, and after September 19, 1962, lived with another person and held himself or herself out openly to the public to be the spouse of such other person."

VA supports with amendments and subject to the availability of appropriations. The removal of the restriction on remarriage in section 2 and the change in the definition of "surviving spouse" in section 7 would allow certain individuals to retain and use their educational assistance. However, VA recommends Congress add an explicit provision to section 2 that would reinstate eligibility for any surviving spouses who lost eligibility to the Fry Scholarship due to a remarriage and likewise add an explicit provision to section 7 (or in a new section) that would reinstate eligibility for any surviving spouses who lost eligibility to the Dependents' Educational Assistance Program due to remarriage. Resumption of entitlement is specifically addressed in section 3(b) of the bill with regard to DIC beneficiaries, and VA supports extending similar equities regarding educational assistance for survivors under section 2 and section 7 of the bill. Furthermore, the 15-year time limitation in § 3311(f) being removed by section 2 is also mentioned in 38 U.S.C. § 3321(b)(5)(A). To create consistency and eliminate confusion, VA recommends Congress also amend § 3321(5) to read as follows:

> (5) Applicability to spouses of deceased members. --The period during which a spouse entitled to educational assistance by reason of section 3311(b)(9) may use such spouse's entitlement shall not expire.

No mandatory or discretionary costs are associated with section 2.

Regarding section 3, VA supports the removal of remarriage restriction requirements for surviving spouses. The bill specifically addresses DIC benefits under 38 U.S.C. § 1311, which VA reads as applying to benefits granted under both sections 1310 and 1318 of the same title. If this is not the case, then VA recommends modifying the language in the bill to ensure all chapter 13 benefits are applied consistently for each benefit type. VA notes that the bill would create a disparity between DIC beneficiaries and survivor pension beneficiaries under chapter 15, the latter of whom would remain precluded from receiving those benefits if they remarry at any age. Furthermore, VA notes this bill would also create a disparity between DIC beneficiaries and survivors who qualify for Medal of Honor special pension under Chapter 15 because benefit entitlement is restricted to remarriages after age 57.

VA has further concerns with section 3(a) of the bill. Pursuant to 38 U.S.C. § 3701(b)(2) and (b)(6), certain surviving spouses are eligible for VA home loan benefits. Currently, VA relies upon a determination of the surviving spouse's eligibility for DIC benefits when evaluating eligibility for VA home loan benefits. The bill, as drafted, would create a disconnect between the requirements for DIC benefits and the requirements for home loan benefits for surviving spouses, because proposed 38 U.S.C. § 103(d)(5)(C) would still bar a surviving spouse from receiving VA home loan benefits if the spouse remarries prior to age 57. While VA could implement the

legislation as drafted, the inability to rely solely on the DIC determination would increase the complexity of, and likely the time needed to complete, a determination regarding a surviving spouse's home loan eligibility. VA would need to evaluate whether a surviving spouse with DIC remarried prior to age 57 as this would no longer be considered when awarding DIC benefits. Aligning the requirements for DIC and home loan eligibility would ensure a more streamlined process for determining eligibility for VA home loan benefits for surviving spouses.

VA further recommends deletion of the proposed language within section 3(b)(2)(A) stating that the resumption of DIC payments for the surviving spouse of a Veteran be restricted to remarriages that occurred prior to the surviving spouse reaching age 55. This requirement would disparately impact surviving spouses who were subject to statutory requirements in effect at the time of their benefit adjudication which resulted in the denial or termination of DIC benefits due to a remarriage that occurred at an age greater than 55. An example would be a surviving spouse who was afforded DIC benefits per the reduction of remarriage age restrictions from 57 to 55 per Public Law 116-315, *the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020*, § 2009 (January 5, 2021). The main concern for the disparate impact would be that Public Law 116-315 did not incorporate language similar to that of the Love Lives On Act of 2023 regarding the express requirement to resume the payment of DIC benefits for all potentially affected individuals. Instead, those surviving spouses who were either subject to DIC benefit denial or termination due to a remarriage between the ages of 55 and 57 would have to reapply to have their benefits granted or restored. As such, the language of the current bill would continue to disadvantage that population. The removal of the bills' language within section 3(b)(2)(A) would not detract from the intent of the bill and would result in a more clear, consistent, and equitable application.

Additionally, VA cites concerns regarding its ability to implement section 3(b) as well as the timeframe provided in the bill for doing so. The bill as written implies that VA will be responsible for identifying all potential claimants who were either denied or their eligibility terminated for DIC due to remarriage. This would require extensive outreach efforts, identification of individuals who are not currently in receipt of benefits, and significant implementation time.

Mandatory benefit costs associated with section 3 are estimated to be $15.3 million in 2024, $137.7 million over 5 years, and $327.7 million over 10 years. Additional time would be needed to estimate administrative costs.

VA supports section 7, and views the amendments to 38 U.S.C. § 101(3), which would result in the removal of language, as being supportive to the surviving spouses of Veterans. The removal of "a person of the opposite sex" conforms with the Supreme Court decision in *Obergefell v. Hodges*, which ruled that marriage is a fundamental right under the Fourteenth Amendment to be afforded to same-sex couples and extends to the application of benefits subject to said marriage.

VA also supports the bill's proposed removal of language that results in the denial or termination of benefits for a survivor who lives with another person and holds themselves out to the public as being the spouse of such other person, without necessarily being legally married to said individual. The language under 38 U.S.C. § 101(3) as currently written has resulted in many survivors electing to be in a committed relationship but choosing not to remarry nor hold themselves out as the spouse of another individual in order to maintain benefit eligibility. The removal of the specified language supports the overall intent of the bill to be more claimant friendly.

However, VA again recommends that Congress add an explicit provision to section 2 that reinstates eligibility for any surviving spouses who lost eligibility to the Fry Scholarship due to remarriage and likewise an explicit provision to section 7 or elsewhere that reinstates eligibility for any surviving spouses who lost eligibility to Dependents' Educational Assistance Program due to remarriage.

No mandatory or discretionary costs are associated with section 7.

Finally, VA defers to the Department of Defense (DoD) on sections 4, 5, and 6 of the bill, as these sections amend title 10 of the United States Code, which pertains to programs and services administered by the United States Armed Forces.

H.R. 7100 The Prioritizing Veterans' Survivors Act

The proposed legislation would amend 38 U.S.C. § 321(a) to reorganize the Office of Survivors Assistance (OSA) under the Office of the Secretary of Veterans Affairs.

VA opposes this bill. OSA strives to serve as a resource regarding all benefits and services furnished by VA to Survivors and dependents of deceased Veterans and members of the Armed Forces. Furthermore, OSA works to pursue matters related to policy, legislation, and other initiatives to benefit such survivors and dependents.

OSA is currently located within the Veterans Benefits Administration (VBA). This strategic placement under VBA provides them access to business lines that administer survivor benefits and allows them to collaborate directly with these business lines on beneficial initiatives for survivors. Furthermore, it provides OSA the opportunity to relay insight received from their survivor engagements to VBA. This allows OSA to utilize this information in pursuits with VBA to advance legislative and regulatory opportunities that best serve survivors.

Additionally, this placement allows OSA to directly access expert knowledge about survivors' benefits, by working directly with program offices which provide services and benefits to which survivors may be entitled. This access to knowledge is vital for streamlining communication and allows OSA to ensure any impact to survivors is considered when VBA is drafting or reviewing policy or legislative initiatives. Relocating OSA would inhibit the efficient processes currently in place for pursuing

policy and legislative changes through VBA. These existing avenues allow OSA to effectively advocate for improvements to survivor benefits and services. Disrupting the streamlined processes would affect established lines of communication with VBA and detrimentally impact individuals that this office serves.

H.R. 7150 The Survivor Benefits Delivery Improvement Act of 2024

The proposed legislation would amend title 38 of the United States Code, to direct the Secretary of Veterans Affairs to improve equitable access to certain benefits under the laws administered by the Secretary and to improve certain outreach to individuals who served uniformed services and dependents of such individuals, and for other purposes.

Section 2(a) would provide the short title for this section 2 as the Survivor Benefits Data Collection Act of 2024.

Section 2(b)(1) would create a new section 38 U.S.C. § 5321, that requires the Secretary to develop a method to collect certain demographic data from recipients of survivors' benefits in consultation with certain VA advisory committees. Based on this collection, proposed section 5321 would require VA to designate certain demographics as underserved, and include demographic information in the submission of VBA's annual reports. Proposed section 5321 would also establish definitions for certain terms related to this information collection and reporting.

Section 2(b)(2) would set deadlines for VA to develop methods to collect the above demographic information and make initial designations regarding underserved demographics.

Section 2(c) would require VA to develop and submit to the House and Senate Committees on Veterans' Affairs an outreach and education strategy for raising awareness regarding burial benefits under 38 U.S.C. § 2303 among covered dependents and Veterans who belong to an underserved demographic.

Section 2(d) would require VA to conduct an assessment of the resources of the OSA and develop a strategy to ensure the availability of resources necessary for the function of such office.

Section 3(a) would provide the short title for section 3 as the Survivor Solid Start Act of 2024.

Section 3(b) would amend chapter 63 of title 38, United States Code, in several places to redesignate paragraphs, add a definition for "covered individual," and replace "Veterans" with "covered individuals" where applicable. Additionally, this bill would require VA to provide outreach services for surviving eligible dependents of deceased Veterans.

Section 3(c) would require VA to create full-time equivalent positions focused on survivors' benefits at VA call centers.

VA supports section 2, if amended, and subject to the availability of appropriations. VA highlights the need to edit the proposed 38 U.S.C. § 5321(a)(1)(A) as that proposed subparagraph uses an erroneous description that is inconsistent with existing law. The proposed paragraph uses the term "disability and indemnity compensation" while incorporating by reference to "chapter 13 [of title 38 U.S.C.]". However, under chapter 13, the term is properly referred to as "dependency and indemnity compensation" (commonly referred to as DIC). VA recommends using the term as written and defined under chapter 13, to avoid any confusion.

VA notes concern that the collection of the data points specified in proposed 38 U.S.C. § 5321(f)(2)(A)-(E) will require not only development, but also multiple levels of concurrence prior to approval from the Office of Management and Budget (OMB) to utilize those data points. It is presumed that future demographic data requests would also need to be incorporated within existing VA forms, which would result in significant additional work on the part of VA to implement this bill given the need to review, revise and approve numerous administrative claim forms, as well as obtain the necessary clearances from OMB and consultations with other entities as specified in paragraph (b) of the proposed bill. Additionally, under current procedures, certain awards of VA benefits can be made via automated processes without the collection of additional data—for example, in certain situations, surviving spouses who were a dependent on a Veteran's award can be granted benefits through automation if VA has sufficient information already on file at the time of the Veteran's death. The Secretary understands that failure to provide information is not to be considered in the receipt of benefits but, nevertheless, the agency would be in a position of issuing benefits without even having attempted to collect the data specified by this bill as existing systems would not necessarily have captured this data previously. For all of these reasons outlined above, VA recommends the 180-day implementation date under section 2(b)(2)(A) be expanded to an implementation window of 24 months from the date of enactment to allow for adequate evaluation of forms as well as the development, testing, and implementation of systems.

VA also views the implementation under section 2(b)(2)(B) of the proposed legislation as not being feasible, and again recommends the implementation window be expanded to 24 months. This would provide sufficient time for data collection and analysis prior to VA drafting designations of "underserved demographics under subsection (c) of such section 5321" for Secretary of Veterans Affairs proclamation.

VA does not support section 3. VA highlights that the mandated frequency of once per quarter in the proposed language for 38 U.S.C. § 6307(c) is a more frequent cadence than the outreach provided to separating and retiring Veterans under the VA Solid Start (VASS) program (38 U.S.C. § 6320) and could be seen as disparate treatment. The bill would also require that the outreach be by "mail, email, and telephone," which could be read as requiring all three forms of communication be used

every time. VA agrees with the concept of using all three forms of outreach as outlined but does not agree with using all three forms of communication concurrently. As a requirement of VASS, attempts at contact are made with newly retired and those newly separated under said program in 3 general windows of time: 0-90 days post-separation, 91-180 days, and 181-365 days. VA recommends mirroring this cadence for survivors and supports using the date VA is notified of the Veteran's death to start the notification process timeline.

The proposed amendments to 38 U.S.C. § 6307 made by section 3(b)(5) of the bill require that outreach be conducted with eligible dependent(s) of a Veteran. Generally, VA is only notified of the deaths for individuals who are in receipt of VA benefits, as opposed to any and all Veterans who once served in the uniformed services. Thus, eligibility is not determined until a claimant files a claim for benefit unless they were previously identified as a dependent on the Veteran's award. If VA was never provided information that identifies a dependent, then it would not be possible for VA to conduct outreach to those individuals.

As drafted, and as it pertains to beneficiaries that VA has on its rolls, the outreach services are to continue until the eligible dependent files a claim for a benefit; however, 38 U.S.C.§ 5101(a)(1)(B) allows for benefits to be paid to survivors who have not filed formal claims if the record contains sufficient evidence to establish entitlement. Because of this, VA would omit outreach to these survivors who receive benefits paid without a claim filed. Furthermore, VA may take notification of death from any individual, so it would be reasonable for benefits to be paid without VA engaging with an eligible dependent at the time of the Veteran's death.

VA further highlights that the wishes of those who no longer want to be contacted by VA are respected by VASS. The precedent created by VASS's existing approach to outreach appears to conflict with this proposed bill's requirement in section 3(c)(1)(A) mandating that VA continue contacting a survivor until they file a claim without any regard for a survivor's communicated wishes.

Finally, VA recommends broadening the contact information provided to eligible dependents under proposed section 6307(c)(2)(A) to include "appropriate contact information for additional support" or similar. VA notes that the provision of contact information for only the OSA would result in an unmanageable caseload for that office. By broadening the language in the bill, VA would be able to determine the most appropriate office(s) to refer eligible dependents, to include but not limited to OSA. Similarly, VA provides that the removal of the specified full-time equivalent position allocation in this section would allow for VA to properly assess staffing needs to support the required outreach.

Estimated GOE Costs: The GOE estimate for FY 2024 is $491,000 and includes salary, benefits, rent, travel, supplies, other services, and equipment. 5-year costs are estimated at $2.6 million and 10-year costs are estimated to be $5.6 million.

H.R. XXX The Clear Communication for Veterans Claims Act

The proposed legislation would direct the Secretary of Veterans Affairs (Secretary) to enter an agreement with a Federally funded research and development center (FFRDC) to assess notification letters sent to claimants for benefits administered by VA and would require the Secretary to make changes to those notice letters in conformity with recommendations provided by the FFRDC.

Section 2(a) directs the Secretary to enter into such an agreement within 30 days after enactment of the bill.

Section 2(b) specifies that the FFRDC assessment shall include whether currently used notification letters can be feasibly altered to reduce paper consumption by, and cost to, the Federal Government. It also requires the FFRDC to include its recommendations for how the Secretary may, in compliance with laws administered by the Secretary, make such notices clearer to claimants, better organized, and more concise.

Section 2(c) provides that the Secretary would have no more than 90 days following receipt of the FFRDC's assessment to implement the proposed recommendations and to submit a copy of the report to the Committees on Veterans' Affairs of the Senate and House of Representatives.

Finally, Section 2(d) of the bill provides a definition of the term "FFRDC," and specifies that the terms "claimant" and "notice" as used in the bill have the same meanings given such terms in 38 U.S.C. § 5100.

VA cites concerns with this bill. While VA generally supports the intent of the bill, the deadlines it imposes are challenging, unrealistic, and would be difficult to implement.

VA notes concern with the language specifying that the FFRDC's report would be binding upon the Secretary. This provision leaves no room for VA to refine or improve upon the recommendations, should the need arise. While an FFRDC's report would provide an unbiased third-party view of the problem, VA views research and development processes as being designed to create recommendations, not policy. Moreover, VA must exercise caution to ensure that its notification letters comply with existing statutes and controlling case law (which is protean in nature). Although the bill directs the FFRDC to make recommendations in conformity with laws administered by the Secretary, VA is concerned that it should not adopt those recommendations on a wholesale basis without independently assuring that they did not put the Agency at risk for non-compliance with its legal duties to claimants.

VA is concerned that the bill's requirement to enter into an agreement with a FFRDC within 30 days following enactment of the bill may hinder VA's ability to ensure an agreement is reached with the FFRDC most appropriate for the task under VA's contracting requirements.

Additionally, VA is concerned that the bill's mandate to implement the FFRDC's recommendations within 90 days of receipt would be challenging at best and potentially unachievable without significant risk. VA notes that making changes to notice letters is a thoughtful, considered, deliberative, time-consuming, and complicated process which requires updating existing information technology systems. VBA claims processors handling compensation and pension claims operate in a paperless environment and utilize the Veterans Benefits Management System (VBMS) as the primary system to generate letters to Veterans and claimants. Updates to VA's technology systems, to include VBMS, are prioritized far in advance. Implementation of the letter changes required by the bill, if required within 90 days, could require VA to displace current priority updates that have a more substantial impact on Veterans.

VA views a 90-day window to implement the recommendations in the assessment as required in section 2(c)(2) as not being feasible given the needed technological and system upgrades that would be required. VA recommends an implementation window of at least 24 months from the date of enactment to allow for adequate system development, testing, and implementation. VA notes that these enhancements are required since letters to claimants are not constructed in one uniform manner. Letter generation is complex and current templates often require extensive editing, concurrence, deployment testing, and validation from subject expert, legal, regulatory, and technological standpoints to ensure that all case-specific factors for individual claimants can be captured.

Additionally, VA notes that legislative action is not required for an enterprise-wide review of VA's letters. If VA internally reviews its enterprise-wide letters and reports on the findings, this would result in a cost savings to the Government. Furthermore, VBA reviews and updates benefits claim letters internally on a regular basis.

For example, VBA utilizes a Language Change Control Board (LCCB) to review and approve all disability compensation and pension-related language change requests for letters, glossary texts, fragments, or any other external facing communications. The LCCB is responsible for ensuring that identified language changes are tracked, reviewed for accuracy, and sent to implementation in a timely manner. The LCCB is made up of members from various staffs across multiple VBA business lines. Requests are generated by statutes, regulation, policy, or procedure being implemented, or when deficiencies within our products are found. In addition, in 2023, a collaborative workgroup including members from VBA and the Veterans Health Administration (VHA) has reviewed all military sexual trauma-related letter language to ensure it is trauma-informed, including consultation with Veterans Service Organizations (VSOs).

Focusing on human centered design (HCD), VBA collaborated with the Veterans Experience Office from October to December of 2023 to conduct HCD co-design workshops to redesign Character of Discharge letters sent to Veterans with an Other Than Honorable discharge. The objective was to enhance clarity, accessibility, and

usefulness of these letters for Veterans seeking to understand their eligibility for benefits from the VA. VA is currently working to implement the findings.

In 2019, VBA's Insurance Service (INS) completed a review of all VA Insurance letters to reduce the number of letters being used based on usage and to revise content into a more reader-focused format. With the new Information Technology (IT) system INS recently implemented, the revisions from the 2019 project were used as a basis for the letter templates in the new SmartComm system. INS also moved toward online policy access, information and E-Forms, and electronic communications via email and Short Message Service text messages.

VA contracts with Prudential's Office of Servicemembers' Group Life Insurance (OSGLI) to administer SGLI and VGLI programs under VA Oversight. OSGLI regularly reviews their outgoing communications and updated their VGLI outreach materials in 2022.

VBA's Veterans Readiness and Employment (VR&E) Service participated in a workgroup in 2020, whose goal was to simplify and strengthen VBA's communication with Veterans. As a result, in July 2020, VR&E Service updated and released 15 letters to accomplish this goal.

VA further notes that there have been recent efforts to quantify the number of claims for which decision letters generated outside of the claims processing environment are required to be used, such as letters regarding pension benefits. Those efforts have yielded progress in incorporating advancements in modernizing letter templates.

H.R. 1083 The Caring for Survivors Act of 2023

The proposed legislation would amend title 38 of the United States Code, to improve and expand eligibility for DIC paid to certain survivors of certain Veterans, and for other purposes.

Section 2(a) of the bill would increase the DIC rate in 38 U.S.C. § 1311(a)(1) from $1,154 to an amount equal to 55% of the monthly 100% disability compensation rate in effect under 38 U.S.C. § 1114(j). This would adjust the current DIC rate of $1,612.75 effective December 1, 2023, to $2,132.47 (55% of $3,877.22 which is the 100% disability compensation rate in effect as of December 1, 2023).

Section 2(b)(1) would make the amendments made by subsection (a) effective for any payments made that are 6 months after the date of enactment. Section 2(b)(2) would require VA, for months beginning after the date that is 6 months after the date of enactment, to pay dependents and survivors income security benefits under section 38 U.S.C. § 1311 to an individual eligible predicated on the death of a Veteran before January 1, 1993, in a monthly amount that is the greater of the following:

1. The amount determined under section 1311(a)(3), as in effect on the day before the date of enactment.
2. The amount determined under section 1311(a)(1), as amended by subsection (a) of this legislation.

Section 3 of the bill would amend 38 U.S.C. § 1318(b)(1), to reduce, from 10 years to 5 years, the period in which a Veteran must have been rated totally disabled due to service-connected disability in order for a survivor to qualify for DIC benefits. It would further add a new subsection (a)(2) to state the following: "In any case in which the Secretary makes a payment under paragraph (1) of this subsection by reason of subsection (b)(1) and the period of continuous rating immediately preceding death is less than 10 years, the amount payable under paragraph (1) of this subsection shall be an amount that bears the same relationship to the amount otherwise payable under such paragraph as the duration of such period bears to 10 years."

VA supports, if amended, and subject to the availability of appropriations. Under 38 U.S.C. § 1311(a)(1), DIC is paid to a surviving spouse at the monthly rate of $1,154, which is increased in accordance with any increase of benefit amounts payable under title II of the Social Security Act pursuant to section 1311(f)(4). The current rate paid under section 1311(a), effective December 1, 2023, is $1,612.75. DIC is also paid to a surviving spouse, and to a child of a deceased Veteran, if the Veteran's death was not the result of their own willful misconduct and they were continuously rated totally disabling for specific periods of time prior to their death as outlined in 38 U.S.C. § 1318(a) and (b).

VA notes that Public Law 118-6 requires VA to increase the rate paid under section 1114 in addition to the rates paid under section 1311. VA views section 2(a) of this bill as allowing for the use of the current rate paid, as of December 1, 2023, under section 1114(j) of $3,621.95 in calculating the benefit provided under proposed section 1311(a)(1), as well as any future increases to section 1114(j).

VA further notes that section 2(b)(2) of the bill would require VA to pay the greater of the benefit under proposed section 1311(a)(1) and "[section 1311(a)(3)], as in effect on the day before the date of the enactment of this Act." VA infers that the intent of this provision is to use the rates under section 1311(a)(3) at that fixed point in time, even if those statutory rates are later changed. However, the statutory language is somewhat ambiguous because the rates payable under section 1311(a)(3) may change even if the text of that provision remains unchanged. Congress routinely enacts annual cost-of-living adjustments (COLA) increasing DIC rates, including the section 1311(a)(3) rates. *See*, *e.g.*, Public Law 118-6. VA believes the intent of the bill is to use the rate that would have been payable on the day before the date of enactment under section 1311(a)(2) and any COLAs in effect on that date. However, the bill language as drafted would also be susceptible to the interpretation that the rate should be increased by any subsequent COLAs because such rate would still be predicated on section 1311(a)(3) "as in effect on the day before the date of enactment of this Act." This ambiguity could be removed by adding language at the end of section 2(b)(2)(A)(i)

of the bill saying, “including any applicable statutory cost-of-living increases in effect on that day.”

Additionally, due to the extensive information system updates required to implement and the enhanced ability to conduct oversight on said implementation, VA recommends that section 2(b)(1) be amended with an effective date of 1 year after the date of enactment.

Regarding section 3 of the bill, VA views proposed section 1318(a)(2) as supporting the families of Veterans who die with a total disability rating that existed for more than 5 years, but less than 10 years immediately preceding death. For individuals who qualify for DIC under proposed section 1318(b)(1) due to a Veteran’s disability continuously rated totally disabling for a period of more than 5 years but less than 10 years immediately preceding death, VA views the proposed statute as more generous than existing law in that VA may provide DIC benefits to such individuals. However, VA views the proposed language of subsection 3(1)(B) as incorporating an unclear and potentially overly complex application for survivor beneficiaries, the agency, and external partners. The proposed language of 1318(a)(2) creates a relationship between a 10-year rating requirement for full benefit entitlement and a 5-year rating requirement for baseline entitlement per amendments to subsection (b)(1). The apparent effect would allow for DIC benefits to be granted based on a shortened duration of time that a Veteran must be continuously rated totally disabled, but then disallow full benefit entitlement through the utilization of an unclear payment structure.

Specifically, the benefit provided by VA to the families of Veterans with more than 5 years, but less than 10 years of disability rated as totally disabling under the proposed statute (proposed beneficiaries) would “bear[] the same relationship” to the full benefit amount as the length of totally disabling rating “bears to 10 years.” Using a Veteran with exactly 5 years of total disability rating as an example, exactly 5 years is half of 10 years, meaning a DIC benefit based on exactly 5 years of total disability rating would have exactly the same relationship to half of the benefit paid based on 10 years of total disability.

However, it is unclear how precisely VA should calculate the relationship. Using a Veteran with 5 years and 6 months of total disability rating as an example, VA would like to clarify if Congress’s intent is for VA to provide 55% of the benefits it would provide based on 10 years of total disability. Or, is the intent for VA to round up to 60%? If the Veteran has 5 years and 7 months, VA would like to clarify if the intent is to provide 55.8% of full DIC benefits. Or should VA round up to 56%? The issue of precision and rounding could be challenged based on additional days. VA requests that Congress provide clear standards to avoid potential confusion and litigation.

VA does not currently reduce DIC benefits in any scenario along the lines it would be required to under the proposed language. This novel requirement would be operationally difficult and would appear to preclude automation, at least initially. VA currently is able to automate, and therefore expedite, provision of DIC benefits pursuant

to section 1318 because VA knows exactly how long a Veteran has received a total disability rating. The bill would require VA personnel to research and adjudicate to determine whether the family of a Veteran with more than 5, but less than 10 years of total disability would be eligible for the greater benefit paid under section 1311 for a service-connected cause of death, then determine how much to reduce the benefit if only section 1318 DIC were available.

This calculation is further complicated by the incremental structure of section 1311 used to calculate DIC benefits, which allows VA to supplement the base rate when a number of different conditions are met. VA would be unsure if the application of "bears the same relationship to" language would apply to solely the underlying DIC benefit rate, or if VA is meant to extend such application of benefit reduction to any additional supplemental allowance. For example, section 1311(a)(2) allows VA to pay an additional $246 per month of DIC if the deceased Veteran received a total disability for 8 years before death *and* was married to the surviving spouse for those 8 years. Sections 1311(a)(2) and 1318(b)(1) currently operate separately and apply separate standards, and not all proposed beneficiaries would qualify for DIC benefits under section 1311(a)(2). Section 1311(a)(2) is not the only potential supplement to which VA would have to apply the reduction. *See, e.g.*, 38 U.S.C. § 1311(b) (allowing VA to provide an increase of $286 per month per child under 18 years old).

VA views the potential application of the proposed language for subsection 1318(a)(2) as being inconsistent with the benefit's current intent and program integrity. As such, VA recommends removal of section 3(1) of the bill to allow the proposed amendments under section 3(2) to achieve the primary intent of DIC expansion. The effect of the proposed amendments under section 3(2) of the bill, on their own, would result in clearer and more consistent program application. Removing the novel adjudication calculations and solely retaining the amendment to section 1318(b)(1) is sufficient to fulfill the intended purpose of expanding DIC benefits to survivors of Veterans with a totally disabling disability rating by shortening the duration of time required for the disability to have been continuously rated. It would also maintain allowing VA to quickly implement the expansion while retaining the existing automation that allows the families of deceased Veterans to receive DIC benefits as quickly and accurately as possible.

The bill as written does not contain an effective date for section 3. VA would likely interpret any new benefit eligibility created by this section to be effective based on the date of enactment of the bill, but not authorize retroactive payments. This outcome is complicated by the timeline for applying to receive DIC benefits. Under 38 U.S.C. § 5110(d), an application received more than a year after death cannot result in VA providing benefits retroactive to the date of death, but the applicant would qualify for DIC benefits from the date of application forward. VA recommends the bill be amended to add an explicit effective date.

Mandatory costs associated with H.R. 1083 are estimated to be $0 in 2024, $14.6 billion over 5 years, and $40.3 billion over 10 years.

Mandatory costs associated with section 2 are estimated to be $0 in 2024, $13.8 billion over 5 years, and $36.9 billion over 10 years.

Mandatory costs associated with section 3 are estimated to be $0 in 2024, $814.5 million over 5 years, and $3.4 billion over 10 years.

Additional time would be needed to estimate administrative costs.

H.R. XXX Medical Disability Examination Improvement Act of 2023

The proposed legislation would amend title 38 of the United States Code to alter matters relating to medical examinations for Veterans' disability compensation, and for other purposes.

Section 2 would make several amendments to 38 U.S.C. § 1168 including removing the term “Veteran” each place it occurs and replacing it with “covered Veteran,” and providing a definition for the term “covered Veteran.” Further, section 2 would modify the criteria for when VA is required to provide a Veteran with a medical nexus examination for a toxic exposure risk activity (TERA).

Section 3 of the proposed legislation would amend 38 U.S.C. § 5103A(d) by adding a new paragraph that would authorize VBA’s Compensation and Pensions (C&P) account to reimburse the VBA GOE account and the IT Systems account for all expenses of carrying out a medical examination or obtaining a medical opinion for VBA’s disability examinations. Section 3 further notes the intent to add authority for VBA’s GOE account to reimburse VHA for costs of carrying out medical examinations for C&P claims.

Section 4 of the proposed legislation would create an annual reporting requirement to conduct a study on improvements to VA covered medical disability examinations in rural areas. Section 4 would also require a study on access to covered medical disability examinations by Veterans who reside in rural areas.

Section 5(a) would require VA, within 180 days of enactment of the bill, to provide additional training to all claims processors who order or review medical disability examinations.

Section 5(b) would provide that mandatory training must include instruction on how to assess whether a covered medical disability examination is adequate for purposes of adjudicating claims for benefits, and instruction on how to assess whether a medical disability examination is necessary for purposes of adjudicating a particular claim for a benefit. That mandated training would also have to include review of relevant statutes, judicial decisions, regulations, and VA policies regarding covered medical

disability examinations including, at minimum, the duty to assist, the relevance of causation compared to other evidentiary standards in covered medical disability examinations, required elements of a covered medical disability examination (with an emphasis on the requirement for reasoned analysis to support medical opinions), the relevance of a lack of a statutory or regulatory presumption of service connection in covered medical disability examinations, and input from impacted employees of the Department, to include labor representatives.

Section 5(c) would require the specified mandatory training to be completed no less frequently than once per year.

Section 5(d) would amend 38 U.S.C. §§ 7101(d)(2) and 7288(b) to modify certain reporting requirements by the Board of Veterans' Appeals and the U.S. Court of Appeals for Veterans Claims.

Section 6(a) would require that not later than 1 year after the date of enactment, and not less frequently than once every calendar month thereafter, VA review a randomly selected representative sample of all medical disability examinations, defined as a medical nexus examination or a medical opinion, completed within the previous calendar month. Section 6(b) would require the Secretary to ensure that these reviews include statistically significant samples of covered medical disability examinations completed by both VA employees and contractors. Section 6(c) would require the Secretary to analyze the review under section 6(a) to determine whether these examinations were adequate for adjudicating claims under chapters 11 and 15 of title 38 of the United States Code. Section 6(d) would require the Secretary to provide another examination to a claimant who, following the analysis undertaken pursuant to section 6(c), received an inadequate examination. This examination, along with the processing of the individual's claim, would be provided on a priority basis.

Section 7 would require VA to establish a mechanism for contractors conducting disability examinations under a certain VA pilot program to transmit medical evidence introduced by claimants during examinations.

VA cites concerns with this draft bill. VA is concerned that amendments outlined in this bill could restrict eligibility for veterans exposed to toxic exposures outside of those locations defined in 38 U.S.C. § 1168. VA has provided comments on the non-TERA related provisions in the bill. The below analysis addresses the specific provisions of this draft bill.

VA cites concerns regarding Section 2. Generally, VA understands the intent of section 2 of this draft bill regarding the provision of examinations and nexus opinions for Veterans potentially exposed to chemicals, substances, and airborne hazards during service.

Regarding the revision to strike "with evidence of a disability and evidence of participation in a toxic exposure risk activity during active military, naval, air, or space

service" this could be construed as requiring examinations for nearly all claims for service-connected disability compensation under 38 U.S.C. § 1110, even if the Veteran does not have evidence of a current disability or active military service.

The draft bill's limitation of the application of the TERA examination and opinion requirements to "covered Veterans" would have several effects. Section 1168(c)(1)(A), as amended by the bill, would require VA to automatically provide TERA examinations and opinions for Veterans who served in the *location* of Southwest Asia theater of operations (SWATO) and other locations listed in section 1119(c) for which there were documented wide-spread exposures to burn pit emissions, particulate matter, oil well fires, and other toxins.

As originally prescribed in the PACT Act, Section 1168 enables veterans exposed to toxins during their military service to receive a medical nexus exam for non-presumptive conditions. The Individual Longitudinal Exposure Record (ILER) was created in December 2012 to allow the DoD and VA to construct a complete record of every Service member's occupational and environmental health exposure during their career. The enactment of the PACT Act brought ILER to the forefront as the main tracking system for toxic exposure risk activities (TERA). DoD does not generally classify activities performed by Service members as toxic versus non-toxic activities, however, DoD is required to document when a toxic exposure is identified. Through the accumulation of data, DoD does in fact classify certain locations as toxic or potentially toxic. As such, any location for which a toxic exposure occurred or potentially occurred can be appropriately identified and verified by VA and DoD based on ILER data.

The provision in section 1168(c)(1)(C), as amended by the bill, would allow VA to continue to identify certain locations for which toxic exposures occurred, and then afford TERA examinations and opinions for specific Veteran cohorts who participated in such TERAs. This type of real time surveillance is regularly occurring as VA continues to partner with DoD on identifying cohorts that were present at certain high risk locations. For example, VA has received the list of individuals within ILER who were subject to contaminated water from the Red Hill underground fuel storage facility in Oahu, Hawaii. Other types of surveillance efforts include those Veterans who served at Karshi Khanabad (K2) Air Base in Uzbekistan between 2001 and 2005.

In addition to the real time exposure monitoring that is documented in ILER, VA notes that in some circumstances where such monitoring may not have been available, high risk exposure locations are identified later and have been established by statute or regulation for presumptions of exposure. As such, VA notes that there are additional locations for which presumptions of toxic exposure already exist which could be added to the statute to ensure parity. However, VA highlights that the amendments to section 1168 change the requirements for mandatory examinations for toxic exposure, but VA's duty to assist for all claims remains unchanged. VA aims to sympathetically read all claim submissions and provides examinations on a case by case basis if indicated by the evidence of record even if not required by section 1168. Under the draft bill, VA could establish additional categories under new section 1168(c)(1)(C) but such new

categories would have to be established in regulation and could take years, if not decades, to be completed, potentially delaying the opportunity for veterans with toxic exposures to qualify for a medical nexus exam.

Amended section 1168(c)(1)(B) would trigger the examination and opinion requirements based on TERA for Veterans not covered under section 1119(c) who express that their claim is associated with a TERA (explicit claim). Currently section 1168(a)(1) requires VA to consider both implicit and explicit claims.

VA notes that for "covered Veterans," the examination and opinion requirements remain linked to the definition of TERA in 38 U.S.C. § 1710(e)(4)(C). Under this definition, any activity that requires a corresponding entry in Individual Longitudinal Exposure Record (ILER), regardless of the nature of the entry, generally affords Veterans eligibility to enroll in VA health care under section 1710(e)(1)(G). Importantly, VA does not recommend amending the definition of TERA in 38 U.S.C. § 1710, as this definition establishes eligibility for health care effective March 5, 2024.

VA does not believe section 2 of the bill would affect VHA workload or requirements to conduct compensation examinations. To the extent it does, such increased workload would require additional resources to support these efforts. If the bill does not increase the number of examinations that are required, this would not affect VHA's resource needs.

VA does not support section 3. The first portion of legislative text in section 3 is unnecessary because it duplicates existing authority (see 38 U.S.C. § 5101, special note on Pilot Program for Use of Contract Physicians for Disability Examinations, section (d)). Currently, all necessary expenses associated with C&P exams completed by VBA's contractors are funded by the VBA-GOE account or IT Systems account, and then VBA's mandatory C&P account reimburses the VBA-GOE and IT Systems accounts. VA needs this funding structure because VBA's C&P account is designed to issue benefit payments, not to pay for contracts or provide health care. For this reimbursement authority, VBA and OIT utilize existing infrastructure for discretionary-funded contracts; for example, contracts for C&P exams use the same systems, review/approval processes, reporting mechanisms, and internal controls that are used for any other VBA-GOE or IT funded contract.

In addition, the draft bill includes a note that would authorize VBA's GOE account to reimburse VHA for costs of carrying out medical examinations for C&P claims. Although the bill does not yet include legislative text for this provision, VA does not support the concept of VBA reimbursing VHA for costs of carrying out these examinations. C&P funding is generally intended for benefit payments to Veterans and their survivors. VBA works closely with the Office of General Counsel to ensure compliance with the law for this reimbursement authority and to avoid any chance of misuse of funds that could instead be used for benefit payments. VBA has high standards for documentation required for reimbursement under this authority. In 2023, 92% of C&P exam requests were sent to VBA's contractors, and VBA obligated $3.2

billion for necessary expenses associated with contract C&P exams. VHA does not separate costs associated with C&P examinations in its budget and does not have systems in place to separately report costs associated with C&P exams from all other health care costs. The proposed expansion of authority to all C&P medical examinations and opinions would be extremely difficult to administer and introduce an unnecessary risk of misusing funds that are generally intended for benefit payments to disabled Veterans and their families.

With respect to section 4 of the bill, VA generally supports this section but recommends a definition of "rural" also be provided.

VA does not support Section 5. VA notes that comprehensive training regarding medical disability examinations is currently provided to claims processors. Claims processors are provided initial in-person and virtual training in VA's foundational training program. In addition, proficiency of claims processors with 1 or more year of experience is assessed annually. That assessment includes evaluation of their knowledge of the medical disability examination process. Training mandates in sections 5(a) through (c) of the bill are largely redundant of training VA currently provides, and therefore may not produce any additional benefit to Veterans. VA defers to the United States Court of Appeals for Veterans Claims on section 5(d)(2) of the bill, as that language pertains to the Court's reporting requirements.

VA does not support section 6. VA has a comprehensive quality program at the national level through the systematic technical accuracy review (STAR) program and at the local claims processor level which capture medical opinion accuracy and nexus exams. When errors are identified through the quality review process, VA ensures the claimant receives another examination, if necessary.

VA notes a discrepancy between section 6(a) which requires a "randomly selected representative sample" and section 6(b) which refers to "a statistically significant sample." VA suggests reconciliation of this terminology.

VA further notes that implementation of section 6 would necessitate extensive coordination across many VBA business lines and staff offices to include (at minimum) the Office of Field Operations, Compensation Service, Pension and Fiduciary Service, Office of Administrative Review, the Medical Disability Examination Office, the Office of Performance Analysis and Integrity, and VHA's Office of Disability and Medical Assessment (DMA). Implementation of section 6 would also necessitate ensuring availability of sufficient personnel to accomplish its goals, as well as the creation of standardized operating procedures to ensure consistency and accuracy in the mandated reviews.

VA supports section 7, subject to the availability of appropriations.

H.R. XXX The Toxic Exposures Examination Improvement Act

The proposed legislation would modify sections of title 38 of the United States Code related to toxic exposures and the duty of the Secretary of Veterans Affairs to provide Veterans with medical examinations in connection with certain claims for disability compensation under the laws administered by the Secretary.

Section 2(a) would amend 38 U.S.C. § 1168(a) by striking "such evidence is not sufficient to establish a service connection for the disability" and inserting "such evidence does not contain sufficient medical evidence for the Secretary to make a decision on the claim."

Section 2(b) would amend 38 U.S.C. § 1119(a)(1), by inserting "that indicates that the Veteran was subject to a toxic exposure" after "tracking record system," and amends 38 U.S.C. § 1710(e)(4)(C)(i) by inserting "that indicates that the Veteran was subject to a toxic exposure" before "for the Veteran."

VA cites concerns. The below analysis addresses the specific provisions of this draft bill.

VA has no objection to the amendment to 38 U.S.C. § 1168(a) in section 2(a) of the bill that would change the current threshold for ordering an examination and medical opinion for claims based on TERA. This change would align the examination threshold under 38 U.S.C. § 1168 with the long-standing examination threshold under 38 U.S.C. § 5103A.

This bill seeks to align the statutory language in 38 U.S.C. § 1168 with the language from 38 U.S.C. § 5103A. This difference in language may impact the number of examinations and medical opinions requested based on 38 U.S.C. § 1168. However, VA is unable to determine whether this change would reduce the number of examinations and TERA medical opinions requested. If a Veteran provides evidence of a disability and there is evidence of their participation in a TERA, a nexus opinion from a VA examiner or contract examiner would still be required to decide the claim. The only time a claim based on participation in a TERA may be denied without an examination and medical opinion is when the Secretary has determined under 38 U.S.C. § 1168(b) that there is no indication of an association between the claimed disability and the TERA.

It is important to note that VA bears a duty to assist veterans in obtaining evidence necessary to support their claim for a benefit. The medical nexus exam represents an important opportunity for a medical provider to consider how toxic exposures may have contributed to the health concerns the veteran is seeking a service connection determination. VA highlights that the amendments to section 1168 change the requirements for mandatory examinations for toxic exposure, but VA's duty to assist for all claims remains unchanged. VA aims to sympathetically reads all claim submissions and would provide examinations on a case-by-case basis if indicated by the evidence of record even if not required by section 1168.

VA acknowledges the provision that would amend 38 U.S.C.§ 1119(a)(1) but notes it would not change VA procedures. This provision would require VA, when considering a claim that was submitted based on a toxic exposure, to consider any record of the Veteran in an exposure tracking record system *that indicates that the Veteran was subject to a toxic exposure*. As written, it does not appear that such change in and of itself would substantially change the outcome of claims or how VA operates when reviewing claims based on toxic exposures. As a matter of course, VA always checks ILER when a claim is not subject to the exception clause in 38 U.S.C. § 1168(b) and, in the end, VA would not expect service connection to be granted for any claim based on a toxic exposure if the evidence does not reveal that they were exposed to a chemical, substance or airborne hazard. It also is important to note that this provision does not by itself inherently require VA to order examinations and opinions since that mandate is controlled in section 1168.

While VA understands the intent of the provision that amends part of the TERA definition as codified in section 1710(e)(4)(C) to mean any activity "that requires a corresponding entry in an exposure tracking record system (as defined in section 1119(c) of this title) *that indicates that the Veteran was subject to a toxic exposure* for the Veteran," **VA restates here that it does not recommend amending the definition of TERA in 38 U.S.C. § 1710 at this time because the current definition is part of the health care eligibility expansion VA commenced on March 5, 2024.**

Under current law, any activity that requires a corresponding entry in ILER, regardless of the nature of the entry, generally affords Veterans eligibility to enroll in VA health care under § 1710(e)(1)(G). The proposed change would have the effect of narrowing eligibility for VA health care, as well as VBA nexus examinations. VHA has developed guidance and training materials based on the existing definition of TERA, changes to this provision would increase administrative costs, potentially significantly, and would likely create confusion among Veterans and VA staff. VA cautions against changes that would disrupt VHA's efforts, recently begun, to enroll Veterans who participated in a toxic exposure risk activity while on active duty, active duty for training, or inactive duty training under 38 USC 1710(e)(1)(G). VA is seeking to enroll as many Veterans as possible under these new authorities, and is concerned with any actions that would limit eligibility under this law.

Additionally, the newly proposed definition of TERA would create a circularity, in that toxic exposure is defined in 38 U.S.C. § 101 as including TERAs. The new definition would have the effect of defining a TERA as an activity that requires a corresponding entry in ILER that indicates that the Veteran was subject to a TERA.

H.R. XXX The Veterans Appeals Efficiency Act of 2024

The proposed legislation would amend title 38 of the United States Code with the goal of improving the efficiency of adjudications and appeals of claims for benefits under laws administered by Secretary of Veterans Affairs. These amendments would further require the Secretary to provide the Committees on Veterans' Affairs in the House and Senate with annual reports on lengths of the adjudication of Board of Veterans' Appeal (Board) remands. The bill would also add a requirement for VA to track and maintain information on certain benefits administered by the Secretary.

Section 2(a) of the bill would amend 38 U.S.C. § 5109B to add a subsection in which VA would be required to submit an annual report on the length of time a claim (or issue within a claim) that is remanded by the Board is pending before the Secretary after such return or remand.

Section 2(b) of the bill would add a new section under title 38 of the United States Code, 38 U.S.C. § 5109C, that would require VA to use technology to track and maintain information on certain benefits claims relating to the timeliness of adjudications, VBA's compliance with Board remand orders, supplemental claims, death notices and the assignment of fiduciaries, and Board remands that were determined to be "unnecessary" under section 2(c)(2) of the bill.

Section 2(c) of the bill would amend 38 U.S.C. § 7104 in three ways. Section 2(c)(1) of the bill would authorize the Chairman of the Board to aggregate multiple appeals if they involve substantially similar questions of law or fact under a revised version of section 7104(a). Section 2(c)(2) of the bill would create a new subsection under section 7104 that requires the Secretary, through the Chairman of the Board, to ensure substantial compliance with Board remand orders, or waive compliance under limited circumstances. And section 2(c)(3) of the bill would add a new subsection to section 7104 that allows the Board and appellants to request an opinion from VA's General Counsel regarding a question of law that arises in an appeal under review by the Board.

Section 2(d) of the bill would amend 38 U.S.C. § 7252 to grant the U.S. Court of Appeals for Veterans Claims (Veterans Court) supplemental jurisdiction over class-wide claims for benefits that are pending at the Board. It would further toll the period for a claimant to seek administrative review of an eligible claim beginning the date on which the claimant submits a motion for class action review to the Veterans Court. The tolling period would end 60 days after the court either rules on the motion or the eligible claim, whichever is later. Additionally, section 2(d) would authorize the Veterans Court to remand matters to the Board to address a question of fact or law when the court determines the Board failed to A) address an issue raised by the claimant or reasonably raised by the record, or B) provide an adequate statement of reasons or bases for its decision. During this remand, the Veterans Court would retain jurisdiction over the matter.

Section 2(e) of the bill would require the Chairman of the Board to carry out a study identifying questions of law or fact the Board commonly considers when reviewing

appeals for which precedential guidance would assist the Board in issuing final decisions on such appeals. The Chairman would be required to report the findings of this study to the House and Senate Veterans' Affairs Committees not later than one year after enactment of the bill.

Section 2(f) of the bill would require the Secretary to enter into an agreement with an FFRDC to assess the feasibility of authorizing the Board to issue precedential opinions on questions of law or fact arising in matters before the Board. The selected FFRDC would submit a written assessment to the Secretary with its findings and recommendations, and the Secretary would have 90 days after receiving that assessment to submit a report to the House and Senate Veterans' Affairs Committees. The Secretary would also be required to create policies and procedures to implement the FFRDC's recommendations.

Section 2(g) of the bill would require the Secretary to a plan to ensure VA benefits claims are assigned to VBA adjudicators in a timely manner and submit a copy of that plan to the House and Senate Committees on Veterans' Affairs within 1 year of the bill's enactment.

VA has various positions on sections of this bill. Many of the proposed jurisdictional and procedural amendments in this proposed bill would fundamentally alter key provisions of the carefully constructed Appeals Modernization Act (AMA) in ways that would re-introduce many of the same inefficiencies and wait times for Veterans that they experienced under the Legacy system of appeals. The net effect would be to add significant delays to appeals processing timelines and lead to exponential a growth in appeals backlogs at a time when the Board has finally started to reduce the number of pending appeals in its inventory for the first time since AMA was fully implemented 5 years ago.

VA supports section 2(a), if amended, and subject to the availability of appropriations. It is unclear whether this section of the bill is intended to include both legacy appeal remands and AMA remands. VA proposes separating the reporting requirements for the two groups of remands. Currently, remands under the legacy system inventory are being worked down and once all legacy appeals are addressed then the need for reporting on these remands will diminish. Information on legacy remand timeliness is publicly available in section 2A of the monthly AMA Metrics Report, found at https://www.benefits.va.gov/REPORTS/ama/.

Additionally, VA cites concerns with the phrase "or issue within a claim" as a criterion for reporting because VA does not currently have the technical capacity to reliably track timeliness at the issue level. Particularly as it pertains to legacy appeals, multiple appealed issues may be aggregated into a single Board decision, which could unintentionally skew the average timeline reporting required under this bill. Understanding the complexities and challenges involved in managing claims and appeals, the technical capability requires development to improve the visibility and management of claims as they progress through various stages of the claims process,

from initial filing to resolution, if appealed. The technical capability would need to be developed between VBA and the Board to ensure compliance with the reporting requirements.

Further, overly specific statutory data tracking and reporting requirements could reduce the flexibility of the agency to adapt to changes in policy and implement improvements in the future to offer Veteran-centric data points to best inform claimant choice as to which options under the AMA to pursue when challenging a claim decision.

Additionally, while current section 5109B is focused solely on claims filed with VBA, the bill's proposed subsection (b) is not as specific. If the Committee intends to include VHA, VHA would need to add functionality to track the length of time a claim is pending after a return or remand from the Board. If the drafters only intend for this to apply to VBA, VA recommends stating so clearly.

Additionally, the reporting requirement does not appear to capture the varying complexities in post-remand actions required for certain claims; some remand instructions are very simple, while others are lengthy with additional dependencies on examinations or experts. This reporting requirement could fail to reflect the actual work being done following a remand from the Board.

VA has no objections to section 2(b)(1). Proposed section 5109C(a)(1)(A) requires tracking of "continuously pursued" claims. Current system structures do not allow for the connection of a single contention between multiple claims. Additionally, Veterans commonly request service connection for symptoms, as opposed to diagnosed conditions, limiting the ability to track continuity between claims using methods such as text mining.

As an initial matter, VA notes that the series of conditions set forth in the new section 5109C appear focused on VBA, but the language is not so limited. VHA could have claims for benefits that are continuously pursued, remanded by the Board, or pending a hearing by the Board. If the Committee only intends for this to apply to VBA, VA recommends stating so clearly. Other terms in the bill, such as the reference to instances in which "a VBA adjudicator does not comply" are unclear as to the scope of behavior that would be considered non-compliance. VA also recommends the drafters clarify this scope as well.

Proposed section 5109C(a)(1)(C) includes reporting on claims "afforded expeditious treatment by [VBA] pursuant to section 5109B," and proposed section 5109C(a)(1)(D) includes reporting on remands pursuant to 38 U.S.C. § 7104. VA has no objection to these provisions as the information is available in systems of record.

VA opposes section 2(b)(2). Compliance with a Board remand is sometimes a subjective measure that might not be consistently captured by individual Veterans Law Judges, which would lead to inconsistent data that could not be reasonably relied upon

for potential intervention strategies. For example, if the Agency of Original Jurisdiction (AOJ) grants the remanded claim in full without conducting the development directed by the Board, it is unclear if this would trigger reporting requirements under a failure to comply even though the claim has been resolved in the Veteran's favor. A second significant challenge is that there is no system in place to determine when the AOJ does not comply with a Board remand order unless the AOJ's decision is subsequently appealed to the Board within 1 year. Appeals in the AMA are not automatically returned to the Board after a Board remand and subsequent AOJ decision. Therefore, there is no way to evaluate if the Board's remand instructions were substantially complied with when there is no further Board review of the decision. Once an AMA appeal is remanded, the Board no longer has jurisdiction over it. Complying with this for AMA appeals would require an entirely new structure and review program of all post-remand AOJ decisions, which would take considerable additional personnel resources and IT development costs. Again, this would divert already scarce personnel and financial resources away from the Board's focus on deciding pending appeals as swiftly and fairly as possible. Tracking compliance with Board remands also would require increased system integration to track remands and would require significant technological development and testing requirements by VA to successfully accomplish.

VA cites concerns with section 2(b)(3). As the bill references supplemental claims filed in accordance with 38 U.S.C. §§ 5104C(a) and 5110(a)(2), the information required is applicable to supplemental claims filed within 1 year of the agency of original jurisdiction decision, thus establishing continuous pursuit. VA's Corporate database has the capability to track and retrieve information for supplemental claim timeliness.

However, VBMS is not designed to track the date of prior decisions for each issue in any given supplemental claim. While VA Form 20-0995 Part II asks the claimant to identify the specific issues and the date of the VA decision notice, this data is not recorded in systems and is used only by the claims processors responsible for thoroughly reviewing all claim submissions and evidence of record to determine if continuous pursuit is at issue and applying appropriate effective dates accordingly. To implement this proposed statue, VA must have sufficient IT appropriations to redesign relevant VBMS pages to capture the prior decision date to identify supplemental claims filed within a year of the original decision and those that were not. It is unclear what efficiency would be gained from separately tracking supplemental claims that are continuously pursued.

VA has no objection to section 2(b)(4). This information is available in its systems of records.

VA does not support section 2(b)(5)(a). The resources necessary to satisfy this requirement would drastically reduce the Board's annual adjudications. As a practical matter, the Board's Chairman does not personally review Board decisions and it would not be feasible for him or her to independently review each remand order for a determination on whether it was unnecessary. All Veterans Law Judges are expected to exercise independent judicial discretion in deciding cases pursuant to the Judicial

Cannons of Ethics governing the conduct of all Federal judicial officials, and so review of their decisions on individual cases and issues has traditionally been reserved to random sampling for quality assurance purposes or when the performance or conduct concerns with an individual judge requires particular scrutiny by more senior judicial officials.

Furthermore, the tracking requirements would create serious delays in the timely production of Board decisions. Last year, the Board adjudicated 103,245 appeals and is on track to adjudicate 111,000 appeals this year. It is important to note that most appeals have more than one issue and that it is common for individual issues to be resolved in different ways. In other words, many Board appeal decisions involve mixed results, with some issues granted and/or denied and other issues where a remand is more appropriate or legally required. Approximately 57,000 appeals adjudicated during FY 2023 required at least 1 issue be remanded. Requiring the Chairman or other Board member judges to independently review and advise or determine whether each remand is appropriate requires sufficient personnel resources be diverted to complete case file reviews that essentially amount to "second opinions." Using last year's data as a benchmark, that would require approximately 57,000 additional reviews and opinions to be rendered by scarce judicial resources. It would necessarily hinder the adjudication of other pending appeals, thus creating a backlog at a time when the Board has started to reduce the pending appeals inventory for the first time in 5 years. Inefficiencies in the entire appeals system created by proposed section 5109C(a)(5) would be harmful to Veterans who have already waited a long time for resolution of their appeals.

VA does not support proposed section 2(b)(5)(b). VA strives to complete all claims as efficiently as possible. All claims actions, whether they move a claim forward, defer action for further development, or record new evidence development or suspense date for receipt of said evidence, are input in VBMS by claims processors. National Work Queue (NWQ) is strictly a claims distribution engine designed to ensure that claims are distributed to an adjudicator to take the next action on any claim efficiently. As such, NWQ is not designed to defer or change suspense dates, which generally require a claims processing decision by an adjudicator.

A deferral is an internal document to clarify information received from the examiner, perform administrative actions to include minor corrections, or perform additional development. Additional development will trigger written notice to the claimant and the representative, and in such cases the pertinent contents of this deferral document are already available through the written notice informing the claimant of the additional information or action required. Notice of other administrative actions would be confusing to a layperson as those actions are simply internal tracking mechanisms for VA claims processors.

While a deferral represents a return to a prior stage of the claim for additional action, the use of suspense dates and reasons is part of the fundamental processing of a claim in VBMS and does not necessarily indicate any abnormal delay of the claim. Suspense dates are established to ensure that actions are taken promptly and may

reflect a reasonable period of time based on current workload or the expiration of a statutory waiting period for evidence development. It is unclear what value this information has to the claimant or representative. If claimants and representatives desire to know how much longer until the claim is completed, this information will not be satisfactory.

Veterans and claimants are already able to access information on pending claim actions through VA.gov, which provides information on the status of claim, decision review, or appeal. It also allows claimants to check the evidence filed online to support the initial claim, any additional evidence requested to support the claim, and to download decision letters for certain types of claims, decision reviews, and appeals. Claimants may obtain additional assistance by contacting VBA's National Contact Center by phone, sending questions through the secure Ask VA (or AVA) online tool, or by visiting a local VBA benefits office. Additionally, a claimant's accredited representative and/or Veterans Service Officer, may have access to the electronic VA claims folder to assist with claims for benefits. Without additional context regarding the intent of the bill, VA notes that this provision may be unnecessary given the existing authorities and processes in place.

VA does not support section 2(c). Section 2(c)(1) authorizes the aggregation of Board appeals, which would substantially alter the Board's longstanding case distribution and would completely upend docket order rules in unfair ways for many Veterans. For example, allowing aggregating appeals for the same Veteran across dockets with different evidentiary windows will create increased confusion as each appeal will need to be evaluated independently based on its own evidentiary record. Worse, it would allow a Veteran with a pending appeals on the same or similar issue to file a new appeal on the same or similar issue with entirely different evidence (possibly, years later based on the current pending inventory) and then essentially cut the line in front of other Veterans with their more recently filed appeal. If a change in law allowed this, the Board would also need to completely revise its case management systems, to include integration with other VA systems, to allow this entirely new method of moving cases ahead of others. It would require both a complete overhaul of the Board's docketing system and would also require other potential legal changes for unforeseen consequences regarding which docket date should be controlling for the aggregated or merged appeal. For example, there may be instances where a later docket date (on, for instance, the Direct docket) might provide the Veteran a faster decision than an earlier Hearing docket date, but it would be impossible to predict how these issues might impact not only individual Veteran choices, but also the impacts of those choices on other Veterans who have been waiting longer. Further, different evidence windows for separate appeals that are aggregated or joined would add further confusion to the AMA system at a time when Veterans, representatives, and adjudicators are just becoming familiar with the nuances of AMA after many decades under the legacy system.

Moreover, one of the fundamental challenges of aggregation, regardless of where in the system it is applied, is that it only lowers the total amount of system-wide work that must be done to the extent it replaces individualized review of the evidence.

Overall, aggregation seems likely to shift the Board's focus away from substantive review of the evidence and toward procedural issues. Also, there is no readily apparent reason why aggregating claims will result in more grants than denials. Claimants whose claims are aggregated will be bound to any resulting denials despite not having received individualized review of their evidence.

Aggregating appeals would be a sharp departure from the Board's longstanding role in evaluating the particular and unique facts and circumstances for each appeal that is filed at the Board. When the Board reviews an AOJ decision, it conducts a de novo review and decides all questions of law and fact necessary to adjudicate the claim. This proposed change to the Board's jurisdiction apply a legal or factual conclusion to an entire class of claimants without appropriate consideration of the specific and unique facts of each case. Rather than speed up the appeals process, the Board believes that aggregation of appeals for different Veterans would require a significant amount of attorney and/or Veterans Law Judge (VLJ) resources to be diverted to determining what metrics would be applied in choosing cases for aggregation and on-going review of the Board's entire pending inventory of approximately 206,000 cases to identify a common class of Veterans.

There are also significant technological resource concerns, as Caseflow–an application that allows authorized personnel to download each document in a Veteran's electronic claims folder into a single file–is not currently designed to docket, process, or otherwise track aggregated appeals. Consideration of what docket number, or docket selection, to assign such an aggregated claim would require balancing the different needs and requests of the multiple appellants involved and would necessarily require moving some cases out of docket order, thus unfairly adjudicating some claims before their place in line. Aggregating any later filed appeals with earlier ones will necessarily move a newer appeal to the front of the line ahead of older ones that have been waiting longer negatively impacting Veterans who are patiently waiting in line. Even if appeals could be aggregated, each appeal would have to be adjudicated on its own factual basis and would require independent analysis. The evidence of record for each individual case is still unique and would have to be evaluated individually. Moreover, there does not appear to be any mechanism in the bill that would allow individual claimants to oppose or opt out of aggregation, thereby depriving some Veterans of the ability to have their appeals decided on their own merits and independent of an entire class. Therefore, rather than create efficiencies in the system, aggregating appeals would cause a significant delay to many appeals in the system.

VA does not support section 2(c)(2). This would require the Chairman of the Board to ensure compliance with Board remands. VA is concerned that this requirement would require the Board to have direct oversight of claims and decision reviews processed by VBA. Currently, compliance with Board decisions is conducted through quality reviews conducted at both the local and national levels within VBA. The bill suggests an additional review conducted by the Board. This is particularly pertinent under the AMA modernized review system, where appeals once remanded and a final decision issued by VBA, do not return to the Board unless the claimant opts to appeal

the VBA decision to the Board. This feature of the AMA was enacted purposefully to ensure claimants could choose which organization next reviewed their claim. Moreover, deliberation on resource allocation is necessary to determine the prudence of conducting another mandatory review on VBA decisions by the Board without the request or consent of the claimant: this mandatory churning of cases between VBA and the Board causes delays, strips claimants of their ability to make choices in the review process, and was a core feature of the legacy appeals system that precluded it from successfully serving Veterans and was intentionally removed from the AMA system.

Additionally, as a technical drafting matter, VA notes that section 2(c)(2) of the bill redesignated current 38 U.S.C. § 7104(f) as 38 U.S.C. § 7104(g), but section 2(c)(3) of the bill creates a new 38 U.S.C. § 7104(g) without regard for the aforementioned redesignation.

VA does not support section 2(c)(3). This would create a new subsection under 38 U.S.C. § 7104 that would allow the Board to request an opinion from VA's General Counsel regarding a question of law that arises in an appeal under review by the Board. VA's General Counsel is the Department's chief legal officer and provides legal assistance to the Secretary concerning the programs and policies of the Department. VA is, in essence, the organizational client of the Office of General Counsel (OGC). The Board currently has processes in place for seeking legal guidance from OGC. From this standpoint alone, section 2(c)(3) is duplicative and unnecessary.

Section 2(c)(3) provides that the Board "may" request an OGC opinion on the motion of the appellant. This provision is most naturally read to suggest that the Board retains independent judgment regarding whether to request an opinion. To the extent this language could be construed to create a right on the part of appellants to request OGC opinions, there are significant ethical considerations. Neither the General Counsel nor OGC provide legal opinions to individuals or private parties as they are not OGC's clients. Section 2(c)(3) of the bill–which would require the General Counsel to provide legal opinions to non-clients–would be at odds with the General Counsel's authority under 38 U.S.C. § 311. Furthermore, providing such legal opinions could be at odds with the Rules of Professional Conduct for OGC attorneys in the jurisdiction in which they are admitted to practice law. For example, Rule of Professional Conduct 4.3(a)(1) in the District of Columbia (where OGC is headquartered) prohibits attorneys from providing advice to an unrepresented person when the person's interests "are or have a reasonable possibility of being in conflict with the interests of the lawyer's client."

Although proceedings before the Board are non-adversarial in nature, proceedings before the U.S. Court of Appeals for Veterans Claims (Veterans Court) are adversarial in nature. The parties often have distinctly conflicting interests, and so Rule 4.3(a)(1) would prohibit the OGC attorney from providing a legal opinion to an unrepresented appellant. Given that OGC represents VA as an organizational client before the Veterans Court, OGC attorneys would be forced either to comply with their ethical obligations and violate a Federal statute or comply with the statute and violate their ethical obligations at the risk of jeopardizing their law licenses.

Even under the view that the Board may deny an appellant's request for an opinion, OGC is still concerned that the claimant may develop an expectation of an attorney-client relationship. This and other ethical issues identified above may still be implicated even under this reading of the bill.

But our Nation's Veterans need not navigate the claims process without legal assistance to obtain benefits. VA has accredited approximately 14,000 attorneys, VSO representatives, and claims agents who can assist claimants in the preparation, presentation, and prosecution of their claims before VA's regional offices (RO) and the Board. Many of these accredited individuals represent Veterans at no charge, and Veterans can search for qualified representatives on a publicly available VA webpage, https://www.va.gov/ogc/apps/accreditation/index.asp.

Furthermore, OGC necessarily exercises discretion in deciding whether and to what extent to issue public-facing opinions. In doing so, it accounts for its primary duty to provide candid guidance to the Secretary and other department officials, as well as other considerations impacting agency functions such as pending rulemaking or ongoing litigation involving related issues. This provision would interfere with that discretion and hamper OGC's ability to faithfully carry out its duties.

VA is also concerned that the provision would likely lead to a wide range of motions by appellants for OGC opinions on questions not appropriate for OGC opinions, including the ultimate issues of entitlement in their case.

Additionally, OGC precedent opinions are subject to direct review by the U.S. Court of Appeals for the Federal Circuit. Were this bill to become law, under sections 2(c)(3) and 2(d)(2) of the bill, if the Board requested a legal opinion from OGC pursuant to a Veterans Court remand, and OGC were to issue a precedent opinion that the appellant challenged at the Federal Circuit, it would create a scenario where the Board, the Veterans Court, and the Federal Circuit could all exercise jurisdiction over the same appeal at the same time. The resulting chaos and confusion introduced into the system would create more problems than the bill presumably aims to solve.

Related to litigation, under the reading that allows the Board to decline to ask for an opinion, the bill could be understood to create an appealable issue that does not currently exist. VA anticipates an increase in litigation at the Veterans Court and the Federal Circuit over the Board's rulings on such motions, including denials of motions and reframing of the requests proposed by appellants. Further, it is unclear whether the Committee intends for the Board's rulings on these motions to be separately appealable issues, particularly in light of proposed 38 U.S.C. § 7252(c)'s expansion of the Veterans Court's ability to remand issues to the Board while still retaining jurisdiction. This lack of clarity could lead to more disruption and uncertainty within the appellate system, as well as increased workloads for the courts and OGC.

VA would need additional resources to address the increase in requests for OGC opinions and the additional litigation that would result from this provision. While VA cannot predict the number of opinions that the Board and/or appellants would request from OGC, requests in even a small percentage of the Board's cases could have an overwhelming impact on OGC's ability to provide legal advice and guidance to VA in the absence of a significant increase in resources. As previously stated, the Board is on track to issue 111,000 decisions this year. If OGC received requests for opinions in only 2% of those cases, this would entail 2,220 OGC opinions per year. If the average request merits 15 hours to draft and issue an opinion, that would require 33,300 hours of attorney time, or the equivalent of roughly 25 additional attorneys on staff, which VA estimates would cost $4.9 million. VA expects that staffing needs would increase the more frequently the Board or appellants request these opinions.

VA does not support section 2(d). The bill's expansion of the Veterans Court's jurisdiction to allow review of benefits claims which may be granted on a class-wide basis prior to a final Board decision is contrary to the very well-documented and carefully considered legislation that originally created the Court in 1988, especially the debate about the appropriate jurisdictional scope of the Court to review only "final" decisions by the Board and Secretary.

The bill's amendments to 38 U.S.C. § 7252 would create supplemental jurisdiction to review all pending claims at the Board. Eligible claims are those within the substantive scope of a certified class, "that can be granted on a class-wide basis," as determined, "pursuant to the rules and practice," of the Court. Expanding the Court's jurisdiction to review all matters "pending" a final decision by the Board and those pending appeals previously remanded by the Board to VBA. This would represent approximately a 600% increase in cases that would be subject to Court review. This proposed bill would add another 200,000 pending appeals at the Board, plus at least another 40,000 cases remanded by the Board back to VBA at any given time. This would essentially mean the proposed bill would create a 600% increase in the number of cases subject to Court review, well above the roughly 40,000 "final" Board decisions encompassed within the Court's jurisdiction today.

VA notes that granting two separate tribunals with overlapping jurisdiction may cause confusion for appellants before the Veterans Court and the Board and may result in misdirected action from the Board. Further, it is unclear how those tribunals are to treat an appellant's case where one or more claims is part of a question certified for class treatment, but others are not. For example, if an appellant is seeking benefits for an orthopedic condition and dermatitis in the same appeal, and a class is certified for an issue relating to dermatitis, the bill offers no clarity on how either the Board or the Veterans Court should proceed with the pending orthopedic condition claim. Moreover, the amendments provide that there is finality and binding aggregate resolution for granted appeals, but never for certified classes that lose on the merits. As this appears to encourage class certification as another possible avenue of relief without any loss of an appellant's other options, the total work system-wide will increase, not decrease.

The amendments further authorize the Veterans Court, if it has taken supplemental jurisdiction over an appeal, to remand that matter to the Board for the limited purpose of ordering the Board to address a question of law or fact that the Board failed to address, or to provide adequate reasons or bases for its decision. These amendments would also authorize the court to require the Board to issue a decision within in a court-prescribed time while it retained jurisdiction. This has the potential to create a perpetual loop between the Board and the court if there are ongoing disputes over the adequacy of the Board's reasons or bases. The result would be similar to the remand loop between the Board and the AOJ experienced in the legacy process that the AMA was intended to cure. Additionally, the Veterans Court could retain jurisdiction over an appeal even where the appellant is satisfied with the supplemental decision. This would not only delay finality for the successful appellant but would be a time-consuming process for the Board that would require significant resources and would delay the adjudication of other appeals waiting for a Board decision. As the proposal allows the Veterans Court to prescribe the time period for a new decision to be issued, this could cause a substantial burden on the Board and on Veterans waiting for a decision if normal docket order rules are ignored. If appeals are frequently remanded with a limited time period to complete, they would necessarily need to be prioritized over other appeals that are waiting for a Board decision. Finally, the Board would need to build new functionality in its Caseflow case management system which would be a significant IT development requirement.

Also, VHA could have claims that would become subject to the Veterans Court's supplemental jurisdiction. If the Committee only intends for this to apply to VBA, VA recommends stating so clearly.

VA does not support section 2(e). This section would require the Chairman of the Board to carry out a study to identify questions of law or fact the Board commonly considers for which precedential guidance would assist the Board in issuing final decisions on such appeals. To the extent that the provision is intended to increase consistency across Board decisions, it is unlikely that the study and report requested would have its desired impact. Questions of fact would be case-specific and would not be appropriate for precedential guidance. As for questions of law, the Board already has authority to request an opinion from OGC when necessary. Thus, this section of the proposed bill is duplicative and unnecessary.

VA cites concerns with section 2(f). These concerns stem from the assignment of authority to FFRDCs without clear statutory guidance on their role as determining authorities within VA. While an independent assessment of the feasibility of Board precedential decisions and the consolidation of appeals could yield valuable insights, the requirement for strict implementation of the findings appears excessive. The Secretary should retain greater decision-making authority for final implementation, considering the overarching needs of the agency. Moreover, having the Board bound by other Board decisions is also inconsistent with current law and would likely require substantial revisions of other statutes within title 38 of the United States Code and revisions to VA's regulations governing the Board. Any policies or procedures to

implement recommendations could be substantial and would have to go through multiple levels of departmental review to carefully debate and consider substantial legal, regulatory, and procedural overhauls. VA is concerned that it would take significantly longer than 90 days to develop the necessary policies and procedures recommended by the FFRDC. Finally, there would be significant cost to commission such a study that would require additional resources or resource trade-offs with the current Board budget.

VA cites concerns with section 2(g). This section requires VA to provide a plan to Congress to show how claims are assigned to an adjudicator in a timely manner *to* the NWQ. VA interprets this to mean the timeliness of distribution *from* NWQ *to* the RO-based adjudicators. NWQ is a paperless workload management system designed to optimize VBA's productive capacity. Claims are eligible for distribution when actionable and there is available capacity to complete the required actions in each lifecycle of the claims process. VBA aggressively manages timely distribution of claims for completion through a team of 28 NWQ full-time equivalent employees, who monitor daily assignment of claims to ROs. This plan thus would represent a granular view of VA's execution of the funding provided by Congress to support staff who process claims across VBA's entire portfolio. VBA's NWQ only manages disability rating claims, pension claims, survivor claims, claims that do not require a rating decision, and administrative reviews across each lifecycle to ROs, but staff are allocated across the entire portfolio based on a financial operating plan. This plan would require VBA to expend resources to create a report, which diverts resources away from activities leading to the efficient and accurate processing of claims.

H.R. XXX Veterans Appeals Options Expansion Act of 2024

The proposed legislation would amend multiple sections of title 38 of the United States Code to address intent to file claim submissions, the dockets maintained by the Board, and notices of untimely evidence.

Section 2(a) of the bill would amend 38 U.S.C. § 5101(a) by adding a new paragraph to address claims for VA benefits received on an incorrect prescribed form. This section would require VA to treat those submissions as an intent to file pursuant to 38 C.F.R. § 3.155 or successor regulation.

Section 2(b) of the bill amends 38 U.S.C. § 7107 by adding new paragraphs relating to continuously prosecuted claims previously remanded by the Board for which a subsequent notice of disagreement was filed. This section requires the Chairman of the Board to ensure those cases are treated as if they were assigned to a docket pending the date the initial appeal was filed, and assigned to the Board judge who held the most recent hearing relevant to the case. Additionally, this section would authorize movement of such cases between AMA dockets pending in the Board's inventory up until the time the case is assigned for decision, which would often lead to evidentiary periods being extended and could potentially add procedural steps that would further delay case adjudications.

Section 2(c) of the bill amends 38 U.S.C. § 7113 by adding a new subsection relating to untimely evidence received. Under this section, the Board would be required to notify claimants of receipt of untimely evidence and explain why such evidence cannot be included in the evidentiary record.

VA cites concerns with section 2(a) of this bill. An intent to file (ITF) is a claimant-centric concept provided in 38 C.F.R. § 3.155(b). Upon receipt of an ITF, VA will furnish the claimant with the appropriate application form prescribed by the Secretary. If VA receives a complete application form prescribed by the Secretary, appropriate to the benefit sought within 1 year of receipt of the ITF, VA will consider the complete claim filed as of the date the ITF was received.

VA acknowledges and supports initiatives to allow claimants the option to select the decision review or appeal lane they deem most advantageous for their case outcome. However, categorizing any form as an ITF under section 3.155 would deviate from the regulation's intended purpose of improving the quality and timeliness of the processing of Veterans' claims for benefits by standardizing the claims and appeals processes through the use of forms. As written, it is unclear whether the proposed bill allows for any documentation to be used as an ITF even if not on a form prescribed by the Secretary.

VA supports the intent behind this proposed change, which appears to ensure that claimants who submit an incorrect prescribed form have the date of receipt of that incorrect form documented and tracked for effective date purposes should the correct form be received within 1 year. However, it is important to note that the concept of an ITF exists only in VA regulatory guidance pursuant to 38 C.F.R. § 3.155(b). There are complexities inherent to adding a statutory requirement linked to a solely regulatory provision.

First, VA notes that 38 C.F.R. § 3.155(a) advises claims processors to treat a request for benefits not on an appropriate prescribed form as a request for application (RFA). In such cases, VA notifies the claimant of the information necessary to complete the correct form, but there is no protection of the date of receipt of the incorrect form if the correct form is subsequently received. This may occur, for example, where a VA Form 20-0995, *Decision Review Request: Supplemental Claim*, is received but other information suggests the claimant's intent to be a claim for increase or new claim for compensation, which should be submitted on a VA Form 21-526EZ, *Application for Disability Compensation and Related Compensation Benefits*. This scenario could also occur in reverse where VA receives a VA Form 21-526EZ, but it later becomes clear that the claimant's intent was to file a supplemental claim.

VA has heard concerns from VSOs and accredited representatives that the RFA process can be frustrating for them and for claimants. Based on this feedback, VA is currently exploring administrative solutions to address concerns regarding the current RFA process such that a claimant's date of receipt could be protected in such cases when an incorrect claim form is received. While analysis is in the early stages, VA

believes that these concerns could be addressed administratively through rulemaking or form revision without introducing significant procedural and legal complexity to the claims process. VA is open to collaborating with the Committee to determine whether statutory revision is necessary and the best path forward to address the issue.

Second, 38 C.F.R. § 3.155(b)(2) requires that an ITF must identify the general benefit (for example, compensation, pension), but need not identify the specific benefit claimed or any medical condition(s) on which the claims is based. VA Form 21-0996, *ITF a Claim for Compensation and/or Pension, or Survivors Pension and/or DIC* (https://www.vba.va.gov/pubs/forms/VBA-21-0966-ARE.pdf), allows the claimant to select from the following general benefit types: 1) compensation, 2) pension, or 3) survivors' pension and/or dependency and indemnity compensation (DIC). Claimants may choose all that apply. Per 38 C.F.R. § 3.155(b)(6), VA will not recognize more than one ITF concurrently for the same benefit (for example, compensation, pension). This regulatory structure is dependent upon claimant identification of the benefit(s) sought when submitting the ITF, allowing for consistent tracking of ITFs in VA's electronic claims processing system and eliminating claims processor interpretation of claimant intent.

The proposed amendment refers broadly to "a claim for benefits under the laws administered by the Secretary," consistent with section 5101(a). As such, it appears VA would be required to apply the concept of ITF much more broadly than it currently exists in regulation, treating an application on a prescribed form for any VA benefit that appears to be an incorrect form as an intent to file, adding considerable complexity to the administration of various VA benefits. If this bill were enacted, VA would notify the claimant that the form submitted appears to be a claim for a benefit not covered under the form submitted and provide the perceived correct form and any information necessary to complete the form. However, this requires the claims processor to interpret the claimant's intent, and that interpretation may be incorrect.

Based on the complexity of applying a statutory provision to a purely regulatory concept, and the need for a clearer outline of statutory intent, prior to making statutory changes to amend 38 U.S.C. § 5101(a) for the purpose of allowing incorrect claim forms to be treated as ITFs, VA recommends adding the guidelines for an ITF to the statute. VA is concerned that inclusion of ITF language into 38 U.S.C. § 5101 without it first being written into statute could create unintended complications and confusion. VA stands ready to provide the Committee with technical assistance in this regard.

Third, 38 C.F.R. § 3.155(b)(1) provides that an ITF can be submitted in one of three ways: 1) saved electronic application, 2) written intent on prescribed intent to file a claim form, or 3) oral intent communicated to designated VA personnel and recorded in writing. Because claims processors primarily look to VA's regulations for guidance in these matters, a regulatory update would be required to allow an incorrect claim form to be treated as an ITF in addition to these three ways.

Fourth, claimants are only permitted to have one ITF pending at a time. Under 38 C.F.R. § 3.155(b)(6). VA does not allow the submission of another ITF to "update" or "cancel" a prior ITF because this could create a situation where a claimant inadvertently deprives him or herself of a currently held effective date. The language of the bill, read in isolation, could be understood as requiring VA to treat the submission of the incorrect form as an ITF regardless of this rule. In order to prevent harm to claimants, VA suggests the bill be revised to align with the broader rule that only one ITF at a time may be pending.

Lastly, the phrase "with a claim for benefits" in the first line of the proposed paragraph (3) may imply that a claimant must already have a pending claim for benefits for this provision to apply. VA recommends revision to avoid confusion and to specify the pursuit of a "claim" versus an "appeal," thereby removing the potential for unintended consequences concerning appeals before the Board.

VA suggests the following:

> "(3) If an individual pursues a claim for benefits under the laws administered by the Secretary using a prescribed form under paragraph (1) that is not the correct form for the benefits sought or for such claim, the Secretary shall treat such form as an intent to file a claim under section 3.155 of title 38, Code of Federal Regulations, or successor regulation unless the individual already has a pending intent to file for that same benefit."

VA also notes that while section 3.155 is a VBA regulation, the language in the bill is exceptionally broad and could be read to establish an "intent to file" process and requirement for VHA benefits. If the Committee only intends for this to apply to VBA, VA recommends stating so clearly.

VA does not support section 2(b) of the bill. This section would essentially re-create the same inefficiencies within the Legacy appeals system that the AMA sought to remedy after pending legacy appeals grew to nearly 475,000 cases, many of which took as long as 10 years to fully resolve underestimates provided at the time.

The proposed amendments to this section would result in piecemeal proceedings with ever-changing appellate records. This is a stark contrast from the closed record system AMA implemented to improve accountability, efficiency, and fundamental fairness to all waiting Veterans. Over the past 4 years, AMA appeals on average have been resolved 3-4 years faster than legacy appeals, have a 20% lower remand rate, and have a 10% higher grant rate. With legacy appeals still working their way through the system, the remanded cases keep displacing AMA cases at a high rate, and frequently receive multiple reviews before awaiting AMA cases can be adjudicated for the first time. Allowing remanded cases to move to the head of the line would erode the progress gained under the AMA.

As briefly summarized above, section 2(b) of the bill would also require any subsequent appeal of a previously remanded and continuously pursued claim to be assigned to the VLJ "who held the most recent hearing relevant to such case." This was a legacy system requirement that the AMA removed for efficiency, and a mandated, rigid return to that model will increase wait times for appellants as their appeals must wait to be assigned to a particular VLJ out of the over 130 VLJs currently appointed to the Board. The verbatim transcript of the Veteran's hearing (and notes of the judge who conducted the hearing) on the same or similar issue would also be available even if a different judge is deciding the appeal, and so appellants would not be prejudiced if their remanded appeal were assigned to a different judge. Nevertheless, the Board is committed to ensuring the same judge who held the hearing decides the AMA appeal to the greatest extent practicable. However, that should be a matter of procedural discretion rather than a legal mandate that could have the same unintended consequences that the AMA remedied.

Section 2(b) of the bill also amends 38 U.S.C. § 7107(e) to allow Veterans to switch between Board dockets or withdraw a claim on appeal at any time before the date on which the appeal "is assigned to an individual employed by the Department responsible for writing the decision of the Board with respect to such case." This allows a docket switch at any time up until the appeal is assigned for review and drafting of a decision, but proposed section 7107(e)(2) would prohibit a docket switch after that date. Allowing appellants to switch dockets at any time would diminish the carefully considered efficiencies built into the AMA system, and these proposed changes would essentially mimic the features of the legacy system which allowed appellants to add evidence or request a hearing at any time, thus creating further delays in issuing decisions. Furthermore, proposed section 7107(e)(1)(B) would allow a withdrawal of a claim or issue at any time up until the appeal is assigned for review and drafting of a decision. This appears to be redundant of what is already afforded via regulation which permits withdrawal of a modernized appeal at any time before the Board issues its decision, and the withdrawal is effective the date it is received. In other words, the current regulatory scheme provides a longer period in which an appellant may withdraw their appeal than proposed 7107(e)(1)(B) would allow. Withdrawal is not required to switch dockets before the Board. To the extent withdrawal of an appeal is required to switch from the Board Appeal review lane to either the Supplemental Claim or Higher-Level Review lanes, as written this new paragraph would not affect the time limits for an appellant to switch lanes and maintain continuous pursuit of their claim.

VA does not support section 2(c) of the bill. This section would require the Board to promptly notify the appellant when any evidence submitted in connection with a case before the Board is untimely and may not be considered as part of the evidentiary record before the Board. Such notice must inform the appellant of from one docket to another under proposed 38 U.S.C. § 7107(e). The requirements made by this amendment would be administratively burdensome and would add significant delays to appeals processing timelines, thus leading to growth in appeals backlogs. This is particularly true if appellants were allowed to change dockets multiple times because each docket has its own evidentiary windows.

The amendments would also require the Board to immediately and repeatedly review the appellant's claims file after an appeal is docketed to determine whether VA received any documents from the appellant or representative subsequent to the issuance of the notice of the AOJ decision on appeal, and then review and determine whether a notice under section 7113(d) is necessary. This is particularly problematic if the AOJ utilizes a claims system and document repository that the Board cannot access, such as those used by VHA. Furthermore, proposed section 7113(d) does not appear to contain any limitation on the number of notice letters that the Board must transmit to an appellant. Requiring the Board to conduct a review and provide such a notice every time an appellant submits evidence outside of the window of time permitted by section 7113 would dilute much of the administrative efficiency value of closing the record. This is particularly true if the Board must send multiple notice letters to appellants who–despite previously receiving section 7113 letters–continue to send untimely evidence to the Board without opting to switch dockets.

H.R. XXX Veterans Claims Quality Improvement Act of 2024

The proposed legislation would amend title 38 of the United States Code, to provide for certain revisions to the VBA adjudication manual and to mandate various procedures with an intended goal to help improve the quality of the adjudication of claims for benefits under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

Section 2(a) of the bill would amend 38 U.S.C. § 311 by creating three new subsections: subsection (a), which restates current section 311; subsection (b), which requires the General Counsel to review any revisions to the VBA adjudication manual; and subsection (c), which requires the General Counsel to develop and carry out a training program for VBA on rules, guidance, and other issuances that have a material effect on claims for benefits administered by VA.

Section 2(b) of the bill would require the Secretary, in consultation with the General Counsel and the Chairman of the Board, to complete a study that identifies issues about which an opinion from the General Counsel would foster consistency in the decisions of claims for benefits administered by VA. Not later than 1 year after enactment of the bill, the Secretary would be required to submit the study's findings in a report to the House and Senate Veterans Affairs Committees.

Section 3(a) of the bill would amend 38 U.S.C. § 7101 by adding a new subsection directing the Chairman of the Board to develop and carry out a quality assurance program with respect to Board decisions. The Secretary would be required to submit an annual report to the House and Senate Veterans' Affairs Committees on this program, beginning no later than 1 year after enactment of the bill.

Section 3(b)(1) of the bill would create new 38 U.S.C. § 7101B, which would require the Secretary, in conjunction with the Chairman of the Board, to develop and

carry out a training program for members of the Board on timely and correct adjudication of appeals under chapter 71, title 38 of the United States Code. In carrying out the program, the Secretary would be required to consider Board member and covered employee feedback, error data generated under proposed 38 U.S.C. § 7101(f), and remands from the Veterans Court. The Secretary would be required to submit an annual report to the House and Senate Veterans' Affairs Committees on this program. Section 3(b)(1) also creates a definition of the phrase "covered employee."

Section 3(b)(2) of the bill would amend 38 U.S.C. § 7101A(c)(1)(B) by requiring performance reviews of Board members no less often than 1 year to determine whether the members' job performance meets the performance standards set for members. The current statute requires these reviews to be conducted no less often than every 3 years. Section 3(b)(2) would further amend 38 U.S.C. § 7101A by creating a new subparagraph that prohibits the performance review panel from considering the timeliness or quality of work of any Member of the Board when reviewing the performance of a covered employee (as defined by proposed 7101B).

Section 3(c)(1) of the bill would amend 38 U.S.C. § 7104(d) by adding a new paragraph that requires Board remand orders contain a statement of the specific reasons why the claim was remanded, including any failure of VA to satisfy the statutory duties to assist or notify the claimant. Section 3(c)(2) of the bill would further amend 38 U.S.C. § 7104 by adding a requirement that where the Board remands a claim, the Secretary, to the maximum extent practicable, issue a copy of the remand order to the VBA employee "who committed the error resulting in the decision of the Board to remand."

Section 3(d) of the bill would add a new and additional reporting requirement to the Board's longstanding 38 U.S.C. § 7114 annual reporting requirements, mandating "the Chairman of the Board and the head of VBA's Office of Administrative Review" supplement current remand statistics to include "the number of decisions of the Board to remand a claim…determine[d]" to be unnecessary.

Section 3(e) of the bill would require the Secretary, in consultation with the Chairman of the Board and the head of VBA's Office of Administrative Review, to develop a plan to improve the quality of Board remand orders for further action and mitigate the number of such decisions that are unnecessary under any applicable law or regulation. The bill would require the Secretary to develop this plan within 6 months of the bill's enactment and submit a report to the House and Senate Veterans' Affairs Committees within those 6 months.

VA does not support this bill. VA is the organizational client of OGC and, much like the Board, VBA currently has processes in place for seeking legal guidance from OGC. OGC routinely provides guidance to VBA, to include legal advice related to its adjudication manual revisions. To this point, OGC provided VBA with advice in 2021 on the legal requirements for revisions to VBA's adjudication manual. OGC has responded to VBA's subsequent questions on this subject as they have come up, and OGC and

VBA will continue working together to ensure manual revisions are legally sufficient. Proposed 38 U.S.C. § 311(b)'s codification of a process that is already in place and operational is redundant and unnecessary.

Proposed section 311(b) would direct OGC to review each provision of relevant VBA manuals that would have a "material effect" on claim adjudications. OGC does not routinely monitor all changes to all relevant VBA manuals to determine whether they would have a material effect on claims adjudication, but necessarily relies upon its VBA colleagues to identify changes potentially requiring OGC review and guidance. To the extent section 311(b) is intended to impose a burden on OGC to regularly monitor all changes to the relevant VBA manuals, OGC would need additional resources to carry out that function and, in any event, such routine monitoring would be an ill-advised use of OGC resources.

With respect to the study and report required by section 2(b) of the bill, VA notes that VBA, the Board, and OGC regularly discuss legal issues that impact the administration of VA benefits, including at monthly meetings to discuss developments in caselaw, statute, and regulations. In the event of an adverse decision with greater implications for a particular benefit line, OGC provides guidance to VBA and the Board on how to comply with the court's decision and does so in a manner that provides consistency in the administration of benefits. Even in circumstances where VA receives a favorable court decision with broader implications across benefits lines, OGC has provided training to its clients to aid in better understanding and implementing the decision. One such example is a 2022 OGC training on a Federal Circuit decision, *Lynch v. McDonough*, that clarified how the benefit-of-the-doubt rule is properly applied under 38 U.S.C. § 5107(b).

While a study may identify specific legal issues of concern at a given point in time, VA believes that VBA and the Board, as the subject matter experts on administering VA benefits and in partnership with OGC, are well suited to identify the concerns targeted by section 2(b) of the bill on an ongoing basis. If VBA or the Board discover inconsistencies in claims adjudications that may stem from a lack of clarity on a legal issue, OGC currently provides guidance on those issues as they arise and stands ready to do so in the future.

Further, this study could include a review of VHA decisions and benefits as well. If the drafters only intend for this to apply to VBA, VA recommends stating so clearly.

Should the Committee advance the bill, VA recommends replacing each instance of "the General Counsel" with "the Office of General Counsel" to clarify that the Office of General Counsel would review these revisions rather than the General Counsel personally review each revision.

VA does not support section 3(a). This section is duplicative and unnecessary, as the Board already maintains a quality review program conducted by the Board's Office of Assessment and Improvement. The quality review program and the quality

assurance rate are included in the Board's Congressionally-mandated annual reports. The Board's quality review program reviews Board decisions prior to dispatch to identify clear and unmistakable errors, customer service errors, and process protection errors. The Board presently works to ensure that identified errors are reviewed prior to a decision being issued through issuance of a memorandum identifying the error with recommended actions to cure the error. Its current quality assurance program has been in place for decades, has evolved over time as the law and caseloads have changed, and is robustly documented with statistics and procedural manuals that are publicly available and published (including in CMRs). The entire program was recently reviewed by the Government Accountability Office (GAO) over the course of about 18 months and further refinements are being made to the program as a result of that review and a November 29, 2024, GAO report. It is unclear how this legislation might disrupt or potentially limit these longstanding efforts.

VA does not support section 3(b). This section is duplicative of the Board's current efforts. The Board already maintains a robust training program implemented by its Professional Development Division. This program delivers Board-wide training covering a variety of topics, such as the AMA and the PACT Act, as well as issue-based training such as special monthly compensation and musculoskeletal ratings. Additionally, VLJs participate in an annual multi-day training program. The training program is designed to provide ongoing education on procedural and substantive areas of Veterans' law and enhance judges' issuance of sound decisions requiring training on the "correct adjudication of appeals" implies that there is a correct outcome in any given appeal before the Board. As stated above, the ultimate outcome of a particular appeal is based on the judge's factual findings for that specific appeal and the application of the law to those facts. Reasonable minds may differ on a fact-specific outcome without one being "correct" and the other being or "incorrect." The Board already provides training that incorporates legal errors identified through the Board's quality review program, as well as on appeals remanded to the Board from the Veterans Court. Such training is provided in Board-wide trainings, monthly digests, monthly tips, and special alerts. In recent years, the Board has delivered trainings targeting the most common errors identified in the quality review process, as well as the precedential cases cited most often in Court of Appeals for Veteran Claims decisions and Joint Motions for Remand.

Further, VA notes the Committee's intent regarding proposed 38 U.S.C. § 7101a(h)(1), which prohibits the performance review board from considering the timeliness and quality of any Board member's work when reviewing the performance of a covered employee. As drafted, it would appear the bill precludes the review board from considering whether a covered employee prepared untimely or poor work product for a Board member's review and final signature.

VA does not object to section 3(c).

VA does not support section 3(d).VA notes that the Board currently provides remand data in its annual report. This proposal essentially would add a requirement that the Board independently review every issue remanded in a Board decision to legally

evaluate whether, in the opinion of the judicial reviewer, any of the remands were "unnecessary" and to then to report "the number of decisions of the Board to remand a claim…determine[d] to be unnecessary." It further implies this judicial review and reporting should be done by "the Chairman of the Board and the head of [VBA's] Office of Review of the Veterans Benefits Administration." Vesting VBA or its subcomponent Office of Appellate Review the judicial authority to review Board directives for necessity would undermine the Board's 90-year jurisdiction of being the "final" authority to make findings of fact or law on benefits and services administered by the Secretary. Even if the provision were revised to correct this legal oversight, the required judicial review of each of those independent legal remand determinations by Board judges every year would be resource intensive and further delay other appeal reviews and adjudications. Last year, the Board adjudicated 103,245 appeals and is on track to adjudicate 111,000 appeals this year. It is important to note that most appeals have more than one issue and that it is common for individual issues to be resolved in different ways. In other words, many Board appeal decisions involve mixed results, with some issues granted and/or denied and other issues where a remand is more appropriate or legally required. Approximately 57,000 appeals adjudicated during FY 2023 required at least 1 issue be remanded. Requiring the Chairman or other Board Member judges to independently review and advise or determine whether each remand is appropriate require sufficient personnel resources be diverted to complete case file reviews that essentially amount to "second opinions." Using last year's data as a benchmark, that would require 57,000 additional reviews and opinions to be rendered by scarce judicial resources and would necessarily lead to at least a 50% reduction in the number of appeals that could be adjudicated. This, in turn, would lead to an exponential growth in pending appeals, all at a time when the Board has started to reduce the pending appeals inventory for the first time in 5 years.

VA does not support section 3(e). Implementation of this section would slow the adjudication of appeals and negatively impact Veterans. Additionally, it is unclear whether there are specific metrics the Committee has in mind that would satisfy the requirements of a plan to improve the quality of the Board's remands. Similar to subsection (d) of the bill, if the Committee only intends for this plan to apply to decisions on claims pertaining to VBA claims rather than VBA and VHA claims, VA recommends stating so clearly.

Conclusion

This concludes my statement. We thank the committee for your continued support of programs that serve the Nation's Veterans. My colleagues and I are prepared to respond to any questions you may have.

Prepared Statement of Tiffany Wagner

CHAIRMAN LUTTRELL, RANKING MEMBER PAPPAS, AND DISTINGUISHED MEMBERS OF THE SUBCOMMITTEE:

Thank you for inviting the U.S. Court of Appeals for Veterans Claims (Court) to participate in the April 10, 2024, legislative hearing of the U.S. House of Representatives, Committee on Veterans' Affairs, Subcommittee on Disability Assistance and Memorial Affairs (Subcommittee). I'm Tiffany Wagner, the Court's Executive Officer and Clerk of Court, and I'm pleased to appear as the designee of Chief Judge Margaret Bartley on behalf of the Court. The Subcommittee is considering several bills, but we limit our testimony to the Medical Disability Examination Improvement Act of 2024 and the Veterans Appeals Efficiency Act of 2024, and specifically, to the sections within those bills that directly impact the Court. Those provisions pertain to the Court's Annual Report and to proposed supplemental jurisdiction and limited remand authority for the Court. While we are appreciative of the Committee's efforts on our behalf, for the reasons outlined below the Court does not support adoption of the proposals.

I. Proposed Section 5(d)(2) of the Medical Disability Examination Improvement Act of 2024

Section 5(d)(2) of the Medical Disability Examination Improvement Act of 2024 would add an additional annual reporting requirement under 38 U.S.C. § 7288(b). Currently, the Court is required to summarize our annual workload as to 15 specific elements. Proposed Section 5(d)(2) would add a 16th element, requiring a "summary of recurring issues that the chief judge of the Court believes could be resolved by better training for employees of the Department, increased oversight, or clarification from either the Department or Congress." Respectfully, the Court opposes this proposal.

The Court was established by Congress 35 years ago as an independent Federal court with "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals" (Board) (38 U.S.C. § 7252). The Board is the entity within the Department of Veterans Affairs (VA) that provides final executive agency decisions as to veterans benefits entitlement (38 U.S.C. § 7104). Administration of the Board is the ultimate responsibility of the Secretary of VA (38 U.S.C. § 7101).

There are two primary reasons for the Court's opposition to the Section 5(d)(2) proposal. First, the Court, as a judicial entity, has no authority or responsibility to oversee VA or to resolve VA training issues. The VA Secretary is tasked by the President to lead the Department and, of course, this Committee maintains oversight as to VA operations. Thus, it is the Secretary's responsibility to manage Department employees, to include establishing internal operations and directing necessary training or supervision based on his knowledge of any VA deficiencies. The Court and its judges have no role in that executive function, and no role in the legislative oversight function. Court judges are not privy to internal VA operations, including as to current training or oversight. The Court reviews issues and arguments presented in appeals; decides all relevant questions of law; holds unlawful and sets aside Board decisions and findings that are, among other things, arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; and affirms, reverses, or remands as appropriate. When the Court finds Board error requiring reversal or remand, the Court identifies the error and explains the reasons for its decision. Once the Court's action becomes final, the matter returns to the Board and the Court has no further involvement. Therefore, even were it appropriate, the Court's judges have no means to evaluate what is or is not working successfully within VA or to suggest changes or enhancements to VA internal operations.

A second reason for the Court's opposition to the Section 5(d)(2) proposal is that, as with all judicial tribunals, the Veterans Court speaks through its judicial decisions and does not issue advisory opinions or generalize or summarize the errors of one of the parties outside of the context of a case. VA is charged to readjudicate claims that are returned to it for error correction. By statute, 38 U.S.C. § 7112, the Board is the recipient of every reversed or remanded Court decision, and is likely in the best position to assess and evaluate trends; to develop strategies and training to address errors; to allocate resources toward such initiatives; and to limit error recurrence. In this vein, the Court notes that proposed subsection 5(d)(1) of the Medical Disability Examination Improvement Act of 2024 places on the Chairman of the Board a reporting requirement identical to that of proposed Section 5(d)(2). The Court believes that the burden of identifying, reporting, and remedying errors should rest with the Board. Indeed, in November 2023 testimony to this Subcommittee, the U.S. Government Accountability Office made similar recommendations to improve Board quality assurance, to include: "The [Board] Chairman...

should develop and implement an evidence-based decision-making process that includes a plan outlining how it will build evidence to assess the underlying causes for the most common errors identified by the case review process and the most common reasons for [Court] remands. The Board should use this evidence to better target its interventions and assess their results." (https://www.gao.gov/products/gao–24–106156). Thus, as others with knowledge of this area have prescribed, the Board is in the best position and has the authority and responsibility to collect and provide the information outlined in proposed Section 5(d)(2).

For these reasons, the Court respectfully opposes Section 5(d)(2) of the Medical Disability Examination Improvement Act of 2024.

II. Proposed Section 2(d) of the Veterans Appeals Efficiency Act of 2024

Section 2(d) of the Veterans Appeals Efficiency Act of 2024, titled "Expansion of Jurisdiction of [the Court]," would modify 38 U.S.C § 7252 to add two additional subsections–the first pertaining to supplemental jurisdiction and the second to limited remand authority.

A. Supplemental Jurisdiction

Section 7252 of title 38 U.S. Code establishes the Court's jurisdiction, stating that the Court has "exclusive jurisdiction to review decisions of the Board." Proposed subsection 7252(b)(1) would add that the Court "shall have supplemental jurisdiction to review an eligible claim pending a final decision of the [Board] with respect to such eligible claim"; proposed subsection 7252(b)(2) would address how the period for administrative review of such claims would be tolled pending a Court decision; and proposed subsection 7252(b)(3) would define an "eligible claim" for purposes of supplemental jurisdiction.

This proposal appears to be directed toward that part of the U.S. Court of Appeals for the Federal Circuit's decision in *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022), that held that the Veterans Court exceeded its jurisdiction when it included in a certified class veterans who had not yet received final Board decisions as to their individual claims. The Federal Circuit held: "While district courts may indeed exercise jurisdiction over future claimants, that is because Congress explicitly conferred the district courts with supplemental jurisdiction encompassing such claims. Critically, Congress has not enacted any comparable jurisdictional statute for the Veterans Court." *Skaar*, 48 F.4th at 1333–34 (internal citations omitted).

Congressional modification or expansion of the Veterans Court's jurisdiction is a legislative policy determination that the Court will not comment on. However, the Court offers the following observations with regard to the specific language in proposed subsections 7252(b)(1), (b)(2), and (b)(3).

First, the term "supplemental jurisdiction" is not defined in new proposed subsection 7252(b)(1), and therefore is susceptible to broad construction. The statutory basis for supplemental jurisdiction in United States district courts is found in 28 U.S.C. § 1367(a). That statute defines a claim over which a district court has supplemental jurisdiction as one that is "so related to claims in the action within such original jurisdiction that they form part of the same case or controversy." Stated differently, if a district court has jurisdiction over claim #1, it may exercise supplemental jurisdiction over claim #2 (over which it would not have original jurisdiction) so long as the two claims "form part of the same case or controversy." The absence of a definition of "supplemental jurisdiction" in proposed section 7252(b) may invite a wave of requests citing this proposed provision and arguing for a wider interpretation of the expansion of the Court's jurisdiction than Congress may have contemplated.

Second, new proposed subsection 7252(b)(2) may be intended to permit a claimant who is included in a certified or proposed class pending at the Court and who has not yet received a final Board decision to temporarily stop the clock on agency review deadlines that follow an initial VA decision on a claim. But it is unclear whether the subsection intends to use the word "claimant" to refer to different actors. The first use of "claimant" may be referencing an individual needing tolling of the period in which to submit a request for agency administrative review when that individual is included in a class action pending before the Court. In other words, the first "claimant" may refer to a person whose claim remains before the agency. However, the second use of "claimant" refers to an individual who "submits to the Court a motion for class action review." It is unclear whether this second use intended to include someone who has appealed a final Board decision to this Court and has submitted a request for class certification. Because the intent is unclear and because the Court may be called upon in the future to interpret whatever language Congress enacts, the Court finds it difficult to provide thoughtful feedback as to this proposed subsection.

Third, new proposed subsection 7252(b)(3) defines the term "eligible claim" used in subsection 7252(b)(1) concerning supplemental jurisdiction as a claim pending a final Board decision "for which relief may be granted on a class-wide basis" pursuant to the Court's Rules of Practice and Procedure (Rules). If Congress's sole intent is to permit the Court to include in an existing class a VA claimant who lacks a final Board decision, the Court suggests that Congress seriously consider whether the definition goes beyond what Congress has contemplated. Because the Court's Rules contain no restriction as to appeals that *may be* subject to relief on a class-wide basis, this leaves unsettled whether as written the Court might have supplemental jurisdiction over *any* claim pending before VA, regardless of whether a request for class certification and class action has been filed. This could result in a flood of claimants seeking Court review of myriad non-final agency actions. It may be possible to read "eligible claim" in the context of supplemental jurisdiction as fundamentally changing the Court's current statutory jurisdictional requirement that there be a final Board decision prior to Court review. Unfettered jurisdiction could significantly grow the Court's caseload, which in turn would require reevaluation of Court processes and resource needs.

For the above reasons, the Court has serious concerns about Section 2(d) of the Veterans Appeals Efficiency Act of 2024.

B. Limited Remand Authority

Section 2(c) of the Veterans Appeals Efficiency Act of 2024 proposes to add new 38 U.S.C § 7252(c), addressing the Court's remand authority.

Proposed new subsection 7252(c)(1) would authorize the Court to remand a matter to the Board "for the limited purpose of ordering the Board to address a question of law or fact" that the Court determines the Board failed to either (1) address after it was explicitly or reasonably raised, or (2) adequately explain the reasons or bases for the Board's decision as to such question. Proposed new subsection 7252(c)(2) would permit the Court, when issuing such a limited remand, to direct the Board to issue a decision by a date certain. Proposed new subsection 7252(c)(3) would require the Court to retain jurisdiction over such remanded matters and to stay Court proceedings until the Board satisfies the remand instructions and issues a decision.

Proposed subsection 7252(c) could inject uncertainty into the law given that the Court already has the authority to take the actions contemplated in this proposed new section. Currently, 38 U.S.C. § 7252(a) permits the Court to remand matters as appropriate. Issuing limited remands, retaining jurisdiction, and setting out a timetable within which the Board must act are all actions that the Court at the current time may take or has taken. Most recently, the en banc Court in *Skaar v. Wilkie*, 31 Vet.App. 16 (2019) (per curiam order), did just that. There, the Court clarified its authority in this regard and noted that the unique circumstances of that case made using a limited remand appropriate. The Court retained jurisdiction of the matter and directed the Board to address specific issues on a detailed timeline. Although later holdings in *Skaar* were overturned by the Federal Circuit, this holding was not disturbed.

The fact that the Court has current authority to engage in limited remands is the primary reason that the Court raises questions about the proposed changes regarding limited remand authority. But in addition, by articulating *when* the Court may order a limited remand, new subsection 7252(c)(1) may in fact limit the Court's current authority to engage limited remands. And proposed new subsection 7252(c)(3) could impose a potentially unclear and unnecessarily rigid framework on Court actions. How and when to act in handling cases before the Court is a judicial determination and the Court, for example, should not be prevented from acting in cases where the Board fails to comply with the remand instructions.

Without a doubt, retaining jurisdiction and directing a limited remand with specific adjudication instructions to the agency could be a powerful tool. But this tool is already in the Court's toolbox—and we suggest that Congress consider whether increased use may disturb the normal process for veterans waiting in the traditional appeal queue. In short, under our current authority the Court may undertake case-by-case judicial determinations as to when and to what extent to remand, and it is unclear to the Court why Congress may believe this to be insufficient.

III. Conclusion

The Court takes seriously its mission to afford veterans and their families and survivors full, fair, and prompt judicial review of final Board decisions. The Court is open to ways to improve its functioning and appreciates the Subcommittee's continued interest and effort in this shared goal. Thank you for the opportunity to submit this statement.

Prepared Statement of Daniel Shedd

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TESTIMONY

Statement of

Daniel T. Shedd
Legislative Attorney

Before

Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
U.S. House of Representatives

Hearing on

"Pending Legislation Before the Subcommittee"

April 10, 2024

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CRS TESTIMONY
Prepared for Congress

Chairman Luttrell, Ranking Member Pappas, and Members of the Committee:

My name is Daniel Shedd, and I am a legislative attorney in the American Law Division of the Congressional Research Service (CRS). Thank you for the opportunity to testify on the proposed legislation entitled the "Veterans Appeals Efficiency Act of 2024" that is before the Subcommittee today. My testimony will focus on two aspects of the proposed legislation: (1) the aggregation of agency adjudications and (2) the authority of the Court of Appeals for Veterans Claims (CAVC) to issue limited remands.

The first section of this testimony provides an overview of agency aggregation of adjudications that involve claims with substantially similar questions of law or fact. The proposed legislation would specifically authorize the Board of Veterans' Appeals (BVA or Board) to aggregate certain appeals that are pending before the Board. The proposed legislation provides that "[i]f the Chairman of the Board determines that more than one appeal involves substantially similar questions of law or fact, the Chairman may aggregate such appeals for review."[1] Further, the proposed legislation would require the Department of Veterans Affairs (VA) to seek an independent assessment from a federally funded research and development center (FFRDC) regarding the BVA's authority to aggregate appeals with substantially similar questions of law or fact.[2] To assist the Subcommittee in evaluating these provisions, this written statement will (1) provide an overview of how other executive agencies and non-Article III courts have implemented aggregation procedures for claims or appeals; (2) summarize commentators' views as to the potential benefits and drawbacks related to the aggregation of claims; and (3) provide analysis of how courts and other jurists have evaluated whether an agency has the authority to aggregate adjudications. Finally, it will briefly review how the CAVC has implemented class action procedures in the context of appeals from BVA decisions.

Next, this testimony will provide an overview of the CAVC's use of limited remands. The proposed legislation would require the CAVC to retain jurisdiction over a matter that it remands to the BVA when it finds that the Board failed to address an issue raised by the claimant or reasonably raised by the evidence of record. This section of the testimony provides a brief overview of limited remands. It then reviews the CAVC's authority to issue limited remands in light of the court's 1995 decision in *Cleary v. Brown*, which held that the CAVC lacked authority to retain jurisdiction over matters remanded to the BVA for a new adjudication.[3] This testimony then discusses the CAVC's departure from that holding in more recent cases such as *Skaar v. Wilkie*, where the court determined that it has authority to issue limited remands in certain circumstances.[4] Finally, the written statement concludes by examining the text of the proposed legislation in light of the CAVC's history of issuing limited remands.

Aggregation of Agency Adjudications

The Veterans Appeals Efficiency Act of 2024 would authorize the BVA to aggregate certain appeals that are before the Board. The proposed legislation provides: "If the Chairman of the Board determines that more than one appeal involves substantially similar questions of law or fact, the Chairman may aggregate such appeals for review."[5] The proposed legislation would also require VA to seek an independent assessment from an FFRDC regarding the BVA's authority "to aggregate, for review, more than one appeal . . . that involves substantially similar questions of law or fact pursuant to section 7104 of such

[1] Veterans Appeals Efficiency Act of 2024, H.R. ___, 118th Cong. § 2(c)(1) [hereinafter Veterans Appeals Efficiency Act].

[2] *Id.* § 2(f)(2).

[3] Cleary v. Brown, 8 Vet. App. 305 (1995), *on reconsideration in part*, 9 Vet. App. 201 (1996).

[4] Skaar v. Wilkie, 31 Vet. App. 16 (2019) (per curiam).

[5] Veterans Appeals Efficiency Act § 2(c)(1) (2024).

title," as amended by the proposed legislation.[6] The FFRDC would provide recommendations regarding rules or principles that should govern BVA's aggregation of appeals and the BVA, in turn, would be required to establish "policies and procedures to implement the recommendations."[7]

This section of the testimony discusses how other executive agencies and non-Article III tribunals have implemented policies to provide for aggregation of administrative adjudications. First, this section provides a brief overview of the appeal process at the BVA to provide context to the current legislation. It then provides an overview of the benefits and drawbacks of claim aggregation. It also discusses the legal authority of agencies to establish aggregation policies and procedures and addresses the BVA's authority to implement such policies under the proposed legislation. Finally, this section provides an overview of certain best practice guidelines established by the Administrative Conference of the United States (ACUS) in its recommendation regarding aggregation of claims before an executive agency.

Brief Overview of BVA's Appeals Process

In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act (AMA) in an effort to "expedite VA's appeals process while protecting veterans' due process rights."[8] Pursuant to the AMA, if a claimant disagrees with the initial decision of a VA agency of original jurisdiction (AOJ) (e.g., a VA regional office, medical center, or other VA entity) on a claim for benefits or reimbursement, they may appeal it.[9] The AMA provides three avenues for review: (1) requesting higher-level review from a more experienced adjudicator within the AOJ; (2) filing a supplemental claim with new evidence at the AOJ; or (3) appealing to the BVA.[10] To elect BVA review, a claimant must file a notice of disagreement (NOD) (more formally known as a VA Form 10182) with the BVA within one year of the AOJ's decision.[11]

When electing BVA review, the claimant must select one of three review options available at the Board: (1) the direct review docket, (2) the new evidence docket, or (3) the hearing docket.[12] Once the Board receives the completed NOD, it assigns the appeal a docket number. The BVA is statutorily obligated to hear appeals from each docket in the order in which they are received.[13] However, an appeal may be advanced on the docket (1) "if the case involves interpretation of law of general application affecting other claims"; (2) if the claimant is suffering severe financial hardship or has a severe illness; or (3) if there is other sufficient cause.[14]

When reviewing a claim on appeal, the BVA is bound by statute, VA regulations, "instructions of the Secretary, and the precedent opinions of the chief legal officer of the [VA]."[15] VA regulations authorize the VA General Counsel to issue "precedent opinions involving veterans' benefits under laws

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[6] *Id.* at § (f)(2).

[7] *Id.*

[8] H. REP. NO. 115-135, at 2 (2017).

[9] 38 U.S.C. § 5104C.

[10] *Id.* The AMA provides that a claimant may seek an unlimited number of reviews and, as long as each subsequent appeal is filed within one year of the most recent decision, keep the original claim's effective date. *Id.* Because the proposed Veterans Appeals Efficiency Act of 2024 addresses appeals at the BVA, this testimony will focus on the third option—the BVA appeal process.

[11] 38 U.S.C. § 7105.

[12] 38 C.F.R. § 20.202(b) (2024).

[13] 38 U.S.C. § 7107(a) ("Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the docket to which it is assigned by the Board.").

[14] *Id.* § 7107(b).

[15] *Id.* § 7104(c).

administered by the [VA]."[16] Current regulations provide that the Chairman of the BVA[17] may request an opinion from the General Counsel, and the General Counsel's written legal opinion is considered "conclusive . . . with respect to the matter at issue."[18] The General Counsel may designate an opinion as "precedential" and, if so designated, the opinion will be "binding on Department officials and employees in subsequent matters involving a legal issue decided in the precedent opinion."[19] Reviewing courts have upheld the binding nature of and procedures for issuing these General Counsel opinions.[20] Although the VA Office of General Counsel may issue precedential opinions that are binding on the BVA, BVA decisions themselves *do not* have precedential effect—that is, the decision of any individual case does not bind the Board to rule in the same manner in any subsequent case.[21] Appellate courts have upheld this on judicial review and have thwarted attempts to circumvent the regulation.[22]

The VA adjudication process at the BVA is unique compared to many other agencies, as Congress has established a "uniquely pro-claimant adjudicatory system."[23] BVA proceedings are non-adversarial—there is no party that argues *against* the claimant in front of the BVA.[24] Further, the scope of review favors claimants: by statute, the BVA is bound by all AOJ findings that are *favorable* to the claimant.[25] In addition, the burden of proof is also uniquely pro-claimant, as the BVA is to award benefits to the claimant based on a "benefit of the doubt" standard, instead of the typical "preponderance of the evidence" standard.[26]

When review is complete, the BVA will grant, deny, or remand the claim to the AOJ for further development.[27] If the claimant disagrees with the BVA's decision, the claimant may continue to pursue their claim before VA by filing a supplemental claim with new evidence or seek judicial review of the

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[16] 38 C.F.R. § 2.6(e); *id.* § 14.507(b).

[17] *Id.* § 14.502 ("Requests for formal legal advice, including interpretation of law or regulations, shall be made only by the Secretary, the Deputy Secretary, the Assistant Secretaries, the Deputy Assistant Secretaries, and the administration head or top staff office official having jurisdiction over the particular subject matter, or by a subordinate acting for any such official.").

[18] *Id.* § 14.507(a).

[19] *Id.* § 14.507(b).

[20] Paralyzed Veterans of Am. v. Sec'y of Veterans Affs., 308 F.3d 1262, 1265 (Fed. Cir. 2002) (rejecting argument that a precedential opinion is a "rule" requiring notice and comment procedures under the Administrative Procedure Act and upholding General Counsel precedential opinion as an "integral part of the Board's adjudicatory process."); Greer v. McDonough, 36 Vet. App. 220, 229 (2023) (noting that "the Board can request (through the Chairman) a precedent opinion from VA's General Counsel on a legal question.").

[21] 38 C.F.R. § 20.1303 ("Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided."); Bumpass v. McDonough, No. 19-8081, 2021 WL 4059693, at *2 (Vet. App. Sept. 7, 2021) (noting that "Board decisions are not precedential and are binding only with respect to a particular veteran's case."); Lynch v. Gober, 11 Vet. App. 22, 27 (1997) (recognizing nonbinding nature of Board decisions beyond the specific case at hand).

[22] *See, e.g. Lynch,* 11 Vet. App. at 27 ("The appellant's contention that the BVA in this case deviated from a clear pattern of BVA decisions that had recognized and applied a constructive-notice doctrine and that such a deviation would be arbitrary and capricious decision making is but another way of trying to import precedential value to nonprecedential BVA decisions, and must fail.").

[23] Hayre v. West, 188 F.3d 1327, 1333 (Fed. Cir. 1999) (noting that Congress has reinforced the "strongly and uniquely pro-claimant system of awarding benefits to veterans"), *overruled by* Cook v. Principi, 318 F.3d 1334 (Fed. Cir. 2002).

[24] 38 C.F.R. § 20.700 ("Hearings conducted by the Board are ex parte in nature and nonadversarial.").

[25] 38 U.S.C. § 5104A ("Any finding favorable to the claimant . . . shall be binding on all subsequent adjudicators within the Department, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding.").

[26] *Id.* § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."); Lynch v. McDonough, 21 F.4th 776, 781 (Fed. Cir. 2021) (holding that "a claimant is to receive the benefit of the doubt when there is an 'approximate balance,'" defined as a "nearly equal" amount, "of positive and negative evidence.").

[27] 38 U.S.C. § 7104; 38 C.F.R. § 20.904.

BVA decision at the CAVC.[28] Currently, there are no procedures in statute, regulation, or practice for aggregating claims pending before the BVA that present common issues of law or fact. With the context of the current BVA appeals process in mind, the following sections detail how other agencies have implemented aggregation procedures into their adjudicatory systems and how legal scholars and other commentators have addressed such procedures.

Aggregate Agency Adjudication: Potential Benefits and Drawbacks

Claim aggregation in the context of federal courts and executive agencies involves grouping together claims that have similar questions of law or fact for collective resolution of those claims or common issues within those claims.[29] Legal commenters have generally classified claim aggregation into two categories: *formal* aggregation and *informal* aggregation.[30] Formal aggregation of claims is when a single proceeding has the ability to bind other parties that may not be before the tribunal.[31] The class action lawsuit—where a single party represents the interests of a class of similarly situated claimants in a single action that is binding on all members of the class—is a well-documented example of formal aggregation.[32]

Informal aggregation, on the other hand, maintains separate, individual proceedings for each claimant and uses other mechanisms, such as placing similar cases on a specialized docket or assigning them all to the same judge or panel, to promote efficiency and consistency in adjudicatory outcomes across those claims.[33] The federal court system's procedures for multidistrict litigation (MDL) provide such an example.[34] In short, pursuant to MDL procedures, cases stemming from a common set of facts that are filed in numerous district courts are channeled to a single district court for coordinated or consolidated pretrial proceedings.[35] After such pretrial proceedings are concluded, the individual cases are remanded back to the original jurisdiction for trial.[36]

The purpose of implementing aggregation procedures is to efficiently handle large volumes of cases or claims in a consistent and equitable manner. Thus, courts and legal scholars have recognized that the

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[28] 38 U.S.C. § 5104C.

[29] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L.J. 1634, 1646 (2017) [hereinafter *Inside the Agency Class Action*] (describing aggregation as "grouping together and resolving large groups of similar claims").

[30] *See, e.g., id.* at 1647; James Hannaway, *Codifying the Agency Class Action*, 87 GEO. WASH. L. REV. 1451, 1456 (2019) (distinguishing formal binding aggregation procedures from informal aggregation procedures that are "less binding on absent parties"). Some texts refer to informal aggregation as *administrative* aggregation. *See, e.g.,* Fabrizio Cafaggi, *The Great Transformation. Administrative and Judicial Enforcement in Consumer Protection: A Remedial Perspective,* 21 LOY. CONSUMER L. REV. 496, 502 (2009).

[31] *Inside the Agency Class Action*, *supra* note 29, at 1647.

[32] *Id.* Other examples of formal aggregation include "lawsuits by and against organizations in bankruptcy, trustee actions commenced on behalf of many beneficiaries, statistical sampling and extrapolation, and *parens patriae* actions by state attorneys general." *Id.* (footnotes omitted).

[33] *Id.* at 1647–48.

[34] 28 U.S.C. § 1407; *see also* CRS In Focus IF11976, *Multidistrict and Multicircuit Litigation: Coordinating Related Federal Cases*, by Joanna R. Lampe.

[35] The MDL statute provides that the judicial panel on multidistrict litigation, a panel of seven federal judges, may transfer pending "civil actions involving one or more common questions of fact" to a district court for "coordinated or consolidated pretrial proceedings." 28 U.S.C. § 1407(a). Such pretrial proceedings include "conducting documentary discovery, establishing document depositories, arguing motions, conducting bellwether trials, and in general, carrying out the duties and responsibilities set for in the court's pretrial orders" Eldon E. Fallon, *Common Benefit Fees in Multidistrict Litigation*, 74 LA. L. REV. 371, 373 (2014).

[36] 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated.").

potential benefits of claim aggregation include: (1) judicial efficiency and (2) consistent legal outcomes for similarly situated claimants. In another view, implementation of aggregation policies also includes potential risks, as aggregation might strain an agency's adjudicatory resources and may raise fairness concerns for absent claimants that may be bound decisions in a class action.

One of the primary reasons cited for implementing claim aggregation is to promote adjudicatory efficiency. Traditional case-by-case adjudication of claims involving similar factual or legal questions requires adjudicators to decide those similar questions in each case.[37] Aggregation of claims, however, can potentially conserve adjudicatory resources by allowing for collective resolution of similar claims or issues. The Supreme Court has stated that a "principal purpose" of the class action is to promote "efficiency and economy of litigation."[38] Similarly, the judicial panel on MDL has a statutory mandate to transfer cases involving common questions of facts to a single district court "to promote . . . *efficient* conduct of such actions."[39]

Claim aggregation also can promote consistency in judicial outcomes for similarly situated claimants.[40] When multiple adjudicators hear individual claims without coordination or consolidation, there is potential for inconsistent outcomes despite the presence of common questions of law or fact.[41] By using methods such as channeling similar claims to a particular judge or panel, or by binding members of a class to a judgment reached in a class action, aggregate proceedings may provide for increased consistency in decisions for similarly situated claimants.[42]

On the other hand, aggregation procedures may also have limitations and potential drawbacks. Some note that certain aggregation devices can put a significant strain on an agency's adjudicatory resources.[43] As one federal court has observed, almost "all class action law suits involve complex issues, which are costly to resolve and often result in protracted proceedings."[44] At least one federal agency declined to adopt regulations to implement class action proceedings, in part because of the time, complexity, and expense associated with managing class actions.[45] This concern led ACUS to recommend that agencies implementing aggregate procedures ensure that their adjudicators have the necessary skill, resources, and time to manage the chosen procedures.[46]

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[37] *See, e.g.,* Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986) (noting that certifying a class action in the case would prevent the judicial system from "repeating, hundreds of times over" the same factual and legal inquiries in each individual trial).

[38] Am. Pipe & Constr. Co. v. Utah, 414 U.S. 538, 553 (1974).

[39] 28 U.S.C. § 1407(a) (emphasis added).

[40] Gunnells v. Healthplan Servs., 348 F.3d 417, 427 (4th Cir. 2003) (noting that "[c]lass certification . . . promotes consistency of results . . . .").

[41] *See, e.g.,* 1 WILLIAM B. RUBENSTEIN, NEWBERG AND RUBENSTEIN ON CLASS ACTIONS §10 (6th ed. 2023) ("Individual processing leaves open the possibility that one court, or jury, will resolve a factual issue for the plaintiff while the next resolves a seemingly similar issue for the defendant.").

[42] MICHAEL SANT'AMBROGIO & ADAM ZIMMERMAN, ADMINISTRATIVE CONFERENCE OF THE UNITED STATES, AGGREGATE AGENCY ADJUDICATION FINAL REPORT 14 (2016) [hereinafter AGGREGATE AGENCY ADJUDICATION] ("At bottom, aggregate proceedings . . . seek consistency and distributive fairness—to treat like parties in a like manner.").

[43] *Id.* at 63 (noting that administrative judges within the EEOC "observed that class action proceedings [at the EEOC] involved substantial time and resources, sometimes requiring extensive motion practice and complex statistical proofs . . . .").

[44] Lachance v. Harrington, 965 F. Supp. 630, 645 (E.D. Pa. 1997).

[45] Commodity Futures Trading Commission, Rules Relating to Reparation Proceedings, 59 Fed. Reg. 9631, 9631 (Mar. 1, 1994) (to be codified at 17 C.F.R. pt. 12) (noting that agency adjudication is "designed for quick and inexpensive resolution of disputes whereas class action litigation must be conducted with formality and strict attention to procedural issues and is often lengthy" and concluding that the agency's "resources would be used more effectively elsewhere . . .").

[46] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 82 (noting that adjudicators should be "appropriately trained" and noting that "some agency adjudicators may simply lack the expertise or time to resolve complex multiparty disputes.").

Claim aggregation may also raise concerns related to fairness. In formal aggregation, such as a class action proceeding, absent class members (i.e., those who are not actively involved in the litigation) are bound by the result of the litigation even without participating in the proceeding.[47] Absent class members, therefore, depend on named plaintiffs to defend the rights of the class. If the class representative fails to zealously advocate on behalf of the class or puts their own interests ahead of the class as a whole, absent claimants may feel they have been treated unjustly.

Examples of Claim Aggregation in Federal Agencies and Article I Courts

Although aggregate litigation is quite prevalent in federal courts,[48] the practice of aggregating claims is not as widespread in the context of administrative adjudications.[49] Although one study found that seven agencies had rules in place permitting class actions, five of those agencies do not appear to have used those procedures.[50] That study found that only one federal agency, the Equal Employment Opportunity Commission (EEOC), frequently used class action procedures.[51] Slightly more agencies used procedural rules to consolidate proceedings.[52] The study's authors explained that a distinguishing feature was that the majority of these consolidations were for a small amount of parties or claims—unlike the large aggregate proceedings typical in federal courts.[53] Nonetheless, an ACUS report found that agencies employed both formal and informal procedures that aggregate claims or appeals to adjudicate large numbers of claims in an efficient and equitable manner.[54] Agencies have adopted aggregate procedures to fit their specific adjudicatory schemes. The following section provides examples of how agencies have pursued claim aggregation in various ways.

The EEOC provides an example of an agency implementing formal aggregation proceedings: the agency class action proceeding. Congress has charged the EEOC with enforcing employment anti-discrimination

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[47] *In re* Veneman, 309 F.3d 789, 795 (D.C. Cir. 2002) ("Class certification affects the due process rights of absent class members to have their own day in court.").

[48] *See* Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. REV. 109, 110 (2015) (noting that "MDL practice has become so pervasive as to be almost routine"); *see also* Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 VAND. L. REV. 67, 72 (2017) (noting that "from 2002 to 2015, multidistrict proceedings leapt from sixteen to thirty-nine percent of the federal courts' entire civil caseload.").

[49] *Inside the Agency Class Action*, *supra* note 29, at 1657 (describing the "virtual absence of aggregate practice from the administrative state").

[50] *Id.* at 1659 (noting that although the authors identified "seven agencies—the Board of Governors of the Federal Reserve, the Consumer Financial Protection Bureau, the Consumer Product Safety Commission, the Corporation for National and Community Service, the EEOC, the Government Accountability Office Personnel Appeals Board, and the Merit System Protection Bureau" that have a rule permitting class actions, "five of the agencies did not have *any* reported decisions involving the rule's use").

[51] *Id.* at 1659. The study noted that two Article I courts, the Bankruptcy Courts and the Court of Federal Claims, also made frequent use of class action procedures. *Id.* The study predated the opinion in *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017), holding that the CAVC has "authority to certify and adjudicate class action cases." To date, the CAVC has certified four classes.

[52] *Inside the Agency Class Action*, *supra* note 29, at 1659. The authors chose to define "frequent use" as an agency using the procedure more than 15 times since "they began including their decisions in electronic databases." *Id.* The eight agencies to have more than 15 reported cases indicating consolidation of more than one party were "the Department of Labor, the EEOC, the Federal Communications Commission, the Federal Energy Regulatory Commission, the Federal Mine Safety and Health Review Commission, the Merit System Protection Board, the Occupational Safety and Health Review Commission, [and] the Patent and Trademark Office." *Id.* at 1659 n.97. The authors identified the Bankruptcy Court, the Court of Federal Claims, and the Tax Court as other non-Article III tribunals that made "frequent use" of procedures to consolidate claims. *Id.*

[53] *Id.* at 1660 ("More importantly, most efforts to consolidate involved a very small number of cases—generally far fewer than the forty cases required to certify a class action or to justify multidistrict litigation in federal court.").

[54] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 32.

laws.[55] The Federal Sector of the EEOC is responsible for adjudicating complaints from federal employees against their employers.[56] The caseload of the EEOC's Federal Sector is significant; in FY2023, the Federal Sector resolved 8,669 hearing requests.[57] To assist with this workload, EEOC has implemented regulations that authorize EEOC adjudicators to certify classes and hear class actions filed against federal employers.[58]

The EEOC's class actions resemble class action procedures established for civil actions filed in federal court.[59] At the outset, a complainant may move for class certification on behalf of employees (or former employees) who have been "adversely affected by an agency personnel management policy" that discriminates against a protected class.[60] To certify a class, the administrative judge—like their counterparts in the federal judiciary—must determine that

> (i) the proposed class is so numerous that a consolidated complaint of the members of the class is impractical; (ii) there are questions of fact common to the class; (iii) the claims of the agent are typical of the claims of the class, and (iv) the agent of the class, or, if represented, the representative, will fairly and adequately protect the interests of the class.[61]

Once a class has been certified, the EEOC adjudicator has authority to manage the case in much the same manner as a federal judge: the administrative judge may conduct discovery, create subclasses, facilitate settlement, ensure proper representation of the class, and issue decisions on the claim.[62] Also, just as in federal court, the decisions of the administrative judge are "binding on all members of the class and the agency."[63] Using these procedures, the EEOC is able to adjudicate numerous claims from their docket simultaneously. The resulting judgments can be large—EEOC's *2023 Annual Performance Report* notes that in FY2023, EEOC secured "over $85 million in settlements of significant class action cases."[64]

The National Vaccine Injury Compensation Program (NVICP) provides another example of claim aggregation in a non-Article III tribunal." Congress established the NVICP through the National Childhood Vaccine Injury Act of 1986[65] to reduce the number of lawsuits filed against vaccine manufacturers and doctors.[66] The program is administered by the Department of Health and Human

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[55] The EEOC enforces, *inter alia*, Title VII of the Civil Rights Act, the Age Discrimination in Employment Act, and the Americans with Disabilities Act. *See* EEOC, 2023 ANNUAL PERFORMANCE REPORT (Feb. 23, 2024) [hereinafter 2023 EEOC ANNUAL PERFORMANCE REPORT], https://www.eeoc.gov/2023-annual-performance-report.

[56] 42 U.S.C. § 2000e-16(b). Although the EEOC has significant responsibilities with regard to the enforcement of anti-discrimination laws in the private sector, the scope of this written statement is limited to the EEOC's use of claim aggregation in agency adjudication, which only applies to claims against federal employers.

[57] *2023 EEOC Annual Performance Report*, *supra* note 55.

[58] 29 C.F.R § 1614.204. The EEOC has used its class action procedures—which generally follow Federal Rule of Civil Procedure 23—for more than 30 years. Michael Sant'Ambrogio & Adam Zimmerman, Admin. Conf. of the U.S., *Aggregate Agency Adjudication* 32 (2016).

[59] *Compare* Fed. R. Civ. P. 23 *with* 29 C.F.R § 1614.204.

[60] 29 C.F.R. § 1614.204.

[61] *Id.* § 1614.204(a)(2).

[62] *Id.* § 1614.204.

[63] *Id.* § 1614.204(j)(3). One significant difference between class actions in federal court and class actions at the EEOC is that although federal rules require class members to be given the opportunity to "opt out" of the class, there is no such option pursuant to the EEOC procedures. EEOC MANAGEMENT DIRECTIVE 110, ch. 8, § VI.C (Aug. 5, 2015), http://www.eeoc.gov/federal/directives/md110.cfm ("The class members may not 'opt out' of the defined class.").

[64] 2023 EEOC ANNUAL PERFORMANCE REPORT, *supra* note 55.

[65] 42 U.S.C. §§ 300aa-1 to -6.

[66] See AGGREGATE AGENCY ADJUDICATION, supra note 42, at 38; see also CRS In Focus IF12213, *The National Vaccine Injury Compensation Program and the Office of Special Masters*, by Hannah-Alise Rogers.

Services (HHS),[67] and the Office of Special Masters (OSM) in the U.S. Court of Federal Claims adjudicates claims under the program.[68] Pursuant to the statute, claimants alleging injury due to a vaccine may file a claim with OSM. Much like proceedings before the BVA, the proceedings are pro-claimant, at least when compared to pursuing a claim against a physician or vaccine manufacturer through tort, as a claimant only needs to show that the vaccine caused the injury to recover.[69] The claimant does not need to prove negligence or any other theory of tort liability.[70] Compensation is paid through a fund administered by HHS.[71] In some instances, a large amount of claims related to a particular vaccine may arise at one time, requiring resolution of similar questions concerning whether a particular vaccine can cause a particular injury or illness.[72] This process can strain the resources of the limited number of adjudicators at OSM.[73] In response, OSM developed an informal aggregation procedure known as an *omnibus proceeding*.[74]

The omnibus proceedings at OSM are not established in statute or regulation. Instead, the OSM relies on the broad discretion in its enabling statute to conduct hearings, require testimony, and obtain evidence "as may be reasonable and necessary."[75] In this manner, the OSM crafts ad hoc coordinating procedures on a case-by-case basis to reach a conclusion on a general question of causation—that is, can a specific vaccine cause a particular injury or illness?[76] Once that question is answered, the finding can be used separately in each individual case presenting the same issues.[77] In one example, a special master facing factually similar claims in 130 cases directed, *sua sponte*, attorneys for claimants to "form a steering committee to coordinate the presentation of expert evidence" to the OSM on the issue of causation.[78] After holding a hearing on general causation, the special master issued a "case management order requiring individual parties" to prove specific facts in their individual claims, consistent with the finding on general causation, to obtain compensation.[79] In another example, the OSM received more than 5,000 cases claiming that the measles, mumps, and rubella (MMR) vaccine caused autism in children.[80] In this instance, the OSM used a procedure similar to so-called "bell weather" cases in federal court.[81] The OSM conducted three test cases, each heard by a different special master, to answer the general causation question of whether the MMR vaccine could cause autism.[82] These decisions on the general question of causation were binding only on the individual claimants in those cases and "would help the remaining claimants evaluate the strength and merits of their claims in the vaccine program."[83] In this manner, OSM is able to coordinate proceedings informally to enable more efficient resolution of individual claims.

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[67] 42 U.S.C. § 300aa-10.

[68] *Id.* § 300aa-12.

[69] *Id.*

[70] *See id.*

[71] 42 U.S.C. § 300aa-12.

[72] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 39–40.

[73] *See id.* at 39–40.

[74] *See id.* at 40.

[75] 29 U.S.C. § 300aa-12(d)(3)(B).

[76] *See* AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 41.

[77] *See id.*

[78] *See id.*

[79] *See id.*

[80] *Id.*

[81] *See id.* at 43–44.

[82] *Id.*

[83] *See id.* 41.

Although technically not an example of an aggregation mechanism, it may be instructive to consider that the ACUS report on aggregation explained that implementing precedential decisions and *stare decisis* (a system requiring adjudicators to follow the rulings of prior decisions) at an agency can potentially improve efficiency and consistency in the same manner as aggregation.[84] This result would be because adjudicators would not need to reexamine legal and factual questions already answered in previous decisions. Thus, just like the benefits of aggregation, there is no need to reconsider the same questions "hundreds of times over."[85] At the same time, ACUS cautioned that, especially for agencies with large volumes of cases, it may be difficult for adjudicators to work efficiently with precedential decisions. ACUS explained that adjudicators might not be able to identify and apply precedential decisions or "issue well-reasoned, precedential decisions" when there is a considerable volume of cases to adjudicate.[86] Further, it could potentially make adjudication more complex for claimants' representatives, as those representatives may be required to "find relevant precedents, interpret their significance, and advocate [for] their application."[87] Therefore, there are, just as with claim aggregation, potential benefits and drawbacks associated with implementing a *stare decisis* structure.

Agency Authority to Aggregate Claims

As illustrated above, federal agencies have established procedures for aggregating similar claims, both formally and informally, that are before agency adjudicators.[88] For at least some of these agencies, including the EEOC and NVICP, the agencies' enabling statutes do not provide express authority for the agencies to aggregate claims for adjudication. Instead, agencies employing these practices may rely on their general authority to establish rules and procedures to manage their adjudication dockets and implement the regulatory program.

This posture reflects the general principle that agencies are, absent statutory direction otherwise, generally free to implement their own procedures governing adjudications so long as those procedures comport with the Due Process Clause's requirements.[89] The Supreme Court has expressed that courts should not interfere with an agency's decision regarding how it implements adjudications. In *Pension Benefit Guarantee Corp. v. LTV Corp.*, the Supreme Court held that courts are not permitted to impose additional procedural requirements on agency adjudications beyond what has been imposed by statute.[90] Further, in *Federal Communication Commission (FCC) v. Pottsville Broadcasting, Co.*, the Court has held that agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."[91] In that case, the Court upheld the FCC's authority to consolidate three adjudications on licensing into one hearing, absent specific statutory authority on consolidation.[92] The Court held that "questions of procedure" including "whether

[84] *Id.* at 69.

[85] Jenkins v. Raymark Indus., 782 F.2d 468, 473 (5th Cir. 1986).

[86] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 69.

[87] *Id.* Most of the claimants in the AMA appeal process are not represented by attorneys before the BVA. EEOC, 2023 ANNUAL PERFORMANCE REPORT 35 (Feb. 23, 2024), https://www.eeoc.gov/2023-annual-performance-report ("[F]or the more than 160,000 Veterans with pending AMA system appeals at the Board, only about 0.5% of those Veterans are currently choosing to be represented by private attorneys and representatives.").

[88] *See, supra,* notes 47–82 and accompanying text.

[89] *See* Pension Benefit Guar. Corp. v. LTV Corp., 496 U.S. 633, 655–56 (1990).

[90] *Id.*

[91] FCC v. Pottsville Broad. Co., 309 U.S. 134, 143 (1940).

[92] *Id.* at 140.

applications should be heard contemporaneously or successively" are "left to the Commission's own devising."[93]

To date, there appear to be relatively few judicial opinions regarding an agency's authority to aggregate claims for adjudication absent specific statutory authorization. The limited opinions available appear to indicate that such aggregation may be permissible. As discussed above, the EEOC's organic statute is silent with regard to its authority to aggregate discrimination claims filed on behalf of federal employees. Instead, the EEOC relies on the general provision providing that "the [EEOC] shall have authority to enforce the provisions of subsection (a) of this section through appropriate remedies . . . and shall issue such rules, regulations, orders and instructions as it deems necessary and appropriate to carry out its responsibilities under this section."[94] The U.S. Postal Service challenged the EEOC class action procedures by seeking an opinion from the Department of Justice Office of Legal Council (OLC).[95] The OLC found the statute to be ambiguous with regard to the EEOC's authority to implement class action procedures and applied *Chevron* deference.[96] OLC opined that "the EEOC's class action regulations are not contrary" to its organic act.[97]

In the context of VA benefits appeals, the U.S. Court of Appeals for the Federal Circuit (Federal Circuit), in *Monk v. Shulkin*, held that the CAVC has authority to certify class actions.[98] Part of the court's reasoning reflects the above discussion. The court held that the CAVC's general authority to prescribe "rules of practice and procedure" grants it broad authority over the procedures governing CAVC proceedings; such authority includes the ability to certify "class actions or other methods of aggregation."[99] In addition, the court noted that Congress had not explicitly restricted the CAVC's authority to certify class actions.[100]

CAVC Class Actions

As discussed above, the CAVC, pursuant to the decision in *Monk*, has authority to certify class actions. To date, the CAVC has certified four classes. The CAVC has certified classes in the context of both petitions—procedural tools to compel agency action—and appeals of final BVA decisions. In 2020, the CAVC amended its *Rules of Practice and Procedure* and adopted Rules 22 and 23 governing the procedures related to class actions before the court.[101] These procedures, similar to the EEOC, largely mimic the rules governing class actions in federal court. However, the CAVC rules also require that the individual seeking class certification establish that a class action would be superior to a precedential decision.[102] The CAVC established this requirement in *Skaar v. Wilkie*, prior to its incorporation into the

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[93] *Id.* at 138.

[94] 42 U.S.C. § 2000e-16(b).

[95] Executive Order No. 12,146 provides that OLC has the authority to resolve disputes between executive agencies. Exec. Order No. 12,146, 44 Fed. Reg. 42,657 (1979).

[96] Legality of EEOC Class Action Regulations, Memorandum Opinion for the Vice President and the General Counsel of the United States Postal Service, 28 Op. O.L.C. 254, 260–62 (2004), http://www.justice.gov/sites/default/files/olc/opinions/2004/09/31/op-olcv028-p0254.pdf.

[97] *Id.* at 268.

[98] Monk v. Shulkin, 855 F.3d 1312 (Fed. Cir. 2017).

[99] *Id.* at 1319–20. The court also referenced the EEOC class action procedures in noting that other tribunals rely on their general authority to prescribe procedural rules governing adjudications to aggregate claims. *Id.*

[100] *See id.* at 1320–22. The court also held that the CAVC can rely on authority granted through the All Writs Act "to aggregate claims in aid of [its] jurisdiction. *Id.* at 1318–19.

[101] *In re* Rules of Practice and Procedure, U.S. Vet. App. Misc. Order No. 12-20 (Nov. 10, 2020).

[102] R. Prac. & Proc. 22(a)(3) (requiring the Request for Class Certification and Class Action to "explain the reasons why a decision granting relief on a class action basis would serve the interests of justice to a greater degree than would a precedential decision granting relief on a non-class action basis").

Rules, holding that the court "will presume classes should not be certified because [its] ability to render binding precedential decisions ordinarily will be adequate."[103]

In the context of appeals, the Federal Circuit established that the CAVC's authority to certify a class is limited by the CAVC's jurisdiction. In *Skaar*, the CAVC had certified a class that included veterans "who had not received a Board decision and veterans who had not yet filed a claim."[104] However, the Federal Circuit stated that "[c]lass certification is merely a procedural tool" and cannot be used to assert authority over "claims it would otherwise lack."[105] Therefore, the CAVC is only permitted to certify classes containing individuals that have received a final BVA decision on a matter where the time to appeal has not lapsed. Although Congress has authority to confer supplemental jurisdiction on the court to enable them to exercise jurisdiction over other individuals, the Federal Circuit held that Congress had not done so.[106]

Veterans Appeals Efficiency Act of 2024

As discussed in the previous section, agencies may have power to implement aggregation procedures without explicit statutory instruction when they are provided broad authority to prescribe rules and regulations to set procedures for their adjudications. Therefore, the BVA arguably may already have the legal authority to implement aggregation procedures. VA appears to have broad authority to establish rules and procedures with regard to how it conducts its adjudications. For example, 38 U.S.C. § 501(a)(4) provides that the "Secretary has authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department," including "the manner and form of adjudications and awards."[107] This provision is comparable to the statutory provisions that the EEOC relies on in implementing its aggregation procedures.[108] Further, there does not appear to be any statutory provision in the *U.S. Code* that explicitly *prohibits* the BVA from aggregating claims.

However, as noted above, the BVA is statutorily required to adjudicate cases in docket order for each docket.[109] This requirement, arguably, could prevent the BVA from advancing an appeal on a docket to aggregate multiple claims. Although there is an exception to permit advancement of a matter on a docket "if the case involves interpretation of law of general application affecting other claims,"[110] it is not entirely clear whether this exception is broad enough to permit the BVA from implementing aggregation procedures. While not explicit regarding aggregation, at least one CAVC opinion holds that the docket-order requirement was not intended to remove flexibility from the Board in how it hears appeals.[111] Nonetheless, the Veterans Appeals Efficiency Act of 2024, if enacted, would clearly provide the BVA the authority to aggregate similar claims.[112]

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[103] Skaar v. Wilkie, 32 Vet. App. 156, 196 (2019), *vacated and remanded sub nom*. Skaar v. McDonough, 48 F.4th 1323 (Fed. Cir. 2022).

[104] Skaar v. McDonough, 48 F.4th 1323, 1332 (Fed. Cir. 2022).

[105] *Id.*

[106] *Id.* at 1334.

[107] 38 U.S.C. § 501(a)(4).

[108] *Compare id. with* 42 U.S.C. § 2000e-16(b).

[109] 38 U.S.C. § 7107 ("Except as provided in subsection (b), each case before the Board will be decided in regular order according to its respective place on the docket to which it is assigned by the Board.").

[110] *Id.* § 7107(b).

[111] Ramsey v. Nicholson, 20 Vet. App. 16, 34 (2006) ("We conclude that there is nothing in the legislative history that indicates a clear intent that section 7107 be read as an exclusive set of rules by which the Board must consider and decide cases. It is more reasonable to conclude that Congress did not intend to micromanage the Board . . . this history is instructive in that these concerns are better met when the Board is given some flexibility in managing the appeals.").

[112] Veterans Appeals Efficiency Act § 2(c)(1).

The proposed legislation would provide the BVA with broad authority to tailor such aggregation of claims. As illustrated by the examples above, agencies may tailor aggregate procedures to meet their specific needs and capabilities.[113] It may be that some or all of the specific aggregation models that other agencies employ are not appropriate for the types of appeals that the BVA adjudicates. More generally, these varying models illustrate that agencies have wide latitude to formulate policies and procedures governing the use of aggregate adjudication that best fit their own needs and capabilities. In its report, ACUS concluded that "Congress should continue to grant agencies broad discretion to develop procedures tailored to the cases and claims they adjudicate."[114] Providing broad discretion to implement such procedures could enable the BVA to select procedures that appropriately balance the potential benefits of claim aggregations, such as judicial efficiency and consistency, while guarding against the drawbacks of potential unfairness and overly burdensome proceedings.[115]

The proposed legislation also instructs VA to seek independent recommendations regarding the feasibility of authorizing the BVA to issue precedential decisions.[116] BVA decisions currently are not considered binding precedent.[117]

Limited Remands from the Court of Appeals for Veterans Claims

The Veterans Appeals Efficiency Act of 2024 would also address the CAVC's authority to issue limited remands of matters to the BVA. Specifically, the proposed legislation would clearly establish that the CAVC has the authority to remand a case to the BVA and retain jurisdiction over the appeal while the BVA addresses the CAVC's order.[118] The following sections provide an overview of limited remands[119] and discusses the history of the CAVC's caselaw with regard to its authority to issue such remands.

Overview of Limited Remands

When an appellate court determines that further proceedings are necessary to resolve a decision on appeal, the court may remand the case to the lower tribunal.[120] Federal courts have classified remands into two categories: *general* and *limited*.[121] "[I]n a general remand the appellate court returns the case to the [lower tribunal] for further proceedings consistent with the appellate court's decision, but consistency

[113] *See, supra* notes 47–82 and accompanying text.

[114] AGGREGATE AGENCY ADJUDICATION, *supra* note 42, at 67.

[115] *See, supra* notes 36–46.

[116] Veterans Appeals Efficiency Act § 2(f)(1).

[117] 38 C.F.R. § 20.1303 ("Although the Board strives for consistency in issuing its decisions, previously issued Board decisions will be considered binding only with regard to the specific case decided.")

[118] Veterans Appeals Efficiency Act § 2(f).

[119] For the purposes of this written statement, the term "limited remand" refers to a court remanding a matter to the lower tribunal while retaining jurisdiction over the case.

[120] For the Supreme Court and "any other [federal] court of appellate jurisdiction," 28 U.S.C. § 2106 provides that those courts "may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Accord* 38 U.S.C. § 7252(a) (authorizing the CAVC to "remand [a] matter, as appropriate"). Federal courts have interpreted § 2106 "to allow appellate courts the flexibility to adapt their mandates to the particular problem discerned on appeal and to provide an efficient and sensible solution." United States v. Garafano, 61 F.3d 113, 116 (1st Cir. 1995). Although this statute does not specifically authorize or define "limited remands," federal courts have established that the statute provides broad discretion to the courts to issue general or limited remands. In either case, the lower tribunal is required to conform with the articulated scope of the remand. United States v. Hicks, 146 F.3d 1198, 1200 (10th Cir. 1998).

[121] United States v. Richardson, 948 F.3d 733, 738 (6th Cir. 2020).

with that decision is the only limitation imposed by the appellate court."[122] In contrast, a limited remand from an appellate court specifically limits the issues to be addressed by the lower tribunal and creates a narrow framework within which the lower tribunal must operate.[123] A remand is presumed to be general, which is the most common form of remand,[124] unless the appellate court limits the lower tribunal's scope of inquiry in "unmistakable terms."[125]

Federal courts have further distinguished two different kinds of limited remands. In one form of limited remand, the appeals court returns the case to the lower tribunal with instructions to "make a ruling or other determination on a specific issue or issues *and do nothing else*."[126] The lower court, which is bound to follow the appellate court's mandate, is not permitted to address other issues during the remanded proceedings. In the other form of limited remand, which is the focus of this written statement, the appellate court seeks a ruling or advice on a specific issue from the lower tribunal but retains jurisdiction over the appeal while it awaits a response from the lower tribunal.[127] In these cases, the appellate court seeks discrete information from the lower tribunal necessary to reach a legal conclusion on a particular issue before the court.

CAVC's Jurisdiction and Authority to Issue Remands

Congress established the CAVC to provide judicial review of BVA decisions on VA benefits claims.[128] Pursuant to 38 U.S.C. § 7252, the court has exclusive jurisdiction to review BVA decisions.[129] Once the CAVC has jurisdiction over an appeal the court may "affirm, modify, or reverse a decision of the [BVA] *or . . . remand the matter*, as appropriate."[130] The CAVC will remand a case if it finds (1) that the BVA committed a prejudicial error on a claim and (2) that additional proceedings are necessary to properly resolve the matter.[131] The CAVC's review "shall be on the record of proceedings before the Secretary and the [BVA]."[132] Accordingly, the CAVC cannot base a decision on extra-record evidence, and the court must remand to the BVA if further development of a claim is necessary.[133]

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[122] United States v. Simms, 721 F.3d 850, 852 (7th Cir. 2013); *see* United States v. Uriarte, 975 F.3d 596, 600 n.2 (7th Cir. 2020).

[123] *Richardson*, 948 F.3d at 738.

[124] *Simms*, 721 F.3d at 852.

[125] United States v. Davison, 832 F. App'x 408, 410 (6th Cir. 2020).

[126] *Simms*, 721 F.3d at 852 (emphasis added).

[127] *Id.*; *see also, e.g.*, United States v. Taylor, 509 F.3d 839, 845–46 (7th Cir. 2007) ("We simply need to learn the district court's assessment of the challenge in light the record made during voir dire. Therefore, we will retain jurisdiction over this case but remand to the district court for the limited purpose of supplementing the record with its findings about whether the government's stated reason for exercising a peremptory challenge against Watson is credible . . .").

[128] 38 U.S.C. § 7252(a) ("The Court of Veterans Appeals shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.").

[129] *Id.*

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

[131] Tucker v. West, 11 Vet. App. 369, 374 (1998) (holding that remand is the appropriate remedy "where the Board has incorrectly applied the law, failed to provide an adequate statement of reasons or bases for its determinations, or where the record is otherwise inadequate").

[132] 38 U.S.C. § 7252.

[133] Kyhn v. Shinseki, 716 F.3d 572, 576 (Fed. Cir. 2013); *see, e.g.*, Hensley v. West, 212 F.3d 1255, 1264 (Fed. Cir. 2000) (holding the CAVC lacked jurisdiction to engage in fact finding in the first instance and explaining that remand to the BVA was required if there was "insufficient factual development of the record").

CAVC Authority to Issue Limited Remands

The CAVC has held that its jurisdictional statute restricts the court's authority to issue limited remands. In the 1995 decision of *Cleary v. Brown*, the CAVC held that it is not permitted to retain jurisdiction over a case that has been remanded to the BVA for a new adjudication.[134] Since then, however, the court has distinguished its *Cleary* holding and found that it may issue limited remands in certain situations.[135] There is also some ambiguity as to whether the CAVC overruled *Cleary* in 2019 when it decided *Skaar v. Wilkie*.[136]

In *Cleary*, the CAVC found that its jurisdictional statute restricts its authority to issue limited remands.[137] In the original claim at issue, the appellant sought CAVC review of a BVA decision denying an increased rating for service-connected post-traumatic stress disorder (PTSD).[138] The court reversed the BVA's decision and remanded the claim for readjudication, adding that "[t]he Court retains jurisdiction."[139] On remand, VA ultimately awarded the claimant a 100% disability rating, and the claimant advised the CAVC that he would not be seeking further review of the claim. At that point, the CAVC entered judgment.[140] Later, the claimant filed a request under the Equal Access to Justice Act (EAJA)[141] for attorney fees related to the original PTSD claim, including fees for the attorney's work conducted after the CAVC remanded the claim to the BVA.[142] The CAVC denied the EAJA application with respect to the post-remand work, holding that the court "does not have the authority to retain general and continuing jurisdiction over a decision remanded to the BVA for a new adjudication."[143]

The CAVC determined that once the court remanded the claim for a new adjudication, it no longer had the statutory authority to retain jurisdiction over the matter. The CAVC reasoned that because its jurisdiction is limited to final BVA determinations, once it reversed the BVA decision and ordered a new adjudication, "there was nothing left to which [the CAVC's] 'jurisdiction to review decisions of the [BVA]' could attach."[144] The court emphasized that the new adjudication, while related to the previous decision, would be a *new* final decision that the CAVC could only review if the claimant properly filed a new notice of appeal to the court.[145] Retaining jurisdiction while the BVA conducted the new adjudication would be tantamount to supervising an ongoing adjudication—a power that the court held Congress did not grant to the CAVC.[146] The CAVC concluded that, "notwithstanding its language purporting to retain jurisdiction, the Court properly could not have retained jurisdiction over the reversed BVA decision while the matter was being readjudicated."[147] As a result, the "veteran's claim was exclusively before the BVA at the time of the postremand proceedings," not the CAVC.[148]

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[134] Cleary v. Brown, 8 Vet. App. 305 (1995).

[135] *See infra* notes 131–47 and accompanying text.

[136] Skaar v. Wilkie, 31 Vet. App. 16 (2019) (per curiam).

[137] *Cleary*, 8 Vet. App. at 307.

[138] *Id.* at 306.

[139] *Id.*

[140] *Id.* at 307. The entry of judgment "begins the 60-day time period for appealing [a CAVC decision] to the U.S. Court of Appeals for the Federal Circuit." U.S. VET. APP. R. 36(a).

[141] 28 U.S.C. § 2412(d).

[142] *Cleary*, 8 Vet. App. at 307.

[143] *Id.*

[144] *Id.* at 308.

[145] *Id.*

[146] *Id.*

[147] *Id.*

[148] *Id.*

Since the CAVC's decision in *Cleary*, the court has distinguished that holding to find that it does have the authority to issue limited remands, at least in certain circumstances. For example, in *Mayfield v. Nicholson*, the CAVC issued a limited remand to the BVA to make a factual finding that was necessary for the CAVC to make a proper determination in the appeal.[149] The CAVC retained jurisdiction and allowed VA 60 days to make the factual finding based on information already in the record.[150] When remanding the case, the CAVC specified that "the [BVA] shall not take any further action beyond the response required by this order unless and until the Court relinquishes jurisdiction over the matter."[151] The court distinguished the situation in *Mayfield* from the situation in *Cleary*. In *Mayfield*, the CAVC only needed VA to make a factual finding based on the existing record for the court to reach a legal conclusion on the claim, whereas in *Cleary*, the court had reversed the BVA decision and ordered a completely new adjudication.[152] Therefore, the CAVC has found that it has authority to issue limited remands to the BVA if the court is seeking supplemental information from the factfinder to better understand the basis for the BVA's factual determinations.[153] Based on the historical record, however, it appears that this procedure is not a regular CAVC practice.[154]

In *Skaar*, the CAVC appears to have clarified that it is also permitted to issue limited remands when additional evidence—that is, evidence not already in the BVA record—is needed to make a decision on the appeal. In *Skaar*, the CAVC held that the BVA failed to address an argument raised by the claimant before the BVA.[155] The CAVC determined that the BVA needed to evaluate that portion of the claim to make a determination on the appeal. Instead of issuing a general remand, the CAVC issued a limited remand, retained jurisdiction over the matter, and ordered the BVA to accept additional evidence from the claimant, hold additional hearings, and provide a supplemental statement of reasons or bases[156] to the court, accompanied by supplemental briefing from VA.[157] The limited remand in *Skaar* appears to go beyond remanding for the BVA to make an additional factual finding or to supplement its statement of bases or reasons based on information already in the BVA record.[158] The CAVC, however, stated that its

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[149] Mayfield v. Nicholson, 20 Vet. App. 98, 99 (2006).

[150] *Id.*

[151] *Id.*

[152] *Id.*; *see also* Bonhomme v. Nicholson, 21 Vet. App. 40, 45 (2007) (explaining that in *Mayfield* the court "ordered a limited remand under that unique circumstance to permit the Board to make the necessary factual findings based on the evidence *then in the record*") (emphasis added).

[153] *See, e.g.*, Robinson v. Shulkin, No. 15-3549, 2017 WL 747939, at *1 (Vet. App. Feb. 27, 2017) ("[The CAVC] will remand this case for the limited purpose of obtaining a [BVA] decision addressing whether the submission that the appellant allegedly faxed to it on August 26, 2015, was before it when it issued the decision here on appeal."); Tagupa v. Gibson, No. 11-3575, 2014 WL 3632990, at *1-4 (Vet. App. June 18, 2014) (remanding for the Board to consider a document that the Secretary submitted to the Court during the pendency of the appeal); Spencer v. Shinseki, No. 11-3010, 2013 WL 1283462, at *6 (Vet. App. Mar. 29, 2013) (remanding for "the limited purpose of having the Board make a factual determination."); Sellers v. Shinseki, No. 08-1758, 2011 WL 2110038, at *2 (Vet. App. May 27, 2011) ("[T]he matter is remanded for a limited purpose . . . the Board shall determine whether (1) the purported June 2004 rating decision is authentic and (2) whether that decision was subjected to an invalid EAP.").

[154] A brief search for cases where the CAVC remanded a matter to the BVA but retained jurisdiction pending the BVA's compliance with the CAVC's order revealed a limited number of opinions. *See supra* note 153; *see also* Skaar v. Wilkie, 31 Vet. App. 16, 26 (Pietsch, J., dissenting) (noting that the limited remand authority described in *Mayfield* has only been exercised "a handful" of times).

[155] *Skaar*, 31 Vet. App. at 17.

[156] By statute, the BVA must provide "a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record." 38 U.S.C. § 7104(d)(1).

[157] *Skaar*, 31 Vet. App. at 18. The CAVC ordered that the claimant had 90 days to submit additional evidence to the BVA, stated that the claimant had a right to a BVA hearing, and required the BVA to provide a supplemental statement of reasons or bases within 30 days of receipt of the claimant's additional evidence. *Id.*

[158] *See Bonhomme*, 21 Vet. App. at 45 (explaining that in *Mayfield* the court "ordered a limited remand under that unique (continued...)

opinion in *Skaar* was consistent with *Cleary*, explaining that "*Cleary* effectively stands for the proposition that decisionmaking should not simultaneously occur at both the [BVA] and the Court."[159] The court emphasized that, in *Skaar*, "the decision is still pending at the Court and what we require from the [BVA] is not a new decision, but a supplemental statement of reasons or bases pertaining to a claim it already decided."[160] Therefore, following *Skaar*, it appears that the CAVC has interpreted its statutory authority as permitting limited remands when the court has not vacated or reversed the BVA decision and ordered a new adjudication on the matter.[161]

Although the opinion in *Skaar*, as discussed above, can be read to distinguish *Cleary*, concurring and dissenting opinions indicate that there may be some confusion as to whether *Skaar* effectively overturned *Cleary*. The majority opinion provided that, "[t]o the extent *Cleary* could be read to prohibit the Court from *ever* retaining jurisdiction over a remand to the Board, we clarify that the Court may, in certain circumstances, retain jurisdiction over limited remands to the Board."[162] The court, however, declined to delineate the appropriate circumstances in which a limited remand can be used.[163] Given this lack of specificity as to the circumstances under which the court may exercise its authority, the scope of the court's power to issue limited remands is not entirely clear. One concurring opinion indicated that the majority's opinion amounted to an "unacknowledged overruling of *Cleary*."[164] Similarly, the dissent questioned whether the majority overturned *Cleary*: "If the majority's decision can be read to overturn *Cleary* in whole or in part, we do not believe that its analysis contains the reasoned justification necessary to do so."[165] However, it appears that *Cleary*, *Mayfield*, and *Skaar* may stand for the principle that the CAVC has the authority to issue limited remands *if* the court has not reversed or vacated the BVA's decision on appeal.[166]

CAVC-Imposed Deadlines on BVA Action Following Limited Remand

When the CAVC exercises its authority to issue a limited remand, it often imposes a deadline by which the BVA must fulfill the required tasks. For example, in *Mayfield*, the CAVC ordered the BVA to provide the court with a supplemental statement of reasons or bases within 60 days of the order.[167] Similarly, in *Robinson v. Shulkin*, the CAVC imposed a 90-day deadline for the Secretary to forward to the court the required factual findings and statement of reasons or bases.[168] The order in *Skaar* set deadlines for both parties—the claimant had 90 days to submit additional evidence, and the BVA had 30 days thereafter to provide the court with its supplemental statement of reasons or bases.[169] This procedure contrasts with the court's practice when it issues a general remand. The court regularly declines to impose deadlines on BVA action when it issues a general remand, noting that remanded cases will require factual development and

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circumstance to permit the Board to make the necessary factual findings based on the evidence *then in the record*") (emphasis added).

[159] *Skaar*, 31 Vet. App. at 19.

[160] *Id.*

[161] *Id.*

[162] *Id.*

[163] *Id.* ("We do not here attempt to lay out the circumstances in which we will employ such limited remands.").

[164] *Id.* at 21 (Shoelen, J., concurring).

[165] *Id.* at 28 (Pietsch, J., dissenting).

[166] *See* Cleary v. Brown, 8 Vet. App. 305, 307 (1995) (holding the CAVC "does not have the authority to retain general and continuing jurisdiction over a decision remanded to the BVA for a *new* adjudication") (emphasis added); *Skaar*, 31 Vet. App. at 19 ("[T]his particular case involves a situation where the Court does not need to vacate the Board decision on appeal.").

[167] Mayfield v. Nicholson, 20 Vet. App. 98, 99.

[168] Robinson v. Shulkin, No. 15-3549, 2017 WL 747939 at *1 (Vet. App. Feb. 27, 2017).

[169] *Skaar*, 31 Vet. App. at 18.

"[t]o impose an arbitrary date without the slightest clue as to whether such a date was either reasonable or appropriate would be wrong."[170] Instead, the court relies on the general statutory requirement to give all remanded claims "expeditious treatment."[171]

Veterans Appeals Efficiency Act of 2024

Congress has the authority to define the jurisdiction and authority of the CAVC through legislation[172] that may clarify (or remove) the CAVC's authority to issue limited remands to the BVA. As discussed above, the CAVC has determined that the court's authority to issue limited remands is circumscribed as compared to other federal courts.[173] Further, after *Skaar*, there is some ambiguity regarding the circumstances under which the court is permitted to issue a limited remand.[174] Legislative action could provide clarity to the CAVC judges that have grappled with whether they have the authority to use limited remands.

The Veterans Appeals Efficiency Act of 2024, if enacted, would clarify this authority through statute. The proposed legislation authorizes the CAVC to remand a matter to the BVA "for the limited purpose of ordering the Board to address a question of law or fact in a claim" when the CAVC finds that the BVA's decision failed to address (1) an issue raised by the claimant or (2) an issue reasonably raised by the record before the BVA.[175] This text appears to speak directly to the ambiguity presented by the CAVC's opinion in *Skaar*. If enacted, Congress would provide explicit authority for the CAVC to retain jurisdiction in the manner contemplated in *Skaar*. Further, the proposed legislation's provisions authorizing the CAVC to impose deadlines on the BVA to respond to the remand[176] appear to comport with how the CAVC has acted when it has exercised its authority to issue limited remands.

The proposed legislation arguably *requires* the CAVC to retain jurisdiction over any such claim remanded for this purpose. Although the proposed legislation states that it "may" issue a remand, the bill provides that the Court "shall" retain jurisdiction and stay the proceedings.[177] This mandatory language is distinct from the general discretion that Article III federal courts enjoy to craft remands pursuant to 28 U.S.C. § 2106. As stated above, federal courts have noted that the authority to issue remands under § 2106

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[170] *See, e.g.*, Dambach v. Principi, 14 Vet. App. 307, 309 (2001).

[171] 38 U.S.C. § 5109B; *see also* Bruce v. Principi, 15 Vet. App. 27, 30 (2001) ("The Court notes that . . . the Board is required to provide for 'expeditious treatment' of claims remanded by the Court."); *Dambach*, 14 Vet. App. at 309 (noting that the BVA is required to give expeditious treatment to all remanded cases).

[172] *See, e.g.*, Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 818 (1988) ("Courts created by statute can have no jurisdiction but such as the statute confers." (quoting Sheldon v. Sill, 49 U.S. (8 How.) 441, 449 (1850)); *Sheldon*, 49 U.S. at 448 ("Congress, having the power to establish the courts, must define their respective jurisdictions.").

[173] *Compare supra* note 1 and accompanying text *with supra* notes 134–66 and accompanying text.

[174] *See supra* notes 162–66 and accompanying text.

[175] Veterans Appeals Efficiency Act § 2(d).

[176] *Id.* ("In issuing a remand under paragraph (1), the Court may require the Board to issue a decision on the relevant question with a certain period of time prescribed by the Court.").

[177] *Id.* ("With respect to any matter remanded to the Board pursuant to paragraph (1), the Court shall—(A) retain jurisdiction over such matter; and (B) stay the proceedings of the Court on such matter until the date on which the Board issues the decision required by such remand.").

provides "appellate courts the flexibility to adapt their mandates to the particular problem discerned on appeal and to provide an efficient and sensible solution."[178]

Conclusion

The Veterans Appeals Efficiency Act of 2024 proposes to make numerous changes to VA tracking requirements, the authority of the BVA to aggregate claims, and to the jurisdiction of the CAVC. I appreciate the opportunity to testify on these matters before the Subcommittee and I look forward to answering any questions you may have.

[178] United States v. Garafano, 61 F.3d 113, 116 (1st Cir. 1995).

Prepared Statement of Candace Wheeler

The Tragedy Assistance Program for Survivors (TAPS) is the national provider of comfort, care, and resources to all those grieving the death of a military or veteran loved one. TAPS was founded in 1994 as a 501(c)(3) nonprofit organization to provide 24/7 care to all military survivors, regardless of a service member's duty status at the time of death, a survivor's relationship to the deceased service member, or the circumstances or geography of a service member's death.

TAPS provides comprehensive support through services and programs that include peer-based emotional support, casework, assistance with education benefits, and community-based grief and trauma resources, all delivered at no cost to military survivors. TAPS offers additional programs including, but not limited to, the following: the 24/7 National Military Survivor Helpline; national, regional, and community programs to facilitate a healthy grief journey for survivors of all ages; and information and resources provided through the TAPS Institute for Hope and Healing. TAPS extends a significant service to military survivors by facilitating meaningful connections to peer survivors with shared loss experiences.

In 1994, Bonnie Carroll founded TAPS after the death of her husband, Brigadier General Tom Carroll, who was killed along with seven other soldiers in 1992 when their Army National Guard plane crashed in the mountains of Alaska. Since its founding, TAPS has provided care and support to more than 120,000 bereaved military survivors.

In 2023 alone, 9,611 newly bereaved military and veteran survivors connected with TAPS for care and services, the most in our 30-year history. This is an average of 26 new survivors coming to TAPS each and every day. Of the survivors seeking our care in 2023, 34 percent were grieving the death of a military loved one to illness, including as a result of exposure to toxins; 30 percent were grieving the death of a military loved one to suicide; and only 3 percent were grieving the death of a military loved one to hostile action.

As the leading nonprofit organization offering military grief support, TAPS builds a community of survivors helping survivors heal. TAPS provides connections to a network of peer-based emotional support and critical casework assistance, empowering survivors to grow with their grief. Engaging with TAPS programs and services has inspired many survivors to care for other more newly bereaved survivors by working and volunteering for TAPS.

Chairman Luttrell and Ranking Member Pappas, and distinguished members of the House Committee on Veterans' Affairs, Disability and Memorial Affairs Subcommittee, the Tragedy Assistance Program for Survivors (TAPS) is grateful for the opportunity to provide a statement for the record on issues of importance to the 120,000-plus surviving family members of all ages, representing all services, and with losses from all causes who we are honored to serve.

The mission of TAPS is to provide comfort, care, and resources for all those grieving the death of a military loved one, regardless of the manner or location of death, the duty status at the time of death, the survivor's relationship to the deceased, or the survivor's phase in their grief journey. Part of that commitment includes advocating for improvements in programs and services provided by the U.S. Federal Government—the Department of Defense (DOD), Department of Veterans Affairs (VA), Department of Education (DoED), Department of Labor (DOL), and Department of Health and Human Services (HHS)—and State and local governments.

TAPS and the VA have mutually benefited from a long-standing, collaborative working relationship. In 2014, TAPS and the VA entered into a Memorandum of Agreement that formalized their partnership with the goal of providing earlier and expedited access to crucial survivor services. In 2023, TAPS and the VA renewed and expanded their formal partnership to better serve our survivor community. TAPS works with military and veteran survivors to identify, refer, and apply for resources available within the VA, including education, burial, benefits and entitlements, grief counseling, and survivor assistance.

TAPS also works collaboratively with the VA and DOD Survivors Forum, which serves as a clearinghouse for information on government and private-sector programs and policies affecting surviving families. Through its quarterly meetings, TAPS shares information on its programs and services as well as fulfills any referrals to support all those grieving the death of a military and veteran loved one.

TAPS President and Founder Bonnie Carroll served on the Department of Veterans Affairs Federal Advisory Committee on *Veterans' Families, Caregivers, and Survivors*, where she chaired the Subcommittee on Survivors. The committee advises the Secretary of the VA on matters related to veterans' families, caregivers, and survivors across all generations, relationships, and veteran statuses. Ms. Car-

roll is also a distinguished recipient of the Presidential Medal of Freedom, the Nation's highest civilian honor.

LOVE LIVES ON ACT OF 2023 (H.R. 3651)

(TAPS Strongly Supports)

TAPS is honored to work with members of this committee to pass one of our top legislative priorities, the **Love Lives On Act of 2023 (H.R. 3651)**. This comprehensive legislation will allow surviving spouses to retain their benefits following remarriage before the age of 55. TAPS is grateful to Representatives Dean Phillips (D-MN–3) and Richard Hudson (R-NC–9), and Senators Jerry Moran (R-KS) and Raphael Warnock (D-GA) for introducing this important legislation in the 118th Congress.

We ask Congress to:

- Remove the age of 55 as a requirement for surviving spouses to retain benefits after remarrying.
- Allow surviving spouses to retain both the Survivor Benefit Plan (SBP) and Dependency and Indemnity Compensation (DIC) upon remarriage at any age.
- Allow remarried surviving spouses to maintain access to education benefits under the Fry Scholarship and Dependents Education Assistance (DEA).
- Allow remarried surviving spouses to retain Commissary and Exchange benefits *(Passed in Fiscal Year 2024 National Defense Authorization Act)*.
- Allow remarried surviving spouses to regain their TRICARE benefits if their remarriage ends due to death, divorce, or annulment.
- Remove the "Hold Themselves Out to Be Married" clause from 38 USC, Section 101, paragraph 3.

Current law significantly penalizes surviving spouses if they choose to remarry before the age of 55. Given that most surviving spouses from the post-9/11 era are widowed in their 20's or 30's, we are asking them to wait 20-plus years to move forward in their lives with the financial security given as a result of their loved ones' service and sacrifice. They often have children who they must raise alone. Many surviving spouses choose not to remarry after the death of their service member because the loss of financial benefits would negatively impact their family, especially those with children. Many choose to cohabitate instead of legally remarrying.

The long-term goal for TAPS is to secure the right for surviving spouses to remarry at any age and retain their benefits. TAPS is leading efforts to pass the **Love Lives On Act of 2023**, which is supported by over 40 veteran and military organizations. TAPS spearheaded a letter of support from these partner organizations that has been shared with every member of this committee.

Military spouses are among the most unemployed and underemployed population in the United States. Due to frequent military moves, absence due to frequent deployments of the service member, and expensive child care, military spouses face high barriers to employment and are unable to fully invest in their own careers and retirement. For many families, military retirement pay is treated as the household's retirement pay. These barriers to employment continue when a military spouse becomes a surviving spouse. Many surviving spouses have to put their lives on hold to raise bereaved children. They are reliant on their survivor benefits to help offset the loss of pay from their late spouse and their own lost income as a result of military life.

If a surviving spouse's subsequent marriage ends due to death, divorce, or annulment, while most benefits can be restored, TRICARE benefits are not restored. If a surviving spouse was previously eligible for CHAMPVA, that benefit can be restored. TAPS is not asking for surviving spouses to maintain TRICARE upon remarriage, only that we provide parity with other Federal programs, and allow it to be restored if the subsequent marriage ends.

These restrictions appear to be punitive, as they are only imposed on military surviving families, but not others who put their lives on the line to protect and defend. For example, in 30 states, including Texas[1], Virginia[2], and Louisiana[3], first responders' survivors may legally remarry and maintain all or partial pensions and benefits.

In certain circumstances, divorcees are granted more respect than surviving spouses. If a service member was married for at least 20 years and served 20 years,

[1] https://www.firehero.org/resources/family-resources/benefits/local/tx/
[2] https://www.firehero.org/resources/family-resources/benefits/local/va/
[3] https://irp-cdn.multiscreensite.com/ac5c0731/files/uploaded/Louisiana.pdf

their divorced spouse is entitled to a portion of that retirement benefit regardless of whether they remarry or not. Surviving spouses should not be penalized for remarrying when we grant the right to retain benefits to certain divorced spouses.

Additionally, when a surviving spouse remarries before the age of 55, they are legally required to notify the Department of Veterans Affairs (VA) to discontinue Dependency and Indemnity Compensation (DIC). The VA states that the processing time for these claims is typically eight to 12 weeks, but unfortunately, this is most often not the case. Numerous surviving spouses experience delays ranging from six to 18 months, with some cases taking up to 42 months of constant effort to terminate their benefits. They often encounter the need to make multiple calls and resend paperwork repeatedly.

As these survivors continue to receive payments, they subsequently receive debt letters demanding the immediate repayment of benefits, often with added interest. This places an undue burden and emotional distress on surviving spouses who followed the required procedures. The challenge is exacerbated by the fact that many surviving spouses, often with minor children, are unaware of the specific portions of the payments they are supposed to retain and which portions should cease. Additionally, they may lack the financial resources to repay the VA promptly. This is a waste of VA resources, and allowing our surviving spouses to maintain benefits upon remarriage would eliminate these unnecessary challenges.

According to the VA, there are approximately 505,000 DIC recipients. Less than 30,000 of those surviving spouses are under the age of 55 and could potentially benefit from this legislation. Currently, less than 5 percent of surviving spouses under the age of 55 have chosen to remarry due to these penalties.

The Federal Government has allowed surviving spouses to maintain benefits upon remarriage over the age of 55 or 57 for decades. There is no specific reason for the age of 55, it is just the age Congress decided they could live with, but it sets the precedent that surviving spouses can and should be able to remarry and retain survivor benefits without waiting 20-plus years. Most choose to cohabitate until age 55, so all this law does is discourage legal marriages and prevent our young surviving children from having a mother or father figure legally in their lives.

Additionally, not only can a surviving spouse not legally remarry without losing survivor benefits, but there is also a clause in statute that states surviving spouses cannot "hold oneself out to be married" (38 U.S. Code § 101 Paragraph 3). Originally, this referred to common law marriages, but in practice, it means that if anyone could view your new significant other as your "spouse," you could lose your benefits. If someone addresses a Christmas card to "Mr. & Mrs. Smith" as opposed to "Mr. Smith and Mrs. Johnson," that is holding oneself out. If a survivor refers to their new partner as their spouse to simplify explaining the relationship, that is holding oneself out. If your neighbors presume you are married, that is holding oneself out. Anyone can turn in a survivor for holding oneself out, just because they do not like them. The VA is legally required to investigate them and suspend their benefits during the investigation. While the VA does not actively go out and search for these cases, they have to investigate when someone submits a tip. This leads to our surviving spouses constantly living in fear of being turned in, even when they have not remarried.

With recruiting and retention at an all-time low in the military, every time we do not keep our promises to our military, veterans, and their families, we are discouraging our younger generations from serving. When an 18-year-old enlists in the military, they sign a check for up to and including their life. They also know that if something happens to them, our government will take care of their family. Period. There are no conditions, they are promised that their family will be taken care of for the rest of their lives. The current law breaks that promise. Our military, Members of Congress, and administration frequently remind survivors that the death of their loved one "is a debt that can never be repaid," but ending survivor benefits upon remarriage is saying, "that debt is paid in full." Just because a surviving spouse remarries does not mean they stop grieving. A piece of paper will never change that they are a widow or widower; it just means they are also someone else's spouse.

Remarriage should not impact a surviving spouse's ability to pay bills. They should not have to choose between another chance at love, a stable home life for their children, and financial security. They are still the surviving spouse of a fallen service member or veteran, who earned these benefits through their service and sacrifice. Regardless of their marital status, surviving spouses should not be penalized for finding love in the future. All they are asking for is to choose how they move forward to pick up the broken pieces of their lives.

TAPS appreciates the House and Senate Armed Services Committee including section V in the Fiscal Year 2024 National Defense Authorization Act, and we are opti-

mistic this committee will pass sections II and VII in The Senator Elizabeth Dole 21st Century Veterans Healthcare and Benefits Improvement Act soon.

The following personal testimonials from surviving spouses help highlight these important issues.

Gina Kincaide Piland, Surviving Spouse of Lt Col John Kincade U.S. Air Force

"On November 21, 2019, my husband of 20 years, Lt Col John (Matt) Kincade, lost his life in a military aviation training mishap at Vance Air Force Base. Through his (our) 20 years of service, I followed him from base to base—Texas to California to Nevada back to California, then Iowa, and finally 'home' to Oklahoma—raising our two amazing sons, keeping the home fires burning, and praying he would come home safely. The day after my Matt died, I sat down with a representative from Vance AFB and received my benefits briefing. That day I learned about the benefits I would collect due to Matt's death. I also learned that most of the benefits would never expire—assuming I remained unmarried until the age of 55. I remember thinking that wouldn't be a problem. I couldn't see past the grief and despair of the fresh loss to consider that someday in the future I might meet someone who could make my life—and my sons' lives—beautiful again. And yet, that's exactly where I find myself today.

"In March 2022, I met Cally, a man who helped me see the beauty of life again. He allowed space for the legacy of my late husband. Cally and I struggled with how to move forward together, knowing the severe financial repercussions we would face upon marrying. Because we are both Christians who are dedicated to having God at the center of our relationship, and because we believe marriage is a holy covenant that we want to model for our combined six children, Cally and I made the choice to accept the financial penalty and were married on December 31, 2023. I am no longer eligible to receive DIC or the SBP that my late husband invested in to provide for our needs.

"For the 20 years my late husband served, our sons have been my priority. Matt and I always had the belief that one parent should be wholly available to our kids at all times. In the years of deployments, work-ups, and training, I sacrificed my career goals to support him and to raise our two amazing sons. And now, as a result of his death, I find myself at 50 years old starting over again—not just in a relationship, but also in a career.

"In spite of our tremendous loss, under current law, the U.S. Government, the Department of Defense, and Veterans Affairs will be free and clear of any responsibility to the family of the late Lt Col John (Matt) Kincade when our youngest son turns 22."

Marcie Robertson, Surviving Spouse of SFC Forrest Robertson, U.S. Army

"I lost my husband in November 2013 when he was killed in action in Afghanistan. At the time, I was 34 years old, and our daughters were 14, 10, and 6 years old. One day I had a partner, and the next day I was the only one to make decisions, discipline, and raise three daughters.

"My husband deployed four times during our marriage, so we both understood his job meant there was a real possibility that he might not come home each time he deployed. Early on, we had a discussion about what would happen if he were to lose his life. He told me where he wanted to be buried and what to do with the insurance money. He also told me that when I felt ready, he wanted me to move forward with someone new. It was very important to him that I not spend the rest of my life alone. He said this, not realizing that his wish for me would mean the end of the benefits he provided for me. He went to war for his country knowing that if he sacrificed his life, his family would be taken care of. He did not know that meant his widow would have to stay unmarried until she was practically a senior citizen to maintain her benefits.

"I have met a wonderful man who has become a partner to me and a 'bonus dad' to my daughters. He is exactly what my husband would want for the four of us. I dream of the day when I can marry him. I am a Christian and believe that God provided this amazing man to be my husband. I was pulled aside several times by my church leader and told that if I didn't marry him or kick him out of my home, I would lose my ability to volunteer in the church. This ultimately pushed me away from my church and severed important friendships in my support system. I am being forced to make a choice to put aside my religious beliefs to maintain my income.

"Even after all of this, he is willing to wait until we are in our 50's to marry me. I should never have been put in a position to have to ask that of him—especially when a soldier can get divorced, and, if the couple was married for a certain length

of time, the spouse will receive as much as half of the soldier's retirement. That same spouse can remarry and maintain their share of retirement. It is unbelievable that this is not the same for me.

"It appalls me that my country would ask me to give up my financial independence to get married. We are talking about a small portion of the population of the United States that has sacrificed so much. If you are willing to vote 'yes' on a bill to send people to war, you should also hold responsibility for the catastrophic effects of war and serving. It should be a reminder of the cost of war. Continuing to pay these earned benefits after remarriage is a small price to pay to take care of the families of our fallen. If you are concerned about the cost of supporting survivors, stop asking men and women to give their lives."

Kellie Hazlett, Surviving Spouse of Capt Mark Nickles U.S. Marine Corps

"My husband, a United States Marine Corps F–18 pilot, died in a training accident while deployed to Japan in 1997 on my 30th birthday. He is still considered Missing in Action because they were never able to recover his remains. I had to move out of our home in San Diego within 6 weeks of his death because I could not afford to maintain the payments on our rental without his paycheck, so I moved back home to be a caregiver to my mother. I could no longer continue my career in the medical field due to the trauma of losing my husband and had to start over.

"Eventually I met my now husband, Steve, but I hesitated to remarry as I was dependent on the financial benefits that helped offset my own lost income as a military and surviving spouse. Mark and I never had the chance to start a family, and it was important to me that when Steve and I did, we were legally married. We now have three beautiful children.

"I was recently diagnosed with a long-term illness, and my treatments are not covered by insurance as they are viewed as experimental. Restoring my survivor benefits, that Mark and I paid into, would go a long way in helping offset the very expensive costs of my treatments. As I am 57 years old, I could divorce Steve, reinstate my benefits, and remarry him the next day because of the arbitrary remarriage age of 55. This is something that I have seriously considered, due to the unfair penalty."

Linda Ambard Rickard, Surviving Spouse of MAJ Phil Ambard, U.S. Army

"I became a widow just before my 50th birthday when my husband of 23 years, Major Phil Ambard, was killed in Kabul, Afghanistan, in a mass shooting that left eight airmen and one civilian dead. For over two decades, we had moved every 2 to 4 years. While I had multiple master's degrees and a teaching license, I never progressed beyond probation/provisional status at my jobs because we were never in any one place long enough. I never got too attached to a home, people, or a job because everything was so temporary.

"When I became a widow, I didn't know where to move. I hadn't lived back home in Idaho since 1979. I was too old to go live with my mom and dad, and too young to live with my children, four of whom were in the military. It took me years to get my feet on the ground.

"I didn't date for many years because I just couldn't. At 57, I met the man who would become my husband. I married him just after my 60th birthday. While I maintain my survivor benefits and survivor social security, due to my age, I had to give up TRICARE even though I now qualify for CHAMPVA. It is ridiculous that younger widows and widowers lose everything with remarriage; there is a big difference with the magic age of 55."

Tonya Syers, Surviving Spouse of W4 Lowell Syers II, U.S. Army

"My husband, Lowell, enlisted in high school via the delayed entry program. We met at Fort Campbell, Kentucky, and married 6 months later. After multiple moves, he decided to join the National Guard, and we moved to California. He retired after 20.5 years. In May 2019, we watched my son graduate from UGA and be commissioned into the USAR. My husband gave him his first official salute. It was a very exciting moment, but the next day Lowell asked me to take him to the emergency room. Instead of celebrating Jake's graduation, we found out Lowell had stage 4 glioblastoma from exposure to the burn pits while deployed. By the end of July, it took his life.

"Eventually, I met a gentleman named James 'Jay' Matheson. He also retired from the reserves. We got engaged. I was shocked to learn that remarrying before the age of 55 would cause me to lose my military benefits. Jay's ex-wife was granted half of his Navy retirement. She is free to remarry without any financial loss. Why does the government allow divorcees to keep military pensions but punish military wid-

ows? I am not in any way telling the government to rescind ex-wives' court-appointed portions of military pensions. I am only saying that it is morally wrong not to offer military widows the same option to remarry without financial penalty.

"The most pro-family and pro-military decision Congress could make is to change this law! Lowell served over 20 years and never collected one cent in retirement. He died, like most, too early due to military service. We would gladly trade our benefits to have our spouse back. Unfortunately, we do not have that option."

CARING FOR SURVIVORS ACT OF 2023 (H.R. 1083)

(TAPS Strongly Supports)

TAPS and the survivor community have supported increasing Dependency and Indemnity Compensation (DIC) for many years. We are grateful to Congresswoman Jahana Hayes (D-CT–5) and Congressman Brian Fitzpatrick (R-PA–1), and Senate Veterans' Affairs Committee Chairman Jon Tester (D-MT) and Senator John Boozman (R-AR) for reintroducing the **Caring for Survivors Act of 2023 (H.R. 1083)**.

Passing this important legislation is a top priority for The Military Coalition (TMC) Survivor Committee, co-chaired by TAPS. TMC consists of 35 organizations representing more than 5.5 million members of the uniformed services—active, reserve, retired, survivors, veterans, and their families.

TAPS remains committed to improving DIC and providing equity with other Federal benefits. We continue to work with Congress to:

- Pass the **Caring for Survivors Act of 2023**.
- Increase DIC from 43 percent to 55 percent of the compensation rate paid to a 100 percent disabled veteran.
- Reduce the timeframe a veteran needs to be rated totally disabled from 10 to 5 years, allowing more survivors to become eligible for DIC benefits.

More than 505,000 survivors receive DIC from the Department of Veterans Affairs (VA). DIC is a tax-free monetary benefit paid to eligible surviving spouses, children, or parents of service members whose death was in the line of duty or resulted from a service-related injury or illness.

The current monthly DIC rate for eligible surviving spouses is $1,612.75 (Dec. 1, 2023), which has only increased due to Cost-of-Living Adjustments (COLA). TAPS is working to raise DIC from 43 percent to 55 percent of the compensation rate paid to a 100 percent disabled veteran; ensure the DIC base rate is increased equally; and protect added monthly amounts, like the 8-year provision and Aid and Attendance.

The following statements from survivors demonstrate that stringent limitations on DIC payments have financial and widespread impacts on housing, transportation, utilities, clothing, food, medical care, recreation, and employment for surviving families:

Katie Hubbard, Surviving Spouse of CSM James Hubbard Jr., U.S. Army

"Due to his status at the time of my husband's death, the only financial benefit we are eligible for is DIC. CSM James W. Hubbard Jr. died May 21, 2009, while in treatment for leukemia caused by the burn pits in Iraq. Having your income cut by more than 60 percent while trying to navigate funeral costs, bills that aren't stopping, and unexpected ambulance and ER charges nearly took me out too.

"My mental health was not conducive to returning to the workplace quickly after being his caregiver and dealing with the unexpected loss, yet I had to figure out something to make up the income or lose our home too. My future, my best friend, and my normal were gone. While a 12 percent increase doesn't seem like much, any widow living paycheck to paycheck can tell you it is.

"The military is a Federal entity, yet their survivors are treated less than. Passing the Caring for Survivors Act would show military widows that their spouse and themselves are cared for and not forgotten."

MaryAnne Kerr, Surviving Spouse of GySgt Cory Kerr, U.S. Marine Corps

"The money that I receive from DIC has allowed me to stay at home to care for my children full-time. However, an increase will be very beneficial due to my new role as the sole provider for my children. The loss of my husband and children's father has been very hard on our family and especially hard on my daughter. She is not only dealing with the loss of her father but the trauma she endured while he was battling with the effects of combat trauma. There have been incidents at school where she had to be picked up and could not return until cleared by her therapist. An in-

crease in DIC will be greatly appreciated and allow us to continue to heal from the trauma and death of our loved one, free from financial burden."

Sadie Clardy, Surviving Spouse of TSgt Michael Clardy, U.S. Air Force

"Five years ago, my husband died suddenly, leaving me to raise four children—ages 11 and under—on my own. My earning potential is severely limited, due to the years I dedicated to supporting my husband's career, and also the logistics of maintaining a job as a single mother of four. These past few years have been financially draining with supply chain issues, inflation, and the loss of a vehicle due to an uninsured driver.

"It is time to increase DIC in parity with Federal death benefits. It is time to give families of the fallen some breathing room. A DIC increase for our family would mean paying back savings, music lessons, school supplies, and cooking for my children with carefree abandon. Moreover, putting us level with other survivor groups is the right thing to do."

Jackie Ferguson, Surviving Spouse of SGT James Ferguson, U.S. Army

"I completed my degree before my husband joined the Army. It was a blessing I finished. We moved several times before he passed, but I found it very difficult to obtain a position using my degree. It seemed no one was interested in hiring me because we would be moving constantly. In order to work in my field, I drove every day from Fort Sill, Oklahoma, to Oklahoma City, which is over an hour each way. I think that raising the DIC to 55 percent would help me offset the earning potential I have lost due to unemployment and underemployment during my husband's service."

Harry McNally, Surviving Spouse of SGT Shanna Golden, U.S. Army

"Increasing the amount of DIC to levels identical to other Federal survivor benefits should have been done decades ago. As it stands, the implication is that the death of a veteran or service member is worth less than the death of other Federal employees."

Melissa Evinger, Surviving Spouse of Sgt Barry Evinger, U.S. Marine Corps

"As a widow and mother of three children, the weight I carry on my shoulders is substantial and often paralyzing as I strategize how to take care of my children. As a Texas public school teacher, my income will never be substantial. I do receive DIC, however, this does not come close to what my husband received in disability compensation. Because of this, I have to supplement my income by working as a tutor before and after school. This all amounts to time I have to be away from my children just to ensure we can afford a basic lifestyle.

"My husband, children, and I have paid a huge price for our country. As the Nation asked my husband to help defend its interests, I now ask for your help in return. I respectfully ask you to consider the possibility of increasing the amount of DIC for the widows and children of the fallen."

PRIORITIZING VETERANS' SURVIVORS ACT (H.R. 7100)

(TAPS Strongly Supports)

TAPS appreciates Congressman Juan Ciscomani (R-AZ–06) and House Veterans' Affairs Committee Chairman Mike Bost's (R-IL–12) many expressions of strong support for the community of military and veteran survivors, the most recent being their introduction of the **Prioritizing Veterans' Survivors Act (H.R. 7100)**, which would return the Office of Survivor Assistance organizationally to its previous location within the Office of the VA Secretary. Additionally, we are grateful to the Department of Veterans Affairs (VA) for recently holding a Survivor Summit to gain valuable insight and input from survivors and survivor-focused organizations to enhance VA services for survivors enterprise-wide.

The Office of Survivor Assistance (OSA) was established in 2008 in recognition of the sacred obligation the Nation has to the survivors of military service members and veterans. Its director was to serve as a principal advisor to the VA Secretary on policies impacting military service members' and veterans' survivors, and to serve as a resource for surviving family members regarding the benefits, care, and memorial services provided across the entire department.

Unfortunately, this office has been relocated several times over the past 15 years—moved from within the Office of the Secretary under the Chief of Staff to the Veteran Experience Office; then to the Veterans Benefits Administration, where it was placed in the Office of Outreach, Transition and Economic Development; and then recently moved under the Pension and Fiduciary Service in June 2023. These

moves have made it very difficult for survivors to understand its role, find needed information on resources, and access all the department's support with reliable consistency.

While the Department of Defense (DOD) is able to use existing contact information to reach out to grieving families in the event of the death of an active-duty service member to ensure that they have access to the comprehensive support provided by both the DOD and the VA, the VA lacks a similar proactive capability. Prior to the death of their veteran, family members are generally not known to the VA because they are not receiving benefits or services. Thus, following a veteran's death, the burden falls on grieving families to identify, interpret, apply for, and comply with the complex eligibility requirements and siloed administration of benefits, care, and memorial services across one of the largest agencies in the government.

Despite the best intentions of Congress and the VA leadership and employees, the multiple ongoing navigation challenges survivors must manage across their survivor journey too often become confusing, frustrating, and unmanageable, and many fail to even access the much-needed assistance available to them.

For example, surviving spouses are expected to find and use the same entry points for information as veterans. Regrettably, survivors tell us that calls to the general helpline can result in inaccurate information, and some have even been told that they are ineligible for benefits during their initial call. Survivors share this experience with one another, and the unfortunate result is that they become less willing to turn to the VA for assistance. This is harmful to the survivor, and it undermines trust in the VA among the community it serves. Although survivors represent only 1 percent of those receiving VA services, it is essential that all VA staff they may come in contact with have the same willing spirit of customer service that the department's motto expresses so clearly.

From the perspective of the community, OSA would be the logical entry point or "front door" to access VA assistance, but far too many survivors don't even know it exists. It falls on organizations like TAPS to inform them of all the VA resources they may be eligible for and to reach out to OSA on their behalf.

The frequent moves of OSA and its minimal staffing appear to the survivor community to reflect a less than full understanding of the comprehensive nature of their needs and willingness to support their access to the full range of care, benefits, and memorial services that they so desperately need at a most difficult time in their lives.

In its current placement within Pension and Fiduciary Services, the department is operating OSA as if the only benefits survivors receive are related to compensation. Currently, OSA staff only have access to DIC and Pension records, therefore they are unable to assist with many issues survivors face, to include burial benefits, education benefits, CHAMPVA, Survivors Group Life Insurance, home loans, or additional programs and benefits survivors are eligible to receive enterprise-wide, to include the new VHA Survivors Assistance and Memorial Support (SAMS) program. OSA appears not to have the authority and full range of case management coordination processes in place to ensure that they can help survivors access all of the care and memorial services available in other administrations within the VA.

With more than 505,000 survivors currently eligible for DIC, OSA staffing should be significantly increased to better serve surviving families. OSA should be the official entry point into VA for survivors, with the authority, bandwidth, expertise, and access needed to answer any and all challenges that survivors face regarding VA benefits and services. There should also be a dedicated survivor helpline within the Veterans Call Center to provide access to trained agents with the knowledge to address survivor issues. We applaud VA for implementing an education-specific helpline for survivors in 2019, which has been a huge success.

The limited awareness among survivors regarding OSA highlights the need for VA to more effectively communicate and promote this essential survivor program. TAPS strongly believes that OSA should be elevated to the Office of the Secretary or the Office of the Under Secretary for Benefits and granted the necessary authority and access to all programs and services survivors are eligible to receive.

TAPS is committed to working with Congress and the VA to ensure that the organizational placement, staffing, and department-wide connectivity **are** in place to enable OSA to serve as the "front door" for the department and the advocate for the increasing number of surviving veteran families seeking access to all VA benefits, care, and memorial services.

Melissa Alex, Surviving Spouse of SSGT Eugene Alex, U.S. Army

"The Office of Survivor Assistance was established in 2008 to serve as an outreach regarding benefits and services for our families. I didn't know for years that they ex-

isted. I found out only because I am a service provider with the Michigan National Guard, not because they reached out to me and my children personally!"

Sadie Clardy, Surviving Spouse of TSgt Michael Clardy, U.S. Air Force

"My husband passed in 2017 and I had never heard of OSA until learning about them from TAPS. I had to Google the Office of Survivor Assistance to find out about their services. Without that search, I would not be able to tell you anything about OSA, not even who they're affiliated with. I'm still a little hazy as to what role they may be able to play in supporting me and my children."

SURVIVOR BENEFITS DELIVERY IMPROVEMENT ACT OF 2024 (H.R. 7150)

(TAPS Strongly Supports with Further Recommendation)

TAPS appreciates House Veterans' Affairs Committee Ranking Member Mark Takano (D-CA–39) for introducing the **Survivor Benefits Delivery Improvement Act of 2024 (H.R. 7170)**, which would improve equitable access to certain benefits of the Department of Veterans Affairs (VA) for survivors of veterans, through the collection of demographic data, and would improve outreach services to individuals who served in the uniformed services, their dependents, and survivors.

In addition to collecting demographic data, TAPS recommends adding "Cause of Death" as a tracked demographic. This data would be incredibly important to understand the different types of losses survivors face as well as creating programming and resources that are relevant for all survivors.

The lack of data collection based on the cause of death has also led to issues with the implementation of the PACT Act. For example, the VA estimates there are 382,000 potential survivors who may be eligible for PACT-related benefits, but this number includes all manners of death, including those who died of old age, by suicide, or in car accidents, not just those filing claims related to toxic exposure. This helps explain why after extensive outreach by the VA and organizations like TAPS, more survivors have not applied for PACT-related benefits. Unfortunately, the potential survivor numbers have also informed the Congressional Budget Office's (CBO) scoring of current survivor legislation, such as the *Love Lives On Act and Caring for Survivors Act*, almost doubling the cost and creating exorbitant scores, making it difficult to find funding.

The Survivor Benefits Delivery Improvement Act of 2024, would also require an assessment of the resources of the VA Office of Survivors Assistance (OSA) and the development of a strategy to ensure the availability of these necessary resources. TAPS strongly supports the development of such a strategy, and will continue to work in partnership with the VA to ensure that survivor needs are included in this discussion.

VETERANS COMPENSATION AND COST OF LIVING ADJUSTMENT ACT OF 2023 (H.R. 1529)

(TAPS Strongly Supports)

TAPS thanks Chairman Luttrell and Ranking Member Pappas for introducing the **Veterans Compensation and Cost of Living Adjustment Act of 2023 (H.R. 1529)** to help improve Dependency and Indemnity Compensation (DIC). The current monthly DIC rate for eligible surviving spouses is $1,612.75 (Dec. 1, 2023), which has only increased due to Cost-of-Living-Adjustments (COLA).

TAPS also encourages the committee to pass the *Caring for Survivors Act of 2023* (H.R. 1083) to increase DIC from 43 percent to 55 percent of the compensation rate paid to a 100 percent disabled veteran, providing parity with other Federal survivor programs.

More than 505,000 survivors receive Dependency and Indemnity Compensation (DIC) from the VA. DIC is a tax-free monetary benefit paid to eligible surviving spouses, children, or parents of service members whose death was in the line of duty or resulted from a service-related injury or illness. TAPS is committed to strengthening DIC and providing equity with other Federal benefits.

Barclay Murphy, Surviving Spouse of MAJ Edward Murphy, U.S. Army

"When my son turned 18 and went to college, a significant amount of income was lost while expenses remained constant—if not higher—due to inflation. I had planned for the income loss; I even sold my house and downsized. I raised two kids solo for almost 18 years. As an empty nester, I thought I'd have enough money for just me, but it has been tough even after the Widow's Tax repeal and cutting out so much."

FAIRNESS FOR SERVICEMEMBERS AND THEIR FAMILIES ACT OF 2023 (H.R. 2911)

(TAPS Supports With Further Recommendation)

TAPS thanks Congresswoman Marilyn Strickland (D-WA–10) for introducing the **Fairness for Servicemembers and their Families Act of 2023 (H.R. 2911)**, which would require the Department of Veterans Affairs to periodically review the automatic maximum coverage under the Servicemembers' Group Life Insurance (SGLI) program and the Veterans' Group Life Insurance program (VGLI).

While TAPS appreciates the importance of periodically reviewing the automatic maximum coverage, TAPS would ideally like to see both the SGLI and VGLI fully tied to Cost-of-Living-Adjustments (COLA) and inflation to ensure it stays at the intended rate long term. This would prevent it from continuing to fall behind the intended rates without Congress having to repeatedly increase the maximum amount. While it was increased from $400,000 to $500,000 in 2023, it has already fallen behind due to inflation.

MEDICAL DISABILITY EXAMINATION IMPROVEMENT ACT OF 2024 (Discussion Draft)

(TAPS Supports)

TAPS thanks House Veterans' Affairs Committee Ranking Member Takano for introducing the **Medical Disability Examination Improvement Act of 2024**. This important legislation would improve medical nexus examinations for claims associated with toxic exposure risk activities (TERA) for covered veterans and seek to improve Department of Veterans Affairs (VA) medical disability examinations for rural veterans. It would also require additional training for VA employees who process or review medical disability examinations.

This legislation would also allow the Secretary of Veterans Affairs to provide each claimant with another examination and priority processing for the impacted claim if the Secretary finds any covered medical disability examination to be not adequate for adjudicating a claim.

By improving the medical nexus examination claims process for TERA, more veterans will be able to access critical VA benefits, positively impacting their lives, and improving the financial well-being of their families, caregivers, and survivors.

TOXIC EXPOSURES EXAMINATION IMPROVEMENT ACT (Discussion Draft)

(TAPS Supports)

TAPS thanks the committee for introducing the **Toxic Exposures Examination Improvement Act**, which would provide a veteran with a medical examination in connection with certain claims for disability compensation under the laws administered by the Department of Veterans Affairs (VA).

By amending the current language from "such evidence is not sufficient to establish a service-connection for the disability" and inserting "such evidence does not contain sufficient medical evidence for the Secretary to make a decision on the claim," would provide a toxic-exposed veteran the opportunity for a medical examination in the claims process for disability compensation.

This important legislation would allow more veterans to potentially establish a service connection for disability, and secure disability compensation for themselves and their families, and Dependency and Indemnity Compensation (DIC) for their survivors.

CLEAR COMMUNICATION FOR VETERANS CLAIMS ACT (Discussion Draft)

(TAPS Supports)

TAPS expresses gratitude to the committee for introducing the **Clear Communication for Veterans Claims Act**, which proposes that the Secretary of Veterans Affairs collaborate with a federally funded research and development center to evaluate notice letters sent to claimants for benefits under laws administered by the Secretary, among other purposes. The primary objectives of this evaluation are as follows.

1. Assess whether modifications to the letters could decrease paper usage and costs incurred by the Federal Government.

2. Enhance the clarity, organization, and conciseness of notices and letters to claimants in accordance with the laws administered by the Secretary.

TAPS is of the opinion that veterans, their families, caregivers, and survivors would derive significant benefits from receiving clearer communication from the Department of Veterans Affairs (VA), with legal disclaimers positioned at the conclusion of all notices. It is believed that this approach would contribute to a reduction in appeals and an increase in the accurate processing of claims for all veterans, caregivers, and survivors.

Should the involvement of a third-party entity be deemed beneficial in simplifying language while ensuring compliance with all relevant laws, TAPS fully supports this notion. Ensuring that our veterans, families, caregivers, and survivors comprehend the requests made by the VA, and more importantly, providing accurate information to survivors, while ensuring they understand what the letters mean for them in a practical sense.

CONCLUSION

TAPS thanks the leadership of the House Committee on Veterans' Affairs, Disability and Memorial Affairs Subcommittee, distinguished members, and professional staff for convening this important hearing to address key veteran and survivor legislation introduced in the 118th Congress. TAPS is honored to testify on behalf of the thousands of veteran and military surviving families we serve.

Prepared Statement of Christopher Macinkowicz

Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, on behalf of the men and women of the Veterans of Foreign Wars of the United States (VFW) and its Auxiliary, thank you for the opportunity to provide testimony with regard to this pending legislation.

H.R. 1083, Caring for Survivors Act of 2023

The VFW has been advocating for many components of this legislation for several years and strongly supports its swift passage. The rate of Dependency and Indemnity Compensation (DIC) paid to the survivors of service members who died in the line of duty or to veterans who died from service-related injuries or illnesses has only minimally increased since the benefit was created in 1993. Currently, DIC is paid at 43 percent of 100 percent permanent and total disability while all other Federal survivor programs are paid at 55 percent. This legislation would increase DIC to 55 percent, finally reaching parity with other Federal agencies.

H.R. 2911, Fairness for Servicemembers and their Families Act of 2023

In 2021, the VFW advocated for the Servicemembers' Group Life Insurance (SGLI) and Veterans' Group Life Insurance (VGLI) maximum payouts to be increased from $400,000 to $500,000 to reflect inflation and the cost of living. This change was passed as part of the *Supporting Families of the Fallen Act in October 2022* and came into effect on March 1, 2023. Before this increase, the maximum had not been increased since 2005. The VFW supports the *Fairness for Servicemembers and their Families Act of 2023* to require VA to review the maximum coverage for both SGLI and VGLI every 3 years. Service members and their families should have peace of mind when selecting either of these insurance policies and anticipating what their needs might be in the event of the individual's passing while considering overall rising costs over time due to inflation.

H.R. 3651, Love Lives On Act of 2023

As a resolutions-based Veterans Service Organization (VSO), the VFW does not have a position on whether survivors should retain their benefits upon remarriage. There are, however, provisions within this legislation that the VFW supports.

We support updating the definition of surviving spouse within title 38 of the United States Code. The last time the definition was updated was in 1962 and much has changed in the last sixty years. The change would remove the currently restrictive language that describes a surviving spouse as a person of the opposite sex to be more in line with current law that allows for same-sex marriages. The change also strikes the wording that states a surviving spouse may not live with another person or hold themselves out to be married. Survivors should not fear that living with another person could cause them to lose their benefits. This is outdated language that should be updated to reflect the marriage requirements of the current era.

The VFW supports eliminating the time limit for surviving spouses to use the Fry Scholarship. Following the death of their service members, surviving spouses may not be in the position to use this important education benefit for several years since

they may suddenly be faced with finding stable employment, housing, child care or other critical needs. Survivors should be able to use this benefit without time limits.

The VFW also supports a surviving spouse regaining TRICARE benefits if the individual remarries and that marriage later ends. A survivor who remarries but that marriage later ends can regain DIC and Survivor Benefit Plan payments. TRICARE benefits to which unmarried survivors are entitled should be reinstated if their future marriages end in order to have parity with other survivor benefits.

H.R. 7100, Prioritizing Veterans' Survivors Act

The VFW supports this legislation that relocates the Office of Survivors Assistance (OSA) from its current placement in the Veterans Benefits Administration to the Office of the Secretary of the Department of Veterans Affairs (VA). As the large cohorts of Vietnam and then Gulf War veterans age and die, demand for OSA services will significantly rise. Survivors who may not be familiar with the military or VA will have to successfully navigate a bureaucratic process to access benefits while simultaneously coping with grief, significant upheaval, and loss of income. In this context, VA must robustly resource and optimally locate OSA to ensure maximum beneficial effect.

H.R. 7150, Survivor Benefits Delivery Improvement Act of 2024

The VFW supports this bill that would establish a data-informed survivors education and outreach program. Focused outreach using demographic data to confirm survivors most in need is a smart and efficient practice that would enable VA to best use its limited resources to accurately disseminate critical information, particularly in regard to immediately needed burial benefits. Also, the VFW wholeheartedly endorses Section 3's proactive, personal, and multi—media "Survivor Solid Start Act of 2024" in which VA would maintain a quarterly outreach to each eligible dependent until that person files a claim for a benefit. A particularly attractive feature is VA assisting survivors with accessing accredited representatives to file claims. This action would aid survivors coping with the loss of loved ones to fulfill basic needs as soon as possible, and hopefully debunk common misconceptions about VA benefits. For example, based on previous testimony, VFW Service Officers report that some survivors do not realize their deceased loved ones' VA benefits are not transferrable, resulting in a loss of income when the survivors start receiving lower DIC amounts. Last, the VFW supports the explicit mention of call center manning levels to facilitate this outreach and education plan, implying VA would ensure the program has adequate resources.

H.R. 7777, Veterans' Compensation Cost-of-Living Adjustment Act of 2024

Every year Congress introduces legislation to make cost-of-living adjustments to the rates of disability compensation for veterans with service-connected disabilities, and to the rates for DIC for survivors. These increases are the same percentage as that for Social Security benefits. The VFW supports this legislation that would provide automatic increases in the rates for these benefits when increases are made for Social Security each year. This would provide a guarantee to veterans and survivors that their payments would always be aligned to counteract inflation. We are grateful for the bipartisan and bicameral commitment to making sure cost of living is addressed each year, but we recommend this process be automatic to eliminate the need for subsequent legislation.

H.R. 7793, Veterans Appeals Options Expansion Act of 2024

The VFW supports this bill, with a few recommendations, to expand claimants' options during the appeals process and to research the most common reasons for appeals at the Board of Veterans' Appeals (BVA). While working as a VFW Appeals Consultant, I often worked with veterans who would have directly benefited from this legislation. When reviewing records in preparation for a hearing or informal presentation, it was not uncommon to find that the veteran had other appeals pending that were not allowed to be discussed during the upcoming hearing because they were not part of the original appeal. This resulted in unnecessary delays and frustration for everyone involved. This legislation would allow BVA to combine appeals and honor the original appeal's docket date, which would create a more efficient appeals process overall.

The VFW also supports the intent behind authorizing appellants to switch dockets or withdraw an issue within a claim as long as the claim has not been assigned to whomever is writing the decision at BVA. However, we feel this is a little unclear because the deadline can be moved based on workload at BVA or the speed of the individual working the claim. We recommend setting a more definitive deadline for switching BVA dockets.

Finally, the VFW supports effective notification and also believes that veterans should not be penalized for not understanding the complex laws of the VA claims process. This law provides authorization for VA to treat claims filed on the wrong form as an Intent to File, and requires BVA to notify claimants if their evidence was received after the submission deadline. Both of these provisions would offer veterans a second chance if they make mistakes while trying to navigate the appeals process.

H.R. 7816, Clear Communication for Veterans Claims Act

The VFW supports this proposal to streamline communication and messaging from VA. One of the primary challenges veterans encounter when reviewing their disability notification letters is the intricate language and terminology used. Legal jargon and medical terms can be overwhelming, especially for those without a background in law or medicine. This complexity often leads to confusion and frustration, hindering veterans from grasping the full scope of their benefits and entitlements.

Far too often, accredited representatives spend a great deal of time explaining letters that make sense to the trained eye, but not to anyone else. The VA disability system involves a multitude of regulations, policies, and procedures. Unfortunately, these guidelines can be subject to interpretation, resulting in inconsistencies in notification letters. Veterans often find it challenging to reconcile the information presented with their own experiences, leading to uncertainty about the accuracy of the provided details.

Understanding the full spectrum of benefits associated with a disability rating is another hurdle for veterans. The notification letter may mention various forms of compensation, health care coverage, and vocational rehabilitation, but veterans may struggle to connect these pieces of information and effectively access the services to which they are entitled. This lack of clarity can impede veterans' ability to make informed decisions about their health care and overall well—being.

Discussion Draft, Veterans Appeals Efficiency Act of 2024

Since the creation of the VA National Work Queue (NWQ) in 2016, VFW accredited representatives have seen numerous instances of claims and appeals that have been sent to the NWQ where they stagnate unassigned and unworked by VA staff. In a recent VA meeting with VSOs, it was stated that it is not uncommon for a claim to still be untouched in the NWQ 6 months after submission. Unfortunately, it is also a common occurrence with remanded BVA claims. With this proposed legislation, the VA Secretary would be required to track claims electronically, submit an annual report, and provide notice to veterans of the reasons why their claims are still waiting in the NWQ.

The VFW supports this intent, but feels there needs to be more guidance in regard to the actual method and delivery of the notifications to veterans. During the claims process, veterans are often inundated with different notifications from VA that can be confusing, overwhelming, and repetitive. Simply adding another notification to the veteran that the claim is pending will not solve the underlying issue of why the claim is waiting in the NWQ. Therefore, we recommend that any notifications created as a result of this legislation be reviewed and offered for comment by accredited VSOs to ensure that the messaging is clear and effective.

The VFW also supports improvements to BVA and the United States Court of Appeals for Veterans Claims (CAVC). This bill expands the ability of BVA and CAVC to decide appeals in a few ways. First, it allows BVA to bypass the remand process if additional evidence is received after a BVA decision has been made if that evidence would satisfy the appeal. This idea is beneficial as it would prevent unnecessary remands, but there is no indication as to the timeframe in which the evidence would need to be received before BVA would remand the appeal. We recommend that the bill be amended to include a timeframe for BVA to receive new evidence before remanding the claim.

Additionally, the bill allows BVA to submit a request to the VA Office of General Council for an opinion if there is a question of law during an appeal. The VFW supports this as it would allow legal questions to be addressed without the need for an appeal to CAVC. Also included in this bill are provisions to allow BVA to aggregate appeals if they involve similar laws. While this may be beneficial in some cases, we must ensure that BVA does not sacrifice the accuracy of the decision in order to combine claims for efficiency.

Finally, this bill also authorizes CAVC to perform an administrative review of eligible claims upon request of the claimant. The VFW supports this as well, provided that it does not create an unnecessary backlog of appeals.

The VFW supports transparency and research and believes that a study to identify commonly appealed issues would help identify potential inefficiencies in the ap-

peals process. The VFW also agrees with the requirement for VA to meet with a federally funded research and development center (FFRDC) to determine if BVA can issue precedential decisions and aggregate claims. However, when this assessment takes place, we ask that VA and the FFRDC be cognizant of the time it takes to render decisions and ensure that offering precedential decisions would not unduly slow down the appeals process.

Discussion Draft, Medical Disability Examination Improvement Act of 2024

The VFW appreciates the intent of this bill to help streamline Toxic Exposure Risk Activity (TERA) examinations, but we believe Section 2 of this proposed legislation could lead to fewer examinations, which would potentially result in missed opportunities to identify exposures.

We are concerned about the proposed language that would limit TERA examinations of veterans as identified in Section 1119(c) of title 38, United States Code, or anyone else who self-reports. Section 1119 basically covers veterans who deployed to areas in the Middle East. This would exclude countless veterans who had exposures in other areas where they served. Additionally, asking veterans who are not on the list of areas described in Section 1119 to self-report possible exposures could lead to missed identifications.

The critical component of the TERA examinations was for VA providers to probe patients about their possible exposures and try to identify areas where there might be risk. We believe this proactive approach is more beneficial to veterans because it may draw out information regarding risks that were unknown to the veterans.

However, there are portions of this proposal that we do support, such as identifying issues facing rural veterans and improving the training for processing medical examinations. We would recommend combining the two TERA proposals and taking the best parts of each bill to craft comprehensive legislation that would streamline efficiency without reducing necessary examinations.

Discussion Draft, Toxic Exposures Examination Improvement Act

The VFW believes we should help improve and streamline toxic exposure examinations, but we are concerned this proposal would also reduce the number of examinations for veterans. The PACT Act intentionally set a lower standard for exposure examinations to identify as many exposed veterans as possible. This process seeks to help identify a nexus through direct service connection and secondary service connection. We are concerned that this language change would limit veterans seeking service connections by raising the standard for examinations.

We have heard of veterans claiming toxic exposure illnesses due to seemingly nonconnected issues. However, we believe an examination should still be conducted because of VA's duty to assist in order to determine possible connection. As unusual as it seems, disabilities like tinnitus could be affected by certain exposures to toxins. Tinnitus is a neurological condition as well as a hearing condition, and toxins can affect our neurological systems. At face value there might not be an obvious connection with issues like tinnitus and toxic exposure, which is why examinations can be beneficial. An examiner may not grant an examination if this language were passed into law.

The VFW is encouraged by both proposals that seek to strengthen the TERA examination process. We look forward to working together in a bipartisan manner to hopefully produce a comprehensive TERA reform bill that would benefit all veterans and reduce inefficiencies.

Discussion Draft, Veterans Claims Quality Improvement Act of 2024

The VFW supports this legislation that would provide much needed training and oversight for those deciding VA claims. However, the addition of more oversight often comes with delays in timeliness if the program is not properly funded. This bill instructs the General Council to review each updated VA regulation, and to develop and administer a training program to ensure that those writing the regulations are properly trained. It also instructs BVA to create a training and quality assurance program. While training and oversight is essential, without proper funding for these programs, the development and execution could be severely impacted thus limiting the effectiveness of these programs.

As the former director for training and quality assurance in VFW National Veterans Service, I am keenly aware of how quickly and often VA regulations change as well as the need to ensure that updated regulations are understood by those who use them. Recently, I was representing a veteran who had a claim for service connection for a mental health condition denied by VA. The veteran had claimed posttraumatic stress disorder (PTSD) on the initial application for benefits. However, during his compensation and pension examination the examiner diagnosed him with

a different mental health condition and provided a medical opinion linking the condition to his active military service. A VA rating officer denied the claim because the veteran did not have PTSD.

According to VA's M21–1 Manual, "It is impermissible to limit the scope of the claim for SC to the claimant's lay hypothesis about the nature of a specific mental disorder disability. Because the Veteran is reasonably requesting benefits for symptoms of a mental disorder but is not competent to medically identify such symptoms, it is insufficient for the Department of Veterans Affairs (VA) to simply deny benefits for the claimed diagnosis and not address evidence in the record of other mental disorder diagnoses, as indicated in Clemons v. Shinseki, 23 Vet. App. 1 (2009)." Though the referenced CAVC case and the regulation both state that the rater was supposed to consider all mental health diagnoses of record, without proper training and plain language this regulation can easily confuse a VA Rating Veterans Service Representative and result in an unnecessary appeal.

Chairman Luttrell and Ranking Member Pappas, this concludes my testimony. I am happy to answer any questions you may have.

Information Required by Rule XI2(g)(4) of the House of Representatives

Pursuant to Rule XI2(g)(4) of the House of Representatives, the VFW has not received any Federal grants in Fiscal Year 2024, nor has it received any Federal grants in the two previous Fiscal Years.

The VFW has not received payments or contracts from any foreign governments in the current year or preceding two calendar years.

Prepared Statement of Andrew Tangen

Chairman Luttrell, Ranking Member Pappas, and distinguished members of the Subcommittee, the National Association of County Veteran Service Officers, commonly referred to as NACVSO, would like to thank you for the opportunity to submit our views on pending legislation impacting the Department of Veterans Affairs (VA) that is before the Subcommittee.

NACVSO is a unique organization in that all our elected or appointed leaders and most of our members are currently serving as VA accredited representatives—working as Government Veteran Service Officers (GVSOs) in the field every day to help America's Veterans and their dependents access the benefits they earned with their service. Once again, it is our honor to share with you the issues that are important to NACVSO.

Veterans Appeals Options Expansion Act of 2024

NACVSO supports the proposed legislation's goal of removing barriers for Veterans that were inadvertently created under AMA.

Although Public Law 115–55, *Veterans Appeals Improvement and Modernization Act of 2017* (hereinafter AMA) greatly improved Veterans' and advocates' ability to challenge initial benefit eligibility determinations, a number of issues became apparent during the implementation of the AMA.

A primary challenge with the AMA is how supplemental claims are processed when there is an unintentional or clerical error in form filing. Take for example, a Veteran from the Vietnam era, who filed an initial claim for hearing loss in 1972 with the Veterans Benefits Administration (hereinafter VBA), which the VBA denied in 1972. Decades later, that same Veteran has progressive hearing loss and inadvertently submits another initial claim form for hearing loss instead of a supplemental claim form, as historical evidence of the first claim from 1972 is unavailable to the Veteran or their advocate at the time of submission. When VA receives the new claim submission, it correctly identifies that the Veteran previously filed a claim for hearing loss and informs the Veteran by mail that he or she used the wrong form. The Veteran then correctly submits a supplemental claim form to VBA, and the effective date for the Veteran, in many instances, becomes the date that VBA receives the correct form, not the date when the Veteran actually notified VA of his intent to file, but inadvertently used the wrong form. Since it takes several months or, in some cases, even years for VA to notify Veterans of clerical errors in

form filing, many Veterans lose out on benefits they should have been entitled to simply because of a clerical error. This also increases the number of appeals to the Board of Veterans Appeals (hereinafter Board).

AMA made other changes to the VBA claims adjudication process that have slowed benefits delivery to eligible Veterans. Under AMA, when a claim is remanded and returned by the Board to the VA Regional Office for additional follow-up, it can be denied at the Regional Office and ultimately end up back at the Board. When this happens, Veterans' cases are placed in a "queue" in which any judge on the Board may be assigned to review the decision. Under the prior system, the same judge who initially remanded the case would review and render a decision on the case when it is returned to the Board. Under the AMA, the judge who conducted the initial hearing, and who likely has the best understanding of the case, is now unlikely to be the same judge to review the new determination of the Regional Office. Further, Veterans who find themselves returning to the Board do not receive priority for new decisions; some Veterans have waited over 2 years for a decision on the return of their case to the Board under AMA.

Veterans Appeals Efficiency Act of 2024 and the Veterans Claims Quality Improvement Act of 2024

NACVSO supports the proposed legislation's overall goals of improving Board decisions and VBA compliance with those decisions, expanding the jurisdiction of the Court of Appeals for Veterans Claims, and requiring notice for reasons for deferrals and assigned suspense dates for further actions on claims pending adjudication. However, NACVSO does not believe that allowing the Board to issue precedential decisions is in keeping with the non-adversarial nature of initial appeals before the Board. NACVSO believes that each appeal at the Board should be evaluated on its own merit and set of facts and conditions.

An AMA Summit hosted by The Board and VBA on 6–7 February 2024, brought to light many of the current challenges with Board decisions and VBA compliance. At this summit, the Board informed participants that between 1 October 2023 and 6 February 2024, there were 20,381 reasons for remands from the Board to VBA. Fifty-two percent (52 percent) of these remands (10,607) dealt with errors, omissions, or inadequacy in the required forensic examinations that Veterans must complete in order to receive a decision on their claim for benefits.

As an example, GVSOs have seen situations where a Veteran with an established history of receiving treatment for Post-Traumatic Stress (PTS) at a VA medical center was denied benefits because the VBA forensic examiner determined, despite having the treatment records, that the Veteran not only does not have PTS, but also no mental health diagnosis. Upon appeal to the Board, these cases are currently remanded to the VBA for a new examination to determine whether the Veteran has PTS again, rather than the Board relying on medical evidence of a diagnosis, granting PTS, and remanding to the VBA solely to determine severity of the Veteran's PTS. Currently, Veterans who find themselves in the appeals repeat loop who have PTS have sometimes had to go through multiple forensic examinations, which leaves Veterans feeling helpless, unwanted, and untrusted.

Toxic Exposures Examination Improvement Act and Medical Disability Examination Act of 2024

NACVSO supports both of these proposed pieces of legislation but recommends combining the bills and striking Section 2 from the Medical Disability Examinations Act of 2024. The *Sergeant First Class (SFC) Heath Robinson Honoring Our Promise to Address Comprehensive Toxics (PACT) Act of 2022* (Pub. L. 117–168) (hereinafter PACT Act) was a lifechanging piece of legislation for so many Veterans who now receive services and benefits that were previously not available to them. However, its implementation has revealed issues that we believe must be urgently addressed. For example, a massive amount of Veterans who have filed a claim for benefits since the PACT Act was signed into law are having their claims processed under a toxic exposure risk activity claim (hereinafter TERA), even if the Veteran did not allege or claim TERA when filing for a condition, they believe they are eligible for but is not related to toxic exposure. Under the US Code, Veterans filing a disability claim must have: 1) an in-service injury or disease; 2) a current diagnosis; and 3) a medical nexus connecting the two. Further, a Veteran may be awarded benefits under any of the five theories of entitlement: 1) direct service connection; 2) aggravation of a pre-existing condition; 3) a presumptive condition relating to the nature of the Veterans service; 4) a condition deemed secondary, or caused by, an already established service connected injury or disease; or, 5) due to injuries sustained by the VA (38 U.S.C. § 1151).

Since passage of the PACT Act, GVSOs have seen situations where forensic examiners and VA ratings specialists rely solely on TERA claims, and not on the aforementioned entitlement theories in US Code for granting benefits. Without official action on the part of Congress or the Secretary, overreliance on TERA has created a situation in which some VBA employees have, in essence, created a sixth criteria of entitlement (e.g., toxic exposure) rather than utilizing TERA as part of determining eligibility under the five established theories of entitlement.

Both of the proposed bills are designed to remedy this situation; however, under Section 2 of the Medical Disability Examinations Act of 2024, the change to what constitutes a "covered Veteran" to only those Veterans who fall under section 1119(c) carries with it an unintended consequence. As an example, consider a Veteran who served as a heavy equipment operator in Germany during the Vietnam War and who was routinely exposed to toxins. Medical studies indicate these Veterans carry an increased risk of developing Non-Hodgkins Lymphoma.[1, 2, 3] The changes proposed under Section 2 of the Medical Disability Examinations Act of 2024 would, in essence, preclude this Veteran from being able to prove service connection for benefits, even though medical literature shows an extremely high likelihood of Non-Hodgkins Lymphoma due to that Veteran's military service.

HR 2911 – Fairness for Servicemembers and their Families Act of 2023 and the Veterans' Compensation Cost-of-Living Adjustment Act of 2024

NACVSO supports both H.R. 2911 and the proposed Veterans' Compensation Cost-of-Living Adjustment Act of 2024.

Chairman, Ranking Member, and members of the subcommittee, on behalf of NACVSO thank you for the opportunity to submit our views on some of the bills being considered today. We look forward to working with you on this legislation and would be happy to take any questions for the record.

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[1] *See e.g.* Schenk M, Purdue MP, Colt JS, Hartge P, Blair A, Stewart P, Cerhan JR, De Roos AJ, Cozen W, Severson RK. Occupation/industry and risk of non-Hodgkin's lymphoma in the United States. Occup Environ Med. 2009 Jan;66(1):23–31. doi: 10.1136/oem.2007.036723. Epub 2008 Sep 19. PMID: 18805886; PMCID: PMC3051169.

[2] *See e.g.* Mester B, Nieters A, Deeg E, Elsner G, Becker N, Seidler A. Occupation and malignant lymphoma: a population based case control study in Germany. Occup Environ Med. 2006 Jan;63(1):17–26. doi: 10.1136/oem.2005.020453. PMID: 16361401; PMCID: PMC2078033.

[3] *See e.g.* Francisco LFV, da Silva RN, Oliveira MA, Dos Santos Neto MF, Gonçalves IZ, Marques MMC, Silveira HCS. Occupational Exposures and Risks of Non-Hodgkin Lymphoma: A Meta-Analysis. Cancers (Basel). 2023 May 4;15(9):2600. doi: 10.3390/cancers15092600. PMID: 37174074; PMCID: PMC10177442.

Prepared Statement of Renee Burbank

NVLSP
NATIONAL VETERANS LEGAL SERVICES PROGRAM

Statement of

Renée Burbank, Esq.,
Director of Litigation

Before the

House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

Legislative Hearing on Pending Legislation

April 10, 2024

TABLE OF CONTENTS

Introduction

Thank you, Chairman Luttrell, Ranking Member Pappas, and esteemed members of the Disability Assistance and Memorial Affairs Subcommittee, for the opportunity to testify before you on ways to improve the claims adjudication process of the Department of Veterans Affairs (VA) and the Court of Appeals for Veterans Claims (CAVC). I am speaking on behalf of the National Veterans Legal Services Program (NVLSP), a nonprofit veterans' services organization founded in 1981 and dedicated to ensuring that our nation's 18 million veterans and their families receive the benefits that they need and deserve for disabilities resulting from their military service to our country. I currently serve as NVLSP's Director of Litigation.

Before discussing the proposed bills before this subcommittee, it is worth briefly reflecting on the purpose of the current system of appeals for veterans' claims, which is the subject of several of the bills and the main focus of my testimony.

Over the past 200 years, Congress has developed a comprehensive statutory framework for supporting our nation's veterans, which laws are "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." Boone v. Lightner, 319 U.S. 561 (1943). While the structures and mechanisms of the veterans' appeals system have changed over time, the promise of the system has remained consistent: to care for those who "have borne the battle" and for their families, survivors, and caregivers.[1]

In its most recent structural overhaul of the benefits regime, the Veterans' Judicial Review Act of 1988, Congress established judicial review of claims denied by the Board of Veterans' Appeals (BVA). This reviewing court, the U.S. Court of Appeals for Veterans Claims (CAVC), is empowered to "decide all relevant questions of law" relevant to veterans' claims, and consistent with the pro-veteran canon, must construe all provisions in the light most favorable to the claimant. Similarly, although veterans may appeal a denial of benefits, the Government may not appeal any awards or grants.

However, despite the best intentions of the Congress that created this pro-veteran system, and the agency, staff, and judges that implement it, reality has often fallen short of this promise. The backlog at the BVA is unacceptably high, leaving veterans waiting for years for a decision on their claims. Further, the number of precedential opinions from the CAVC remains too low to meaningfully improve consistency in judicial and agency decision-making and wait times. The appellate process is marred by sluggishness and inconsistent decision-making, leaving thousands of veterans underserved and disillusioned. Congress now has the opportunity to enact commonsense reforms to the BVA and CAVC's case management tools and honor our country's commitments to our veterans.

Many of the reforms being considered today constitute a multi-faceted approach to improving the veterans' benefits appeals process. Some bills seek to make veterans' choices in the system clearer and less constraining. Some would increase efficiency, speed, and consistency in agency and court review, while others would work to improve the quality of that review. The legislative proposals reflect that no single reform will fix the problems in the VA benefits appeals process.

NVLSP supports many of the bills on today's agenda, and additional legislative changes could do even more to reverse systemic deficiencies. In that spirit, NVLSP urges Congress to enact the following legislative reforms.

Veterans Appeals Efficiency Act of 2024

NVLSP supports this proposed legislation, with amendments.

[1] Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

I. CAVC Supplemental Jurisdiction: § 2(d)(2)

NVLSP supports the reform described in § 2(d)(2) of the Appeals Efficiency Bill, which would amend 38 U.S.C § 7252 to grant the CAVC supplemental jurisdiction "to review an eligible claim pending a final decision of the Board of Veterans' Appeals with respect to such eligible claim." However, for the reasons described below, this change does not go far enough. The CAVC's supplemental jurisdiction should be extended to not just those claims that are pending a decision by the Board, but all pending claims, regardless whether they are pending before the Board or the agency of original jurisdiction. Additionally, the tolling language in the bill requires clarification to be effective.

A. CAVC should be granted supplemental jurisdiction over pending claims.

The CAVC already has authority to certify classes and has done so in the past.[2] Class actions are an important part of civil litigation outside of veterans benefits law. They save resources for all parties and for the courts by having many people's claims decided in a single case, rather than making each litigant bring similar claims with similar arguments over and over. They increase uniformity and fairness, by ensuring that all plaintiffs in similar circumstances get the same outcome. And they make sure that people who may not have access to attorneys—for whatever reason—can still have their rights vindicated.

However, class actions remain an underdeveloped tool for veterans, largely because the CAVC and the Federal Circuit have made them available only in very narrow circumstances. In particular, the Federal Circuit's 2022 ruling in *Skaar v. McDonough*[3] wrongly restricts the group of similarly situated claims which CAVC can aggregate to only claimants who have already received final Board decisions, which represents only a small fraction of all veterans' claims. This ruling restricts veterans' ability to meaningfully contest VA policies and structures, and diminishes the potential benefits of efficiency, uniformity, and consistency in agency decision making that the class action mechanism would otherwise provide. It also impedes the CAVC's ability to identify and resolve systemic issues within the veterans' benefits process.

The restriction on the CAVC's ability to join pending claims imposed by *Skaar* presents unwise structural hurdles to the certification of classes. Under the CAVC's rules of procedure, one of the prerequisites for certification is that "the class is so numerous that consolidating individual actions in the [c]ourt is impracticable."[4] Now, under the Federal Circuit's 2022 holding in *Skaar v. McDonough*, even if there are hundreds or thousands of similarly situated veterans with claims pending at the agency level, they cannot be considered in the court's

[2] *See* Monk v. Shulkin, 855 F.3d 1312, 1318 (Fed. Cir. 2017) (holding that the CAVC has authority to entertain class action lawsuits "under the All Writs Act, other statutory authority, and the [CAVC's] inherent powers."); CAVC Rules of Practice and Procedure 22-23.
[3] 48 F.4th 1323 (Fed. Cir. 2022).
[4] CAVC Rules of Practice & Procedure, 23(a)(1).

numerosity analysis. This poses an unsurmountable obstacle for many appellants who wish to challenge a problematic agency practice because they will be unable to satisfy the numerosity requirement for class actions imposed by *Skaar*.[5] At the time class certification is sought, there will always be an insufficient number of claimants who have finished the BVA's process.

The impact of *Skaar* is that the only pathway left to correct VA policies and practices that violate the law is through issuance of a precedential CAVC decision in an individual appeal. Unfortunately, over the last three decades, precedential CAVC decision-making has not adequately protected veterans from systemic and unlawful VA action. The CAVC rarely issues precedential decisions in the first place. And in the rare case that the CAVC issues a precedential decision to correct unlawful and systemic VA action, the precedential decision only has a limited reach. It provides no relief to the many similarly situated veterans who were unlawfully denied benefits but failed to keep their pending claim alive during the years it takes for the CAVC to issue a precedential decision. Over the 26 months it typically takes for the CAVC to issue a precedential decision,[6] many claimants abandon their pursuit and allow their VA decisions to become final. Alternatively, during their appeals period, they may lack awareness that the VA practices leading to their claims' denial are under challenge. The situation is exacerbated by known delays in the system, and the possibility that VA may prevent issuance of a CAVC precedential decision by mooting the appeal—that is, by agreeing to pay benefits to the individual challenging the legality of the VA's actions.

Congress here has the opportunity to expand the CAVC's supplemental jurisdiction and provide veterans with pending claims the benefits of aggregation.

1. Aggregation of pending claims increases adjudicative efficiency.

Granting CAVC supplemental jurisdiction over pending, non-final claims would substantially improve the adjudicative efficiency of the Court and, consequently, improve decision times for veterans.

The CAVC grapples with a substantial case load. In 2018 alone, the CAVC received 6,802 appeals—surpassing the number of appeals filed in all Article III circuit courts from federal agencies combined.[7]

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[5] *Cf.* David L. De Courcy, *Administrative exhaustion under the Federal Tort Claims Act: The Impact on Class Actions*, 58 BOSTON L. REV. 627, 627 (1978) (drawing an analogous conclusion regarding the structural barriers of the individual exhaustion requirement of the FTCA, which creates the same problem).

[6] *See* FY 2021 CAVC Report at 5, http://www.uscourts.cavc.gov/documents/FY2021AnnualReport.pdf.

[7] *The Class Appeal*, 1457 (comparing ROBERT N DAVIS, STATEMENT OF THE HONORABLE ROBERT N. DAVIS CHIEF JUDGE, U.S. COURT OF APPEALS FOR VETERANS CLAIMS FOR SUBMISSION TO THE UNITED STATES HOUSE OF REPRESENTATIVES COMMITTEE ON APPROPRIATIONS COMMITTEE ON THE APPROPRIATIONS SUBCOMMITTEE ON MILITARY CONSTRUCTION, VETERANS AFFAIRS, AND RELATED AGENCIES 6 (2018) *with* U.S. Courts Administrative Office, Table B-5—U.S. Courts of Appeals Federal Judicial Caseload Statistics (March 31, 2018)).

Other courts have broad jurisdiction to aggregate related claims as a case management tool, allowing them to craft a single decision that is binding on multiple cases with similar facts.[8] Indeed, these types of actions appeared in veterans' benefits litigation prior to the Veterans' Judicial Review Act (VJRA), which created the CAVC.[9] This bill would give the CAVC the same case management tools that other courts use to the benefit of judicial efficiency and the parties and make meaningful its current (limited) authority to aggregate claims.

2. Aggregation of pending claims will improve outcomes for pro se claimants.

Veterans served this country together, but when they leave the service with injuries and disabilities, many represent themselves pro se, to their great disadvantage. Many Veterans Service Organizations (VSOs) face significant resource constraints which limit their ability to provide comprehensive representation to every veteran, especially below the level of the Board. Veterans who decide to go it alone often lack the necessary resources and expertise to navigate a bureaucratically complex system and may be unaware of their rights, the avenues for recourse, or the broader context of similar cases of fellow impacted veterans.[10] In contrast, parties who wish to initiate class actions before the CAVC have access to counsel and resources to aid them in understanding the government procedures applied to their case.

3. Broad aggregation for supplemental jurisdiction will support consistency and uniformity of CAVC decision making.

Aggregated decision making at the CAVC promotes uniform and consistent decision making. Single-judge unpublished CAVC decisions—which constitute the overwhelming majority of

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[8] Article III examples: *Manker v. Spencer*, 329 F.R.D. 110 (D. Conn. 2018); *Kennedy v. Esper*, No. 16-cv-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018); *J.D. v. Azar*, 925 F.3d 1291, 1305 (D.C. Cir. 2019) (affirming certification of a class of children denied abortion access "who are or will be in the legal custody of the federal government."); *Scott v. Quay*, 338 F.R.D. 178, 192 (E.D.N.Y. May 25, 2021) (certifying a class of prisoners "who have or will in the future have satisfied the exhaustion requirement [of the Federal Tort Claims Act]."); *Barfield v. Cook*, No. 3:18-cv-1198, 2019 WL 3562021 (D. Conn. Aug. 6, 2019) (certifying a class of people "who have been or will be diagnosed with Hepatitis C" who "are or will be in the custody of the Connecticut Department of Corrections").

[9] Pub. L. No. 100-687, 102 Stat. 4105 (1988). Pre-VJRA Veterans Benefits examples: *Nehmer v. U.S. Veterans' Administration*, 118 F.R.D. 113, 115 (N.D. Cal. 1987) (certifying a class that included current and former servicemembers who "are eligible to apply to, who will become eligible to apply to, or who have an existing claim pending before the Veteran's Administration" in a challenge the VA's Agent Orange compensation regulation); *Wayne State University v. Cleveland*, 440 F. Supp. 811, 812 (E.D. Mich. 1977), *aff'd in part, rev'd in part on other grounds*, 590 F.2d 627 (6th Cir. 1978) (certifying a class of full-time veteran students, including those with pending claims and those who had not yet sought relief from the VA); *Beauchesne v. Nimmo*, 562 F. Supp. 250, 259 (D. Conn. 1983) (certifying a class of members with current claims and members who have yet to file claims); *National Association of Radiation Survivors v. Walters*, 111 F.R.D. 595 (N.D. Ca. 1986) (certifying conditionally a proposed class of "all past, present and future ionizing radiation claimants who have, or will have, some form of 'active' claim[.]").

[10] *See Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 813 (1985) (highlighting the particular utility of the class action device where "[t]he plaintiff's claim may be so small, or the plaintiff so unfamiliar with the law, that he [or she] would not file suit individually.").

CAVC decisions—can differ on the same point of law.[11] Aggregation provides consistent legal resolutions. Moreover, class members notified of a ruling can themselves or through counsel advocate for compliance at the court, BVA, and regional office (RO) to cure unfair outcomes.

Binding the agency through a court order in aggregated proceedings permits the court to swiftly address and resolve issues, applying decisions uniformly across all relevant cases. This proactive approach eliminates the need to await individual appeals to address the same points of fact or law, thereby expediting the delivery of justice to veterans and assuring that the rule of law is evenly applied to all pending cases that present the same legal and factual questions.

4. Broad aggregation of claims aids in the identification of systemic problems in agency practices.

Aggregating pending agency claims also offers significant advantages to the veterans benefits system itself.

One of the core benefits of broad aggregation is its ability to give the CAVC perspective on the scope of systemic problems. Without the benefit of the class action procedural vehicle, it may not be clear to the court what problems are felt by many, versus those specific to individual claimants. For example, at issue in *Skaar v. McDonough* was an opaque agency practice for calculating radiation exposure for Air Force veterans who had assisted with cleanup after a nuclear disaster in Palomares, Spain in 1966.[12] The widespread effects of this policy on Palomares veterans and the necessity for intervention by precedential decision was not apparent until these claims were aggregated. Aggregation is a powerful tool to give the CAVC a *complete* picture of the problem.

Aggregation provides a unique procedural benefit in retaining jurisdiction to resolve the identified problems at the VA. If challenges to agency policies are dependent on an individual case, there is an ever-present risk that the challenge disappears from the court's view when the individual's case is resolved on alternative grounds.[13] The court may decide the merits of an individual benefits claim without deciding the problematic collateral issue that would be the

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[11] James D. Ridgway, Barton F. Stichman & Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 14 (2016) (outlining critiques of unpublished decisions, such as how they result in backwaters of inconsistent application of law); *Id.* at 25–26 (concluding, based on statistical analysis of CAVC single-judge outcomes, that "outcomes in some individual appeals [] would result in a different outcome had the appeal been adjudicated instead by one or more of the other judges."); *Id.* at 11. ("[S]ingle-judge dispositions have come to dominate to a degree far greater than non-precedential decisions used in other courts of appeals."). One commentator, now a CAVC judge, noted that the CAVC's use of single-judge decisions has created "iceberg jurisprudence" because so much of it exists below the surface. Michael P. Allen, *Significant Developments in Veterans Law (2004-2006) and What They Reveal About the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit*, 40 U. MICH. J.L. REFORM 483, 515 (2007).

[12] *See Skaar v. Wilkie*, 33 Vet. App. 127, 139–40 (2020) (outlining appellant's arguments that the dose estimates and methodologies relied upon by the VA to deny service-connection claims to the Palomares vets was flawed).

[13] *Lippert v. Baldwin*, No. 10 C 4603, 2017 WL 1545672, at *4 (N.D. Ill. Apr. 28, 2017) (collecting cases).

subject of the class action challenge. Thus, a court could choose an alternative theory to grant benefits in the individual's case without having to resolve the problematic collateral issue that would otherwise be subject to challenge. The broad aggregation of claims prevents this from happening because the common question of law is the challenge, and the individual mooting of the lead appellant's case does not derail consideration of the core problem for the remaining class members.[14]

B. Proposed Amendments

NVLSP proposes two edits to § 2(d)(2).

1. *The current proposed bill should be amended to encompass all pending claims at the agency to facilitate the broadest possible aggregation.*

First, § 2(d)(2) should extend supplemental jurisdiction to all pending claims at the agency as of the date of the filing of the class action at the CAVC, not just those pending at the Board.[15] That does not mean that the agency cannot process pending claims while the class action is pending. It simply means that veterans would have the opportunity to appeal their claims after the class action is decided, which would relieve the strain of claimants appealing

The aim of aggregation is to enhance efficiency, justice for claimants, and improvement of the veterans' benefits system through identification and resolution of unlawful agency policies and practices. This objective is furthered by the broadest potential aggregation of claims, encompassing as many claimants affected by unlawful agency action as possible, including those whose cases have not yet reached finality at the agency level at the time of class certification.

2. *Tolling instructions in the current proposed bill require clarification.*

Second, it is important that this bill, overturning the fatal obstacle to class actions imposed by *Skaar*, contains a provision that tolls the running of the appeal periods applicable to class members during the period in which the class action is pending before the CAVC. Otherwise, class members will likely lose the right to appeal their individual claim, if necessary, after the Court decides the common questions at issue for the class.

The text of the bill providing for the tolling of claims should be amended to provide clarity to its operation. In particular, page 8, lines 11-19 suggest that tolling for claims at the Board only applies to the claim of the lead appellant, rather than all claims subject to a pending class action decision at the CAVC.[16] Language needs to be amended to clarify that similarly situates claims

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[14] *See, e.g.*, *Gerstein v. Pugh*, 420 U.S. 103 (1975); *Deposit Guar. Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980); *Monk v. Shulkin*, 855 F.3d 1312, 1316–17 (Fed. Cir. 2017).

[15] *Id.* (currently amending (b)(1) to state that "[t]he Court shall have supplemental jurisdiction to review an eligible claim *pending a final decision of the Board of Veterans Appeals*") (emphasis added).

[16] *See* § 2(d)(2) ("The period during which a claimant may submit a request for administrative review of an eligible claims . . . shall be tolled for the period beginning on the date on which the claimant submits to the Court *a motion for class action review* [].") (emphasis added).

pending at the VA regional offices or the Board of Veterans' Appeals are tolled for the period of time that the putative class action is pending before the CAVC, , whether or not claimants have themselves submitted a motion for class action review. NVLSP proposes language that says, "The appeal period for an agency decision relating to a claim asserted under subsection (b)(1) shall be tolled while the action is pending before the Court and for a period of 60 days after the Court's decision on the claim under subsection (b)(1) becomes final, unless another law provides for a longer tolling period."

II. Limited Remands and Compliance: § 2(c)(2) and § 2(d)(2)

NVLSP strongly supports § 2(c)(2) and § 2(d)(2), outlining a procedure for limited remands of the CAVC. The CAVC has the authority to issue limited remands, but the severance of its jurisdiction over those claims that are remanded to the BVA and below, compounded with the harmful effects of the *Best* and *Mahl* policy adopted by the CAVC more than two decades ago, have contributed to the development of the euphemistically termed "hamster wheel" of veteran's appeals. The authority granted in this bill will ameliorate some of its most harmful effects. Like the supplemental jurisdiction described above, this section would also ensure that the CAVC has tools comparable to other courts that review other agencies' actions. Federal courts routinely use limited remands, where appropriate, to engage in more effective review of agency decisions.[17]

A. The "hamster wheel" crushes veterans.

The "hamster wheel" refers to the devastating effect on veterans of an endless cycle of remands between the CAVC, BVA, and RO. Limited remands would facilitate a quicker path out of this cycle.

1. Remands sever the CAVC's jurisdiction.

The cycle begins with the common practice of the Court to resolve appeals on a piecemeal basis. When the Court concludes that one of the allegations of error has merit, it will usually remand the case to the BVA to correct one error without resolving the other allegations of agency error. When the CAVC does this, it loses jurisdiction over the case. The CAVC already has authority to issue limited remands to the BVA and keep jurisdiction over the case while the BVA handles the limited remand.[18] But the Court rarely exercises this authority. The Court's

[17] *See* Christopher J. Walker, The Ordinary Remand Rule and the Judicial Toolbox for Agency Dialogue, 82 GEO. WASH. L. REV. 1553, 1558 (2014) ("For instance, in cases where courts are skeptical of the agency getting it right on remand, concerned about undue delay, or worried about the petitioner getting lost on remand, some circuits require the agency to provide notice of its final determination, retain panel jurisdiction over the matter, or set deadlines for an agency response to the remand."); *id.* at 1591–94.

[18] *See Skaar v. Wilkie*, 32 Vet. App. 156, 201 (2019). 28 U.S.C. § 2106 provides that the CAVC "may remand the cause and direct entry of such appropriate judgement, decree, or order, or require such further proceedings to be had as may be just under the circumstances." *Accord* 38 U.S.C. § 7252(a) (authorizing the CAVC to "remand [a] matter,

piecemeal approach is a major contributor to the hamster wheel. For example, when one error correction is remanded to the BVA, the BVA may remand that one issue to the RO, without addressing the other allegations of error.[19] When this happens, the court's jurisdictional authority to review the issue and the agency's compliance with its order is severed because the BVA's remand to the RO renders the Board's decision non-final. This severance contributes to the one-step-forward-three-steps-back effect that is termed the "hamster wheel."[20]

2. Actions at the BVA extend the cycle.

The CAVC may remand claims to the BVA, either with a finding of error and instructions to issue a new decision, or with precise direction on how to address findings of error. When considering the new decision, the BVA may then decide that further development is needed and remand the claim back to the RO for that purpose. However, due to any number of administrative pitfalls, such as training deficiencies, problems with findings of credibility, or errors in communication, there may be *repeated* remands to the RO, further exacerbating delays in the claims process.

For many veterans, particularly those who have already endured lengthy delays in resolution, each additional remand may represent a significant setback. By the time a claim reaches the stage of a CAVC appeal, veterans may already have been waiting years, making each remand potentially devastating.

B. The *Best* and *Mahl* policy further extends veteran wait times.

The policy adopted by the CAVC in 2001 in *Best v. Principi* and *Mahl v. Principi* ("*Best* and *Mahl*") exacerbates the "hamster wheel" effect of the claims process just described.[21]

In *Best* and *Mahl*, the CAVC held that when it concludes that an error in the BVA decision requires a remand, the court will generally not address other errors raised in the claim. This means that, although the CAVC has the power to resolve all allegations of error, as a prudential matter, the court resolves cases on the narrowest possible grounds. As a matter of course, the court then vacates and remands for the Board to correct the identified error and issue a new decision. The remanded issue is then subject to possible further remand to the RO, which often means a complete loss of substantive progress for the veteran in the resolution of their claim, and a loss of claim identity at the BVA and CAVC. Even if the BVA does not remand the claim, the

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as appropriate"). It is settled that the BVA is required to conform with CAVC remands. *Stegall v. West*, 11 Vet App. 268 (CAVC 1998).

[19] Under 38 U.S.C. § 7252(a) the CAVC has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." However, the jurisdiction of the Court to review decisions has historically been interpreted to pertain to only "final decisions." See *Cleary v. Brown* 8 Vet. App 305, 307 (1995).

[20] This term can be found in Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 NEB. L. REV. 388, 391 (2011).

[21] 15 Vet. App. 18, 19-20 (2001); 15 Vet. App. 37 (2001).

Board may repeat the other alleged errors that the CAVC did not resolve the first time under the *Best* and *Mahl* policy. The veterans must then appeal the decision back to the BVA.[22]

This pattern reveals the importance of active and involved enforcement within the veterans claims process. Unfortunately, the number of claims that are remanded by the BVA and CAVC each year serve as clear evidence that oversight of processing is required. The measures in this bill address instances where the veterans have been subject to errors in that processing and review at every stage. The CAVC should be able to substantively offer those veterans relief.

C. The bureaucratic deficiencies of the claims process manifest in burdens on the system and the individual veteran.

The inefficiencies of the claims process manifest in burdens on the agency and on the veteran. The lack of quality control and inability to enforce remands lead to artificially extended wait times for veterans. The efforts spent correcting and often repeating administrative errors would be better spent processing the overwhelming backlog of veterans claims.

1. *The combined effect of severance of jurisdiction, excessive remands, and* Best *and* Mahl *manifest as burdens on the system.*

The impact of this bureaucratic challenge does not just impact the lives of affected veterans; it also places a burden on the agency itself. In Fiscal Year (FY) 2023, the Board received 208,155 appeals,[23] and decided 103,245 claims. Of these adjudicated claims, 54,236 were remanded.[24] Only 49,009 of the claims (23%) that were before the BVA in FY 2023 were definitively decided rather than remanded. To put it clearly, *over half* of the Board's decisions resulted in a remand to the RO. This data does not capture claims that have been remanded several times.

An appeal to the CAVC represents one of the final forms of relief that a veteran has when alleging that errors have occurred in the claims process. The average wait time for an appeal to be heard by the Court is about one to one and a half years.[25] Currently, if the veteran is not appealing a legacy claim and has exhausted his or her administrative options at the RO, the average wait time can be over *three years*.[26] If the BVA does not remand the claim, the Board

[22] Many veterans have their claims remanded for errors in the VBA DBQ medical examinations. Clear instructions on how to cure these deficiencies rarely accompany the new examination requests as they move through the administrative process. If the error is repeated, the result will be a further denial of benefits by the RO.
[23] *Board of Veterans' Appeals Wait Times*, https://www.bva.va.gov/decision-wait-times.asp.
[24] *Id.*
[25] See *CAVC Process and Timelines: Court of Appeals for Veterans Claims*, https://cck-law.com/cavc-process-and-timelines-court-of-appeals-for-veterans-claims/,
"But on average, the Court is going to come to a decision on a case within 12 to 18 months, but some cases can take as long as two years if those factors that I mentioned earlier are involved." (f
[26] As of today, the average time a veteran will wait for their initial claim to be processed is 158.4 days. *See The VA claim process after you file your claim*, https://www.va.gov/disability/after-you-file-claim/. The veteran will then wait an average of 154.7 days for their supplemental claim to be decided. See *Supplemental Claims*,

ensures that the one legal error identified by the CAVC is corrected. But not surprisingly, the Board usually does not change the position it previously took and rejects for a second time the allegations of Board error that the CAVC refused to resolve when the case was previously before it.

This system is inefficient, costly, and fundamentally broken. To keep it the same is to fail to fulfill a commitment to America's veterans who are, and will come to be, caught in the VA's hamster wheel.

2. Veterans bear the burden of the inefficiencies of this process.

The veteran will have waited years by the time a single error has been corrected, let alone multiple. Even one year may be too much for a veteran. The undue delay felt by veterans as their claims are bounced between administrative authorities is even more painful when there is a possibility that the remanded issues are often reviewed by both the BVA and the CAVC without any assurance that the errors will be resolved. Telling a veteran that their wait was for nothing is an intolerable outcome.

Sometimes, veterans who suffer from serious disabilities and financial hardships just below the criteria for advancement on the BVA's docket, do not survive to the end of their ride on the hamster wheel. Under the current jurisdictional arrangements of the CAVC, there is no escape.

D. Congress should take this opportunity to improve the veterans benefits process.

The Improvements to Board of Veterans' Appeals § 2(c) of the Appeals Efficiency Act of 2024 presents Congress the opportunity to substantively address the issues mentioned above in a meaningful way; by providing the court with the ability to remand a matter for limited purposes under § (3)(c) (1-2), the CAVC would be able to both establish a system of expedited resolution of errors in BVA decisions and retain jurisdiction on those matters. This would avoid the delays that happen at the very end of the administrative process by ensuring that errors are promptly corrected in accordance with the orders of the Court. By retaining jurisdiction, the Court will have insight into how the Board complies and will be able to quickly respond to any further errors.

This legislation also alleviates some of the inefficiencies and injustices that currently plague the system as a result of the *Best* and *Mahl* policy, without substantially undercutting the CAVC's interest in judicial economy on which the policy rests.

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https://www.va.gov/decision-reviews/supplemental-claim/. For higher-level reviews, the VBA website states that "our goal for completing Higher-Level Reviews is an average of 125 days." However, the average wait time that used to be tracked similarly to supplemental claims has been removed. See *Higher-Level Reviews*, https://www.va.gov/decision-reviews/higher-level-review/. The average wait time for the BVA to complete a resolved claim in FY 2023 was 1.8 years, not including remands, which is the outcome for the majority of claims decided by the BVA. See *Board of Veterans' Appeals Decision wait times*, https://www.bva.va.gov/decision-wait-times.asp.

III. Motion for OGC Opinion: § 2(c)(3)

NVLSP supports this subsection concerning the motion for an Office of General Counsel (OGC) opinion. It is well recognized that the VA appeals adjudication process is dysfunctional in part because there are relatively few objective precedents to guide ROs and the BVA in the meaning of statutes and VA regulations. With few published precedential OGC opinions, and relatively few published decisions from the CAVC, the ROs and the BVA interpret statutes and regulations in an isolated, *sui generis* fashion.

The language proposed in the bill codifies the existing regulation which allows the Board to ask for an OGC opinion and adds the option for the appellant to request such an opinion. This addition will help raise important issues for OGC consideration and, we hope, increase the number of precedential OGC opinions. In turn, this increase will improve consistency and fairness across all benefits appeals. NVLSP would also support an additional provision that clarifies the ability for interested parties to seek judicial review of OGC opinions.

IV. BVA Aggregation: § 2(c)(1)

NVLSP supports, with amendment, § 2(c)(1) of the Appeals Efficiency Act, which explicitly grants aggregation authority to the Board of Veterans' appeals. Agency aggregation can be a useful tool to address agency backlog and increase adjudicatory efficiency. However, Congress must craft this directive clearly so that the Board may accurately operationalize aggregation to accomplish legislative intent. While NVLSP is pleased to see a direct mention of aggregation, the single paragraph dedicated to it does not offer a clear directive for the Board to follow in implementing aggregation at the agency level.

A. BVA aggregation benefits both claimants and the agency.

Board aggregation conserves agency resources by allowing similar issues based on similar facts "to be litigated in an economical fashion."[27] Furthermore, aggregation offers veterans more comprehensive access to legal representation and subject matter expertise. It is unjust to expect individual veterans to undertake the immense burdens of procuring their own experts, and to independently make the intricate legal arguments often demanded of complex benefits claims. For those veterans with limited resources, aggregation poses an efficient, consistent, and fair pathway for claims adjudication.[28]

Next, aggregation promotes uniformity and accuracy of Board decisions. Without aggregation, two veterans seeking identical relief arising from identical facts may nonetheless be subject to disparate outcomes. Aggregation ensures that at least on the shared question of law or fact presented to the Board, these two veterans would receive the same ruling. Such a Board

[27] *Califano v. Yamasaki,* 442 U.S. 682, 701 (1979).
[28] *See Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017).

decision would also be instructive to Regional Offices across the country; when the Board speaks authoritatively on an issue, Regional Offices are given greater direction concerning how to adjudicate related issues.[29]

Finally, aggregation can help reduce the worrisome backlog of cases at the BVA. As of the end of FY 2023, the Board had a backlog of 208,155 appeals.[30] In the same year, the Board was only able to render 103,245 decisions, which included remands from the CAVC, final Board decisions, and remands to the ROs. In FY 2023, the Board took an average of 927 days to render a decision for claims on the AMA docket where the veteran chose to have a hearing.[31] The Board's growing backlog illustrates the compounding effects of the CAVC's limited jurisdiction, the Court and Board's inability to issue effective limited remands, and the Board's inability to aggregate claims. If given the tool of aggregation, the Board can collect significant numbers of claims to be decided in one fell swoop, a sure win for the agency and veterans alike. With aggregation, Congress can considerably alleviate the Board's congestion and bring finality to more claims.

B. The BVA needs formal authority in order to effectively aggregate.

The Board can presently engage in some informal aggregation through its authority of advancement on the docket and creation of new dockets.[32] However, formal aggregation carries a stronger potential for global solutions to commonly recurring questions of law related to the provision of benefits. The proposed legislation attempts to formalize this authority but requires further development in order to be effective. Without clear direction from Congress about the intent behind this aggregation principle, the Board will be left with little guidance and may not accomplish the necessary objectives.

V. Research and Data Collection: § 2(b)(1), (e) & (f)

NVLSP approves of the change made at § 2(b)(1), (e) & (f). Data collection is critical to better understand this complex system and to fuel future changes.

Veterans Claims Quality Improvement Act of 2024

NVLSP supports this bill. BVA judges and others at the Board currently have no formal mechanism for learning about their legal mistakes, much less learning from them. Like the other bills discussed today, this proposed legislation would help consistency and efficiency within the

[29] David Ames, Cassandra Handan-Nader, Daniel E. Ho & David Marcus, *Due Process and Mass Adjudication: Crisis and Reform*, 72 STAN. L. REV. 1 (2020).
[30] *Appeals Adjudicated and Pending (FY 2019-FY 2023)*, DEP'T OF VETERANS AFFS., https://www.bva.va.gov/images/appeals/adjudicated-and-pending-large.jpg (last viewed Nov. 19, 2023).
[31] *AMA Appeals*, BOARD OF VETERANS' APPEALS, https://www.bva.va.gov/images/appeals/ama-appeals-large.jpg
[32] *See* Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 YALE L. J. 1634, 1644 (2017) (describing aggregation at the EEOC, National Vaccine Injury Compensation Program, and Office for Medicare Hearings and Appeals).

appeals system by increasing the quality of decisions and reducing the need for repeated appeals of the same issues and errors.

Veterans Appeals Options Expansion Act of 2024

NVLSP supports this bill with amendment. In particular, NVLSP supports the intent behind treating incorrect forms as intent to file (ITF) claims—namely, that veterans should keep their effective dates as the date they originally filed a claim, even if it was on the wrong form. However, NVLSP suggests that these claims not actually *become* ITFs because of the VA's procedures for handling multiple ITFs or claims filed at different times. If a veteran files another, different claim under the current procedure, that claim will essentially erase all extant ITFs; this does not ultimately benefit the veteran if a submission the veteran thought was a claim was converted to an ITF.

Instead, NVLSP suggests that Congress require VA to process the veteran's claim without requiring the veteran to resubmit if the VA can appropriately determine the intent of that claim.[33] The VA prides itself in saying there is no wrong door to accessing benefits; it should fulfill that mission by accepting claims when it knows what the veteran is seeking. If it cannot determine the veteran's intent, VA should notify the veteran and permit resubmission within a certain period to maintain the original effective date. It is my understanding that this is VA's stated policy already, and NVLSP supports codifying this process.

NVLSP also recommends removing § 4(B) on page 3 which suggests that the veteran is only assigned the docket on the date suggested in § 4(A) if that veteran was previously in the hearing lane. NVLSP believes that this erroneous suggestion is due to the improper inclusion of the "and" between sections (A) and (B).

NVLSP strongly supports the rest of this bill and its overall intent.

TERA Bills

Overall, NVLSP does not fully support either bill's proposed amendments to the toxic exposure risk activity (TERA) examination process. We recognize that there is a problem with overdevelopment of TERA, however the solution is not to instead make TERA exams subject to regular duty to assist metrics or to limit the eligibility for TERA in a way that will likely exclude many of the toxic-exposed veterans.

<u>Toxic Exposures Examination Improvement Act:</u>

NVLSP opposes this bill because it would convert the standard for referring a veteran for a TERA examination to the same standard as all other medical examinations. Determining whether

[33] This would include notice to the veteran so that they can correct the VA if they interpreted the intent incorrectly.

a condition is related to a toxic exposure, however, is a highly complex process requiring specialized expertise. Many toxic-related conditions are ones that, to a lay person or even an untrained medical expert, do not seem like they could possibly be related to toxic exposure. NVLSP believes that this bill would undermine the important goals of the TERA examination process to ensure that toxic-exposed veterans are provided with appropriate and adequate examinations.

NVLSP would support the bill if section (2)(a) were removed, leaving § 2(b) concerning clarification on ILER entries.

Medical Disability Examination Improvement Act of 2024:

NVLSP strongly supports § 3 regarding specification of accounts for certain expenses, as well as § 4 regarding a proposed study on improvements to VA covered medical disability examinations in rural areas.

We do not support § 2 concerning the modification of eligibility requirements for medical nexus examinations for toxic exposure risk activities. Like the Toxic Exposure Examination Improvement Act, this section would undermine the purpose of the TERA examination process by providing it only to a subset of toxic-exposed veterans who served in specific locations or who are savvy enough to specifically request a TERA examination. Such restrictions have no place in a pro-veteran system where the VA has a duty to assist veterans to obtain the benefits they have earned.

Clear Communication for Veterans Claims Act

We support the proposed legislation authorizing a federal assessment of notice letters to increase clarity and organization for the veteran's benefit. As this subcommittee is aware from its recent hearing, notice letters can be long and confusing. We strongly support efforts to make them more veteran friendly.

Fairness for Servicemembers and their Families Act of 2023

NVLSP supports this proposed legislation to consider the impact of inflation on Veterans Affairs Life Insurance benefits by requiring the VA Secretary to provide reports to this Committee comparing the maximum SGLI and VGLI coverage amounts against the Consumer Price Index ("CPI"). However, we suggest two amendments.

First, NVLSP urges this Committee expand the scope of this legislation to include Servicemembers' Group Life Insurance Traumatic Injury Protection Program ("TSGLI") benefits in the required analysis. On May 11, 2005, Congress passed legislation creating the TSGLI program, establishing a short-term financial assistance benefit for traumatically injured servicemembers to offset the financial hardship associated with recovering from traumatic

injuries. As noted by the bill's sponsor, traumatically injured servicemembers "[incur] hospital expenses, meal expenses, travel expenses—never mind the loss [of] income" of family members leaving employment to become full-time caregivers.[34] The intent of the legislation "was to provide an immediate payment . . . for the servicemembers and their families to help with this financial burden with this recovery, with these expenses, and with this full transition back as a full and complete wage-earner in their community, in their society and in their family."[35]

TSGLI benefits—which are considered a rider to the SGLI program—are paid as a one-time, lump-sum benefit ranging from $25,000 to $100,000.[36] However, these amounts have not been adjusted for inflation since the enabling legislation took effect on December 1, 2005. According to the Bureau of Labor Statistics CPI Inflation Calculator, in 2005, the minimum TSGLI benefit of $25,000 has the same buying power as $39,421.49 in February 2024. At the same time, the maximum TSGLI benefit of $100,000 has the same buying power as $157,685.98 in February 2024.

This leads to NVLSP's second recommendation: instead of simply witnessing the effects of inflation on these benefits, Congress should adjust the benefits to account for inflation. Prior to the 2023 enactment of Public Law 117-209, the last increase in maximum SGLI coverage occurred in 2005, when it was raised from $250,000 to $400,000.[37] Servicemembers and their families waited almost 20 years for that increase, and real value of the benefit was significantly lower by the end of that period compared to the beginning. NVLSP would therefore strongly support legislation that would automatically make CPI-adjusted increases to SGLI and TSGLI on a periodic basis.

Caring for Survivors Act of 2023

NVLSP supports this proposed legislation to increase the monthly compensation of Dependency and Indemnity Compensation (DIC) benefits. NVLSP strongly supports providing certain DIC benefits to survivors of veterans with a service-connected disability continuously rated totally disabling for at least five years. In our practice, we often encounter widows and other beneficiaries who are shut out of DIC entirely because the veteran died just shortly before the current 10-year requirement. The current strict cutoff does not reflect the needs and realities

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[34] *Hearing on (1) Draft Bill to Enhance SGLI; (2) P.L. 109-13, Traumatic Injury Protection Provisions; (3) H.R. 1618, the Wounded Warrior Servicemembers Group Disability Assistance Act of 2005 Before the Subcomm. On Disability Assistance and Memorial Affs. of the H. Comm. On Veterans Affs*, 109th Cong. 5–7 (2005) (Statement of Rep. Richard Renzi) (available at https://www.govinfo.gov/content/pkg/CHRG-109hhrg22365/pdf/CHRG109hhrg22365.pdf).

[35] *Id.*

[36] 38 U.S.C. § 1980A(d)(1).

[37] Supporting the Families of the Fallen Act, Pub. L. No. 117-209, 136 Stat. 2244; Amanda Miller, *Opt Out or Pay: All Troops to Automatically Get Life Insurance March 1*, MILITARY.COM (Feb. 24, 2023), https://www.military.com/daily-news/2023/02/24/opt-out-or-pay-all-troops-automatically-get-life-insurance-march-1.html.

of a family that had been receiving disability compensation for a veteran's 100% disability rating for years.

Survivor Benefits Delivery Improvement Act

NVLSP supports this proposed legislation to collect voluntarily supplied demographic data about survivors and for the Secretary to develop a plan to improve outreach to underserved demographics. All eligible veterans and survivors should have equal access to VA benefits like burial benefits and DIC, regardless of their race, ethnicity, where they live, or any other demographic trait.

Veterans' Compensation Cost-of-Living Adjustment Act of 2024

NVLSP supports this legislation.

Love Lives On Act of 2023 and Prioritizing Veterans' Survivors Act

NVLSP takes no position on these bills.

Conclusion

NVLSP encourages this subcommittee to adopt many of the substantive proposals in the proposed legislation but urges the subcommittee to implement the modifications contemplated in this testimony. The overall goal of these bills is to improve both the quality and timing of decisions made at all levels of the VA system through straightforward efforts to make the appeals process more accurate, efficient, clear, and consistent. NVLSP strongly supports those goals and appreciates the work being done by the House Committee on Veterans' Affairs and its distinguished members. We are grateful for the opportunity to provide our testimony on these significant pieces of legislation. NVLSP is committed to working with the members of Congress and all relevant federal agencies to ensure that servicemembers, veterans and their survivors receive the benefits to which they are entitled due to disabilities they incurred as a result of their military service to our nation.

STATEMENTS FOR THE RECORD

Prepared Statement of Disabled American Veterans

Chairman Luttrell, Ranking Member Pappas and Members of the Subcommittee:

DAV (Disabled American Veterans) is grateful to provide testimony for the record for this legislative hearing concerning 12 different pieces of legislation. DAV is a congressionally chartered and Department of Veterans Affairs (VA) accredited veterans service organization (VSO). We provide meaningful claims support free of charge to more than 1 million veterans, family members, caregivers and survivors.

To fulfill our service mission, DAV directly employs a corps of benefits advisors, national service officers (NSOs), all of whom are themselves wartime service-connected disabled veterans, at every VA regional office (VARO) as well as other VA facilities throughout the Nation, including the Board of Veterans' Appeals (Board).

We are pleased to provide our views on the bills impacting service-disabled veterans, their families and the programs administered by the VA that are under consideration by the Subcommittee.

H.R. 1083, the Caring for Survivors Act

Created in 1993, Dependency and Indemnity Compensation (DIC) is a benefit paid to surviving spouses of service members who die in the line of duty or veterans who die from service-related injuries or diseases. DIC provides surviving families with the means to maintain some semblance of economic stability after losing their veteran.

Increase DIC Rates

When a veteran receiving compensation passes away, not only does the surviving spouse have to deal with the loss of the veteran, they also have to contend with the loss of annual income. This loss can be devastating, especially if the spouse was also the veteran's caregiver and reliant on that compensation as their sole income source.

Survivors who rely solely on DIC benefits face significant financial hardships after the death of their loved one. For example, a veteran who is married and receiving compensation at the 100 percent rate would be paid $3,946 a month. Once that veteran passes away, the survivor would only be eligible to receive $1,612.75 a month, a loss of nearly $28,000 a year.

In contrast, monthly benefits for survivors of Federal civil service retirees are calculated as a percentage of the civil service retiree's Federal Employees Retirement (FERS) or Civil Service Retirement System (CSRS) benefits, up to 55 percent. This difference presents an inequity for survivors of our Nation's heroes compared to survivors of Federal employees. The death benefit is about $33,000 annually for Federal employees compared to DIC at $19,353 in 2024.

The Caring for Survivors Act would increase the rate of compensation for DIC to 55 percent of a totally disabled veteran's compensation to correspond with what Federal employee survivors receive, thus providing parity for veterans' survivors and families.

Reduce the 10-Year Rule for DIC

If a veteran is 100 percent disabled, to include unemployable, for 10 consecutive years before their death, their surviving spouse and minor children are eligible for DIC benefits even if the death is not considered service connected.

Conversely, if that veteran dies due to a nonservice-connected condition before they reach 10 consecutive years of being totally disabled, their dependents are not eligible to receive the DIC benefit. This happens even though many surviving spouses put their careers on hold to act as primary caregivers for the veteran, and now with the loss of their loved one, they could potentially be left destitute. DAV believes the requirement of 10 years is arbitrary.

The Caring for Survivors Act would modify the DIC program and institute a partial DIC benefit starting at 5 years after a veteran is rated totally disabled and reaching full entitlement at 10 years. This would mean if a veteran is rated as totally disabled for 5 years and dies, a survivor would be eligible for 50 percent of the total DIC benefit, increasing until the 10-year threshold and the maximum DIC amount is awarded.

DAV strongly supports the Caring for Survivors Act, consistent with DAV Resolution Nos. 039 and 241. We urge Congress to provide parity for DIC compensation in comparison to Federal programs and establish equity concerning the current 10-year rule.

H.R. 2911, the Fairness for Servicemembers and their Families Act

The Fairness for Servicemembers and their Families Act would require the VA to periodically review and report on the maximum coverage available under the Servicemembers' Group Life Insurance (SGLI) and Veterans' Group Life Insurance (VGLI) programs.

From 2006 to 2023, the maximum insurance value available for servicemembers and veterans remained static, diminishing its value for military families affected. H.R. 2911 would improve the financial safety net for veterans, servicemembers, and their families by helping to ensure coverage amounts for the SGLI and the VGLI account for changes in economic trends. Specifically, it would help ensure the maximum group insurance available to servicemembers and veterans account for rising costs by requiring the Secretary to submit a report to Congress indicating the buying power of the current maximum coverage against Fiscal Year 2005 dollars using data from the Bureau of Labor and Statistics.

DAV supports the Fairness for Servicemembers and their Families Act based on DAV Resolution No. 530, calling for reform to life insurance benefits for veterans.

H.R. 3651, the Love Lives On Act

The Love Lives On Act would restore payment of dependency and indemnity compensation (DIC) to surviving spouses who remarry before the age of 55. This legislation would also not allow the termination of annuity payments to surviving spouses solely on the basis of them remarrying. In the case of a spouse that has remarried prior to the age of 55 and before this act becomes law, payments would be resumed. This legislation would also entitle a surviving spouse the opportunity to use the commissary and exchange stores. H.R. 3651, also expands the definition of a surviving spouse and dependent for entitlement to certain benefits, to include veterans benefits and Tricare.

DAV strongly supports the Love Lives On Act in accordance with DAV Resolution No. 241. Removing the remarriage age for surviving spouses has been a long-standing issue for DAV. Surviving spouses who are currently in receipt of DIC benefits should not have to worry about losing their benefits if they remarry before age 55.

H.R. 7100, the Prioritizing Veterans' Survivors Act

The Office of Survivors Assistance (OSA) was established by Public Law 110–389, in October 2008, to serve as a resource regarding all benefits and services furnished by VA to survivors and dependents of deceased veterans and members of the Armed Forces. Additionally, it serves as a principal advisor to the Secretary of Veterans Affairs, working to promote the use of VA benefits, programs, and services to survivors while ensuring that they are properly supported as stated in VA's mission.

On January 30, 2024, Josh Jacobs, VA Under Secretary for Benefits, testified before the House Veterans' Affairs Committee. In his written testimony he noted, "In February 2021, OSA was moved under the Veterans Benefits Administration (VBA) to better align OSA's work with survivors, outreach, and survivors' monetary benefits under the program office that has oversight of several benefit programs available to survivors."

The Prioritizing Veterans' Survivors Act would require the removal of the OSA from VBA and place it directly within the office of the VA Secretary. DAV does not have a specific resolution or a position on this legislation. Our concern lies directly with survivors and dependents receiving the appropriate resources and maximum benefits available.

H.R. 7150, Survivor Benefits Delivery Improvement Act of 2024

Following the passage of P.L. 117–168, the Sergeant First Class Heath Robinson Honoring Our Promise to Address Comprehensive Toxics Act of 2022, known as the PACT Act, VA extended outreach to 385,000 potential survivors who may be impacted. Since then, as of January 1, 2024, VA has received 13,768 DIC claims re-

lated to presumptive conditions. A total of $116 million has been awarded in retroactive benefits to survivors. However, we question if VA reached out to all of the impacted survivors in all locations?

The Survivor Benefits Delivery Improvement Act would require VA to collect demographic data on the survivor population. This could assist VA with outreach to very specific populations. Additionally, this legislation directs VA to develop an outreach program for survivors to make sure that every survivor knows what benefits are available to them.

DAV supports H.R. 7150 in accordance with DAV Resolution No. 241. The onus should not be on survivors to reach out to VA during a difficult time. VA should make every effort to inform all survivors of the resources and benefits available to them.

H.R. 7777, the Veterans' Compensation Cost-of-Living Adjustment Act

The Veterans' Compensation Cost-of-Living Adjustment (COLA) Act would increase compensation rates for VA benefits, including clothing allowance, and dependency and indemnity benefits paid to survivors and families of service members who died in the line of duty or suffer from a service-related injury or disease.

Many service-disabled veterans and their families depend on VA compensation benefits just to make ends meet. This COLA will benefit wounded, injured and ill veterans, their families and survivors by helping to maintain the value of VA benefits.

DAV strongly supports H.R. 7777, in accordance with DAV Resolution No. 226. To avoid any potential delays in applying the increase, we urge swift passage of the Veterans' COLA Act. Without annual COLAs, many disabled veterans, who sacrificed their own health and family life for the good of our Nation, may not be able to maintain the quality of life they and their families deserve.

H.R. 7793: Veterans Appeals Options Expansion Act

The Veterans Appeals Options Expansion Act would address several areas of concern DAV has raised regarding the VA's rejection of claims based on submittal of the wrong form and the increasing backlog of appeals at the Board of Veterans Appeals.

Effective March 24, 2015, VA amended its adjudication regulations adding the Standard Claims and Appeals Forms Regulation, which requires all claims to be on the appropriate VA form. If the veteran uses the wrong form, VA sends a letter to acknowledge they received a claim but noting it was on the wrong form. Further, VA will not accept the submission of the wrong form as an informal claim or as an Intent to File (ITF), thus not establishing the veteran's potential effective date for a grant of benefits.

H.R. 7793, provides, "If an individual with a claim for benefits under the laws administered by the Secretary submits to the Secretary a form under paragraph (1) that is not the correct form prescribed by the Secretary for such claim, the Secretary shall treat such form as an intent to file a claim under section 3.155 of title 38, Code of Federal Regulations, or successor regulation."

This is consistent with recommendations DAV made in our testimony before the Subcommittee on March 20, 2024. We stated, "DAV believes there should never be a wrong door at VA and we recommend that VA reconsider the standardized forms requirement or take an approach that will either accept the wrong form as an Intent to File or if all of the needed information is provided VA should process and decide the claim."

DAV strongly supports this proposed change; however, VA regulations only allow a veteran to have one pending ITF at a time. Therefore, this change could have a negative impact on effective dates as the most recent ITF would negate an already established ITF. We recommend that the language be amended to consider this potential complication and ensure that a veteran's effective date, already established by an ITF, is not impacted.

Additionally, the Veterans Appeals Option Expansion Act would allow veterans to switch Board dockets at any time before their appeal has been assigned to a Board decision-maker. Further, it would require the Board to promptly notify veterans when they have submitted untimely evidence and the consequences of doing so, and would prevent veterans from being moved to the back of the Board's line after the Board sends those veterans' claims back to VBA.

The Board noted in its final Fiscal Year 2023 quarterly report, published on its website, that 103,245 appeals were decided while receiving over 101,000 new appeals. There were 24,145 legacy appeals pending and over 180,000 pending AMA cases totaling 208,155 appeals pending on October 1, 2023. Of the appeals pending,

it noted that AMA appeals on a direct route were pending an average of 577 days, AMA appeals with evidence were pending an average of 682 days and AMA appeals requesting a hearing were pending an average of 700 days. Given the backlog of appeals and those that have been pending for years, there should be an alternative option for veterans.

DAV supports the Veterans Appeals Option Expansion Act in accordance with DAV Resolution No. 220. We believe any appeals reform must preserve or enhance veterans' due process rights and ensure that adjudications are fair, accurate, timely and of acceptable quality.

H.R. 7816, the Clear Communication for Veterans Claims Act

The Clear Communications for Veterans Claims Act would require the VA Secretary to enter into an agreement with a federally funded research and development center, (FFRDC), which are owned by the Federal Government, but operated by contractors, including universities, nonprofit organizations, and industrial firms.

The subject for the FFRDC is the notices and letters issued by the VA to veterans and other claimants. As we highlighted in our testimony before this Subcommittee on March 20, 2024, "it is evident that these letters speak a language that veterans cannot always translate."

Additionally, we recommended that VA take a new look at its letters by concentrating on the language for the reader and not the legal requirements. We suggested the use of focus groups populated with veterans and veterans service organizations to assist in developing language that is understood and clearly conveys information and the intent of the letter.

VA letters should not be structured in a way that induces confusion, anxiety or frustration for veterans. DAV fully supports the Clear Communications for Veterans Claims Act in accord with DAV Resolution No. 220, which calls for meaningful claims and appeals reform.

Discussion Draft—The Veterans Appeals Efficiency Act

This proposed bill, the Veterans Appeals Efficiency Act, would require several reporting and tracking requirements for VBA and the Board to include tracking and maintaining information on Higher Levels Reviews, Supplemental Claims and Notices of Disagreement. Further, it would require tracking on claims pending in the National Work Queue not assigned to an adjudicator, cases remanded by the Board, AMA cases pending a hearing and when a decision-maker did not comply with the Board's decision.

The draft legislation contains other noteworthy requirements such as improvements to the Board, a study and report on common questions of law or fact before the Board and an independent assessment of potential modifications to the authority of the Board.

In principle, DAV would support tracking and reporting information on claims and appeals in order to help resolve the current lengthy timeline for pending appeals. Based on DAV Resolution No. 220, DAV could support this proposed legislation. However, we have concerns over any potential changes to the authority of the Board. The independent review has the ability to provide insights to the process, but before any changes to the Board's authority are contemplated, the VSO and stakeholder community must be engaged in thoughtful and deliberate conversations over any such changes.

Medical Nexus Examinations for Toxic Exposure Risk Activities as Addressed in
Discussion Draft—Medical Disability Examination Improvement Act &
Discussion Draft—Toxic Exposures Examination Improvement Act

For more than 100 years, our servicemembers have been exposed to hazardous environments and toxins, often resulting in negative health impacts, which require future health care and benefits. Historically, it takes VA and Congress decades to establish recognized toxic exposures and related diseases.

Our sense of duty to them must be heightened as many of the illnesses and diseases due to these toxic exposures may not be identifiable for years, even decades, after they have completed their service. When VA and Congress do not recognize toxic exposures or presumptive diseases, toxic exposed veterans are placed at a severe disadvantage in trying to establish direct service connection for diseases. The PACT Act included in Title 38, United States Code, section 1168, which requires VA

to provide a medical nexus examination for toxic exposed veterans if the evidence is not sufficient to establish direct service connection. This removed a barrier for toxic exposed veterans, without this, many claims will be denied without VA requiring an examination or a medical opinion.

Currently, the statute states that if a veteran submits a claim for a condition due to toxic exposures, the VA will provide the veteran an examination as indicated. However, provisions in the Discussion Draft—Medical Disability Examination Improvement Act, would change this statute by redefining who is eligible for the medical nexus opinion. The proposal would change veteran to covered veteran. The statute defines a covered veteran as only those noted directly in the PACT Act.

DAV would not support this proposed change in the Discussion Draft—Medical Disability Examination Improvement Act, as it is defining a toxic exposed veteran with restrictions and limitations for the purpose of a medical nexus examination. Thus, not every toxic exposed veteran would fit in this definition, including those exposed toxins at Ft. McClellan, veterans exposed to PFAS or other toxins. We argue that the congressional intent of the law was to cover all toxic exposed veterans not just a smaller group of veterans.

The Discussion Draft—Toxic Exposures Examination Improvement Act, would also make changes to section 1168 of Public Law 117–168, that does not honor the heightened sense of duty to toxic exposed veterans. This proposal would remove the current requirement, "if the evidence is not sufficient to establish direct service connection." It would change it to "such evidence does not contain sufficient medical evidence for the Secretary to make a decision on the claim". While this would reduce the number of examinations VA would be required to conduct, it creates a barrier for toxic exposed veterans trying to establish direct service connection for a toxin-related disease.

DAV would not support this proposed change in the Discussion Draft—Toxic Exposures Examination Improvement Act. It takes VA and Congress decades to establish toxic exposure related diseases and this proposed change would remove an advantage toxic exposed veterans were guaranteed by the PACT Act.

Discussion Draft—The Veterans Claims Quality Improvement Act

The proposed bill, the Veterans Claims Quality Improvement Act, would provide for certain revisions to the manual of the Veterans Benefits Administration and aims to improve the quality of the adjudication of claims for benefits.

Specifically, it would require the VA General Counsel to review and comment on any revisions to VBA manuals addressing the adjudication of claims. Additionally, it would require the VA General Counsel to develop a training program and provide training for any employees responsible for drafting rules, guidance, or any other types of issuances.

The proposed bill would also require the Chairman of the Board to establish a program to ensure the quality of Board decisions with a requirement to report to the House and Senate Veterans' Affairs Committee annually.

In accordance with DAV Resolution No. 220, we support the discussion draft as currently written to strengthen VBA adjudication manuals, Office of General Counsel opinions, and training programs, which could result in an overall improvement of decisions within VBA and the Board.

In closing, Mr. Chairman, we thank you for the opportunity to submit a statement for the record addressing our concerns on the 12 bills being considered by the Subcommittee.

Prepared Statement of National Organization of Veterans' Advocates, Inc.

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.

Statement for the Record

Before the

House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs

Concerning Pending Legislation

April 10, 2024

Chairman Luttrell, Ranking Member Pappas, and members of the Subcommittee, the National Organization of Veterans' Advocates (NOVA) thanks you for the opportunity to offer our views on pending legislation.

NOVA is a not-for-profit 501(c)(6) educational membership organization incorporated in the District of Columbia in 1993. NOVA represents nearly 850 accredited attorneys, agents, and qualified members assisting tens of thousands of our nation's military veterans, families, survivors, and caregivers seeking to obtain their earned benefits from VA. NOVA works to develop and encourage high standards of service and representation for persons seeking VA benefits.

NOVA members represent veterans before all levels of VA's disability claims process, and handle appeals before the U.S. Court of Appeals for Veterans Claims (CAVC), U.S. Court of Appeals for the Federal Circuit, and the Supreme Court of the United States. As an organization, NOVA advances important cases and files amicus briefs in others. *See, e.g., Henderson v. Shinseki*, 562 U.S. 428 (2011) (amicus); *NOVA v. Secretary of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) (addressing VA's failure to honor its commitment to stop applying an invalid rule); *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (amicus); *NOVA v. Secretary of Veterans Affairs*, 981 F.3d 1360 (Fed. Cir. 2020) (M21-1 rule was interpretive rule of general applicability and agency action subject to judicial review); *Buffington v. McDonough*, No. 21-972 (February 7, 2022) (amicus in support of petition for writ of certiorari before U.S. Supreme Court); *Van Dermark v. McDonough*, No. 23-178 (September 25, 2023) (amicus in support of petition for writ of certiorari before U.S. Supreme Court). In 2000, the CAVC recognized NOVA's work on behalf of veterans with the Hart T. Mankin Distinguished Service Award.

NOVA also advocates for laws to improve the VA disability claims and appeals process. NOVA participated in the stakeholder meetings that resulted in the development and passage of the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55, 131 Stat. 1105 (August 23, 2017) (AMA). As VA has implemented the new system over the last several years, NOVA has provided extensive training to our members on the statute, regulations, and practice under the AMA. We have also gathered information from our members across the country on their experiences advocating for clients under the AMA before the agency, Board of Veterans' Appeals (Board), and CAVC. Our views as expressed below are informed by our members' feedback.

TERA Examination Bills: Toxic Exposures Examination Improvement Act and Medical Disability Examination Improvement Act of 2024

In the PACT Act, Congress defined a "toxic risk exposure activity" as "any activity" that "requires a corresponding entry in an exposure tracking system," e.g., ILER, or "that the Secretary determines qualifies for purposes of this subsection when taking into account what is reasonably prudent to protect the health of veterans." 38 U.S.C. § 1710(e)(4). What the Secretary has generally determined to be a toxic risk exposure activity (TERA) is expansive, and includes (1) air pollutants, e.g., burn pits, sand, dust, particulates, oil well fires, sulfur fires; (2) chemicals, e.g., pesticides, herbicides, depleted uranium with embedded shrapnel, contaminated water; (3) occupational hazards, e.g., asbestos, industrial solvents, lead, paints including chemical agent resistant coating, firefighting foams; (4) radiation, e.g., nuclear weapons handling, maintenance and detonation, radioactive material, calibration and measurement sources, X-rays, radiation from military occupational exposure; and (3) warfare agents, e.g., nerve agents, chemical and biological weapons. *See, e.g.,* All Veterans exposed to toxins and other hazards during military service – at home or abroad – are now eligible for VA health care, *https://www.va.gov/st-louis-health-care/news-releases/all-veterans-exposed-to-toxins-and-other-hazards-during-military-service-at-home-or-abroad-are-now-eligible-for-va/*, March 5, 2024.

NOVA is concerned about how section 303 of the PACT Act governing TERA exams is being translated in the reality of VA's disability examination process. After much consideration and as discussed below, however, we conclude that both bills being proffered here would unacceptably narrow the intent of TERA exams. That is, when passing the PACT Act, Congress intended that any veteran exposed to toxins during service be eligible for a medical examination when filing a claim for direct service connection of a non-presumptive condition.

NOVA members do report frequent situations where VA requests TERA exams that are exempted from the process, e.g., for a presumptive condition or a condition specifically excluded by VA, e.g., claims based on a physical trauma, claims for mental health disorders. These errors require better training and oversight for VA employees, not narrowing the rights of veterans, particularly veterans who might be proceeding without accredited representation.

On this basis, **NOVA does not support either the Toxic Exposures Examination Improvement Act or the Medical Disability Examination Improvement Act of 2024 regarding the threshold changes proposed to the TERA examination process.**

We do, however, support other sections of the Medical Disability Examination Improvement Act of 2024. Specifically, we endorse Section 4's requirement for a study on improvements to VA medical disability examinations in rural areas; Section 5's

requirements for improvements to training for processing medical disability examinations[1]; and Section 6's requirements for review and priority processing of claims where inadequate or unnecessary examinations were used to decide them. Of particular importance in section 6 is the requirement for VA to provide "another examination, if necessary, on a priority basis" and to provide "priority processing for the entirety of [the] impacted claim."

We offer the following suggestions to strengthen this legislation:

1. In Section 5(b)(3), a subsection (E) should be added to require training on the acceptance of private physician examinations under 38 U.S.C. § 5125.

2. Congress should provide definitions for what is an inadequate or unnecessary examination for purposes of Section 6.

Veterans Appeals Efficiency Act

NOVA does not support this bill as written, but we support certain aspects of it with additional revisions.

As an initial matter, NOVA supports collection and publication of accurate data that assists veterans and their representatives in making informed decisions about pursuing claims and appeals. Without a clearer picture of how Section 2 will impact VA's ability to timely issue decisions, however, we cannot support it as written.

Notice of Reason for Certain Assignments. NOVA supports the intent of this provision, but it needs to also include an opportunity for veterans to respond to the notice and waive any additional unnecessary development with safeguards to ensure informed consent.

Authority to Aggregate Certain Claims. NOVA does not categorically oppose the concept of Board aggregation, but does not support this provision as currently written. NOVA members expressed concerns about issues relating to the veteran's privacy and whether the veteran would be able to opt-out of aggregation. NOVA maintains the objectives sought through Board aggregation might better be achieved through an opinion from the Office of General Counsel on a question of law regarding a recurring issue as

[1] Under Section 5 of this draft bill, subsection (2) should be stricken since the CAVC is able to address recurring issues in precedential opinions and should not be compelled to issue advisory opinions through a reporting requirement. In addition, subsection (2) should be stricken because it is inconsistent with the purpose of 38 U.S.C. § 7288(a), which is to summarize the "workload of the Court."

provided elsewhere in the bill. In addition, any larger question of law that may be subject to aggregation could also be addressed by Congress through legislation, i.e., creating legal presumptions for veteran with certain types of service and certain conditions.

Requirement to Ensure Substantial Compliance. The CAVC has held that "[a] previous remand confers on the claimant, as a matter of law, the right to compliance with the remand orders." *Stegall v. West*, 11 Vet.App. 268, 271 (1998). To the extent that Congress seeks to codify this holding to ensure it is not removed in pending or future litigation interpreting the AMA, NOVA supports such codification. We do have concerns, however, regarding what notice and opportunity to respond would be provided. Will the Secretary's waiver and notation of the exercise contain a reason and allow the appellant to have an opportunity to respond without having to appeal to the CAVC or file a motion for reconsideration? Without a reason and proper due process, NOVA cannot support this provision beyond codification of *Stegall*.

Expansion of the CAVC's Jurisdiction under 38 U.S.C. § 7252. NOVA does not support this provision as written. We have concerns regarding how supplemental jurisdiction would work in practice. If the Board is given authority to aggregate claims, can the CAVC then take "supplemental jurisdiction" over one or some of those appeals? Would the aggregate cases at the Board be on hold?

Limited remands. To the extent Congress seeks to codify the CAVC's existing authority to issue limited remands, which it has exercised in some instances, NOVA supports this provision. *See, e.g., Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990) ("We will retain jurisdiction and direct that, upon completion of the remand proceeding, the Secretary supplement the record on appeal to include the further action of the Board."); *Skaar v. Wilkie*, 31 Vet.App. 16, 18 (2019) (CAVC recognized its limited-remand authority when it retained jurisdiction and remanded to the Board for the limited purpose of addressing the veteran's challenge to 38 C.F.R. § 3.311); *Mote v. Wilkie*, 976 F.3d 1337, 1345 (Fed. Cir. 2020) (Federal Circuit recognized the CAVC's "flexibility to fashion appropriate relief in a given case," which would include limited remands).

Study and Report on Common Questions of Law or Fact Before the Board of Veterans' Appeals/Independent Assessment of Potential Modifications to Authority of the Board of Veterans' Appeals. As we discuss below regarding the Clear Communication for Veterans Claims Act, the study and independent report described in these sections need the input of accredited practitioners who regularly appear before the Board. NOVA would support these measures with amendments to provide for such input.

Clear Communication for Veterans Claims Act

NOVA supports the goal of the Clear Communication for Veterans Claims Act. We

incorporate by reference our recent testimony before this subcommittee that addressed the notice letters VA sends to veterans, family members, survivors, and caregivers. National Organization of Veterans' Advocates, Inc., *Statement of Diane Boyd Rauber, Esq., Executive Director,* Before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs Oversight Hearing, "Lost in Translation: How VA's Disability Claims and Appeals Letters Should Be Simplified" (March 20, 2024) (hereinafter NOVA Letters Testimony). In our testimony, we highlighted the lack of readable, understandable, and organized letters sent by VA to claimants and appellants and made suggestions for improvements. With the assistance of a federally funded research and development center to assess current letters and provide solutions for improvement, VA can gain valuable assistance with this process.

What is missing from this legislation as currently written, however, is an important requirement that VA include stakeholders, i.e., accredited advocates and claimants/appellants, in this process. Accredited advocates, as demonstrated at the recent hearing, have extensive experience with providing guidance to veterans as they help them understand letters and make decisions about next steps. Claimants and appellants are the target audience and VA should pilot any proposed improved letters with them. The Subcommittee should include language requiring such collaboration.

Veterans Appeals Options Expansion Act of 2024

NOVA supports aspects of the Veterans Appeals Options Expansion Act of 2024, with additional suggestions for improvements.

Treatment of certain forms as intent to file claims. At the recent Appeals Modernization Act (AMA) Summit held by VA, participating stakeholders uniformly described problems with VA's handling of standardized forms submitted by claimants and appellants. Frequently, VA is rejecting forms where the claimant has submitted an outdated version or a "wrong" form, even though the benefit being sought is clear. Sometimes VA sends confusing instructions, resulting in the claimant being required to resend forms previously sent. *See, e.g.,* NOVA Letters Testimony 9.

Requiring VA to accept a "wrong" form as an intent to file under 38 C.F.R. § 3.155 is a welcome improvement. **To make it easier for claimants, however, the bill should include an option for VA to accept the form as a claim for the specific benefit if it can be determined from the submission.** Adding this option would ensure that, wherever possible, VA reduces the claimant's burden. If VA cannot determine what benefit is being sought, it can then accept the form as an intent to file and let the claimant know of the requirement to complete the application within the year.

Modification of certain policy relating to dockets of Board of Veterans' Appeals.

The amendment to 38 U.S.C. § 7107(a)(4) would restore the veteran's place in line after a remand. This right was relinquished under the AMA, based on the commitment that the Board would adjudicate direct docket decisions within one year and remands would be greatly reduced. Over five years into implementation of the AMA, those expectations have not been met. NOVA testified to these issues in November 2023 and asked Congress to restore the claimant's right to the same docket number on remand if the Board's remand does not result in a full grant by the agency. National Organization of Veterans' Advocates, Inc., *Statement of Diane Boyd Rauber, Esq., Executive Director,* Before the House Committee on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs Oversight Hearing, "Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal" 3-4, 5-7 (November 29, 2023). We support this important amendment.

NOVA also supports the amendment to 38 U.S.C. § 7107(d), which would improve the ability of appellants to move dockets and withdraw a claim. Such a policy will need to consider nuances such as what happens if you want to move from the direct review docket to evidence docket, where the evidence window is currently triggered by the date of the *VA Form 10182*.

Notice of untimely evidence. Notice of untimely evidence is critical information needed by appellants to better manage their case. This amendment not only furthers the nonadversarial system intended by Congress, it also promotes agency efficiency. When appellants clearly understand what evidence can or cannot be considered, it potentially reduces the need for repetitive claims and appeals and helps to alleviate ongoing churn.

CONCLUSION

Thank you again for allowing us to present our views on this important legislation. If you have questions or would like to request additional information, please feel free to contact:

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Prepared Statement of Administrative Conference of the United States

ADMINISTRATIVE CONFERENCE OF THE UNITED STATES

ANDREW FOIS
Chair

April 8, 2024

The Honorable Morgan Luttrell
Chairman
Subcommittee on Disability Assistance
and Memorial Affairs
Committee on Veterans' Affairs
1320 Longworth House Office Building
Washington, D.C. 20515

The Honorable Chris Pappas
Ranking Member
Subcommittee on Disability Assistance
and Memorial Affairs
Committee on Veterans' Affairs
452 Cannon House Office Building
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Dear Chairman Luttrell and Ranking Member Pappas:

The Office of the Chair of the Administrative Conference of the United States (ACUS) is pleased to submit this letter for the record of the Subcommittee's April 10, 2024, legislative hearing. We appreciate the opportunity to provide the Subcommittee information about ACUS resources related to improving the efficiency and quality of adjudications and appeals of claims for benefits under laws administered by the Secretary of Veterans Affairs.

ACUS is a nonpartisan, independent agency in the executive branch charged by statute with making recommendations to the President, federal agencies, Congress, and the Judicial Conference to improve adjudication, rulemaking, and other administrative processes (*see* 5 U.S.C. § 594). ACUS consists of up to 101 members drawn from federal agencies, the practicing bar, scholars in the field of administrative law or government, and others specially informed by knowledge and experience with respect to federal administrative procedure. A presidentially appointed, Senate-confirmed Chair serves as chief executive of the agency and oversees staff within the Office of the Chair. The Office of the Chair supports the work of the membership and undertakes other activities to study and improve federal administrative processes.

ACUS has adopted dozens of recommendations, and the Office of the Chair has produced many additional resources that address federal administrative adjudication. This letter highlights a selection of these materials which you may find helpful in assessing issues of timeliness and quality in adjudications and appeals of claims in programs that experience particularly high caseloads. For a comprehensive list of all ACUS recommendations and resources on administrative adjudication generally, please visit http://www.acus.gov/adjudication.

The Hon. Morgan Luttrell
The Hon. Chris Pappas
April 8, 2024

Timeliness in Administrative Adjudication

Over its long history, ACUS has adopted many recommendations identifying specific methods that agencies have used or might use to improve timeliness and reduce backlogs in administrative adjudication programs.[1]

In Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*,[2] ACUS built upon this body of earlier recommendations, in part to account for advances in technology. It provides a general framework that agencies and Congress can use to both foster an organizational culture of timeliness in agency adjudication—consistent with principles of fairness, accuracy, and efficiency—and devise plans to address increased caseloads, delays, backlogs, and other timeliness concerns when they arise.

While I commend the recommendation to you in its entirety, I believe certain elements may be of particular interest to the Subcommittee as it considers the draft bill entitled, the "Veterans Appeals Efficiency Act of 2024." For example, Section 2(b)(1) of the draft bill would require that the Secretary of Veterans' Affairs (hereinafter, Secretary) use technology to track and maintain information (including information with respect to timeliness) on the Department's adjudication of claims for benefits. Similarly, in paragraph 1 of Recommendation 2023-7, ACUS recommends that agencies collect the data necessary to monitor and detect accurately changes in case processing times at all levels of their adjudication systems (e.g., at the Veterans Benefits Administration (hereinafter, VBA) and Board of Veterans' Appeals (hereinafter, BVA)), identify the cause(s) of changes in case processing times, and devise methods to promote or improve timeliness without adversely affecting decisional quality, procedural fairness, or other objectives. Paragraph 1 further specifies that agencies should track, both within and across the different levels of their adjudication systems, the number of proceedings of each type pending, commenced, and concluded during a standard reporting period (e.g., week, month, quarter, year); the current status of each pending case; and, for each case, the number of days required to meet critical case processing milestones.

To capitalize on the improved situational awareness that these case tracking practices confer, paragraph 3 of Recommendation 2023-7 further recommends that agencies utilize the data they collect to adopt organizational performance goals that encourage and provide clear expectations for timeliness. These self-imposed performance goals could take several forms, as appropriate, including goals contained in agency strategic plans, agency guidelines establishing time limits for concluding cases, and agency policies instituting step-by-step time goals.

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[1] *See* Jeremy S. Graboyes & Jennifer L. Selin, *Improving Timeliness in Agency Adjudication*, pp. 3–6 (Dec. 11, 2023) (report to the Admin. Conf. of the U.S.) (available at https://www.acus.gov/sites/default/files/documents/Improving-Timeliness-Agency-Adjudication-121223.pdf).

[2] Admin. Conf. of the U.S., Recommendation 2023-7, *Improving Timeliness in Agency Adjudication*, 89 Fed. Reg. 1513 (Jan. 10, 2024) (available at https://www.acus.gov/document/improving-timeliness-agency-adjudication).

In light of the mandate contained in Section 2(a) of the draft bill, which would require the Secretary to submit annual reports to Congress on the average length of time a claim (or issue within a claim) is pending before the Secretary following remand from the BVA, I also direct your attention to paragraph 25 of Recommendation 2023-7. Paragraph 25 recommends that agencies publicly disclose key metrics and goals concerning their adjudication programs, including average processing times and aggregate processing data for claims pending, commenced, and concluded during a standard reporting period; any deadlines or processing goals for adjudicating cases; and information about the agency's plans for and progress in addressing timeliness concerns.

Section 2(c)(1) of the draft bill, which would empower the Chairman of the BVA to aggregate appeals that involve substantially similar questions of law or fact, is also well aligned with Recommendation 2023-7. Indeed, in paragraph 6, ACUS recommends that agencies, as appropriate, adopt procedures for aggregating similar claims as a means of improving timeliness. I further direct your attention to Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*,[3] which provides additional guidance and best practices for the use of case aggregation in the context of administrative adjudication.

With respect to Section 2(f) of the "Veterans Appeals Efficiency Act of 2024," which instructs the Secretary to seek to enter into an agreement with an FFRDC for an assessment of the feasibility of permitting the Board to issue precedential decisions, Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*,[4] may be of particular interest to the Subcommittee. In that recommendation, ACUS provides best practices for agencies to employ when considering whether and how to use precedential decisions in their adjudicative systems, including criteria that agencies should consider when determining whether to treat a particular decision or class of decisions as precedential and appropriate processes and procedures for designating decisions as precedential.

Paragraph 15 of Recommendation 2023-7 may also prove instructive as the Subcommittee considers Section 2(g) of the "Veterans Appeals Efficiency Act of 2024." Through that section, the draft bill would require the Secretary to develop and submit to Congress a plan to ensure that claims for benefits are assigned to a Veterans Benefits Administration adjudicator in a timely manner. In paragraph 15, Recommendation 2023-7 similarly urges agencies to engage in evidence-based, transparent strategic planning to better enable them to anticipate and address concerns about efficiency and timeliness in

[3] Admin. Conf. of the U.S., Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication*, 81 Fed. Reg. 40260 (June 21, 2016) (available at https://www.acus.gov/document/aggregation-similar-claims-agency-adjudication).
[4] Admin. Conf. of the U.S., Recommendation 2022-4, *Precedential Decision Making in Agency Adjudication*, 88 Fed. Reg. 2312 (Jan. 13, 2023) (available at https://www.acus.gov/document/precedential-decision-making-agency-adjudication). *See also* Christopher J. Walker, Melissa Wasserman & Matthew Lee Wiener, *Precedential Decision Making in Agency Adjudication* (Dec. 6, 2022) (report to the Admin. Conf. of the U.S.) (available at https://www.acus.gov/document/precedential-decision-making-agency-adjudication-final-report).

their adjudication programs. It also identifies relevant factors and best practices that agencies should consider during their strategic planning processes, ranging from reviews of prior efforts to address timeliness concerns and solicitation of feedback on draft or proposed plans, to the use of pilot studies and demonstration projects to test the effectiveness of different policy solutions prior to their full-scale implementation.

Finally, I refer you to paragraph 27 of Recommendation 2023-7, which sets forth general considerations to assist Congress when drafting legislation to address timeliness in administrative adjudication.

Quality in Administrative Adjudication

In 1973, ACUS recommended that agencies employ quality assurance systems—internal review mechanisms used to detect and remedy both problems in individual adjudications and systemic problems in agency adjudicative programs—to evaluate the accuracy, timeliness, and fairness of their adjudication of claims for public benefits or compensation.[5] Since that time, many agencies have successfully implemented quality assurance systems.

In Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*,[6] ACUS identifies best practices for quality assurance systems drawn from an extensive study[7] of systems implemented since our 1973 recommendation. It provides valuable guidance for agencies on developing and implementing quality assurance systems to proactively identify problems, including misapplication or inconsistent application of the law, procedural violations, and systemic barriers to participation in their adjudication programs. The recommendation also offers many strategies, tools, and techniques that can be implemented to improve quality in adjudication, particularly in systems that experience high caseloads.

While I commend the recommendation to you in its entirety, I direct your attention to elements of the recommendation that might contribute to the draft bill entitled, the "Veterans Claims Quality Improvement Act of 2024." Paragraph 15 of Recommendation 2021-10, in particular, may be of interest to the Subcommittee as it considers Section 3(1) of the draft bill, which would require the Chairman of the BVA to develop policies and procedures for measuring decisional quality and maintaining data on errors. In paragraph 15 of Recommendation 2021-10, ACUS recommends that agencies, particularly those with large caseloads, collect data on, at a minimum, the identities of adjudicators and any

[5] Admin. Conf. of the U.S., Recommendation 73-3, *Quality Assurance Systems in the Adjudication of Claims of Entitlement to Benefits or* Compensation, 38 Fed. Reg. 16840 (June 27, 1973) (Available at https://www.acus.gov/sites/default/files/documents/73-3.pdf).
[6] Admin. Conf. of the U.S., Recommendation 2021-10, *Quality Assurance Systems in Agency Adjudication*, 87 Fed. Reg. 1722 (Jan. 12, 2022) (available at https://www.acus.gov/document/quality-assurance-systems-agency-adjudication).
[7] *See* Daniel E. Ho, David Marcus, & Gerald K. Ray, *Quality Assurance Systems in Agency Adjudication* (Nov. 30, 2021) (report to the Admin. Conf. of the U.S.) (available at https://www.acus.gov/document/quality-assurance-systems-agency-adjudication-final-report).

personnel who assisted in evaluating evidence, writing decisions, or performing other case-processing tasks; the procedural history of the case, including any actions and outcomes on administrative appeals or judicial review; and the issues presented in the case and how they were resolved.

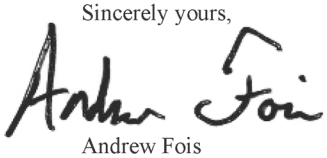
I further direct you to paragraph 17 of Recommendation 2021-10, which recommends that agencies, particularly those with high caseloads, consider leveraging technology, including data analytics and artificial intelligence tools, where appropriate, to help identify errors and other quality issues. These tools can help agencies rapidly and efficiently identify anomalies and systemic trends in their adjudication programs in a more efficient and cost-effective manner.

Finally, paragraph 22 of Recommendation 2021-10 may also be of interest, as it recommends that agencies consider whether to publicly disclose data collected by quality assurance systems in a de-identified form (i.e., with all personally identifiable information removed). Such proactive disclosure would enable continued research and study by individuals outside of the agency, which would promote improvements in both quality assurance systems and, more broadly, the programs in which they are employed.

* * *

I welcome any questions the Subcommittee may have about these or other ACUS materials on timeliness or quality in administrative adjudication. I encourage your staff to contact Conrad Dryland, Attorney Advisor and Special Counsel to the Chair, at cdryland@acus.gov if we can be of assistance on this or any other matter.

Sincerely yours,



Andrew Fois
Chair

Prepared Statement of The American Legion

STATEMENT FOR THE RECORD
OF
THE AMERICAN LEGION

TO THE

SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES

ON

"PENDING AND DRAFT BILLS"

APRIL 10, 2024

EXECUTIVE SUMMARY

BILL	POSITION
Draft Bill - Veterans Appeals Efficiency Act of 2024	Support
Draft Bill - Medical Disability Examination Improvement Act	Support
Draft Bill - Veterans Appeals Options Expansion Act of 2024	Support
H.R. 2911 - Fairness for Servicemembers and their Families Act of 2023	Support
Draft Bill - Prioritizing Veterans' Survivors Act	Support
Draft Bill - Toxic Exposures Examination Improvement Act	Support
Draft Bill - Clear Communication for Veterans Claims Act	Support
Draft Bill - Veterans Claims Quality Improvement Act of 2024	Support

STATEMENT FOR THE RECORD OF
PHILIP DU
DEPUTY DIRECTOR OF BENEFITS AND CLAIMS
NATIONAL VETERANS' AFFAIRS AND REHABILITATION DIVISION
THE AMERICAN LEGION
BEFORE THE
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS
COMMITTEE ON VETERANS' AFFAIRS
UNITED STATES HOUSE OF REPRESENTATIVES
ON
PENDING AND DRAFT BILLS

APRIL 10, 2024

Chairman Luttrell, Ranking Member Pappas and distinguished members of the Subcommittee on Disability Assistance and Memorial Affairs on behalf of National Commander Daniel Seehafer and The American Legion, the country's largest service organization for veterans, comprised of over 1.5 million dues-paying members, we thank you for the opportunity to offer this statement for the record on the following pending and draft Bill.

The American Legion is directed by active Legionnaires who dedicate their time and resources to serve veterans, servicemembers, their families, and caregivers. As a resolution-based organization, our positions are guided by more than 105 years of advocacy and resolutions that originate at the grassroots level of our organization. Every time The American Legion testifies, we offer a direct voice from the veteran community to Congress.

Draft Bill: Veterans Appeals Efficiency Act of 2024

To improve the efficiency of adjudications and appeals of claims for benefits under laws administered by Secretary of Veterans Affairs, and for other purposes.

The Board of Veterans' Appeals (BVA) reviews appeals filed by veterans and dependents from adverse decisions of the Veterans Benefits Administration and other Department of Veterans Affairs (VA) "agencies of original jurisdiction" (AOJ). The appeals before BVA include those filed after February 19, 2019, under the Appeals Modernization Act (AMA) as well as those filed under the previous, or "Legacy," system. At the same time, BVA must address decisions remanded by the Court of Appeals for Veterans Claims (CAVC) and those returning to BVA following a remand an AOJ. By law, BVA is required to give priority to claims in certain categories, which are "advanced on the docket." BVA is consistently failing to meet its timeliness goals for rendering decisions on appeals, resulting in a growing backlog of cases, with veterans waiting multiple years to have their case reviewed by a Veterans Law Judge.

When President Trump signed the AMA at The American Legion's 2017 National Convention in Reno, National Commander Charles E. Schmidt described the Bill as "a simple, fair and appropriate way to ensure that our nation's veterans — and their families — receive their earned

benefits in a timely and efficient manner."[1] This draft Bill would require BVA to track the progress of claims for benefits on a more specific basis, and report progress in reducing the appeals backlog annually to Congress. It would also grant BVA authority to aggregate claims involving similar factual or legal issues for resolution as a group, rather than individually as it does at present. BVA would also be authorized to request an opinion from the VA's Office of General Counsel if an appeal or group of appeals involves a question of law that would benefit from such an opinion.

American Legion *Resolution No. 5: Department of Veterans Affairs Appeals Process* supports any Bill that calls on VA to address all claims, to include its growing inventory of appeals in an expeditious and accurate manner.[2]

The American Legion supports this draft Bill as written.

Draft Bill - Medical Disability Examination Improvement Act of 2024

To amend title 38, United States Code, to improve matters relating to medical examinations for veterans' disability compensation, and for other purposes.

Recent passage of *Promise to Address Comprehensive Toxics (PACT) Act* granted 3.5 million Post 9/11-era veterans and ~52,000 surviving Vietnam War-era veterans exposed to Agent Orange in previously unrecognized locations immediate eligibility for exposure-connected disability and healthcare benefits.[3] While the Department of Veterans Affairs (VA) is commended for already having screened over 5.3 million veterans for toxic exposures, VA's current strict interpretation of recently passed *PACT Act* has arbitrarily created prolonged wait times due to VA's inability to expeditiously conduct PACT Act related Compensation and Pension (C&P) exams. As of March 2024, VA reported that it has already processed more than 1.1 million *PACT Act* related claims, with over 60 percent still pending.[4]

Ensuring timely access to VA C&P exams is an issue that The American Legion as previously supported under Senator Tester's then-proposed *Update Rural Access to Local (RURAL) Exams Act of 2021*.[5] With steep grades and mountain passes, more dramatic weather effects, long distances required, and cost of time and money potentially lost, the VA Office of Rural Health has acknowledged that a lack of reliable transportation is a top-five reason for veterans to cancel or

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[1]Henry Howard, "Trump signs appeals modernization act at American Legion convention", The American Legion Website, August 23, 2017, https://www.legion.org/convention/238958/trump-signs-appeals-modernization-act-american-legion-convention.

[2] The American Legion Resolution No. 5 (2016): Department of Veterans Affairs Appeals Process

[3] "Don't Wait to File for *PACT Act* Care, Benefits," *Legion Online*, Vincent J. "Jim" Troiola, May 18, 2023, https://www.legion.org/commander/258886/don%E2%80%99t-wait-file-pact-act-care-benefits%C2%A0

[4] Department of Veterans Affairs, *VA PACT Act Performance Dashboard,* issue 29 https://department.va.gov/pactdata/wp-content/uploads/sites/18/2024/03/VA-PACT-Act-Dashboard-Issue-29-031524_FINAL_508.pdf.

[5] U.S. Congress, Senate, Press Release: *Rural Veterans' Access to Medical Disability Examinations*. November 16, 2021, Retrieved from: Tester, Moran Champion Bipartisan Bill to Improve Rural Veterans' Access to Medi... (senate.gov)

not attend a scheduled VA C&P appointment.[6] As nearly 57 percent of all Veterans Health Administration (VHA)-enrolled veterans reside in a rural area,[7] securing adequate examination access in rural America must be a priority.

This proposed Bill will not only remove unnecessary delays, but will add additional funding, training, personnel support, and other initiatives to better streamline the examination and claims workflow to ensure that environmentally exposed veterans have their disability claims processed expeditiously. Waiving the medical exam currently required in section 303 of *PACT Act* for veterans who already have well-documented indications of environmental exposures within their records from previous VA medical examinations would help clear the current claims backlog. Allowing this waiver would also address VA workload burnout, a concern raised recently by VA leadership after implementing mandatory overtime for claims personalists upon *PACT Act* rollout. Lastly, Sen. Tester's proposed pilot rural program authorizing for reasonable in-home screenings accommodations or the option to receive a C&P exam from a more localized Community Care vendor would alleviate the arduous travel for rural veterans who face mobility hurdles, geographic barriers, and/or are housebound or autoimmune compromised.

Mandating a direct mechanism for VA contractors to upload any submitted medical evidence introduced by veterans as new evidence during an exam will relieve the duplicative and onerous recordkeeping tasks expected of our ailing veterans. While electronic portals already exist to exchange patient information, only participating external health providers currently have access to VA's electronic health information exchange.[8] Allowing contracted VA examiners a mechanism to gain access will maximize efficiency, curtailing unnecessary redundancy and wait times.

As this proposed Bill reduces unnecessary redundancies and arbitrary bottlenecks, offers alternative access points for rural veterans who face travel or mobility challenges, and ensures adequate staffing and training, The American Legion provides support through *Resolution No. 14: Quality Assurance for Department of Veterans Affairs (VA) Contracted Compensation and Pension (C&P) Examinations*,[9] which urges Congress to pass Bill that will ensure the quality and timeliness of C&P examinations performed by VA contractors, and ensure that they provide veterans with professional, high-quality service. The American Legion also supports this Bill through *Resolution No. 118: Environmental Exposures*,[10] which resolves that veterans reporting to VA medical care facilities claiming exposure to such environmental hazards be provided examinations and treatment which are thorough and appropriate.

The American Legion supports this draft bill as written.

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[6] Thomas F. Klobucar, PhD, "*VHA: An Introduction to the VA Office of Rural Health (ORH) by new Executive Director*," (presentation, quarterly rural health VSO workgroup held virtually on May 5, 2021).
[7] Ibid
[8] U.S. Department of Veterans Affairs, *Veterans health Information Exchange (VHIE), accessed September 8, 2023,* https://www.va.gov/VHIE/VHIE_Participating_Partners.asp.
[9] The American Legion Resolution No. 14 (2021): Quality Assurance for Department of Veterans Affairs (VA) Contracted Compensation and Pension (C&P) Examinations
[10] The American Legion Resolution No. 118 (2016): Environmental Exposures

Draft Bill - Veterans Appeals Options Expansion Act of 2024

To amend title 38, United States Code, to provide an individual with a claim for benefits under the laws administered by the Secretary of Veterans Affairs with more options to appeal a decision of the Secretary with respect to such claim to the Board of Veterans' Appeals, and for other purposes.

The *Veterans Appeals Improvement and Modernization Act of 2017* (AMA) introduced stringent requirements for form submissions and established fixed deadlines for various actions, such as submitting additional evidence and changing appeal lanes. While these measures were well-intentioned, the rigidity of the "correct form" and "timely submission" requirements are leading to unintended and adverse consequences for veterans and other claimants. The current application of the AMA by the Department of Veterans Affairs' (VA) intake staff poses several challenges for veterans. When an application is submitted on a "wrong" form, it is considered as a rejection and requires a resubmission on the appropriate form. This means that consideration of the claim is not started until a completed application on the correct form is received and may also result in the loss of an earlier effective date for earned benefits. The AMA's strict deadlines for submitting additional evidence and for changing appeal lanes without regard for whether the appeal is ready for review by the Board of Veterans Appeals (BVA) are also inflexible.

The American Legion supports a "no wrong door" approach. We also support allowing flexibility to submit additional evidence or change from one appeal option to another if the change does not impose a significant burden on BVA's staff. The draft Bill would require BVA to treat a "wrong form" submission as an intent to file, easing the harshness of claim rejection. It also allows veterans to change appeal dockets until their case is assigned to a BVA employee for review, with no adverse impact on BVA's operations. Additionally, this Bill would require VA to provide notice to veterans who submit evidence outside fixed windows, including their potential opportunity to change dockets.

The American Legion has urged Congress and the VA to address these appeals issues since 2016 when adopting *Resolution No. 5: Addressing growing inventory of appeals in an expeditious and accurate manner*[11] and *Resolution No. 369: Restore VA's Informal Claims and Appeals Process*[12] urging the VA to accept any written correspondence as an intent to file.

The American Legion supports this draft bill as written.

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[11] The American Legion Resolution No. 5 (2016): Department of Veterans Affairs Appeals Process
[12] The American Legion Resolution No. 369 (2016): Restore VA's Informal Claims and Appeals Process

H.R. 2911 - Fairness for Servicemembers and their Families Act of 2023

To amend title 38, United States Code, to require the Secretary of Veterans Affairs to periodically review the automatic maximum coverage under the Servicemembers' Group Life Insurance program and the Veterans' Group Life Insurance program, and for other purposes.

The Veterans' Group Life Insurance (VGLI) is a term life insurance catering to the needs of servicemembers transitioning from active duty to civilian life. It allows servicemembers the opportunity to convert their Servicemember's Group Life Insurance (SGLI) coverage into renewable term insurance, ensuring continued financial protection for themselves and their families. This program represents one of the many commendable efforts by the Department of Veterans Affairs (VA) to provide comprehensive insurance coverage to servicemembers and veterans who might otherwise face challenges in obtaining insurance benefits from private companies due to the unique risks associated with military service or service-connected disabilities. Once enrolled, veterans can augment their coverage by $25,000 on their one-year anniversary of enrollment and subsequently once every five years thereafter, up to the current legal maximum of $500,000, extending coverage until the age of 60. No proof of good health required.

Although VGLI proves to be a popular program for veterans and families, the maximum coverage remained static from year 2006-2023, until passage of *Supporting Families of the Fallen Act* in October 2022, where maximum coverage of SGLI and VGLI were raised to $500,000.[13] When justifying raising the maximum coverages of SGLI and VGLI to account for inflation, the analysis from Military Officers Association of America noted that the $400,000 coverage back in 2005 would be worth $622,565 in September of 2022, after adjustments.[14] However, Bill accounting for inflation adjustments should not wait for another 17 years as surviving military members struggle financially. Instead, inflation should be automatically adjusted.

The American Legion has long advocated for the adoption of more frequent reviews of VA compensation and benefits amount to accurately reflect the ongoing economic environment. Under the *Resolution No. 19: Protection of Veterans' Disability & Compensation,*[15] The American Legion supports Bill to amend for a periodic cost-of-living adjustment increase and an augmentation of the monthly rates of disability compensation. Also, *Resolution No. 377: Support for Veteran Quality of Life*[16] urges Congress and the VA to enact Bill and programs aimed at enhancing, promoting, restoring, or preserving benefits for veterans and their dependents.

The American Legion supports H.R. 2911 as written.

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[13] "Cornyn, Colleagues Introduce Bill to Help Adjust Military Life Insurance for Inflation", U.S. Senate, April 26, 2023, https://www.cornyn.senate.gov/news/cornyn-colleagues-introduce-bill-to-help-adjust-military-life-insurance-for-inflation/

[14] Mark Belinsky, "Long-Overdue SGLI, VGLI Coverage Increase Now Law, But Work Remains", MOAA, October 24, 2022, https://www.moaa.org/content/publications-and-media/news-articles/2022-news-articles/advocacy/long-overdue-sgli,-vgli-coverage-increase-now-law,-but-work-remains/

[15] The American Legion Resolution No. 19 (2023): Protection of Veterans' Disability & Compensation

[16] The American Legion Resolution No. 377 (2016): Support for Veteran Quality of Life

Draft Bill - Prioritizing Veterans' Survivors Act

To amend title 38, United States Code, to clarify the organization of the Office of Survivors Assistance of the Department of Veterans Affairs.

In 2008, Congress established The Department of Veterans Affairs (VA) Office of Survivors Assistance (OSA) to serve as a "principal advisor" to the Secretary of Veterans Affairs on all policies and programs affecting the veteran survivor community. But this office was moved out of the Secretary's office.[17]

Currently, there are four full-time employees within OSA tasked to handle the influx of questions and casework associated with the passage of the *Promise to Address Comprehensive Toxics (PACT) Act*. OSA's staffing level is simply insufficient to meet the demand for the increasing size of clientele as the result. While VA confirmed the pensions office is trained in survivors' issues, survivors continue to decry the inability of the OSA helpline to address their concerns. It must be noted that VA OSA was not only tasked to facilitate access to benefits for bereaved families but also to deploy subject matter experts strategically, ensuring their proximity to enterprise-wise policies and decisions impacting veterans, thereby amplifying the voices of survivors.

With this proposed Bill mandating VA OSA be placed back within the Secretary's office rather than the Veterans Benefit Administration, it would comprehensively address all VA benefits and services for survivors. Without this crucial aspect of appropriate office placement, the core mission of advising the Secretary on policies and legislative matters concerning survivors cannot be fulfilled.

The American Legion resolves to support survivors to the greatest extent feasible and empower VA to pursue its mission. As it stands, the OSA is unable to provide the internal policy guidance and oversight to VA in the name of survivors it was intended to do. American Legion *Resolution No. 18: Comprehensive Supports for Caregiver Support Program,*[18] resolves for VA to extend follow-on support and programs for survivors to the greatest extent feasible for bereaving family members and/or caregivers.

The American Legion supports this draft bill as written.

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[17] Kathleen McCarthy, "Chairman Bost Delivers Opening Remarks at Oversight Hearing to Support Surviving Family Members of Fallen Servicemembers", U.S. House Committee on Veterans' Affairs, January 30, 2024, https://veterans.house.gov/news/documentsingle.aspx?DocumentID=6365

[18] The American Legion Resolution No. 18 (2022): Comprehensive Supports for Caregiver Support Program

Draft Bill – Toxic Exposures Examination Improvement Act

To amend title 38, United States Code, to modify the duty of the Secretary of Veterans Affairs to provide a veteran with a medical examination in connection with certain claims for disability compensation.

In August 2022, President Biden signed the *Promise to Address Comprehensive Toxics (PACT) Act* into law and expanded benefits and services for veterans with toxic exposures during service. The expansion includes toxic exposure screening, education, research, and a new process to handle toxic exposure claims. According to law, if a veteran files a claim for disability and the term "PACT Act" is referenced, a toxic exposure risk activity report, or "TERA Memorandum," is compiled for the Department of Veterans Affairs (VA) medical examiner to review before providing an opinion. 38 U.S.C § 1710 (e)(4) defined "toxic exposure risk activity," or TERA, as a type of military activity that may expose the service member to occupational or environmental hazards. Specific types of activities are required to be logged into the tracking system.

The process of drafting a TERA Memorandum by a VA Veteran Service Representative (VSR) consists of two primary steps: first, identifying whether the veteran engaged in any TERA activities, and second, examining the veteran's Service Treatment Records (STR) within the Individual Longitudinal Exposure Record (ILER) to document any relevant "entries." However, due to lack of definition of what should constitute as an "entry" in ILER, VA clinicians, claims adjudicators, and benefits advisors must shift through all Department of Defense (DoD) data entries captured by ILER for occupational and/or environmental health exposures -- even if the entries may be objectively unrelated to the veteran's TERA. While 38 U.S.C. § 1168(b) offers guidance to the Secretary on exceptions regarding TERA exams, ambiguity persists in the existing statutes. This leads to situations where VSRs continue scheduling TERA exams unnecessarily, resulting in overdevelopment of claims.

This proposed Bill would provide a clear definition of the ILER "entry" and allow VA Compensation and Pension examiners and claims adjudicators to assess whether there is already adequate evidence to reach a decision more effectively. Ultimately, this Bill would eliminate the necessity for unnecessary and repetitive VA-initiated examinations for each TERA-related claim, thereby releasing essential VA resources to address the backlog of PACT claims.
The American Legion supports this Bill through *Resolution No. 123: Increase the Transparency of the Veterans Benefits Administration's Claim Processing,*[19] which petitions Congress to pass Bill that requires VA to be held accountable to VA Secretary's stated goal of achieving an operational state in which no VA claim is pending more than 125 days.

The American Legion supports this draft bill as written.

[19] The American Legion Resolution No. 123 (2016): Increase the Transparency of the Veterans Benefits Administration's Claim Processing

Draft Bill – Clear Communication for Veterans Claims Act

To amend title 38, United States Code, to direct Secretary of Veterans Affairs to enter agreement with the Federally Funded Research and Development Center (FFRDC) for an assessment of VBA notices letters sent to claimants.

The American Legion commends Department of Veterans Affairs' (VA) continuous efforts in improved communication of pertinent information and next steps required for claimants in filing claims. In the legacy system, the VA would often list various regulations and statutes in lengthy Statements of Case to justify claim denial decisions. These convoluted and challenging-to-understand notification letters left claimants feeling alarmed and disheartened, prompting many to seek assistance from veteran service officers or attorneys to navigate the legal language and understand the next steps. While VA has since moved away from this practice, some autogenerated letters are still overly complex. For instance, a simple acknowledgment letter from the VA claims processing center could generate a 20-40 page letter, including a redundant "What We Might Need from You" section, despite the initial claims submission already containing necessary medical opinions and documentation listed in acknowledgement letter. Another trend observed involves a two-page notice letter from the Board of Veterans' Appeals acknowledging a Notice of Disagreement (NOD) or the chosen docket the veteran chose. However, this generic notification letter often lacks any meaningful confirmation that all necessary steps for the chosen appeals "lane" has been completed and no further actions are required on the claimant's behalf. The American Legion service officers have long suggested that a VA-generated checklist would offer more clarity and utility to ensure accurate correspondence and timely follow-through on claims.

This proposed Bill would require an independent research agency to assess whether the VA's current computer-generated notification letters are overly complicated with legal jargon, and whether they should be more tailored to each veteran's specific needs to provide clearer guidance. As claimants and veterans service officers often find themselves rereading auto-generated notice letters multiple times to decipher the exact next steps required, The American Legion welcomes outside agency review.

The American Legion supports this Bill through *Resolution No. 123: Increase the Transparency of the Veterans Benefits Administration's Claim Processing,*[20] which petitions Congress to pass Bill that requires VA to be held accountable to VA Secretary's stated goal of achieving an operational state in which no VA claim is pending more than 125 days.

The American Legion supports this draft bill as written.

[20] Ibid

Draft Bill - Veterans Claims Quality Improvement Act of 2024

To amend title 38, United States Code, to provide for certain revisions to the manual of the Veterans Benefits Administration and to improve the quality of the adjudication of claims for benefits under the laws administered by the Secretary of Veterans Affairs, and for other purposes.

Department of Veterans Affairs (VA) adjudicators are guided by procedures manual, a set of internal instructions promulgated by VA. The manual provides guidance, for example, on the circumstances under which a veteran is entitled to a VA medical examination in connection with the processing of a claim under the VA's duty to assist. The manual reflects the requirements of statutes enacted by Congress as well as VA's own implementing regulations. However, the courts have held that the manual is neither a law nor a regulation. If the manual provision fails to accurately reflect the law or regulations, it will have a material effect on the adjudication of veterans' claims, such as failing to complete appropriate development under the duty to assist, or ordering unnecessary examinations.

The quality of claims processing has been a longstanding concern of The American Legion. We testified at a DAMA hearing in January of 2015 that, "nearly 75 percent of claims presented at Board of Veterans' Appeals (BVA) have either been improperly denied at a VA regional office, or inadequately developed and denied prematurely. Many claims were also appealed because their claims adjudicators failed to follow their legally mandated duties to assist veterans."[21]

This draft Bill requires that any proposed manual revision that would have a material effect on the adjudication of a claim for benefits be reviewed by VA's Office of General Counsel (OGC). The draft Bill also requires OGC to develop and implement a program for training VA employees responsible for drafting rules, guidance, or other issuances regarding the need for OGC review of provisions that would have a material effect on the adjudication of claims. Additionally, the draft Bill introduces comprehensive reforms to enhance the efficiency of BVA and to reduce unnecessary remands.

The American Legion supports this Bill through *Resolution No. 5: Department of Veterans Affairs Appeals Process.*[22] It underscores the Legion's support for Bill that aids the VA in expeditiously and accurately addressing all claims, including its growing appeals inventory.

The American Legion supports this draft bill as written.

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[21] Marty Callaghan, "Legion: VA claims appeals can be 'adjudication purgatory'", Legion Online, January 22, 2015, https://www.legion.org/legislative/225794/legion-va-claims-appeals-can-be-'adjudication-purgatory'

[22] The American Legion Resolution No. 5 (2016): Department of Veterans Affairs Appeals Process

Conclusion

As always, The American Legion thanks this subcommittee for the opportunity to elucidate the position of the over 1.5 million veteran members of this organization. For additional information regarding this testimony, please contact The American Legion Director of the Legislative Division, Julia Mathis, at jmathis@legion.org.

Prepared Statement of Paralyzed Veterans of America

Chairman Luttrell, Ranking Member Pappas, and members of the subcommittee, Paralyzed Veterans of America (PVA), would like to thank you for the opportunity to submit our views on pending legislation impacting the Department of Veterans Affairs (VA) that is before the subcommittee. No group of veterans understand the full scope of benefits and care provided by VA better than PVA members—veterans who have incurred a spinal cord injury or disorder (SCI/D). Several of these bills will help to ensure veterans and their survivors receive earned benefits and support. PVA provides comment on the following bills included in today's hearing.

H.R. 1083, the Caring for Survivors Act of 2023

Losing a spouse is never easy, but knowing that financial help will be available following the death of a loved one can ease this burden. Dependency and Indemnity Compensation (DIC) is intended to protect against survivor impoverishment after the death of a service-disabled veteran. In 2024, this compensation starts at $1,612.75 per month and increases if the surviving spouse has eligible children who are under age 18. DIC benefits last the entire life of the surviving spouse except in the case of remarriage before a certain age. For surviving children, DIC benefits last until the age of 18. If the child is still in school, these benefits might go until age 23.

The rate of compensation paid to survivors of servicemembers who die in the line of duty or veterans who die from service-related injuries or diseases was established in 1993 and has been minimally adjusted since then. In contrast, monthly benefits for survivors of Federal civil service retirees are calculated as a percentage of the civil service retiree's Federal Employees Retirement System or Civil Service Retirement System benefits, up to 55 percent. This difference presents an inequity for survivors of our Nation's heroes compared to survivors of Federal employees. DIC payments were intended to provide surviving spouses with the means to maintain some semblance of economic stability after the loss of their loved one.

PVA supports the Caring for Survivors Act of 2023, which raises DIC rates to meet the 55 percent threshold. Additionally, current law restricts the DIC benefit for survivors if the veteran was disabled for less than 10 years before his or her death. This bill reduces the timeframe a veteran needed to be rated totally disabled from 10 to 5 years which would allow greater numbers of survivors to benefit from this important program.

H.R. 2911, the Fairness for Servicemembers and their Families Act of 2023

PVA supports this legislation which requires the VA to periodically review and report on the maximum coverage available under the Servicemembers' Group Life Insurance and Veterans' Group Life Insurance programs. It would help ensure the relevancy of this pair of financial safety nets by ensuring their coverage amounts account for changes in economic trends.

H.R. 3651, the Love Lives On Act of 2023

When a military member or veteran dies, their spouse is eligible to receive a number of survivor benefits, but current law strips many of them if the spouse remarries again before age 55. This arbitrary age limit often prevents many surviving spouses from remarrying out of concern for the financial stability of their surviving children. These surviving spouses should be freed from the fear of losing the benefits owed to them through their late spouse's military sacrifice. PVA supports the Love Lives On Act, which would ensure they retain many benefits from both the VA and the Department of Defense, regardless of their age at the time of remarriage.

H.R. 7100, the Prioritizing Veterans' Survivors Act

VA's Office of Survivors Assistance (OSA) was established in 2008 (P.L. 110–389) to serve as a resource regarding all benefits and services furnished by the department to the survivors and dependents of deceased veterans and members of the Armed Forces. Congress also intended that OSA would serve as a principal advisor to the VA Secretary, and promote the use of VA benefits, programs, and services to survivors. In February 2021, the OSA was moved from the Office of the VA Secretary to the Veterans Benefits Administration's (VBA), Pension and Fiduciary Service, changing the span of control and altering a key role that Congress intended for the office. PVA has no objection to this bill which seeks to realign the OSA back under the Office of the VA Secretary.

H.R. 7150, the Survivor Benefits Delivery Improvement Act of 2024

PVA supports this bill which directs the VA to collect demographic data on the survivor population. We believe the change would help the department and Congress better understand the utilization of survivor-related benefits and services. It also directs the VA to develop an outreach program for survivors, similar to the Solid Start program, to make sure that every survivor knows what benefits are available to them.

H.R. 7777, the Veterans' Compensation Cost-of-Living Adjustment Act of 2024

PVA supports this legislation which directs VA to increase amounts payable for disability compensation, additional compensation for dependents, the clothing allowance for certain disabled veterans, and DIC for surviving spouses and children. VA would be required to raise compensation amounts by the same percentage as the cost-of-living increase in benefits for Social Security recipients that is effective on December 1, 2024. It also requires the VA to publish the amounts payable, as increased, in the Federal Register.

H.R. 7793, the Veterans Appeals Options Expansion Act of 2024

Veterans often find the claims process extremely confusing so it is not too surprising whenever mistakes are made. Currently, if a veteran filed an initial claim for VA benefits on the wrong form, then later submits the correct one, VA does not backdate payments to the date of the wrong form when that claim is eventually granted. This bill would ensure that veterans are not penalized for making small errors when filling out forms by requiring the department to treat the original submission as an intent to file a claim according to 38 C.F.R. § 3.155. PVA agrees with this change but feels strongly that this section of the bill could be strengthened and confusion over which form to use be fully eliminated if Congress would direct the VA to create a single form that can be used for any kind of claim.

Another provision in the bill requires the Board of Veterans' Appeals to promptly notify veterans when they have submitted untimely evidence and the consequences of doing so, and would prevent veterans from being moved to the back of the Board's line once the veteran's claim is returned to VBA. PVA supports telling veterans when they have filed something that the agency won't look at, but don't think that should be limited to the Board. If we are going to address that problem, it should apply to the whole agency. Finally, the current timeframe to resolve appeals remains unacceptably long and this would allow veterans to switch Board dockets at any time before their appeal has been assigned to a Board decision-maker.

H.R. 7816, the Clear Communication for Veterans Claims Act

Testimony received by this subcommittee on March 20, 2024, revealed many problems with the language the VA uses in its letters to veterans regarding the status of their disability claims and appeals. In recent years, these letters have become lengthy tomes that require veterans to obtain help to interpret them. The Clear Communication for Veterans Claims Act directs the VA to enter into an agreement with a federally funded research and development center for an assessment of notice letters that the department sends to claimants. PVA believes the VA should place greater emphasis on successfully communicating with the veteran, and focus less on legalese. Therefore, we appreciate and strongly support efforts like this to help demystify the VA claims process.

Discussion Draft, the Medical Disability Examination Improvement Act

When a veteran files a claim for disability compensation, the VA often requires a medical disability exam to determine if a medical connection can be established between a condition being claimed and a veteran's military service. Between August 10, 2022, and February 24, 2024, the VA added 264,548 veterans to its healthcare rolls and 1.4 million claims for benefits had been filed. This draft bill seeks to ensure the VA can handle its increasing workload which is largely caused by the PACT Act (P.L. 117–168). Specifically, it would bolster the department's ability to hire more medical disability examiners and improve training for VA claims processing staff to determine if a medical disability exam is necessary or if there's already sufficient existing evidence to grant a claim. Other language in the bill requires the VA to study and develop a plan to improve rural veterans' access to quality and timely medical disability examinations and to develop a mechanism for contract examiners to transmit evidence introduced by veterans during their exam for their claim—a move PVA strongly supports.

Our lone concern with this draft measure rests with the language in section two seeking to change "veteran" to "covered veteran." This differs from current law which states, that if a veteran submits a claim for a condition stemming from toxic

exposures, the VA will provide the veteran an examination as indicated. Without additional information on why such a change is necessary, we could not support its inclusion in the bill.

Discussion Draft, the Toxic Exposures Examination Improvement Act

This draft bill proposes to change the definition of evidence as it pertains to toxic exposure-related claims. Specifically, it would remove the language in 38 C.F.R. § 1168 (a) that currently reads, "if the evidence is not sufficient to establish direct service connection," and replace it with "such evidence does not contain sufficient medical evidence for the Secretary to make a decision on the claim." PVA cannot support this bill at this time because we believe the change may create an unnecessary barrier for veterans seeking to establish a direct service connection for their toxin-related conditions.

Discussion Draft, the Veterans Appeals Efficiency Act of 2024

This draft bill creates additional reporting and tracking requirements for VBA and the Board, such as information on Higher Level Reviews, Supplemental Claims, and Notices of Disagreement. It also requires the tracking of claims pending in the National Work Queue, not assigned to an adjudicator; cases that are remanded by the Board; Veteran Appeals Improvement and Modernization Act cases pending a hearing; and when a decision-maker did not comply with the Board's decision. We recognize the value of and support efforts to track meaningful data to improve the effectiveness and accuracy of the claims process. However, the data sought by this legislation will be meaningless until the VA first fixes their problems with obtaining medical opinions, since the lack of them are constantly creating remandable errors.

We also have concerns with language regarding potential changes to the authority of the Board, and oppose the provision about seeking an opinion from VA's Office of General Counsel (OGC) with respect to a question of law arising in an appeal under review by the Board. Under 38 U.S.C. § 7104 (c), the Board is already bound by the opinions of the chief legal officer (i.e., the General Counsel) and they already do seek opinions from time to time. For example, PVA had a case where we challenged the legal finding of the opinion sought in that specific case and we prevailed on the legal interpretation.

This legislation would open the option to seek an opinion to claimants as well. But, we already have an appeals structure that includes court review, which would be the "final" say on the interpretive question. And, since the VA OGC's authority is unclear as to any interpretive or regulatory authority for the department in individual claims, it would actually be less efficient to seek an OGC opinion, since if the veteran loses, it will certainly be litigated and there is not a time limit on when the OGC produces the opinion. Thus, it delays the veteran's case. While we see the facial appeal of allowing both claimants and the Board to seek an OGC opinion, we don't want the OGC's intervention to be used more than it is now or to be seen as a short cut of some sort. We view this as a Pandora's box that likely would not aid efficiency.

Discussion Draft, the Veterans Claims Quality Improvement Act

This draft legislation requires the VA General Counsel to review and comment on any revisions to the VBA manuals addressing the adjudication of claims. It also requires them to develop a training program and provide training for any employees responsible for drafting rules, guidance, or any other types of issuances.

Aside from potentially slowing the claims process down, we have no concerns with the first two provisions. After the Veterans Auto and Education Improvement Act (P.L. 117–333) was signed authorizing an additional Auto Grant for certain veterans, it took about 10 months for VA Manual M–21 to be updated. Our service officers who are assisting veterans in filing these claims found many VA Regional Offices didn't even know about this benefit until they told them. In effect, it was our personnel who had to teach them about the statutory change, VA's interim procedures, and subsequent changes to the M–21, because it appears the VA does not have an effective, standardized method of updating the field on changes to the manual. We highly recommend language be added to the bill directing the VA to establish such a process.

A third provision in the bill directs the Chairman of the Board to establish a program to ensure the quality of Board decisions with a requirement to report to the Veterans' Affairs Committees annually. This section would impose many requirements related to items that are already the Board's responsibility. Instead of a new law, the Board should be held accountable for these existing requirements.

PVA would once again like to thank the subcommittee for the opportunity to submit our views on some of the bills being considered today. We look forward to work-

ing with you on this legislation and would be happy to take any questions for the record.

Information Required by Rule XI 2(g) of the House of Representatives

Pursuant to Rule XI 2(g) of the House of Representatives, the following information is provided regarding Federal grants and contracts.

Fiscal Year 2023

Department of Veterans Affairs, Office of National Veterans Sports Programs & Special Events—Grant to support rehabilitation sports activities—$479,000.

Fiscal Year 2022

Department of Veterans Affairs, Office of National Veterans Sports Programs & Special Events—Grant to support rehabilitation sports activities—$ 437,745.

Disclosure of Foreign Payments

Paralyzed Veterans of America is largely supported by donations from the general public. However, in some very rare cases we receive direct donations from foreign nationals. In addition, we receive funding from corporations and foundations which in some cases are U.S. subsidiaries of non-U.S. companies.

Prepared Statement of Dean Phillips

Thank you, M. Chair. I would like to begin by thanking the leadership of the House Veterans Affairs Committee – Chairman Bost and Ranking Member Takano – and the Subcommittee on Disability Assistance and Memorial Affairs – Chairman Luttrell and Ranking Member Pappas. I am grateful for all you do to advocate for our Nation's veterans.

I am delighted to testify before the Subcommittee on behalf of my legislation, the *Love Lives On Act*. I thank the Subcommittee for considering this important bill and my esteemed colleague from North Carolina – Mr. Hudson – for his partnership in introducing this measure.

As a Gold Star Son, my gratitude to our servicemembers and their families is immeasurable. Spouses of those who die in service to our Nation make unimaginable sacrifices and deserve unending respect and support in return. Unfortunately, surviving spouses of Federal personnel risk losing survivor benefits if they remarry under the age of 55. My legislation, the *Love Lives On Act*, would ensure military spouses are allowed to retain benefits upon remarriage no matter their age. The bill's protections extend to surviving spouses of active-duty, veteran, and retired military personnel.

I was thrilled to help pass a portion of this legislation in the Fiscal Year 2024 National Defense Authorization Act. That provision granted all remarried surviving spouses access to Commissary and Exchange benefits. This is a great start, but I will continue to push the remaining components of this legislation until we eliminate all remarriage benefit reductions for anyone whose spouse dies in service to our country.

The *Love Lives On Act* would extend other critical benefits to remarried surviving spouses, such as Survivor Benefit Plan and Dependency and Indemnity Compensation, certain electronic medical services, and education benefits under the Fry Scholarship program. These survivor benefits help us honor Gold Star families – we must ensure they receive every single benefit they are owed for their sacrifice.

Thank you very much for the opportunity to advocate for the *Love Lives on Act* and I look forward to our continued collaboration.

Prepared Statement of Marilyn Strickland

Chairman Luttrell, Ranking Member Pappas, and members of this distinguished Committee, thank you for allowing me to submit a statement supporting critical legislation that benefits our active duty servicemembers, Veterans, and their families.

I write today in support of my bill, H.R. 2911, the Fairness for Servicemembers and their Families Act of 2023, which will help ensure that life insurance packages for servicemembers and veterans account for changes in the economy. This legislation will require the Department of Veterans Affairs to periodically review and report on the maximum coverage available under the Servicemembers' Group Life Insurance and Veterans' Group Life Insurance.

Our servicemembers courageously put their lives on the line for their country, and it is our duty to reciprocate. This means ensuring the well-being of their families and loved ones in the event of a tragedy. The importance of servicemembers' life insurance plans keeping pace with economic demands cannot be overstated. A robust life insurance policy will provide grieving families the security they need to navigate the loss of their loved ones with pride and dignity.

The brave men and women who sacrifice their lives deserve peace of mind in knowing that their families are able to take care of final expenses and carry on their legacy. As a daughter of a veteran, I understand the many challenges veterans experience. It is imperative that we ensure those who serve can provide a sense of security for their families.

For nearly two decades, the maximum coverage of the Servicemembers Group Life Insurance and Veterans' Group Life Insurance programs remained stagnant, even as the cost of housing, goods, and services rose. This bill, H.R. 2911, will ensure that these programs are reviewed periodically to verify that their value sufficiently reflects contemporary consumer price index.

Chairman Luttrell, Ranking Member Pappas, and esteemed members of this distinguished Committee, thank you for your unwavering commitment to supporting veterans and their families and for prioritizing their care.

Prepared Statement of Michael Wishnie

House Committee on Veterans' Affairs
Subcommittee on Disability Assistance and Memorial Affairs
Legislative Hearing on Pending Legislation
April 10, 2024

Statement for the Record of Prof. Michael J. Wishnie

My name is Michael J. Wishnie. I am the William O. Douglas Clinical Professor of Law at Yale Law School, where I serve as director of the Veterans Legal Services Clinic. I make this statement in my individual capacity. The views set forth below are my own and do not reflect the views of Yale Law School or my clients.[1]

I write today in support of H.R. 7917, the Veterans Appeals Efficiency Act of 2024, which contains several concrete, practical reform proposals that if enacted would meaningfully improve the adjudication of disability compensation claims and appeals. The Subcommittee's focus on the appeals backlog is welcome. H.R. 7917 wisely does not attempt a wholesale revision of the disability compensation system, but it does make important, common-sense changes that are likely to materially assist veterans and relieve the burdens and frustrations of the notorious "hamster wheel" of recycled claims and delayed relief. The reforms in this bill will increase the overall efficiency and efficacy of veterans' benefits decisions.

First, H.R. 7917 would amend the statutes governing judicial review of veterans' claims at the U.S. Court of Appeals for Veterans Claims (CAVC). The bill would grant the CAVC supplemental jurisdiction over certain pending claims in cases that satisfy the court's standard for aggregation. In addition, the bill would enhance the court's authority to issue limited remands without returning a veteran's claim to the hamster wheel of agency review. I urge the Committee to adopt these twin reforms, which provide the CAVC with necessary tools that other federal courts have used to manage mass adjudications in agency contexts, ensure consistent and fair application of judicial rulings, reduce strategic mooting of cases by the agency, and limit the senseless repetition of unpublished single-judge opinions on the same issue of law or fact. There is no reason veterans seeking judicial review of benefits decisions should be denied recourse to tools available to civilians challenging government decisions by other federal agencies.

Second, the bill would codify into statute the authority of the Board of Veterans Appeals (BVA) to aggregate claims in appropriate cases, as do more than seventy other federal agencies, and would encourage the issuance of precedential opinions by the Office of General Counsel (OGC). Each of these measures would relieve the burden on veterans to repeat arguments and evidence before the agency on the same issues again and again. Aggregation and precedential decisions are modern tools employed by many agencies to promote consistency and fairness in mass-adjudication settings. Here too, there is no reason to deny veterans access to tools that

[1] My students and I represented the veterans in several of the cases mentioned in these remarks: *Monk v. Shulkin*, *Skaar v. McDonough*, *Manker v. Spencer*, and *Kennedy v. Esper*.

civilians may invoke before other federal agencies to manage backlogs, promote uniformity of decision, and speed adjudications.

For the reasons outlined below, I support these reforms in H.R. 7917.

CAVC Supplemental Jurisdiction

The CAVC has the authority to aggregate claims where appropriate,[2] a power it has exercised judiciously to ensure efficient and consistent application of its holdings and to address the Secretary's well-known practice of strategically mooting cases on which VA wishes to avoid a judicial ruling.[3] However, a recent Federal Circuit decision adopted a crabbed construction of the CAVC's jurisdictional statute, frustrating the ability of veterans raising a common issue of law or fact to obtain a single, enforceable resolution. In *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022), the Federal Circuit held that the CAVC can aggregate only those claims that are pending at the Court itself, and that the claims of other veterans whose cases are languishing at the Board or before the VA Regional Offices must be excluded.[4] Because few veterans raising the same issue are within the 120-day appeals window at the same time, the *Skaar* decision undermines the ability of veterans to meet the numerosity requirement of class certification.[5]

Recognizing the severe consequences of excluding veterans with pending claims from any class, five of the twelve judges of the Federal Circuit objected to the *Skaar* decision in a dissent from denial of petition for rehearing *en banc*.[6] "For many years, the system for processing veterans' claims has been inefficient and subject to substantial delays," Judge Dyk explained for the dissenters.[7] "The class action mechanism [at CAVC] promised to help ameliorate these problems to some significant extent, enabling veterans in a single case to secure a ruling that would help resolve dozens if not hundreds of similar claims."[8] But the court's decision in *Skaar* "will effectively eliminate class actions in the veterans context."[9]

In my view, the Federal Circuit committed multiple legal errors in *Skaar*. The result has been to undermine the CAVC's ability to use aggregation, when warranted, to "promot[e] efficiency, consistency, and fairness, and improv[e] access to legal and expert assistance by

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[2] *Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017); CAVC Rules of Practice and Procedure 22, 23.
[3] *Monk v. Shulkin*, 855 F.3d at 1320-21 (noting that "VA's delay in adjudicating appeals evades review" when VA acts to moot mandamus petitions and that "[c]ase law is replete with such examples"); *id.* at 1321 ("Permitting class actions would help prevent the VA from mooting claims scheduled for precedential review" (citing amicus brief)).
[4] In *Skaar*, the Federal Circuit panel rejected CAVC's determination that it had "jurisdiction to certify a class action that includes members who do not have a final Board decision" so long as "(i) the challenged conduct is collateral to the class representative's administratively exhausted claim for benefits—i.e., the class representative has obtained a final Board decision; (ii) enforcing the exhaustion requirement would irreparably harm the class; and (iii) the purposes of exhaustion would not be served by its enforcement." 32 Vet.App. 156, 184-85 (2019) (*en banc*).
[5] *See* CAVC Rules of Practice & Procedure, 23(a)(1).
[6] 57 F.4th 1015 (Fed. Cir. 2023) (Dyk, J., dissenting from denial of rehearing *en banc*).
[7] *Id.* at 1016.
[8] *Id.* at 1017.
[9] *Id.*

parties with limited resources."[10] The CAVC, and as a result veterans, are deprived of an important instrument to "compel correction of systemic error and to ensure that like veterans are treated alike."[11] H.R. 7917 advances a narrow but urgent fix to extend the CAVC's supplemental jurisdiction. This reform will restore aggregation as a vital tool for the CAVC to address VA backlogs and hold the agency accountable to the veterans the agency is charged with serving. That said, the current language in Section 2(d) of H.R. 7917 would be improved by clarifying that the CAVC's supplemental jurisdiction includes claims pending at the Regional Offices, not only those pending final decision at the BVA. I urge that Section 2(d) be amended as proposed by Renée Burbank of the National Veterans Legal Services Program in her testimony.[12]

1. Other federal courts have the jurisdiction to certify mixed classes.

It is well-settled that when civilians challenge federal agency actions in court, those civilians may use aggregation as a procedural tool to treat collectively those cases that have reached the court and like cases still pending at lower levels of the agency decision-making process. The Federal Circuit's interpretation of the CAVC's authority means this tool is effectively denied to veterans.

Section 2(d) of H.R. 7917 remedies this problem by restoring the authority of CAVC to use aggregation to address recurring problems. The CAVC's lack of authority to aggregate non-final claims into class certifications is anomalous. This is a power possessed by other federal courts that review agency actions.[13] In fact, other federal courts hearing claims of former service members are able to aggregate exhausted and unexhausted claims.[14] Without adequate aggregation authority, however, the CAVC class-action mechanism is drained of its utility. This is because veterans appealing final BVA decisions are unlikely to be able to meet the numerosity

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[10] *Monk v. Shulkin*, 855 F.3d at 1320.
[11] *Id.* at 1321.
[12] *Hearing on H.R. 7917 Before the H. Comm. on Veterans' Affairs Subcommittee on Disability Assistance and Memorial Affairs*, Statement of Renée Burbank, Esq., at 8-9 (Apr. 10, 2024).
[13] *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 703–704 (1979) (holding that the inclusion of future claimants in the class was permissible because recipients may benefit from the injunctive relief in the subsequent treatment of their individual claims); *Newkirk v. Pierre*, No. 19-cv-4283, 2020 WL 5035930 at *12 (E.D.N.Y. Aug. 26, 2020) ("[t]he fact that the class includes future members . . . does not pose an obstacle to certification.") (quoting *Westchester Indep. Living Ctr., Inc. v. State Univ. of New York, Purchase Coll.*, 331 F.R.D. 279, 299 (S.D.N.Y. 2019)) (certifying a class including future claimants because injunctive relief sought would affect future class members); *J.D. v. Azar*, 925 F.3d 1291, 1305 (D.C. Cir. 2019); *Barfield v. Cook*, No. 3:18-cv-1198, 2019 WL 3562021 (D. Conn. Aug. 6, 2019); *Tataranowicz v. Sullivan*, 959 F.2d 268, 272-73 (D.C. Cir. 1992); *Dixon v. Heckler*, 589 F. Supp. 1494, 1512 (S.D.N.Y. 1984), *aff'd*, 785 F.2d 1102 (2d Cir. 1986), *cert. granted, judgment vacated on other grounds sub nom. Bowen v. Dixon*, 482 U.S. 922 (1987) (certifying a class including those who had not yet filed for Social Security benefits at the time of class certification); *R.F.M. v. Nielsen*, 365 F. Supp. 3d 350, 369 (S.D.N.Y. 2019) (explaining that a class can include non-final claims because "[t]he plaintiffs do not seek to litigate individual claims but rather a policy the agency uses to adjudicate those claims").
[14] *See, e.g., Torres v. Del Toro*, 2021 WL 4989451 (D.D.C. Oct. 27, 2021) (certifying class of former sailors and Marines wrongfully denied military disability retirement); *Manker v. Spencer*, 329 F.R.D. 110 (D.Conn. 2018) (certifying nation-wide class of former sailors and Marines challenging procedures at Naval Discharge Review Board); *Kennedy v. Esper*, No. 16-cv-2010, 2018 WL 6727353 (D. Conn. Dec. 21, 2018) (same, as to former soldiers challenging procedures at Army Discharge Review Board).

required in order to certify classes in the first instance, and because, even if a class were to be certified, the court would be constrained from simultaneously applying its decision in all claims where it applies—a core consistency and efficiency benefit of the agency class action.

As practiced in other courts, certification of a mixed class of claims (those that have reached the court and those that are still pending before the agency) would maximize the benefits to veterans. As explained in the Federal Circuit's *Monk* opinion and Judge Dyk's dissent from denial of rehearing in *Skaar*, this would promote consistency, fairness, and efficiency for veterans; advance access to justice by ensuring fuller legal and expert assistance; and prevent the Secretary from strategically mooting cases to evade the CAVC's correction of systemic error.[15]

2. *Supplemental jurisdiction would provide the CAVC a tool for efficiently resolving common issues before remanding cases for merits adjudication.*

The supplemental jurisdiction provided in H.R. 7917, Section 2(d), would usefully permit the CAVC to aggregate non-final claims for the narrow purpose of resolving common issues of fact or law. This is distinct from the class action tool as it often operates in other litigation contexts, where the final disposition of a class action claim may involve the resolution of the individual claims on the merits. In the CAVC, the class action mechanism is used to decide a narrow question of law or fact that undergirds the claims of similarly situated veterans.

The challenge in *Skaar v. McDonough* is an example of this concept: Mr. Skaar asked VA to determine whether the particular methodology on which VA relies to calculate radiation exposure for a small class of veterans—those who participated in a clean-up of radioactive plutonium in Palomares, Spain in 1966—reflects "sound scientific evidence," as required by 38 C.F.R. § 3.311(c). Mr. Skaar, with the assistance of his counsel, was able to marshal expert assistance from a Princeton nuclear physicist who demonstrated that the VA's methodology was junk science. Indeed, in Mr. Skaar's individual case, the CAVC agreed that the Board had failed to justify its reliance on the challenged methodology.[16] Recognizing that the hundreds of other veterans whose claims VA evaluates using the same deficient dosimetry methodology may not have access to the same expert opinion and legal representation, and that individual judges of the BVA or CAVC might render inconsistent, unpublished decisions, Mr. Skaar sought to aggregate the claims of other Palomares veterans with whom he had served in 1966. With a class, once the question of the methodology's validity is answered by the court, individual veterans' claims will return to the agency or court for final resolution on the merits.[17] Aggregation does not necessarily result in a mass grant or denial of benefits, but resolution of the common issue that

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[15] *Monk v. Shulkin*, 855 F.3d at 1317; *Skaar v. McDonough*, 57 F.4th at 1017 (Dyk, J., dissenting from denial of rehearing *en banc*) (explaining that the class action mechanism can "help ameliorate" backlog problems "to some significant extent" and "improve access to legal and expert assistance by parties with limited resources.") (internal quotations omitted).

[16] *Skaar v. Wilkie*, 33 Vet.App. 127 (2020).

[17] This is an outcome mandated by the CAVC's limited appellate jurisdiction, which, among other constraining features, prohibits the court from engaging in direct factfinding. 38 U.S.C. § 7261(c).

affects all Palomares veterans' individual claims speeds adjudication of hundreds or thousands of claims. Unfortunately, the Federal Circuit vacated the class on the ground that it improperly included claims pending at the BVA or RO.

Of course, the proposed legislation does not require the CAVC to employ aggregation for every claim. It only ensures that when the court chooses to use the tool, subject to its rigorous standards, it can do so efficiently. The proposed bill would not interrupt the court's discretion in determining which claims are worthy of aggregation, nor would it invite unqualified attorneys to take advantage of the class action mechanism.[18] Rather, extending the court's supplemental jurisdiction to enhance class actions adds a functional tool to the court's toolbox, one familiar in suits challenging federal agency conduct in many other federal courts.

3. *Broad aggregation that includes non-final claims would advance equity, judicial economy, and uniformity in the appeals process.*

An aggregation authority more akin to that available to other federal courts adjudicating claims of civilians against federal agencies would reduce the agency backlog and benefit veterans. The Supreme Court itself has explained that the potential benefits of aggregation include "provid[ing]the most secure, fair, and efficient means of compensating" claimants.[19]

First, aggregation advances equity interests. Many veterans file their claims pro se or with the assistance of Veterans Services Organizations, but certain claims requiring complex fact-finding and legal analysis will benefit from legal representation.[20] Securing counsel to assist in benefits adjudication can be crucial both for the outcome of the case and for the veteran's dignity throughout the process.[21] By aggregating claims, class members who may lack counsel receive the benefit of legal representation from class counsel.

Beyond access to counsel, aggregation also allows veterans with complex cases to utilize expert witnesses that can otherwise be impossible to find. For example, in *Skaar v. McDonough*, veterans who had developed radiogenic conditions from the 1966 nuclear clean-up in Palomares, Spain, challenged the methodology used by VA to calculate their radiation exposure for disability compensation claims. For the lead plaintiff in *Skaar*, extensive evidence from a Princeton nuclear physicist and medical experts was crucial in detailing the impact of radiation exposure on the development of his radiogenic diseases. However, most veterans do not have

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[18] Rule 23(f) of the CAVC's Rules of Practice and Procedure requires the court to assess the competence of class counsel before certifying a class and appointing class counsel.
[19] *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 628-29 (1997).
[20] *See* James D. Ridgway, *Why So Many Remands?: A Comparative Analysis of Appellate Review by the United States Court of Appeals for Veterans Claims*, 1 VET. L. REV. 113 (2009).
[21] Ctr. for Innovation, *Veteran Appeals Experience: Listening to the Voices of Veterans and Their Journey in the Appeals System*, U.S. DEP'T VETERANS AFF. 5 (Jan. 2016), http://www.innovation.va.gov/docs/VOV_Appeals_FINAL_20160115-1.pdf [http://perma.cc/6HFN-KSVV] (finding that veterans often feel alone in a complex legal process that they do not understand, and having an advocate in the process makes them feel acknowledged and understood).

access to such expert testimony. Aggregation would allow all claimants to benefit from access to expertise and counsel that is currently enjoyed by few.

Additionally, aggregation administers justice for claimants for whom damages are too small to hold agencies accountable or to justify the costs of legal counsel.[22] These plaintiffs may also be unaware of how they have been negatively affected by a policy.[23] A Palomares veteran who has submitted several claims, all of which have been denied, may not know about VA's use of the flawed methodology in adjudicating his claim. The class action device makes visible such issues, to the benefit of both the individual veteran and the CAVC, which otherwise would have limited insight into systemic problems facing many veterans. Veterans deserve streamlined procedures that enable them to band together and benefit from advocacy in challenging the sometimes-nonsensical black box of VA procedures and policies.

Second, aggregation advances judicial economy by targeting resources to resolve issues underlying multiple claims. Efficiency is at the heart of class actions, and the exclusion of non-final claims places this benefit at risk. Veterans serving together often experience similar events or circumstances in service, such as exposure to toxic substances in a particular location. Such shared circumstances can give rise to identical claims, raising the same issue of law or fact. Where a court can aggregate non-final claims, it can avoid repetitive adjudication and its accompanying costs to the agency and to veterans. Instead of the RO adjudicators, veterans law judges of the BVA, or a single judge on the CAVC repeatedly deciding cases on the same facts, same evidence, or same legal issue, aggregation allows the CAVC to make the relevant decisions once and for all.[24] Preventing the Court from including non-final claims in a class introduces a significant inefficiency. This opens subsequent individual judgments to the possibility of error, inconsistency, and further challenges in piecemeal litigation, while forfeiting the benefits of streamlined communication of decisions to veterans.

Class actions result in cost savings, for the simple reason that it costs less to adjudicate a claim once than to adjudicate hundreds or thousands of individual claims raising the same issue of law or fact. Repetitive adjudication clogs the system and delays resolution of claims not only by veterans presenting the same question of fact or law, but also by other veterans languishing in the queue while the same question is decided for the umpteenth time. Aggregation would ameliorate the VA's backlog of cases and bring more finality to claims by removing them from the hamster wheel.

Third, aggregation helps to advance uniformity in decision making. Currently, most CAVC decisions are non-precedential and issued by single judges—just like decisions of the

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[22] Adam S. Zimmerman, *The Class Appeal*, 89 U. Chi. L. Rev. 1419, 1441 (2022).
[23] *See Phillips Petro. Co. v. Shutts*, 472 U.S. 797, 813 (1985) (highlighting the class action device where "the plaintiff [is] so unfamiliar with the law, that he [or she] would not file suit individually.").
[24] *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 350 (2011) (highlighting the efficiency benefits of the aggregated resolution of a common question, since "determination of its truth or falsity will resolve an issue that is central to the validity of each one of the claims in one stroke.").

Board. This can lead to inconsistent outcomes for similar claims.[25] Lack of uniformity can also create issues with enforcement and compliance. If different judges rule in conflicting manners on similar issues, VA will be confused about the proper course of action. Aggregation gets in front of this issue by ensuring a singular outcome that is implementable by the defendant.

Limited Remands at the CAVC

It is no secret that the VA disability compensation process suffers from a substantial backlog of claims. This backlog delays the provision of critical support to veterans and their families that they have earned by their service. A second tool available to courts reviewing civilian challenges to decisions of other federal agencies is the limited remand—returning a case to the agency but only briefly and for a specific purpose, thus ensuring that a procedural or substantive deficiency can be cured that is necessary for the court to fully resolve an appeal. The CAVC also can engage in limited remands to the Board, but its authority to do so is constrained. As a result, the court must often order a full remand, resulting in years more of delay at the Board (or further remand to the RO) before the case can return to the CAVC to reach the merits. This is wildly inefficient. H.R. 7917 addresses this problem by expanding the authority of the CAVC to use the sort of limited remand that is available to civilians on judicial review of other federal agency decisions.

For instance, when appealing to the CAVC, a veteran may raise several errors. However, when the CAVC concludes that a remand is necessary on any one error, it will remand the entire claim to the Board without addressing the other errors raised by the veteran.[26] The Board, unable to conduct fact elaboration or issue medical examinations, will frequently remand the claim to the RO without correcting the errors. If the CAVC's ability to issue limited remands were expanded, the court could retain jurisdiction of a case while remanding it to the Board to address one of several errors. In doing so, the veteran is protected from multiple spins on the hamster wheel.

Federal appellate courts use limited remands in a variety of circumstances for the efficient adjudication of appeals.[27] Limited remands may be directed to agencies as well as to

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[25] James D. Ridgway, Barton F. Stichman & Rory E. Riley, *"Not Reasonably Debatable": The Problems with Single-Judge Decisions by the Court of Appeals for Veterans Claims*, 27 STAN. L. & POL'Y REV. 1, 25-26 (2016) (concluding that "outcomes in some individual appeals [] would result in a different outcome had the appeal been adjudicated instead by one or more of the other judges.").

[26] *See Best v. Principi*, 15 Vet.App. 18, 19-20 (2001) ("[I]t has been the practice of this Court that when a remand is ordered because of an undoubted error that requires such a remedy, the Court will not, as a general rule, address other putative errors raised by the appellant."); *Mahl v. Principi*, 15 Vet.App. 37, 38 (2001) (declining to address more than one of the appellant's allegations of errors, as "if the proper remedy is a remand, there is no need to analyze and discuss all the other claimed errors that would result in a remedy no broader than a remand."). Since errors are addressed piecemeal, claims are often returned to the BVA before all substantial errors are corrected.

[27] *See, e.g.*, *Mendia v. Garcia*, 874 F.3d 1118, 1122 (9th Cir. 2017); *Casanova v. Dubois*, 289 F.3d 142, 147 (1st Cir. 2002); *Cent. States v. Creative Dev. Co.*, 232 F.3d 406, 423 (5th Cir. 2000); *Asani v. I.N.S.*, 154 F.3d 719, 729 (7th Cir. 1998); *Amrine v. Bowersox*, 128 F.3d 1222, 1230 (8th Cir. 1997); *see also* Fed.R.App.P. 12.1(b) (discussing limited remands in the context of an "indicative ruling" by a district court).

district courts.[28] Providing the same practical tool to the CAVC will allow veterans to avail themselves of this efficiency, just as can civilians on review of claims against other federal agencies in other federal courts.

The CAVC has recognized its authority to issue limited remands, but only on narrow grounds, based on an opinion of the Court not long after it was established.[29] As a result, it rarely exercises this power. In *Skaar v. Wilkie*, where the CAVC sitting *en banc* in 2019 did order a limited remand, the court identified only two other times in which the court had done so.[30]

One must not lose sight of the veterans and their families who are stuck in the hamster wheel. Throughout their wait for relief, their disabilities persist, and their hardships can intensify. Some veterans do not survive these trials of bureaucracy. Presently, veterans can expect to wait nearly four years for the BVA to decide their appeal.[31] When the veteran finally reaches the CAVC, their claim may have already been subjected to numerous remands. This cyclical process is a devastating reality for veterans. Therefore, it is paramount that the CAVC have tools that allow it to resolve errors expeditiously, efficiently, and with finality. The inability to issue a limited remand to resolve outstanding errors inevitably leads to further remands, further delays, and further pain for veterans and their families.

Part 2(d) of H.R. 7917 would create a new provision, to be codified at 38 U.S.C. 7252(c)(1), to clarify the Court's authority to remand a matter to the Board to address a question of law or fact, including the Court's authority to direct the Board to act within a prescribed period of time. The authority conferred in this new provision is appropriately scoped. It would be an important step to promote more efficient adjudication by the Court and to reduce the inevitable delays of a full remand back into the hamster wheel for the veteran.

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[28] *See, e.g., Ucelo-Gomez v. Gonzales*, 464 F.3d 163, 172 (2d Cir. 2006); *Caterpillar, Inc. v. NLRB*, 138 F.3d 1105, 1107 (7th Cir. 1998); *Am. Gas Ass'n v. FERC*, 888 F.2d 136, 142 (D.C. Cir. 1989); *Sierra Club v. Gorsuch*, 715 F.2d 653, 661 (D.C. Cir. 1983); *NRDC, Inc. v. Coit*, 597 F. Supp. 3d 73 (D.D.C. 2022); *Shank v. Saul*, No. 19-2400 (JEB), 2021 U.S. Dist. LEXIS 8052 (D.D.C. Jan. 15, 2021).

[29] *Cleary v. Brown*, 8 Vet.App. 305, 309 (1995) ("Nowhere has Congress given this Court either the authority or the responsibility to supervise or oversee the ongoing adjudication process which results in a BVA decision. Hence, this Court has no more jurisdiction to intervene in the adjudication of the 'new' decision of the BVA than it did to intervene in the adjudication process which led to the initial decision which precipitated the initial appeal.").

[30] *See Skaar v. Wilkie*, 31 Vet.App. 16, 18 (2019) (*en banc*) (ordering "a limited remand for the Board to provide a supplemental statement of reasons or bases addressing the appellant's expressly raised argument in the first instance"); *id.* (noting two prior instances of limited remands); *see also Gilbert v. Derwinski*, 1 Vet.App. 49, 59 (1990) ("We will retain jurisdiction and direct that, upon completion of the remand proceeding, the Secretary supplement the record on appeal to include the further action of the Board.").

[31] The BVA currently reports the average wait time to be between 314 and 927 days. *See*, Board of Veterans' Appeals Decision Wait Times, https://www.bva.va.gov/decision-wait-times.asp. However, A recent Freedom of Information Act disclosure to the law firm Chisholm Chisholm & Kilpatrick revealed "data indicating that the average appeal before BVA has been waiting for an average of 43 months — 1308 days — despite BVA claiming that decision wait times are between 314 and 927 days." *See* CAVC Process and Timelines, https://cck-law.com/cavc-process-and-timelines-court-of-appeals-for-veterans-claims/.

BVA Reforms

In addition to its important reforms to the CAVC's supplemental jurisdiction and limited remand authority, H.R. 7917 would also reduce the backlog of veterans' benefits appeals by making key improvements at the BVA. H.R. 7917 contains three provisions to this effect: Section 2(c)(1), confirming that the BVA also has the authority to aggregate appeals; Section 2(c)(2), mandating the Board's "substantial compliance" with certain CAVC remand decisions; and Section 2(c)(3), structuring a process to encourage the use of VA OGC opinions to set precedent for Board cases. Each of these measures is sensible and holds promise to further reduce the backlog of appeals at the Board. I will focus on Sections 2(c)(1) and 2(c)(3).

More than seventy other federal agencies have a class action, joinder, or consolidation practice that facilitates aggregation of administrative appeals.[32] The Board is an outlier in refusing ever to group together appeals raising the same question of law or fact for efficient adjudication. In fact, a 2016 study by the Administrative Conference of the United States (ACUS) encouraged federal agencies to make greater use of aggregation procedures, especially in mass-adjudication settings such as veterans' benefits appeals.[33] In response, ACUS adopted Administrative Conference Recommendation 2016-2, "Aggregation of Similar Claims in Agency Adjudication" (June 10, 2016).[34] ACUS recognized that "[f]ederal agencies in the United States adjudicate hundreds of thousands of cases each year," but unlike courts, agencies "have generally avoided aggregation tools that could resolve large groups of claims more efficiently."[35] The result, found the Administrative Conference, is that "in a wide variety of cases, agencies risk wasting resources in repetitive adjudication, reaching inconsistent outcomes for the same kinds of claims, and denying individuals access to the affordable representation that aggregate procedures promise."[36]

Aggregation authority is consistent with already existing procedures and practices of the Board. For instance, a case may "be advanced on motion for earlier consideration and determination" given one of several reasons.[37] The Board is also required by its Rules of Practice to "secure a just and speedy decision,"[38] which aggregation facilitates. Building on the insights of the ACUS study and these preexisting obligations and practices, Section 2(c)(1) of H.R. 7917 wisely confirms that the BVA has authority to aggregate like claims in appropriate

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[32] Michael Sant'Ambrogio & Adam S. Zimmerman, *Inside the Agency Class Action*, 126 Yale L.J. 1634, 1658-59 (2017).
[33] Michael Sant'Ambrogio & Adam Zimmerman, *Aggregate Agency Adjudication*, ADMIN. CONF. OF THE UNITED STATES (2016).
[34] *See* Administrative Conference Recommendation 2016-2, *Aggregation of Similar Claims in Agency Adjudication* (2016), https://www.acus.gov/sites/default/files/documents/aggregate-agency-adjudication-final-recommendation_1.pdf.
[35] *Id.* at 1.
[36] *Id.*
[37] 38 U.S.C. § 7207(b); 38 C.F.R. § 20.800(c)(1).
[38] 38 C.F.R. § 20.1(b).

circumstances. I also support the request for amended language to clarify the operation of this mechanism, as stated by Renée Burbank, NVLSP, in her testimony.[39]

Moreover, Section 2(c)(3) of H.R. 7917 would structure a process to encourage issuance of VA OGC opinions, a form of agency precedent that would reduce repetitive and inconsistent decisions by individual members of the Board, and therefore reduce the backlog of appeals as well. As the Administrative Conference Recommendation 2016-2 put it: "Agencies should consider using a variety of techniques to resolve claims with common issues of fact or law, especially in high volume adjudication programs. In addition to [aggregation] . . . these techniques might include the designation of individual decisions as 'precedential.'"[40]

In conclusion, I strongly urge the Committee to enact H.R. 7917, especially Sections 2(c) and 2(d). The latter grants the CAVC supplemental jurisdiction and codifies its authority to issue limited remands. The former confirms the BVA's authority to aggregate claims, mandates substantial compliance with certain CAVC remands, and structures a process to promote issuance of more precedential decisions through the VA OGC. Together, these measures will materially reduce the BVA appeals backlog while advancing uniformity and consistency of decisions, fairness to veterans and families, and more equitable access to justice.

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[39] *Hearing on H.R. 7917*, *supra* note 12 at 14.
[40] Administrative Conference Recommendation, *supra* note 35 at 3.

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