NVLSP

NATIONAL VETERANS LEGAL SERVICES PROGRAM

Statement of

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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

[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.