STATEMENT OF
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U.S. COURT OF APPEALS FOR VETERANS CLAIMS

FOR SUBMISSION TO THE
UNITED STATES HOUSE OF REPRESENTATIVES
COMMITTEE ON VETERANS' AFFAIRS
SUBCOMMITTEE ON DISABILITY ASSISTANCE AND MEMORIAL AFFAIRS

APRIL 10, 2024

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 United States 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.