

STATEMENT OF GABRIEL STULTZ
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PARALYZED VETERANS OF AMERICA
FOR THE
SUBCOMMITTEE ON ECONOMIC OPPORTUNITY
OF THE
HOUSE COMMITTEE ON VETERANS' AFFAIRS
CONCERNING
PENDING LEGISLATION

JUNE 29, 2017

Chairman Arrington, Ranking Member O'Rourke, and members of the Subcommittee, Paralyzed Veterans of America (PVA) would like to thank you for the opportunity to provide our views on pending legislation before the Subcommittee.

H.R. 282, the "Military Residency Choice Act"

PVA supports the Military Residency Choice Act. Forced moves between states, sometimes more than once in a given year, lead to complicated and burdensome tax situations for service members. The Service Members Civil Relief Act alleviated this burden by allowing them to keep one tax domicile or state of residence throughout their career. The Military Spouse Residency Relief Act (MSRRA) later extended the same benefit to spouses who share the same domicile or residence as the service member.

The caveat in the law requiring the couple to share the same state unfortunately excludes from the benefit a number of military spouses who marry after the service member established domicile or residency elsewhere. For example, if the service member maintained his home state domicile of Florida while stationed in Georgia, and then he marries his spouse who is a resident of Georgia, the spouse is unable to maintain her Georgia residency for tax purposes when the service member subsequently gets stationed in Kentucky. While she can feasibly maintain domicile in Georgia, current law does not protect her from statutory residency laws in Kentucky. If she was able to independently establish domicile in Florida, she would be eligible for this benefit upon moving to Kentucky. Similarly, if the service member changed his domicile to Georgia, she would be eligible. But it is unlikely the spouse can meet the requirements for Florida, and because Florida has no state income tax, few service members would abandon that state as their domicile.

The language used permitting the spouse's election of the service member's state "regardless of the date on which the marriage . . . occurred" leaves some ambiguity in the wake of evolving marital laws. State tax agencies may fail to realize this bill's intent. For clarity, we suggest the committee include language indicating that the spouse's inability to independently establish

domicile or residency within the service member's designated state shall not be a bar to such an election. We would also offer this same suggestion for the language in the proposal amending 50 U.S.C. § 4025 pertaining to residency and voting rights.

H.R. 1690, the “Department of Veterans Affairs Bonus Transparency Act”

PVA supports greater oversight of Department of Veterans Affairs' (VA) utilization of bonuses and other incentives. Over the last few years, numerous instances of gross mismanagement by senior officials and misconduct among the rank-and-file within VA have been exposed. The impact on veterans produced a national outrage. But what really inflamed the issue was the fact that in many of these instances, some leading to avoidable harm, the employee's job was not only protected, but he or she collected a bonus. The recent passage of the Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 included provisions allowing VA to claw back bonuses earned through misconduct.¹ This is a welcome step forward because it continues to incentivize hardworking employees while punishing those who put themselves before the veterans they serve. This proposal considered here dovetails nicely with this recently enacted provision. With roughly \$230 million allotted for VA bonuses this year alone, it is important to keep a watchful eye on what type of behavior VA is rewarding.

H.R. 2631, the “Justice for Service Members Act of 2017”

The Supreme Court of the United States recently denied a petition for certiorari in *Ziober v. BLB Resources, Inc.* on June 19, 2017.² In doing so, the Court sent a clear signal to Congress that veterans and service members subjected to arbitration as part of an employment contract will not find relief in the courts when they end up not liking the forum. A number of the federal circuit courts took up the question of whether a provision of the Uniformed Services Employment and Reemployment Rights Act (USERRA) precludes the enforcement of individual contracts to arbitrate employment disputes.³ Arbitration is considered a choice of forum, rendering it a procedural, not substantive, aspect of litigation. Because the language in USERRA does not suggest that the protections extend to procedural rights, each circuit concluded that no such prohibition exists in the statute. The Supreme Court's decision leaves this collective interpretation undisturbed.

It is important to note that the Federal Arbitration Act (FAA) “was enacted in response to judicial hostility to arbitration.”⁴ Subsequent jurisprudence has “established a liberal policy of favoring arbitration agreements.”⁵ In fact, the burden is on the veteran “to show that Congress intended to preclude a waiver of a judicial forum for the particular claim.”⁶ This comes from the belief that arbitration “allows a plaintiff to vindicate his or her substantive statutory rights to the

¹ Pub. L. No. 115-41 (2017).

² *Ziober v. BLB Resources, Inc.*, 839 F.3d 814 (9th Cir. 2016), *cert. denied*, No. 16-1269, 2017 WL 1437638 (U.S. June 19, 2017).

³ *Garrett v. Circuit City Stores*, 449 F.3d 672 (5th Cir. 2006); *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559 (6th Cir. 2008); *Ziober v. BLB Resources, Inc.*, 839 F.3d 814 (9th Cir. 2016); *Bodine v. Cook's Pest Control Inc.*, 830 F.3d 1320 (11th Cir. 2016).

⁴ *CompuCredit Corp. v. Greenwood*, 565 U.S. 95, 97 (2012).

⁵ *Id.* at 98.

⁶ *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991).

same extent as filing a lawsuit in federal court.”⁷ Some veterans have unsuccessfully argued that the legislative history indicated an intent to preclude arbitration, but even if the history supported their claims, courts as a matter of practice do not consider legislative history unless the statute is ambiguous. Legislative history is rarely used in statutory interpretation, and it should not be relied upon.

If Congress intends to preclude forced arbitration of disputes arising under USERRA, it must do so in unmistakable language. Two circuit judges in separate cases went so far as to write concurring opinions to express the importance of clearly articulating congressional intent to preclude forced arbitration in light of the strong policies favoring arbitration.⁸ We support this legislation because it does just that. We appreciate that our laws and jurisprudence have placed arbitration on equal footing with legislation. And this bill permits veterans and their employers to continue to utilize an arbitral, instead of judicial, forum to resolve disputes if they so choose. We find, though, that veterans seeking protections under USERRA are doing so precisely because of the significant risk of discrimination placed upon them when forced to leave their job for months or even over a year in order to serve their country. Growing numbers of employers are turning to mandatory pre-dispute arbitration agreements, and in light of the sacrifices veterans make, it is consistent with the intent of USERRA to afford them every advantage in ensuring their rights remain protected.

H.R. 2772, the “SEA Act”

The VA Senior Executive Accountability Act or “SEA Act” would require the VA Secretary to personally approve senior executive reassignments. It would also require semiannual reporting to Congress on the reasoning for such reassignments. We will echo some of our comments above discussing H.R. 1690. Two years ago, seniors executives were caught gaming the system through beneficial reassignments. This practice went unchecked due to limited oversight at the highest levels of VA leadership, and it only exacerbated an already frustrated population of veterans failing to receive health care as a result of other misconduct. The Department of Veterans Affairs Accountability and Whistleblower Protection Act of 2017 included a provision allowing for recoupment of relocation expenses in such circumstances. But in addition to reinforcing this recently-enacted provision, this bill would help address an even bigger problem. VA has long been hamstrung by burdensome employment laws forcing VA to transfer bad employees rather than attempting the arduous process of terminating them. Most would expect this to at least result in burying the employee somewhere within VA in an inconsequential role, but a surprising number of these employees end up promoted. This reporting requirement would begin to shed light not only on how pervasive this practice has become, but how effective the recently-enacted accountability law ends up being for VA.

Draft bill authorizing VA to furnish adaptations of residences under chapter 31

VA administers a number of programs designed to help veterans modify their homes to make them accessible. These include the Specially Adapted Housing Grant (SAH), the Special

⁷ *Ziober*, 839 F.3d at 821 (citing *Gilmer* at 30).

⁸ *Ziober*, 839 F.3d at 821-823 (Watford, concurring); *Landis v. Pinnacle Eye Care, LLC*, 537 F.3d 559, 564-565 (6th Cir. 2008) (Cole, concurring).

Housing Adaptation Grant (SHA), the Home Improvement and Structural Alterations Grant (HISA), and the Vocational Rehabilitation and Employment (VR&E) Independent Living services. This draft bill would shift authority from the VR&E program to the Loan Guaranty program to carry out home adaptations veterans are entitled to under chapter 31. Because the Loan Guaranty office currently administers both the SAH and SHA grants, the effect would be to consolidate all administrative authorities for home modifications under one office within VA. The HISA grant would remain separate and continue to be administered by the Prosthetics and Sensory Aids department within the Veterans Health Administration (VHA).

Consolidating these legal authorities will likely translate into administrative efficiency through elimination of redundant efforts and processes. These gains, however, will fail to be realized if the Loan Guaranty office is unable to scale up in a way that corresponds with the increased population it will now be required to serve. Congress must ensure that this program serving the most catastrophically disabled veterans is not suddenly disrupted with an unfunded or under-resourced mandate. Just a year ago, our organization testified before this subcommittee calling for greater investment in staffing and expedited processing for terminally ill veterans, including those with amyotrophic lateral sclerosis (ALS). Veterans with ALS are critical users of the SAH program, and the disability claims system is not designed to be responsive to such rapidly changing disorders. Spreading staff too thin in this department could exacerbate such issues. If not executed well, this consolidation could produce more harm than good. If this Committee moves forward with this proposal, we encourage strong oversight throughout implementation.

Draft bill permitting appraisals based on inspections conducted by third parties

PVA has no position on this draft bill.

Thank you for the opportunity to submit our views on pending legislation. We would be happy to answer any questions the Subcommittee may have.

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Gabe Stultz serves as Legislative Counsel for Paralyzed Veterans of America (PVA) at its National Office in Washington, D.C. He is responsible for federal legislation and regulations related to veterans health care reform, veterans benefits, and modernization efforts related to the disability claims and appeals process.

Gabe was raised in Homer City, Pennsylvania. He attended the University of Pittsburgh where he earned a Bachelor of Arts degree in Political Science and Economics. After college he joined the U.S. Army and received his commission from the Officer Candidate School at Fort Benning, Georgia. He subsequently completed Ranger School, Reconnaissance and Surveillance Leaders Course (RSLC), Airborne School, and Air Assault School and was later assigned to the 2nd Battalion, 506th Infantry Regiment (4th Brigade Combat Team) of the 101st Airborne Division at Fort Campbell, Kentucky. In 2008, he deployed to Afghanistan in support of Operation Enduring Freedom as an Infantry Platoon Leader operating out of a remote outpost in the mountains of Khost Province. During his year-long tour he earned the Combat Infantryman Badge and the Bronze Star.

After the Army, Gabe attended Wake Forest School of Law. During his time as a student he was actively involved in helping establish the Veterans Advocate Law Organization (VALOR), which has since become a school-sponsored legal clinic at Wake Forest serving veterans in Winston-Salem, North Carolina. Before joining PVA in 2015, he was a prosecutor in Florida. He is licensed to practice law in Florida, North Carolina, the U.S. District Court for the Western District of North Carolina and the Court of Appeals for Veterans Claims.

Gabe lives in Old Town Alexandria, Virginia with his wife, Cecelia, and daughter, Penelope.

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 2017

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — \$275,000.

Fiscal Year 2016

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — \$200,000.

Fiscal Year 2015

Department of Veterans Affairs, Office of **National Veterans Sports Programs & Special Events** — Grant to support rehabilitation sports activities — \$425,000.

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.