No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

PETITION FOR REVIEW

Daniel L. Nagin
Dana Montalto
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
dnagin@law.harvard.edu
dmontalto@law.harvard.edu

Matthew T. Murchison
Christine C. Smith
Hasala K. Ariyaratne
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
matthew.murchison@lw.com
christine.smith@lw.com
hasala.ariyaratne@lw.com

Counsel for Petitioners Minority Veterans of America, National Veterans Legal Services Program, Daniel Caba Soto, and Reilly Sherwin

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I. INTRODUCTION

This case concerns VA's answer to one of the most fundamental questions in veterans' law: Who counts as a "veteran"? By statute, only those discharged from military service "under conditions other than dishonorable" qualify—and so can access the crucial benefits and services provided by the Department of Veterans Affairs ("VA"). 38 U.S.C. § 101(2). But for decades, VA has excluded hundreds of thousands of service members from "veteran" status by imposing "[r]egulatory bars" to benefits based on an erroneous reading of 38 U.S.C. § 101(2), despite those bars lacking any foundation in the statutory text. *See* 38 C.F.R. § 3.12(a), (d).[1]

Recently, VA was poised to undo this error. In 2020, after granting a rulemaking petition submitted by petitioner National Veterans Legal Services Program ("NVLSP"), VA issued a harshly criticized proposed rule and received voluminous comments detailing the severe flaws with the proposal's perpetuation of the existing regulatory bars. In a November 2023 draft rule submitted to the Office of Information and Regulatory Affairs ("OIRA"), VA declared that it was "eliminating all current regulatory bars to benefits." Ex. C (OIRA Submission) at 1-2. Yet months later—after receiving a single, conclusory letter from the Department of Defense ("DoD") that asserted without evidence that the then-

[1] A copy of the current rule is attached as Exhibit A, and a copy of the rule in effect before the most recent amendments (described in the following paragraphs) is attached as Exhibit B.

existing VA regulatory bars contribute to military good order and discipline, *see* Ex. D (DoD Letter) at 1-2—VA issued a *different* final rule, reverting almost entirely to its flawed 2020 proposal with minimal modifications.

In doing so, VA exceeded its statutory authority by maintaining unlawful regulatory bars that are completely untethered from the relevant statutory standard—whether service was "under conditions other than dishonorable." 38 U.S.C. § 101(2).

Accordingly, NVLSP and Minority Veterans of America ("MVA"), along with individual veterans and members of MVA, Daniel Caba Soto and Reilly Sherwin (collectively, "Petitioners"), hereby petition this Court, under 38 U.S.C. § 502 and Federal Circuit Rule 15(f), to review the final rule adopted by VA in April 2024. *See* 89 Fed. Reg. 32361 (Apr. 26, 2024) (codified at 38 C.F.R. § 3.12). Petitioners also challenge parts of 38 C.F.R. § 3.12 that have remained in place since 1963. *See* 28 Fed. Reg. 123 (Jan. 4, 1963). The Court should grant this petition and set aside the challenged regulatory bars as inconsistent with VA's statutory mandate and the Administrative Procedure Act ("APA").

II. JURISDICTION

This Court has jurisdiction over this petition for review under 38 U.S.C. § 502. Section 502 provides this Court with exclusive jurisdiction to review direct challenges to actions taken by VA "to which section 552(a)(1) or 553 of title 5 (or

both) refers." 38 U.S.C. § 502. The challenged regulations are notice-and-comment rules governed by Section 553.

III. TIMELINESS

This petition for review is timely under the six-year statute of limitations. *See* 28 U.S.C. § 2401(a); Fed. Cir. R. 15(f)(1); *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.* ("*NOVA*"), 981 F.3d 1360, 1383-86 (Fed. Cir. 2020). The 2024 rule was promulgated on April 26, 2024, and went into effect on June 25, 2024. Additionally, Caba Soto was discharged from the U.S. Marine Corps with an Other Than Honorable ("OTH") discharge on November 19, 2024, Ex. E ("Caba Soto Decl.") ¶ 3, and Sherwin was discharged from the Army with an OTH discharge in 2021, Ex. F ("Sherwin Decl.") ¶ 3. Accordingly, both of these petitioners first "suffer[ed] an injury from" the regulation, including the regulatory bars that were left unrevised by the 2024 rule, within the last six years. *Corner Post, Inc. v. Bd. of Governors of Fed. Reserve Sys.*, 603 U.S. 799, 809 (2024); *see id.* at 813 (explaining that a plaintiff's "cause of action [i]s not complete and present until [the plaintiff] was injured by" a regulation).

IV. PARTIES ADVERSELY AFFECTED

Petitioners are all adversely affected by the final rules and have standing to bring this challenge. Petitioners Caba Soto and Sherwin have standing to sue in their own right, while MVA has associational standing to sue on behalf of its injured

members, including Caba Soto and Sherwin. NVLSP has organizational standing to sue on its own behalf.

A. Caba Soto And Sherwin Have Standing

To establish Article III standing, "a plaintiff must show (i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

Caba Soto has Article III standing because he is directly injured by VA's maintenance of the unlawful regulatory bars. Caba Soto received an OTH discharge based on (1) two non-judicial punishments—one for being out after curfew without signing out, and one for being disenrolled from a language course because he had fallen asleep in class—and (2) two counselings—one for not keeping the door open when visiting another Marine's room and one relating to checking in late when he was on restriction. Caba Soto Decl. ¶ 4. When Caba Soto applied for dependents' educational assistance benefits based on his mother's honorable service, VA determined that Caba Soto's service was "Dishonorable for VA purposes" because he was discharged for "willful and persistent misconduct," one of VA's regulatory bars to benefits. *Id.* ¶ 5. As a result of that determination, Caba Soto has been unable to access educational benefits or any other VA benefits or services. *Id.* If this Court

were to agree with Petitioners that VA's regulatory bars are unlawful, Caba Soto would likely be granted benefits. *Id.* ¶ 7.

Sherwin similarly has Article III standing because she is directly injured by VA's maintenance of the unlawful regulatory bars. Sherwin received an Honorable discharge for her first term of service but an OTH discharge for her second term of service based on two charges of making a false statement and disobeying an order. Sherwin Decl. ¶¶ 3-4. When Sherwin applied for disability benefits, VA determined that Sherwin's second term of service was "Dishonorable for VA Purposes." *Id.* ¶ 5. As a result of that determination, Sherwin has been unable to access disability benefits and related services for disabilities incurred during her second term of service, including post-traumatic stress disorder and numerous physical injuries. *Id.* ¶¶ 5-6. If this Court were to agree with Petitioners that VA's regulatory bars are unlawful, Sherwin would likely be granted benefits. *Id.* ¶ 7.

Moreover, for veterans like Caba Soto and Sherwin with OTH, Bad Conduct, or Dishonorable discharges (together, "less-than-honorable discharges"), VA requires an individualized Character of Discharge ("COD") review to determine whether the veteran's service was "under conditions other than dishonorable" before granting access to benefits, such as health care, disability compensation, vocational rehabilitation, and other supportive services. *See* 38 C.F.R. § 3.12(a). If this Court were to hold that presumption of ineligibility is unlawful, Caba Soto and Sherwin

would at least receive important benefits during the pendency of their COD review, which remains ongoing. Caba Soto Decl. ¶ 7; Sherwin Decl. ¶ 7.

B. MVA Has Associational Standing

To establish associational standing, an association must demonstrate that "(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *NOVA*, 981 F.3d at 1368 (quoting *Hunt v. Wash. State Apple Advert. Comm'n*, 432 U.S. 333, 343 (1977)).

MVA satisfies all requirements for associational standing. *See Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.*, 7 F.4th 1110, 1122-24 (Fed. Cir. 2021) (concluding that a veterans service organization had associational standing to challenge a regulation); *NOVA*, 981 F.3d at 1371-72 (same).

First, many of MVA's members would themselves have standing. As shown above, Caba Soto and Sherwin, MVA members, have standing in their own right. Caba Soto Decl. ¶ 2; Sherwin Decl. ¶ 2. And MVA's membership includes over 4,000 veterans (and family members of veterans), many of whom received less-than-honorable discharges and have been, or will be, injured by the regulatory bars imposed by both the prior rule and the 2024 rule. Some are "currently seeking benefits" under those rules, and so "face[] a substantial risk of being denied" a

favorable COD determination to which they are entitled. *NOVA*, 981 F.3d at 1370; *see* Ex. G ("Church Decl.") ¶¶ 18, 20. Others have already been denied benefits based on unfavorable COD determinations resting on the unlawful regulatory bars and so "face[] an ongoing injury from" those denials. *NOVA*, 981 F.3d at 1370; *see* Church Decl. ¶ 20; *e.g.*, Ex. H ("Woods Decl.") ¶¶ 2-5 (veteran denied benefits based on willful and persistent misconduct bar); Ex. I ("Wirkkala Decl.") ¶¶ 2-5 (veteran denied benefits during pendency of COD review). In addition, some of MVA's members received their less-than-honorable discharges less than six years ago, meaning that their current or imminent harm from VA's long-standing regulatory bars accrued less than six years ago. *Corner Post*, 603 U.S. at 809-13; *see* Caba Soto Decl. ¶¶ 2-3; Sherwin Decl. ¶¶ 2-3. And all injuries inflicted on MVA's members by the challenged rules have been, or will be, caused by VA's perpetuation of the unlawful regulatory bars. A decision by this Court invalidating those bars will redress those injuries. *Mil.-Veterans Advoc.*, 7 F.4th at 1121.

Second, this petition for review is germane to MVA's purpose. MVA is a nationwide not-for-profit organization that works to advance equity and justice for the minority veteran community. That effort includes reducing barriers to accessing services and VA benefits—which disproportionately affect minority veterans. *See* Church Decl. ¶¶ 6-14, 24-34.

Third, this petition for review does not require the participation of MVA's individual members. It presents a pure question of law: whether VA's promulgation of each rule was legally valid under the APA. *See Mil.-Veterans Advoc.*, 7 F.4th at 1123; *NOVA*, 981 F.3d at 1371.

C. NVLSP Has Organizational Standing

To establish organizational standing, an organization itself must "demonstrate the three elements of injury in fact, causation, and redressability." *Mil.-Veterans Advoc.*, 7 F.4th at 1129. "To prove an injury in fact, an Organization must establish a 'concrete and demonstrable injury to the [O]rganization's activities'—such as a 'perceptibl[e] impair[ment]' of the Organization's mission—'with the consequent drain on the [O]rganization's resources.'" *Id.* (alterations in original) (citation omitted); *see, e.g.*, *Mil.-Veterans Advoc. v. Sec'y of Veterans Affs.*, 130 F.4th 965, 969-70 (Fed. Cir. 2025) (finding organizational standing where the challenged rule "frustrate[d] [the organization's] goal of representing veterans" by requiring the organization to "use paper copies of client files" rather than VA's IT system).

NVLSP satisfies all the requirements for organizational standing. NVLSP is a veterans service organization that, among other things, offers direct legal representation to veterans to gain access to the benefits they have earned. For veterans with less-than-honorable discharges, NVLSP must expend significant

resources securing a favorable COD ruling or discharge upgrade with an appropriate military board *before* VA benefits applications can even be considered on the merits.

VA's regulatory bars dramatically increase the resources required to see veterans through that process. VA requires that veterans with less-than-honorable discharges receive an individualized COD review before VA will turn to the adjudication of the veteran's substantive eligibility for the claimed benefit. Ex. J ("Burbank Decl.") ¶¶ 5-7. Thus, even if a veteran receives a favorable COD determination in an initial claim, the claim typically takes significantly longer because of the two sequential adjudicatory steps. However, as is often the case because of VA's restrictive and unlawful regulatory scheme, COD decisions may be initially denied or only partially successful, thus requiring veterans to pursue lengthy and burdensome appeals. *See id.* ¶¶ 5-7, 10-11.

Alternatively, veterans who wish to obtain VA benefits but do not qualify for a favorable COD determination under VA's unlawful standards must instead seek a discharge upgrade or correction directly from a military board before VA will consider most claims for benefits. *Id.* ¶¶ 8-11. The discharge upgrade process is also lengthy; it is complex; it involves legal questions and bodies of evidence that are completely different from those in the COD or benefits-application processes; and it, too, often takes months or years prior to a final decision. *See id.* ¶ 13; 10 U.S.C. § 1557 (setting forth expected timelines for military board decisions). Many

veterans seek a discharge upgrade or correction solely or primarily because of how a discharge upgrade would affect their access to VA benefits. *See* Burbank Decl. ¶ 9. If veterans with less-than-honorable discharges already had access to VA benefits, NVLSP would not have to expend so many resources to help them obtain discharge upgrades before the military. *Id.* ¶ 14.

As a result, the regulatory bars at 38 C.F.R. § 3.12 greatly increase the time and resources that NVLSP must expend in order to help veterans access VA benefits—not to mention the additional resources required to appeal an unfavorable COD or discharge upgrade decision. *Id.* ¶¶ 14, 16-17. That is time and money that could be better spent providing direct services to veterans if VA regulations did not, by default, "foreclose claimants [with less-than-honorable discharges] from obtaining benefits." *Mil.-Veterans Advoc.*, 7 F.4th at 1130; *see PETA v. U.S. Dep't of Agric.*, 797 F.3d 1087, 1097 (D.C. Cir. 2015) (finding organizational standing where the organization had to "expend[] resources 'in response to, and to counteract, the defendants' alleged [unlawful conduct] rather than in anticipation of litigation'" (citation omitted)). VA's perpetuation of the unlawful regulatory bars thus drains the resources of NVLSP—requiring it to devote substantial resources that it would not otherwise spend in the "ordinary course" of its operations. *Mil.-Veterans Advoc.*, 7 F.4th at 1130; *see* Burbank Decl. ¶ 14. And as with MVA and its members, *see supra* at 4-8, these harms are directly caused by VA's unlawful conduct in

maintaining the regulatory bars at 38 C.F.R. § 3.12, and would be redressed by a ruling setting aside those bars.

V. FINAL RULES THAT REQUIRE THIS COURT'S REVIEW

Since 1944, access to almost all VA benefits has hinged on whether a service member was "discharged . . . under conditions other than dishonorable"—a definition that Congress adopted for the purpose of liberalizing access to benefits, honoring military service, and best supporting service members in their transitions to civilian life. 38 U.S.C. § 101(2).[2] The key statutory question here is whether VA's regulatory bars are consistent with that central eligibility criterion. They are not.

1. Before 1944, Congress set various standards for benefits eligibility. *See* Bradford Adams & Dana Montalto, *With Malice Toward None: Revisiting the Historical and Legal Basis for Excluding Veterans from Veteran Services*, 122 Penn. St. L. Rev. 69, 82-83 (2017). In the War Risk Insurance Act of 1918, for example, Congress excluded former service members from certain benefits if they were discharged for:

> mutiny, treason, spying, or any offense involving moral turpitude, or willful and persistent misconduct, of which he was found guilty by court-martial, or that he was an

[2] *See, e.g.*, 38 U.S.C. § 101(13)-(15) (eligibility for monthly compensation and pension benefits); *id.* § 1710(a)(1)(A) (same for hospital care and medical services); *id.* § 2012(a)(1) (same for support to homeless veterans).

> enemy alien, . . . conscientious objector who refused to perform military duty or to wear the uniform, or a deserter.

Act of June 25, 1918, ch. 104, 40 Stat. 609, 609-10, *amended by* World War Veterans' Act, ch. 320, §§ 23, 31, 43 Stat. 607, 613, 615 (1924). Many of these exclusions mirror the regulatory bars VA would later create.

The 1944 GI Bill changed this approach in two key provisions (both of which remain largely unmodified today). *First*, Congress departed from earlier schemes and chose to exclude only veterans discharged under "dishonorable" "conditions." *E.g.*, Servicemen's Readjustment Act of 1944 ("GI Bill"), ch. 268, § 400, 58 Stat. 284, 287-91. That standard was meant to encompass only the worst misconduct, which either (1) actually resulted in a Dishonorable discharge or (2) involved conduct that could have led to a Dishonorable discharge but did not because of "procedural or practical constraints." Adams & Montalto, *supra*, at 105. *Second*, Congress codified specific bars to benefits that echoed certain earlier enactments: discharges by general court-martial, for certain conscientious objectors, for desertion, and for requests for discharge as an alien. GI Bill § 300, 58 Stat. at 286 (codified at 38 U.S.C. § 5303(a)). In all, and as shown by the legislative history, these changes were meant to mark a decisive, liberalizing shift away from the old, harsher eligibility standards. *See* Adams & Montalto, *supra*, at 103, 109-12.

2. Yet VA's COD regulations—codified at 38 C.F.R. § 3.12 and updated by the 2024 rule—buck this clear statutory shift. To begin, 38 C.F.R. § 3.12(d)(2)

reestablishes bars to benefits that Congress decided to leave behind in 1944. For example, Congress replaced the pre-1944 bar for any "offense involving moral turpitude, or willful and persistent misconduct, *of which [the veteran] has been found guilty by court-martial*," World War Veterans' Act, ch. 320, § 23, 43 Stat. at 613 (emphasis added), with the statutory bar for discharge "by reason of the sentence of a general court-martial," 38 U.S.C. § 5303(a). But VA then enacted a regulatory bar for any individual who engaged in an "offense involving moral turpitude" or "[w]illful and persistent misconduct"—with *no* requirement of a general court-martial conviction (or the significant procedural protections that come with such judicial proceedings). 38 C.F.R. § 3.12(d)(2).

Moreover, the "[w]illful and persistent misconduct" bar at 38 C.F.R. § 3.12(d)(2)(ii) bears no connection to whether a discharge was under "conditions other than dishonorable." For example, as VA now defines the term, "[w]illful and persistent misconduct" can be found any time a veteran engages in two "instances of minor misconduct occurring within two years of each other." 38 C.F.R. § 3.12(d)(2)(ii); *see id.* (defining "minor misconduct" as offenses for which the maximum sentence under the *Manual for Courts-Martial* "would not include a dishonorable discharge"). By text and in practice, that exclusion sweeps in far more conduct—and so permits benefits for far fewer veterans—than the "conditions other than dishonorable" term was meant to capture.

More broadly, the regulatory bars are unlawful insofar as they bar veterans from obtaining benefits who neither (1) received a Dishonorable discharge, nor (2) engaged in severe misconduct that could have and would have led to a Dishonorable discharge. That is the clear meaning of the standard Congress enacted, *see* Adams & Montalto, *supra*, at 105, and VA's broader exclusions of veterans who engaged in relatively minor misconduct in 38 C.F.R. § 3.12(d) flout the statute's requirements.

Finally, 38 C.F.R. § 3.12(a) assumes that all veterans with Honorable or General (Under Honorable Conditions) discharges are eligible for benefits but excludes nearly all other veterans from obtaining benefits (including health care) pending the lengthy, complex, and paperwork-intensive COD review or discharge upgrade processes. *See* 38 C.F.R. § 3.12(a) (declaring "[a] discharge under honorable conditions" to be "binding on [VA]"). This effective presumption of ineligibility for less-than-honorable discharges is contrary to the statute Congress enacted.

3. This Court's decision in *Garvey v. Wilkie*, 972 F.3d 1333 (Fed. Cir. 2020), is not a barrier to holding the challenged rules unlawful. To begin, *Garvey* was a *Chevron* step-two decision: it held that "the phrase 'conditions other than dishonorable'" was "ambigu[ous]," *id.* at 1337-40 (quoting 38 U.S.C. § 101(2); citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843

(1984)), explained that the ambiguity may be an "implicit" grant of interpretive authority to VA, and upheld the "'willful and persistent misconduct'" bar as reasonable, *id.* at 1337-40 (quoting 11 Fed. Reg. 12869, 12878 (Oct. 31, 1946)). The Supreme Court recently overruled *Chevron*, rejecting the "fiction" that ambiguity is an implicit delegation. *Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 398-407 (2024). So the Court's task is now to discern the *best* reading of the statute—not just whether VA's interpretation of the statute is permissible. As shown above, VA's reading is far from the best interpretation of the statute.

In any event, all *Garvey* held was that the "'willful and persistent misconduct'" bar is reasonable as to "*serious misconduct*." 972 F.3d at 1340 (emphasis added). But as the revised 2024 rule makes clear, even "minor misconduct" can lead to exclusion under this bar. 38 C.F.R. § 3.12(d)(2)(ii). Petitioner Caba Soto's experience is illustrative of that. His alleged misconduct involved a series of minor infractions—being out after curfew, falling asleep in class, not keeping a door open, and checking in late. Caba Soto Decl. ¶ 4. These are nowhere near "serious misconduct," much less misconduct that would have resulted in a court-martial. Whether VA's new regulatory bar for willful and persistent misconduct (or any other regulatory bar) is lawful under Section 101(2) remains unresolved by this Court.

VI. CONCLUSION

For all these reasons, Petitioners are adversely affected by the unlawful final rules challenged above, and respectfully petition this Court to set aside those rules as "in excess of statutory jurisdiction, authority, or limitations, or short of statutory right." 5 U.S.C. § 706(2)(C).

Dated: November 17, 2026

Respectfully submitted,

/s/ Matthew T. Murchison

Matthew T. Murchison
Christine C. Smith
Hasala K. Ariyaratne
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
matthew.murchison@lw.com
christine.smith@lw.com
hasala.ariyaratne@lw.com

Counsel for Petitioners Minority Veterans of America, National Veterans Legal Services Program, Daniel Caba Soto, and Reilly Sherwin

Daniel L. Nagin
Dana Montalto
LEGAL SERVICES CENTER OF HARVARD LAW SCHOOL
122 Boylston Street
Jamaica Plain, MA 02130
(617) 384-0781
dnagin@law.harvard.edu
dmontalto@law.harvard.edu

CERTIFICATE OF SERVICE

I hereby certify that on November 17, 2026, I caused a copy of the foregoing Petition for Review to be served by FedEx upon the following:

Douglas A. Collins, Secretary
James S. C. Baehr, General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

/s/ Matthew T. Murchison
Matthew T. Murchison

EXHIBIT A

AUTHENTICATED
U.S. GOVERNMENT
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other dependency and indemnity compensation payable. The increase in dependency and indemnity compensation of a surviving spouse under this paragraph shall cease beginning with the first month commencing after the month in which all children of the surviving spouse have attained the age of 18.

(f) *Criteria governing section 1311(a)(2) increase.* In determining whether a surviving spouse qualifies for the section 1311(a)(2) increase under paragraph (c) of this section, the following standards shall apply.

(1) *Marriage requirement.* The surviving spouse must have been married to the veteran for the entire eight-year period referenced in paragraph (c) of this section in order to qualify for the section 1311(a)(2) increase.

(2) *Determination of total disability.* As used in paragraph (c) of this section, the phrase ''rated by VA as totally disabling'' includes total disability ratings based on unemployability (§ 4.16 of this chapter).

(3) *Definition of ''entitled to receive''.* As used in paragraph (c) of this section, the phrase ''entitled to receive'' means that the veteran filed a claim for disability compensation during his or her lifetime and one of the following circumstances is satisfied:

(i) The veteran would have received total disability compensation for the period specified in paragraph (c) of this section but for clear and unmistakable error committed by VA in a decision on a claim filed during the veteran's lifetime; or

(ii) Additional evidence submitted to VA before or after the veteran's death, consisting solely of service department records that existed at the time of a prior VA decision but were not previously considered by VA, provides a basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§ 3.156(c) and 3.400(q)(2) of this part for the period specified in paragraph (c) of this section; or

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (c) of this section, but was not receiving compensation because:

(A) VA was paying the compensation to the veteran's dependents;

(B) VA was withholding the compensation under the authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(C) The veteran had not waived retired or retirement pay in order to receive compensation;

(D) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(E) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(F) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(Authority: 38 U.S.C. 501(a), 1311, 1314, and 1321)

[70 FR 72220, Dec. 2, 2005, as amended at 71 FR 44918, Aug. 8, 2006; 77 FR 40525, July 10, 2012; 80 FR 18117, Apr. 3, 2015]

§ 3.11 Homicide.

Any person who has intentionally and wrongfully caused the death of another person is not entitled to pension, compensation, or dependency and indemnity compensation or increased pension, compensation, or dependency and indemnity compensation by reason of such death. For the purpose of this section the term *dependency and indemnity compensation* includes benefits at dependency and indemnity compensation rates paid under 38 U.S.C. 1318.

[44 FR 22718, Apr. 17, 1979, as amended at 54 FR 31829, Aug. 2, 1989]

§ 3.12 Benefit eligibility based on character of discharge.

(a) *General rule.* If the former service member did not die in service, then pension, compensation, or dependency and indemnity compensation is payable for claims based on a period of service that was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)) A discharge under honorable conditions is

binding on the Department of Veterans Affairs as to character of discharge.

(b) *Insanity exception.* No bar to benefits under this section shall be applied if VA determines that the former service member was insane at the time he or she committed the offense(s) leading to the discharge or release under dishonorable conditions. (38 U.S.C. 5303(b)) Insanity is defined in § 3.354.

(c) *Statutory bars to benefits.* Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful orders of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See § 3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days (38 U.S.C. 5303(a)).

(i) *Compelling circumstances exception.* This paragraph (c)(6) does not apply if compelling circumstances mitigate the prolonged unauthorized absence, as discussed in paragraph (e) of this section.

(ii) *Applicability prior to October 8, 1977.* This paragraph (c)(6) applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (i) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. *Basic eligibility* for purposes of this paragraph (c)(6)(ii) means either a Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (i) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can establish basic eligibility to receive Department of Veterans Affairs benefits.

(d) *Regulatory bars to benefits.* Benefits are not payable where the former service member was discharged or released under one of the conditions listed in paragraph (d)(1) or (2) of this section.

(1) Compelling circumstances exception is not applicable for:

(i) *Discharge in lieu of trial.* Acceptance of a discharge under other than honorable conditions or its equivalent in lieu of trial by general court-martial.

(ii) *Mutiny or espionage.* Mutiny or spying.

(2) Compelling circumstances exception is applicable for:

(i) *An offense involving moral turpitude.* This paragraph (d)(2)(i) includes, generally, conviction of a felony.

(ii) *Willful and persistent misconduct.* For purposes of this section, instances of minor misconduct occurring within two years of each other are persistent; an instance of minor misconduct occurring within two years of more serious misconduct is persistent; and instances of more serious misconduct occurring within five years of each other are persistent. For purposes of this section, minor misconduct is misconduct for which the maximum sentence imposable pursuant to the Manual for Courts-Martial United States would not include a dishonorable discharge or confinement for longer than one year if tried by general court-martial.

(e) *Compelling circumstances exception.* The bar to benefits for prolonged AWOL under paragraph (c)(6) of this section and the two types of misconduct described in paragraph (d)(2) of this section will not be applied if compelling circumstances mitigate the AWOL or misconduct at issue. The following factors will be considered in a determination on this matter:

(1) *Length and character of service exclusive of the period of prolonged AWOL or misconduct.* Service exclusive of the

period of prolonged AWOL or misconduct should generally be of such quality and length that it can be characterized as honest, faithful, and meritorious and of benefit to the Nation.

(2) *Reasons for prolonged AWOL or misconduct.* Factors considered are as follows:

(i) Mental or cognitive impairment at the time of the prolonged AWOL or misconduct, to include but not limited to a clinical diagnosis of (or evidence that could later be medically determined to demonstrate existence of) posttraumatic stress disorder (PTSD), depression, bipolar disorder, schizophrenia, substance use disorder, attention deficit hyperactivity disorder (ADHD), impulsive behavior, or cognitive disabilities.

(ii) Physical health, to include physical trauma and any side effects of medication.

(iii) Combat-related or overseas-related hardship.

(iv) Sexual abuse/assault.

(v) Duress, coercion, or desperation.

(vi) Family obligations or comparable obligations to third parties.

(vii) Age, education, cultural background, and judgmental maturity.

(3) Whether a valid legal defense would have precluded a conviction for AWOL or misconduct under the Uniform Code of Military Justice. For purposes of this paragraph (e)(3), the defense must go directly to the substantive issue of absence or misconduct rather than to procedures, technicalities, or formalities.

(f) *Board of corrections upgrade.* An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(g) *Discharge review board upgrades prior to October 8, 1977.* An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (i)(1) through (3) of this section by a discharge review board established under 10 U.S.C. 1553, sets aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(h) *Discharge review board upgrades on or after October 8, 1977.* An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d) of this section, but not under paragraph (c) of this section, provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval, air, or space service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(i) *Special review board upgrades.* Under 38 U.S.C. 5303(e), unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (h) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(j) *Overpayments after October 8, 1977, due to discharge review board upgrades.* No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (i) of this section which would not be

awarded under the standards set forth in paragraph (h) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (h) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(k) *Overpayments after October 8, 1977, based on application of AWOL statutory bar.* No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(l) *Uncharacterized separations.* Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) *Entry level separation.* Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) *Void enlistment or induction.* Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of §3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) *Dropped from the rolls.* Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 101, 501, and 5303)

CROSS REFERENCES: Validity of enlistments. See §3.14. Revision of decisions. See §3.105. Effective dates. See §3.400(g). Minimum active-duty service requirement. See §3.12a.

[28 FR 123, Jan. 4, 1963, as amended at 41 FR 12656, Mar. 26, 1976; 43 FR 15153, Apr. 11, 1978; 45 FR 2318, Jan. 11, 1980; 49 FR 44099, Nov. 2, 1984; 62 FR 14823, Mar. 28, 1997; 87 FR 26125, May 3, 2022; 89 FR 32372, Apr. 26, 2024]

§ 3.12a Minimum active-duty service requirement.

(a) *Definitions.* (1) The term *minimum period of active duty* means, for the purposes of this section, the shorter of the following periods.

(i) Twenty-four months of continuous active duty. Non-duty periods that are excludable in determining the Department of Veterans Affairs benefit entitlement (e.g., see §3.15) are not considered as a break in service for continuity purposes but are to be subtracted from total time served.

(ii) The full period for which a person was called or ordered to active duty.

(2) The term *benefit* includes a right or privilege but does not include a refund of a participant's contributions under 38 U.S.C. Ch. 32.

(b) *Effect on Department of Veterans Affairs benefits.* Except as provided in paragraph (d) of this section, a person listed in paragraph (c) of this section who does not complete a minimum period of active duty is not eligible for any benefit under title 38, United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.

(c) *Persons included.* Except as provided in paragraph (d) of this section, the provisions of paragraph (b) of this section apply to the following persons:

EXHIBIT B

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basis for reopening a claim finally decided during the veteran's lifetime and for awarding a total service-connected disability rating retroactively in accordance with §§3.156(c) and 3.400(q)(2) of this part for the period specified in paragraph (c) of this section; or

(iii) At the time of death, the veteran had a service-connected disability that was continuously rated totally disabling by VA for the period specified in paragraph (c) of this section, but was not receiving compensation because:

(A) VA was paying the compensation to the veteran's dependents;

(B) VA was withholding the compensation under the authority of 38 U.S.C. 5314 to offset an indebtedness of the veteran;

(C) The veteran had not waived retired or retirement pay in order to receive compensation;

(D) VA was withholding payments under the provisions of 10 U.S.C. 1174(h)(2);

(E) VA was withholding payments because the veteran's whereabouts were unknown, but the veteran was otherwise entitled to continued payments based on a total service-connected disability rating; or

(F) VA was withholding payments under 38 U.S.C. 5308 but determines that benefits were payable under 38 U.S.C. 5309.

(Authority: 38 U.S.C. 501(a), 1311, 1314, and 1321)

[70 FR 72220, Dec. 2, 2005, as amended at 71 FR 44918, Aug. 8, 2006; 77 FR 40525, July 10, 2012; 80 FR 18117, Apr. 3, 2015]

§ 3.11 Homicide.

Any person who has intentionally and wrongfully caused the death of another person is not entitled to pension, compensation, or dependency and indemnity compensation or increased pension, compensation, or dependency and indemnity compensation by reason of such death. For the purpose of this section the term *dependency and indemnity compensation* includes benefits at dependency and indemnity compensation rates paid under 38 U.S.C. 1318.

[44 FR 22718, Apr. 17, 1979, as amended at 54 FR 31829, Aug. 2, 1989]

§ 3.12 Character of discharge.

(a) If the former service member did not die in service, pension, compensation, or dependency and indemnity compensation is not payable unless the period of service on which the claim is based was terminated by discharge or release under conditions other than dishonorable. (38 U.S.C. 101(2)). A discharge under honorable conditions is binding on the Department of Veterans Affairs as to character of discharge.

(b) A discharge or release from service under one of the conditions specified in this section is a bar to the payment of benefits unless it is found that the person was insane at the time of committing the offense causing such discharge or release or unless otherwise specifically provided (38 U.S.C. 5303(b)).

(c) Benefits are not payable where the former service member was discharged or released under one of the following conditions:

(1) As a conscientious objector who refused to perform military duty, wear the uniform, or comply with lawful order of competent military authorities.

(2) By reason of the sentence of a general court-martial.

(3) Resignation by an officer for the good of the service.

(4) As a deserter.

(5) As an alien during a period of hostilities, where it is affirmatively shown that the former service member requested his or her release. See §3.7(b).

(6) By reason of a discharge under other than honorable conditions issued as a result of an absence without official leave (AWOL) for a continuous period of at least 180 days. This bar to benefit entitlement does not apply if there are compelling circumstances to warrant the prolonged unauthorized absence. This bar applies to any person awarded an honorable or general discharge prior to October 8, 1977, under one of the programs listed in paragraph (h) of this section, and to any person who prior to October 8, 1977, had not otherwise established basic eligibility to receive Department of Veterans Affairs benefits. The term *established basic eligibility to receive Department of Veterans Affairs benefits* means either a

Department of Veterans Affairs determination that an other than honorable discharge was issued under conditions other than dishonorable, or an upgraded honorable or general discharge issued prior to October 8, 1977, under criteria other than those prescribed by one of the programs listed in paragraph (h) of this section. However, if a person was discharged or released by reason of the sentence of a general court-martial, only a finding of insanity (paragraph (b) of this section) or a decision of a board of correction of records established under 10 U.S.C. 1552 can estalish basic eligibility to receive Department of Veterans Affairs benefits. The following factors will be considered in determining whether there are compelling circumstances to warrant the prolonged unauthorized absence.

(i) Length and character of service exclusive of the period of prolonged AWOL. Service exclusive of the period of prolonged AWOL should generally be of such quality and length that it can be characterized as honest, faithful and meritorious and of benefit to the Nation.

(ii) Reasons for going AWOL. Reasons which are entitled to be given consideration when offered by the claimant include family emergencies or obligations, or similar types of obligations or duties owed to third parties. The reasons for going AWOL should be evaluated in terms of the person's age, cultural background, educational level and judgmental maturity. Consideration should be given to how the situation appeared to the person himself or herself, and not how the adjudicator might have reacted. Hardship or suffering incurred during overseas service, or as a result of combat wounds of other service-incurred or aggravated disability, is to be carefully and sympathetically considered in evaluating the person's state of mind at the time the prolonged AWOL period began.

(iii) A valid legal defense exists for the absence which would have precluded a conviction for AWOL. Compelling circumstances could occur as a matter of law if the absence could not validly be charged as, or lead to a conviction of, an offense under the Uniform Code of Military Justice. For purposes of this paragraph the defense must go directly to the substantive issue of absence rather than to procedures, technicalities or formalities.

(d) A discharge or release because of one of the offenses specified in this paragraph is considered to have been issued under dishonorable conditions.

(1) Acceptance of an undesirable discharge to escape trial by general court-martial.

(2) Mutiny or spying.

(3) An offense involving moral turpitude. This includes, generally, conviction of a felony.

(4) Willful and persistent misconduct. This includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct. A discharge because of a minor offense will not, however, be considered willful and persistent misconduct if service was otherwise honest, faithful and meritorious.

(5) Homosexual acts involving aggravating circumstances or other factors affecting the performance of duty. Examples of homosexual acts involving aggravating circumstances or other factors affecting the performance of duty include child molestation, homosexual prostitution, homosexual acts or conduct accompanied by assault or coercion, and homosexual acts or conduct taking place between service members of disparate rank, grade, or status when a service member has taken advantage of his or her superior rank, grade, or status.

(e) An honorable discharge or discharge under honorable conditions issued through a board for correction of records established under authority of 10 U.S.C. 1552 is final and conclusive on the Department of Veterans Affairs. The action of the board sets aside any prior bar to benefits imposed under paragraph (c) or (d) of this section.

(f) An honorable or general discharge issued prior to October 8, 1977, under authority other than that listed in paragraphs (h) (1), (2) and (3) of this section by a discharge review board established under 10 U.S.C. 1553 set aside any bar to benefits imposed under paragraph (c) or (d) of this section except the bar contained in paragraph (c)(2) of this section.

(g) An honorable or general discharge issued on or after October 8, 1977, by a discharge review board established under 10 U.S.C. 1553, sets aside a bar to benefits imposed under paragraph (d), but not paragraph (c), of this section provided that:

(1) The discharge is upgraded as a result of an individual case review;

(2) The discharge is upgraded under uniform published standards and procedures that generally apply to all persons administratively discharged or released from active military, naval, air, or space service under conditions other than honorable; and

(3) Such standards are consistent with historical standards for determining honorable service and do not contain any provision for automatically granting or denying an upgraded discharge.

(h) Unless a discharge review board established under 10 U.S.C. 1553 determines on an individual case basis that the discharge would be upgraded under uniform standards meeting the requirements set forth in paragraph (g) of this section, an honorable or general discharge awarded under one of the following programs does not remove any bar to benefits imposed under this section:

(1) The President's directive of January 19, 1977, implementing Presidential Proclamation 4313 of September 16, 1974; or

(2) The Department of Defense's special discharge review program effective April 5, 1977; or

(3) Any discharge review program implemented after April 5, 1977, that does not apply to all persons administratively discharged or released from active military service under other than honorable conditions.

(Authority: 38 U.S.C. 5303 (e))

(i) No overpayments shall be created as a result of payments made after October 8, 1977, based on an upgraded honorable or general discharge issued under one of the programs listed in paragraph (h) of this section which would not be awarded under the standards set forth in paragraph (g) of this section. Accounts in payment status on or after October 8, 1977, shall be terminated the end of the month in which it is determined that the original other than honorable discharge was not issued under conditions other than dishonorable following notice from the appropriate discharge review board that the discharge would not have been upgraded under the standards set forth in paragraph (g) of this section, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment or April 7, 1978, whichever is the earliest.

(j) No overpayment shall be created as a result of payments made after October 8, 1977, in cases in which the bar contained in paragraph (c)(6) of this section is for application. Accounts in payment status on or after October 8, 1977, shall be terminated at the end of the month in which it is determined that compelling circumstances do not exist, or April 7, 1978, whichever is the earliest. Accounts in suspense (either before or after October 8, 1977) shall be terminated on the date of last payment, or April 7, 1978, whichever is the earliest.

(k) *Uncharacterized separations.* Where enlisted personnel are administratively separated from service on the basis of proceedings initiated on or after October 1, 1982, the separation may be classified as one of the three categories of administrative separation that do not require characterization of service by the military department concerned. In such cases conditions of discharge will be determined by the VA as follows:

(1) *Entry level separation.* Uncharacterized administrative separations of this type shall be considered under conditions other than dishonorable.

(2) *Void enlistment or induction.* Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation, with reference to the provisions of §3.14 of this part, to determine whether separation was under conditions other than dishonorable.

(3) *Dropped from the rolls.* Uncharacterized administrative separations of this type shall be reviewed based on facts and circumstances surrounding separation to determine

whether separation was under conditions other than dishonorable.

(Authority: 38 U.S.C. 501)

CROSS REFERENCES: Validity of enlistments. See § 3.14. Revision of decisions. See § 3.105. Effective dates. See § 3.400(g). Minimum active-duty service requirement. See § 3.12a.

[28 FR 123, Jan. 4, 1963, as amended at 41 FR 12656, Mar. 26, 1976; 43 FR 15153, Apr. 11, 1978; 45 FR 2318, Jan. 11, 1980; 49 FR 44099, Nov. 2, 1984; 62 FR 14823, Mar. 28, 1997; 87 FR 26125, May 3, 2022]

§ 3.12a Minimum active-duty service requirement.

(a) *Definitions.* (1) The term *minimum period of active duty* means, for the purposes of this section, the shorter of the following periods.

(i) Twenty-four months of continuous active duty. Non-duty periods that are excludable in determining the Department of Veterans Affairs benefit entitlement (e.g., see § 3.15) are not considered as a break in service for continuity purposes but are to be subtracted from total time served.

(ii) The full period for which a person was called or ordered to active duty.

(2) The term *benefit* includes a right or privilege but does not include a refund of a participant's contributions under 38 U.S.C. Ch. 32.

(b) *Effect on Department of Veterans Affairs benefits.* Except as provided in paragraph (d) of this section, a person listed in paragraph (c) of this section who does not complete a minimum period of active duty is not eligible for any benefit under title 38, United States Code or under any law administered by the Department of Veterans Affairs based on that period of active service.

(c) *Persons included.* Except as provided in paragraph (d) of this section, the provisions of paragraph (b) of this section apply to the following persons:

(1) A person who originally enlists (enlisted person only) in a regular component of the Armed Forces after September 7, 1980 (a person who signed a delayed-entry contract with one of the service branches prior to September 8, 1980, and under that contract was assigned to a reserve component until entering on active duty after September 7, 1980, shall be considered to have enlisted on the date the person entered on active duty); and

(2) Any other person (officer as well as enlisted) who enters on active duty after October 16, 1981 and who has not previously completed a continuous period of active duty of at least 24 months or been discharged or released from active duty under 10 U.S.C. 1171 (early out).

(d) *Exclusions.* The provisions of paragraph (b) of this section are not applicable to the following cases:

(1) To a person who is discharged or released under 10 U.S.C. 1171 or 1173 (early out or hardship discharge).

(2) To a person who is discharged or released from active duty for a disability adjudged service connected without presumptive provisions of law, or who at time of discharge had such a service-connected disability, shown by official service records, which in medical judgment would have justified a discharge for disability.

(3) To a person with a compensable service-connected disability.

(4) To the provision of a benefit for or in connection with a service-connected disability, condition, or death.

(5) To benefits under chapter 19 of title 38, United States Code.

(e) *Dependent or survivor benefits*—(1) *General.* If a person is, by reason of this section, barred from receiving any benefits under title 38, United States Code (or under any other law administered by the Department of Veterans Affairs based on a period of active duty, the person's dependents or survivors are also barred from receiving benefits based on the same period of active duty.

(2) *Exceptions.* Paragraph (e)(1) of this section does not apply to benefits under chapters 19 and 37 of title 38, United States Code. (38 U.S.C. 5303A)

[47 FR 24549, June 7, 1982]

§ 3.13 Discharge to change status.

(a) A discharge to accept appointment as a commissioned or warrant officer, or to change from a Reserve or Regular commission to accept a commission in the other component, or to reenlist is a conditional discharge if it was issued during one of the following periods:

EXHIBIT C

VA | U.S. Department of Veterans Affairs

Office of General Counsel
Washington DC 20420

In Reply Refer To: **00REG**

November 7, 2023

Subject: Regulatory Impact Analysis for RIN 2900-AQ95(F), Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

I have reviewed this rulemaking package and determined the following.

1. VA has examined the economic, interagency, budgetary, legal, and policy implications of this regulatory action and has concluded that it is a significant rule under Executive Order 12866, Section 3(f)(1), as amended by Executive Order 14094.

2. This rulemaking will not have a significant economic impact on a substantial number of small entities under the Regulatory Flexibility Act, 5 U.S.C. 601-612.

3. This rulemaking is not likely to result in the expenditure of $100 million or more by State, local, and tribal governments, in the aggregate, or by the private sector, in any one year, under the Unfunded Mandates Reform Act of 1995, 2 U.S.C. 1532.

4. Attached please find the relevant Regulatory Impact Analysis document, dated November 7, 2023.

Approved by:
Roy Johnson
Chief Economist
Office of Regulation Policy & Management (00REG)
Office of General Counsel

(Attachment)

Regulatory Impact Analysis for RIN 2900-AQ95(F)

Title of Regulation: Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge

Purpose: To determine the economic impact of this rulemaking.

Statement of Need: The Department of Veteran Affairs (VA) has determined this rulemaking is necessary, in accordance with 38 U.S.C. 501, to make necessary amendments to VA regulations concerning character of discharge (COD) determinations for veterans.

Summary: In a document published in the Federal Register (85 FR 41471) on July 10, 2020, the Department of Veterans Affairs (VA) proposed to amend its regulation regarding character of discharge (COD) determinations. Specifically, VA proposed minor modifications to VA's regulatory provisions that treat certain circumstances of discharge as "dishonorable" for VA benefit eligibility purposes (VA's "regulatory bars"), such as discharges due to "willful and persistent misconduct" or due to "homosexual acts involving aggravating circumstances or other factors affecting the performance of duty." VA also proposed to extend a "compelling circumstances" exception to certain regulatory bars to ensure consideration of all pertinent factors.

In response to the proposed rule, a majority of the public comments received urged VA to go beyond mere modification of a regulatory framework that the commenters believed was outdated, vague, subjective, and underinclusive. In response to a subsequent Request for Information and during a two-day listening session, additional commenters advocated for the complete removal of the regulatory bars, such that former Service members (SMs) would only be ineligible for benefits and healthcare if they were barred by statute. Based on all the received public input and after thorough consideration of the issue, VA is eliminating all current regulatory bars to benefits in this final rule. With this change, the COD process will become more objective, which will lead to more consistent adjudications of benefits eligibility. In addition, it will become more inclusive, increasing the number of former SMs eligible for certain VA benefits.

Benefits: This rulemaking allows the COD process to become more objective, which will lead to more consistent adjudications of benefits eligibility. In addition, it will become more inclusive, increasing the number of former SMs eligible for certain VA benefits.

Estimated Impact: VA has determined that both transfers and costs are associated with this potential rulemaking. The total budgetary impact is estimated to be $28.3 million in 2024, $8.9 billion over five years, and $25.2 billion over 10 years, as detailed in Table 1 below. Transfers are estimated to be $22.0 million in 2024, $8.5 billion over five years, and $24.6 billion over 10 years, as detailed in Table 2 below. Costs are

estimated to be $6.3 million in 2024, $404.8 million over five years, and $609.3 million over 10 years, as detailed in Table 3 below.

This rulemaking is exempt from the Administrative Pay-As-You-Go Act of 2023. Section 266 of the Act exempts otherwise qualifying rules from the Act where the direct spending increase is less than $100 million in any given year during the 10-year period beginning with the current year. Direct spending associated with this rulemaking is estimated to be less than $100 million in 2024.

Table 1: Total Budgetary Impact ($000s)			
FY	**Transfers**	**Costs**	**Total**
2024	$21,967	$6,311	$28,278
2025	$1,340,426	$155,183	$1,495,609
2026	$1,901,602	$89,453	$1,991,055
2027	$2,368,897	$76,559	$2,445,456
2028	$2,833,693	$77,271	$2,910,964
5-Year	**$8,466,589**	**$404,776**	**$8,871,365**
2029	$3,011,241	$49,965	$3,061,206
2030	$3,140,736	$40,766	$3,181,502
2031	$3,226,261	$38,785	$3,265,046
2032	$3,316,452	$37,773	$3,354,225
2033	$3,408,342	$37,251	$3,445,593
10-Year	**$24,569,621**	**$609,316**	**$25,178,937**

Table 2: Total Transfers ($000s)					
FY	**VBA C&P Mandatory**	**VBA RB Mandatory**	**VBA Credit Mandatory**	**VHA Medical Care**	**Total Transfers**
2024	$7,270	$133	-$4,318	$18,882	$21,967
2025	$1,142,914	$43,830	-$7,595	$161,277	$1,340,426
2026	$1,435,799	$57,662	-$3,667	$411,808	$1,901,602
2027	$1,668,813	$50,451	-$2,684	$652,317	$2,368,897
2028	$1,918,927	$50,982	-$2,730	$866,514	$2,833,693
5-Year	**$6,173,724**	**$203,059**	**-$20,993**	**$2,110,799**	**$8,466,589**
2029	$1,934,825	$47,744	-$316	$1,028,988	$3,011,241
2030	$1,962,329	$45,173	-$327	$1,133,561	$3,140,736
2031	$1,991,962	$23,901	-$329	$1,210,727	$3,226,261
2032	$2,022,409	$18,455	-$35	$1,275,623	$3,316,452
2033	$2,053,602	$14,804	$7	$1,339,929	$3,408,342
10-Year	**$16,138,851**	**$353,136**	**-$21,993**	**$8,099,627**	**$24,569,621**

Table 3: Total Costs ($000s)					
FY	VBA GOE Discretionary	OIT Discretionary	NCA Discretionary	Board Discretionary	Total Costs
2024	$5,713	$506	$92	$0	$6,311
2025	$147,883	$4,639	$471	$2,190	$155,183
2026	$68,450	$1,567	$171	$19,265	$89,453
2027	$59,727	$1,351	$125	$15,356	$76,559
2028	$63,704	$1,438	$128	$12,001	$77,271
5-Year	**$345,477**	**$9,501**	**$986**	**$48,812**	**$404,776**
2029	$36,530	$795	$13	$12,627	$49,965
2030	$33,529	$738	$14	$6,485	$40,766
2031	$32,043	$710	$14	$6,018	$38,785
2032	$30,937	$694	$15	$6,127	$37,773
2033	$30,293	$684	$15	$6,259	$37,251
10-Year	**$508,809**	**$13,122**	**$1,056**	**$86,329**	**$609,316**

Assumptions and Methodology:

COD Determinations

The Veterans Benefits Administration (VBA) processes COD claims to determine eligibility for certain VA benefits and services. Claims during which COD are determined occur either when a claim for benefits is filed by either Service members (SM) or survivors of deceased SMs or when a former SM or survivor requests a COD determination. If VBA determines a SM is found honorable for VA purposes (HVA), then the SM is deemed a Veteran and such SM and survivors are newly eligible for most benefits.

VBA's systems do not capture the specific reason a COD claim is denied, such as regulatory bars or statutory bars. However, VBA worked with the Veterans Health Administration (VHA) and National Cemetery Administration (NCA) to estimate COD claims and HVA decisions based on other data and assumptions described below. VA used the same estimates for COD claims and HVA decisions, as detailed in Table 4, as the starting point for all budget estimates.

Table 4: COD Claims and Determinations				
FY	SM Claims	SM HVA Grants	Survivor Claims	Survivor HVA Grants
2024	18,485	14,545	260	202
2025	93,664	73,624	1,169	907
2026	33,525	26,321	390	302
2027	24,080	18,847	390	302
2028	24,169	18,916	390	302
2029	2,585	1,938	0	0
2030	2,615	1,961	0	0
2031	2,645	1,984	0	0

2032	2,675	2,007	0	0
2033	2,705	2,030	0	0
Total	**207,148**	**162,173**	**2,598**	**2,016**

Service Member Claims

COD claims from former SMs were analyzed in three categories:

1. *Current former SMs with a previous COD determination*
2. *Current former SMs without a previous COD determination*
3. *Future separations – comparing current trends to anticipated trends*

Within each of these categories, VA accounted for unique living former SMs whose COD may result in new eligibility for benefits and services under this policy change. Specifically, VA accounted for COD categories of under other than honorable (OTH) conditions, bad conduct, and dishonorable.

1. Former SMs with a Previous COD Determination

According to VBA's Office of Performance Analysis and Integrity (PA&I), as of July 2022, 540,566 living SMs had a COD of under OTH, bad conduct, or dishonorable and may be newly eligible for VA benefits and services under this change. PA&I also found that 8% of SMs who separated from service with under OTH, bad conduct, and dishonorable CODs already filed a COD claim with VBA. VA applied 8% to 540,566 to estimate that 44,459 SMs with a previous COD claim could be newly eligible for benefits and services under this change. VA analyzed separation data from the Department of Defense (DoD) to estimate that this number will increase to 44,604 by 2024, when the policy change would be effective.

Based on program expertise, Compensation Service assumed the application rates and percentages found HVA shown in Table 5 for the 44,604 SMs with previous COD determinations.

Table 5: Former SMs with a Previous COD Determination Found Newly HVA

	Under OTH	Bad Conduct	Dishonorable	Total
Total Starting Population – Oct. 1, 2023	41,741	460	2,403	**44,604**
Percent Applying for COD Determination	90%	20%	20%	
COD Claims	37,567	92	481	**38,140**
Percent Found HVA	80%	20%	20%	
Veterans Newly HVA	30,054	18	96	**30,168**

VA assumed these former SMs will apply over three years, as shown in Table 6, with applications concentrated in FY 2025 as the regulation will be effective near the end of FY 2024:

Table 6: Phase-In for SMs with Previous COD Determinations Found Newly HVA			
FY	**Application Rate**	**COD Claims**	**HVA Grants**
2024	10%	3,814	3,017
2025	65%	24,7910	19,6094
2026	25%	9,535	7,542
Total	**100%**	**38,140**	**30,168**

2. Former SMs without a previous COD determination
According to PA&I, as of July 2022, 540,566 living SMs had a current COD of under OTH, bad conduct, or dishonorable and may be newly eligible for VA benefits and services under this change. PA&I also found that 92% of SMs who separated from service with under OTH, bad conduct, and dishonorable CODs have not filed a COD claim with VBA. VA applied 92% to 540,566 to estimate 496,107 SMs without a previous COD claim could be newly eligible for benefits and services under this change. VA analyzed separation data from DoD to estimate that this number will increase to 500,414 by 2024, when the policy change would be effective.

Based on program expertise, Compensation Service assumed the application rates and percent found HVA shown in Table 7 for the 500,414 Veterans without previous COD determinations.

Table 7: Former SMs without a Previous COD Determination Found Newly HVA				
	Under OTH	**Bad Conduct**	**Dishonorable**	**Total**
Total Starting Population – Oct. 1, 2023	468,288	5,163	26,963	**500,414**
Percent Applying for COD Determination	30%	10%	10%	
COD Claims	140,486	516	2,696	**143,698**
Percent Found HVA	80%	20%	20%	
Veterans Newly HVA	112,389	103	539	**113,031**

VA also assumed these former SMs will apply over five years, as shown in Table 8, with applications concentrated in FY 2025 as the regulation will be effective near the end of FY 2024.

Table 8: Phase-In for SMs without Previous COD Determinations Found Newly HVA			
	Application Rate	**COD Claims**	**HVA Grants**
2024	10%	14,370	11,303
2025	45%	64,664	50,864
2026	15%	21,555	16,955

2027	15%	21,555	16,955
2028	15%	21,555	16,955
Total	**100%**	**143,698**	**113,031**

3. Future separations – comparing current trends to anticipated trends
Based on historical separation data that PA&I obtained from the Defense Manpower Data Center, VA estimates 4,023 SMs will separate annually with a COD of under OTH, bad conduct, or dishonorable and may be newly eligible for VA benefits and services under this change.

Under current policy, PA&I found that 8%, or 331 of the 4,023 SMs, are expected to submit COD claims, and 63% of COD claims, or 207 SMs, are expected to be found HVA. Under this policy change, VA assumed 3,337 of the 4,023 SMs would submit COD claims and 2,457 SMs would be found HVA. As shown in Table 9, this would result in an increase of 3,006 COD claims and an increase of 2,250 SMs found HVA for each cohort of annual separations:

Table 9: Future Separations Found Newly HVA

	Anticipated Trends				**Current Trends**	**Difference in Trends**
	Under OTH	**Bad Conduct**	**Dishonorable**	**Total**		
Annual Separations	3,314	515	194	4,023	4,023	0
Percent Applying for COD Determinations	90%	50%	50%	83%	8%	75%
COD Claims	2,982	258	97	3,337	331	**3,006**
Percent Found HVA	80%	20%	20%	74%	63%	11%
Veterans Newly HVA	2,386	52	19	2,457	207	**2,250**

VA also assumed 90% of these SMs will apply within 10 years of separation, as shown in Table 10. For purposes of this estimate, VA assumes this rule will be effective June 1, 2024, and application rates for SMs separating in 2024 are adjusted accordingly.

Table 10: Future Separations Found Newly HVA

Year Following Separation	**Application Rate for Separations in 2024**	**Application Rate for Separations in 2025 and Outyears**		**FY**	**Cumulative COD Claims***	**Cumulative HVA Grants***
Year-1	10%	75%		2024	301	225
Year-2	65%	3%		2025	4,209	3,151
Year-3	3%	3%		2026	2,435	1,824

Year-4	3%	3%		2027	2,525	1,892
Year-5	3%	1%		2028	2,615	1,960
Year-6	1%	1%		2029	2,585	1,938
Year-7	1%	1%		2030	2,615	1,961
Year-8	1%	1%		2031	2,645	1,984
Year-9	1%	1%		2032	2,675	2,007
Year-10	1%	1%		2033	2,705	2,030
Total	**89%**	**90%**		**Total**	**25,310**	**18,972**

*Cumulative counts include separations beyond 2024.

Survivor Claims

PA&I identified 17,892 unique deceased SMs who separated since 1980 with a current COD of under OTH, bad conduct, or dishonorable. VA applied a general Veteran-specific marriage rate of 63%, which was provided by the Office of Enterprise Integration, to estimate 11,223 surviving spouses associated with these deceased SMs. For purposes of this estimate, VA assumed spouses had the same age and mortality rates as the population of Veterans with an honorable, general or under honorable conditions discharge or deemed HVA. After applying the Veteran-specific mortality rates from the Office of Enterprise Integration, and assuming this population mirrors the entire population of Veterans with an honorable, general or under honorable conditions discharge or deemed HVA, with an average age of 26 upon separation, VA estimates 9,097 spouses are still alive. VA analyzed separation data from DoD to estimate that this number will increase to 9,350 by 2024, when the policy change would be effective.

Based on program expertise, Pension and Fiduciary Service assumed the application rates and percent found HVA shown in Table 11 for the 9,350 survivors:

Table 11: Survivors of Deceased SMs Found Newly HVA

	Under OTH	**Bad Conduct**	**Dishonorable**	**Total**
Total Starting Population – Oct. 1, 2023	8,309	336	705	**9,350**
Percent Applying for COD Determination	30%	10%	10%	
COD Claims	2,493	34	71	**2,598**
Percent Found HVA	80%	20%	20%	
Survivors of Veterans Newly HVA	1,994	7	14	**2,015**

VA also assumed these survivors will apply over five years, as shown in Table 12.

Table 12: Phase-In for Veterans without Previous COD Determinations Found Newly HVA			
	Application Rate	**COD Claims**	**HVA Grants**
2024	10%	260	202
2025	45%	1,169	907
2026	15%	390	302
2027	15%	390	302
2028	15%	390	302
Total	**100%**	**2,598**	**2,015**

VBA Compensation and Pension (C&P) Transfers

Transfers to the mandatory C&P account are estimated to be $7.2 million in 2024, $6.2 billion over five years, and $16.1 billion over 10 years, as detailed in Table 13 below. Caseload for compensation and pension is detailed in Table 14, and caseload for burial benefits is detailed in Table 15.

Table 13: Total C&P Transfers ($000s)							
FY	**Veteran Compensation**	**Veteran Pension**	**Survivor Compensation**	**Survivor Pension**	**Contract Exams**	**Burial Benefits**	**Total**
2024	$5,526	$127	$7	$-	$1,415	$195	$7,270
2025	$1,031,623	$23,522	$1,562	$290	$82,568	$3,350	$1,142,914
2026	$1,344,589	$27,871	$7,790	$2,001	$49,991	$3,558	$1,435,799
2027	$1,572,436	$29,764	$15,738	$3,759	$43,150	$3,966	$1,668,813
2028	$1,805,765	$31,644	$24,826	$5,393	$46,858	$4,441	$1,918,927
5-Year	**$5,759,939**	**$112,928**	**$49,923**	**$11,442**	**$223,981**	**$15,509**	**$6,173,724**
2029	$1,826,202	$28,287	$34,630	$6,811	$34,713	$4,182	$1,934,825
2030	$1,847,231	$25,367	$44,332	$7,770	$33,494	$4,135	$1,962,329
2031	$1,868,945	$22,835	$53,930	$8,355	$33,799	$4,097	$1,991,962
2032	$1,891,472	$20,653	$63,429	$8,670	$34,112	$4,072	$2,022,409

2033	$1,914,742	$18,771	$72,829	$8,776	$34,434	$4,050	$2,053,602
10-Year	**$15,108,532**	**$228,841**	**$319,073**	**$51,825**	**$394,534**	**$36,045**	**$16,138,851**

Table 14: C&P Caseload

FY	Veteran Compensation	Veteran Pension	Survivor Compensation	Survivor Pension	Total
2024	687	27	1	0	715
2025	41,590	1,617	77	25	43,309
2026	52,989	1,852	390	166	55,397
2027	60,575	1,912	770	300	63,557
2028	68,001	1,965	1,187	414	71,567
2029	67,224	1,698	1,618	503	71,043
2030	66,470	1,472	2,024	552	70,518
2031	65,740	1,281	2,406	571	69,998
2032	65,035	1,120	2,765	570	69,490
2033	64,354	984	3,102	555	68,995

Table 15: Burial Caseload

FY	H&M	OBR	Burial Allowance	S-C Burial Allowance	Plot Allowance	Flags
2024	473	22	6	9	7	433
2025	2,284	110	359	543	441	2,194
2026	796	39	450	681	553	786
2027	657	28	507	767	623	564
2028	660	28	563	852	692	569
2029	37	3	548	829	674	58
2030	37	3	535	808	657	59
2031	38	3	522	790	642	60
2032	38	3	512	774	629	61
2033	39	3	502	759	617	62

Veteran Compensation

Historical data from PA&I showed that of all SMs found HVA, 62% apply for compensation, and of those who apply, 76% have their compensation claims granted with an average disability rating of 59%. For purposes of this estimate, VA assumes this new policy will be effective for COD decisions starting June 1, 2024, and 10% of SMs found HVA in 2024 would have compensation claims decided in 2024; the other 90% of SMs found HVA in 2024 would not have compensation claims decided until 2025 due to the time associated with COD and compensation claims processing. VA estimates 62%,

or 54,724 of the 88,169 SMs found HVA in 2024 and 2025, will apply for compensation. VA also estimates that 76%, or 41,607 of the 54,724 Veterans who apply for compensation, will have their compensation claims granted.

Caseload was distributed by degree of disability based on the 2024 Mid-Session Review (MSR) Budget model, which had the same average degree of disability of 59% for all Veterans receiving compensation in 2022. Termination rates from the 2024 MSR Budget were combined with newly granted compensation claims to estimate caseload in subsequent years. Average payments and cost-of-living adjustments (COLAs) from the 2024 MSR Budget were applied to caseload to calculate obligations each year.

Veteran Pension

Historical data from PA&I showed that of all SMs found HVA, 6% apply for pension, and of those who apply, 31% have their pension claims granted. For purposes of this estimate, VA assumes this new policy will be effective for COD decisions starting June 1, 2024, and 10% of SMs found HVA in 2024 would have pension claims decided in 2024; the other 90% of SMs found HVA in 2024 would not have pension claims decided until 2025 due to the time associated with COD and pension claims processing.VA estimates 6%, or 5,264 of the 88,169 SMs found HVA in 2024 and 2025, will apply for pension. VA also estimates that 31%, or 1,621 of the 5,264 Veterans who apply for pension, will have their pension claims granted. Termination rates from the 2024 MSR Budget were combined with newly granted pension claims to estimate caseload in subsequent years. Average payments and COLAs from the 2024 MSR Budget were applied to caseload to calculate obligations each year.

Survivor Compensation

Survivor compensation, or Dependency and Indemnity Compensation (DIC), was estimated based on combining two populations: 1) COD claims from survivors of previously deceased SMs, and 2) future terminations from Veteran compensation.

COD claims from Survivors of previously deceased SMs

Historical data from PA&I showed that of all survivors who file a COD claim where the deceased SM was found HVA, 14% apply for DIC, and of those who apply, 48% have their DIC claims granted. VA estimates 14%, or 150 of the 1,109 survivors of deceased SMs found HVA in 2024 and 2025 will apply for DIC. VA also estimates that 48%, or 72 of the 150 survivors who apply for pension, will have their pension claims granted. Termination rates from the 2024 MSR Budget were combined with newly granted DIC claims to estimate caseload in subsequent years. Average payments and COLAs from the 2024 MSR Budget were applied to caseload to calculate obligations each year.

Future Terminations from Veteran Compensation

For purposes of this estimate, VA assumed survivors will begin receiving DIC benefits the year following the Veterans' deaths. For these Veteran deaths, a 63% marriage rate, based on Veteran-specific data provided by VA's Office of Enterprise Integration, as well as a 52% DIC eligibility rate based on the distribution by degree of disability, were applied to estimate eligible survivors. Additionally, a 90% application rate, and 100%

grant rate were applied to calculate survivor accessions. Applying these percentages to the 1,039 Veterans compensation deaths anticipated in 2024 and 2025 results in 302 survivors in receipt of DIC benefits between 2025 and 2026. Termination rates from the 2024 MSR Budget were combined with newly granted DIC claims to estimate caseload in subsequent years. Average payments and COLAs from the 2024 MSR Budget were applied to caseload to calculate obligations each year.

Survivor Pension

Survivor pension was estimated based on combining two populations: 1) COD claims from survivors of previously deceased SMs, and 2) future terminations from Veteran pension.

COD claims from Survivors of previously deceased SMs

Historical data from PA&I showed that of all survivors who file a COD claim where the deceased SMs was found HVA, 6% apply for pension, and of those who apply, 34% have their survivor pension claims granted. VA estimates 6%, or 65 of the 1,109 survivors of deceased SMs found HVA in 2024 and 2025, will apply for pension. VA also estimates that 34%, or 22 of the 65 survivors who apply for pension, will have their pension claims granted. Termination rates from the 2024 MSR Budget were combined with newly granted pension claims to estimate caseload in subsequent years. Average payments and COLAs from the 2024 MSR Budget were applied to caseload to calculate obligations each year.

Future Terminations from Veteran Pension

For purposes of this estimate, VA assumed survivors will begin receiving pension benefits the year following the Veterans' deaths. For these Veteran deaths, a 63% marriage rate, based on Veteran-specific data provided by VA's Office of Enterprise Integration, as well as a 100% eligibility rate based on the Veterans' eligibility for pension, were applied to estimate eligible survivors. Additionally, a 90% application rate, and 100% grant rate were applied to calculate survivor accessions. Applying these percentages to the 253 Veterans pension deaths anticipated in 2024 and 2025 results in 143 survivors in receipt of pension benefits between 2025 and 2026. Termination rates from the 2024 MSR Budget were combined with newly granted pension claims to estimate caseload in subsequent years. Average payments and COLAs from the 2024 MSR Budget were applied to caseload to calculate obligations each year.

Contract Exams

VA estimates an additional 990 Veterans' disability claims in 2024, and 277,507 Veterans' disability claims over 10 years will require medical exams. These estimates are based on the assumptions previously described along with an assumed 33% reopened claim rate. Based on historical data, VBA estimates approximately 1.4 exams per claim. Consistent with the 2024 MSR Budget, VBA assumed 84% of exams will be funded through VBA contracts, which are reimbursed from the mandatory C&P account. The remaining exams will be completed by VHA. Total obligations for contract exams are calculated by multiplying the number of projected exams by the average cost per contract exam from the 2024 MSR Budget.

Burial Benefits

Headstones and Markers (H&M) and Outer Burial Receptacles (OBR)

To estimate C&P transfers associated with providing H&M and OBRs, NCA used the caseload provided by VBA to identify the newly eligible Veterans with previous COD, without previous COD, future separations that would be considered Newly HVA and survivors of deceased HVA Veterans.

The Veteran population mortality rate was applied to the total Newly HVA caseload. NCA then applied the utilization rate of government-furnished headstones and markers at national, state, tribal and private cemeteries to project the number H&M for future burials. NCA assumes that all survivors of deceased Newly HVA Veterans will request a government-furnished H&M for placement in a private cemetery. To determine the cost for previously deceased Veterans whose survivors would apply for an H&M on behalf of the Veteran, we multiplied the H&M average cost by the annual HVA grants from survivor claims. The estimated H&M caseload was multiplied by the projected average cost of a H&M from the 2024 MSR Budget.

NCA assumes that OBRs will be furnished for all Newly HVA Veterans who choose burial in a state or tribal cemetery. The Veteran population mortality rate was applied to the total Newly HVA caseload. NCA then applied the utilization rate for burial in a state or tribal cemetery and factored in the average cost of an OBR from the 2024 MSR Budget to estimate the total mandatory OBR cost for the potential Newly HVA caseload.

Burial Allowance, Service-Connected Burial Allowance, Plot Allowance, and Flags

To estimate C&P transfers associated with burial allowances, service-connected burial allowances, and plot allowances, VBA used terminations from this estimate for Veteran compensation and Veteran pension. In 2024, 21 Veterans are expected to stop receiving compensation or pension benefits, primarily due to death. VBA applied historical utilization rate for each benefit type to estimate caseload of 6 for burial allowance, 9 for service-connected burial allowance, and 7 for plot allowance in 2024. Average payments from the 2024 MSR Budget were applied to estimate obligations for each benefit type.

To estimate C&P transfers associated with burial flags, VBA used NCA's estimate of annual deaths among newly HVA Veterans. VBA assumed all families of newly HVA Veterans would receive a burial flag following the Veteran's death. Average payments from the 2024 MSR Budget were applied to estimate burial flag obligations.

VBA Readjustment Benefits (RB) Transfers

Transfers to the mandatory RB account are estimated to be $133,000 in 2024, $203.1 million over five years, and $353.1 million over 10 years, as detailed in Table 16 below.

Table 16: Total RB Impact							
	Education: Chapter 35		VR&E		Housing Grants		Total
FY	Caseload	Obligations ($000s)	Caseload	Obligations ($000s)	Caseload	Obligations ($000s)	Obligations ($000s)
2024	49	$ 84	16	$ 49	-	$ -	$ 133
2025	2,971	$ 23,383	973	$ 18,547	30	$ 1,900	$ 43,830
2026	3,858	$ 30,087	1,264	$ 24,941	38	$ 2,634	$ 57,662
2027	4,444	$ 17,471	1,473	$ 29,729	44	$ 3,252	$ 50,451
2028	2,160	$ 12,150	1,682	$ 34,894	49	$ 3,938	$ 50,982
5-Year		**$ 83,175**		**$ 108,160**		**$ 11,724**	**$203,059**
2029	1,338	$ 7,150	1,703	$ 36,337	49	$ 4,257	$ 47,744
2030	769	$ 2,366	1,708	$ 37,572	48	$ 5,234	$ 45,173
2031	198	$ 1,310	772	$ 17,499	48	$ 5,092	$ 23,901
2032	201	$ 1,361	503	$ 11,714	47	$ 5,381	$ 18,455
2033	204	$ 1,414	316	$ 7,578	47	$ 5,811	$ 14,804
10-Year		**$ 96,777**		**$ 218,860**		**$ 37,499**	**$353,136**

Education: Chapter 35

Based on VA's estimate for the C&P account,156 additional Veterans will have a 100% disability rating in 2024 and become newly eligible to have dependents train under Chapter 35. According to marriage rates provided by VA's Office of Enterprise Integration, 63% of all Veterans are married. Applying 63% to 156 Veterans results in 98 Veterans, who VA assumes would have dependents eligible for chapter 35. Education Service assumes 50%, or 49 dependents, will utilize Chapter 35 benefits. Based on historical data, Education Service assumes dependents will utilize 20 months of Chapter 35 benefits over three years. Average payments from the 2024 MSR Budget were applied.

Veteran Readiness and Employment (VR&E)

Based on VA's estimate for the C&P account, 686 Veterans will have a new disability rating qualifying them for VR&E benefits in 2024. VR&E Service provided utilization rates among newly service-connected Veterans at each disability rating. These utilization rates were applied to the Veteran population at each disability level, resulting in 16 Veterans utilizing VR&E benefits in 2024. VR&E Service assumes these Veterans will apply for VR&E benefits the same year they become eligible for compensation benefits and use six years of VR&E entitlement. Average payments from the 2024 MSR Budget were applied.

Housing Grants

Based on VA's estimate for the C&P account, 156 Veterans will have disability ratings that newly qualify them for housing grants in 2024. Loan Guaranty Service assumes 0.30% of these Veterans would utilize specially adapted housing (SAH) grants, and 0.02% would utilize special home adaptation (SHA) grants. Although no Veterans are expected to utilize SAH and SHA grants in 2024, in 2025, 28 Veterans would receive SAH grants, and two Veterans would receive the SHA grant. Average payments from the 2024 MSR Budget were applied.

VBA Credit Reform Transfers

Mandatory benefit loan subsidy transfer savings is estimated to be $4.3 million in 2024, $20.9 million over five years, and $21.9 million over 10 years, as detailed in Table 17 below.

Table 17: Total Credit Reform Impact

Fiscal Year	Newly Eligible Veterans	Svc Conn*	No Down*	Cash Out*	Workload ($000s)	Transfers ($000s)
2024	18,485	34	596	294	$280,790	-$4,318
2025	93,664	2,046	1,767	870	$1,499,402	-$7,595
2026	33,525	621	707	348	$544,453	-$3,667
2027	24,080	445	509	251	$399,243	-$2,684
2028	24,169	446	511	251	$407,870	-$2,730
5-Year Total	**193,923**	**3,592**	**4,089**	**2,014**	**$3,131,757**	**-$20,993**
2029	2,585	46	56	28	$44,762	-$316
2030	2,615	46	57	28	$45,991	-$327
2031	2,645	47	57	28	$47,288	-$329
2032	2,675	47	58	29	$48,951	-$35
2033	2,705	48	59	29	$50,677	$7
10-Year Total	**207,148**	**3,827**	**4,376**	**2,155**	**$3,369,426**	**-$21,993**

*Assumes total newly eligible Veteran population of 207,148 with a 5 percent utilization rate totaling 10,357 combined home loan guarantees over time.

The focus for Loan Guaranty Service is on annual newly HVA Veterans who would become eligible to apply for home loan guaranty benefits. The projected newly HVA population is 18,485 Veterans in 2024 and 207,148 over 10 years. To estimate the number of the additional loan workload impact for newly HVA Veterans who will utilize their home loan benefits, VA notes that approximately 5 percent, or 980,000 out of 19.6 million of living Veterans currently utilize their home loan benefits annually. Therefore, applying a similar usage rate to the annual rising population of newly eligible individuals schedule, VA estimates the eligible individuals that could result in additional workload for loan guarantees.

To capture the impact, VA distributes all the additional workloads for Veterans Compensation "Grants - All New to the Rolls" (aka, Newly HVA Veterans with New Service-Connected) in the Service-Connected loan guarantee category. VA distributes all the Veterans "Newly HVA Veterans without Service-Connected " between the No Downpayment and Cash Out Refinancing loan guarantee categories with 67 percent falling in No Downpayment and 33 percent falling in Cash Out (based on historical trends).

VA uses the budget model for the 2024 President’s budget baseline of estimates to transform the additional workload into benefit costs. The anticipated redistribution of home loan guaranty (HLG) workloads among HGL product types would result in

estimated subsidy savings of $2.2 million annually over the next 10 years, starting in 2024. The subsidy savings is derived from the product of HLG workload rises and positive subsidy rate declines, resulting from rises in expected funding fee collections in the No Downpayment and Cash Out categories relative to the Service-Connected category. The subsidy savings of $2.2 million annually over 10 years seems reasonable for the portfolios of loans. The benefit loan subsidy costs savings is the present value of future cash flow by the budget model in conjunction with the Credit Subsidy Calculator (CSC) tool. The slight reductions in the cohort subsidy rates impact transformation of the additional workloads into mostly reductions in subsidy spending estimates.

VHA Transfers

Transfers to VHA's discretionary Medical Care accounts and the Medical Care portion of the Cost of War Toxic Exposures Fund are estimated to be $18.9 million in 2024, $2.1 billion over five years, and $8.1 billion over 10 years, as detailed in Table 18 below.

Table 18: Total VHA Impact

Fiscal	Cumulative Unique New HVA			Cumulative Unique New Enrollees			VHA Expenditures (in 000s)			
Year	OTH	Non-OTH	Total	OTH	Non-OTH	Total	OTH	Non-OTH	Net VHA Collections	Total
2024	14,466	79	14,545	3,408	19	3,426	$19,568	$111	$796	$18,882
2025	87,241	488	87,729	22,922	128	23,049	$165,284	$1,172	$5,180	$161,277
2026	109,043	587	109,630	40,873	223	41,096	$418,271	$2,455	$8,918	$411,808
2027	124,358	678	125,036	53,966	294	54,260	$659,941	$3,735	$11,358	$652,317
2028	139,445	768	140,213	64,086	351	64,437	$874,583	$4,926	$12,995	$866,514
2029	137,360	758	138,118	67,997	373	68,370	$1,036,509	$5,788	$13,310	$1,028,988
2030	135,351	747	136,098	69,593	382	69,975	$1,140,381	$6,362	$13,181	$1,133,561
2031	133,372	737	134,109	69,496	382	69,877	$1,216,713	$6,787	$12,772	$1,210,727
2032	131,422	728	132,150	69,271	381	69,652	$1,280,842	$7,144	$12,363	$1,275,623
2033	129,503	718	130,221	68,945	379	69,325	$1,344,397	$7,499	$11,966	$1,339,929
5-Year Impact	139,445	768	140,213	64,086	351	64,437	$2,137,647	$12,399	$39,247	$2,110,799
10-Year Impact	129,503	718	130,221	68,945	379	69,325	$8,156,488	$45,978	$102,839	$8,099,627

The projection of unique newly eligible Veterans for VHA enrollment was provided by VBA. These projections were reviewed for reasonableness and adjusted to separate the OTH population since VHA currently provides care to OTH SMs on a limited basis, which is included in the current policy budget projections. The estimates above have not been adjusted to remove VHA's current projections for OTH SMs. These projections served as the starting points for the enrollment and expenditure impact estimates shown in Table 18.

Given the expectation that most of the newly eligible population will be primarily focused on compensation benefits from VBA, it is reasonable to assume that not all newly eligible individuals will seek to enroll with VHA. For example, many SMs have other forms of health insurance (OHI) and may not decide to enroll with VHA. As a working assumption, the enrollment patterns for the newly eligible are expected to resemble that of the currently eligible Veteran population on an age-normalized basis. As a result, the percentage of these SMs ineligible for VHA enrollment due to means test requirements, enrollment take-up rates, mortality rates, and average annual health care expenditures per enrollee are assumed to match those of the current enrollee population. Benchmark assumptions were taken from the 2022 Enrollee Health Care Projection Model (EHCPM) by age and adjusted to the age mix of OTH Veterans in the VADIR and

USVETS data. The underlying priority mix of enrollees was confirmed to be reasonably consistent with the proportion of Veterans that VBA estimated would have service-connected disabilities.

The newly HVA Veteran population estimates are the starting point for projecting the newly eligible pool of Veterans under the revised regulation, which are Veterans who may, in turn, enroll with VHA for healthcare benefits after VA determines such SMs are HVA. An adjustment is made to account for the portion of newly HVA Veterans with incomes more than 10% above the Veteran Means Test (VMT) and Geographic Means Test (GMT), meaning they are not eligible for enrollment (new enrollment into Priorities 8a and 8c is suspended). HVA enrollees are estimated based on the projected enrollee market share among eligible (excluding Priorities 8a and 8c) Veterans, and an assumed phase-in of 50% in the first year, an additional 20% in the second year, 15% more in the third, 10% more in the fourth, and the final 5% in the fifth year. Enrollment rates were set such that the projected market shares align with that expectation relative to existing eligible enrollees. Enrollment counts were reduced for anticipated mortality based on an estimated annual mortality assumption. New enrollment and deaths were assumed to occur uniformly throughout the year.

The average projected expenditures per enrollee is calculated by using the average annual cost per enrollee from the general enrollee population by age group and weighting by the age mix of the OTH population. On a comparable age basis, it is assumed that the average annual cost per enrollee in the newly eligible population will be like that of the VHA enrollee population. This assumption implicitly assumes that the newly HVA population will have a similar priority distribution for a given age as the current HVA population. This assumption is also consistent with the service-connected disability mix assumption used by VBA. VA does not know what the priority mix of OTH SMs will be, but it is possible that it may differ significantly from the general enrollee population (e.g., lower prevalence of service-connected disabilities), which have a material impact on the results in this analysis.

The estimate of C&P exams to be provided by VHA was projected by VBA and allocated to OTH SMs and Veterans and then multiplied by the benchmark average cost per visit and included in the VHA estimate.

The projection methodology was applied separately to OTH SMs and Veterans to develop separate projections for these populations.

VHA Net Collections Methodology

Third Party Impact

VHA used the unique new enrollees by priority group and age and applied 67% to estimate the number of patients. VHA then applied a 68% average for patients with insurance to the Non-OTH Veteran group and a 20% average for patients with insurance to the OTH group. VHA then applied a percentage billable insurance metric by priority group and age. To estimate the collections, VHA applied the FY 2022 average third party collection per Veteran to each age and priority group cohort. The third-party collections impact assumes the newly eligible population has the same average collection per Veteran as the current Veteran population.

First Party Impact
VHA used the unique new enrollees to estimate the number of patients. VHA then applied a percentage collectible Veteran ratio to estimate the number of each priority group cohort that would be billable for first party. To estimate the collections, VHA applied the FY 2022 average collection per Veteran for First Party Rx and First Party Inpatient/Outpatient (I/O). Long Term Care copayments are not included as they are a marginal portion of overall collections. The first party collections impact assumes the newly eligible population is as billable and collectible as the current Veteran population.

VBA General Operating Expenses (GOE) Costs
Costs to VBA's GOE account are estimated to be $5.7 million in 2024, $345.5 million over five years, and $508.8 million over 10 years, as detailed in Table 19 below. GOE costs include salary, benefits, rent, travel, supplies, other services, and equipment.

Table 19: VBA GOE Impact

FY	FTE	Obligations ($000s)
2024	117	$5,713
2025	1,080	$147,883
2026	504	$68,450
2027	422	$59,727
2028	436	$63,704
5-Year		**$345,477**
2029	234	$36,530
2030	211	$33,529
2031	197	$32,043
2032	187	$30,937
2033	179	$30,293
10-Year		**$508,809**

GOE costs for FY 2024 were developed using 117 full-time equivalents (FTE) from Office of Field Operations (96), Veterans Readiness and Employment (13), the Office of Administrative Review (6), and Loan Guaranty (2).

This includes six GS-13 Managers, four GS-13 Quality Review Specialists, two Veterans Benefits Administration Central Office FTE, two GS-13 VA Central Office Quality Assurance Specialists, two GS-13 Local Quality Assurance Specialists, two GS-13 Decision Review Officers, one GS-13 Supervisory Vocational Rehabilitation Counselor, nine GS-12 Ratings Veterans Service Representatives, seven GS-12 Vocational Rehabilitation Counselors, two GS-12 Construction Analysts/Special Adaptive Housing, two GS-12 Human Resource Analysts, one GS-12 Management and Program Analyst, two GS-11 Support Service Division Analysts, 69 GS-10 Veterans Service Representatives, and six Claims Assistants.

Standard rates were applied for benefits, rent, travel, supplies, and equipment. Pay, rent and travel expenses have been prorated to begin in June. All other non-pay costs were developed based upon program requirements.

Please note, $3.9 million of the 10-year estimated costs are under reimbursable authority for Loan Guaranty Service. Details are provided in the Table 20 below.

Table 20: Loan Guaranty Service		
FY	**FTE**	**Obligations ($000)**
2024	2	$126
2025	2	$371
2026	2	$389
2027	2	$403
2028	2	$417
5-Year Total		**$1,706**
2029	2	$426
2030	2	$435
2031	2	$448
2032	2	$458
2033	2	$469
10-Year Total		**$3,942**

Office of Information Technology (OIT) Costs
Costs to the IT Systems account are estimated to be $505,000 in 2024, $9.5 million over five years, and $13.1 million over 10 years, as detailed in Table 21 below.

Table 21: OIT Impact		
FY	**VBA FTE**	**Obligations ($000s)**
2024	117	$506
2025	1,080	$4,639
2026	504	$1,567
2027	422	$1,351
2028	436	$1,438
5-Year		**$9,501**
2029	234	$795
2030	211	$738
2031	197	$710
2032	187	$694
2033	179	$684
10-Year		**$13,122**

Estimates were developed based on IT initial provisioning costs per FTE of $4,321 for 2024 (considering 117 FTE in 2024), IT initial provisioning costs per FTE of $4,451 in 2025 (considering 963 new employees), and annual recurring provisioning costs per FTE of $3,018 in 2025 (considering 117 existing employees), then annual recurring provisioning cost per FTE in subsequent years based on the 2025 recurring provisioning cost escalated by 3% year over year. IT provisioning rates per FTE were confirmed by the Benefits, Appeals, and Memorials Account Management Office, Office of Information Technology (OIT).

NCA Costs

Discretionary costs to NCA are estimated to be insignificant at $92 thousand in 2024, $986 thousand over five years, and $1.1 million over 10 years, as detailed in Table 22 below.

Table 22: NCA Impact

FY	NCA Caseload	Obligations ($000s)
2024	74	$92
2025	374	$471
2026	134	$171
2027	96	$125
2028	97	$128
5-Year	**775**	**$986**
2029	10	$13
2030	10	$14
2031	10	$14
2032	10	$15
2033	11	$15
10-Year	**827**	**$1,056**

To determine the discretionary costs to the NCA Operations and Maintenance appropriation, NCA used the caseload provided by VBA to identify the newly eligible SMs with previous COD, without previous COD, and future separations that would be considered Newly HVA. NCA applied the general Veteran population mortality rate and the utilization rate for burial in a national cemetery to estimate the number of annual interments of newly eligible Veterans. The estimated number of interments was multiplied by the average cost of an internment to calculate the total discretionary cost. The average cost of an interment includes casketed, columbaria, and in-ground cremains burials. NCA assumed the survivors of deceased HVA Veterans would not request disinterment from a private cemetery and reinterment at a national cemetery.

Board of Veterans' Appeals (Board) Costs

Costs to the Board are estimated to begin in 2025 with $2.2 million, with costs totaling $48.8 million over five years, and $86.3 million through 2033, as detailed in Table 23 below.

Table 23: Board Impact		
FY	**Board FTE**	**Obligations ($000s)**
2024	0	$0
2025	10	$2,190
2026	89	$19,265
2027	69	$15,356
2028	52	$12,001
5-Year		**$48,812**
2029	54	$12,627
2030	27	$6,485
2031	24	$6,018
2032	24	$6,127
2033	24	$6,259
10-Year		**$86,329**

Based on VBA's projected workload beginning in 2024, the Board anticipates 841 appeals to come directly to the Board in 2025. In 2026, another 6,576 appeals are expected to come directly to the Board with an additional 614 being appealed to the Board after first going to VBA for a Higher-Level Review or Supplemental claim review in 2025. Increased appeals peak in 2026.

The Board does not anticipate appeals receipts or increased GOE costs for FY 2024. GOE costs were based on a composite of Veteran Law Judges (VLJ's), decision writing attorney's and the appellate operations support staff necessary to move appeals through intake, hearings, decision, and dispatch. Staffing levels (FTE) required are estimated to be allocated as follows: 11% Veterans Law Judges, 75% decision writing attorneys, and 14% appellate operations support staff. During the peak of increased appeals in 2026, the Board anticipates a total of 10 VLJ's [Administrative Law Judge, AL-1], 67 attorney's [GS-11 through 14 levels] and 12 appellate operations support staff [GS-07 through 13 levels]. Additional nonpayroll costs to support contracts and interagency agreements (IAAs) including transcription contracts associated with hearings, research tools, human resources, and labor relations support were factored into the total costs.

Paperwork Reduction Act (PRA): This action contains provisions affecting a collection of information, at 38 CFR 3.151, under the provisions of the Paperwork Reduction Act (44 U.S.C. 3501–3521) (PRA). Under the provisions of the PRA (44 U.S.C. 3501-3521), there are no new collections of information associated with this rule, but there will be an increase in the number of respondents associated with three already approved Office of Management and Budget (OMB) control numbers. The information collections

requirement for 38 CFR 3.12 is currently approved by OMB and has been assigned the control numbers of 2900–0747, 2900–0004 and 2900-0002.

This rulemaking would increase the number of respondents from the existing information collection requirements associated with 38 CFR 3.12 by increasing the number of claims for benefits submitted under 38 CFR 3.151.

For original claims under 2900-0747, this would result in an increased difference of 33,753 estimated annual burden hours and an annual increased cost of $1,004,489.28 (33,753 x $29.76). For pension claims under 2900-0002, this would result in an increased difference of 5,756 estimated annual burden hours and an annual increased cost of $171,298.56 (5,756 x $29.76). For disability and indemnity compensation under 2900-0004, this would result in an increased difference of 922 estimated annual burden hours and an annual increased cost of $27,438.72 (922 x $29.76). As required by the Paperwork Reduction Act of 1995 (at 44 U.S.C. 3507(d)), VA will submit this information collection noted above to OMB for their review. Notice of OMB approval for these information collections will be published in a future Federal Register document.

These statistics are gathered from the Bureau of Labor Statistics (BLS), which gathers information on full-time wage and salary workers. According to the latest available BLS data, the mean hourly wage is $29.76 based on the BLS wage code – “00-0000 All Occupations.” This information was taken from the following website: https://www.bls.gov/oes/current/oes_nat.htm.

PRA Costs: VA anticipates the total annual PRA burden for this rulemaking to be $1,203,226.56 ($1,004,489.28 + $171,298.56 + $27,438.72).

Alternative Policy Approaches: VA strongly considered alternate strategies to address the underlying issues of subjective and inconsistent denial of benefits to former service members. The use of sub-regulatory guidance was deemed to be ineffective and inappropriate to address the underlying problem. Adopting the limited regulatory measures originally proposed, after careful analysis of the comments received, was determined to be ineffectual as it would leave in place regulatory bars which are outdated, vague, subjective, and underinclusive. VA also considered eliminating the current regulatory bars and creating a single objective bar identifying specific serious misconduct that bars benefits; however, based upon initial communication with DoD, VA determined that the information necessary to support implementation of this option could not be consistently provided by the service branches. Based on all the received public input and after thorough consideration of the issue, VA is convinced that eliminating all current regulatory bars will change the COD process to become more objective, which will lead to more consistent adjudications of benefits eligibility. In addition, it will become more inclusive, increasing the number of former SMs eligible for certain VA benefits. This rulemaking supports the Secretary’s goal of providing benefits

in a timely manner and modernizing systems. VA cannot achieve these goals through non-regulatory action.

Accounting Statement and Table: As required by OMB, if the costs or transfers exceed $200M in any given year, agencies must provide estimates of the annualized Transfers, Costs and Benefits of a rulemaking that is determined to be an economically significant major rule under EO 12866, Section 3(f)(1), as amended by Executive Order 14094. The annualized costs and benefits are reported in the accounting statement table below.

Ten Year Projection in Real Dollars (Annualized 3% & 7% Values) *(Inflation rates are not applied in this table)*															
Category	***Transfers($000)***														
Year Dollars		FY2024	FY2025	FY2026	FY2027	FY2028	FY2029	FY2030	FY2031	FY2032	FY2033	Present Value		Annualized	
												3%	7%	3%	7%
Federal Annualized Monetized	*Low Est.*	na	na	na	na	na	na	na	na	na	na	$0	$0	**$0**	**$0**
	Pri. Est.	**$21,967**	**$1,340,426**	**$1,901,602**	**$2,368,897**	**$2,833,693**	**$3,011,241**	**$3,140,736**	**$3,226,261**	**$3,316,452**	**$3,408,342**	**$20,274,469**	**$15,947,869**	**$2,307,559**	**$2,122,073**
	High Est.	na	na	na	na	na	na	na	na	na	na	$0	$0	**$0**	**$0**
From/To: & Period Covered:	*From:*	Federal Government			*To:*	Eligible Veterans								*Period Covered:*	FY2024-FY2033
Notes:	Transfers are attributed to the benefits administered to newly eligible Veterans.														
Category	***Costs ($000)***														
Year Dollars		FY2024	FY2025	FY2026	FY2027	FY2028	FY2029	FY2030	FY2031	FY2032	FY2033	Present Value		Annualized	
												3%	7%	3%	7%
Federal Annualized Monetized	*Low Est.*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*
	Pri. Est.	**$6,311**	**$155,183**	**$89,453**	**$76,559**	**$77,271**	**$49,965**	**$40,766**	**$38,785**	**$37,773**	**$37,251**	**$531,217**	**$448,697**	**$60,461**	**$59,705**
	High Est.	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*	*na*
Notes:	Costs associated with this rulemaking include VBA GOE Discretionary expenses, OIT Discretionary expenses, NCA Discretionary expenses, and Board Discretionary expenses.														
Category	***Benefits***														
Notes:	This rulemaking will allow the COD process to become more objective and inclusive, which will increase the eligible number of former service members.														

Submitted by: Veterans Benefits Administration (VBA)
Questions regarding the regulatory impact analysis should be submitted to 211-regulations.vbavaco@va.gov.

Date: November 7, 2023

EXHIBIT D

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

APR 19 2024

The Honorable Denis R. McDonough
Secretary of Veterans Affairs
Washington, DC 20420

Dear Mr. Secretary:

I understand that you are preparing to issue a final rule to update and clarify the regulatory bars to Veterans' benefits based on character of discharge, located in 38 CFR § 3.12(d). The Department of Defense commends your commitment to taking care of our Veterans and supports eliminating entirely the fifth regulatory bar for "homosexual acts."

I want to emphasize, however, the importance of retaining the remaining regulatory bars in their current form, each of which imposes consequences for offenses committed by Service members.[1] The promise of access to the generous benefits administered by the Department of Veterans Affairs serves as an important incentive to our Service members to remain in the military and to complete their service honorably. By the same token, the threat of losing these benefits acts as a substantial deterrent to misconduct. Regulatory bars 1, 2, 3, and 4 therefore advance the vital national security interests of mission readiness, good order and discipline, and retention. The Department of Defense opposes removal or revision of these bars.

Regulatory Bar 1, 38 CFR § 3.12(d)(1)

Regulatory bar 1 applies to Veterans who were separated with an other-than-honorable characterization of discharge in lieu of trial by general court-martial. Individuals separated under such ignominious conditions should not earn Veterans' benefits. If removed, Veterans' benefits would be provided to Service members who commit serious crimes, such as sexual assault, but are not subject to court-martial for evidentiary or procedural reasons. This frequently involves situations in which the alleged victim prefers not to participate or cases where the perpetrator agrees to a separation under other-than-honorable conditions to avoid the consequences of a criminal conviction at general court-martial. If the Department of Veterans Affairs removed this bar, it would break faith with victims who agreed to support a discharge in lieu of general court-martial based on an understanding that the victim's assailant will be denied VA benefits. It would devalue the consequences of an other-than-honorable characterization of discharge, depriving the commander of a tool to dispose of misconduct in an administrative forum while balancing the interests of justice and victim preferences.

[1] The Department of Defense has no objection to the non-substantive changes to the wording of regulatory bar 1 as proposed by Department of Veterans Affairs, Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, Proposed Rule, 85 Fed. Reg. 41,471 (July 10, 2020).

Regulatory Bar 2, 38 CFR § 3.12(d)(2)

Regulatory bar 2 applies to the offenses of mutiny and spying. While the Department of Defense agrees that these offenses are covered under other laws, removing this bar would send the wrong message to Service members and to the public in light of recent, high-profile, mishandling and disclosures of classified national security information.

Regulatory Bar 3, 38 CFR § 3.12(d)(3)

Regulatory bar 3 applies to Veterans discharged because of an "offense involving moral turpitude." This bar is important for several reasons. Bar 3 covers situations in which a Service member is convicted of a serious offense by a civilian court and then administratively separated by the military. No independent statutory bar covers these situations. Bar 3 is thus necessary to prevent Service members convicted in a civilian court of a serious offense, such as sexual assault or child molestation, from receiving Veterans' benefits after being administratively separated from the military based on that civilian conviction. Furthermore, as the Department of Veterans Affairs has recognized, bar 3 may also be applied absent a prosecution or a conviction. Bar 3 therefore addresses situations in which a prosecution may not be appropriate notwithstanding compelling evidence of guilt, such as where the victim does not wish to be compelled to testify or where compelling evidence of guilt may include classified materials or information related to military operations.

Regulatory Bar 4, 38 CFR § 3.12(d)(4)

Regulatory bar 4 applies to Veterans discharged because of willful and persistent misconduct. Bar 4 is important for retention and mission readiness: If Service members believe they may engage in a pattern of misconduct and still receive most Veterans' benefits upon being separated with an other-than-honorable character of discharge, some Service members wishing to end their obligated military service early would be incentivized to engage in such misconduct. Bar 4 serves as a deterrent to this sort of behavior, thus encouraging Service members to complete their military obligation while simultaneously promoting good order and discipline.

Compelling Circumstances

With respect to your proposal to apply a compelling circumstances exception to regulatory bars 3 and 4, the Department of Defense agrees. Applying this exception on a case-by-case basis will provide flexibility to adjudicators to consider unique situations that may arise in making character of discharge determinations. For example, the exception could be applied to a Service member who was a victim of sexual assault and later self-medicated with marijuana, leading to a separation for drug use.

* * *

In sum, the Department of Defense requests that you adopt a final rule that properly balances the vital national security interests of mission readiness, good order and discipline, and retention, with the interests of our entire Veteran population, including the overwhelming

majority who received honorable discharges. Such a balance favors retaining all regulatory bars other than bar 5, and adding a compelling circumstances exception applicable to bars 3 and 4.

Sincerely,

Ashish S. Vazirani
Performing the Duties of the Under Secretary of
Defense for Personnel and Readiness

EXHIBIT E

No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

Petition for Review of VA's Final Rule Regarding Character of Discharge Review Under 38 U.S.C. §§ 101(2), 5303(a)

DECLARATION OF DANIEL CABA SOTO

1. I make this declaration based on personal knowledge.

2. I am a member of Minority Veterans of America ("MVA"). I have been a member of MVA since August 5, 2026.

3. I am a veteran of the U.S. Marine Corps. I served on active duty between November 2022 and November 2024. On November 19, 2024, I received an Other Than Honorable discharge.

4. My administrative separation was based on two non-judicial punishments—one for being out after curfew without signing out, and one for being disenrolled from a language course because I had fallen asleep in class—and two counselings—one for not keeping the door open when visiting another Marine's room and one relating to checking in late when I was on restriction.

5. Around March 2025, I applied to the Department of Veterans Affairs (VA) for dependents' educational assistance benefits based on my mother's honorable service in the U.S. Army. In June 2025, VA decided that my service was "Dishonorable for VA Purposes" because it said I was discharged for "willful and persistent misconduct" and there were no compelling circumstances. Because of the regulatory bar for "willful and persistent misconduct," VA refused to grant any dependents' educational benefits or access to any other VA benefits or services.

6. I am directly and adversely affected by VA's maintenance of the unlawful COD rule recently amended by VA. *See* 28 Fed. Reg. 123 (Jan. 4, 1963), *amended by Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge* ("*Update and Clarify*"), 89 Fed. Reg. 32361 (Apr. 26, 2024) (codified at 38 C.F.R. § 3.12). I have been

denied access to any VA benefits, not only based on my own military service but also based on the service of my mother, a 100% service-connected veteran. The regulatory bars codified at 38 C.F.R. § 3.12(d) thus impair my ability to access crucial VA benefits to which I would otherwise likely be entitled.

7. If this Court holds that VA has no statutory authority to impose the regulatory bars codified at 38 C.F.R. § 3.12(d), I would likely be granted the benefits that I was denied. If this Court holds that VA has no statutory authority to impose the presumption of ineligibility codified at 38 C.F.R. § 3.12(a), I at least would receive important benefits during the pendency of my character of discharge ("COD") review. Instead, due to the unlawful regulatory scheme maintained by VA, I have been and will continue to be denied benefits to which I am entitled under law.

8. As a result, if MVA's challenge to 38 C.F.R. § 3.12 succeeds in this case, and the Court recognizes either (1) that the regulatory bars at 38 C.F.R. § 3.12(d) are contrary to statute or (2) that the presumption of ineligibility at 38 C.F.R. § 3.12(a) is contrary to statute, I will directly benefit because I will more likely be able to obtain a favorable COD

review and therefore more likely be able to access crucial VA benefits to which I currently lack access.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 8/12, 2026

Daniel Caba Soto

EXHIBIT F

No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

Petition for Review of VA's Final Rule Regarding
Character of Discharge Review Under 38 U.S.C. §§ 101(2), 5303(a)

DECLARATION OF REILLY SHERWIN

1. I make this declaration based on personal knowledge.

2. I am a member of Minority Veterans of America ("MVA"). I have been a member of MVA since September 2026.

3. I am a veteran of the Army. I served on active duty for more than six years, between 2015 and 2021. I received an Honorable discharge in 2018 from my first enlistment contract and received an Other Than Honorable discharge in 2021 from my second.

4. While in the Army, I deployed to Afghanistan and served in Korea and Alaska. I have been diagnosed with Post-Traumatic Stress Disorder (PTSD) related to my combat deployment during my second term of service. The Army administratively separated me and assigned an Other Than Honorable characterization based on two charges of making a false statement and disobeying an order.

5. In May 2024, I applied to the Department of Veterans Affairs (VA) for disability compensation benefits. In December 2024, VA decided that my second term of service was "Dishonorable for VA Purposes." On that basis, VA refused to grant any compensation benefits for disabilities incurred during my second term of service, including PTSD and numerous physical injuries. VA only granted a 10% rating for tinnitus based on my first Honorable term of service. In August 2026, I submitted an Intent to File and am planning to submit a Supplemental Claim to seek a favorable Character of Discharge (COD) Determination and compensation benefits for my second period of service.

6. I am directly and adversely affected by VA's maintenance of the unlawful COD rule recently amended by VA. *See* 28 Fed. Reg. 123 (Jan. 4, 1963), *amended by Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge* ("*Update and Clarify*"), 89 Fed. Reg.

32361 (Apr. 26, 2024) (codified at 38 C.F.R. § 3.12). I have been denied full access to VA compensation benefits and related services, and it is possible that VA will continue to deny me full access. The regulatory bars codified at 38 C.F.R. § 3.12(d) thus impair my ability to access crucial VA benefits to which I would otherwise likely be entitled.

7. If this Court holds that VA has no statutory authority to impose the regulatory bars codified at 38 C.F.R. § 3.12(d), I would likely be granted the benefits that I was denied. If this Court holds that VA has no statutory authority to impose the presumption of ineligibility codified at 38 C.F.R. § 3.12(a), I at least would receive important benefits during the pendency of my character of discharge ("COD") review. Instead, due to the unlawful regulatory scheme maintained by VA, I have been and will continue to be denied benefits to which I am entitled under law.

8. As a result, if MVA's challenge to 38 C.F.R. § 3.12 succeeds in this case, and the Court recognizes either (1) that the regulatory bars at 38 C.F.R. § 3.12(d) are contrary to statute or (2) that the presumption of ineligibility at 38 C.F.R. § 3.12(a) is contrary to statute, I will directly benefit because I will more likely be able to obtain a favorable COD review and therefore more likely be able to access crucial VA benefits to which I currently lack access.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 11/September/2026

Reilly Sherwin

EXHIBIT G

No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

DECLARATION OF MINORITY VETERANS OF AMERICA

---

1. My name is Lindsay Church. I am the co-founder and Executive Director of Minority Veterans of America ("MVA"). I use they/them pronouns.

2. I am over 18 years of age, am competent to testify about the information contained in this declaration if needed, and offer this declaration based on my own personal knowledge, or knowledge learned in my role as Executive Director of MVA.

Background

3. I am a veteran of the U.S. Navy. I served from 2008 to 2012 as a Cryptologic Technician Interpretive (Linguist). During my time in service, I attended language school at the Defense Language Institute in Monterey, California, where I learned Persian-Farsi. I am also queer and non-binary, and all but three months of my service was under "Don't Ask, Don't Tell." I was medically retired in 2012.

4. When I left the Navy, I returned to Seattle, Washington, and attended the University of Washington. There, I co-founded the Office of Student Veteran Life and served as the University Liaison for the Student Veterans of America Chapter. I was also elected Commander of American Legion Post 40 in Seattle, where I led efforts to help build the Post, increase membership, and save it from dying.

5. My involvement in these veterans' groups made me realize that some "traditional" veteran spaces were not welcoming for women veterans, LGBTQ+ veterans, and veterans of color. In 2017, I co-founded MVA to ensure that there would be a community of support around minority and underrepresented veterans so that we may see the true diversity of the U.S. military reflected in our veteran communities.

MVA's Structure, Mission, and Purpose

6. MVA is a nonprofit charitable corporation organized under the laws of the State of Washington. Our registered place of business is in Seattle, Washington, but we also have a principal place of business in Berwyn, Illinois, which is where I reside and conduct the day-to-day business of the organization.

7. MVA is a nationwide, nonprofit, non-partisan organization. We are structured with a Board of Directors that sets the strategic direction of the organization and supervises the Executive Director; and staff (full-time, part-time, and volunteer) who implement the strategic goals and handle day-to-day operations.

8. MVA has been granted tax-exempt status by the Internal Revenue Service under Internal Revenue Code § 501(c)(3).

9. MVA's mission is: "To create community belonging and advance equity for minority veterans." MVA's vision is: "Our vision is a just world that empowers minority veterans."

10. MVA's work is built on five fundamental values that we use as the guiding principles for our organization. They are:

a. **Equity:** We look to understand and address the equity gaps and disparities that exist between minority veterans and their non-minority veteran and civilian counterparts.

b. **Inclusion:** We include veterans of all walks of life and lived experiences, regardless of race, sex, sexual orientation, gender identity, age, or religious affiliation.

c. **Education:** We recognize that to bring about meaningful change, we must first educate people about the experiences of the members of the communities we serve. Further, training and developing members of our community is necessary to create new leaders.

d. **Intersectionality:** Because we understand that minority veterans are affected by multiple layers of discrimination, we are building a united community to address the greatest challenges our communities face, recognizing that a collective voice is more powerful.

e. **Advocacy:** We use our individual and collective voices to speak on the needs of minority veterans and to ask that our governmental institutions address those needs.

11. Consistent with these organizational values, MVA broadly construes its mission. We represent and serve veterans who are racial, gender, sexual, and religious minorities. We also work on behalf of service members and veterans who are living with HIV or military sexual trauma ("MST"). Despite our focus on these historically marginalized and underserved veteran communities, MVA's

membership is open to service members, military and veteran families, and civilian supporters who back our mission and core values.

12. From our members and published research, we know that minority veterans—especially Black, Indigenous, Latinx, and LGBTQ+ veterans—as well as veterans who are living with MST, who experienced traumatic brain injury ("TBI"), or who developed other mental health conditions from their service, are disproportionately more likely to have left military service with less than fully honorable discharges that pose significant legal barriers to them accessing many Department of Veterans Affairs ("VA") benefits. Much of MVA's advocacy work focuses on these veterans and getting them access to the benefits they earned and deserve.

13. We also know that historical bias, discrimination, and inequitable military policies are significant contributing factors to the disparities experienced by minority veteran communities. When these historical inequities prevent veterans from accessing VA benefits and services, seeking systemic change to address those issues is part and parcel of our mission.

14. To achieve equity for minority veterans, we have worked in coalition with other military and veteran service organizations ("MSOs" and "VSOs") to advocate for systemic change, including changes to statutes and regulations governing VA benefit eligibility. In addition, MVA's policy team has directly

advocated to VA and Congress—including by submitting Petitions for Rulemaking, commenting on proposed rules, providing written and oral testimony before congressional committees, and communicating directly with White House and VA decisionmakers—for policy and legislative changes that would improve VA access for veterans with less-than-honorable discharges. As relevant here, those efforts are detailed below and included submitting comments at various stages of the rulemaking at issue in this Petition.

Membership

15. Of the 19 million total veterans in the United States, well over 10 million are part of the main populations of minority veterans that we represent. To my knowledge, we are the only nationwide advocacy organization that focuses on serving this whole range of historically marginalized and underserved minority service members and veterans.

16. MVA is a membership-based organization. We welcome and currently have as members veterans who have separated from service, service members who are still serving, family members and caregivers of veterans and service members, and civilians who have not served—often called allies—who support MVA's work.

17. Joining MVA is simple: A person needs only to visit our website (www.minorityvets.org) and click on the button that says "Join Minority Vets." Doing so takes the person to a membership registration form hosted by Salesforce,

where they fill out their name and pronouns, email address, contact information, type of membership (ally, veteran, service member, etc.), and demographic information. They are also given an opportunity to tell their personal story and provide some information about how MVA can best advocate or work for them. A copy of the full membership registration form is attached as Exhibit 1.

18. Completing the membership registration form causes the registrant to be saved in a Salesforce membership database. Currently, the membership list contains over 4,000 people, including people from 49 U.S. states, three territories, and three foreign countries.

19. We communicate with members through the email address they provide during registration. We also communicate through various social media accounts—Facebook, Instagram, X (formerly Twitter), LinkedIn, and YouTube.

20. MVA's members include veterans with less-than-honorable discharges. I am aware of several MVA members who are affected by the regulations at issue in this Petition: they want to or need to access VA programs, but their less-than-honorable discharge characterizations make them ineligible without undergoing VA's character of discharge ("COD") process. They include: Daniel Caba Soto, Reilly Sherwin, Nicholas Wirkkala, and Robert Woods. There are likely other affected members of whom I am not aware.

MVA's Programs and Services

21. Generally, MVA engages in activities that fall into two main categories, which we call Programs and Advocacy.

22. ***Programs***: MVA programs provide opportunities for engagement and growth for minority veterans. They foster social engagement and community connection, financial stability, leadership development, and greater access to critical systems and services that our communities need most. Programs include:

a. *Engagement & Belonging*: MVA builds community, connection, and belonging among minority and historically underserved veterans through programs designed to reduce isolation, improve access to resources, and create affirming spaces where veterans can participate as their whole selves. This work includes the Minority Vets Community Center (MVCC)—MVA's community-based hub for veteran engagement, services, events, resource access, and partnership activities—and Outdoor Recreation Initiatives, which create opportunities for veterans to build connection and well-being through accessible outdoor experiences.

b. *Housing Stability & Direct Services*: MVA provides direct support to veterans experiencing housing instability, financial hardship, and barriers to accessing services. Programs include Q'mmunity House—MVA's transitional housing program providing affirming housing and

case management for veterans—and Unmet Care Needs/Financial Assistance, which provides direct financial assistance and other targeted supports to address urgent needs, prevent destabilization, and help veterans maintain housing and economic security.

c. *Leadership Development & Civic Engagement*: MVA's Emerging Leaders Program invests in the development of minority veteran leaders by providing opportunities for leadership development, mentorship, relationship building, and civic engagement. The program is designed to strengthen veterans' ability to lead within their communities, organizations, and broader systems affecting veterans.

d. *Training, Education & Systems Change*: MVA provides education, training, and technical assistance designed to improve the ability of organizations, providers, and systems to effectively serve minority and historically underserved veteran communities. This work includes the Training & Education Program through which MVA shares subject-matter expertise, promising practices, and practical tools for improving access, cultural responsiveness, equity, and veteran outcomes.

e. *Narrative Power & Special Projects*: MVA develops special initiatives that elevate the experiences of minority veterans, strengthen community connection, and respond to specific community needs. These

programs include *Our Stories, Our Truth*, a storytelling and community engagement initiative centered on the lived experiences and narratives of minority veterans, and the Winter Wish Project, which provides seasonal support to veteran families experiencing financial hardship.

23. ***Advocacy*:** Effectively supporting minority service members and veterans begins by recognizing that social and structural inequities lie at the heart of many of the problems they face. MVA's advocacy efforts therefore focus on bringing about systemic policy changes that will improve the lives of vulnerable service members and veterans.

a. MVA advocates before Congress, the Department of Defense ("DoD"), and VA on issues that affect minority veterans. MVA's policy priorities for the 118th Congress are attached as Exhibit 2.

b. Among other things, our work includes submitting Petitions for Rulemaking, commenting on proposed rules, providing written and oral testimony before congressional committees, and communicating directly with congressional, White House, and agency leaders.

c. In March 2021, MVA expanded its advocacy work to include legal services. Our legal work includes: (i) leading or participating in amicus briefs in cases involving issues of concern to our communities; (ii) participating in impact litigation challenging DoD and VA policies and

regulations; and (iii) consulting directly with service members and veterans on legal issues concerning their service in the military or their entitlement to and eligibility for veterans benefits.

Specific Work Related to VA Access

24. As reflected in MVA's Policy Priorities for the 118th Congress (Ex. 2), MVA's top policy priority in recent years has been "Creating a More Equitable Department of Veterans Affairs." Among five sub-priorities is our work to "Right Past Wrongs & Restore Dignity," which includes VA access issues. It states, in part: "Throughout history, minority veterans have been harmed by inequitable systems and policies that institutionalized bias and discrimination and criminalized identity. DoD and VA must repair the harm caused by these policies by restoring benefits to Black … and LGBTQ … veterans [and] remove barriers to access for those with bad paper discharges."

25. Consistent with this policy priority, over the past few years MVA has engaged in advocacy related to VA access. In addition to MVA's involvement in this case, below are a few examples.

26. In September 2020, MVA submitted a written comment in response to a Proposed Rule, AQ95, Doc. No. 2020-0018—the rulemaking that prompted the regulatory changes challenged in this Petition. (The tracking number for that comment is keo-mfse-egp1.)

27. In October 2021, MVA submitted a written comment in response to a Request for Information, RIN 2900-AQ95(RFI), Doc. No. 2021-19413, which is another stage of the rulemaking that led to the regulatory changes being challenged in this Petition. (The tracking number for that comment is kuo-s812-zh6z.) Later that month, MVA staff member Peter Perkowski testified at a listening session hosted by VA regarding the issues identified in the Request for Information.

28. In April 2024, MVA participated in a Roundtable on Issues Facing Minority Veterans hosted by the Democratic members of the House Committee on Veterans' Affairs ("HVAC"). MVA's Legislative Priorities document prepared for the Roundtable, attached as Exhibit 3, reflected that one of MVA's legislative priorities was improving access to VA healthcare and benefits. The document contains a separate section addressing the need to remove barriers to VA access for veterans with "bad paper" discharges and identifying proposed legislation and VA actions—such as eliminating the regulatory bars—that MVA supports.

29. Over the past several years, MVA staff have had several meetings with the Special Assistant to the President for Veterans Affairs and other members of the Executive Office of the President to discuss MVA policy priorities, including policy changes that would improve VA access for veterans with bad paper.

30. Since 2021, Mr. Perkowski has engaged with members of Congress or their staff many times to discuss legislative proposals that would address issues of

VA access for veterans, including those with bad paper. Some of those discussions have centered on proposed legislation changing the definition of "veteran" in the United States Code, eliminating VA's regulatory bars, and narrowing or updating the statutory bars to VA benefits that are reflected in the United States Code.

31. MVA has submitted written testimony to the House and Senate Committees on Veterans' Affairs in support of proposed legislation addressing VA access issues, including the Sgt. Isaac Woodard, Jr. and Sgt. Joseph H. Maddox GI Bill Restoration Act, the Unlawful Turn-Aways Act, and the SERVE Act, among many others.

32. For several years, MVA has participated in a coalition with other veterans' advocacy groups focused on VA access issues, including the elimination or modification of the regulatory bars and other improvements to VA's COD process. In May 2024, Mr. Perkowski and other members of that coalition—including representatives from co-petitioner the National Veterans Legal Services Program—met with some Democratic members of HVAC and their staff members to specifically address bad paper discharges and VA's COD processes and regulations.

33. For many years, MVA has participated in a coalition with other MSOs and VSOs focused on equity issues for the LGBTQ+ community related to service in the military and Armed Forces, access to VA benefits and services, and other

national security matters. The coalition strategizes on how best to engage the government on these issues, and one of the topics has included bad paper discharges. On MVA's behalf, Mr. Perkowski, Senior Policy Advisor Lorry Fenner, Policy Advisor Sharon "Spider" Arana, and I have been key participants in the coalition's work in this area.

34. In addition, from March 2021 to the present, Mr. Perkowski has counseled and advised individual veterans facing barriers to accessing VA programs and services, including veterans with bad paper.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on November 10, 2026.

Lindsay Church

Lindsay Church

Church Declaration

Exhibit 1

Thank you for your interest in becoming a member with MVA!

Please complete this brief membership registration form.

Who are you?

* (required) First Name

Preferred Name

* (required) Last Name

Pronouns

- They/Them/Theirs/Themselves
- He/Him/His/Himself
- She/Her/Hers/Herself
- Ze/(Hir/Zir)/(Hirs/Zirs)/(Hirself/Zirself)

* (required) Birthday (M/D/YYYY)

* (required) Email

you@example.com

Next

How do we contact you?

Phone

XXX-XXX-XXXX

Mailing Address:

Street

* (required) City

* (required) State Abbreviation

* (required) Zip/Postal Code

Country

USA

How did you hear about us?

-- none selected --

Previous Next

MVA Member Sign Up

*** (required) I would like to sign up as a(n)**

- ○ Ally
- ○ Veteran
- ○ Active Duty Service Member
- ○ Reservist
- ○ National Guard

Previous Next

Identifying Demographical Information

I identify as (a):

- [ ] Person of Color
- [ ] Woman Veteran
- [ ] LGBTQ+
- [ ] Religious / Non-religious minority
- [ ] Other

Religious Affiliations

- [ ] Christian
- [ ] Muslim
- [ ] Hindu
- [ ] Buddhist
- [ ] Atheist / Non-religious / Agnostic
- [ ] Other

Race

- [ ] American Indian / Alaska Native / Indigenous
- [ ] Asian or Asian American
- [ ] Black or African American
- [ ] Native Hawaiian or Other Pacific Islander
- [ ] White / European
- [ ] Hispanic / Latinx
- [ ] Not Hispanic / Latino(a)Hispanic / Latino(a) / Latinx
- [ ] Other
- [ ] Unsure
- [ ] Prefer not to answer

Gender Identity - How do you describe yourself?

- [ ] Female
- [ ] Gender Fluid
- [ ] Genderqueer / Gender Nonconforming
- [ ] Intersex
- [ ] Male
- [ ] Nonbinary / Agender
- [ ] Other
- [ ] Trans Female to Male
- [ ] Trans Male to Female

Sexual Orientation - Do you consider yourself to be:

- [ ] Heterosexual or straight
- [ ] Gay
- [ ] Lesbian
- [ ] Bisexual
- [ ] Pansexual
- [ ] Asexual
- [ ] Queer
- [ ] Other

Are You a Military Sexual Trauma Survivor?

- ○ Yes
- ○ No

Education & Employment

What is the highest level of education you have received?

- ○ Some high school, no diploma
- ○ High school graduate, diploma or the equivalent (GED)
- ○ Some college credit, no degree
- ○ Trade/technical/vocational training
- ○ Associate degree
- ○ Bachelor's degree
- ○ Master's degree
- ○ Doctorate degree

What is your current employment status?

- ☐ Part-Time
- ☐ Full-Time
- ☐ Student
- ☐ Self-Employed
- ☐ Out of work but looking for work
- ☐ Unable to work
- ☐ Retired
- ☐ Other

Previous Next

Tell Us Your Story

* (required) Please tell us your story

Complete this field.

*** (required) Do we have consent to share all or parts of your story?**

- Yes, with my name
- Yes, without my name
- No

Previous Next

How can we best advocate for you?

I am experiencing the following:

- [ ] Barriers to Accessing Benefits
- [ ] Isolation
- [ ] Financial Instability
- [ ] Housing Instability
- [ ] Food Insecurity
- [ ] Unemployment
- [ ] Mental Health Crisis
- [ ] Barriers to Healthcare
- [ ] Other

I would like to be connected to the following resources:

- [ ] Mind Body Balance
- [ ] Listening Sessions
- [ ] Crisis Center
- [ ] Leadership Training
- [ ] Career Fairs
- [ ] Entrepreneurship
- [ ] Higher Education
- [ ] Financial Support
- [ ] Medical Assistance
- [ ] Behavioral Health
- [ ] Nutrition
- [ ] Family Support
- [ ] Compensation
- [ ] Housing Stability
- [ ] Transportation
- [ ] Other

Leadership with MVA

*** (required) Are you interested in leading with MVA?**

- ( ) Yes
- ( ) No

Previous Next

Church Declaration

Exhibit 2

minorityvets

Policy Priorities

118TH CONGRESS

About Us

Minority Veterans of America is a non-partisan, nonprofit community organization serving our nation's most underserved veteran populations. Founded in 2017 in Seattle, WA, Minority Vets works to create community belonging and advance equity for minority veterans. We fight for veterans who are racial and ethnic, gender, sexual, and (non)religious minorities to create more equitable services and to change the narrative of the American veteran.

Who We Are

Minority Vets was founded by Lindsay Church and Katherine Pratt. The two first met as student veterans in 2014 at the University of Washington where they both attended graduate school. Though they didn't share the same identities, they both understood what it meant to be marginalized in the veteran community and made to feel outside. Their intentional organizing began with the understanding that when one of us is harmed, we are all harmed.

What We Do

Minority Vets is an intersectional movement of minority veterans – including racial and ethnic minorities, women, LGBTQ, and (non)religious minorities and those who support us – fighting on the front lines of change. We believe that through creating a collective voice we are capable of impacting the critical change our communities need most. Today, our movement includes over 3,000 members around the country and world.



Minority Vets Advocacy

Both legislation and regulations affect the everyday lives of minority veterans. They create rules by which resources are allocated and systems are established. Those resources and systems either perpetuate disparities and harms or equitably meet the needs of minority veterans. Our legislative and policy work helps to ensure that minority veteran experiences and perspectives are heard and the direct effects of policy on our lives are fully considered as laws and regulations are written and implemented.



Our Strategic Efforts

In order to make the greatest impact on behalf of the communities we serve, our organization engages in advocacy and policy efforts in a multi-faceted way. We work to engage coalitions, lawmakers, agency representatives and decision-makers, community organizations, legal professionals, and courts to ensure that we pursue all avenues necessary to create the critical and lasting changes that our communities need most.

- **Coalition Building**
- **Congressional Advocacy**
- **Community Organizing**
- **Litigation**
- **Administrative Advocacy**
- **Agency-Level Advocacy**

Our Priorities

01 Creating More Equitable Department of Veterans Affairs

02 Addressing Systemic Inequities in the Department of Defense

03 Addressing Healthcare Disparities

04 Addressing Veteran Suicide and Mental Health Disparities

01

Creating A More Equitable Department of Veterans Affairs



The Department of Veterans Affairs is charged with serving our nation's more than 16.5 million living veterans, a population that grows more diverse with each generation. In spite of its charge to serve all veterans, minority veterans continue to struggle to access the care and benefits that they've earned. Rather than an institution that understands them, they often struggle to be heard and understood by a system that, at best was not designed for them, and, at worst was designed with their exclusion in mind. To address many of the greatest challenges facing the veteran community, solutions must prioritize the needs and experiences of minority veterans to have the deepest impact.

A

VA Motto Change

It is long past time to change the exclusionary motto of the Department of Veterans Affairs to include women and transgender veterans. Despite repeated commitments, VA has not taken action to remove or replace the outdated motto. This failure is eroding hard-fought trust among gender-minority veterans.

B

Identity-Based Harassment at VA

Identity-based harassment of racial/ethnic, gender, sexual, and religious minorities is pervasive across the VA. In spite of legislative changes made through the Deborah Sampson Act, harassment has persisted. All identity-based harassment should be tracked, reported, and perpetrators (and their leadership) held accountable for their actions (or lack of).

C

Military Sexual Trauma Survivor Care & Benefits

Veteran survivors of MST continue to experience re-traumatization in the benefits administration process and in their treatment at VA. Attention and resources should be directed to address the prevalence of sexual trauma in the military, and efforts should be made to comprehensively overhaul the benefits application process for people who have experienced MST.

D

Right Past Wrongs & Restore Dignity

Throughout history, minority veterans have been harmed by inequitable systems and policies that institutionalized bias and discrimination and criminalized identity. DoD and VA must repair the harm caused by these policies by restoring benefits to Black (117th HR.5905) and LGBTQ (117th HR.5170) veterans, remove barriers to access for those with bad paper discharges, and institute Boards of Corrections reforms.

E

Training Mandates for VA Staff

Cultural-competency training specific to minority veteran communities - including training on best practices for providing care, support, and inclusive environments - must be mandated for VA staff who interact with veterans, for community-based providers, and for all VA contractors. Training should be provided at all VA points of entry to ensure that minority veterans are treated with respect, and that no veteran is wrongly prevented from accessing earned benefits.

02 Addressing Systemic Inequities in the Department of Defense

The Department of Defense grows increasingly diverse each year and continues to fill many of its ranks with minority and underrepesented service members. The issues that minority veterans face often originate in service and represent a continuum of harm from uniform to veteran status. It is imperative that we work to address the structural barriers and inequities minority service members face in order to mitigate the challenges of the next generation of minority veterans. Identity-based discrimination, structural biases, and a culture that operates with impunity have contributed to many of the disparities we see today and must be addressed through legislation and agency-wide policy changes and reforms.



A

HIV Discrimination

Despite recent policy changes (which resulted from successful litigation), discrimination based on HIV status continues at DoD. Civilians with HIV - including veterans who want to return to service - still cannot enlist or commission. Service members with HIV still face administrative barriers that limit their ability to deploy, promote, and accept certain assignments. DoD must update its policies so that people with HIV can serve equally.

B

Military Sexual Trauma

In spite of decades of advocacy and reform efforts, MST continues to be one of the greatest challenges facing the DoD, especially as they navigate gender-based inclusion. A culture of impunity and failed reform efforts have resulted in the highest number of sexual assaults with some of the lowest trust scores in recorded history. DoD must invest in full implementation of 2021 IRC recommendations and maintain oversight as they recent reform legislation takes effect.

C

Military Trans Ban Repeal

In January 2021, President Biden signed an Executive Order that reversed the unwarranted ban on open and authentic transgender military service. This EO was critical to righting a past wrong. But to ensure that future generations of transgender service members are protected from mounting attacks, it is imperative and urgent that the Military Trans Ban Repeal be codified.

D

Hate Crimes & Discrimination

Service members across the DoD face instances of identity-based discrimination and hate crimes, both on and off base. Currently, the Uniform Code of Military Justice does not cover hate crimes and uses Conduct Unbecoming as a catchall to prosecute these crimes. We urge DoD to adopt hate crime provisions and allow service members who are subject to identity-based harassment and violence to transfer duty stations.

E

Reproductive Health Access

Service members and their families have always faced unique barriers to accessing reproductive healthcare. With the Dobbs decision, these barriers have become harder to navigate as many military installations exist in states with abortion bans and DoD has severe statutory limitations to reproductive healthcare access. DoD and Congress should take measures to expand abortion access, eliminate contraceptive copays, and ensure access to assistive reproductive technologies.

03 Addressing Veteran Health Care Disparities



Access to quality healthcare that is culturally competent and equitable is a central issue facing the minority veteran community. Disparities in healthcare access and delivery, as well as systemic and persistent inequities, deeply affect minority veterans. There is a deep need for comprehensive policies that address these problems. VHA has taken many measures to improve access to quality healthcare for minority veterans but more changes and reforms must take place before minority veterans can reliably turn to VA for their care. We must work to support efforts that embolden healthcare access for all veterans and address the many systemic inequities within VA.

A

Abortion & Contraception Access

Minority veterans are disproportionately harmed by restrictive abortion bans and often lacked basic access to abortion and contraception, even before the Dobbs decision. VA efforts to provide abortion care and counseling in certain instances is a first step to ensuring veterans have access to critical reproductive care. These efforts must be protected, expanded, and codified, and all contraceptive copays eliminated.

B

Gender Affirming Surgery

Regulations prohibit VA from providing transgender veterans the full spectrum of essential and medically necessary gender-affirming care by classifying gender-affirming surgery as "cosmetic." Reversing this ban will result in better overall health outcomes for transgender veterans. VA's medical benefits package must be expanded to include gender affirming surgeries.

C

VA Health Records & Data Collection

The failure to collect key aspects of veteran demographic data - especially sexual orientation, gender identity, intersex status, and tribal affiliation - have led to deep health equity issues that have been devastating for minority veterans. VA must properly collect comprehensive veteran demographic data and mandate the appropriate use of this information in the provision of veteran care and benefits.

D

IVF & Surrogacy Expansion

In vitro fertilization (IVF) and surrogacy are crucial forms of health care for same-sex couples, unmarried women, and some trans people. Coverage for IVF at VA is restricted to married couples with service-connected infertility who can provide their own egg and sperm, leaving out single women and LGBTQ people. These exclusionary restrictions must end.

E

LGBTQ+ Health Center Pilot

VA has made concerted efforts to make the Department more LGBTQ+ inclusive through LGBTQ+ care coordinators throughout VA facilities. To best serve LGBTQ+ veterans and meet their unique healthcare needs, VA should pilot LGBTQ+ Health Centers in cities and regions with the highest concentrations of LGBTQ+ veterans.

F

Racial Bias in Provision of Care

VA has invested in health equity efforts through their Office of Health Equity, which works to address health disparities among veterans. Even with these efforts, racial and ethnic minority veterans still face disparate care despite utilizing health benefits at higher rates. VA must address bias and discrimination in VA care and benefits administration.

04 Addressing Veteran Suicide and Mental Health Care Disparities

Minority veterans face disparate mental health outcomes compared to their dominant culture veteran counterparts, making it imperative that we invest in solutions that will address the margins of identity and veteran care. In the coming years, this issue will only increase in importance given the projected growth of minority veterans' share of the veteran community. It is crucial that efforts to address mental health crisis and suicide among veterans be developed with minority veterans, and their unique needs and challenges, in mind.



A

Psycho-pharmacological Expansion

The epidemic of substance use disorder and other mental health crises among veterans demonstrates the need for innovative therapies that extend beyond traditional psychopharmacological interventions. We believe it is necessary to include cannabis and psychedelics in the VHA's psychopharmacological repertoire and to support and remove existing governmental impediments to cannabis and psychedelic research and therapies broadly.

B

Crisis Line Training Mandates

The Veterans Crisis Line is a critical lifeline for veterans experiencing mental health crisis. Without appropriate and proper training, VA's front-line staff can cause greater distress among veterans looking for support. VCL staff must be held to the highest standards as they are often the last line of defense between a veteran and further mental health crisis or suicide. VA should mandate annual minority-focused training and track and report on negative patient interactions.

C

Minority Stress & Social Determinants of Health

In order to best address veteran suicide and mental health disparities, it is imperative to address the unique psycho-social stressors minoritized individuals face. Policy initiatives aimed at alleviating mental health disparities and suicide among veterans must attend to social determinants of health and salient stressors for minority veterans to be effective.

D

Outdoor Recreation Expansion for Minority Vets

Nature has the power to create healing among veterans after service. Rather than turning exclusively to traditional medications and therapies, VA should expand outdoor recreation and retreat offerings to veterans with an emphasis on addressing the inequities minority veterans face in access. Retreats should be tailored to the unique experiences of minority veterans.

Our Team

Minority Vets is a community-founded and community-led movement. We aim to reflect the members we serve through both our priorities and our organization's leadership. Our team is largely volunteer powered and works to educate and empower minority veterans to engage with our policy work and to use their voices to impact change. We incorporate storytelling and feedback to ensure that our community's voices are at the forefront of our advocacy, policy, and organizing work.

Policy Team Leadership



Lindsay Church
Chief Executive Officer



Peter Perkowski
Legal & Policy Director

Minority Vets is home to policy advocates, analysts, advisors, interns, fellows, and more - many of whom are minority veterans themselves. They contribute their time, talent, and efforts to fighting for future generations of minority veterans to inherit a more equitable community. We are grateful to each person, who gives an hour, 100 hours, or shares their story with us in this fight.

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Fawn Sanchez
Member

Mailing Address

PO Box 25272
Richmond, VA 23260

Minority Vets Contact

Lindsay Church
Chief Executive Officer
lchurch@minorityvets.org

Peter Perkowski
Legal & Policy Director
pperkowski@minorityvets.org

MINORITY VETERANS OF AMERICA

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Church Declaration

Exhibit 3



Legislative Priorities

Prepared for:

Roundtable on Issues Facing Minority Veterans
with the
Democratic Members of the House Committee on Veterans' Affairs

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Prepared by:

Lindsay Church (they/them), *Executive Director & Co-Founder*, lchurch@minorityvets.org
Peter Perkowski (he/him), *Legal & Policy Director*, pperkowski@minorityvets.org
Melissa Bryant (she/her), *Chair, Board of Directors*, mbryant@minorityvets.org

Minority Veterans of America
Legislative Priorities

Ranking Member Takano and Minority Members of the Committee,

We are Minority Veterans of America (MVA), an intersectional movement of minority veterans dedicated to creating community belonging and advancing equity for service members and veterans who are racial, gender, sexual, and religious minorities. MVA works on behalf of more than 10.2 million minority veterans and is home to 3,300 members across 49 states, two territories, and three countries. Through our suite of programs, we directly serve thousands of veterans, service members, and their families each year. On behalf of our dedicated staff, volunteers, and the communities we serve, we extend our gratitude for the opportunity to contribute to this Joint Hearing.

Since our inception in 2017, MVA has been at the forefront of advocating for the unique needs of minority veterans across the nation. In our work, we have witnessed firsthand the challenges faced by members of our community during their time in service that spill over into their existence as veterans. Minority veterans face unique challenges when trying to access quality healthcare and benefits through VA and have unique needs when it comes to their mental and physical healthcare.

Our legislative priorities reflect our commitment to addressing these critical issues. We advocate for improved access to VA healthcare and benefits, ensuring that minority veterans receive equitable support and services. We also emphasize the importance of mental health and suicide prevention initiatives tailored to the unique needs of minority veterans. Too often, our community faces barriers to accessing culturally competent care and support, exacerbating physical and mental health challenges and contributing to disproportionate rates of suicide for racial, gender, and sexual minority veterans.

As we confront these pressing matters, we ask that Congress prioritize legislation that places the unique needs of minority veterans at the forefront, honoring the profound sacrifices our communities have made in service to our nation. The politicization of minority veterans, along with our families, must end. Exploiting our lived experiences, identities, and struggles for political gain through divisive riders that attack the communities we represent undermines the very essence of our collective sacrifices. We must refuse to allow honorable service to be reduced to mere political spectacle and gamesmanship. We honor service by fighting for policies that are worthy of the sacrifices veterans make for the country.

Below, we outline our legislative priorities in detail, offering insight into the specific challenges faced by minority veterans and proposing actionable solutions. It is our sincere

hope that this information will inform and inspire the work of the Committee in the months ahead, driving us closer to a future where every veteran is seen, heard, and valued.

I. Improving Access to VA Healthcare & Benefits

Ensuring equitable access to healthcare and benefits is not just a moral imperative but a solemn commitment to those who have selflessly served our nation to care for them when they return from service. For many minority veterans, accessing the vital resources provided by the Department of Veterans Affairs through the healthcare and benefits system is often hindered by insurmountable barriers.[1] [2] These barriers result in delayed or deferred care which can ultimately lead to exacerbating health issues and diminishing overall well-being. MVA advocates for policies that dismantle these obstacles and ensures that every veteran receives the timely and comprehensive care they require and deserve.

A. Addressing Sexual Harassment, Assault, Identity-Based Harassment, and Discrimination in VA Benefits and Care Settings

Sexual harassment, assault, identity-based harassment, and discrimination within VA spaces, facilities, and programs pose significant barriers to the well-being and access to care for minority veterans. These pervasive forms of institutional abuse, whether stemming from race, gender identity, sexual orientation, or religion, not only violate the principles of equality and respect but also directly hinder the health outcomes and overall experiences of those seeking care from VA. Failures by VA leadership to hold perpetrators accountable have tragically resulted in instances such as the death by suicide of a veteran who sought justice for her sexual harassment by a VA employee and a harassment-free environment.[3] In response to these pressing concerns, Congress passed the Deborah Sampson Act (DSA), which vowed to address the profound gaps in healthcare and reduce barriers to care for women veterans — including by comprehensively tackling sexual harassment and assault throughout the entire agency.

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[1] U.S. Department of Veterans Affairs. (2015). Study of Barriers for Women Veterans to VA Health Care [PDF]. Retrieved from https://www.womenshealth.va.gov/WOMENSHEALTH/docs/Womens%20Health%20Services_Barriers%20to%20Care%20Final%20Report_April2015.pdf# (Page 115)

[2] Garcia, P., Ma, S. P., Shah, S., et al. (2024). Mental Health Outcomes in Transgender and Nonbinary Youths Receiving Gender-Affirming Care. JAMA Network Open, 3(2), e1920622.

[3] U.S. Department of Veterans Affairs, Office of Inspector General. (2023). Failure of leaders to respond to reports of sexual harassment at the VA Black Hills Health Care System in Fort Meade and Hot Springs, South Dakota. Retrieved from https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-22-00514-108.pdf

Despite provisions aimed at mandating improvements, implementation has fallen short of the intended objectives of the law. In fact, since the first Congressionally Mandated Report (CMR) on sexual assault and harassment within VA in 2021, the number of reported assaults on VA campuses has continued to rise, reaching 394 in the 2023, a 21% increase.[4] VA's policies, procedures, and systems to address sexual harassment and assault have failed to have the impact DSA intended. For instance, VA has established five different avenues through which patients, staff, and visitors can report instances of sexual harassment and assault, each yielding varying outcomes. Notably, cases brought to the Harassment Prevention Office are most likely to be deemed founded, with a 68% success rate in 2022. In contrast, cases reported directly to facility leadership have a 50% chance of being founded, while only 43% of cases reported to the VA Police resulted in founded cases.[5] It is imperative that survivors are not confronted with inconsistent outcomes when reporting incidents. VA should eliminate the least effective reporting channels and prioritize those through which survivors are most likely to achieve justice.

MVA strongly advocates for the removal of facility leadership as a reporting pathway for sexual assault and harassment incidents within VA facilities. As a community that has tirelessly campaigned for the Department of Defense to strip commanders of their authority in determining accountability for cases of sexual harassment and assault, it is crucial that similar reforms be implemented in VA policies and procedures. Persistent failures by facility leadership to hold perpetrators accountable drives veterans away from seeking care at VA facilities, exacerbates mental health challenges, and tragically have even led to the loss of veteran lives.[6]

The DSA also outlined a path for problem facilities to be placed in remediation plans when they meet a certain threshold. As part of VHA Directive 5019.02, Harassment, Sexual Assaults, and Other Defined Public Safety Incidents in VHA, the current threshold is five or more substantiated or founded instances of sexual harassment or assault or a combination of both in one over year.[7] In the 2022 Annual Report to Congress on Reporting and Tracking of Sexual Assault and Other Safety Incidents, VA breaks down sexual harassment and assaults by facility. Data indicate that 45 VA Medical Centers, or 29% of facilities, met this

[4]U.S. Department of Veterans Affairs. (2023). Annual Report to Congress on Reporting and Tracking of Sexual Assault and Other Safety Incidents. Report can be accessed at https://bit.ly/43GmmMh.
[5] U.S. Department of Veterans Affairs. (2022). Annual Report to Congress on Reporting Harassment and Sexual Assault Incidents Occurring in Facilities of the Department. Report can be accessed at https://bit.ly/3VE4CPZ.
[6] U.S. Department of Veterans Affairs. (2023). Failure of leaders to respond to reports of sexual harassment at the VA Black Hills Health Care System in Fort Meade and Hot Springs, South Dakota. Retrieved from https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-22-00514-108.pdf
[7] U.S. Department of Veterans Affairs. (2022, September 12). VHA Directive 5019.02(1) Transmittal Sheet: Harassment, Sexual Assaults and Other Defined Public Safety Incidents in VHA.

threshold. Yet, in the 2022 Annual Report to Congress on Reporting Harassment and Sexual Assault Incidents Occuring in VA Facilities of the Department, only five facilities had been placed in remediation plans.[8] Further analysis is impossible, as VA remains delinquent in submitting the 2023 Annual Report on Congress on Reporting Harassment and Sexual Assault Incidents Occurring in Facilities of the Department, due in December 2023.

In addition to the rising number of documented sexual assaults, VA's current CMR fails to capture important data about other forms of harassment and discrimination that veterans face in their care. Current reporting only tracks incidents of sexual harassment and sexual assault, thus missing other important forms of identity-based harassment and discrimination that impede access to care, including based on race, gender, sexual orientation, and religion. Annual reports should be required to track and report on all instances of identity-based harassment, assault, and discrimination occurring on VA campuses across the country, either in VA's CMR on Sexual Assault and Harassment or in their annual Annual Report to Congerss on Reporting and Tracking on Incidents of Sexual Assault and Other Safety Related Incidents.

Finally, MVA and 13 other veterans service organizations submitted a petition for rulemaking asking VA to promulgate regulations under Section 1557 of the Patient Protection and Affordable Care Act (ACA), enforcing the prohibition of discrimination on various bases, including race, color, national origin, sex, age, and disability in health care programs.[9] This action is crucial to addressing the pervasive discrimination faced by veterans, particularly women and LGBTQ+ people, within VHA facilities. Specifically, the petition calls for clarification that Section 1557's antidiscrimination protections extend to all health programs or activities under the VA's purview, delineation of prohibited forms of discrimination and corresponding remedies, and acknowledgment that sex discrimination encompasses sexual-orientation and gender-identity discrimination, aligning with Section 1557 implementing regulations of the Department of Health and Human Services and the Supreme Court's decision in *Bostock v. Clayton County* (2020). Such measures are essential for fostering an inclusive and equitable healthcare environment for all veterans.

Actions MVA supports:

[8] U.S. Department of Veterans Affairs. (2022, December). Annual Report to Congress on Reporting Harassment and Sexual Assault Incidents Occurring in Facilities of the Department (p. 10).

[9] Minority Veterans of America et al. (2023, July 20). Petition for Rulemaking to Promulgate Regulations Governing Discrimination Under Section 1557 of the Patient Protection and Affordable Care Act. Retrieved from https://law.yale.edu/sites/default/files/documents/pdf/2023.07.20_mva_petition_for_rulemaking_va_155771.pdf

- Require VA to advance necessary and overdue rulemaking on 1557 regulations that will offer patients protection from and remediation for instances of discrimination in care settings;
- Amend or expand the Deborah Sampson Act to:
    - Require VA to include identity-based harassment and discrimination in its Annual Report to Congress on Reporting Harassment and Sexual Assault Incidents Occuring in VA Facilities of the Department and its Annual Report to Congress on Reporting and Tracking of Sexual Assault and Other Safety Incidents;
    - Eliminate pathways to reporting harassment, assault, and discrimination that have a higher likelihood of being dismissed without action, including reporting to facility leadership;
    - Provide oversight of facility remediation plans, the criteria for determining if facilities should enter remediation, and ensuring there is oversight of measures taken to hold facility leadership accountable for the outcomes;
    - Report annually on incidents of identity-based harassment and discrimination in health care and benefits settings.

B. Removing Gender Affirming Surgery Exclusion in Medical Benefits Package

Transgender, nonbinary, and gender-diverse veterans have never had access to gender-affirming surgery through VA. Regulations exclude gender affirming surgery from the health benefits package, deeming it "strictly cosmetic."[10] This classification contradicts international standards of transgender healthcare, which recognize such surgeries as "essential and medically necessary" interventions.[11] Over decades, these standards have been supported by substantial evidence, showing that transgender people who undergo such procedures experience marked improvements in mental health, including reductions in depression and anxiety.[12]

[10] U.S. Department of Veterans Affairs. (2018, May 23). VHA Directive 1341(3) providing health care for transgender and intersex veterans https://www.patientcare.va.gov/LGBT/docs/directives/VHA_DIRECTIVE_1341.pdf.

[11] Coleman, E., Radix, A. E., Bouman, W. P., Brown, G. R., de Vries, A. L. C., & Deutsch, M. B. (2022). Standards of care for the health of transgender and gender diverse people, Version 8. International Journal of Transgender Health, 23(Suppl 1), S1-S259.

[12] Park, R. H., Liu, Y. T., Samuel, A., Gurganus, M., Gampper, T. J., Corbett, S. T., Shahane, A., & Stranix, J. T. (2022). Long-term Outcomes After Gender-Affirming Surgery: 40-Year Follow-up Study. Annals of plastic surgery, 89(4), 431–436. https://doi.org/10.1097/SAP.0000000000003233

Secretary McDonough pledged to lift this ban in statements on June 19, 2021,[13] a commitment that the White House also vowed to uphold in their 2023 TDOV Fact Sheet.[14] These announcements, made during Pride month and on Transgender Day of Visibility, were rightfully celebrated by the community. Unfortunately, nearly three years later, we are still awaiting the fulfillment of these promises.

The ban on gender-affirming surgery is not only an equity issue but also a safety issue, a reality that the Secretary himself has acknowledged.[15] In his own words, the Department is taking steps to remove the ban "not only because [it is] the right thing to do, but because [it] can save lives." Saving lives is even more urgent today than when the Secretary made his remarks in 2021, as the health and safety of trans people are threatened nationwide. In 2023, 45 states attempted to pass anti-trans legislation[16] with 23 states passing laws banning access to gender-affirming care.[17] While many of these laws have specifically targeted minors, a growing number have also barred access to medical care for transgender adults. Transgender, nonbinary, and gender-diverse Americans are twice as likely as the general population to serve in the military[18] and many rely on the Department to provide this care.

Some lawmakers have argued that gender affirming surgeries are "[w]holly incompatible with the mission" of VA.[19] This belief fails to recognize the deep impacts that military service has on patriotic transgender people who are disproportionately likely to serve in uniform. Adherence to the hypermasculine, highly sexed, and rigidly gendered nature of the military has a deep and lasting impact on minority service members and

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[13] Office of Public and Intergovernmental Affairs. (2021, June 19). Remarks by Secretary Denis R. McDonough. Office of Public and Intergovernmental Affairs. https://www.va.gov/opa/speeches/2021/06_19_2021.asp

[14] The White House. (2022, March 31). Fact Sheet: Biden-Harris Administration Advances Equality and Visibility for Transgender Americans [Press release]. Retrieved from https://www.whitehouse.gov/briefing-room/statements-releases/2022/03/31/fact-sheet-biden-harris-administration-advances-equality-and-visibility-for-transgender-americans/

[15] Ibid.

[16] Track Trans Legislation, https://www.tracktranslegislation.com.

[17] Movement Advancement Project. (2024). Equality Maps: Bans on Best Practice Medical Care for Transgender Youth. Accessed at https://www.mapresearch.org/equality-maps/healthcare/youth_medical_care_bans.

[18]Schvey, N. A., Klein, D. A., Pearlman, A. T., & Riggs, D. S. (2020). A Descriptive Study of Transgender Active Duty Service Members in the U.S. Military. Transgender health, 5(3), 149–157. https://doi.org/10.1089/trgh.2019.0044

[19] Rosendale, M., et. al. (2021, June 28). Sex Reassignment Letter. Retrieved from https://rosendale.house.gov/uploadedfiles/6.28.21_sex_reassignment_letter.pdf

veterans, transgender and cisgender alike.[20] These experiences, coupled with living under discriminatory policies such as "Don't Ask, Don't Tell" and the Military Trans Ban, make gender dysphoria and the resulting conditions an issue that is directly relevant to the mission of the Department.

Secretary McDonough has indicated that this process will take time and involve several steps.[21] Since 2021, the Department has made progress internally on the proposed regulatory changes, and its regulatory agenda projected that the Notice of Proposed Rulemaking (NPRM) would be issued in the fall of 2022.[22] But on February 22, 2024, Secretary McDonough denied the petition for rulemaking for gender-affirming care, thus further imperiling the lives of transgender veterans in dire need of this care.[23]

We call on Congress to honor our nation's commitment to provide equitable care for transgender, nonbinary, and gender-diverse veterans and, in the absence of action on the Secretary's part, pass legislation that will remove the discriminatory exclusion of gender-affirming surgeries from the VA medical benefits package.

Actions MVA supports:

- Require VA to amend Title 38 CFR 17.38(c)(4) to remove the exclusion of medically necessary gender-affirming surgery and to update VHA Directive 1341(3).

C. Addressing Systemic Failures in the Benefits Process for Military Sexual Trauma Survivors

Military Sexual Trauma (MST) survivors confront a broken benefits process that exacerbates their trauma and impedes access to essential care and support. The current system fails to adequately address the unique needs of MST survivors, perpetuating their suffering and denying them the benefits they rightfully deserve. There is urgent need for systemic reform to ensure that survivors are not further harmed by bureaucratic barriers and inefficiencies in the benefits adjudication process. It is imperative that policymakers

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[20] Rosenthal, M. (2021, October 26). U.S. Military's Male-Dominated Culture Harms More Than Just Women. Ms. Magazine. Retrieved from https://msmagazine.com/2021/10/26/u-s-military-male-culture-women-sexual-assault-harassment-gender-stereotypes/

[21] Office of Public and Intergovernmental Affairs. (2021, June 19). *Remarks by Secretary Denis R. McDonough*. Office of Public and Intergovernmental Affairs. https://www.va.gov/opa/speeches/2021/06_19_2021.asp

[22] Removal of Exclusion of Gender Alterations From the Medical Benefits Package. (Fall 2022). Retrieved from Federal Register website https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202210&RIN=2900-AR34

[23] United States, Court of Appeals. Transgender American Veterans Association Petition for a Writ of Mandamus to the Department of Veterans Affairs. https://bit.ly/TAVAvVA

undertake a comprehensive analysis of the broken benefits system, addressing root causes rather than attempting to fix the system piece by piece.

Survivors of MST often encounter insurmountable obstacles when navigating the benefits process, including complex paperwork, lengthy wait times, and doctors and raters who lack culturally-informed care and training to support and believe survivors. These systemic failures not only retraumatize MST survivors but they also perpetuate cycles of suffering that all too often lead to mental health crises. A 2022 report by the Government Accountability Office showed that, though VA had instituted a number of reforms to the disability process for survivors of MST, "Most relevant leading practices [were] partially or not followed."[24]

MVA advocates for a comprehensive overhaul of the benefits process, emphasizing the need for a holistic approach that identifies and rectifies systemic deficiencies at the most fundamental levels and prioritizes the unique needs of sexual harassment and violence survivors. This overhaul should be conducted in collaboration with relevant agencies, veteran and military service organizations, as well as survivors themselves, aiming to strike a balance between the government's demand for substantiation and the limitations survivors face in meeting the existing criteria, without exacerbating their trauma further. By implementing comprehensive reforms that prioritize the needs and experiences of MST survivors, we can begin to dismantle the barriers that prevent them from accessing the care and benefits they are entitled to receive and set them on a path to recovery, healing, and restoration of their trust in the VA as an institution built for them.

Legislation MVA supports:

- S. 1028 / H.R. 2441 Servicemembers and Veterans Empowerment and Support Act (Senator Tester / Representative Pingree)
- H.R. 2724 (117th) / S. 4441 (117th) VA Peer Support Enhancement for MST Survivors Act (Representative Delgado / Senator Cortez)

D. Promoting Equitable Access to Comprehensive Family Planning Services for Veterans

Equitable access to comprehensive family planning services is paramount for the holistic well-being of veterans and their families. MVA advocates for policies that ensure veterans have access to a broad spectrum of family planning options, including abortion

[24] United States Government Accountability Office. (Year). VA Disability Benefits Compensation Program Could Be Strengthened by Consistently Following Leading Reform Practices. Report to the Ranking Member, Committee on Veterans' Affairs, House of Representatives. Accessed at https://www.gao.gov/assets/gao-22-104488.pdf.

and contraception, in vitro fertilization (IVF) and surrogacy programs, and maternity care coordination. However, barriers within the VA healthcare system hinder minority veterans' access to these critical services. By prioritizing equitable access to comprehensive family planning, we can empower veterans to make informed choices about their reproductive health and family planning goals, regardless of their background or identity.

Currently, minority veterans encounter significant challenges in accessing family planning services through the VA. Limited availability of contraceptive options, restricted access to IVF and surrogacy programs, and inadequate maternity care coordination disproportionately affect minority veterans and their families. These barriers not only impede veterans' ability to access necessary care but also exacerbate existing health disparities. MVA calls for policies that address these disparities head-on, ensuring that all veterans have access to the full spectrum of family planning services they need to lead healthy and fulfilling lives. By investing in comprehensive family planning access, we can promote reproductive autonomy, improve health outcomes, and support the well-being of veterans and their families for generations to come.

1. Abortion and Contraception

Our nation is confronting a reproductive healthcare crisis, exacerbated by the recent Supreme Court decision in Dobbs v. Jackson Women's Health Organization, which overturned Roe v. Wade and revoked the constitutional right to abortion. Within the VA healthcare system, access to abortion and contraception services is crucial for the reproductive health and autonomy of women and gender minority veterans.

In 2022, the VA initiated rulemaking to broaden access to abortion counseling and care for veterans and CHAMPVA dependents in cases of rape, incest, and threats to the patient's life or health. This process was finalized on March 4, 2024 with publication of the final rule.[25] This expansion has been vital for meeting the needs of veterans residing in states with restrictive abortion laws who rely on the VA for such care. It is imperative for Congress to oppose any attempts to roll back this expanded coverage and safeguard contraceptive care, including contraception and medication abortion.

In addition, veterans who use VA for their contraceptive care are required to pay copays where their civilian counterparts do not as the result of cost-sharing requirements. Congress should take long-overdue action on H.R. 239, the Equal Access to Contraception for Veterans Act to eliminate contraceptive copays for veterans.

Legislation we support:

[25] Department of Veterans Affairs. (2024, March 4). Reproductive Health Services [Rule]. Federal Register, 89(44), 15451-15474.

- H.R. 239 (117th) / S. 4700 (117th) Equal Access to Contraception for Veterans Act (Representative Brownley / Senator Blumenthal)

2. IVF and Surrogacy Programs

Access to in vitro fertilization (IVF) and surrogacy programs is crucial for many minority veterans seeking to build families, yet disparities in access persist. Recently, VA announced that they, "Will soon be able to provide in vitro fertilization (IVF) to eligible unmarried Veterans and eligible Veterans in same-sex marriages. VA will also be able to provide IVF to Veterans using donated sperm or eggs – a critical step toward helping Veterans who are not able to produce their own sperm or eggs due to service-connected injuries and health conditions."[26] MVA applauds this move to change the Department's discriminatory bars and awaits further guidance on how this will be implemented.

Despite this announcement and the anticipated expansion of services for veterans seeking access to this crucial care, significant barriers persist. Planned reforms will continue to limit the availability of the benefit to only a narrow class of veterans who can demonstrate service connection, a requirement that poses challenges for many women, as well as some transgender and nonbinary veterans.[27] Legislation is necessary to broaden access to IVF services for all veterans, eliminating the barriers they may encounter when planning their families.

Moreover, the existing regulations do not allow the use of a surrogate in family planning benefits. For individuals, particularly women and gender minorities, grappling with conditions that impede their ability to carry a pregnancy to term—such as endometriosis or necessitating a full hysterectomy due to fibroids—the availability of a surrogate is paramount. Additionally, for LGBTQ+ couples, notably gay men and transgender individuals undergoing hormone therapy, the involvement of surrogates often plays a pivotal role in their family planning endeavors. However, the current regulatory framework excludes many veterans from realizing their aspirations of building the families they desire.

MVA advocates for reform efforts aimed at removing the requirement of a service-connected disability to access IVF services and urges the VA to extend surrogacy benefits to qualified veterans.

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[26] VA News. (2024, March 11). VA expands in vitro fertilization for Veterans. Retrieved from https://news.va.gov/press-room/va-expands-in-vitro-fertilization-for-veterans/

[27] Mattocks, K., Kroll-Desrosiers, A., Zephyrin, L., Katon, J., Weitlauf, J., Bastian, L., Haskell, S., & Brandt, C. (2015). Infertility care among OEF/OIF/OND women Veterans in the Department of Veterans Affairs. Medical care, 53(4 Suppl 1), S68–S75. https://doi.org/10.1097/MLR.0000000000000301

Legislation we support:

- H.R. 544 Veterans Infertility Treatment Act of 2023 (Representative Brownley)

3. Maternity Care and Coordination

Maternal health for veterans is a critical aspect of care that addresses the unique needs of veterans navigating pregnancy, childbirth, and postpartum care within the VA healthcare system. Accessing comprehensive maternal health services poses significant challenges, however, particularly for minority veterans. Structural inequities, including systemic racism, socioeconomic disparities, and cultural biases, often impede access to essential prenatal, labor, delivery, and postpartum care for minority veterans. These disparities are further exacerbated by factors such as geographic constraints, transportation issues, and limited availability of on-site obstetric services within VA facilities.[28] As a result, pregnant and postpartum veterans, especially those from racial and ethnic minority groups, may face obstacles in accessing timely and appropriate maternity care, leading to fragmented care experiences and disparities in maternal health outcomes.

Despite initiatives like the Maternity Care Coordinator (MCC) program aimed at supporting pregnant veterans, minority veterans encounter intersectional challenges that significantly impact their maternal health experiences within the VA healthcare system. These challenges stem from a combination of factors, including race, ethnicity, gender identity, sexual orientation, socioeconomic status, and geographic location, which contribute to disparities in access to and quality of maternity care. Minority veterans are more likely to experience discrimination, cultural insensitivity, and implicit bias within VA care settings, leading to mistrust and reluctance to engage with healthcare providers. Additionally, historical inequities, such as those stemming from discriminatory policies like "Don't Ask, Don't Tell" and the Military Trans Ban, further compound disparities in maternal health outcomes for LGBTQ+ veterans.[29] Addressing these challenges requires a comprehensive approach that prioritizes equity, cultural competence, and coordinated care to ensure that all veterans, regardless of their minority status, have access to quality maternal health services within the VA healthcare system.[30]

Legislation we support:

- H.R. 3303 Maternal Health for Veterans Act (Representative Underwood)

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[28] S, Rose D., Saechao, F., Shankar, M., Shaw, J., Vinekar, K. S., Yano, E. M., Christy, A. Y., & Johnson, A. M. (2023). *State of Reproductive Health Volume II: VA Reproductive Health Diagnoses and Organization of Care*. Office of Women's Health, Veterans Health Administration, Department of Veterans Affairs.

[29] S, Rose D., Saechao, F., Shankar, M., Shaw, J., Vinekar, K. S., Yano, E. M., Christy, A. Y., & Johnson, A. M. (2023). *State of Reproductive Health Volume II: VA Reproductive Health Diagnoses and Organization of Care* (pp. 18-20). Office of Women's Health, Veterans Health Administration, Department of Veterans Affairs.

[30] MVA's full testimony on H.R. 3303 can be found at https://bit.ly/3VEwkvP

E. Establishing LGBTQ+ Veteran Advisory Committee and Centers for LGBTQ+ Veterans

LGBTQ+ service members and veterans face unique challenges related to their healthcare, benefits, and end of life planning needs through the Department of Veterans Affairs. In recognition of these distinct challenges and the failures of the Department to provide this care to LGBTQ+ veterans, it is imperative that VA take a comprehensive strategy to their future work related to these communities. VA is currently home to the Center for Women Veterans and Center for Minority Veterans as well as Advisory Committees on Women and Minority Veterans. MVA supports the establishment of a Center for LGBTQ+ Veterans with a standing Advisory Committee on LGBTQ+ Veterans.

Like its peer centers, the Center for LGBTQ+ Veterans should be charged with:

- **Advocacy**: Advocate for the needs and concerns of LGBTQ+ veterans within the Department of Veterans Affairs (VA) and across federal agencies.
- **Policy Development**: Participate in the development of policies and programs that address the unique challenges faced by minority veterans and women veterans, ensuring that their voices are heard in the policymaking process.
- **Outreach and Education**: Conduct outreach activities to raise awareness about available VA benefits and services among LGBTQ+ veterans. This includes providing information about healthcare, education, housing, employment, and other resources.
- **LGBTQ+ Veteran Coordinators**: Oversee the work of LGBTQ+ Veteran Care Coordinators who serve at all VA facilities.
- **Advisory Committee**: Administer an Advisory Committee on LGBTQ+ Veterans tasked with providing recommendations to the Department.
- **Advisor to VA Leadership**: Serve as advisory body to VA leadership, providing insights and recommendations on issues affecting LGBTQ+ veterans.
- **Research and Data Analysis**: Conduct and facilitate research on LGBTQ+ veteran demographics, health outcomes, access to care, and other relevant topics to inform VA programs and policies.

VA should pilot up to five LGBTQ+ Health Centers that can provide specialized care, encompassing primary care, mental health, reproductive health services, and social support services. These pilot programs should be selected to include areas with the highest concentration of LGBTQ+ veterans or LGBTQ+ Americans given the pervasive data disparities on veterans relating to sexual orientation and gender identity. Through creating safe and affirming environments and delivering culturally-informed care, these centers can

address the unique healthcare needs of LGBTQ+ veterans while serving as models for future LGBTQ+ healthcare initiatives within VA and the public sector. Overall, these efforts represent significant strides towards fostering inclusivity and improving healthcare outcomes for LGBTQ+ veterans within the VA system.

Legislation we support:

- H.R. 7674 To amend title 38, United States Code, to establish the Advisory Committee on Lesbian, Gay, Bisexual, Transgender, and Queer Veterans (Representatives Pappas and Delbene)
- H.R. 5776 (117th) Serving our LGBTQ Veterans Act (Representative Kehele)

F. Mandated Minority-Focused Cultural Competency Training

The implementation of mandated, minority-focused cultural competency training would represent a critical step in enhancing the quality of care provided to minority veterans within the VA healthcare system. VA should ensure that all staff, contractors, and community care providers receive annual comprehensive training on minority-focused cultural competence, including topics such as implicit bias, racial equity in the provision of care, gender identity, pronouns, and best practices in providing culturally competent and informed care. While many of these training are available to staff who opt-in, training should be required for all staff who have direct interactions with veterans, especially those who provide care or are responsible for regular interactions with patients. By mandating these trainings, VA can better equip its workforce to address and meet the unique needs and experiences of minority veterans, leading to more inclusive and equitable healthcare delivery.

G. Removing Barriers to Benefits and Healthcare Access for Individuals with Bad Paper Discharges

Addressing structural barriers that accompany negative discharge characterizations is essential to ensure equitable access to benefits and healthcare for all veterans. This is a serious issue for veterans with mental or behavioral health conditions related to MST, traumatic brain injury, or other service-related experience (including combat), as many of them have received Other Than Honorable (OTH) discharges (or worse) due to misconduct related to such conditions. As a result, bars to VA eligibility have the effect of excluding veterans most in need of benefits and services.

In addition, benefit ineligibility due to bad paper disproportionately affects minority veterans. For example, Black and racial minority veterans are more likely to have been

separated with bad paper than their white counterparts, suggesting that prejudice plays a part in these outcomes and the consequent VA ineligibility. For LGBTQ+ veterans, VA access ineligibility is the direct result of historical policies of the Armed Forces that policed and criminalized sexual orientation and non-conforming gender identity and expression. DoD's enforcement of those policies caused many thousands of LGBTQ+ veterans to be administratively separated with an OTH characterization of service, if not discharged after court-martial conviction or in lieu of court-martial.

Veterans with bad paper are ineligible for VA benefits and services because of the "regulatory bars" in 38 C.F.R. § 3.12(d), which makes an OTH discharge characterization presumptively disqualifying. Section 3.12(d) is VA's interpretation of 38 U.S.C. §101(2), in which Congress defined "veteran" to include only those discharged "under conditions other than dishonorable." VA's interpretation, which lumps OTH discharge characterizations with Dishonorable ones, is unnecessarily strict. It should be modified. Affected veterans have two options. The first is to seek a character-of-discharge (COD) determination from VA, a burdensome process that is hard to successfully navigate without legal assistance. The second is to seek a discharge upgrade from the military correction Boards, which for many reasons are not well-equipped to evaluate claims from veterans affected by historical government-mandated discrimination and criminalization.

Veterans with bad paper experience significant challenges in accessing VA benefits and healthcare services. These barriers are inequitable and must be eliminated.

Actions MVA supports:

- Require VA to repeal the regulatory bars or modify them in accordance with Congressional mandates;
- Require DoD to issue comprehensive guidance to the military departments on how correction Boards should analyze and decide upgrade petitions from LGBTQ+ veterans affected by historical military policies of discrimination and criminalization.

Legislation MVA supports:

- H.R. 5321 (117th) / S. 2786 (117th) Unlawful Turn-Aways Act (Representative Underwood / Senator Blumenthal)
- H.R. 5170 (117th) Securing the Rights Our Veterans Earned ("SERVE") Act (Representative Pappas)
- S. 3257/H.R. 1255 Sgt. Isaac Woodard, Jr. & Sgt. Joseph H. Maddox GI Bill Restoration Act (Senator Warnock / Representative Moulton)

- H.R. 1596 (117th) Commission to Study the Stigmatization, Criminalization, and Ongoing Exclusion and Inequity for LGBTQ+ Servicemembers and Veterans Act (Representative Takano)

II. Mental Health & Minority Veteran Suicide Prevention

Minority service members and veterans have unique experiences both during their military service and after transitioning to civilian life, necessitating tailored interventions, strategies, and investments by VA. While addressing mental health and suicide prevention among veterans has been a longstanding commitment of the Committee, the evolving nature of the suicide crisis among veterans requires an adaptation of our approaches to meet the emerging needs of the most vulnerable communities of veterans, including minority veterans. Many of the communities we serve face disproportionate challenges related to mental health, including suicidal ideation, and are more likely to die by suicide compared to their dominant culture counterparts.[3132]

Despite advancements in understanding and addressing mental health issues among veterans, persistent disparities remain, particularly among minority veterans. For instance, according to VA's 2023 National Veteran Suicide Prevention Annual Report, Native American veterans saw a spike in the suicide rate, from 30.5 per 100,000 in 2020 to 46.3 per 100,000 in 2021—an alarming 52% increase.[33] Similarly, Black and African American veterans also experienced a significant increase, from 14.6 per 100,000 in 2020 to 17.4 per 100,000 in 2021. Moreover, suicide rates among women veterans surged by 24.1% between 2020 and 2021, compared to a 6.3% increase among male veterans.

To address suicide among minority veterans, tailored interventions are imperative. Current prevention models adequately address the cultural and social factors contributing to mental health disparities. Interventions must encompass culturally competent care, community-based support networks, and accessible mental health services that recognize and honor the diverse backgrounds and lived experiences of minority veterans.

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[31] Department of Veterans Affairs (VA). (2022, May). LGBTQ+ Identities and Suicide Risk Among Veterans: From Science to Practice Using Research to Promote Safety and Prevent Suicide. Retrieved from https://www.mentalhealth.va.gov/suicide_prevention/docs/FSTP-LGBT.pdf.

[32] Johnson, D. (2024, February 28). Service Members and Vets Belonging to Racial Minority Groups Face Disproportionately High Suicide Rates. Military.com. Retrieved from https://www.military.com/daily-news/2024/02/28/service-members-and-vets-belonging-racial-minority-groups-face-disproportionately-high-suicide-rates.html

[33] Department of Veterans Affairs (VA). (2023). 2023 National Veteran Suicide Prevention Annual Report. VA Suicide Prevention Office of Mental Health and Suicide Prevention. Page 20. Full data tables can be accessed in the data appendix that can be accessed at https://www.mentalhealth.va.gov/suicide_prevention/data.asp.

Legislation MVA supports:

- S. 853/H.R. 1639 VA Zero Suicide Demonstration Project Act (Senator Rosen/Representative Susie Lee)

III. Outdoor Recreation Access for Minority Veterans

Nature holds transformative powers that extend far beyond its scenic beauty, for minority veterans it can be a pathway toward healing, renewal, and personal growth after service. Outdoor activities not only facilitate the transition from military service to civilian life but also foster vital connections with nature and community, providing a sanctuary for reflection and rejuvenation. Nature-based experiences promote resilience, reduce stress, and enhance overall well-being among minority veterans. Minority veterans often encounter barriers when attempting to access the outdoors and face disproportionate challenges in access, including limited financial resources, geographic disparities, and physical and safety barriers.

Recognizing these challenges, VA should prioritize initiatives aimed at expanding outdoor recreation access for minority veterans in outdoor spaces. By increasing funding for tailored outdoor programs, improving accessibility through infrastructure enhancements and transportation support, investing in local and underserved communities, and fostering partnerships with community organizations, we can empower minority veterans to fully experience the transformative benefits of nature. Investing in equitable access, programs, and resources not only enhances the quality of life for minority veterans but also strengthens their connection to the outdoors, promoting holistic well-being and supporting their successful transition to civilian life.

MVA has the privilege of serving on the Task Force on Outdoor Recreation for Veterans, an interagency working group tasked with identifying opportunities to formalize coordination between VA, public land agencies, and partner organizations, as well as addressing the barriers that veterans experience when accessing outdoor recreation opportunities. The Task Force has submitted preliminary findings to Congress through our first CMR and we are scheduled to issue our comprehensive recommendations in late 2024. We look forward to working with the Committee to bring these recommendations to life through increased resources, programs, and benefits available to service members, veterans, and their families.

Legislation MVA supports:

- S. 448 / H.R. 1065 Outdoors for All Act (Senator Padilla / Representative Barragan)

EXHIBIT H

No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,

Respondent.

Petition for Review of VA's Final Rule Regarding Character of Discharge Review Under 38 U.S.C. §§ 101(2), 5303(a)

DECLARATION OF ROBERT WOODS

1. I make this declaration based on personal knowledge.

2. I am a member of Minority Veterans of America ("MVA"). I have been a member of MVA since January 31, 2026.

3. I am a veteran of the United States Marine Corps. I served on active duty between November 29, 1995, and February 8, 2000. I received an Other Than Honorable ("OTH") discharge.

4. As a Black Marine, I experienced racial hostility during my service, including twice finding a noose beneath my bunk. Additionally, my friend died in an on-base accident shortly before I deployed overseas. These experiences affected me greatly, but for the majority of my service I had no misconduct. In the final months of my enlistment, my experiences took a toll on my mental health. I was cited for growing my mustache too long and a few unauthorized absences. I used marijuana to cope with my mental health symptoms, and I was discharged for drug abuse.

5. In October 2018, I applied to the Department of Veterans Affairs (VA) for service-connected compensation for multiple disabilities. I included a statement regarding the racial hostility I experienced in service. In March 2019, VA decided that my service was "Dishonorable for VA Purposes" because it said I was discharged for "willful and persistent misconduct." In April 2019, VA granted service connection "for treatment purposes only" for some of my claimed disabilities. Because of the regulatory bar for "willful and persistent misconduct," VA refused to grant any monetary benefits for my service-connected disabilities. In 2020, before VA updated 38 C.F.R. § 3.12, I filed a supplemental claim

with additional evidence regarding my character of discharge. That claim remained pending and was not decided until October 1, 2025. On that date, VA determined that my discharge was "other than dishonorable" solely under the newly revised regulation at 38 C.F.R. § 3.12.

6. I am directly and adversely affected by VA's maintenance of the unlawful COD rule recently amended by VA. *See* 28 Fed. Reg. 123 (Jan. 4, 1963), *amended by Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge* ("*Update and Clarify*"), 89 Fed. Reg. 32361 (Apr. 26, 2024) (codified at 38 C.F.R. § 3.12). I have continuously pursued my application for COD, with evidence and multiple submissions, since 2018. The regulations create unlawful procedural hurdles for obtaining my statutory disability benefits. The regulatory bars codified at 38 C.F.R. § 3.12(d) thus impaired my ability to access disability compensation benefits to which I am entitled.

7. If this Court holds that VA has no statutory authority to impose the regulatory bars codified at 38 C.F.R. § 3.12(d), I would likely be granted the benefits that I was denied. If this Court holds that VA has no statutory authority to impose the presumption of ineligibility codified at 38 C.F.R. § 3.12(a), I at least would receive compensation

benefits for my disabilities which have been service-connected since my 2018 claim. Instead, due to the unlawful regulatory scheme maintained by VA, I have been and will continue to be denied benefits to which I am entitled under law.

8. As a result, if MVA's challenge to 38 C.F.R. § 3.12 succeeds in this case, and the Court recognizes either (1) that the regulatory bars at 38 C.F.R. § 3.12(d) are contrary to statute or (2) that the presumption of ineligibility at 38 C.F.R. § 3.12(a) is contrary to statute, I will directly benefit because I will more likely be able to obtain compensation benefits for my current service-connected disabilities.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: February 6th, 2026

Robert Woods

EXHIBIT I

No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

Petition for Review of VA's Final Rule Regarding Character of Discharge Review Under 38 U.S.C. §§ 101(2), 5303(a)

DECLARATION OF NICHOLAS WIRKKALA

1. I make this declaration based on personal knowledge.

2. I am a member of Minority Veterans of America ("MVA"). I have been a member of MVA since January 2026.

3. I am a veteran of the U.S. Marine Corps. I served on active duty between June 2017 and January 2020.

4. I received high Pro/Con marks during training and my early service in the Marine Corps, and I was awarded a Meritorious Mast.

However, after receiving two non-judicial punishments, on January 7, 2020, I was administratively separated with an Other Than Honorable discharge.

5. For the first five years after my discharge, I did not apply for any Department of Veterans Affairs (VA) benefits because I had been told that I was not eligible because of my discharge status. In December 2025, after learning that my discharge status might not be a total bar to accessing health care and benefits, I submitted an Intent to File for disability compensation benefits. I plan to file a full claim for compensation in the coming months. However, because of the regulatory bars at 38 C.F.R. § 3.12, specifically the bar for "willful and persistent misconduct," it is highly likely that VA will deny me eligibility for compensation or other benefits based on the two non-judicial punishments that led to my separation. Even if I am approved for VA benefits, I have been unable to access VA benefits for the years since my discharge and during the pendency of my claim, and I have been required to undergo this additional and burdensome eligibility review that other former servicemembers do not.

6. I am directly and adversely affected by VA's maintenance of the unlawful COD rule recently amended by VA. *See* 28 Fed. Reg. 123 (Jan. 4, 1963), *amended by Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge* ("*Update and Clarify*"), 89 Fed. Reg. 32361 (Apr. 26, 2024) (codified at 38 C.F.R. § 3.12). The regulatory bars codified at 38 C.F.R. § 3.12(d) thus have impaired my ability to access crucial VA benefits to which I would otherwise likely be entitled.

7. If this Court holds that VA has no statutory authority to impose the regulatory bars codified at 38 C.F.R. § 3.12(d), I would likely be granted the benefits that I likely will be denied. If this Court holds that VA has no statutory authority to impose the presumption of ineligibility codified at 38 C.F.R. § 3.12(a), I at least would receive important benefits during the pendency of my character of discharge ("COD") review. Instead, due to the unlawful regulatory scheme maintained by VA, I have been and will continue to be denied benefits to which I am entitled under law.

8. As a result, if MVA's challenge to 38 C.F.R. § 3.12 succeeds in this case, and the Court recognizes either (1) that the regulatory bars at 38 C.F.R. § 3.12(d) are contrary to statute or (2) that the presumption of

ineligibility at 38 C.F.R. § 3.12(a) is contrary to statute, I will directly benefit because I will more likely be able to obtain a favorable COD review and therefore more likely be able to access crucial VA benefits to which I currently lack access.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: JAN 21, 2026

Nicholas Wirkkala

EXHIBIT J

No. _____

United States Court of Appeals for the Federal Circuit

MINORITY VETERANS OF AMERICA, NATIONAL VETERANS LEGAL SERVICES PROGRAM, DANIEL CABA SOTO, AND REILLY SHERWIN,

Petitioners,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

DECLARATION OF
NATIONAL VETERANS LEGAL SERVICES PROGRAM

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1. My name is Renée Burbank. Since 2021, I have been the Director of Litigation at the National Veterans Legal Services Program (NVLSP). I make this declaration as an officer of NVLSP and its designee to provide testimony on behalf of the organization.

2. NVLSP was founded in 1981 as a national nonprofit organization whose mission is to ensure that the government delivers to our nation's veterans and active duty personnel the benefits to which they are entitled because of disability resulting from their military service. NVLSP is a veterans service organization that provides legal representation to veterans and their survivors, caregivers, and family

members before the Department of Veterans Affairs (VA), military discharge review agencies, and federal courts; offers training for attorneys and other advocates; connects veterans and active duty personnel with pro bono legal help when seeking disability benefits; and publishes the nation's definitive guide on veteran benefits, the Veterans Benefits Manual.

3. Not everyone who served in the military is able to receive VA benefits. Access is generally limited to those who meet the threshold definition of a veteran, which is a person who separated from the armed forces "under conditions other than dishonorable." 38 C.F.R. § 3.12(a). If a servicemember left the military with a discharge characterization of Honorable or General under Honorable Conditions, the VA considers that discharge status to automatically satisfy this threshold definition of Veteran.[1] However, servicemembers who left the military with a less than honorable discharge status are not automatically eligible for benefits.[2]

4. Despite their military service, hundreds of thousands of former service members are by default not considered "veterans" by the VA, and as such do not have access to VA healthcare and services. Many of these former service members deployed to combat, experienced military sexual trauma, endured serious hardship,

[1] Servicemembers with an uncharacterized discharge status due to entry level separation also have automatic access to VA benefits.
[2] Former service members with uncharacterized discharges due to reasons other than entry level separation are also by default ineligible for VA benefits.

and risked their lives. In our experience, the vast majority committed misconduct that was relatively minor, such as short unauthorized absence or one time drug use, and that was oftentimes a consequence of their service-related physical and mental health disabilities—wounds that persist to this day. Yet, they are unable to access lifesaving benefits solely because of their discharge status.

5. If a former servicemember with a less than honorable discharge applies for a VA benefit, the VA subjects them to an independent review of the reasons for their discharge from the military and makes its own determination of whether those reasons fall under a regulatory or statutory bar to benefits. This process is called a "character of discharge determination" (COD) at the VA.

6. The COD process is opaque and many service members do not understand how to request an eligibility review. In fact, unlike other VA benefits, there is no designated application to request a COD determination, making it even more difficult for former servicemembers to access. There is significant confusion among VA employees about the bars to benefits and claimants' rights in the COD process, which makes errors in these claims prevalent. The COD process is also burdensome on both VA adjudicators and the veteran, and often takes a year or more to complete.

7. While the review is pending, veterans are excluded from many or all VA benefits even though they may, in fact, be eligible. This is particularly

problematic because veterans with less than honorable discharges are often extremely vulnerable. Compared with those with Honorable discharges, they are more likely to be unhoused and to experience mental health issues, including suicidal ideation. Access to VA benefits can mean the difference between a veteran sleeping on the street or with a roof over their head, between access to mental health care or dying by suicide.

8. Separately from the VA's COD process, veterans with less than honorable discharges can seek a more favorable characterization, commonly called a "discharge upgrade," from the military branch that discharged them. There are two avenues former service members can use to pursue a discharge upgrade. First is the Discharge Review Board, also called a DRB. Second is the Board for Correction of Military or Naval Records, also called a BCMR or BCNR. Each military department has both a discharge review board and a corrections board.

9. In NVLSP's experience, one of the main reasons a veteran may seek a discharge upgrade is to access VA benefits like disability compensation, pension, and health care, which the veteran cannot access without either an upgrade or a favorable COD determination by VA. *See* Congressional Research Service, R43928, *Veterans' Benefits: The Impact of Military Discharges on Basic Eligibility* at 6 table 1 (March 6, 2015) (setting forth common VA benefits and how discharge characterization affects eligibility). If VA provided those benefits to more veterans

with less than honorable discharges without the need for applying for a discharge upgrade or obtaining a favorable COD determination from VA, many veterans would not seek to change their discharge characterization because they could already obtain the benefits they care the most about.

10. The military boards' process for discharge upgrades, and their standards of review, are wholly separate from VA's COD determination process. However, because discharge status is so important for accessing VA benefits, and because VA denies most COD determinations, many veterans feel compelled to seek discharge upgrades at the same time as, or prior to, seeking VA benefits. *Cf. Underserved: How the VA Wrongfully Excludes Veterans With Bad Paper* at 9-10 (2016) (noting that 90% of post-9/11 veterans with less-than-honorable discharges have not sought a VA COD determination or other VA benefits that would prompt an eligibility determination).

11. The intertwined nature of discharge upgrades and COD determinations is also evident in VA's approach to the issue. When VA denies or otherwise will not provide a COD determination, the agency often actively recommends that the veteran seek a discharge upgrade rather than provide a clear decision with appellate rights for the veteran to challenge VA's COD determination. *See, e.g.*, Ex. 1, Letter to Mr. Hamill (July 13, 2022); Ex. 2, Affidavit of Yelena Duterte in Support of Request for Class Action Certification, *Hamill v. McDonough*, Ct. Vet. App. No. 22-

7344 (March 6, 2023) (quoting email from VA officer advising veteran to seek discharge upgrade). VA also maintains information on its website on how to seek a discharge upgrade from the military. *See How to Apply for a Discharge Upgrade*, VA, https://www.va.gov/discharge-upgrade-instructions (last visited November 9, 2026).

12. Like VA's COD process, the discharge upgrade process is both flawed and opaque. Although the Department of Defense has issued a variety of clarifying memoranda to guide applicants and advocates, *see Overview: DOD Issuances*, Military Department Review Boards, https://www.milreviewbds.mil/ (listing six clarifying memoranda between 2011 and 2024), each board has its own internal culture and standards that make success rates for upgrades wildly inconsistent between boards, even when broken down by type of claim. *See e.g.*, *Select Claims Data for Review Boards Quarter Jan – Mar 25*, Department of Defense, at https://boards.law.af.mil/stats/CY2025/01.%20Jan-Mar%202025%20Quarterly%20Stats%20for%20Review%20Bds.pdf.

13. The discharge upgrade process is burdensome on veterans and can take a year or more to complete. In May 2024, the Department of Defense reported that, for the period between September 2023 and February 2024, the average time between submitting an application to a military board and a final decision ranged from 112 days at the Board for Correction of Naval Records to 972 days—

approximately *2 years and 8 months*—at the Army Discharge Review Board. Ex. 3, Letter from Ashish S. Vazirani, Performing the Duties of the Under Secretary of Defense for Personnel and Readiness, to Rep. Robert Garcia, U.S. House of Representatives, enclosure at 3 (May 23, 2024). Because of the size of the Army in comparison to the other military branches, it handles far more applications than the other branches. Almost half (46%) of all discharge review board applications are thus subjected to the Army's 972-day waiting period. *Id.*

14. NVLSP expends significant resources on discharge upgrade and COD matters. NVLSP currently employs over fifty attorneys, who represent veterans, survivors, and caregivers across a wide array of issues and venues, including COD matters on appeal to the Board of Veterans' Appeals and the Court of Appeals for Veterans Claims. NVLSP attorneys also spend significant time on discharge upgrade matters. In particular, through NVLSP's Lawyers Serving Warriors® (LSW) program, our attorneys and legal staff screen and place cases with pro bono attorneys who represent veterans primarily before military boards and in federal court on appeal from those board decisions. NVLSP attorneys serve as co-counsel in matters that are placed for full representation. Discharge upgrades and, when appropriate, assisting veterans with VA COD applications and appeals, constitute a significant percentage of this work. Each year, NVLSP screens and places hundreds of discharge upgrade cases with pro bono attorneys, and NVLSP provides ongoing

assistance on each case until its resolution, which can take years. In 2025, LSW placed 209 discharge upgrade cases for full representation, and placed hundreds more discharge upgrade file review matters.

15. Additionally, for more than a decade, NVLSP has advocated for changes to the COD regulations and has spent a significant amount of time and effort in those pursuits. In 2015, NVLSP joined Swords to Plowshares (Swords), represented by the Veterans Legal Clinic at the Legal Services Center of Harvard Law School and Latham & Watkins, to submit a petition for rulemaking to VA requesting multiple changes to the then-existing COD regulation. VA ultimately granted this petition and initiated the rulemaking process. In July 2020, VA published a proposed rule and Swords and NVLSP submitted lengthy comments on the rule. In September 2021, VA issued a Request for Information (RFI) asking for additional comments on the rule. NVLSP and Swords again submitted a detailed public comment in response to this request. I also personally testified at the October 2021 listening sessions that VA held in conjunction with this COD rulemaking process. I have provided information to members and staff of the House Committee on Veterans' Affairs about the COD process at their request. NVLSP and Swords filed two lawsuits against VA in order to compel VA to finalize the new COD regulations, finally promulgated in April 2024. In July 2026, NVLSP participated

in a roundtable discussion with Rep. Mark Takano regarding the issues with the COD process and suggested changes that could be made to that process.

16. NVLSP is directly and adversely affected by VA's maintenance of the unlawful COD rule recently amended by VA. *See* 28 Fed. Reg. 123 (Jan. 4, 1963), *amended by Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge*, 89 Fed. Reg. 32361 (Apr. 26, 2024); 38 C.F.R. § 3.12. The regulatory bars codified at 38 C.F.R. § 3.12(d) impair our clients' ability to access crucial VA benefits to which they would otherwise likely be entitled, costing NVLSP significant resources.

17. If VA repealed or modified the regulatory bars codified at 38 C.F.R. § 3.12(d), NVLSP attorneys would be able to spend their time advocating for veterans in their VA claims or other military benefits instead of fighting with VA and military boards to establish the threshold question of their basic eligibility for VA benefits. Hundreds of hours of NVLSP attorney time are diverted from other tasks each year into helping clients obtain discharge upgrades from their military branches or be recognized as veterans at VA. In other words, the regulatory bars directly burden and interfere with NVLSP's legal representation of veterans—one of its core activities in furtherance of its mission to ensure that veterans receive the benefits to which they are entitled.

18. As a result, if our challenge to 38 C.F.R. § 3.12 succeeds in this case, and the Court recognizes either (1) that the regulatory bars at 38 C.F.R. § 3.12(d) are contrary to statute or (2) that the presumption of ineligibility at 38 C.F.R. § 3.12(a) is contrary to statute, NVLSP will directly benefit in time and resources saved and an increased ability to help more veterans secure VA and other benefits.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: 11/13/2026_____, 2026 

Renée Burbank

Burbank Declaration

Exhibit 1

EXHIBIT H

Department of Veterans Affairs
1240 East 9th St
Cleveland, OH 44199

July 13, 2022

In Reply Refer To: [redacted]
Hamill D A

[redacted]

Dear David Hamill,

This letter from the Department of Veterans Affairs regarding Mr. Hamill request to upgrade his DD 214.

You can also ask the Service Department to change the character of discharge or you can apply for correction of military records To request change use the enclosed DD Form 293 Application for the Review of Discharge or Dismissal from the Armed Forces of the United States To apply for correction use the enclosed DD Form 149 Application for Correction of Military Record under the Provisions of Title 10 Code Section 1552 Send the completed form to the proper address on the back of the form.

Do You Have Questions or Need Assistance?

If you have any questions, you may contact us by telephone, email or letter.

If you	Here is what to do.
Telephone	Call us at 1-800-827-1000. If you use a Telecommunications Device for the Deaf (TDD), the number is 711.
Use the Internet	www.VA.gov- "ask a question"
Write	Put your full name and VA file number on the letter. Please send all correspondence to the address below: Department of Veterans Affairs Claims Intake Center PO Box 4444 Janesville, WI 53547-4444 Toll Free Fax: 844-531-7818 DID Fax: 248-524-4260

With sincere regard for the Veteran's service,

RO Director
VA Regional Office

To email us visit www.VA.gov- "ask a question"

Do you know about VA.gov?
The new VA.gov design focuses on the top information Veterans seek out across all VA websites. This homepage also provides Veterans with a standard way to log in to access a personalized user experience. Users are able to log into VA.gov via their existing MyHealtheVet, DS Logon, or ID.me credentials.

As VA continues to transition self-service capabilities from eBenefits to VA.gov, there are limited functions available exclusively in eBenefits. All eBenefits functionality has been transitioned to VA.gov except:
-Request for Certificate of Eligibility
-Chapter 31 VRE application
-POA Search and VAF 21-22/a submission
-Specially Adapted Housing (SAH) or Special Home Adaptation (SHA) grant application
-Order prosthetic socks
-View My Document

To register for an account, follow the online prompts on VA.gov.

Burbank Declaration

Exhibit 2

EXHIBIT F

AFFIDAVIT

I, Yelena Duterte, having been first duly sworn, provide this Affidavit in support of the Petitioner's Request for Class Action Certification.

1. I am the Director of the Veterans Legal Clinic at University of Illinois Chicago School of Law.

2. In addition to representing Mr. Hamill, I represent at least three other veterans who have received Chapter 17 decisions, without an underlying character of service determination.

3. Most recently, I have seen this very issue happen with a veteran I will call "Veteran C."

4. The Veterans Legal Clinic has represented Veteran C since 2021 on his VA benefits claim.

5. He originally filed for benefits in 1977, but was denied benefits due to his less-than-honorable discharge characterization.

6. Veteran C applied for compensation in April 2021.

7. In December 2021, VA sent him a character of discharge letter, explaining that "[a]ny time a Veteran receives a discharge that is not 'honorable,' VA must decide whether that Veteran is eligible for VA benefits . . . As long as we decide that your service was not 'dishonorable,' you will be eligible for VA benefits."

8. In response, Veteran C provided a statement about his service and provided a copy of his military records, which the VA did not have in its possession, yet.

9. VA attempted to obtain his military records through the NPRC, but did not receive them until October 2022.

10. In January 2023, VA issued a Chapter 17 decision, but did not make a decision as to his character of service.

11. In February 2023, I emailed the Veterans Service Center Manager (VSCM) from the New Orleans Regional Office to fix the error, since the New Orleans Regional Office made the Chapter 17 Decision.

12. The VSCM from the New Orleans Regional Office responded via email to me, explaining that the "[n]otification letter, dated August 8, 1977, notified [Veteran C] of that decision along with his appeal rights . . . The letter that was sent in December 2021 indicating a review of the character of his service would occur was sent in error and should not have been sent . . . [Veteran C] can submit the attached DD From 149 to the Military Review Board. The form indicates where it should be sent once completed based on branch of service. If [Veteran C] believes VA did not have all of the information during the initial COD determination, he can request VA look at that decision again based on new evidence submitted."

13. The email from the VSCM does not provide Veteran C with proper appellate rights to appeal whether VA already received new and relevant evidence.

I hereby certify, under penalty of perjury, that the information contained in this affidavit is true and correct.

STATE OF Illinois)
) SS
COUNTY OF Cook)

Yelena Dvizde
PRINT FULL NAME

SIGNATURE

Sworn to and subscribed before me this 6th day of March, 2023.

Maria Diaz
Notary Public

Notary Seal

OFFICIAL SEAL
MARIA DIAZ
NOTARY PUBLIC - STATE OF ILLINOIS
MY COMMISSION EXPIRES:03/22/23

Burbank Declaration

Exhibit 3

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

The Honorable Robert Garcia
U.S. House of Representatives
Washington, DC 20515

MAY 23 2024

Dear Representative Garcia:

Thank you for your January 25, 2024 letter to the Secretary of Defense regarding the proactive review of military records for former Service members separated under the Don't Ask, Don't Tell policy. I appreciate your inquiry and the important role Congress plays in helping to ensure that our Nation's Service members and veterans receive the respect and due process they deserve.

On March 5, 2024, I sent you a partial response to your questions. Thank you for your patience as my staff obtained the requested information. The enclosure provides both new and updated responses to your questions regarding the progress the Department of Defense has made implementing the Don't Ask, Don't Tell Records Review Initiative.

Thank you for your continued strong support for our Service members and veterans. I am sending similar letters to Representatives Pocan and Pappas.

Sincerely,

Ashish S. Vazirani
Performing the Duties of the Under Secretary of Defense for Personnel and Readiness

Enclosure:
As stated

OFFICE OF THE UNDER SECRETARY OF DEFENSE
4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

The Honorable Mark Pocan
U.S. House of Representatives
Washington, DC 20515

MAY 23 2024

Dear Representative Pocan:

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4000 DEFENSE PENTAGON
WASHINGTON, D.C. 20301-4000

PERSONNEL AND READINESS

The Honorable Chris Pappas
U.S. House of Representatives
Washington, DC 20515

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Enclosure

1. *What are the current figures, by service, for total applications received to correct the records of individuals [dis]charged under DADT or a similar previous policy, total applications relief granted, total applications requests denied, and the respective percentages for granted and denied?*

   Response. As of February 2024, the Military Departments report the following number of applications received, granted,[1] and denied, by the Boards for Correction of Military/Naval Records (BCM/NRs) and Discharge Review Boards (DRBs), with percentages provided.

Organization	Applications	Granted	Denied	Granted %	Denied %
AFBCMR	143	130	13	90.9%	9.1%
AFDRB	36	35	1	97.2%	2.8%
USAF (Total)	**179**	**165**	**14**	**92.2%**	**7.8%**
ABCMR	415	389	26	93.7%	6.3%
ADRB	144	139	5	96.5%	3.5%
USA (Total)	**559**	**528**	**31**	**94.5%**	**5.5%**
BCNR-USN	773	598	175	77.4%	22.6%
NDRB-USN	127	111	16	87.4%	12.6%
USN (Total)	**900**	**709**	**191**	**78.8%**	**21.2%**
BCNR-USMC	204	162	42	79.4%	20.6%
NDRB-USMC	79	70	9	88.6%	11.4%
USMC (Total)	**283**	**232**	**51**	**82.0%**	**18.0%**
DoD (Total)	**1,921**	**1,634**	**287**	**85.1%**	**14.9%**

2. *Of the application requests which have been denied, how many of those denials are based on "aggravating factors in the record?"*

   Response. Following the repeal of the Don't Ask, Don't Tell (DADT) policy, Under Secretary of Defense Memorandum, "Correction of Military Records Following Repeal of Section 653 of Title 10, Unites States Code," September 20, 2011, provided the Military Department Review Boards with guidance for handling applications by former Service members separated under DADT or other similar policies in effect before February 28, 1994.

[1] "Granted" applications include all cases where any form of relief was granted, but not necessarily all relief the applicant requested. For example, if a former Service member who was separated under Don't Ask, Don't Tell policy but received an Other Than Honorable conditions characterization of discharge due to significant collateral misconduct, he or she might be upgraded to a "General (Under Honorable Conditions)" discharge characterization, rather than "Honorable." This case would still be marked "granted," because the applicant's military records were in fact corrected/upgraded in response to her or his request.

The September 20, 2011 memorandum states that "[e]ffective September 20, 2011, Service DRBs should normally grant requests to change the narrative reason for a discharge…, reasons to re-characterize the discharge to honorable, and/or requests to change the reentry code… when both of the following conditions are met: (1) the original discharge was based solely on DADT or a similar policy in place prior to the enactment of DADT and (2) there were no aggravating factors in the record, such as misconduct." The September 20, 2011 memorandum recognizes the "significantly broader scope of review" of the BCM/NRs and states that "upon finding an error or injustice, BCM/NRs may fashion the remedy they find necessary and appropriate within applicable legal limits."

Consistent with this guidance, the Air Force, Navy, and Marine Corps confirmed that every case they denied in the table above was due to aggravating circumstances in the record. The Department of the Army reported all but 10 denials were due to aggravating circumstances in the record; however, these 10 cases were adjudicated prior to the repeal of DADT and release of additional guidance to the Military Department review boards in September 2011.

3. *Are there any statutory limitations that affect the ability of the Department to complete the proactive review of records, or the ability to upgrade discharges to honorable status?*

Response. At this time there are not any statutory limitations affecting the Department's ability to proactively review or upgrade discharges to honorable status.

Congress authorizes the Secretaries of the Military Departments to correct personnel records in accordance with 10 U.S.C. § 1552, which establishes the BCM/NRs. The BCM/NRs are authorized to make corrections to military records, including upgrades to the narrative reasons for discharge and service characterization (e.g., Honorable, General Under Honorable Conditions, Other Than Honorable, etc.) among other injustices or errors they may identify.

While requests for relief are normally submitted by individual applicants, 10 U.S.C. § 1552(b) authorizes the Secretaries of the Military Departments to submit applications to their respective BCM/NRs on behalf of a group of individuals whom they certify as "similarly harmed" by the same error or injustice. The Department is utilizing this existing authority for its proactive review of records. Rather than require individuals to apply for relief to the BCM/NR, the Department of Defense (DoD) will send records of eligible former members to the Secretaries of the Military Departments for possible inclusion in a group application to the relevant BCM/NR.

4. *Are there any budgetary limitations that affect the ability of the Department to complete the proactive review of records, or the ability to upgrade discharges to honorable status?*

Response. At this time the proactive review process is not impacted by any budget limitations. In addition to relying on pre-existing statutory authorities, the Department re-tasked members of its existing Review Boards organizations from their primary missions to pivot to intake and pre-screen the records of individuals who may be eligible for correction by the BCM/NRs. As the Secretaries of the Military Departments certify "similar harm" by

the same error or injustice, the cases are referred to the BCM/NRs for individual case-by-case review by current review board staff.

5. *From initiating an application for review to a final decision, what was the average wait time prior to the September 2023 decision? How has that wait time changed since September 2023?*

Response. The following table summarizes the average wait time (from submission date to decision) for BCM/NR and DRB applicants during the calendar year before September 20, 2023, and between September 20, 2023 and February 2024.

Organization	**Average Before 9/20/23**	**Average After 9/20/23**
Air Force Board for Correction of Military Records	218 days	229 days
Army Board for Correction of Military Records	300 days	300 days
Board for Correction of Naval Records	90 days	112 days
DoD BCM/NR Average	**229 days**	**237 days**
Air Force Discharge Review Board	108 days	140 days
Army Discharge Review Board	875 days	972 days
Navy Discharge Review Board	323 days	239 days
DoD DRB Average	**548 days**	**577 days**

While applicants waited approximately 1 week longer for BCM/NR decisions and 1 month longer for DRB decisions during the second time period, these represented approximately 3 percent and 5 percent variances in response timelines and are not related to the DADT proactive review initiative (as no cases had been certified by the Secretaries of the Military Departments for review before the end of February 2024).

Notably the Army adjudicated approximately 46 percent of all DoD DRB cases, and 56 percent of all DoD BCM/NR cases, during these time periods resulting in slower timelines than the other Military Departments. All three BCM/NRs meet the statutory requirement under 10 U.S.C. § 1557 that 90 percent of BCM/NR cases be adjudicated within 10 months of board receipt.

6. *Since September 2023, has the percentage of applications being granted changed in any substantial way?*

Response. DoD has completed pre-screening the military records for eligible individuals, and as required by 10 U.S.C. § 1552(b), referred them to the Secretaries of the Military Departments for possible group certification as "similarly harmed" by the same injustice. Once the group certification is complete, each Secretary (or his or her delegee) will refer the group of records determined to be "similarly harmed" to the relevant BCM/NR for action. Because the BCM/NRs have not completed their individual reviews of the records for eligible individuals, the percentage of applications being granted is not yet impacted (positively or negatively).

7. *Since the announcement of proactive review of cases, how many cases have been proactively reviewed by the Department?*

Response. Upon announcing its intent to review the records of former Service members separated under DADT policy, the Department pulled data from the Defense Manpower Data Center (DMDC) identifying every Service member who was separated under DADT policy. To ensure that the appropriate individuals receive relief, the Military Departments then validated the accuracy of the service characterizations reflected in the DMDC data. Because DADT policy began in 1994, long before the Military Departments digitized their records, in many cases this required manually requesting hard copy personnel records maintained by the National Archives.

Concurrently, both the Deputy Secretary of Defense (DepSecDef) and the Under Secretary of Defense for Personnel and Readiness (USD(P&R)) issued detailed guidance and Office of the Secretary of Defense staff developed a workflow for the DADT proactive review process. The Department identified, re-tasked, and trained members of the Discharge Appeal Review Board to serve on the DADT Records Review Initiative (DRRI), which is responsible for obtaining the actual service records for every potentially eligible individual separated under DADT policy, scanning and preparing those records (which can easily exceed one hundred pages in length) for review, and pre-screening digital records to ensure the accuracy of the data obtained from DMDC and the Military Department databases.

In addition to pulling pre-existing DoD personnel from their primary missions to support this effort, the Department also hired and trained new contractors to perform administrative duties for the DRRI and contracted with LexisNexis to provide current addresses for the individuals in question. Recognizing the sensitivity of the impact DADT policy had on the lives of former Service members, and the importance of proceeding in a way that will avoid "outing" any former Service members to their families, DoD leaders met with outside interest groups to ensure that the Department's review process and communication strategies are thoughtful and align with the interests of impacted communities and individuals.

The Department's DRRI team has completed review of eligible former Service members and referred those individuals to the Secretaries of the Military Departments for group application to the appropriate BCM/NRs. This certification and review, however, is ongoing and no individual cases have yet been completely adjudicated through the proactive review process.

8. *Of those proactive reviews, how many cases have been forwarded to the respective service chief for possible upgrades by review boards?*

Response. Per the process established by the DepSecDef and the USD(P&R), the Chiefs of the Military Service are not involved in the process. Instead, the records are forwarded to the Secretaries of the Military Departments for possible certification for a group application to the responsible BCM/NRs. Once certified, the cases will be individually reviewed by the BCM/NRs.

9. *What is the current timeline for completion of proactive cases?*

Response. The Department has identified all the individuals separated under DADT policy, validated eligible Service characterizations, pre-screened the records of all potentially eligible individuals, and sent those individuals' names and personnel records to the Secretaries of the Military Departments for group certification in accordance with 10 U.S.C. § 1552(b).

As the Secretaries of the Military Departments certify the records of individuals who suffered "similar harm," they will send those records to the appropriate BCM/NRs for review. This is likely to continue over the summer and through the fall. Upon receipt, the BCM/NRs review each individual's military service record, by order of receipt, under their statutory authority to correct any identified error or injustice.

By statute, 10 U.S.C. § 1557, the BCM/NRs must strive to complete 90 percent of their cases within 10 months of receipt. In the case of the proactive review, receipt occurs once DoD has formally transmitted the list of names of eligible members to the Secretary of the Military Department.

Upon the decision of the BCM/NR to correct a military record as part of this review effort, the Department estimates approximately 3-4 months will be required to amend the impacted documents, transmit documents to the National Archives, and notify the former Service members of the change to their records. While notification of discharge upgrades is typically handled at the Military Department level, the Office of the Under Secretary of Defense for Personnel and Readiness has determined that all notifications should be issued at the DoD level both because this is a proactive review (i.e., Service members do not have an opportunity to provide their current addresses, if different than those provided by LexisNexis) and to ensure that notification is handled in such a way as to minimize the chances of revealing information concerning former Service members who may have decided to keep their DADT discharges private or inadvertently providing personally identifiable information, including social security numbers to the wrong address or person.

10. *Has the Department considered proactive review of records of veterans discharged prior to the "Don't Ask, Don't Tell" period beginning February 28, 1994?*

Response. At this time there has been no determination by DoD leadership regarding expanding the DADT proactive review initiative.