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October 12, 2021

Robert Parks, Chief, Part 3 Forms and Regulations (211D)

U.S. Department of Veterans Affairs

810 Vermont Avenue NW

Washington, DC 20420

via: www.Regulations.gov

Re: Response of National Veterans Council for Legal Redress and Connecticut Veterans Legal Center to Request for Information on Proposed Rule to Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, RIN 2900-AQ95

Dear Director,

On behalf of the National Veterans Council for Legal Redress and the Connecticut Veterans Legal Center, we write to respond to the questions asked by the U.S. Department of Veterans Affairs (VA) regarding proposed changes to the character of discharge regulation at 38 C.F.R. § 3.12. The Proposed Rule, as well as VA's existing rule, exceeds VA's authority to bar veterans from services. Both the existing and proposed rule exclude far more veterans than Congress intended, perpetuate systemic injustices, and contribute to the epidemic of veteran suicide and homelessness. We urge VA to fundamentally overhaul the rule to presume eligibility for all veterans with an administrative discharge, including those with Other Than Honorable (OTH) characterizations of service, and to exclude only those former servicemembers who actually received or who, based on clear evidence in the record, should have received a fully Dishonorable discharge.

WHO WE ARE

The National Veterans Council for Legal Redress (NVCLR) is a Connecticut-based veterans service organization that has been impacting veterans' lives since 1982. NVCLR engages in legislative advocacy, public education, and impact litigation to promote the respect and acceptance of all who served our country in uniform, including veterans with less-than-honorable discharges and veterans involved in the criminal justice system. NVCLR operates a referral network to secure much-needed benefits for those veterans and their families, including access to legal assistance and

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social services to help them secure housing, employment, food assistance, medical care, education, and disability benefits.

The Connecticut Veterans Legal Center (CVLC) was founded in 2009 as the United States' first medical-legal partnership with the Veterans Health Administration. CVLC works with clinicians to help veterans recovering from homelessness and mental illness overcome legal barriers to housing, healthcare, and income. Much of CVLC's practice focuses on veterans who unjustly received less-than-honorable discharges, providing them representation before VA in character of discharge determinations (CODs) as well as before the military discharge review boards and boards of correction for military/naval records.

Following VA's publication of the proposed rule on July 10, 2020, NVCLR and CVLC submitted a comment on September 8, 2020.¹ In that comment, we urged VA to go back to the drawing board and adopt a rule to presume eligibility for all veterans² with administrative discharges and remove the existing regulatory bars for three reasons:

- 1) The current and proposed regulatory bars contravene the intent of Congress in passing the 1944 G.I. Bill, which was to create a generous eligibility standard for VA benefits that excluded only those returning servicemembers who were discharged Dishonorably or who engaged in conduct that could have led to a Dishonorable discharge. In creating this more generous standard, Congress explicitly rejected the previous standards, which barred those veterans who engaged in "willful and persistent misconduct" or an "offense involving moral turpitude." The reimposition of these bars exceeded VA's legal authority when the current bars were promulgated and do so to this day. The proposed regulations do the same.³
- 2) The current and proposed regulatory bars do, and will, result in an adjudicatory system that is onerous and time-consuming for veterans and the agency. The current and proposed bars also rely too heavily on the discretion of individual VA adjudicators, leading to inconsistent and improper decisions. VA should adopt a rule that is simple to administer and tailored to the statutory bars to benefits imposed by Congress at 38 U.S.C. § 5303(a).⁴
- 3) The current and proposed rules create a presumption of ineligibility for veterans with OTH discharges, requiring them to undergo a burdensome and flawed COD determination process. This presumption of ineligibility cuts veterans off from care even though the military chose *not* to dishonorably discharge them. VA persists in imposing this exclusionary presumption despite the dramatic rise in the proportion of veterans

¹ National Veterans Council for Legal Redress and Connecticut Veterans Legal Center, Comment on Proposed Rule to Update and Clarify Regulatory Bars to Benefits Based on Character of Discharge, RIN 2900-AQ95 (Sept. 8, 2020). [hereinafter: NVCLR/CVLC Comment].

² Throughout this Response, NVCLR and CVLC use the term "veteran" to refer to all individuals who served in the armed forces, regardless of discharge status. The term "veteran" does not mean only those individuals who have been able to successfully establish status as "Honorable for VA purposes." A more expansive usage of "veteran" acknowledges the value of all those who served our country in uniform and is consistent with Congress's intent in enacting the Servicemen's Readjustment Act of 1944 (the "1944 G.I. Bill").

³ NVCLR/CVLC Comment at 4-5.

⁴ *Id.* at 6-9.

discharged Other Than Honorably in recent decades (up to 5.8% in the post-2001 era compared with 1.0% during the WWII era),⁵ and despite known disparate impacts of bad discharges on historically marginalized populations of veterans.⁶ Removing the presumption of ineligibility is the only way VA may comport with the text of 38 U.S.C. § 101, give the benefit of the doubt to veterans, and fulfill its mandate as a healthcare and benefits administration.⁷

NVCLR and CVLC refer VA back to the text and references of our September 2020 comment. Below, we respond to the specific questions raised by VA in its September 9, 2021 Request for Information (RFI).

RESPONSES TO REQUESTS FOR INFORMATION

NVCLR and CVLC know that access to healthcare saves veterans' lives. We believe that no veteran should be denied access to VA benefits due to rules that not only exceed VA's authority but also vague, unjust, and inconsistently implemented. The proposed regulations needlessly use VA resources to adjudicate honor while deserving veterans—those whom Congress directed VA to care for—are deprived of medical and financial assistance, live in poverty, and contemplate suicide at alarming rates. The bureaucracy that has sprung out of the existing regulations is so complex that VA employees struggle to apply it correctly, resulting in veterans being unlawfully turned away without CODs, despite prior Honorable periods of service, or without healthcare that they are statutorily eligible for.⁸ Even when veterans win a designation of “Honorable for VA purposes,” the victory is hollow, often coming after decades of VA deprivation of care and irreparable consequences to the veteran.

CVLC's client Mr. F.⁹ provides a case study of the harm caused by VA's commitment to the regulatory bars. Mr. F. volunteered to serve in Vietnam in 1968. He engaged in four combat operations, for which he earned the National Defense Service Medal, the Vietnamese Service Medal with one star; the Vietnamese Campaign Medal; the Combat Action Ribbon, and the Cross of Gallantry with Frame and Palm. He also experienced and witnessed the trauma of combat, including instances in which he shot and killed an elderly woman and a 12-year old boy who were enemy combatants, and the loss of his best friend to artillery fire. He witnessed atrocities. In one instance, he saw a village of women and children who had been raped, disemboweled, and dismembered. He witnessed the torture of a girl who was bound and forced to hold aloft a grenade with the pin removed until she became too weak to continue holding it and it detonated, killing her. Mr. F. maintained a stellar performance record until he returned stateside and began experiencing symptoms of severe PTSD. When he was informed he would be redeployed, he became

⁵ Veterans Legal Clinic, Legal Services Center of Harvard Law School, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper Discharges* 10 (2016), https://uploads-ssl.webflow.com/5ddd3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0_Underserved.pdf [hereinafter: *Underserved*].

⁶ *See infra*, Section III.

⁷ NVCLR/CVLC Comment at 10-16.

⁸ *See generally*, Outvets, Legal Services Center of Harvard Law School, and Veterans Legal Services, *Turned Away: How VA Unlawfully Denies Health Care to Veterans with Bad Paper Discharges* (2020) <https://www.legalservicescenter.org/wp-content/uploads/Turn-Away-Report.pdf> [hereinafter *Turned Away*]

⁹ Mr. F. consented to share this information.

overwhelmed at the thought of returning to Vietnam. After a series of unauthorized absences, he was given an Undesirable discharge in 1971.

Mr. F. first came to the VA for help in the late 1970s. None of the statutory bars applied to him, but in 1978, the VA determined he was dishonorable due to willful and persistent misconduct. In 1994, Mr. F. returned to the VA, where he underwent a compensation and pension exam that diagnosed him with PTSD due to the stressors of combat. He asked VA for reconsideration of his COD determination, specifically listing out the combat traumas and atrocities he experienced. VA determined, again, that he was dishonorable due to willful and persistent misconduct. Mr. F. filed claims with the VA for a third time in 2007 and a fourth time in 2013; both times VA determined not to change its COD determination. In 2017, after retaining CVLC for help, Mr. F. received a second compensation and pension exam from the VA, which again determined he had PTSD caused by his military experience and combat exposure. The VA agreed to grant Mr. F. healthcare benefits under chapter 17 for his service-connected PTSD, but determined that a new COD decision was “not warranted.” CVLC appealed VA’s refusal to reopen the COD, after which VA delayed and resisted for two years. Less than a year ago, VA finally determined that Mr. F. is honorable for VA purposes.

Mr. F.’s story is one of tragedy. For five decades, a decorated and disabled combat veteran was denied VA care and benefits before VA realized he had been “honorable” all along. During that time, he suffered from untreated mental illness without VA healthcare, became unable to work due to his service-connected disability yet received no compensation, and became homeless and estranged from his family who could not afford to support him to the degree his disabilities required. Mr. F. was denied VA care for half a century due to a regulatory bar that has no basis in the law. None of VA’s proposed changes would prevent this from happening again.

Mr. F. is but one of many clients with similar stories. The only way for VA to end its unnecessary exclusion of deserving veterans and give full effect to Congress’s intent in the G.I. Bill is for VA to rescind the regulatory bars and instead craft a regime narrowly focused on applying the statutory bars enumerated at 38 U.S.C. § 5303. Accordingly, NVCLR and CVLC focus our responses to VA’s questions regarding bars to Benefits Eligibility.¹⁰

I. Removing the regulatory bars would have no impact on military order and discipline.

In its RFI, VA asks, “[h]ow (if at all) would removing the regulatory bars affect military order and discipline?”¹¹ There is no evidence to support the proposition that VA’s regulatory scheme has any impact on the ability of military leadership to maintain order and discipline, nor any evidence to suggest that making VA more inclusive would have any detrimental impact on the military at all.

Military law—not VA the regulatory system—provides commanders with a robust and effective legal system to address misconduct and maintain mission readiness. Not only does the military have an extensive reward system to reinforce positive behaviors through promotions,

¹⁰ We provide no additional comments on the proposed definitions of “Willful and Persistent Misconduct” or “Offense Involving Moral Turpitude.” These criteria for excluding veterans are unlawful under any definition and should be revoked. *See generally*, NVCLR/CVLC Comment.

¹¹ Request for Information and Notification of Listening Sessions, 86 Fed. Reg. 50513, 50514 (Sept. 9, 2021). (Question D.1). [Hereinafter, RFI].

recognition, and training, but the military operates a self-contained judicial system as well. This includes an extensive range of proscribed behaviors for all servicemembers and related punishments in the punitive articles of the Uniform Code of Military Justice (UCMJ).¹²

In addition, command discretion is built into the fabric of military law. If a commander suspects that a servicemember has committed an offense, the commander enjoys complete discretion over whether to impose non-judicial punishment (NJP) with a minimum of due process or initiate punitive action under the UCMJ.¹³ NJP action may include reduction in rank, confinement, and other significant consequences,¹⁴ and often leads to the initiation of administrative separation. Indeed, Congress has conferred great latitude on the Department of Defense (DoD) to administratively separate servicemembers as needed.¹⁵

DoD has all the legal tools it needs to punish and/or separate servicemembers. With such a robust system in place within the military itself, we doubt that any commander in the U.S. Military relies on VA's eligibility rules to maintain good order and discipline within her command.

VA regulatory bars have no preventive effect on servicemembers' misconduct. Such a proposition frames the VA eligibility regulations as an incentive-based carrot-and-stick system with the inherent purpose of rewarding and punishing: reinforcing "good" military behavior with access to lifesaving healthcare services, on the one hand, and punishing "bad" military behavior with lack of access on the other. This characterization is flawed for two reasons. One, because it runs counter to the mission of the VA, and two, because it simply does not work.

The VA has a different mission than the Armed Forces—to care for veterans, and their families, caregivers, and survivors—and VA's eligibility regulations should reflect that mission. The applicability of a "crime prevention" model for VA's eligibility regulations is completely inappropriate. Military justice and punishment for misconduct should remain within the military.

Assuming for sake of argument that VA *should* concern itself with preventing misconduct in service, using VA regulations as a punitive measure to deter misconduct is not evidence-based. Research demonstrates that, in general, the type and severity of punishments carry no deterrent effect on criminal behavior; instead, the certainty of being caught is a much stronger deterrent than increasing the severity of the punishment itself.¹⁶ By extension, VA's imposition of a collateral, years-after-the-fact "punishment" of loss of benefits adds no preventive effect to the military justice system. The connection between in-service misconduct and future VA benefit eligibility is so attenuated as to be irrelevant to most servicemembers. That is, if servicemembers even have knowledge of the VA regulations at all.

¹² 10 U.S.C. §§ 877–934 (Articles 77-134).

¹³ *Manual for Courts Martial*, R.C.M. 306(c).

¹⁴ 10 U.S.C. § 815 (Art. 15)

¹⁵ See 10 U.S.C. § 1169, which provides that "no regular enlisted member of an armed force may be discharged before his term of service expires, except—(1) as prescribed by the Secretary concerned; (2) by sentence of a general or special court martial; or (3) as otherwise provided by law."

¹⁶ National Institute of Justice, *Five Things About Deterrence*, (May 2016).

<https://www.ojp.gov/pdffiles1/nij/247350.pdf>; See also Daniel S. Nagin, "Deterrence in the Twenty-First Century," in *Crime and Justice: A Review of Research*, vol. 42, (Michael Tonry, ed., 2013); Minnesota House Research Department, "Do Criminal Laws Deter Crime? Deterrence Theory in Criminal Justice Policy: A Primer," (2019). <https://www.house.leg.state.mn.us/hrd/pubs/deterrence.pdf>.

In fact, often servicemembers are entirely unaware of the regulations at 38 CFR § 3.12. CVLC attorneys have represented scores of veterans with OTH discharges who learned about their presumed ineligibility for the very first time when presenting to the VA asking for help. Moreover, veterans, their advocates, and their clinicians are all very familiar with the fact that the misconduct at issue in less-than-honorable discharges often stems from untreated and unaddressed trauma and mental illness. As such, it is unlikely to be preventable through punishment.

The VA eligibility regulations are not a behavior management tool. For VA to maintain the current regulations or adopt the proposed revisions with that intention in mind would be an unjustifiable rejection of VA's duty to care.

Finally, we caution against relying on a concept of “good order and discipline” to justify continued exclusionary practices. This concept has been deployed against progressive changes in military policy in the past; the “good order and discipline language reflects not a core principle of military effectiveness but a rhetorical smokescreen to reflect its opposition to social and personnel policy changes and proposed military justice reforms.”¹⁷ The VA runs the nation's largest comprehensive public health system. Making VA more inclusive of administratively-discharged veterans by removing the regulatory bars is the right thing to do for veterans' health and wellbeing. We urge VA to focus on caring for veterans instead of judging them and to leave the DoD to manage the military.

II. Removing the regulatory bars does not denigrate the service of veterans who earned Honorable discharges.

In the RFI, VA asks, “how (if at all) would extending VA benefits eligibility denigrate others' honorable service?”¹⁸ We reject the notion that treating veterans who need healthcare or providing benefits to veterans disabled by their service is a denigration to any other veteran. On the contrary, the best way to honor the service of our country's veterans is for VA to save more veterans' lives, regardless of their discharge status, and to leave to the DoD the matter of conferring or withholding honor.

Indeed, granting a veteran with a less-than-honorable discharge the status of “Honorable for VA Purposes” has absolutely no bearing on the DoD's system for recognizing honor. Inclusion in VA care does not grant a veteran additional rank, retirement fund access, or even the G.I. bill's education benefits. It simply provides a veteran with assistance in the transition to civilian life and the resources to heal from the scars of service.

¹⁷ Jeremy S. Weber, Colonel, USAF. The Disorderly, Undisciplined State of the ‘Good Order and Discipline’ Term. 3 (2016) https://www.jcs.mil/Portals/36/Documents/Doctrine/Education/jpme_papers/weber_j.pdf?ver=2017-12-29-142200-423; see also Jeremy Weber. Whatever Happened to Military Good Order and Discipline. 66 Cleveland State L. Rev. 123 (2017) <https://engagedscholarship.csuohio.edu/cgi/viewcontent.cgi?article=3985&context=clevstlrev>

¹⁸ RFI, 86 Fed. Reg. at 50514. (Question D.2).

It is the VA's position that their "top clinical priority is preventing suicide among all Veterans — including those who do not, and may never, seek care within the VA health care system."¹⁹ This priority speaks to the heart of the issue at hand— that VA healthcare and benefits exists not as a reward, but as a critical program to save veterans' lives and prevent veterans from slipping into poverty and homelessness. VA's current and proposed regulations, and the VA's lengthy and bureaucratic COD process for adjudicating honor, abrogate this clinical priority in fundamental ways. Rejecting less-than-honorable veterans who need healthcare puts their lives at risk.

The evidence that access to VA healthcare saves lives is overwhelming.²⁰ Of the 20 veterans daily who complete suicide, 75% are not under VA Care.²¹ This horrific number is quoted often, along with a repeated ask of how to solve the problem. As a nation, not a single legislative cycle passes without multiple hearings on the issue of veteran suicide and how to combat this endemic problem. One simple, evidence-based solution is right at VA's fingertips—remove the regulatory bars and provide care to all OTH veterans without delay.

The moral crisis that VA faces is not whether granting benefits to veterans with bad paper denigrates the service of veterans with Honorable discharges. Rather, it is that VA shuts its doors to individuals who desperately need access to healthcare, income, and housing. VA can, and should, take this opportunity to strike at the heart of veteran suicide and poverty by removing these regulatory bars to access.

III. Both the existing regulation and the proposed rule unfairly exclude historically disadvantaged and vulnerable populations, and principles of fairness, inclusion, and justice mandate the regulation be revised to remove the regulatory bars.

In the RFI, VA reflected and asked "VA is committed to ensuring that its character of discharge regulations reflect the principles of fairness, inclusion, and justice that our Service members and our Nation deserves. What specific changes can be made to the proposed rule for fairly adjudicating the benefits eligibility of historically disadvantaged and vulnerable populations?"²² The most fair, inclusive, and just action VA could take would be to remove the regulatory bars entirely.

The regulatory bars contravene Congress's intent to provide an inclusive system to care for our nation's veterans. Due to systemic injustice and/or lack of appropriate care, veterans from disadvantaged and vulnerable populations receive OTH and Bad Conduct discharges at higher rates than other veterans. In any individual case, it can be difficult or impossible for a veteran to prove that they were impacted by systemic injustice. By presuming all veterans with OTH or BC discharges are ineligible, despite the evidence of disparate impacts on certain populations, VA's regulatory bars perpetuate injustice against these veterans.

¹⁹ Department of Veterans' Affairs, Veteran Suicide Prevention, https://www.mentalhealth.va.gov/suicide_prevention.

²⁰ See Claire A. Hoffmire, PhD, et. Al, Administrative Military Discharge and Suicidal Ideation Among Post-9/11 Veterans, *American Journal of Preventative Medicine*, 727 (May 2019). ("The relationship [between discharge and suicidal ideation] was only significant among Veterans not using mental health services . . . and among transition Veterans <2 years from separation[.]")

²¹ Charles Hooper, MSW, Suicide Among Veterans, (July 28, 2021) <https://americanaddictioncenters.org/veterans/suicide-among-veterans>.

²² RFI, 86 Fed. Reg. at 50514. (Question D.3).

Black Veterans and Veterans of Color receive bad paper discharges at disproportionate rates compared to white veterans. The DoD has documented “dramatic” racial disparities in disciplinary actions going back to at least 1971.²³ This problem continues unabated. Based on FOIA data received by CVLC from the Marines and Navy, those branches administratively separate Black veterans with OTH discharges at disproportionately high rates and Honorable discharges at disproportionately low rates.²⁴ In comparison, those same branches give white veterans OTH discharges at disproportionately low rates and Honorable discharges at disproportionately high rates.²⁵ As recently as 2020 the Air Force determined that Black enlisted members were still twice as likely to be involuntarily separated for misconduct as other enlisted members.²⁶ In all branches of the service, veterans of color are court martialled at higher rates than white members.²⁷

LGBTQ Veterans faced explicit discrimination under the ban on transgender servicemembers, Don’t Ask Don’t Tell, and the military’s predecessor policies. Veterans who served despite being gay or trans, or veterans perceived as being LGBTQ, could be discharged less-than-honorably for a variety of reasons stemming from anti-LGBTQ discrimination. An estimated greater than 100,000 veterans were less-than-honorably discharged between WWII and present day due to these policies.²⁸ In some cases, it is clear from the veteran’s DD-214 that they were discharged for “homosexuality,” but in many others, a veteran discharged because of their sexuality or gender identity carries an OTH discharge with a narrative reason indicating misconduct. Alleged misconduct may have been a pretext for discharging an LGBTQ service member unjustly, or the misconduct may have actually occurred but stemmed from the difficulties of serving under these discriminatory policies.²⁹

Veterans with mental health disorders are known to disproportionately receive OTH discharges. Veterans outside of VA care are more likely to commit suicide than those with VA care,³⁰ and veterans with OTH discharges are twice as likely to commit suicide as those with Honorable or General discharges.³¹ Although the military’s awareness of mental health has improved in recent years, the military’s mission is to provide our country with the forces needed to deter war and ensure

²³ See Department of Defense, Report of the Task Force on the Administration of Military Justice, 109 (Nov. 1972) (“Black service members received in Fiscal Year 1971 a lower proportion of honorable discharges and a higher proportion of general and undesirable [OTH] discharges than whites of similar aptitude and education.”).

²⁴ Data on file with the authors. CVLC requested that each branch supply the race, ethnicity, gender and characterization of service of members separated from August 2015 through August 2020. To date, the Navy and Marine Corps have responded to this FOIA request, and the Army, Air Force, and Coast Guard responses are outstanding.

²⁵ *Id.*

²⁶ Inspector General Department of the Air Force, Report of Inquiry (S8918P) Independent Racial Disparity Review, 17-18 (2020).

²⁷ In the Air Force, Black airmen are 71% more likely than white airmen to face NJP or court martial; in the Marine Corps, Black marines are 32% more likely than white marines to be found guilty at court martial or NJP; in the Navy, Black sailors are 40% more likely than white sailors to face General or Special Court Martial; in the Army, Black soldiers are 61% more likely than white soldiers to face General or Special Court Martial. Protect Our Defenders, Racial Disparities in Military Justice, (2017). <https://www.protectourdefenders.com/racial-disparities-reports/>

²⁸ Turned Away at 5-6.

²⁹ *Id.*

³⁰ Hoffmire, Administrative Military Discharge and Suicidal Ideation at 727.

³¹ Underserved at 21.

our nation's security.³² not to operate a public health system. Despite improvements in providing mental health services before discharge, service members with diagnosed mental illness still unjustly face OTH discharges. The GAO found that out of all service members separated for misconduct between 2011 and 2015, 62% had diagnosed PTSD or TBI.³³ Of those, 23% received an OTH discharge.³⁴ This report covers only those service members who were diagnosed in service with specific conditions, and thus underreports the problem, as many service members have a mental illness that is not diagnosed before separation. Additionally, the GAO found that no branch fully adhered to policies intended to protect service members with mental illness from unfair misconduct separations.³⁵ Additionally, veterans who served in prior decades did not have the benefit of contemporary understandings regarding mental illness at the time of their discharge.

Veterans who experienced Military Sexual Trauma (MST) likewise face OTH discharges. The discharge may be related to misconduct resulting from mental health disorders triggered by the MST, or the discharge may be in retaliation for reporting MST or rejecting sexual advances. An estimated one in three victims of sexual assault develop PTSD, a higher incidence than PTSD rates for combat survivors.³⁶ In CVLC's experience, veterans are rarely successful in demonstrating that their misconduct was caused by a mental health condition unless they have begun treatment for the mental health condition – yet VA routinely denies these veterans access to mental health services until *after* the COD is concluded. Despite a 2018 expansion of law to provide mental health care to OTH veterans who are MST survivors,³⁷ CVLC has repeatedly assisted clients who were erroneously denied this care by VA because VA considers them “dishonorable.”

Veterans may unfairly receive misconduct-based administrative discharges due to their *branch of service* or *the decade in which they served*.³⁸ Administrative discharges are meant to provide operational flexibility; as such, they have streamlined and minimal due process and are heavily dependent on the culture of the branch and the discretion of individual commanders and supervisors. It defies logic and basic fairness that a veteran of the Marine Corps could provide the same length and quality of service as a veteran of the Air Force yet be denied VA care and benefits based on differences in culture between the branches.

VA's bureaucratic adjudication system, whether under the existing or proposed regulation, cannot correct for these injustices. VA judges the severity of misconduct on the veteran's Official Military Personnel File – a record that contains DoD's version of events. Often, a veteran's only proof of racial or LGBTQ-based bias, MST, or symptoms of mental health disorders is their own testimony. The current and proposed regulations rely on VA adjudicators to routinely weigh a veteran's credibility against an official record and the adjudicator's own implicit biases. The existing regulation requires veterans to relive their most traumatic moments in order to convince VA that they are “worthy” of care, with arbitrary and inconsistent results. The proposed regulations are more of the same. This system too often results in veterans, harmed once by DoD, harmed again by VA.

³² U.S. Dep't of Defense. About. <https://www.defense.gov/About/>

³³ U.S. Government Accountability Office, GAO-17-260, DOD Health: Actions Need to Ensure Post-Traumatic Stress Disorder and Traumatic Brain Injury Are Considered in Misconduct Separations, 12 (2017).

³⁴ Id. at 14.

³⁵ Id. at 20, 22.

³⁶ Human Rights Watch, *Booted: Lack of Recourse for Wrongfully Discharged U.S. Military Rape Survivors*, 7 (2016). https://www.hrw.org/sites/default/files/report_pdf/us0516_militaryweb_1.pdf

³⁷ 38 U.S.C. § 1720I.

³⁸ Underserved at 8-13; Turned Away at 6-7.

VA's adherence to the regulatory bars results not only in a policy in which veterans are presumptively ineligible for care, but also a culture in which VA actively discourages veterans from seeking help. Whether due to the confusion caused by this complex system or due to bias against veterans with bad paper, too often VA staff improperly treat veterans with OTH discharges as ineligible for services.³⁹ This occurs despite the fact that Congress has explicitly indicated that certain populations are eligible. For instance, in recognition of the link between trauma, mental illness, and OTH discharges, Congress in 2018 passed the Honor Our Commitment Act, which mandated that VA provide mental and behavioral healthcare to veterans with OTHs who experienced MST or served in combat.⁴⁰ Yet, as mentioned above, CVLC attorneys have repeatedly accompanied veterans to VA who have asked for mental healthcare, explicitly invoking their rights under this statute, only to have VA staff tell the veterans they are "not honorable." The most recent example of a CVLC client being turned away in this fashion occurred in August 2021.

A veteran should not need to hire an attorney to access the care Congress directed them to receive, yet this is where the regulatory bars have led us. VA's reliance on its own discretion to determine who is "honorable" under the regulatory bars perpetuates historic injustice and violates Congressional intent. In addition to perpetuating historic injustices, this system ruptures veterans' trust in the VA. The only means by which VA can become fair, inclusive, and just is to craft a simple, narrow regulation that will bar the door only to the very few veterans who have engaged in conduct that earned a Dishonorable discharge or subjects them to a statutory bar, in the absence of mitigating and compelling circumstances.

IV. The definition of compelling circumstances should be expanded and incorporated into the adjudication of statutory bars.

In the RFI, VA asks: whether it should consider extenuating circumstances when evaluating the severity of a veteran's misconduct; whether it should consider the totality of the circumstances when evaluating the number of instances of misconduct; what conditions, symptoms or circumstances the VA should consider when determining the impact of mental health on a prolonged AWOL or misconduct; and additional questions regarding compelling circumstances and corroboration of the same.⁴¹ As we stated in our previous comment, VA should remove the existing regulatory bars entirely because the regulatory bars exceed VA's authority.⁴² However, VA can, and must, consider compelling circumstances to determine when a veteran who is presumptively subject to a statutory bar should nonetheless be eligible for benefits.

Such an approach is consistent with 38 U.S.C. § 5303, which not only requires VA to consider "compelling circumstances" before determining whether a veteran should be barred due to a lengthy AWOL,⁴³ but also requires VA to waive any applicable statutory bar if the VA finds that the veteran was "insane" at the time of the events leading to their discharge.⁴⁴ Congress has directed VA to err on the side of including veterans who, despite the applicability of a statutory bar, nevertheless

³⁹ Turned Away at 13-25.

⁴⁰ 38 U.S.C. § 1720I.

⁴¹ RFI, 86 Fed. Reg. at 50514. (Questions A.1, A.2, B.1 and B.2).

⁴² See generally, NVCLR/CVLC Comment.

⁴³ 38 USC § 5303(a).

⁴⁴ 38 USC § 5303(b).

deserve care and benefits because of the specific facts at issue in their case. We urge VA to take a broad, compassionate, and trauma-informed approach to this analysis. Consideration of compelling circumstances requires an evidence-based understanding of mental health. VA should also take into account service members' experiences with discrimination, harassment, abuse, or assault, whether based on race, sex, national origin, ethnicity, LGBTQ status, religion, or disability.

CONCLUSION

The VA provides our country's veterans with lifesaving healthcare and benefits. Yet the continued use of regulatory bars excludes far too many deserving veterans. VA's current and proposed regulations contravene Congress's direction and impose a complex, exclusionary, and arbitrary bureaucratic process that perpetuates unjustifiable harm. As in our prior comment, we urge VA to adopt a rule that honors Congress's intent in enacting the 1944 G.I Bill and gives the "benefit of the doubt" to all who served our country in uniform. Such a rule would remove the regulatory bars and utilize the statutory bars alone to exclude only those truly dishonorable former service members, as Congress intended. A more just system would presume eligibility for all administratively discharged veterans. Doing so would be lawful and within the VA's authority; would create a simple and efficient system that could be implemented consistently on a national scale; would save VA—and taxpayers—the expense of maintaining and defending a complex adjudication system that necessitates legal representation for deserving veterans to access care; and would truly give meaning to VA's stated priority of saving veterans lives.

Respectfully submitted,



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