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Listening Session Testimony
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Thank you. My name is Mo Siedor, and I'm the Legal Director at Swords to Plowshares. We are a community-based non-profit dedicated to serving the homeless, low-income and at-risk veterans in the San Francisco Bay Area. Each year, our team of attorneys at Swords assists over 500 veterans and nearly half of them have a less than honorable discharge. As such, we have helped a large volume of clients navigate the Character of Discharge process.

Seeing the VA regularly issue incorrect and unjust decisions in these cases was our impetus to petition the VA, along with The National Veterans Legal Services Program, for rulemaking regarding its COD regulations. Our petition was the culmination of an extensive amount of data collection, deep historical legal research, numerous conversations with advocates across the country, and our considerable experience directly representing clients in COD cases.

Given my time limit today, I want to focus my comments on the requests for information pertaining to Moral Turpitude and Benefit Eligibility.

To begin, the proposed definition of moral turpitude is overboard and vague, and will likely lead to inconsistent and arbitrary decision making. This bar should be removed entirely.

I want to provide some examples to illuminate how in practice this proposed definition might be applied. Take the relatively common reason our clients are kicked out of the military – testing positive for marijuana use. Under the proposed language, an adjudicator in locations where recreational marijuana has been legal for many years – such as Denver or LA – this behavior would likely not rise to the level of a "grave violation" of moral standards and wouldn't be seen as harmful, while in a more conservative jurisdiction where marijuana use is still a crime – such as Little Rock or Wichita -- an adjudicator could reasonably conclude the opposite. In fact, at Swords, we had a client whose only misconduct was a single positive drug test, and the Muskogee RO denied his COD on moral turpitude grounds.

This vague definition also gives room for an adjudicator - with a strong belief that taking one's own life is immoral - to deny a veteran access to benefits because of a suicide attempt in service. We had a client at Swords who lost friends in an IED explosion in Iraq and while still on that deployment, he shot himself in the chest and was discharged with an Other than Honorable.

Two months ago, the VA denied his COD. It is inconceivable that Congress intended the VA to turn someone away from treatment and help for being suicidal, but both the current and proposed regulations would allow for that outcome.

One could argue that training the adjudicators on what constitutes moral turpitude would remedy these issues, but – as documented in our petition and comment – a review of vast inconsistency in these decisions based on Regional Office or which BVA judge is assigned makes it hard to feel confident that training would solve the problem.

When devising a federal benefits system, the language employed must ensure a consistent outcome regardless of the office adjudicating the claim or the individual assigned to make the decision. However, these vague definitions, all but guarantee inconsistent outcomes for claimants.

And it's important to remember that the decisions VA is making can mean life or death for many of our clients. They are determining whether someone will receive mental health care, prescription medications, social worker support and case management, and disability income to help pay their basic needs.

VA adjudicators are a diverse group, living in a very diverse nation. The proposed definition does not adequately account for these differences.

Next, regarding Question D - Benefits Eligibility - the VA asks how removing the regulatory bars would impact military order and discipline. I have been representing clients in CODs since 2014, and I have personally met with hundreds of veterans wanting legal help related to a less than honorable discharge. Of those conversations, I can remember only one time– it was at a legal clinic at the Menlo Park VA – when a client came to me asking for help with a COD. It was memorable because I was so surprised that he knew about the process at all.

Clients come to us regularly requesting help with a discharge upgrade because they think that's the only avenue to getting help from VA. In my experience, former servicemembers – and even many employees within VA -- generally do not know about this process, let alone what the regulatory bars say or don't say.

Given this, I can't imagine how removing them would have any impact on military order and discipline. The DOD has an entire system – including their own judiciary and legal code - to handle disciplinary issues, and they do a fine job of maintaining military order. VA should focus on its own mission to "care for those who have borne the battle."

To the second question of whether extending benefits to those with less than honorable discharges will denigrate the service of others – many veterans have already answered this question in the listening session, so I will limit my response to this one point – the COD process already exists. Any analysis as to whether this negatively impacts those with honorable discharges is ultimately irrelevant. There are currently veterans with less than honorable discharges who already get VA benefits because of Congressional mandate. Again, the focus needs to stay on how to improve the existing COD process so that it is more equitable and consistent with Congressional intent.

Lastly, I want to conclude with some brief thoughts on the VA's general inquiry with this Request for Information. One of the main challenges we face as advocates is a lack of understanding by

VA adjudicators of the COD regulations. In interactions at hearings, on calls with Higher Level Review Officers, and in the language of the decision letters – it is commonplace that the regulations governing this process are misstated, misunderstood, and misapplied.

I want to share some examples from just the last few months from our work at Swords.

I have a client who was diagnosed with mouth cancer on active duty. Part of his check had to be removed. He tested positive one time for marijuana use and received an OTH discharge. The VA's decision letter cited only that single non-judicial punishment yet denied his COD under the willful & persistent misconduct bar.

We had another client who received an NJP early on in service for underaged drinking right before is combat deployment to Iraq. Two years later - after he was back stateside – he tested positive once for marijuana, and -- in the 14 pages of discharge paperwork -- the only misconduct cited was that positive drug test. At the COD hearing, the adjudicator conceded on the record that the regulation states that the VA is only allowed to consider the misconduct for which our client was quote "discharged or released because", per 3.12(d). Nevertheless, the adjudicator told us that he was still going to count earlier NJP in the willful & persistent misconduct analysis because that's how "we were trained to do it."

Lastly, an adjudicator recently called an attorney on my team to tell her that the COD hearing she'd requested for her client wasn't going to make a difference in his case, that we were wasting her time and ours, and the only way he would ever get anything from VA was with a discharge upgrade. We looped in the Under Secretary for Benefits' Office, got the adjudicator removed from his claim, and within weeks we had a new hearing in which the client prevailed in his COD and is now receiving 70% service-connection for combat-related PTSD.

The proposed regulations do not address these problems.

The VA is asking for us to help figure out how many incidents over how many months or years, what types of sexual abuse should or shouldn't be considered mitigation, what symptoms should and shouldn't be considered when assessing mental impairment during an AWOL?

With all due respect, the VA is missing the forest for the trees. Adding more categories of minor versus serious misconduct based on the UCMJ, will lead to confusion. Leaving it up to adjudicators to parse out what is a "grave" vs "not grave" moral violation will not help. Allowing compelling circumstances to be applied – but only some compelling circumstances, and only to some bars and not others – VA is all but guaranteeing we will continue to see inconsistent, unfair, and unlawful outcomes.

It is an impossible ask of these adjudicators to apply these convoluted rules after a just brief review of someone's military file and make a moral judgment on the character of their military service. The beauty of the statutory bars is that, for the most part, they are simple yes or no questions, and they provide simple guidance to adjudicators.

If the VA is going to continue to have regulatory bars, the overarching goal must be to make the rules as simple as possible, as clear as possible, to limit the discretion of adjudicators, and to comport them with Congressional intent. We implore VA to keep this in mind.

The veterans in need of CODs are some of the most vulnerable and most in need of VA help as you have heard today and yesterday. Congress intended VA to give those who served the benefit of the doubt and wrote the statutory bars to reflect that intention. The VA has gone awry of that intent with these proposed regulations that will exclude many veterans who very much deserve and have earned the VA's help.

Thank you.