

No. 22-1264

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

JEREMY BEAUDETTE, MAYA BEAUDETTE,
Claimants-Appellees,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs
Respondent-Appellant

On Appeal from the United States Court of Appeals
For Veterans Claims, No. 20-4961

**UNOPPOSED BRIEF OF AMICUS CURIAE
NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM
IN SUPPORT OF APPELLEES JEREMY AND MAYA BEAUDETTE AND
IN FAVOR OF AFFIRMANCE**

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

CERTIFICATE OF INTEREST

Case Number 22-1264

Short Case Caption Beaudette v. McDonough

Filing Party/Entity National Law School Veterans Clinic Consortium

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box.** Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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Signature: /s/Morgan MacIsaac-Bykowski

Name: Morgan MacIsaac-Bykowski

<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input checked="" type="checkbox"/> None/Not Applicable</p>
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Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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**IDENTITY OF AMICUS CURIAE, ITS INTEREST IN THE CASE,
AND SOURCE OF AUTHORITY TO FILE**

The National Law School Veterans Clinic Consortium (NLSVCC) submits this brief in support of the position of the Appellants, Jeremy Beaudette and Maya Beaudette. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.¹

NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC’s mission is, working with like-minded stakeholders, to gain support and advance common interests with the Department of Veterans Affairs (“VA”), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

NLSVCC exists to promote the fair treatment of veterans under the law. It respectfully submits that Board of Veterans’ Appeals (“Board”) and Veterans Court oversight of Caregiver Program decisions is necessary to protect the rights of

¹ NLSVCC wishes to thank and acknowledge Katie M. Becker, Esq. at the University of Georgia School of Law, Yelena Duterte, Esq. at University of Illinois at Chicago School of Law, and Judy Clausen, Esq. at University of Florida Levin College of Law for their hard work. NLSVCC also recognizes the following students, who were instrumental in drafting and editing this brief – Sarah Long, Madelyn Brenner, Sven Kleinhans, and Brennon Lindsey Sean Caulfield, Janis Olkowicz, Grace Paul, and Pamela Watt.

veterans and caregivers to access and maintain the benefits that Congress provided. This oversight will ensure that VHA's decision-making is consistent nationwide.

Counsel for Appellants and Counsel for the Secretary of Veterans Affairs consented to the filing of this brief.

**STATEMENTS PURSUANT TO FEDERAL RULE OF
APPELLATE PROCEDURE 29(a)(4)(E)**

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and
Federal Circuit Rule 29(a), the NLSVCC states:

- a) No party's counsel has authored this brief in whole or part;
- b) No party or party's counsel has contributed money intended to fund
the preparation or submission of this brief;
- (c) No other person has contributed money intended to fund the
preparation or submission of this brief.

ARGUMENT

Jeremy Beaudette was medically discharged from the Marine Corps in 2012 after ten years of service and five combat tours in Iraq and Afghanistan.² He suffered multiple concussions that left him with traumatic brain injury (“TBI”).³ He was also rendered legally blind.⁴ The Veterans Benefits Administration (“VBA”) rated him at 100 percent for his service-connected disability.⁵ In March 2013, the Veterans Health Administration (“VHA”) granted Jeremy and his wife, Maya, benefits under the VA Program of Comprehensive Assistance for Family Caregivers (“Caregiver Program”).⁶ This allowed Maya the flexibility to quit her job and care for Jeremy full time.⁷

That is, until VHA changed its mind. In 2017, it initiated a reassessment of the Beaudettes’ continued eligibility for the Program.⁸ Jeremy was recovering from two major surgeries at the time and could not participate in an in-person examination.⁹ He asked VHA to delay its reassessment.¹⁰ It denied his request

² *Beaudette v. McDonough*, 34 Vet. App. 95, 99 (2021).

³ *Beaudette*, 34 Vet. App. at 99.

⁴ *Id.* at 100.

⁵ *Id.*

⁶ *Id.*

⁷ *Id.*

⁸ *Beaudette*, 34 Vet. App. at 100.

⁹ *Id.*

¹⁰ *Id.*

and conducted the reassessment based on his medical records alone.¹¹ In February 2018, the Beaudettes were informed that they were no longer eligible to participate in the Caregiver Program.¹²

The Beaudettes are not alone. VA's decentralized administration of the Caregiver Program results in inconsistent decisions about who is able to access and maintain caregiver benefits. This inconsistency leaves veterans and caregivers vulnerable to factual inaccuracies they cannot anticipate, procedures they cannot enforce, and decisions they do not understand. Members of the National Law School Veterans Clinic Consortium have witnessed the detrimental effects of VA's inconsistent denials and discharges on the physical and emotional health of those the program is designed to benefit. We provide testimony from some of those veterans and caregivers discharged or declined under the Program below.

There is a simple solution: Board and Veterans Court oversight will protect the rights of veterans and caregivers to access and maintain the benefits that Congress intended. It will also result in VHA's consistent decision-making nationwide. The Veterans Court's decision should be affirmed on this basis.

¹¹ *Id.*

¹² *Id.*

I. VA’s decentralized administration of the Caregiver Program results in inconsistent decisions about who is able to access and maintain caregiver benefits.

In 2010, Congress passed the Caregivers and Veterans Omnibus Health Services Act to acknowledge the significant medical needs of seriously injured post-9/11 veterans and to support the medical care provided to them by family and friends.¹³ VA implemented its Caregiver Program in May of the following year.¹⁴ It identified the “unique nature” of the program that made it significantly different from every other benefit offered by VHA.¹⁵ It estimated the total number of veterans and caregivers qualified to receive benefits in its first year to be 3,596.¹⁶

VA’s estimation of the interest in the program fell well short of reality. VHA has struggled to consistently administer the program and protect the very population it was created to serve ever since. By May 2014, more than 15,600 caregivers were accepted into the program.¹⁷ Veterans and caregivers alike had a

¹³ Caregiver and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, 124 Stat. 1130 (2010).

¹⁴ Caregivers Program, 76 Fed. Reg. 26148 (May 5, 2011) (to be codified at 38 C.F.R. pt. 17, 71).

¹⁵ *Id.*

¹⁶ *Id.*

¹⁷ U.S. Gov’t Accountability Off., GAO-14-675, VA Healthcare: Actions Needed to Address Higher-Than-Expected Demand for the Family Caregiver Program 3 (2014).

sustained interest in participating in it – from April 2013 to May 2014 the number of applicants more than doubled.¹⁸

VHA entrusted each individual VA Medical Center (“VAMC”) with the responsibility of implementing and maintaining the program. Many VAMCs were structurally unprepared to meet the demand. Contrary to VHA’s assumption, many VAMCs did not allocate their existing resources to the program.¹⁹ Moreover, VHA did not have the technology to accurately track program participation data nationwide.²⁰

Rather, VHA placed only a single caregiver support coordinator (CSC) at each facility to administer the program, work with accepted veterans and caregivers, and conduct yearly eligibility reassessments.²¹ These individuals were quickly overwhelmed by the weight of their responsibilities. Moreover, each CSC served as educator, advocate, administrator, and decision maker.²² By May 2014, the Government Accountability Office (GAO) found that the local ratio between CSCs to accepted caregivers in VHA facilities ranged from 1:6 to 1:251.²³

¹⁸ *Id.* at 13.

¹⁹ *Id.* at 14-17.

²⁰ *Id.* at 21-25; *see also* Joint Response to April 19, 2021 Order: Joint Class Notice Plan 3.

²¹ U.S. Gov’t Accountability Off., GAO-14-675, VA Healthcare: Actions Needed to Address Higher-Than-Expected Demand for the Family Caregiver Program 14.

²² *Id.*

²³ *Id.* at 15.

These resource and staffing limitations had an immediate impact on program participants. “The significant stress on resources at some VAMCs resulted in delayed application decisions and home visits – ultimately limiting services to caregivers.”²⁴ By September 2014, the GAO concluded, “[a]fter 3 years of operation, it is clear that VHA needs to formally reassess and restructure key parts of the Family Caregiver Program.”²⁵ It recommended VA reassess staffing levels and procedures to manage the local workload.²⁶ It confirmed, “if the program’s workload problems are not addressed, the quality and scope of caregiver services, and ultimately the services the veterans receive, will continue to be compromised.”²⁷

VHA did not implement GAO’s recommendation to establish a system tracking Caregiver Program participant data.²⁸ Yet, as GAO cautioned four months later, “[w]ithout such data, VHA will not be positioned to make sound,

²⁴ *Id.* at 26.

²⁵ *Id.*

²⁶ U.S. Gov’t Accountability Off., GAO-14-675, VA Healthcare: Actions Needed to Address Higher-Than-Expected Demand for the Family Caregiver Program 14; *see also id.* at 18-21.

²⁷ *Id.* at 26.

²⁸ U.S. Gov’t Accountability Off., GAO-15-245T, VA Healthcare: Improvements Needed to Manage Higher-Than-Expected Demand for the Family Caregiver Program 7 (2014); *see also* Dep’t of Veterans Affs. Off. of Inspector Gen., Rep. 17-04003-222, Veterans Health Administration: Program of Comprehensive Assistance for Family Caregivers: Management Improvements Needed (2018) at 20-21.

well-informed decisions about the program, potentially allowing it to continue to struggle to meet the needs of caregivers of seriously wounded and injured veterans.”²⁹ While VHA attempted to address its staffing shortages, it could not overcome CSC-to-caregiver ratios due to the program’s continued high demand.³⁰

On January 9, 2015, VA announced that the Caregiver Program would be excluded from the Veterans Judicial Review Act’s Board-review mandate.³¹ Local CSC decisions became final, without any opportunity to seek further review.

Nevertheless, by April 2017, “some VAs were dumping caregivers in huge numbers.”³² The discharge rates varied widely.³³ NPR’s Quil Lawrence reported that the Fayetteville, North Carolina VAMC decreased the number of accepted

²⁹ U.S. Gov’t Accountability Off., GAO-15-245T, VA Healthcare: Improvements Needed to Manage Higher-Than-Expected Demand for the Family Caregiver Program 7 (2014)7.

³⁰ *Id.* at 4.

³¹ Caregivers Program, 80 Fed. Reg. 1357, 1366 (Jan. 9, 2015) (to be codified at 38 C.F.R. pts. 17, 71); *see also Beaudette*, 34 Vet. App. at 101.

³² Quil Lawrence, *VA Re-Evaluates Family Caregiver Program*, NPR (May 29, 2017, 5:01AM), <https://www.npr.org/2017/05/29/530555463/va-re-evaluates-family-caregiver-program>; *see also* Quil Lawrence, *Some VAs Are Dropping Veteran Caregivers From Their Rolls*, NPR (Apr. 5, 2017, 5:03AM), <https://www.npr.org/2017/04/05/522690583/caregivers-for-veterans-dropped-from-va-plan>.

³³ Quil Lawrence, *Some VAs Are Dropping Veteran Caregivers From Their Rolls*, NPR (Apr. 5, 2017, 5:03AM), <https://www.npr.org/2017/04/05/522690583/caregivers-for-veterans-dropped-from-va-plan>.

caregivers from 314 to 256 over a three-year period.³⁴ The Northern Arizona VA Healthcare System dropped from 186 to 38 participants.³⁵ Further, the Charleston, South Carolina VAMC decreased from 196 to 11 participants.³⁶

Approval rates also varied dramatically.³⁷ The Huntington, West Virginia program had a 79 percent approval rate.³⁸ But the approval rate in the nearby Tennessee Valley Healthcare System was only two percent.³⁹ When asked to explain these discrepancies over time, NPR's Quill Lawrence reflected, "[VA] didn't really have an explanation. They didn't seem to be aware of these inconsistencies from station to station. I mean, they - honestly, they didn't seem to be aware of their own data I compiled."⁴⁰

³⁴ Quill Lawrence, *Some VAs Are Dropping Veteran Caregivers From Their Rolls*, NPR (Apr. 5, 2017, 5:03AM), <https://www.npr.org/2017/04/05/522690583/caregivers-for-veterans-dropped-from-va-plan>.

³⁵ *Id.*

³⁶ *Id.*

³⁷ See Yelena Duterte, *Splendid Isolation: VA's Failure to Provide Due Process Protections and Access to Justice to Veterans and Their Caregivers*, 29 J. L. & POL'Y 1, 25-30 (2020).

³⁸ *Id.* at 28.

³⁹ *Id.* at 29.

⁴⁰ Quill Lawrence, *Some VAs Are Dropping Veteran Caregivers From Their Rolls*, NPR (Apr. 5, 2017, 5:03AM), <https://www.npr.org/2017/04/05/522690583/caregivers-for-veterans-dropped-from-va-plan>.

Secretary Shinseki confirmed Lawrence's suspicion; he paused all program revocations twelve days after that NPR article was released.⁴¹ In June 2017, six years after the program's first implementation, VHA issued its first guidance, VHA Directive 1152, in an attempt to standardize program procedures across each local VAMC.⁴² The program then resumed in July 2017.⁴³

By June 2018, VAMCs were still shedding caregivers.⁴⁴ VA's Office of Inspector General ("OIG") conducted a contemporaneous audit of the program from June 2017 through June 2018.⁴⁵ It found that VHA "did not consistently monitor and document the health and well-being of an estimated 50 percent of the

⁴¹ Quil Lawrence, *VA Re-Evaluates Family Caregiver Program*, NPR (May 29, 2017, 5:01AM), <https://www.npr.org/2017/05/29/530555463/va-re-evaluates-family-caregiver-program>; *VA Caregiver Support Program: Correcting Course for Veteran Caregivers: Hearing Before the H. Committee on Veterans' Affairs*, 115 Cong. 5 (2018) (statement of Eric Shinseki, Former Secretary of Veterans Affairs).

⁴² Dep't of Veterans Affs, Veterans Health Administration, Directive 1152, Caregiver Support Program (2017).

⁴³ Dep't of Veterans Affs. Off. of Inspector Gen., Rep. 17-04003-222, Veterans Health Administration: Program of Comprehensive Assistance for Family Caregivers: Management Improvements Needed (2018) at 20.

⁴⁴ Quil Lawrence, *VA's Caregiver Program Still Dropping Veterans With Disabilities*, NPR (May 21, 2018, 1:26PM), <https://www.npr.org/2018/05/21/611733148/vas-caregiver-program-still-dropping-veterans-with-disabilities>; *see also* Quil Lawrence, *VA Says It's Trying to Improve Caregiver Program's Appeals Process*, NPR (May 21, 2018, 5:00AM), <https://www.npr.org/2018/05/21/612941604/va-says-its-trying-to-improve-caregiver-programs-appeals-process>.

⁴⁵ Dep't of Veterans Affs. Office of Inspector General, Rep. 17-04003-222, Veterans Health Administration: Program of Comprehensive Assistance for Family Caregivers: Management Improvements Needed (2018) at ii.

1,604 veterans it discharged” from the program from January to September 2017.⁴⁶ Specifically, “[c]linicians and CSCs either did not adequately document how much veterans’ health conditions changed, or failed to routinely monitor those veterans and their caregivers” prior to the reassessment that led to their discharge.⁴⁷ VHA also failed to establish procedures to ensure the accuracy of eligibility determinations.⁴⁸

Congress expanded the Caregiver Program to pre-9/11 veterans the following month.⁴⁹ In December 2018, NPR again reported that VA continued to arbitrarily discharge caregivers.⁵⁰ The Secretary responded by imposing another moratorium on discharges from the program and decreases within the program.⁵¹

⁴⁶ *Id.* at iii.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ VA Mission Act of 2018, Pub. L. 115-182, 132 Stat. 1393 (2018); *see also* Quil Lawrence, *VA Says It’s Trying to Improve Caregiver Program’s Appeals Process*, NPR (May 21, 2018, 5:00AM), <https://www.npr.org/2018/05/21/612941604/va-says-its-trying-to-improve-caregiver-programs-appeals-process>.

⁵⁰ Quil Lawrence, *VA Still Arbitrarily Cutting Caregivers From Program, Even As It Aims to Expand*, NPR (Dec. 18, 2018, 5:00AM), <https://www.npr.org/2018/12/18/677346997/va-still-arbitrarily-cutting-caregivers-from-program-even-as-it-aims-to-expand>; Quil Lawrence, *VA Says It Will Stop Arbitrarily Dropping Caregivers From Program*, NPR (Dec. 21, 2018, 1:02PM), <https://www.npr.org/2018/12/21/679123976/va-says-it-will-stop-arbitrarily-dropping-caregivers-from-program>.

⁵¹ Press Release, Dep’t of Veterans Affs., VA announces moratorium on discharges and decreases from comprehensive caregiver program (Dec. 21, 2018).

In September 2019, GAO published the results of its second audit of the program.⁵² It confirmed, “VA continues to struggle to have the information and tools needed to effectively monitor the Family Caregiver Program.”⁵³ It lacked data to ensure sufficient staffing, track completion of program requirements and accurate projections of the future needs of an expanded caregiver population.⁵⁴

Nevertheless, by May 11, 2020, 19,472 veterans participated in the Caregiver Program.⁵⁵ For those enrolled amidst the COVID-19 pandemic, “getting care in their own homes [went] from a preference to a matter of survival.”⁵⁶

In July 2020, VA implemented regulatory amendments to the program following the passage of the VA MISSION Act.⁵⁷ It created a centralized eligibility and appeals team (CEAT) to make eligibility determinations.⁵⁸ “The

⁵² U.S. Gov’t Accountability Off., GAO-19-618, VA Healthcare: Actions Needed to Improve Family Caregiver Program (2019).

⁵³ *Id.* at 27.

⁵⁴ *Id.*

⁵⁵ Dep’t of Veterans Affs. Off. of Inspector Gen., Rep. 20-00178-24, Veterans Health Administration: Program of Comprehensive Assistance for Family Caregivers: IT System Development Challenges Affect Expansion (2021).

⁵⁶ Quil Lawrence, *COVID-19 Hits Veterans Homes, VA Says New Home-Care Program Still Months Off*, NPR (May 16, 2020, 7:00AM), <https://www.npr.org/2020/05/16/857110011/veterans-see-caregivers-as-even-more-crucial-in-the-covid-19-era>.

⁵⁷ Program of Comprehensive Assistance for Family Caregivers Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. 46,226 (July 31, 2020) (to be codified at 38 C.F.R. pt. 71).

⁵⁸ *Id.* at 46,230.

CEAT will be composed of a standardized group of inter-professional, licensed practitioners, with specific expertise and training in the determinations of eligibility and the criteria for the higher-level stipends”⁵⁹ It reasoned that these CEATs would “improve standardization in eligibility determinations across VA.”⁶⁰

It further stated that CEATs would increase the objectivity of eligibility determinations.⁶¹ It proposed, “[c]linical staff at local VA medical centers will conduct evaluations of PCAFC applicants with input provided by the primary care teams This information will be provided to the CEATs for use in making eligibility determinations.”⁶² But “neither the veteran’s VA primary care provider [nor private treatment provider] would determine PCAFC eligibility.”⁶³

⁵⁹ *Id.*

⁶⁰ *Id.* at 46,243.

⁶¹ *See id.* at 46,244.

⁶² Program of Comprehensive Assistance for Family Caregiver Improvements and Amendments Under the VA Mission Act of 2018, 85 Fed. Reg. at 46,232.

⁶³ *Id.* at 46,243.

VA also required the reassessment of “legacy participants”⁶⁴ to determine their continued eligibility for the program.⁶⁵ It reasoned that new reassessments would improve the consistency and transparency of VHA decision making.⁶⁶

Thereafter, VHA conducted 80 percent of its required reassessments for the legacy participants and applicants; it found that approximately 12,970, or about 90 percent, of existing participants were no longer eligible under the new regulatory criteria.⁶⁷

⁶⁴ 85 Fed. Reg. at 46,253; *see also* 38 C.F.R. § 71.15 (2020) (defining legacy participant as an eligible veteran whose caregiver was approved by VA before October 1, 2020).

⁶⁵ 85 Fed. Reg. at 46,253-54; *see also* Quil Lawrence, *VA revamps caregivers program: Those who already qualified must reapply*, NPR (Jan. 18, 2022, 5:08AM), <https://www.npr.org/2022/01/18/1073732623/va-revamps-caregivers-program-those-who-already-qualified-must-reapply#:~:text=A%20MARTINEZ%2C%20HOST%3A,to%20stay%20on%20the%20program>.

⁶⁶ 85 Fed. Reg. at 46,253-54.

⁶⁷ Extension of Program of Comprehensive Assistance for Family Caregivers Eligibility for Legacy Participants and Legacy Applicants, 87 Fed. Reg. 57,602 (Sept. 21, 2022) (to be codified at 38 C.F.R. pt. 71); *see* Rebecca Kheel, *VA Was on a Path to Kick 90% of Legacy Caregivers Out of Program Before Review Suspension*, Military.com (Mar. 25, 2022), <https://www.military.com/daily-news/2022/03/25/va-was-path-kick-90-of-legacy-caregivers-out-of-program-review-suspension.html>.

On March 25, 2022, this court set aside VA’s definition of “need for supervision, protection, or instruction.”⁶⁸ This rendered the results of VHA’s preexisting reassessments unreliable.⁶⁹

On June 9, 2022, VA announced that it was suspending its annual reassessments amidst its continuing review of the program; it also paused all discharges from and reductions within the program.⁷⁰ On September 15, 2022, VA granted legacy participants and applicants three years of extended eligibility.⁷¹

II. VHA’s inconsistent decision-making leaves veterans and caregivers particularly vulnerable to factual inaccuracies they cannot anticipate, procedures they cannot enforce, and decisions they do not understand.

General Caregiver Program denial and discharge statistics mask a factual reality: the threat of discharge from the Caregiver Program looms over every program participant. Moreover, participants know that VA’s most recent pause in 2022 is only a temporary source of peace. Frequent reassessments will return and will continue to be a significant source of stress for the financial and emotional

⁶⁸ *Veteran Warriors, Inc. v. Sec’y of Veterans Affairs*, 29 F.4th 1320, 1342-43 (Fed. Cir. 2022).

⁶⁹ Extension of Program of Comprehensive Assistance for Family Caregivers Eligibility for Legacy Participants and Legacy Applicants, 87 Fed. Reg. at 57,604.

⁷⁰ Press Release, U.S. Dep’t of Veterans Affs., VA suspends annual reassessments in the Program of Comprehensive Assistance for Family Caregivers (June 9, 2022).

⁷¹ Extension Program of Comprehensive Assistance for Family Caregivers Eligibility for Legacy Participants and Legacy Applicants, 87 Fed. Reg. 57602 (Sept. 21, 2022) (to be codified at 38 C.F.R. pt. 71).

well-being of each family. Veterans and their caregivers' concerns are reasonable; VA acknowledged that a substantial majority of "legacy" veterans were proposed to be discharged under the new post-MISSION Act standards.⁷²

Yet, when the pause ends, neither the veteran nor the caregiver can be certain that their continued participation in the program will be protected. They cannot be sure that there are accurate facts in their medical records or procedural safeguards on which they can rely. We include testimonies from willing veterans and caregivers about their participation in or discharge from the Caregiver Program below. Many of these individuals declined to give their names for fear of VHA retribution. Accordingly, we reference them by letter and in alphabetical order. Their stories illustrate the wide array of preventable errors that stop deserving individuals from receiving the benefits of a program designed to assist them.

A. Veterans and their caregivers cannot be certain that their VHA medical records will accurately reflect their daily, lived reality.

Two veterans, A and B, underwent triple amputations of both legs and one arm. Each veteran requires their mothers' assistance with activities of daily living (ADLs). Each was discharged from the Caregiver Program because VHA inferred that they do not require such assistance based on their VHA medical records. In

⁷² See Rebecca Kheel, *VA Was on a Path to Kick 90% of Legacy Caregivers Out of Program Before Review Suspension*, Military.com (Mar. 25, 2022), <https://www.military.com/daily-news/2022/03/25/va-was-path-kick-90-of-legacy-caregivers-out-of-program-review-suspension.html>.

both cases, VHA found that the veterans' medical providers did not address whether the veterans required assistance tying their shoes. Yet VHA's assumption was based on a flawed premise, as Veterans A and B do not have cause to wear shoes. As a result, they do not need assistance tying them. Their physicians are unlikely to address this counterfactual hypothetical.

Similarly, Veteran C was removed from the Caregiver Program because his VHA records failed to document a neurocognitive disorder. However, his condition was well documented in other components of VA, specifically VBA's disability compensation system. The veteran was medically retired due to his disorder and the VBA had already granted service-connection for it. Moreover, VBA considered him unemployable as a result of his disability.

Veteran D has three 100 percent ratings for PTSD with traumatic brain injury, strokes, and a missing colon and rectum. This means that VBA determined that each of those separate conditions was related to the veteran's military service; moreover, the severity of each separate disability rendered him 100 percent disabled and unemployable. However, in 2020, Veteran D and his wife were denied participation in the Caregiver Program for the third time. VHA's denial was based on the inaccurate factual premises that the veteran was not missing a colon or rectum. Instead, it found that he was missing an eye, he did not require a

specialized diet, and he had no *serious* diagnoses. These plainly inaccurate facts were transmitted from his VHA caregiver support program team to his CEAT.

The VHA records of Veterans A, B, and C do not reflect a fact that is either known to VA or based on a common-sense reality of his situation. Veteran D's VHA records contain factually inaccurate information. Because veterans and their caregivers do not have the current ability to control the quality and extent of notes in their medical records or remedy their inaccuracy then they are subject to VHA decisions based on these inadequate or inaccurate notations.

B. Veterans and their caregivers cannot be certain that VHA's reassessment will be based on an actual review of their medical records.

Veteran E has a spinal cord injury at the T-5 level and two 100 percent ratings: 100 percent for loss of use of both feet; and 100 percent for loss of anal sphincter control. He also has a 60 percent rating for a neurogenic bladder disability. VBA provides him with special monthly compensation at the R-1 level, which includes aid and attendance.⁷³ This means that it determined he has

⁷³ 38 C.F.R. § 3.352 (2022) provides the requirements for aid and attendance. It requires a finding that there is an "inability of claimant to dress or undress himself (herself), or to keep himself (herself) ordinarily clean and presentable; frequent need of adjustment of any special prosthetic or orthopedic appliances which by reason of the particular disability cannot be done without aid (this will not include the adjustment of appliances which normal persons would be unable to adjust without aid, such as supports, belts, lacing at the back, etc.); inability of claimant to feed himself (herself) through loss of coordination of upper extremities or through

additional limitations above and beyond a total disability rating that not only render him unemployable but also require additional care by a family member. However, Veteran E was recently informed that he is being discharged from the Caregiver Program because it *appears* he does not need assistance each time he performs ADLs, even though VBA's finding is inconsistent with VHA's finding.

VBA found that Veteran E requires the aid and attendance of another person, likely due to loss of anal sphincter control and his need for assistance with toileting. But VHA assumed that he did not require such assistance every time. Veteran E will not be able to reconcile these inconsistent conclusions under the current system.

C. Veterans and their caregivers cannot be certain of the reasons why they were discharged or denied from the Caregiver Program.

Veteran F lost his right leg and incurred a traumatic brain injury in Afghanistan.⁷⁴ He and his wife initially applied to the Caregiver Program

extreme weakness; inability to attend to the wants of nature; or incapacity, physical or mental, which requires care or assistance on a regular basis to protect the claimant from hazards or dangers incident to his or her daily environment.” These requirements align closely to those in the Caregiver program requirements.

⁷⁴ Quil Lawrence, *VA revamps caregivers program: Those who already qualified must reapply*, NPR (Jan. 18, 2022, 5:08AM), <https://www.npr.org/2022/01/18/1073732623/va-revamps-caregivers-program-those-who-already-qualified-must-reapply#:~:text=A%20MARTINEZ%2C%20HOST%3A,to%20stay%20on%20the%20program.>

believing that he would be eligible because of his need for supervision.⁷⁵ His various injuries cause him balance issues; his wife worries about his safety when she is not home. The couple was accepted into the program before its 2018 expansion. Yet, they were discharged from the program after VHA decided that all existing participants needed to requalify to continue participating.⁷⁶

The couple was never informed of VHA's reasoning behind its discharge. The rejection they received was "generic, with no specific reasons or explanations."⁷⁷ They now face an appeal without any specific knowledge of why they were discharged from the Caregiver Program in the first place.

Moreover, there are those who were never admitted in the program to begin with despite multiple, independent life-altering disabilities. Veteran G served in Vietnam. He received a 100 percent rating from VBA for his renal failure, PTSD, and congestive heart failure. Each is related to his experiences in Vietnam. His wife now serves as his full-time caregiver. She clothes him, bathes him, feeds him, assists him with his toileting needs, and transfers him to his wheelchair daily. She also drives him to dialysis appointments three times a week. Since the program was expanded to include pre-9/11 veterans, the couple has applied for admission three times. They have been denied each time, even though they twice submitted

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.*

evidence from the veteran's doctor showing his near-complete dependence on his wife. Further, after three applications and three denials, the couple is unaware of why VA continues to deny them admission.

Veterans F and G were discharged or denied from accessing the Caregiver Program. But the reality of their life at home has not changed since VHA's decisions. The veterans still require supervision and full-time care. Their wives continue to provide this care for their husbands. The only thing that has changed is that they now feel like requesting VA assistance is hopeless; they cannot fight a decision that they do not understand. VHA provided no reasoning for why their applications were denied and they are unaware of how they might proceed next. Each couple is in the dark and on their own.

III. Board review is necessary to protect the rights of veterans and caregivers to access and maintain the caregiver benefits Congress provided and ensure VHA's consistent decision-making nationwide.

The Caregiver Program, when effective, provides much-needed assistance to veterans and their caregivers. But its decentralized administration results in inconsistent decisions about who may access or maintain these benefits.⁷⁸ This reality leaves veterans and caregivers vulnerable to factual inaccuracies they

⁷⁸ See Sections I, II.

cannot anticipate, procedures they cannot enforce, and decisions they do not understand, as noted above.⁷⁹

Board review will protect the rights of participants to access and maintain the benefits that Congress intended and prompt a more consistent administration of the program nationwide. Before *Beaudette* was decided by the Veterans Court, Professor Yelena Duterte outlined several proposed changes to the program to ensure that VA provided individuals with due process safeguards.⁸⁰ These changes include the following: First, the veteran and caregiver should have a right to a hearing. Second, an impartial adjudicator should decide their case. Third, the VA's decision should be adequate and explained in a way that the veteran and caregiver can understand it. Finally, they should have a right to judicial review of the decision made in their case.

The Veterans Court's decision permitted Board review of caregiver adjudications. By allowing Board review, the Court enhanced due process protections for veterans and caregivers allowing a right to a hearing, impartial adjudicators, adequate decisions, and thereby enable the potential judicial review by the Veterans Court. This court should affirm that decision. In this section, we

⁷⁹ See Section II.

⁸⁰ *Beaudette*, 34 Vet. App. 95; see Yelena Duterte, *Splendid Isolation: VA's Failure to Provide Due Process Protections and Access to Justice to Veterans and Their Caregivers*, 29 J. L. & POL'Y 1, 25-30 (2020).

provide concrete examples of how these four procedural safeguards might have protected specific veterans and caregivers for the better, based upon NLSVCC clinical experience.

A. The right to a hearing will protect veterans and caregivers.

In order to understand a veteran's needs, it is important to receive information directly from the caregiver and the veteran. A hearing will provide that necessary insight into the participants' daily needs. Without their testimony and the ability to clear up ambiguities in the record, a decision maker may not fully understand the needs of the caregiver or veteran. As discussed above, the VHA may provide incorrect information to the decision maker, such as Veteran D missing an eye instead of a colon. This misunderstanding could have been resolved if the veteran and his caregiver were heard.

The right to a hearing helps clear up inaccurate information about the veteran's needs and allows for the adjudicator to hear exactly what type of care the caregiver is providing. By allowing a hearing, the caregiver is given an opportunity to clear up any misconceptions about the care they are providing. In testimony to Congress, a representative from Disabled American Veterans told the story about Brad Barton, a veteran whose spinal cord was severed in service, leaving him wheelchair bound. Despite being bound to a wheelchair, the VA found he had no mobility issues. This massive failure by the VHA may have been

easily resolved with the opportunity for the Board to meet with Brad and Donna Barton and hear their story.

Since *Beaudette*, caregivers and veterans are provided an optional hearing at the Board of Veterans' Appeals to provide the VA a full understanding of the veteran's daily needs, under 38 U.S.C. 7105.⁸¹ However, if this court removes the Board's jurisdiction over these cases, veterans and caregivers will not be given an opportunity to tell their story and help the adjudicator reach the correct decision.

B. An impartial adjudicator is necessary to ensure due process.

Before 2019, this program's foundation rested on the CSCs at each VAMC.⁸² The CSCs wore many hats and worked directly with the veterans and their caregivers. Each year the task of reevaluating participants to determine eligibility and need were placed directly on the CSCs.

Veteran I participated in the program from the very beginning. He and his wife were initially approved for Tier 1 status.⁸³ Yet, as the veteran's needs increased, he needed additional assistance; they requested Tier 2 status. In 2016, after several appeals, their local facility finally upgraded them to Tier 2. The couple believed that their status was upgraded because someone in the program

⁸¹ *Beaudette*, 34 Vet. App. 95.

⁸² Dep't of Veterans Affs, Veterans Health Administration, Directive 1152, Caregiver Support Program (2017).

⁸³ Tier 1 status is the lowest level of need based on the VA's criteria set out in 38 C.F.R. §71.40.

finally listened to his needs and the amount of care that his wife provided to him. They were always concerned that if they did not have a good relationship with the caregiver staff, they would be discharged. They felt that this program has required them to create relationships with the caregiver staff to ensure that they continue to get support from the VA. Unfortunately, in 2018, they were reduced back to Tier 1. They believe their reduction occurred because the staff member who listened to them left for a new position.

A veteran and caregiver should not worry that personal relationships will impact what tier level they are placed on or whether they can participate in this program at all. In this localized program, the required interpersonal relationships cause stress on caregivers and veterans. To ensure that participants trust the outcome and decision by the VA, there must be impartial decision makers.

Although the regulations in 2019 moved the decision making to an impartial CEAT, there is nothing in the statutes that require the VA to continue this program. By providing caregivers and veterans access to the Board of Veterans' Appeals, there is some assurance that Veterans Law Judges (VLJs) will impartially review the facts and law surrounding their case and making informed decisions. In order to establish trust in this process, an unbiased adjudicator like a VLJ is imperative for veterans and their caregivers to believe that the VA is providing a fair process.

C. Caregivers and veterans need to understand VHA’s decision to accept its outcome.

Caregiver decisions by the VA have been vague, overbroad, and unhelpful.⁸⁴ The veteran and caregiver have no true understanding of why they were denied, because the reasoning is often not included in the notification letter.⁸⁵ Pre-2019, appeals were sent to the VAMC Director and then the VISN Director.⁸⁶ However, most decisions at these levels were merely “rubber stamps.”⁸⁷

As discussed above, when Veteran G was discharged from the program, VHA’s decision was “generic, with no specific reasons or explanations.”⁸⁸ He and his wife are required to face an appeal without fully understanding why they were discharged from the program. By allowing access to the Board of Veterans’ Appeals, caregivers and veterans will be able to understand the reasons and bases

⁸⁴ Quil Lawrence, *VA revamps caregivers program: Those who already qualified must reapply*, NPR (Jan. 18, 2022, 5:08AM), <https://www.npr.org/2022/01/18/1073732623/va-revamps-caregivers-program-those-who-already-qualified-must-reapply#:~:text=A%20MARTINEZ%2C%20HOST%3A,to%20stay%20on%20the%20program>.

⁸⁵ *Id.*

⁸⁶ Dep’t of Veterans Affs, Veterans Health Administration, Directive 1152, Caregiver Support Program (2017).

⁸⁷ VA Mission Act of 2018, Pub. L. 115-182, 132 Stat. 1393 (2018); *see also* Quil Lawrence, *VA Says It’s Trying to Improve Caregiver Program’s Appeals Process*, NPR (May 21, 2018, 5:00AM), <https://www.npr.org/2018/05/21/612941604/va-says-its-trying-to-improve-caregiver-programs-appeals-process>.

⁸⁸ *Id.*

for the VA's decision, as required under 38 U.S.C. 7104. This will allow a caregiver to understand a denial and help them to determine whether to appeal or accept the unfavorable decision.

D. Judicial review is an important check on the administrative agency.

Caregivers must have access to judicial review to ensure that the VA follows Congress's intent to care for veterans. Judicial review may allow for confusing or ambiguous terms to be clearly understood amidst that intent. This Court recently ensured that Congress's intent was not lost among VA's new Caregiver Program regulations in *Veteran Warrior*.⁸⁹ There, the text of VA's new regulations was challenged directly.⁹⁰ This Court found that access to courts is an important function to ensure that the agency is complying with congressional intent. Each veteran will have different experiences, where questions of law may be raised about what specific terms mean and what Congress intended, even after the six-year statute of limitations to challenge a regulation directly to this court.

CONCLUSION

VHA has failed deserving veterans and their caregivers for the last ten years. Its decentralized administration of the Caregiver Program results in inconsistent decisions about who may access and maintain benefits. Veterans and their

⁸⁹ See *Veteran Warriors*, 29 F.4th at 1320.

⁹⁰ *Veteran Warriors*, 29 F.4th at 1342-43.

right to a hearing, an impartial adjudicator, an understanding of VHA's reasoning for its decision and access to Board and Veterans Court review.

For these reasons, the Federal Circuit should affirm the Veterans Court's decision permitting Board review of Caregiver Program decisions.

Respectfully Submitted,

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**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

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Case Number: 22-1264

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