No. _____

In the Supreme Court of the United States

ROBERT H. GRAY,
Petitioner,
v.
PETER O'ROURKE,
ACTING SECRETARY OF VETERANS AFFAIRS,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under 38 U.S.C. § 502, the Federal Circuit has jurisdiction to adjudicate preenforcement challenges to substantive rules, interpretive rules, and statements of general policy issued by the Department of Veterans Affairs (VA). 38 U.S.C. § 502 (cross-referencing 5 U.S.C. §§ 552(a)(1), 553). In this case, a divided panel of the Federal Circuit held that VA interpretive rules are nonetheless *not* reviewable under Section 502 if VA chooses to promulgate those rules by publishing them in the agency's adjudication manual. App. 8a-12a. Three judges dissented from the denial of rehearing en banc, emphasizing the "exceptional importance" of the issue, the panel's erroneous interpretation of Section 502, and the decision's "widespread impact on the efficient adjudication of veterans' claims." App. 37a.

The question presented is whether the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review an interpretive rule reflecting VA's definitive interpretation of its own regulation, even if VA chooses to promulgate that rule through its adjudication manual.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert Gray respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the Federal Circuit (App. 1a-28a) is reported at 875 F.3d 1102. The opinion of the Federal Circuit denying rehearing (App. 29a-37a) is reported at 884 F.3d 1379.

JURISDICTION

The Federal Circuit entered its judgment on November 16, 2017 (App. 1a), and it denied Gray's rehearing petition on March 21, 2018 (App. 29a-31a). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 38 U.S.C. § 502 and 5 U.S.C. §§ 552 and 553 are reproduced at App. 38a-45a.

INTRODUCTION

This case "present[s] a question of exceptional importance concerning [the Federal Circuit's] jurisdiction in veterans' cases." App. 37a (Dyk, J., dissenting from the denial of rehearing en banc). In 1988, Congress granted the Federal Circuit jurisdiction to adjudicate preenforcement challenges to any agency action taken by the Department of Veterans Affairs (VA) "to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. § 502. That cross-reference encompasses any substantive rule, generally-applicable interpretive rule, and general statement of policy. *See* 5 U.S.C. §§ 552(a)(1), 553. In providing that specialized review mechanism in the

Federal Circuit, Congress sought to protect veterans by allowing them to directly challenge unlawful VA agency action, without any need to first litigate such challenges through the notoriously backlogged and inefficient VA disability claims process.

The Federal Circuit's decisions in this case and *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*), have now sharply curtailed the rights of veterans to bring such challenges. Contrary to the unambiguous language of the relevant statutes, the Federal Circuit held that it *lacks* jurisdiction to review VA interpretive rules if VA chooses to promulgate such rules and policies through publication in VA's internally-binding adjudication manual.

The Federal Circuit's jurisdictional holding is wrong and should be overturned. That holding misreads the unambiguous statutory text, undermines its purpose, and—as Judge Dyk explained below—contradicts "[c]ases from the Supreme Court [and] other courts of appeals." App. 26a (Dyk, J., dissenting).

Most importantly, if allowed to stand, the Federal Circuit's erroneous jurisdictional ruling will impose "significant 'hardship'" on our Nation's veterans. *Id.* at 25a (citation omitted). All too often, VA adopts unlawful rules in violation of the substantive and procedural requirements of the Administrative Procedure Act (APA), and it regularly embodies such rules in its adjudication manual. The Federal Circuit's holding prevents veterans from obtaining prompt Article III review of such unlawful rules at the outset, when the damage to veterans can be minimized. *Id.* at 15a-16a (noting that Federal Circuit's rule imposes "substantial and unnecessary

burdens on individual veterans"). This case thus presents yet another instance in which VA and the Federal Circuit have concocted "a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says [VA] is supposed to serve." *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from the denial of certiorari).

Notably, although the Government persuaded the Federal Circuit to adopt its erroneous jurisdictional rule at the panel stage, the Government declined to defend that rule in response to Gray's rehearing petition. Nonetheless, the Government has subsequently proceeded to invoke the rule as binding precedent to deprive veterans of their day in court. The Government's opportunistic advocacy should not be allowed to carry the day: If the Government will no longer defend the legal theory that it foisted on the Federal Circuit, that theory should be overturned.

In short, our Nation's veterans deserve better. Congress granted them the right to bring preenforcement challenges to all generally-applicable VA interpretive rules, and this Court should restore that important check on VA rulemaking. The petition for certiorari should be granted.

STATEMENT OF THE CASE

A. The Federal Circuit's Jurisdiction Over VA Rules

1. In the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), Congress for the first time authorized judicial review of "the adjudication of veterans' benefits claims," and it did so in a way that is "decidedly favorable to veterans." *Henderson v. Shinseki*, 562 U.S. 428, 440-41 (2011).

Most importantly, the VJRA authorized veterans to bring preenforcement challenges to the validity of any VA substantive rule, interpretive rule, or general policy statement directly in the Federal Circuit.

That authorization is embodied in 38 U.S.C. § 502, the jurisdictional provision at the heart of this case. As relevant here, Section 502 states that:

> An action of the [VA] to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with [the judicial review provisions of the Administrative Procedure Act, 5 U.S.C. §§ 701-706] and may be sought only in the United States Court of Appeals for the Federal Circuit.

38 U.S.C. § 502.

The scope of Section 502's jurisdictional grant is undeniably broad—it encompasses *any* VA action "to which section 552(a)(1) or 553 of title 5 (or both) refers." *Id.* Section 552(a)(1) is a Freedom of Information Act (FOIA) provision that requires publication in the Federal Register of various types of agency documents, including "substantive rules" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). Section 553 is the APA provision governing agency rulemaking. Like Section 552(a)(1)(D), Section 553 refers to both "substantive rule[s]" (which the provision says can be promulgated only following notice and comment), and "interpretative rules and statements of policy" (which are exempted from those notice-and-comment requirements). *Id.* § 553(d)(1)-(2).

By cross-referencing Sections 552(a)(1) and 553, Congress intended to give the Federal Circuit jurisdiction to adjudicate any direct APA challenge to the validity of generally-applicable rules and policies. The purpose of Section 502 was to ensure that VA follows its APA "responsibilities . . . with respect to agency rules and interpretations of agency authority." H.R. Rep. No. 100-963, at 27 (1988). And at least until *DAV* and the decision below, Section 502 had fulfilled that purpose, providing the jurisdictional basis for a long list of cases in which VA rules and policies were found to have violated the APA.[1]

2. Apart from Section 502, the Federal Circuit also has jurisdiction to review the denial of individual benefits claims. Such claims are originally adjudicated at one of 56 VA regional offices, *see* App. 8a, and they are first subject to review by the Board of Veterans' Appeals (Board) and the U.S. Court of Appeals for Veterans Claims (Veterans Court), *see* 38 U.S.C. §§ 7101(a), 7252(a). In the course of reviewing individual claims decisions, the Federal Circuit has authority to adjudicate the validity of particular VA rules and policies to the extent they are implicated in each case. *See id.* § 7292 (authorizing review of legal questions).

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[1] *See, e.g.*, *Military Order of the Purple Heart v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1296-98 (Fed. Cir. 2009); *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1318-19 (Fed. Cir. 2006); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1346 (Fed. Cir. 2003); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1348-49 (Fed. Cir. 2003); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1368 (Fed. Cir. 2001).

Needless to say, this mechanism for seeking judicial review of unlawful VA rules and policies is far slower and less efficient than direct judicial review under Section 502. It "takes over *five and a half years* on average" for an individual benefits case to be resolved by the Board, and then nearly an *additional* year for it to be fully adjudicated by the Veterans Court. *Martin v. O'Rourke*, No. 17-1747, 2018 WL 2727502, at *9 (Fed. Cir. June 7, 2018) (Moore, J., concurring); U.S. Court of Appeals for Veterans Claims, *Annual Report: Fiscal Year 2017*, at 3 (2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf. Indeed, the process takes so long that veterans often die while awaiting final resolution of their claims. *See* Office of Audits and Evaluations, VA Office of Inspector General, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* 12 (2018), https://www.oversight.gov/sites/default/files/oig-reports/VAOIG-16-01750-79.pdf (noting that 1,600 veterans participating in VA appeals died in the first quarter of 2016 alone). As VA has itself admitted, the appeals process for benefits claims is both "broken" and deeply "frustrating" to veterans. *Id.* at 15.

B. VA's Restrictive Interpretation Of The Agent Orange Act

1. In the 1960s and early 1970s, the United States used an herbicide known as Agent Orange to clear heavily forested areas in Vietnam during the Vietnam War. *See* S. Rep. No. 100-439, at 64 (1988). Countless U.S. service members were exposed to the herbicide, which has been linked to various adverse health effects. In 1991, Congress made it easier for such veterans to obtain disability compensation by

promulgating the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11.

In general, veterans seeking disability benefits based on military service must establish "service connection"—*i.e.*, that "the disability is causally related to an injury sustained in the service." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985); *see* 38 U.S.C. § 101(16). But it was traditionally "extremely difficult" for Vietnam veterans who had been exposed to Agent Orange to satisfy that requirement, given the passage of time and the lack of information about precisely where and when the United States deployed the herbicide. *Blue Water Navy Vietnam Veterans Ass'n v. McDonald*, 830 F.3d 570, 572-73 (D.C. Cir. 2016); *see* App. 3a.

The Agent Orange Act helps solve that problem. It creates an automatic presumption of service connection for any veteran who (1) "during active military, naval, or air service, served in the Republic of Vietnam" between January 9, 1962, and May 7, 1975; and (2) develops one of several diseases medically linked to Agent Orange. 38 U.S.C. § 1116(a)(1) (requiring VA to presume that the veteran was exposed to Agent Orange and that the disease was "incurred in or aggravated by such service").

2. Over the past 20 years, VA has repeatedly narrowed its understanding of which Vietnam War veterans "served in the Republic of Vietnam" and thus qualify for the Agent Orange Act's automatic presumption. In 1993, VA issued a regulation interpreting the phrase "'[s]ervice in the Republic of Vietnam'" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of

Vietnam." 38 C.F.R. § 3.307(a)(6)(iii). VA later issued several rules interpreting that regulation to exclude from the service-connection presumption veterans who served on ships offshore without entering "inland waterways" or setting foot on Vietnamese soil. *See* 66 Fed. Reg. 23,166, 23,166 (May 8, 2001); VA Op. Gen. Counsel Prec. 27-97, at 3-5 (1997). A divided panel of the Federal Circuit applied *Auer* deference and upheld that narrow interpretation. *Haas v. Peake*, 525 F.3d 1168, 1190-93 (Fed. Cir. 2008).

In 2009, VA further restricted the Agent Orange Act's statutory presumption by issuing a guidance letter that defined "inland waterways" to include rivers, deltas, and *some*—but not all—bays and harbors. App. 6a. Petitioner Gray, who had served in Vietnam's Da Nang Harbor (one of the excluded harbors), successfully challenged that interpretation in the Veterans Court, when appealing the denial of his own individual benefits claim. *Gray v. McDonald*, 27 Vet. App. 313, 322-25 (2015) (rejecting VA's cramped interpretation as "arbitrary," "irrational," "aimless and adrift," and "inconsistent with the identified purpose of the statute and regulation"). Because the Veterans Court could not "discern any rhyme or reason" in VA's narrow interpretation, it remanded Gray's case and instructed VA to reconsider its position. *Id.* at 324, 327-28.

3. In February 2016, VA announced a retooled interpretation of the Agent Orange Act and its regulations. It did so by issuing a "Memorandum of Changes" and accompanying revisions to its *Adjudication Procedures Manual, M21-1* ("M21-1 Manual"), which contains "*all* of [VA's] policies and procedures for adjudicating claims for VA benefits." App. 7a (citing C.A. JA 207); *id.* at 37a (Dyk, J.,

dissenting from the denial of rehearing en banc) (emphasis added). VA regularly uses the M21-1 Manual to set forth its definitive interpretations of key statutes and regulations.[2]

As revised, the M21-1 Manual continues to limit the Act's statutory presumption to those Vietnam veterans who set foot on Vietnamese soil or served in Vietnam's "inland waterways." App. 46a; *see id.* at 8a. But the Manual now defines "inland waterways" to "end at their mouth or junction to other offshore water features." *Id.* at 46a-47a. This narrower definition thus excludes "all Navy personnel" who served in *any* of Vietnam's "ports, harbors, and bays from presumptive service connection." App. 8a.

By incorporating its new definition of "inland waterways" into the M21-1 Manual, VA ensured that the effect of this definition would be "both real and far reaching." *Id.* at 10a. Indeed, the M21-1 Manual formally binds all front-line VA benefits adjudicators working in VA's 56 regional offices throughout the country. *Id.* at 5a, 8a. Such adjudicators issue the final decisions in 96% of all claims for veterans' benefits, and they "are not authorized to independently determine that any particular coastal feature, such as bay, harbor, or inlet, is an inland waterway." *Id.* at 24a-25a (Dyk, J., dissenting); *id.* at 48a. Moreover, VA regularly demands—and receives—*Auer* deference to its interpretive rules set

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[2] *See, e.g.*, App. 4a-5a; *Smith v. Shinseki*, 647 F.3d 1380, 1384 (Fed. Cir. 2011); *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009).

forth in agency manuals, both in Article III courts and before the Board.[3]

C. The Proceedings In This Case

1. In March 2016, while his individual benefits claim was still pending, Gray filed a petition for review of the February 2016 Manual provision in the Federal Circuit pursuant to 38 U.S.C. § 502. As noted, that statute provides that "[a]n action of the [VA] Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review." Gray's "Statement of Subject Matter Jurisdiction" asserted that the Manual revision constituted a "statement[] of general policy" or an "interpretation[] of general applicability" under Section 552(a)(1)(D), as well as a rule "refer[red]" to by Section 553. *See* Pet'r C.A. Br. 1-2.

In response, VA repeatedly acknowledged that the February 2016 M21-1 revisions are "interpretive statements" that apply to all "regional office adjudicat[ions]." App. 51a-57a, 60a; *see id.* at 9a-10a.[4] And it did not deny that the February 2016 M21-1 Manual amendment is an interpretation of general applicability—and thus within the plain language of Section 552(a)(1)(D).

Nonetheless, VA asserted that the petition should still be dismissed for lack of jurisdiction because agency manuals are more clearly referenced in 5

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[3] *See, e.g.*, *Smith*, 647 F.3d at 1385; [Title Redacted by Agency], No. 12-11 139, 2017 WL 2905538, at *8 (Bd. Vet. App. May 12, 2017); *see also* Gov't Br. 31, *Gazelle v. McDonald*, 868 F.3d 1006 (Fed. Cir. 2017) (No. 16-1932), 2016 WL 6883024.

[4] For ease of reference, we have reproduced relevant excerpts of the Government's merits brief in this case at App. 51a-61a.

U.S.C. § 552(a)(2)(C). *See* App. 57a-59a. That latter provision describes materials that agencies must make available for public inspection, including "administrative staff manuals" and "instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(C). VA argued that Sections 552(a)(1) and (a)(2) are mutually exclusive, and that the new rule at issue here is covered by Section 552(a)(2)(C)—and thus not by Section 552(a)(1)(D)—because the former provision "more specifically" refers to agency manuals. App. 58a ("Although the M21-1 also contains interpretive rules arguably referred to by subsection (a)(1), the manual is more specifically referenced in subsection (a)(2)."). VA went on to assert that "[p]ursuant to the 'commonplace' canon of statutory construction 'that the specific governs the general,' the M21-1 is governed by subsection (a)(2), not (a)(l)." *Id.* (citation omitted).[5] VA reiterated its

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[5] *See* App. 58a-59a ("By specifically including section 552(a)(1), [38 U.S.C. § 502] . . . excludes actions referred to in the immediately following subsection, (a)(2)."); *see also id.* at 52a ("[T]he M21-1 revisions at issue in Mr. Gray's petition are referred to in 5 U.S.C. § 552(a)(2), which is beyond the scope of this Court's section 502 jurisdiction."); *id.* at 53a ("Although section 552(a)(1) refers to interpretive rules, the February 2016 revisions appear in an administrative staff manual that is specifically referenced in subsection 552(a)(2), which is omitted from this Court's jurisdictional statute in 38 U.S.C. § 502."). In addition to its mutual-exclusivity argument, VA's brief also argued—confusingly and incorrectly—that Section 502's cross-reference to Section 552(a)(1) only encompasses "substantive rules." *Id.* at 57a ("Because the M21-1 revisions are not substantive rules under section 553, the Court must conclude that they are nevertheless 'substantive rules' under section 552(a)(1) to exercise its section 502 jurisdiction."); *see also infra* at 28 n.8 (noting that VA is still making this argument).

mutual-exclusivity interpretation at oral argument. *See Gray* Oral Arg. 32:40-32:55, 36:45-36:57.

2. After oral argument, a different panel of the Federal Circuit decided *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*). There, a veterans organization had sought Federal Circuit review of a different revision to the M21-1 Manual, in which VA made it harder for Gulf War veterans to establish that certain disabilities were service-connected. *See id.* at 1074. As in this case, VA argued that even though the Manual provision at issue "is an interpretive rule," it was exempt from judicial review under Section 502 because—and only because—it appeared in the Manual. Gov't Br. 16-17, 29-33, *DAV*, 859 F.3d 1072 (No. 16-1493), 2016 WL 5845985 (*DAV* Gov't Br.); *see also id.* at 18, 20, 21, 25.

The Federal Circuit's decision in *DAV* embraced VA's mutual-exclusivity argument and dismissed the petition for lack of jurisdiction. 859 F.3d at 1075-78. The court framed the jurisdictional question as turning on whether the manual provision at issue "more readily" fell under Section 552(a)(1) *or* (a)(2), and it declared that "Congress expressly exempted from § 502 challenges to agency actions which fall under § 552(a)(2)." *Id.* at 1075, 1077-78. The court then held that interpretive rules in the Manual "fall within § 552(a)(2)—not § 552(a)(1)," because VA had chosen to promulgate them "within an administrative staff manual" instead of publishing them in the Federal Register. *Id.* at 1077-78.

Notably, the Federal Circuit did not give any reason why the Manual provision at issue did *not* qualify, on its face, as a "statement[] of general policy or interpretation[] of general applicability" under

§ 552(a)(1)(D). Instead, the court dichotomized "'statements of general policy or interpretations of general applicability' subject to § 552(a)(1)(D) as compared to the interpretive rules subject to § 552(a)(2)(B)-(C)," and it found that manual provisions qualified as the latter. *Id.* at 1078. The court also rejected the veteran's alternative argument that jurisdiction was proper under Section 502's cross-reference to Section 553. *Id.* at 1076-77.

3. In November 2016, a divided panel in this case applied *DAV* and held that it lacked jurisdiction to adjudicate Gray's petition. App. 1a-28a.

The panel began by reiterating *DAV*'s mutual-exclusivity holding and rejecting the notion that an agency action can fall within *both* Section 552(a)(1) and (a)(2). App. 8a-9a (stating that jurisdiction turned on "whether the manual provisions challenged in this action fall under § 552(a)(1), giving us authority to consider them in the context of this action, *or* § 552(a)(2), prohibiting our review" (emphasis added)). The panel agreed that the Manual provision here is properly classified as an "interpretive rule," and it acknowledged the persuasive "force" of Gray's argument "that a manual provision can fall under § 552(a)(1) where, regardless of its designation, it constitutes an interpretive rule of general applicability that adversely affects the rights of an entire class of Vietnam veterans." *Id.* at 9a-10a, 13a-14a.

Nevertheless, the majority reiterated *DAV*'s categorical holding that the Federal Circuit "*do[es] not* have jurisdiction to review actions that fall under § 552(a)(2)." App. 8a. This is true, the court said, "regardless of the extent to which the manual

provision might be considered interpretive or a statement of policy" under § 552(a)(1). *Id.* at 11a.

Judge Dyk dissented in part. He agreed that *DAV* controlled, but said that *DAV* "was wrongly decided." App. 15a. Judge Dyk emphasized that *DAV* rests on "the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive"—a notion for which "[t]here is no support" and that contradicts this Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974), and decisions of the Federal Circuit and other courts of appeals. App. 25a-26a.

Judge Dyk also highlighted the significant harm that the Federal Circuit's rule would inflict on veterans. He noted that *DAV*'s rule "imposes a substantial and unnecessary burden on individual veterans requiring that they undergo protracted agency adjudication in order to obtain preenforcement judicial review of a purely legal question that is already ripe for our review." App. 15a-16a. And he also emphasized that "[r]eview of the Manual revisions is essential given the significant 'hardship that would be incurred if [the Federal Circuit] were to forego judicial review.'" *Id.* at 25a (internal alterations and citation omitted).

4. Gray petitioned for rehearing en banc, again arguing that because the Manual revisions fell under both Sections 552(a)(1) and 553, the Federal Circuit had jurisdiction to review them under Section 502's cross-reference. He explained in detail why VA's argument that Sections 552(a)(1) and (a)(2) are mutually exclusive is wrong, and why *DAV* and the panel in this case erred in embracing it.

VA's response to the rehearing petition was remarkable. Having successfully persuaded the court

in both *DAV* and this case to adopt its mutual-exclusivity interpretation of Section 552, VA suddenly refused to defend that interpretation. But VA nonetheless urged the court to deny rehearing. It argued that *DAV* and the panel in this case had not actually adopted the mutual-exclusivity interpretation that VA had advanced in its merits brief. Gov't Reh'g Opp. 1, 5-14. Instead, VA asserted that *DAV* and the panel had "[i]mplicit[ly]" concluded that the Manual "provisions were not interpretations of 'general applicability' subject to section 552(a)(1)(D)" for some other, *completely unstated* reason. *Id.* at 6.

5. In March 2018, the Federal Circuit denied rehearing en banc, over dissents from Judges Dyk, Newman, and Wallach. App. 29a-37a. The dissenting judges explained that because the M21-1 Manual contains "'all of [VA's] policies and procedures for adjudicating claims for VA benefits,'" the reviewability of those provisions under § 502 is an issue "of exceptional importance" that will have a "widespread impact on the efficient adjudication of veterans' claims." App. 37a (Dyk, J., dissenting from the denial of rehearing en banc) (citation omitted).

Judge Taranto concurred in the denial of rehearing. His opinion expressly recognized that Section 552(a)(1) and (a)(2) are *not* "mutually exclusive." App. 32a. But it also explained that he did not read *DAV* or the decision below as resting on a mutual-exclusivity theory. *Id.* at 32a-33a. Notably, Judge Taranto acknowledged the Government's change of position on the mutual-exclusivity issue, and he himself expressed no view on whether the panel had correctly concluded that the interpretive

rule at issue here does not fall within Section 552(a)(1)(D). App. 32a-36a.

REASONS FOR GRANTING THE WRIT

The Federal Circuit's holdings in *DAV* and this case fly in the face of Congress's manifest desire to give veterans the right to preenforcement judicial review of all generally-applicable VA interpretive rules. Those holdings contradict the statutory text and conflict with other rulings of this Court and other courts of appeals. Indeed, they rest on a mutual-exclusivity theory that is so wrong that the Government is unwilling to defend it—even though the Government itself proposed that theory in the first place.

Most importantly—as Judge Dyk and the other dissenting judges recognized—the Federal Circuit's flawed jurisdictional holding will inflict "significant 'hardship'" and "substantial and unnecessary burdens" on veterans. App. 15a-16a, 25a (citation omitted). It will force such veterans to litigate pure legal challenges to VA manual provisions in the painfully slow disability-claims process, and it will allow VA to insulate its own unlawful rules from immediate judicial review simply by embedding them in agency manuals. This Court should grant certiorari and restore Section 502's important check on VA rulemaking.

A. The Federal Circuit's Jurisdictional Holding Is Indefensible

Section 502 vests the Federal Circuit with jurisdiction over any "action of the [VA] Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. § 502. Both of those cross-referenced provisions "refer[]" to interpretive rules.

See 5 U.S.C. § 552(a)(1)(D) (referring to "interpretations of general applicability formulated and adopted by the agency"); *id.* § 553(d)(2) (referring to "interpretative rules"). It follows that the Federal Circuit thus has authority to adjudicate any challenges to such rules.

Below and in *DAV*, the Federal Circuit rejected that straightforward analysis by adopting an interpretation of Sections 502 and 552 that has no basis in the statutory text. At VA's urging, both decisions treat Sections 552(a)(1) and (a)(2) as mutually exclusive, such that any VA manual provision that is covered by (a)(2) is therefore *not* covered by (a)(1)—and therefore outside the scope of the Federal Circuit's jurisdiction. *DAV*, 859 F.3d at 1077-78; *see* App. 10a-12a; *supra* at 10-14. That interpretation is deeply flawed and should be overturned.

1. Section 502 unambiguously grants the Federal Circuit jurisdiction to review actions "to which section 552(a)(1) . . . refers." And Section 552(a)(1) directly refers to, *inter alia*, "statements of general policy or *interpretations of general applicability* formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D) (emphasis added). A provision of an agency manual that announces an interpretation of general applicability—one that agency staff will apply to individual cases—is therefore indisputably subject to review under Section 502.

In this case and *DAV*, the Federal Circuit conducted its analysis under the premise "that § 552(a)(1) and § 552(a)(2) are mutually exclusive"—*i.e.*, that because the Manual provisions are encompassed by Section 552(a)(2), they are

necessarily excluded from Section 552(a)(1). App. 25a (Dyk, J., dissenting); *see id.* at 8a-9a (considering "whether the manual revisions challenged in this action fall under § 552(a)(1) . . . *or* § 552(a)(2)" (emphasis added)); *DAV*, 859 F.3d at 1075, 1077-78 (declaring that "agency actions which fall under under § 552(a)(2)" are "expressly exempted from § 502," simply because the statute cross-references (a)(1) but not (a)(2), and finding that the Manual provisions fell "within § 552(a)(2)—not § 552(a)(1)"); *see generally supra* at 12-14. The origins of that premise are not a mystery: VA itself urged the court to hold that Section 552(a)(1) and (a)(2) are mutually exclusive in both of its merits briefs. *See supra* at 10-12.

The Federal Circuit's mutual-exclusivity premise is simply wrong. Nothing in the text, structure, or purpose of Section 552(a) indicates that an agency action must fall into *either* (a)(1) *or* (a)(2), but not both. The fact that agency staff manuals are mentioned in § 552(a)(2) therefore does not mean that interpretive rules "contained within an administrative staff manual" must "fall within § 552(a)(2)—not § 552(a)(1)." App. 11a (quoting *DAV*, 859 F.3d at 1078).

2. As a textual matter, it is obvious that certain types of agency statements fit within *both* (a)(1) and (a)(2). For example, (a)(1) expressly covers "descriptions of [an agency's] central and field organization" and "rules of procedure," but such information is also regularly addressed in agency manuals and staff instructions encompassed by (a)(2). *See* App. 25a-26a (Dyk, J., dissenting); *see Herron v. Heckler*, 576 F. Supp. 218, 232-33 (N.D. Cal. 1983)

(holding that provisions of agency manual "clearly fall within *both*" Section 552(a)(1)(D) and (a)(2)(C)).

VA General Counsel opinions provide an especially clear example of such overlap. The statute governing VA rulemaking expressly contemplates that such opinions fall within Section 552(a)(1). *See* 38 U.S.C. § 501(c) ("In applying section 552(a)(1) of title 5 to the Department, the Secretary shall ensure that subparagraphs (C), (D), and (E) of that section are complied with, particularly with respect to opinions and interpretations of the General Counsel."). And that is how VA expressly treats them. *See* 38 C.F.R. § 14.507(b). But those opinions regularly instruct VA adjudicators how to resolve legal questions that control benefits claims. *See, e.g.*, VA Op. Gen. Counsel Prec. 1-2017, at 1 (2017) (instructing Board how to resolve legal issues impacting a veteran's disability claim). Those opinions are therefore also undeniably "instructions to staff that affect a member of the public" under Section 552(a)(2)(C).

3. The possibility of overlap between (a)(1) and (a)(2) is also perfectly consistent with Section 552's structure and purpose. Agency pronouncements can be governed by the requirements of both (a)(1) and (a)(2) without conflict or absurdity. Suppose, for instance, that an agency writes a staff manual that contains, among other things, statements of general policy. The manual as a whole must be "ma[d]e available for public inspection" under (a)(2); the particular statements of general policy must also be "publish[ed] in the Federal Register" under (a)(1). 5 U.S.C. § 552(a)(1), (2).

By contrast, the Federal Circuit's mutual-exclusivity theory undermines the statute's structure

and purpose. Section 552(a)(1) is designed to force agencies to formally publish, in the Federal Register, rules and policies of general applicability. If, as *DAV* presumes, anything described in Section 552(a)(2) is necessarily *not* subject to (a)(1), then agencies can evade the publication requirement simply by embedding materials that would otherwise fall under (a)(1) in staff manuals and staff directives. But agencies do not get to manipulate the legal status of their pronouncements through such maneuvers. *See Guerra v. Shinseki*, 642 F.3d 1046, 1051 n.2 (Fed. Cir. 2011), *cert. denied*, 566 U.S. 905 (2012); *cf. Columbia Broad. Sys., Inc. v. United States*, 316 U.S. 407, 416 (1942).

4. On top of everything else, VA's mutual-exclusivity theory of Section 552 is also inconsistent with this Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974). *See* App. 26a (Dyk, J., dissenting). There, the Court addressed whether a provision of a Bureau of Indian Affairs manual was subject to Section 552(a)(1)'s publication requirement. *Ruiz*, 415 U.S. at 231-33. Although the agency described the manual as "solely an internal-operations brochure," the Court found that it actually contained "important" agency policies concerning benefits eligibility that fell within § 552(a)(1) and therefore should have been published in the Federal Register. *Id.* at 232-35.

Ruiz thus confirms what the statutory text makes plain: Section 552(a)(2)'s reference to administrative manuals does *not* somehow exempt such manuals from Section 552(a)(1). The Federal Circuit's contrary holding is simply wrong.

B. The Federal Circuit's Interpretation Of Section 552 Creates A Circuit Split

The Federal Circuit's mutual-exclusivity holding also contradicts the prevailing interpretation of Section 552(a)(1)(D) in the courts of appeals. *See* App. 26a (Dyk, J., dissenting). That circuit split further confirms that the decision below warrants correction.

As many circuits have held, an agency interpretation is of "general applicability" for purposes of Section 552(a)(1)(D) unless it (1) expresses "only a clarification or explanation of existing laws or regulations," and (2) results in "no significant impact upon any segment of the public." *Anderson v. Butz,* 550 F.2d 459, 463 (9th Cir. 1977) (citation omitted); *accord Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988); *D & W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *Kahn v. United States*, 753 F.2d 1208, 1222 n.8 (3d Cir. 1985); *see also Knutzen v. Eben Ezer Lutheran Hous. Ctr.*, 815 F.2d 1343, 1351 (10th Cir. 1987) (rules must be published "if they constitute a change from the existing law, policy or practice").

That interpretation of Section 552(a)(1) unambiguously covers generally-applicable rules embedded in agency manuals. Indeed, the Ninth Circuit's *Anderson* decision expressly held that Section 552(a)(1)(D) applied to provisions of an agency handbook that the court described as "an administrative staff manual." 550 F.2d at 461, 463. And in *Linoz v. Heckler*, the Ninth Circuit similarly held that provisions of a Medicare manual fell within (a)(1)(D). 800 F.2d 871, 878 n.11 (9th Cir. 1986); *see also Herron*, 576 F. Supp. at 233 (applying *Anderson*

to hold that provisions of Social Security claims manual fall under (a)(1)(D)).

The Federal Circuit's holding that Sections 552(a)(1) and (a)(2) are mutually exclusive thus directly contravenes the standard interpretation adopted by other courts. Under the prevailing test, the M21-1 Manual provisions at issue here clearly qualify as interpretations of general applicability under Section 552(a)(1)(D). As the Federal Circuit *itself* acknowledged, those provisions (1) constitute a "change in policy," and (2) will have "real and far reaching" effects on veterans insofar as they will bind "all internal VA adjudicators." App. 7a, 10a, 12a; *see also id.* at 24-25a (Dyk, J., dissenting); *Anderson*, 550 F.2d at 463.

The Federal Circuit's decision in this case is therefore not only wrong, but also creates a circuit split as to the proper interpretation of Section 552(a). This Court's review would both correct the Federal Circuit's error and vindicate the uniform, nationwide application of federal law.

C. The Government Has Admitted That The Mutual-Exclusivity Theory Is Wrong, But Continues To Advance It In Court

1. As explained above, VA bears responsibility for persuading the Federal Circuit to adopt its flawed mutual-exclusivity interpretation of Section 552(a)(1) and (a)(2) in *DAV* and this case. *See supra* at 10-12. But VA later disavowed that theory in responding to Gray's rehearing petition. *See supra* at 14-15; App. 32a (Taranto, J., concurring in the denial of rehearing en banc) (adverting to the Government's change in position). There, VA conceded that the Federal Circuit *can* "entertain[] direct challenges to

'interpretation[s] of general applicability' subject to 552(a)(1)(D) that are published in the Manual." Gov't Reh'g Opp. 12 (second alteration in original); *see also id.* at 1, 5-6.

The Government's rejection of the Federal Circuit's mutual-exclusivity theory strongly supports this Court's review. Indeed, it is hard to imagine that the Federal Circuit would have adopted that flawed theory if VA had never pressed it in the first place. There is no reason to allow the mutual-exclusivity rule to govern future cases when the Government *itself* acknowledges that the rule is wrong.

Although the Government's response to the rehearing petition rightly disavowed the mutual-exclusivity theory, it claimed that *DAV* and the decision below did not, in fact, adopt that theory. Gov't Reh'g Opp. 1, 5-14; *see also* App. 32a (Taranto, J., concurring in the denial of rehearing en banc). But in making that argument, the Government ignored all of the ways in which both *DAV* and the panel in this case treated the jurisdictional question as hinging exclusively on whether the Manual provision at issue falls under Section 552(a)(1) *or* (a)(2). *See supra* at 12-14. As Judge Dyk and the dissenters recognized, the analysis in *DAV* and this case turns entirely on "the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive"—a notion for which "[t]here is no support." App. 25a-26a; *see also id.* at 37a. Notably, the panel did not challenge Judge Dyk's characterization of its rationale.

Moreover, the Government's theory fails to offer any *alternative* explanation of the Federal Circuit's holding, apart from the mutual-exclusivity theory. There is no doubt that the interpretive rule at issue here falls squarely within Section 552(a)(1)(D)'s

reference to "interpretations of general applicability formulated and adopted by the agency." Indeed, VA itself repeatedly conceded—*no less than 14 times*—that the Manual provisions at issue in *DAV* and here are "interpretive rules" and/or "interpretive statements." *See* App. 51a-58a, 60a; *see also DAV* Gov't Br. 16-17, 18, 20, 21, 25, 29, 33. The panel likewise acknowledged that the provision here is "an interpretive rule in an administrative manual," App. 13a-14a; *see also id.* at 11a (similar); *DAV*, 859 F.3d at 1078 (similar). And the Federal Circuit offered no reasoned explanation of why it would *not* fall within Section 552(a)(1)—only that it *does* fall within Section 552(a)(2).[6]

In short, the best explanation of *DAV* and the decision below is also the simplest: The Government argued a mutual-exclusivity theory, and the Federal Circuit embraced it. The fact that the Government has now abandoned that theory confirms that it is indefensible and must be set aside.

2. Regrettably, the Government's inconsistent treatment of the mutual-exclusivity rule in this case reflects a troubling pattern in which the Government has advanced different (and contradictory) positions as to the meaning of Section 502 at different times and in different cases. The common thread running

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[6] Judge Taranto's concurrence in the denial of rehearing en banc suggests that the panel's decision might "rely on particular features" of the Manual provision at issue, such as the fact that (1) it is not a substantive rule, and (2) it binds "first-level agency decisionmakers" but not the Board. App. 32a-34a. But neither Judge Taranto (nor anyone else) has explained why either point affects the only question that matters: whether the provision is an "interpretation[] of general applicability formulated and adopted by the agency" under Section 552(a)(1). It plainly is.

through the Government's litigation conduct is a win-at-all-costs commitment to depriving veterans of judicial review. And that commitment shows no sign of abating: Despite *abandoning* the mutual-exclusivity interpretation at the rehearing stage in this case, the Government has now once again *invoked* that theory in a new case. This Court should grant certiorari to put an end to the Government's bobbing and weaving.

a. This case and *DAV* are not the first instances in which the Government has addressed whether Section 502 grants the Federal Circuit jurisdiction to adjudicate challenges to VA rules or policy statements embedded in agency manuals. In at least two cases over the last decade, veterans tried to bring such challenges in the U.S. District Court for the District of Columbia. In those cases, the Government had a direct interest in supporting a *broad* interpretation of Section 502's exclusive jurisdictional grant, because it provided a clear basis for dismissing the district court cases. In both cases, the Government correctly argued that under Section 502, VA manual provisions *can* be challenged exclusively in the Federal Circuit.

In 2009, for example, the Government informed this Court that "under 38 U.S.C. 502, the Federal Circuit ha[d] exclusive jurisdiction over . . . APA and FOIA challenges to the [Agent Orange Program Guide]," such as the one that the petitioner in that case had tried to bring in district court. Gov't Br. in Opp. 5-6, *Block v. Shinseki*, 558 U.S. 1048 (2009) (No. 09-225), 2009 WL 3420491. The Agent Orange Program Guide was an amendment to VA's then-existing "manual for use by agency adjudicators," and the Government conceded that it qualified as a "general statement of policy" under Section

552(a)(1)(D)—thereby triggering the Federal Circuit's Section 502 jurisdiction—even though it was also plainly covered by Section 552(a)(2)'s reference to "agency staff manuals." *Id.* at 2, 4. VA had told the D.C. Circuit the same thing. *See* Gov't Response to Order to Show Cause at 3 n.1, *White v. Shinseki*, 329 F. App'x 285 (D.C. Cir. filed Mar. 25, 2009) (No. 08-5161). And in both the D.C. Circuit and this Court, the Government's arguments won the day.

More recently, the Government told the D.C. Circuit in a different case that under Section 502, interpretations "adopted . . . through [VA] adjudication manuals" *can* be "challenge[d] . . . through an APA action directly in the Federal Circuit." Gov't Br. 21-23, *Blue Water Navy Vietnam Veterans Ass'n v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016) (No. 15-5109); *see also* Mem. Supp. Def.'s Mot. to Dismiss 18, *Blue Water Navy Vietnam Veterans Ass'n v. McDonald*, 82 F. Supp. 3d 443 (D.D.C. 2015) (No. 1:13-cv-1187), 2013 WL 5869551 (arguing that Section 552(a)(1) "includ[es] interpretations of general applicability stated in agency manuals"). The Government made this point to support its argument that veterans *cannot* challenge such interpretations in courts other than the Federal Circuit. The D.C. Circuit took the Government at its word, affirming the district court's dismissal of a challenge to VA's narrow interpretation of "inland waterway" after finding "no reason why" veterans "cannot seek relief in the Federal Circuit." *Blue Water Navy*, 830 F.3d at 577-78.

b. Despite endorsing Section 502 jurisdiction over challenges to manual provisions in the cases noted above, the Government flip-flopped in *DAV* and this case. It is not hard to see why: Whereas a broad

interpretation of the Federal Circuit's exclusive Section 502 jurisdiction helped the Government win dismissal in those cases, that same interpretation would prevent the Government from obtaining dismissal here. And in these new circumstances, the Government simply changed its tune: It cast aside its broad interpretation of Section 502 and embraced the far *narrower* mutual-exclusivity theory.[7]

c. As explained above, the Government prevailed on its mutual-exclusivity theory in *DAV* and at the panel stage of this case. But when Gray filed his rehearing petition and provided a detailed explanation of why that theory is wrong, the Government pivoted yet again. Perhaps recognizing that any defense of its theory would be futile (and might provoke a grant of rehearing), the Government instead abandoned that theory and denied that the Federal Circuit had ever adopted its mutual-exclusivity argument in the first place. Here again, the Government's change of position had its desired effect: The Federal Circuit denied rehearing, and Judge Taranto—who expressly rejected the mutual-exclusivity theory—relied on the Government's change of position as a reason to oppose review. App. 32a-33a.

d. The changes of position described above are troubling enough. But it gets even worse: *The Government has flip-flopped yet again.* And just as before, the purpose of the shift is to deny judicial review to a veteran.

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[7] The Government's blatant about-face did not go unnoticed. *See Gray* Oral Arg. 24:00-24:17 (question from panel noting that VA's position in the D.C. Circuit *Blue Water Navy* case was "shockingly different" from its argument in the Federal Circuit).

In *Krause v. Secretary of Veterans Affairs*, a veteran invoked Section 502 to challenge a VA document that the Government repeatedly concedes is a generally-applicable "interpretive document" and "interpretive statement[]." Gov't Br. 1-2, 22, 24-26, *Krause v. Sec'y of Veterans Affairs*, No. 17-1303 (Fed. Cir. Mar. 19, 2018), 2018 WL 1905196 (*Krause* Gov't Br.). But the Government's brief nonetheless argues that the Federal Circuit lacks jurisdiction, because (1) the document is expressly referenced in Section 552(a)(2), and so (2) it therefore does not come within Section 502's cross-reference to Section 552(a)(1). *Id.* at 24-26.

In making that claim, the Government's brief relies heavily on the portions of *DAV* and the decision in this case establishing the Federal Circuit's mutual-exclusivity interpretation of those provisions. *Id.* Indeed, the Government's brief even quotes *DAV*'s holding that "Section 502's express exclusion of agency actions subject to § 552(a)(2) renders the M21-1 Manual beyond our § 502 jurisdiction unless DAV can show the VA's revisions more readily fall under §§ 552(a)(1) or 553." *Id.* at 26 (quoting 859 F.3d at 1075). But that holding—which treats Section 502's cross-reference to Section 552(a)(1) as an "express exclusion" of (a)(2), and which requires a court to determine whether a VA action "more readily fall[s]" under (a)(1) *or* (a)(2)—embodies the mutual-exclusivity interpretation that the Government purported to reject in its rehearing petition in this case. Once again, the Government has changed its tune, just to score a win.[8]

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[8] As in this case, the Government's *Krause* brief also inexplicably advances the view that Section 552(a)(1) covers *only*

3. The Government's approach to the mutual-exclusivity theory—embracing it when convenient, rejecting it when not—strongly reinforces the need for this Court's review. The Government already enjoys immense advantages in resources and expertise when litigating against individual veteran claimants. It should be not allowed to further exploit that advantage by changing positions, chameleon-like, to suit the needs of each moment. Indeed, the Government's most recent filing in *Krause* makes clear that unless this Court intervenes, it will continue to press the mutual-exclusivity theory in the Federal Circuit—where it will surely succeed. The only way to put the Government's opportunism to rest is for this Court to grant certiorari and reject that theory, once and for all.

D. Review Is Needed To Protect Veterans From Unlawful VA Rules

1. In recent years, this Court has regularly granted certiorari to correct the Federal Circuit's misinterpretation of statutes falling within that

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"substantive" rules. *See Krause* Gov't Br. 24 ("Because the [agency document at issue] contains interpretive statements and not substantive rules under section 553, *the Court would need to conclude that they are nevertheless 'substantive rules' under section 552(a)(1) to exercise its section 502 jurisdiction*." (emphasis added)); *see also id.* at 25 (applying test for substantive rules); *supra* at 11 n.5. That assertion is plainly wrong: Section 552(a)(1) encompasses "substantive rules," but it *also* covers agency "interpretations of general applicability" and "statements of general policy." 5 U.S.C. § 552(a)(1)(D). We would welcome the Solicitor General's clarification of (1) whether the Government actually believes that that Section 552(a)(1) is limited to "substantive rules," and (2) whether it believes the Federal Circuit's decisions in this case and *DAV* are premised on that view.

court's exclusive jurisdiction over veterans law. *See, e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969 (2016); *Henderson v. Shinseki*, 562 U.S. 428 (2010); *Shinseki v. Sanders*, 556 U.S. 396 (2009). The need for review is just as compelling here, where the Federal Circuit's decision threatens to inflict "significant 'hardship'" on our Nation's veterans. App. 25a (Dyk, J., dissenting) (citation omitted).

As the dissenting judges recognized, the question presented in this case holds "exceptional importance" for veterans because it will have a "widespread impact on the efficient adjudication of veterans' claims." *Id.* at 37a (Dyk, J., dissenting from the denial of rehearing en banc). Indeed, it will have a direct and immediate impact on the ability of all veterans to obtain the benefits to which they are entitled under law.

As this Court well knows, VA regularly adopts rules or policies that violate important statutes or regulations designed to protect veterans.[9]

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[9] *See, e.g.*, *Kingdomware*, 136 S. Ct. at 1977 (VA "disregard[ed]" statutory text in refusing to award government contract to veteran-owned small businesses); *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (VA heightened veterans' burden to receive disability benefits in a regulation that "flies against the plain language of the statutory text"); *Johnson v. McDonald*, 762 F.3d 1362, 1365-66 (Fed. Cir. 2014) (VA tried to "redefine the plain language of a regulation"); *Military Order of the Purple Heart v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1297-98 (Fed. Cir. 2009) (VA rule "was not implemented in compliance with the requirements of the [APA]" and failed to "comport with the governing [r]egulations"); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1338, 1346 (Fed. Cir. 2003) (VA promulgated "unreasonable" regulation that was "contrary to the statutory mandate" by "impos[ing] on claimants an arbitrary new deadline" that narrowed veterans' ability to submit

Shockingly, the Government is ordered to pay veterans' attorneys' fees in somewhere between 50% and 70% of cases filed in the Veterans Court, because it has taken a "position [that] is not 'substantially justified'" by law. *Astrue v. Ratliff*, 560 U.S. 586, 601 & n.2 (2010) (Sotomayor, J., concurring) (citation omitted); *see also Henderson*, 562 U.S. at 432 (noting that close to 80% of VA decisions appealed to the Veterans Court are either overturned or remanded).

Precisely for that reason, Congress has authorized direct challenges to generally-applicable VA rules—to ensure that the Federal Circuit will protect veterans when the agency loses its way. As that court has explained, Section 502 reflects Congress's "preference for preenforcement review of [VA] rules." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003).

The Federal Circuit's misinterpretation of Section 552(a) countermands that preference by shrinking its authority to hear direct challenges to a broad swath of potentially unlawful VA rules. Under this case and *DAV*, VA can thwart direct review simply by embedding important rules in its M21-1 Manual. Indeed, at oral argument below, the VA unabashedly

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evidence); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1349 (Fed. Cir. 2003) (VA regulation wrongly "impose[d] a misleading hurdle" by failing to "notify[] unsuspecting claimant[s] that [they have] a full year to submit" mitigating evidence); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1368 (Fed. Cir. 2001) (VA "failed to explain its rationale for interpreting . . . virtually identical statutes in conflicting ways"); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 699 (Fed. Cir. 2000) (VA imposed heightened pleading requirements on veterans that were "contrary to the [statute]").

argued that "publish[ing] [the challenged provision] in the administrative staff manual is a choice the agency is entitled to make," that VA's choice "has certain effects," and that one of those effects "is that it divests [the Federal Circuit] from direct review under [Section] 502." *Gray* Oral Arg., 32:39-32:55; *see id.* at 36:44-36:57 ("The [Section 502] question is where do they publish it. If they choose to publish it in the Federal Register, then it is reviewable, because it would be under [Section] 552(a)(1), so it would be within this court's [Section] 502 jurisdiction. But where they choose to put it in an administrative staff manual, it is not.").

Under *DAV* and the decision below, by choosing to publish interpretive rules in a manual rather than as a freestanding document, VA can ensure that its rules will be considered only in challenges to individual benefits adjudications or VA's denial of a rulemaking petition. *See* App. 13a; *id.* at 25a (Dyk, J., dissenting). But VA's gargantuan backlog of over 470,000 individual cases is already a national disgrace, and it can take ages for any such case to wind its way through the VA, the Board, the Veterans Court, the Federal Circuit, and (perhaps) ultimately here. Indeed, on average it takes a total of approximately *six years* for a veteran's claim to proceed through the Regional Office, the Board, and the Veterans Court. *See supra* at 6. And each year, thousands of veterans die before their claims and appeals are finally resolved. *See supra* at 6.

Forcing veterans to navigate this "bureaucratic labyrinth, plagued by delays and inaction," *Martin*, 2018 WL 2727502, at *8 (Moore, J., concurring), is bad enough for ordinary benefits cases. But it makes absolutely no sense when the case centers on a pure

legal issue—the validity of an interpretive rule—that can easily be resolved at the outset by the Federal Circuit on a direct petition for review. As Judge Dyk recognized, it is wrong to inflict "substantial and unnecessary" burdens on individual veterans by requiring them to "undergo protracted agency adjudication in order to obtain preenforcement judicial review of a purely legal question that is already ripe for [Federal Circuit] review." App. 15a-16a.

Congress did the right thing in authorizing preenforcement review in the Federal Circuit, thereby minimizing the extent to which unlawful VA rules will infect individual adjudications while their validity remains uncertain. By granting certiorari, this Court can vindicate Congress's goal of protecting veterans and keeping VA in check.

2. Gray's case illustrates the importance of allowing veterans to bring preenforcement Section 502 challenges to VA manual provisions that unlawfully deprive them of benefits. Gray served our country for more than three years, with honor and distinction, in the Vietnam War. During that time, he served aboard the U.S.S. *Roark*, a destroyer escort that anchored multiple times in Vietnam's Da Nang Harbor. *Gray*, 27 Vet. App. at 316-17. He was exposed to Agent Orange, and he now suffers from herbicide-related disabilities, including diabetes, neuropathy, and heart disease. *Id.*

For over 11 years—*since 2007*—Gray has been diligently pursuing his administrative and legal remedies, thus far to no avail. App. 6a. Although he briefly succeeded in overturning VA's "arbitrary" and "irrational" prior interpretation of "inland waterways," *Gray*, 27 Vet. App. at 324-25, VA simply

responded by issuing the even *more* restrictive 2016 interpretation.

Gray's challenge to the new interpretation has merit: VA still wrongly rejects the presumption of service connection for Navy veterans who served in Vietnam's bays and harbors, even though (1) they undeniably served within the international-law boundaries of the Republic of Vietnam (which is what the statute requires), and (2) the best evidence shows that such veterans *were* exposed to Agent Orange. VA's prior interpretation of the statute and regulations arbitrarily ignored that evidence, *id.* at 322-24, and its 2016 interpretation commits essentially the same mistake, *see* Pet'r C.A. Br. 18-26.

Gray is now nearly 65 years old, and his diabetes and other ailments have left him in poor health and unable to work. Further extended delays could mean that he never receives the benefits he is due under the law. The same goes for the thousands of other Vietnam veterans whose entitlement to benefits likewise turns on the validity of the Manual provisions at issue here. For such veterans, justice delayed will be justice denied.

3. This Court should resolve the Section 502 jurisdictional issue here and now. The Federal Circuit has twice definitively misinterpreted the relevant statutes, and it refused to reconsider its error en banc—even after VA disavowed the mutual-exclusivity theory. There is no reasonable prospect that further percolation will make any difference. Indeed, it is quite unlikely that veterans will continue to bring Section 502 challenges to manual provisions in the face of the Federal Circuit's restrictive holding. This case is an ideal vehicle to overturn that flawed

holding and restore the full measure of judicial review authorized by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT H. GRAY,
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2016-1782

Petition for review pursuant to 38 U.S.C. § 502.

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION,
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2016-1793

Petition for review pursuant to 38 U.S.C. § 502.

Decided: November 16, 2017

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875 F.3d 1102

Before PROST, *Chief Judge*, DYK, and O'MALLEY, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* O'MALLEY.

Opinion dissenting in part and concurring in the judgment filed by *Circuit Judge* DYK.

O'MALLEY, *Circuit Judge*.

Robert H. Gray ("Gray") and Blue Water Navy Vietnam Veterans Association ("Blue Water") (collectively, "Petitioners") petition this court under 38 U.S.C. § 502 to review certain revisions the Department of Veterans Affairs ("VA") made to its Adjudication Procedures Manual M21-1 ("M21-1 Manual") in February 2016. These revisions pertain to the VA's interpretation of provisions of the Agent Orange Act of 1991 (the "Agent Orange Act"), Pub. L. No. 102-4, 105 Stat. 11, codified as amended at 38 U.S.C. § 1116, as implemented via regulations at 38 C.F.R. §§ 3.307(a)(6), 3.309(e). Because the VA's revisions are not agency actions reviewable under § 502, we dismiss for lack of jurisdiction.

I. BACKGROUND

A. The Agent Orange Act

To receive disability compensation based on service, a veteran must demonstrate that his or her disability was service-connected, meaning that it was "incurred or aggravated . . . in line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16). Establishing service connection generally requires three elements: "'(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during

service'—the so-called 'nexus' requirement." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quoting *Shedden v. Principi*, 381 F.3d 1163, 1167 (Fed. Cir. 2004)). The claimant has the responsibility to support a claim for service connection. 38 U.S.C. § 5107(a).

Congress has enacted presumptive service connection laws to protect certain veterans who faced exposure to chemical toxins during service, but would find it difficult or impossible to satisfy the obligation to prove a "nexus" between their exposure to toxins and their disease or injury. Among these laws is the Agent Orange Act, which established a framework for the adjudication of disability compensation claims for Vietnam War veterans with diseases medically linked to herbicide exposure in the Republic of Vietnam during the Vietnam War. Under the Agent Orange Act, any veteran who "served in the Republic of Vietnam" during the Vietnam era and who suffers from any of certain designated diseases "shall be presumed to have been exposed during such service" to herbicides "unless there is affirmative evidence to establish that the veteran was not exposed." *Id.* § 1116(f). The Agent Orange Act also established several statutory presumptions and a methodology for the VA to create additional regulatory presumptions that certain diseases were "incurred in or aggravated by" a veteran's service in Vietnam. *Id.* § 1116(a). The VA then proceeded to determine which diseases would qualify for presumptive service connection and to define what service "in the Republic of Vietnam" encompasses.

In May 1993, the VA issued regulations establishing presumptive service connection for certain diseases associated with exposure to

herbicides in Vietnam. The relevant regulation conditions application of the presumption on the claimant having "served in the Republic of Vietnam," including "service in the waters offshore and service in other locations *if* the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (1993) (emphasis added); *see* Diseases Associated with Service in the Republic of Vietnam, 58 Fed. Reg. 29,107, 29,109 (May 19, 1993). Absent on-land service, the VA concluded that the statute and regulation do not authorize presumptive service connection for those veterans serving in the open waters surrounding Vietnam—known as "Blue Water" veterans. We considered the VA's position in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), and concluded that it was neither an unreasonable interpretation of the congressionally mandated presumption nor of the VA's own regulations relating thereto. *Id.* at 1190–95.

The dispute now before us arises from the VA's decision not just to exclude open water service from the definition of service in the "Republic of Vietnam," but to also exclude those veterans who served in bays, harbors, and ports of Vietnam from presumptive service connection. In other words, absent documented service on the land mass of Vietnam or in its "inland waterways"—defined as rivers and streams ending at the mouth of the river or stream, and excluding any larger bodies of water into which those inland waters flow—the VA has concluded that no presumptive service connection is to be applied. The VA did not implement this additional restriction by way of notice and comment regulation as it did its open waters restriction, and it has not published its view on this issue in the Federal Register. Instead,

the VA has incorporated this new restriction into the M21-1 Manual, which directs VA adjudicators regarding the proper handling of disability claims from Vietnam-era veterans. It is this Manual revision which Gray challenges and asks us to declare invalid.

B. The M21-1 Manual and the 2016 Revision

As we explained recently, "[t]he VA consolidates its [internal] policy and procedures into one resource known as the M21-1 Manual." *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) ("*DAV*"). The M21-1 Manual "is an internal manual used to convey guidance to VA adjudicators." VA Adjudications Manual, M21-1; Rescission of Manual M21-1 Provisions Related To Exposure to Herbicides Based on Receipt of the Vietnam Service Medal, 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007) [hereinafter 2007 M21-1 Manual Revisions]. "The M21-1 Manual provides guidance to Veterans Benefits Administration ('VBA') employees and stakeholders to allow the VBA to process claims benefits quicker and with higher accuracy." *DAV*, 859 F.3d at 1074 (internal quotation marks omitted). The M21-1 Manual is available to the public through the KnowVA website. *See* http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual. The M21-1 Manual provisions are not binding on anyone other than the VBA employees, however; notably, the Board of Veterans' Appeals ("Board") is not bound by any directives in the M21-1 Manual and need not defer to any administrator's adherence to those guidelines. *See* 38 C.F.R. § 19.5.

In 2007, Gray filed a claim for disability compensation for a number of medical conditions allegedly arising out of his naval service in Da Nang Harbor. *Gray v. McDonald*, 27 Vet. App. 313, 316 (2015). At the time, the M21-1 Manual defined "service in the Republic of Vietnam (RVN)" as "service in the RVN or its inland waterways." M21-1 Manual, part IV, ch. 1, ¶ H.28.a (2005). In a February 2009 letter, the VA further explained that it interpreted "inland waterways" to mean "rivers, estuaries, canals, and delta areas inside the country, but . . . not . . . open deep-water coastal ports and harbors where there is no evidence of herbicide use." *Gray*, 27 Vet. App. at 321–22 (alterations in original) (quoting Letter from the Director of VA C & P Service, February 2009, and December 2008 C & P Service Bulletin).

After the VA denied Gray's claim under this interpretation, he appealed to the U.S. Court of Appeals for Veterans Claims ("the Veterans Court"). *Id.* at 318. The Veterans Court concluded that the VA's definition of "inland waterway" was "both inconsistent with the regulatory purpose and irrational," in part because the VA had offered no meaningful explanation for why it classified some bays as inland waterways but not others. *Id.* at 322–25. The Veterans Court remanded the matter to the VA with instructions to reevaluate its definition of "inland waterway" to be consistent with § 3.307(a)(6)(iii). *Id.* at 326–27.

Following the remand, the VA surveyed the available scientific evidence, including documents submitted in July 2015 by counsel for Blue Water, an organization representing a number of Blue Water veterans. In a draft document it issued on January

15, 2016, the VA acknowledged that it had failed to "clearly explain the basis" for its previous classifications. J.A. 203. The VA concluded that, because "Agent Orange was not sprayed over Vietnam's offshore waters," the VA did "not have medical or scientific evidence to support a presumption of exposure for service on the offshore open waters," which it defined as "the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence." J.A. 203–04.

Accordingly, in February 2016, the VA published a "Memorandum of Changes" announcing a change in policy and an accompanying revision of the M21-1 Manual. J.A. 207. The revised M21-1 Manual defines "inland waterways" as follows:

> ***Inland waterways*** are fresh water rivers, streams, and canals, and similar waterways. Because these waterways are distinct from ocean waters and related coastal features, service in these waterways is service in the [Republic of Vietnam]. VA considers inland waterways to end at their mouth or junction to other offshore water features, as described below. For rivers and other waterways ending on the coastline, the end of the inland waterway will be determined by drawing straight lines across the opening in the landmass leading to the open ocean or other offshore feature, such as a bay or inlet. For the Mekong and other rivers with prominent deltas, the end of the inland waterways will be determined by drawing a line across each opening in the landmass leading to the open ocean.

> ***Note:*** Inland waterway service is also referred to as ***brown-water Navy service***.

M21-1 Manual, part IV, subpart ii, ch. 1, ¶ H.2.a (2016) (emphasis in original). By virtue of this manual change, the VA instructed all claims processors in its 56 regional offices to exclude all Navy personnel who served outside the now-defined "inland waterways" of Vietnam—i.e., in its ports, harbors, and open waters—from presumptive service connection for diseases or illnesses connected with exposure to Agent Orange. Thus, the VA instructed its adjudicators to exclude all service in ports, harbors, and bays from presumptive service connection, rather than service in only some of those waterways. Petitioners seek review of this revision pursuant to 38 U.S.C. § 502.

II. DISCUSSION

"A party seeking the exercise of jurisdiction in its favor has the burden of establishing that such jurisdiction exists." *DAV*, 859 F.3d at 1075 (quoting *Rocovich v. United States*, 933 F.2d 991, 993 (Fed. Cir. 1991)). Under 38 U.S.C. § 502, we have jurisdiction to review only those agency actions that are subject to 5 U.S.C. §§ 552(a)(1) and 553. We *do not* have jurisdiction to review actions that fall under § 552(a)(2). "Section 553 refers to agency rulemaking that must comply with notice-and-comment procedures under the Administrative Procedure Act." *DAV*, 859 F.3d at 1075. The parties agree that § 553 is not at issue in this proceeding. The parties instead focus on § 552; their debate is whether the manual provisions challenged in this action fall under § 552(a)(1), giving us authority to consider them in

the context of this action, or § 552(a)(2), prohibiting our review here.

In relevant part, § 552(a)(1) provides:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> . . . .
>
> (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and
>
> (E) each amendment, revision, or repeal of the foregoing.

§ 552(a)(2) provides that:

> Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—
>
> . . . .
>
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and]
>
> (C) administrative staff manuals and instructions to staff that affect a member of the public;
>
> . . . .

The government contends that, because M21-1 Manual provisions are expressly governed by § 552(a)(2), this court may not review them unless and until they are applied in and govern the resolution of an individual action. This is so, according to the government, regardless of how

interpretive or policy-laden the judgments are that resulted in the formulation of those manual provisions. Gray contends that the government's view of § 552 is too myopic. He contends that a manual provision can fall under § 552(a)(1) where, regardless of its designation, it constitutes an interpretive rule of general applicability that adversely affects the rights of an entire class of Vietnam veterans. In other words, Gray contends that it is not the way in which the VA chooses to implement its policies and statutory interpretations that implicates our jurisdiction, it is the impact of what the VA is doing that matters. While Gray's points are not without force—and the VA even concedes that the impact of its manual changes is both real and far reaching—we conclude that we may not review Gray's challenge in the context of this action.

We recently considered a challenge under § 502 to another revision to the M21-1 Manual. *DAV*, 859 F.3d at 1074–75. The Manual revision at issue in *DAV* provided guidance regarding the term "medically unexplained chronic multisymptom illness," which appeared in a statute and regulation related to presumptive service connection for Persian Gulf War veterans. *Id.* (citing 38 U.S.C. § 1117(a)(2); 38 C.F.R. § 3.317(a)(2)(ii)). In determining whether § 502 granted this court jurisdiction to consider a direct challenge to the Manual revision, we identified "three relevant factors to whether an agency action constitutes substantive rulemaking under the APA: '(1) the [a]gency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private

parties or on the agency.'" *Id.* at 1077 (alteration in original) (quoting *Molycorp, Inc. v. EPA*, 197 F.3d 543, 545 (D.C. Cir. 1999)). We noted that "the ultimate focus of the inquiry is whether the agency action partakes of the fundamental characteristic of a regulation, i.e., that it has the force of law." *Id.* (quoting *Molycorp*, 197 F.3d at 545). Applying these factors, we found that the challenged Manual revisions "d[id] not amount to a § 553 rulemaking and d[id] not carry the force of law." *Id.*

We then held that the revisions "clearly f[e]ll under" § 552(a)(2) and not § 552(a)(1). *Id.* at 1078. We explained that "[w]here, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board itself, and contained within an administrative staff manual, they fall within § 552(a)(2)—not § 552(a)(1)." *Id.* We concluded that this was so, regardless of the extent to which the manual provision might be considered interpretive or a statement of policy. *Id.* On these grounds, we dismissed the challenge for lack of jurisdiction. *Id.*

Our holding in *DAV* compels the same result here. Like that in *DAV*, the manual provision at issue here is an interpretation adopted by the agency; the M21-1 Manual "convey[s] guidance to VA adjudicators," but "[i]t is not intended to establish substantive rules." 2007 M21-1 Manual Revisions, 72 Fed. Reg. at 66,219. The revisions at issue were not published in the Federal Register or the Code of Federal Regulations. The Board remains "bound only by 'regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department'"—and not the M21-1 Manual. *DAV*, 859 F.3d at 1077 (quoting 38 U.S.C.

§ 7104(c)). And, of course, the provisions in question are contained within an administrative staff manual: the M21-1 Manual. While it is admittedly true that compliance with this Manual revision by all internal VA adjudicators will affect the concerned veterans, at least initially, it also remains true that the Board is not bound to accept adjudications premised on that compliance. As we found in *DAV*, where the action is not binding on private parties or the agency itself, we have no jurisdiction to review it.

To be clear, it is not the moniker applied to this VA policy statement that is controlling. There are circumstances where we have found agency actions reviewable under § 552(a)(1) precisely because they had a binding effect on parties or entities other than internal VA adjudicators. *See, e.g.*, *Lefevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196–98 (Fed. Cir. 1995). We addressed several of those cases in *DAV* and explained why they differed from the circumstances at issue there. 859 F.3d at 1075–77. While the Manual provisions here differ from those at issue in *DAV*, their scope and binding effect are identical. We, accordingly, must reach the same conclusion regarding the scope of our jurisdiction here as we did in *DAV*.

As we also explained in *DAV*, this disposition does not leave Petitioners without recourse. For example, "[a] veteran adversely affected by a M21-1 Manual provision can contest the validity of that provision as applied to the facts of his case under 38 U.S.C. § 7292." *DAV*, 859 F.3d at 1078; *see, e.g.*, *Haas*, 525 F.3d at 1187–90 (reviewing a provision of the M21-1 Manual interpreting § 3.307(a)(6)(iii) as part of an appeal from the Veterans Court). Individual veterans and organizations such as Blue Water also may

petition the VA for rulemaking. *See* 5 U.S.C. § 553(e). We have held that "§ 502 vests us with jurisdiction to review the Secretary's denial of a request for rulemaking made pursuant to § 553(e)." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011).[1] Because the February 2016 revision to the M21-1 Manual falls under § 552(a)(2) and not § 552(a)(1) or § 553, however, we lack jurisdiction under § 502 to hear Petitioners' direct challenge to the revision.

We recognize the costs that today's outcome imposes on Petitioners and the veterans they represent. Petitioners sought direct review in this court to bypass yet another years-long course of individual adjudications or petitions for rulemaking. Given the health risks that many of these veterans face, Petitioners' urgency is understandable. But we are constrained by the narrow scope of the jurisdiction that Congress has granted to us.

We also note that, although the VA has delayed review of its interpretation by revising its manual instead of pursuing formal rulemaking, "that convenience comes at a price." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). As the VA admits, an interpretive rule in an administrative

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[1] Indeed, the parties advised us at oral argument that Gray and several other veterans have filed appeals to the Veterans Court from the VA's denials of their claims for disability compensation under the revised provision of the M21-1 Manual. Oral Argument at 6:53–8:13, *Gray v. Sec'y of Veterans Affairs*, 2016-1782, available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2016-1782.mp3. Counsel for Gray and Blue Water also informed us that a petition for rulemaking regarding the definition of "inland waterways" is pending before the VA. *Id.* at 13:05–13:34.

manual "lack[s] the 'force and effect of law,' and thus receive[s] different 'weight in the adjudicatory process.'" *Gray* Resp. Br. at 30 (quoting *Perez*, 135 S. Ct. at 1204). And, agencies' "interpretations contained in . . . agency manuals . . . do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (citations omitted). We must await an individual action to assess the propriety of the VA's interpretation of the Agent Orange Act and attendant regulations.

III. CONCLUSION

For these reasons, we dismiss the petition for lack of jurisdiction.[2]

DISMISSED

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[2] Also before us are two motions by Blue Water to supplement the index of record. No. 16-1793, ECF Nos. 22, 30. Because we lack jurisdiction to consider the merits of the VA's action, we deny both motions as moot.

DYK, *Circuit Judge*, dissenting in part and concurring in the judgment.

The majority holds that we lack jurisdiction to review revisions to a Department of Veterans Affairs ("VA") manual used by the agency to adjudicate veterans benefits. The majority concludes it is bound to reach this result by the recent decision of another panel in *Disabled American Veterans v. Secretary of Veterans Affairs* (*DAV*), 859 F.3d 1072 (Fed. Cir. 2017). There, the panel categorically held that "[w]here, as here, manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board [of Veterans' Appeals], and contained within an administrative staff manual, they fall" outside the scope of 5 U.S.C. §§ 552(a)(1) and 553. *DAV*, 859 F.3d at 1078. It follows that there is no jurisdiction under 38 U.S.C. § 502. *Id.*

I agree we are bound by *DAV* to hold that the manual revisions are not reviewable. But I respectfully suggest that *DAV* was wrongly decided. The analysis of 5 U.S.C. § 552(a)(1) in *DAV*—rendered without substantial briefing on that statutory provision—conflicts with our prior decisions applying that subsection to VA actions. The rule established by *DAV* also departs from the approach of other courts of appeals, which have held that analogous agency pronouncements are reviewable. Nothing in § 502 suggests that we should be less generous in our review with respect to VA than other courts have been with respect to other agencies. And *DAV* imposes a substantial and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain

preenforcement judicial review of a purely legal question that is already ripe for our review.

I

Pursuant to the Agent Orange Act of 1991, 38 U.S.C. § 1116, and VA regulations, veterans who "served in the Republic of Vietnam . . . shall be presumed to have been exposed" to Agent Orange, 38 C.F.R. § 3.307(a)(6)(iii). The regulations further define "[s]ervice in the Republic of Vietnam" to "include[] service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." *Id.* For those veterans covered by the presumption, certain specified diseases "shall be considered to have been incurred or aggravated by such service, notwithstanding that there is no record evidence of such disease during the period of such service." § 1116(a)(1). This presumed service connection was established because, as Congress realized, in the absence of adequate contemporaneous records and testing, "it was too difficult to determine who was exposed and who was not." *Haas v. Peake*, 525 F.3d 1168, 1185 (Fed. Cir. 2008); *see also LeFevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1197 (Fed. Cir. 1995) ("Congress . . . recognized that ordinarily it would be impossible for an individual veteran to establish that his disease resulted from exposure to herbicides in Vietnam.").

Many of the rules that govern whether and how to apply the presumption of service connection are set forth in a VA document known as the Adjudications Procedures Manual M21-1 (the "Manual"), "an internal manual used to convey guidance to VA adjudicators" in dealing with veterans' benefits

claims. Maj. Op. 5 (quoting *VA Adjudications Manual, M21-1; Rescission of Manual M21-1 Provisions Related to Exposure to Herbicides Based on Receipt of the Vietnam Service Medal*, 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007)). As described by the majority, the Manual has for at least a decade included service in the "inland waterways" of Vietnam as sufficient to warrant the presumption. *Id.* at 6. In a 2009 letter, VA supplemented this provision by defining "inland waterways" to include rivers and deltas but not harbors and bays. *Id.* Petitioner Gray challenged that definition before the Court of Appeals for Veterans Claims, which found it to be both irrational and inconsistent with VA's own regulations. *Id.* (citing *Gray v. McDonald*, 27 Vet. App. 313, 322-25 (2015)). The matter was remanded for further action by the Secretary. *Id.* (citing *Gray*, 27 Vet. App. at 326-27).

In February 2016, following the remand by the Court of Appeals for Veterans Claims, VA revised the portion of the Manual concerning its interpretation of the Agent Orange Act's requirement that the veteran have "served in the Republic of Vietnam." These revisions for the first time established a detailed test for determining whether service aboard a vessel in the vicinity of Vietnam suffices to establish a presumption of service connection. First, mirroring its 2009 letter, VA inserted a new instruction that "[s]ervice on offshore waters does not establish a presumption." Manual § IV.ii.1.H.2.a. In other words, while service in inland waterways qualifies, service in the offshore waters of Vietnam does not constitute service in the Republic of Vietnam. The revised Manual then goes on to narrowly define

"inland waterways"[1] at the same time it broadly defines "offshore waters": "***Offshore waters*** are the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence. This includes salty and brackish waters situated between rivers and the open ocean." *Id.* § IV.ii.1.H.2.b. Finally, the Manual notes that these revisions change the treatment of Qui Nhon Bay Harbor and Ganh Rai Bay: service in these bays previously entitled a veteran to the presumption, but they now fall outside the Manual's definition of inland waterways. *Id.* § IV.ii.1.H.2.c. The Manual revisions significantly restrict the right to the presumptive service connection. The question before us is whether the revisions are subject to preenforcement judicial review.

II

Our jurisdiction here rests on 38 U.S.C. § 502, which provides, "An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review." Section 553 defines the

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[1] "***Inland waterways*** are fresh water rivers, streams, and canals, and similar waterways. Because these waterways are distinct from ocean waters and related coastal features, service on these waterways is service in [Vietnam]. VA considers inland waterways to end at their mouth or junction to other offshore water features, as described below. For rivers and other waterways ending on the coastline, the end of the inland waterway will be determined by drawing straight lines across the opening in the landmass leading to the open ocean or other offshore water feature, such as a bay or inlet. For the Mekong and other rivers with prominent deltas, the end of the inland waterway will be determined by drawing a straight line across each opening in the landmass leading to the open ocean." *Id.*

requirements for notice-and-comment rulemaking. Section 552(a)(1) defines the circumstances when publication in the Federal Register is required and covers, among other things, "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). While I agree with *DAV* that the Manual is not the type of document that is reviewable because it is subject to the notice-and-comment rulemaking provisions of § 553, it is nevertheless an interpretation of general applicability under § 552(a)(1).

Other circuits have held that agency pronouncements such as those involved here are subject to preenforcement review. Thus, for example, the District of Columbia Circuit has found agency guidance documents reviewable where, as here, the petitioners present purely legal claims. In *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000), the District of Columbia Circuit determined it had jurisdiction to review a Clean Air Act guidance document published on an Environmental Protection Agency ("EPA") website. Although informally published and not subject to notice and comment, the guidance was found to be a "final agency action, reflecting a settled agency position which has legal consequences" for the parties. *Id.* at 1023. The court's decision rested in part on its observation that, as with the VA Manual revisions at issue here, "officials in the field [we]re bound to apply" the rules set forth in the guidance. *Id.* at 1022. In 2011, yet another Clean Air Act guidance was found reviewable where it bound EPA regional directors. *See Nat. Res. Def. Council v. Envtl. Prot. Agency*, 643 F.3d 311, 320 (D.C. Cir.

2011). In the transportation context, the District of Columbia Circuit found jurisdiction to review a Federal Highway Administration investigative training manual. *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 163-65 (D.C. Cir. 1997); *see also W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983) (en banc) (reviewing guidelines of the Interstate Commerce Commission for regulating railroad rates). Thus the circuit found agency guidance, binding on agency subordinates, to be reviewable.

Nothing in § 502 suggests that we should be less generous in our review of actions taken by VA. There is, of course, a "well-settled presumption that agency actions are reviewable," unless Congress clearly precludes such review. *LeFevre*, 66 F.3d at 1198. There is no such clear preclusion in the VA statute. To the contrary, here—as in the other circuit cases discussed above—in the relevant jurisdictional provision, "Congress has declared its preference for preenforcement review of agency rules." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003).

III

Preenforcement review of manual provisions is entirely consistent with the language of § 502. In that statute, as noted earlier, Congress chose to define our jurisdiction with reference to the Administrative Procedure Act's provisions concerning the requirements for public notice of agency actions. *See* 38 U.S.C. § 502. Agency actions requiring notice-and-comment rulemaking were made reviewable by reference to § 553. In addition, Congress made reviewable other agency actions described in

§ 552(a)(1). Section 552(a) establishes a hierarchy of government records.[2] Several categories of records most directly affecting members of the public must be published in the Federal Register, *see* § 552(a)(1); many routine or internal agency records must be publicly available, *see* § 552(a)(2); and still others need only be available by request, *see* § 552(a)(3). With respect to interpretive rules, § 552(a)(2)(B) directs that if they are "of general applicability," the

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[2] Section 552(a) provides, in relevant part:

Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

. . .

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency;

. . . .

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

. . .

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

. . . .

(3)

(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

Federal Register publication requirement of § 552(a)(1)(D) applies. In short, "statements of general policy or interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), must be published in the Federal Register and are thus reviewable under § 502. The relevant question for jurisdictional purposes, then, is whether the Manual revisions here are properly characterized as "statements of general policy or interpretations of general applicability." If so, we have jurisdiction under § 502.

DAV never directly addressed this question of the scope of "interpretations of general applicability." *DAV*'s analytical omission is not surprising given that the petitioners in that case focused their jurisdictional argument primarily on whether the Manual revisions at issue were substantive rules requiring notice and comment under § 553. The panel nonetheless rejected the applicability of § 552(a)(1). Latching onto the undisputed fact that the Manual is an "administrative staff manual" under § 552(a)(2)—a provision not referenced in § 502—the *DAV* court held that we lack jurisdiction "[w]here, as here, manual provisions are interpretations adopted by the agency, [1] not published in the Federal Register, [2] not binding on the Board itself, and [3] contained within an administrative staff manual, they fall within § 552(a)(2)—not § 552(a)(1)." 859 F.3d at 1078.

None of these three theories is supportable. First, the fact that the Manual revisions were not in fact published in the Federal Register does not support the majority's result. As the majority in this case and the panel opinion in *DAV* acknowledge, Maj. Op. 11; *DAV*, 859 F.3d at 1077, an agency's choice of whether

and where to publish a rule are not controlling, *see, e.g.*, *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed. Cir. 2011) (per curiam); *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977). Indeed, neither the majority here nor *DAV* cites any case in which the decision not to publish was even relevant in deciding the scope of § 552(a)(1). A contrary rule would permit the agency to defeat judicial review by the simple expedient of failing to fulfill its obligation to publish the document in the Federal Register.

Second, the fact that the Manual is not binding on the Board is equally irrelevant.[3] We have previously rejected this very theory. In *LeFevre*, the Secretary argued that his refusal to establish a presumption of service connection for certain cancers was not subject to review because it was nonbinding—veterans were still permitted to prove service connection on a case-by-case basis. 66 F.3d at 1197. We rejected that contention, noting that such an action "'has an immediate and practical impact' on Vietnam veterans and their survivors . . . , was not 'abstract, theoretical, or academic,' 'touches vital interests of' veterans and their survivors, and 'sets the standard for shaping the manner in which an important segment' of the Department's activities 'will be done.'" *Id.* at 1198 (quoting *Frozen Food Express v. United States*, 351

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[3] As the majority notes, the Manual is "not binding on anyone other than the VBA [Veterans Benefits Administration] employees" and, in particular, does not bind the Board of Veterans Appeals ("Board"). Maj. Op. 5; *see also Carter v. Cleland*, 643 F.3d 1, 5 (D.C. Cir. 1980) (noting the Manual's binding effect on VA adjudicators); Office of Gen. Counsel, U.S. Dep't of Veterans Affairs, Op. Prec. 7-92, *Applicability of VA Manual M21-1, Part 1, Paragraph 50.45*, 1992 WL 1200482, at *2 cmt. 4 (Mar. 17, 1992) (same).

U.S. 40, 44 (1956)). The same is true of the Manual revisions at issue here. Also, as noted earlier, other circuits have held agency actions that were binding on subordinate agency officials to be reviewable. *See Appalachian Power*, 208 F.3d at 1022 (reviewing a policy issued in a guidance document that "EPA officials in the field are bound to apply"); *Nat. Res. Def. Council*, 643 F.3d at 321 (reviewing a guidance document that "binds EPA regional directors").

As recognized by the majority, the Manual revisions' impact is extensive: "the VA instructed all claims processors in its 56 regional offices to exclude all Navy personnel who served outside the now-defined 'inland waterways' of Vietnam . . . from presumptive service connection for diseases or illnesses connected with exposure to Agent Orange." Maj. Op. 7-8. VA, too, "concedes that the impact of its manual changes is both real and far reaching." *Id.* at 9. Even though not binding on the Board, the Manual does bind the front-line benefits adjudicators located in each VA Regional Office ("RO"). *See, e.g.*, *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009). Over 1.3 million claims were decided by the ROs in 2015, yet during that same period only 52,509 appeals of those decisions were filed before the Board. *Compare* Office of Mgmt., U.S. Dep't of Veterans Affairs, *FY 2016 Agency Financial Report* 18 (Nov. 15, 2016), https://www.va.gov/finance/docs/afr/2016VAafrFullWeb.pdf, *with* Bd. of Veterans Appeals, U.S. Dep't of Veterans Affairs, *Annual Report Fiscal Year 2015* (2016) [hereinafter *BVA Report*], https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf. Those few veterans who do seek Board review can expect to wait an additional three years between the filing of their appeal and a Board

decision. *See BVA Report* 21. With roughly 96% of cases finally decided by VBA employees bound by the Manual, its provisions constitute the last word for the vast majority of veterans. To say that the Manual does not bind the Board is to dramatically understate its impact on our nation's veterans. Review of the Manual revisions is essential given the significant "hardship [that] would be incurred . . . if we were to forego judicial review." *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1316 (Fed. Cir. 2006).

Finally, as the majority here appears to agree, *see* Maj. Op. 11, *DAV*'s reliance on the form of the Manual cannot defeat jurisdiction. Nothing about the statute suggests that a document described in subsection (a)(2) could not also be subject to subsection (a)(1)'s more demanding requirements. Given the statute's "goal of broad disclosure" and the Supreme Court's instructions to construe its exemptions narrowly and exclusively, *U.S. Dep't of Justice v. Tax Analysts*, 492 U.S. 136, 151 (1989), we should not read new limitations into § 552.

Implicit to *DAV*'s reasoning, in this respect, is the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive. In other words, *DAV* instructs that provisions of agency manuals, because described in subsection (a)(2), are therefore not rules of general applicability for purposes of subsection (a)(1). *See id.* at 1077-78 ("Congress expressly exempted from § 502 challenges to agency actions which fall under § 552(a)(2)."). There is no support for this view. Congress did not in fact "expressly exempt" actions described in § 552(a)(1) from § 552(a)(2). To the contrary, a range of content commonly found in staff manuals—such as descriptions of an agency's

organization, rules of procedure, and, importantly, generally applicable policies and interpretations—is expressly described in subsection (a)(1) despite also arguably being covered by the reference to manuals in subsection (a)(2)(C). Even if subsections (a)(1) and (a)(2) could be regarded as mutually exclusive, the Manual at issue here is not merely an "administrative staff manual": the Manual provides the rules of decision to be applied by agency adjudicators in responding to veterans' benefits claims. The revisions challenged here go well beyond "administrative" directions. They announce "interpretations of general applicability" subject to § 552(a)(1)'s publication requirement and, accordingly, to our review under § 502.

Cases from the Supreme Court, other courts of appeals, and our own court have held that similar agency pronouncements fall within the scope of § 552(a)(1) despite appearing within agency manuals. For example, in *Morton v. Ruiz*, 415 U.S. 199, 232-36 (1974), the Supreme Court held that provisions of the Indian Affairs Manual should have been published in the Federal Register pursuant to § 552(a)(1)(D) and the agency's own internal publication rules. Likewise, in *NI Industries, Inc. v. United States*, 841 F.2d 1104, 1107 (Fed. Cir. 1988), this Court held that contracting provisions located in an Army Standard Operating Procedures document were subject to § 552(a)(1)(D)'s publication requirement. *See also Linoz v. Heckler*, 800 F.2d 871, 878 n.11 (9th Cir. 1986) (finding a provision of the Medicare Carrier's Manual to be a generally applicable interpretation subject to § 552(a)(1)(D) publication); *Anderson*, 550 F.2d at 461-63 (same with respect to the Food Stamp Certification Handbook).

The majority's approach is also inconsistent with our own prior cases finding similar agency actions within the scope of § 502 and thus reviewable. Unlike *DAV*, each of these cases analyzed the substance and effect of the agency action, rather than its form. Most recently, in *Snyder v. Secretary of Veterans Affairs*, 858 F.3d 1410, 1413 (Fed. Cir. 2017), we found reviewable an opinion of the VA General Counsel relating to attorney's fees because it "announces a rule that readily falls within the broad category of rules and interpretations encompassed by § 552(a)(1)(B)." In *Military Order of the Purple Heart v. Secretary of Veterans Affairs*, 580 F.3d 1293, 1296 (Fed. Cir. 2009), we found jurisdiction to review a VA letter changing the procedures for reviewing certain benefits awards. Our determination turned not on the form of the letter but on the fact that it "affects the veteran's substantive as well as procedural rights, and is 'a change in existing law or policy which affects individual rights and obligations.'" *Id.* (quoting *Animal Legal. Def. Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991)). We found another VA letter reviewable in *Coalition for Common Sense*, 464 F.3d at 1316-18, by focusing on its effect within the agency and on outside parties and tribunals, not on its form. Finally, as described above, in *LeFevre*, 66 F.3d at 1196-98, we found jurisdiction to review the Secretary's decision to exclude certain cancers from the presumption of service connection by looking to its effects on the veterans suffering from those diseases.

* * *

The provisions of agency manuals and similar documents have been previously held subject to preenforcement review. The *DAV* decision and the

majority decision here represent an unwarranted narrowing of our jurisdiction. I respectfully suggest the *DAV* case was wrongly decided.

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

ROBERT H. GRAY,
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2016-1782

Petition for review pursuant to 38 U.S.C. Section 502.

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION,
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2016-1793

Petition for review pursuant to 38 U.S.C. Section 502.

ON PETITIONS FOR PANEL REHEARING AND REHEARING EN BANC

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884 F.3d 1379

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, *Circuit Judges*.*

TARANTO, *Circuit Judge*, concurs in the denial of the petitions for rehearing en banc.

DYK, *Circuit Judge*, with whom NEWMAN and WALLACH, *Circuit Judges*, join, dissent from the denial of the petitions for rehearing en banc.

PER CURIAM.

O R D E R

Petitioners Robert H. Gray and Blue Water Navy Vietnam Veterans Association each filed separate petitions for panel rehearing and rehearing en banc. Responses to the petitions were invited by the court and filed by the Secretary of Veterans Affairs. The petitions were first referred to the panel that heard the appeals, and thereafter the petitions and responses were referred to the circuit judges who are in regular active service. Polls were requested, taken, and failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petitions for panel rehearing are denied.

The petitions for rehearing en banc are denied.

The mandate of the court will issue on March 28, 2018 in both cases.

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* Circuit Judge Moore and Circuit Judge Hughes did not participate.

FOR THE COURT

March 21, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

TARANTO, *Circuit Judge*, concurs in the denial of the petitions for rehearing en banc.

I believe that petitioners have read too much into the panel decisions in the present cases and in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017). Unlike petitioners, I do not read those decisions, in their rulings about the scope of 38 U.S.C. § 502, as treating the key Administrative Procedure Act provisions at issue—5 U.S.C. § 552(a)(1) and § 552(a)(2)—as mutually exclusive in what they cover. Specifically, I do not read those decisions as standing for the proposition that, if an agency pronouncement is within § 552(a)(2)(C) ("administrative staff manuals and instructions to staff that affect a member of the public"), and so must be made available to the public in an electronic format, the pronouncement cannot also be within § 552(a)(1)(D) ("substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency"), and so must be published in the Federal Register.

The differences in language between § 552(a)(1) and § 552(a)(2) may well inform how to read each provision. But neither the language of the provisions nor the § 552 structure defining a hierarchy of publication methods that are not inconsistent with each other (the same pronouncement can be published electronically and in the Federal Register) facially precludes some subset of what falls under § 552(a)(2) from also falling under § 552(a)(1). The decisions that petitioners challenge do not declare otherwise. Instead, in holding § 552(a)(1)

inapplicable, the decisions rely on particular features of the Department of Veterans Affairs pronouncement at issue, not merely the conclusion that it is an "administrative staff manual" under § 552(a)(2)(C).

The petitions for rehearing en banc rest almost entirely on the asserted need for this court to repudiate the premise of mutual exclusivity. I see no present need for en banc review to do so, because I do not think that our decisions stand for that premise. Nor, at least now, does the Government so read our decisions. If future panels adopt the premise that petitioners challenge, whether based on our precedents or based on additional statutory analyses, en banc review can be considered at that time.

For those reasons, I do not think that the question of mutual exclusivity warrants en banc review. And I see no other justification for en banc review in these cases.

The particular Department pronouncement at issue here, stated in the Department's Adjudication Procedures Manual M21-1, is currently under consideration in cases involving individual benefits claims in the Court of Appeals for Veterans Claims. *See* Combined Pet. for Panel Rehr'g and Rehr'g En Banc at 18 n.3, *Gray v. Sec'y of Veterans Affairs*, No. 16-1782 (Fed. Cir. Dec. 13, 2017), Dkt. No. 66. That court may adopt petitioners' view of the matter or, in any event, issue a decision that, in the ordinary course, will bring the matter to this court relatively soon through an appeal under 38 U.S.C. § 7292. Accordingly, this court may consider the particular Manual pronouncement through an individual benefits case at roughly the same time as it would consider the pronouncement through the present cases if the court heard the § 502 jurisdictional

question en banc, found jurisdiction, and then, as is common for an issue not yet addressed by a panel, returned the case to the panel to address the merits. Thus, the importance of the particular Department pronouncement at issue here does not justify en banc review.

Nor is en banc review warranted to answer the more general question of § 502's application to pronouncements of the sort at issue. No urgency in that regard has been shown. Few challenges to Manual pronouncements have been brought through § 502.

Denying en banc review in the present cases may have benefits. As already noted, petitioners and amici have focused almost entirely on the question of mutual exclusivity. They have not gone much past that question to present detailed analyses of why § 552(a)(1), properly interpreted, does or does not apply to the particular kind of agency pronouncement at issue here. Such analyses, covering at least text and history and case law, appear necessary to a sound interpretation of § 552(a)(1) and, therefore, of 38 U.S.C. § 502.

As presented by the parties, this case, like *Disabled American Veterans*, involves an agency pronouncement with at the following characteristics: (1) It is not a substantive rule and does not purport to have the force of law. (2) It is directed only to first-level agency decisionmakers, *i.e.*, the regional offices of the Department of Veterans Affairs. (3) It does not purport to state how the issue should or will be decided by the final agency decisionmaker on an individual claim, *i.e.*, the Board of Veterans Appeals, *see* 38 U.S.C. §§ 7104, 7252, which we have recognized "conducts de novo review of regional office

proceedings based on the record." *Disabled American Veterans*, 419 F.3d at 1319.

We have little meaningful analysis of the full range of judicial decisions that are potentially relevant to determining § 552(a)(1)'s application to the type of agency pronouncement at issue here. Most relevant would be decisions, if any exist, that involved or addressed an agency pronouncement having the three characteristics just identified. Also relevant would be judicial opinions that bear indirectly on deciding whether such a pronouncement falls within § 552(a)(1)—specifically, within § 552(a)(1)(D)'s coverage of "statements of general policy or interpretations of general applicability formulated and adopted by the agency." Focusing almost entirely on the issue of mutual exclusivity of various portions of § 552, the parties and amici have not furnished much analysis of case law bearing on whether pronouncements of the sort at issue here come within § 552(a)(1).

Nor have the parties and amici provided much meaningful analysis of the relevant statutory texts, contexts, and backgrounds. The statutes at issue are 38 U.S.C. § 502 and the referenced APA provisions §§ 552(a)(1) and 553. As to the latter, full understanding would require analysis of text and context and might be aided by scrutiny of the original 1946 APA § 3 and its later amendments (notably in 1966), as well as relevant legislative history and important commentary. *See, e.g.*, Pub. L. No. 89-487, 80 Stat. 250, 250–51 (1966) (amending APA § 3); APA § 3, Pub. L. No. 79-404, 60 Stat. 237, 238 (1946); H.R. Rep. 89-1497 at 28–30 (1966); S. Rep. 89-813 at 41–43 (1965); Attorney General's Manual on the Administrative Procedure Act 19–25 (1947). At

present, we lack thorough analysis of whether and why the three characteristics of the pronouncement at issue identified just above, or other characteristics, should or should not matter under a proper legal interpretation.

In future cases, parties and amici will have the opportunity to develop and present such analyses. Panels will have the opportunity to examine them. The results would provide the court a fuller basis for assessing a petition for en banc review than we now have. I therefore concur in the denial of the present en banc petitions.

DYK, *Circuit Judge*, with whom NEWMAN and WALLACH, *Circuit Judges*, join, dissenting from the denial of the petitions for rehearing en banc.

These cases present a question of exceptional importance concerning this court's jurisdiction in veterans' cases. As the government concedes, the M21-1 Adjudication Procedures Manual "consolidated all of the [Department of Veterans Affairs] policies and procedures for adjudicating claims for VA benefits into one resource." Resp't Resp. Opp'n Reh'g 2.

For the reasons set forth in the panel dissent, I think that Congress has made these Manual provisions reviewable. We should consider this issue of reviewability en banc because of the widespread impact on the efficient adjudication of veterans' claims.

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format—

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of

subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and

required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the

record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

* * *

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

38 U.S.C. § 502

§ 502. Judicial review of rules and regulations

An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

M21-1, Part IV, Subpart ii, Chapter 1, Section H – Developing Claims for Service Connection (SC) Based on Herbicide Exposure

* * *

2. Developing Claims Based on Service Aboard Ships Offshore of the RVN or on Inland Waterways

* * *

IV.ii.1.H.2.a. Definition of Inland Waterways

The Agent Orange Act of 1991 implemented under 38 CFR 3.307(a)(6)(iii) requires "duty or visitation" within the RVN, including its inland waterways, between January 9, 1962, and May 7, 1975, to establish a presumption of Agent Orange exposure.

Important: The presumption of exposure to Agent Orange requires evidence establishing duty or visitation within the RVN. Service on offshore waters does not establish a presumption of exposure to Agent Orange.

Inland waterways are fresh water rivers, streams, and canals, and similar waterways. Because these waterways are distinct from ocean waters and related coastal features, service on these waterways is service in the RVN. VA considers inland waterways to end at their mouth or junction to other offshore water features, as

	described below. For rivers and other waterways ending on the coastline, the end of the inland waterway will be determined by drawing straight lines across the opening in the landmass leading to the open ocean or other offshore water feature, such as a bay or inlet. For the Mekong and other rivers with prominent deltas, the end of the inland waterway will be determined by drawing a straight line across each opening in the landmass leading to the open ocean. ***Note***: Inland waterway service is also referred to as brown-water Navy service. ***References***: For more information on • criteria for inland waterway service, see the Vietnam Era Navy Ship Agent Orange Exposure Development Site, and • inland waterway locations, see M21-1, Part IV, Subpart ii, 1.H.2.d.
IV.ii.1.H.2.b. Definition of Offshore Waters	***Offshore waters*** are the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to

	regular tidal influence. This includes salty and brackish waters situated between rivers and the open ocean. ***Note***: Service in offshore waters is also referred to as ***blue-water Navy service***. ***Reference***: For more information on offshore waters locations, see M21-1, Part IV, Subpart ii, 1.H.2.c.
IV.ii.1.H.2.c. Specific Geographic Locations Determined to Be Offshore Waters	The following locations are considered to be offshore waters of the RVN: • Da Nang Harbor • Nha Trang Harbor • Qui Nhon Bay Harbor • Cam Ranh Bay Harbor • Vung Tau Harbor, and • Ganh Rai Bay. ***Important***: • RO staff are not authorized to independently determine that any particular coastal feature, such as bay, harbor, or inlet, is an inland waterway. RO staff unclear on the status of a particular body of water may, in accordance with established procedures, submit the claim to Compensation

	Service for administrative review. • VA previously extended the presumption of exposure to herbicides to Veterans serving aboard Navy and other vessels that entered Qui Nhon Bay Harbor or Ganh Rai Bay. In the interest of maintaining equitable claim outcomes among shipmates, VA will continue to extend the presumption of exposure to Veterans who served aboard vessels that entered Qui Nhon Bay Harbor or Ganh Rai Bay during specified periods that are already on VA's "ships list." VA will no longer add new vessels to the ships list, or new dates for vessels currently on the list, based on entering Qui Nhon Bay Harbor or Ganh Rai Bay or any other offshore waters. ***Reference***: For more information on requesting an administrative review, see M21-1, Part III, Subpart vi, 1.A.3.
IV.ii.1.H.2.d. Specific Geographic Locations	The following locations meet the criteria for inland waterways of the RVN:

Determined to Be Inland Waterways

- all rivers, from their mouth on the coast, or junction with adjoining coastal water feature, and throughout upstream channels and passages within Vietnam
  - Rivers ending in bays or other offshore water features on the coastline end at a notional boundary line drawn across the junction between the river and the offshore water feature.
  - The Mekong River and other rivers with prominent deltas begin at a line drawn across the mouth of each inlet on the outer perimeter of the landmass of the delta.
- all streams
- all canals, and
- all navigable waterways inside the perimeter of land-type vegetation (e.g., trees and grasses, but not seaweed or kelp). This is particularly applicable to marshes found in the Rung Sat Special Zone and other Vietnam coastal areas.

* * *

2016-1782

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ROBERT H. GRAY,
Petitioner

v.

ROBERT A. MCDONALD,
Secretary of Veterans Affairs,
Respondent.

Petition for Review of Changes to Department of Veterans Affairs Manual M21-1 Pursuant to 38 U.S.C. § 502

BRIEF FOR RESPONDENT

* * *

November 14, 2016

* * *

STATEMENT OF THE ISSUES

1. Whether this Court possesses jurisdiction pursuant to 38 U.S.C. § 502 to review revisions by the Department of Veterans Affairs (VA) to its Veterans Benefits Administration Adjudication Procedures Manual, known as the M21-1, when those revisions constitute interpretive statements that were not promulgated or published pursuant to 5 U.S.C. §§ 552(a)(1) or 553.

2. If the Court possesses jurisdiction to review VA's interpretative statements in the M21-1, whether VA was required to use notice and comment procedures in announcing its February 2016 revisions to those statements.

* * *

SUMMARY OF THE ARGUMENT

In his petition, Mr. Gray challenges the VA's February 2016 revisions to the M21-1. As an initial matter, Mr. Gray's petition should be dismissed for lack of subject matter jurisdiction. Under 38 U.S.C. § 502, this Court possesses jurisdiction to review a substantive rule referred to in 5 U.S.C. § 553, or agency action referred to in 5 U.S.C. § 552(a)(1), yet the M21-1 revisions at issue in Mr. Gray's petition are referred to in 5 U.S.C. § 552(a)(2), which is beyond the scope of this Court's section 502 jurisdiction.

This Court held in *Haas v. Peake* that the M21-1 provisions VA revised in February 2016 are not substantive rules referred to in section 553, but are instead interpretive statements. *Haas*, 525 F.3d at 1195-97. Indeed, the M21-1 is an administrative staff manual containing instructions for VA adjudicators that is not binding outside of the agency. In its February 2016 revisions, VA interpreted section 3.307(a)(6)(iii) as requiring service in Vietnam or its inland waterways, and explained to its adjudicators how to differentiate between inland and offshore waterways. Thus, because the revisions do nothing more than interpret the applicable regulation, as was the case in *Haas*, they are not substantive rules under section 553.

Nor do the February 2016 M21-1 revisions qualify as agency actions referred to in sections 552(a)(1). Although Section 552(a)(1) refers to interpretive rules, the February 2016 revisions appear in an administrative staff manual that is specifically referenced in subsection 552(a)(2), which is omitted from this Court's jurisdictional statute in 38 U.S.C. § 502. This specific reference controls, and Congress's choice to omit section 552(a)(2) from section 502 jurisdiction must be given effect. *See* 38 U.S.C. § 502. Accordingly, the Court should dismiss Mr. Gray's petition.

For the same reasons, to the extent the Court exercises jurisdiction, it should conclude that VA did not need to subject the February 2016 M21-1 revisions to public notice and comment. As the Court already held in *Haas*, the M21-1 provisions at issue in this case are interpretive statements, not substantive rules, and therefore revisions to those provisions need not have been promulgated through public notice and comment. *Haas*, 525 F.3d at 1195-97.

* * *

ARGUMENT

I. Jurisdiction And Standard Of Review

With exceptions not relevant here, this Court possesses jurisdiction to review an action of the VA "to which section 552(a)(1) or 553 of title 5 (or both) refers[.]" 38 U.S.C. § 502. Section 552(a)(1) refers to agency actions that must be published in the Federal Register, including "'substantive rules of general applicability . . . and statements of general policy or interpretations of general applicability.'" *See LeFevre v. Sec'y of Veterans Affairs*, 66 F.3d 1191, 1196 (Fed.

Cir. 1995) (citing 5 U.S.C. § 552(a)(1)). Section 553, refers to substantive rules that must comply with notice-and-comment procedures. *Id.*; *see also* 5 U.S.C. § 553.

In reviewing a petition pursuant to 38 U.S.C. § 502, the Court applies the standards of review pursuant to the Administrative Procedures Act (APA). 38 U.S.C. § 502 (citing chapter 7 of title 5). The Court shall "hold unlawful and set aside" agency action that is, among other things, "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A). "This review is 'highly deferential' to the actions of the agency." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1372 (Fed. Cir. 2001) (citing *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688, 691 (Fed. Cir. 2000)). Thus, when conducting a section 706(2)(A) review of an agency decision that "pertains to a matter of policy within the agency's expertise and discretion, the scope of review should perforce be a narrow one, limited to ensuring that the agency has adequately explained the facts and policy concerns it relied on and . . . that those facts have some basis in the record." *Service Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1374 (Fed. Cir. 2016) (quoting *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353 (Fed. Cir. 2011)).

II. The Court Does Not Possess Section 502 Jurisdiction To Review The Manual Revisions

Contrary to Mr. Gray's jurisdictional statement, Pet. Br. 1-2, the February 2016 manual revisions are interpretive statements contained in a VA manual

that this Court may not review on a section 502 petition. While the Court possesses jurisdiction to review agency actions by the VA "to which section 552(a)(1) or 553 of title 5 (or both) refers," 38 U.S.C. § 502, the manual revisions do not fall under section 553 or 552(a)(1). Instead, the February 2016 revisions are specifically referred to in section 552(a)(2) – not section 552(a)(a) or section 553 – and therefore fall outside this Court's rulemaking review jurisdiction. *See* 38 U.S.C. § 502.

A. In *Haas*, This Court Found VA's Herbicide Presumption Manual Provisions Were Interpretive Statements, Not Substantive Rules Under Section 553

Substantive rules have the "force and effect of law" and may be promulgated only after public notice and comment. *Haas*, 525 F.3d at 1195-96. Notice-and-comment procedures are not required for interpretive rules, which simply "clarify or explain existing law or regulation." *Id.* at 1195 (citation omitted). "An interpretive rule 'merely represents the agency's reading of statutes and rules rather than an attempt to make new law or modify existing law.'" *Id.* at 1196-96 (quoting *NOVA*, 260 F.3d at 1375). "The absence of notice-and-comment obligation makes the process of issuing interpretive rules comparatively easier for agencies than issuing legislative rules." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). "But that convenience comes at a price[.]" *Id.* Interpretive rules lack the "force and effect of law," and thus receive different weight in the adjudicatory process" than substantive rules. *See id.* (citing *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 99 (1995)).

Applying this standard, this Court has already determined that VA's M21-1 provisions implementing section 3.307(a)(6)(iii) are interpretive statements, not substantive rules under section 553. *Haas*, 525 F.3d at 1195-1197. The *Haas* Court held that the M21-1 "did not set forth a firm legal test for 'service in the Republic of Vietnam,' but simply provided guidance as to how an adjudicator should go about gathering information necessary to determine whether the regulatory test had been satisfied." *Haas*, 525 F.3d at 1196. Further, the Court explained that VA used notice-and-comment rulemaking when promulgating the regulation it was interpreting in the M21-1:

> Importantly, it was through notice-and-comment rulemaking that DVA set forth its position with regard to offshore service in connection with the very regulation that is at issue in this case. In May 2001, the DVA issued the regulation in which it made type 2 diabetes a disease subject to the regulatory presumption of service connection. In so doing, the agency clearly set forth its view as to the status of servicemembers who had served in the waters off Vietnam and had not set foot on shore. Those servicemembers, the agency explained, were not within the scope of the regulatory presumption. . . .
>
> Contrary to the suggestion of the Veterans Court, it was not necessary for the agency to conduct a parallel rulemaking proceeding before incorporating the same rule into its more informal Adjudication Manual.

Haas, 525 F.3d at 1196-97 (citing 66 Fed Reg. 23,166 (May 8, 2001)). Thus, because revisions to the same interpretive statements are at issue in Mr. Gray's petition, the Court's analysis in *Haas* applies with equal force. The M 21-1 herbicide exposure provisions are, therefore, interpretive statements, not substantive rules under section 553.

B. The M21-1 Is A Staff Manual Referred To In 5 U.S.C. § 552(a)(2), Not 5 U.S.C. § 552(a)(1)

Because the M21-1 revisions are not substantive rules under section 553, the Court must conclude that they are nevertheless "substantive rules" under section 552(a)(1) to exercise its section 502 jurisdiction. 38 U.S.C. § 502. Yet the M21-1 provisions at issue fit within subsection 552(a)(2), not (a)(1), and therefore fall outside of this Court's section 502 jurisdiction.

Subsection 552(a)(1) refers to the types of actions that must be published in the Federal Register, including "substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). The VA must comply with section 552(a)(1), "particularly with respect to opinions and interpretations of the General Counsel." 38 U.S.C. § 501(c).

Subsection 552(a)(2), in turn, refers to other information that the agencies must make available to the public in an electronic format, including "administrative staff manuals and instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(C). VA has implemented section 552(a)(2)

by regulation, providing for an electronic public reading room, and for other electronic distribution for "[i]nformation routinely provided to the public." *See* 38 C.F.R. § 1.553(a). The M21-1 is routinely provided to the public on the Know VA website.[12]

The M21-1 fits within subsection 552(a)(2), not (a)(1). Subsection (a)(2) specifically refers to "administrative staff manuals . . . that affect a member of the public." *Id.* That precisely defines the M21-1. Although the M21-1 also contains interpretive rules arguably referred to by subsection (a)(1), the manual is more specifically referenced in subsection (a)(2). Pursuant to the "'commonplace'" canon of statutory construction "'that the specific governs the general,'" the M21-1 is governed by subsection (a)(2), not (a)(1). *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 132 S. Ct. 2065, 2071 (2012) (quoting *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374, 384 (1992)). That distinction is important, because this Court's section 502 jurisdiction only extends to actions to which subsection (a)(1) refers, and does not extend to actions referred to in (a)(2). *See* 38 U.S.C. § 502. Under the canon of *expressio unius est exclusion alterius,* "the express mention of one thing excludes all others." *Shenyang Yuanda Aluminum Indus. Eng'g Co. v. United States*, 776 F.3d 1351, 1359 & n.1 (Fed. Cir. 2015) (citing *Barnhart v. Peabody Coal. Co.*, 537 U.S. 149, 168 (2003)). By specifically including section 552(a)(1), the jurisdictional statute – section 502 –

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[12] Available at http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/topic/554400000004049/M21-1-Adjudication-Procedures-Manual (last visited Nov. 10, 2016).

thus excludes actions referred to in the immediately following subsection, (a)(2). *See* 5 U.S.C. § 552(a).

Accordingly, the Court should conclude that the February 2016 M21-1 revisions fit under subsection 552(a)(2), not subsection (a)(1) or section 553, and that it may not exercise its section 502 jurisdiction to entertain a facial challenge to the provisions' validity. Doing so will not, however, prevent Mr. Gray or other veterans from seeking review of VA's interpretation of section 3.307(a)(6)(iii) in this Court. Much like Mr. Haas, veterans may still raise legal challenges in individual claims, which are appealable to the board, to the Veterans Court, and ultimately to this Court. *See* 38 U.S.C. §§ 7252, 7292; *see, e.g.*, *Dyment v. Principi*, 287 F.3d 1377, 1382 (Fed. Cir. 2002) (reviewing the M21-1 as part of an appeal from theVeterans Court). Veterans may also petition theVA for a rulemaking to reflect their desired interpretation, which, if denied, is appealable to this Court. *See* 5 U.S.C. § 553(e); *see also Preminger*, 632 F.3d at 1352 (exercising jurisdiction to review Secretary's denial of request for rulemaking under section 553(e)); *McKinney v. McDonald*, 796 F.3d 1377 (Fed. Cir. 2015). These avenues for review are adequate, and do not justify rewriting section 502 to include review of the staff manual provisions being challenged in this case. *See* 38 U.S.C. § 502. Because Mr. Gray bears the burden of establishing subject-matter jurisdiction, and has failed to do so, the Court should dismiss the petition. *See Sandoz v. Amgen Inc.*, 773 F.3d 1274, 1277 (Fed. Cir. 2014).

III. VA Did Not Need To Subject The February 2016 M21-1 Revisions To Public Notice And Comment Because They Are Interpretive Statements

To the extent the Court has jurisdiction to entertain Mr. Gray's petition, it should conclude that VA did not need to promulgate the February 2016 revisions to the M21-1 through public notice and comment, as Mr. Gray contends. Pet. Br. 26-29. As established above, the February 2016 M21-1 revisions are interpretive statements that VA need not have subjected to public notice and comment. "Because interpretive rules are not substantive rules having the force and effect of law, they are not subject to the same statutory notice-and-comment procedures. *Haas*, 525 F.3d at 1195 (citations omitted). Indeed, Mr. Gray concedes that notice and comment procedures are only required when the VA promulgates a substantive rule with the force and effect of law. Pet. Br. 26-28. Thus, because the manual provisions at issue merely interpret the applicable regulation and serve as guidance for the regional office adjudicators, they are interpretive statements and public notice and comment was not required. Appx17-23; *see also* 38 C.F.R. 3.307(a)(6)(iii).

For various unpersuasive reasons, Mr. Gray asserts that the February 2016 revisions are substantive rules under sections 552(a)(1)(D) and 553(b). Pet. Br. 26-29. Yet Mr. Gray fails to meaningfully distinguish the M21-1 provisions challenged here form the provisions at issue in *Haas*, where the Court held that the M21-1 provisions

implementing section 3.307(a)(6)(iii) were interpretive statements. *Haas*, 525 F.3d at 1195-97.

* * *