No. 17-1679

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

BRIEF OF *AMICI CURIAE* NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA), MILITARY OFFICERS ASSOCIATION OF AMERICA (MOAA), NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM (NLSVCC), AND VETERANS OF FOREIGN WARS OF THE UNITED STATES (VFW) IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit educational membership organization, comprised of attorneys and other qualified members who represent disabled veterans, and works to develop high standards of service and representation for all persons seeking VA benefits before the agency and federal courts.

The Military Officers Association of America (MOAA) is the nation's largest association of military officers, advocating for the entire military community to protect earned benefits and lead the nation to honor its commitments to all who serve.

The National Law School Veterans Clinic Consortium (NLSVCC) is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis.

Veterans of Foreign Wars of the United States (VFW) is the nation's oldest and largest combat veterans' organization, advocating on behalf of all veterans with nearly 1.7 million members and 2,037 VA-accredited VFW representatives.

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1. Counsel of record for the parties received timely notice of the intent to file and have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or its counsel made a monetary contribution to its preparation or submission.

In the decision below, *Gray v. Secretary of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017) (*Gray*), the U.S. Court of Appeals for the Federal Circuit reads 38 U.S.C. § 502 and 5 U.S.C. §§ 552, 553 to preclude preenforcement judicial review of the Department of Veterans Affairs M21-1 Manual (M21-1). *Gray* illustrates that *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*), was "wrongly decided." *Gray,* 875 F.3d at 1110, 1116 (Dyk, J., dissenting). The holding of *DAV*, as applied in *Gray*, reflects a misreading of the relevant statutes and erroneous assessment that the M21-1 is not binding. The effects are antithetical to the "pro-veteran" nature of the veterans' benefits system. The court's preclusion of preenforcement judicial review poses a grave hardship to disabled veterans who already face untenable delays in the claims adjudication process.

As such, *amici* have a strong interest in seeking to have this Court review, and reverse, the *Gray* decision, and the *DAV* holding upon which it is based.

SUMMARY OF THE ARGUMENT

Adhering to its earlier decision in *DAV*, the Federal Circuit held in the decision below that it had no jurisdiction under 38 U.S.C. § 502 to hear a preenforcement challenge to an interpretive rule promulgated in the M21-1. This conclusion was wrong for several reasons and necessitates review by this Court to overturn this error.

First, the Federal Circuit relied on misinterpretation of the relevant statutes, 38 U.S.C. § 502 and 5 U.S.C. § 552. The Federal Circuit states that § 502 "expressly exempt[s]" actions within § 552(a)(2) from preenforcement

review, when § 502 makes no mention of § 552(a)(2). *DAV*, 859 F.3d at 1077-78. The Federal Circuit also reads more restriction into the scope of actions listed in § 552(a)(2). These interpretive errors underscore the Court's implicit finding that § 552(a)(2) and § 552(a)(1) are mutually exclusive. Further evidence that the Federal Circuit's view is wrong is the fact that § 552(a)(1) requires agencies to "separately" publish interpretive rules in the Federal Register. The use of "separately" confirms congressional intent that a manual such as the M21-1, even though it falls within § 552(a)(2), may also contain interpretive rules that fall under § 552(a)(1) and, therefore, must also be published in the Federal Register.

Second, the Federal Circuit relied, in part, on the misguided assessment that the M21-1 is not binding. However, the M21-1 is binding in effect due to the pivotal role the M21-1 plays in the adjudication of veterans' claims. The manual is undeniably binding on all front line adjudicators, while veterans wait for years in the protracted appeals process for their decisions. Further, even if the M21-1 is not formally binding on the Board, in practice it is. VA itself made this clear at a recent oral argument before the U.S. Court of Appeals for Veterans Claims (CAVC), where VA argued that the Board would have erred if it had departed from the M21-1. As one of the judges recognized, VA is engaging in "a massive bait and switch," declaring before the Federal Circuit that the M21-1 is not binding on the Board, yet arguing before the CAVC that the Board would have erred by not following the M21-1. VA is trying "to have [its] cake and eat it too." Oral Argument at 35:40, 38:19 *Overton v O'Rourke*, Vet. App. 17-125 (Vet. App. June 20, 2018). We agree and ask this Court to hold VA accountable.

Third, the Federal Circuit's decision should be overturned because, as Judge Dyk recognized, it "imposes a substantial and unnecessary burden on individual veterans." *Gray,* 875 F.3d at 1110 (Dyk, J., dissenting). The veterans' benefits system is intended to be *pro-veteran*. By needlessly foreclosing efficient, preenforcement judicial review of purely legal questions, the decision below and *DAV* cause a grave hardship to disabled veterans who already face excessive delays and burdens in the claims adjudication process.

ARGUMENT

I. *DAV* and *Gray* Rest on a Misreading of the Relevant Statutes

A. The Federal Circuit's Discussion of 38 U.S.C. § 502 and 5 U.S.C. § 552 Reveals Inconsistencies between the Court's Description and the Actual Text of the Statutes

The plain language of 38 U.S.C. § 502 indicates that judicial review applies to actions of the Secretary referenced in "section 552(a)(1) or 553 of title 5, (or both)." 38 U.S.C. § 502. In its jurisdictional analysis in *DAV*, the Federal Circuit stated: "Congress chose to limit this court's jurisdiction in § 502 to challenges to agency actions that fall under § 552(a)(1) or § 553." *DAV*, 859 F.3d at 1077-78. It therefore concluded that 38 U.S.C. § 502 does not apply to §552(a)(2). The court went further, however, stating that "Congress *expressly exempted* from § 502 challenges to agency actions which fall under § 552(a)(2)." *DAV*, 859 F.3d at 1077-78 (emphasis added). This interpretation reflects a clear misreading of

the statute. The text of § 502 contains no reference at all to § 552(a)(2); § 552(a)(2) can hardly be "expressly exempt[]" if it is nowhere mentioned in the text. 38 U.S.C. § 502.

In fact, section 502 does not expressly exempt any subsections of 552. Quite simply, as Judge Dyk clarifies in his dissent:

> Section 552(a) establishes a hierarchy of government records. 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).

Gray, 875 F.3d at 1112-13 (Dyk, J., dissenting); *see also Gray v. Sec'y of Veterans Affairs,* 884 F.3d 1379, 1381 (Fed. Cir. 2018) (Taranto, J., concurring) (clarifying that neither the language nor structure of § 552 "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).").

Unfortunately, *DAV* is not free from other similar mischaracterizations of statutory language. Section 552(a)(2) identifies written documents that "[e]ach agency, in accordance with published rules, shall make available for public inspection in an electronic format." 5 U.S.C. § 552(a)(2). Thus, the language of the statute clearly indicates that the purpose of this section is to identify

documents that must be made available to the public "in an electronic format." *Id.* That is the only role of this section based on the plain meaning of its simple language. Nothing in the language suggests limitation to or from other sections. Yet, the Court in *DAV* says: "Section 552(a)(2) refers to agency actions that *need not be published in the Federal Register.* These agency actions *must only be* made publicly available in an electronic format." *DAV*, 859 F.3d at 1075 (emphasis added). Although some of the actions falling under Section (a)(2)(B) "are not published in the Federal Register," the statement that actions under Section 552(a)(2) "need not be published in the Federal Register" reads more into the statute than the plain language warrants. *Id.* Similarly, the reading that the actions "must only be made publicly available in an electronic format" reads more limitation into the statute than the plain language or context suggests. *Id.*

The court bases its jurisdictional holding on these flawed characterizations of the relevant statutes. Through these mischaracterizations of the plain language of sections 502 and 552, the Federal Circuit implies a finding of mutual exclusivity in application of section 552(a)(1) and (a)(2). *See* Petition for Writ of Certiorari at 22-29, *Gray v. O'Rourke*, (No. 17-1679) (2018). Such a reading is the only way to reconcile the Federal Circuit's definitive, but errant classifications of 502 and 552 discussed above. The Federal Circuit's interpretive error cannot be upheld.

B. The Federal Circuit's Holding in *Gray*, and Discussion of 5 U.S.C. § 552 in *DAV,* Rely on a Misreading of the Complete Language of this Statute

The starting point in interpreting a statute is its language, "when the statutory language is plain, [the Court] must enforce it according to its terms." *Jimenez v. Quarterman*, 555 U.S. 113, 118 (2009). The discussions in *DAV* and *Gray* focus primarily on the language contained in subsections 5 U.S.C. § 552(a)(1)(C)-(D) and (a)(2)(B)-(C), but they overlook the introductory language in (a)(1): "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public." There is no discussion of the meaning of the word "separately." Such omission cannot be ignored.

The Court is "not at liberty to construe any statute so as to deny effect to any part of its language. It is a cardinal rule of statutory construction that significance and effect shall, if possible, be accorded to every word." *Mkt. Co. v. Hoffman*, 101 U.S. 112, 115-116 (1879). *See also United States v. Menasche*, 348 U.S. 528, 538-539 (1955). The word "separately," which was not discussed by the Federal Circuit, has been part of the statute since its inception. Pub. L. No. 89-554, 80 Stat. 383 (1966) (formerly § 552(b)). A review of the legislative history reveals that, despite numerous amendments to this statute since its creation in 1966, the word "separately" has never been removed from or altered in the text. Thus, legislative history makes clear that this word holds significance to the meaning of the statute. However, the court's failure to discuss the purpose of this word in the context of its reading of the statute seemingly results in the court's reading of subsections

(a)(1) and (a)(2) as mutually exclusive. *See* Petition for Writ of Certiorari at 22-29, *Gray*, (No. 17-1679).

"Another rule equally recognized is that every part of a statute must be construed in connection with the whole, so as to make all the parts harmonize, if possible, and give meaning to each." *Mkt. Co.*, 101 U.S. at 116. "The meaning of statutory language, plain or not, depends on context." *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (citing *King* v. *St. Vincent's Hospital*, 502 U.S. 215, 221 (1991)). Considering the plain meaning of the words and context, "shall separately state and currently publish," contemplates that "statements of general policy or interpretations of general applicability formulated and adopted by the agency" may be contained within something else such as, for example, an administrative staff manual. This reading reconciles sections (a)(1) and (a)(2) such that the "separately" stated policy subject to publication in the Federal Register might also be subject to the (a)(2) requirements to be made electronically available for public inspection in its complete form.

It is also consistent with the definition of the word "rule" contained at 5 U.S.C. § 551. "Rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency. . . ." 5 U.S.C. § 551 (emphasis added). The mention of "part" in this definition contemplates that only the part of a statement or manual constituting a rule would be applicable for separate statement and publication. Instead of looking at the sections together and looking first to the plain language, the Federal Circuit neglected to consider

the plain meaning and context of the word "separately." This omission resulted in interpretive error and an overly limited view of the exemptions of 552 contrary to the "goal of broad disclosure" this Court discussed in *United States DOJ v. Tax Analysts*, 492 U.S. 136, 151 (1989). *See Gray,* 875 F.3d at 1114 (Dyk, J., dissenting).

II. As Even VA Has Argued, the M21-1 is Binding in Effect

The Federal Circuit found in *DAV*, and reiterated in *Gray*, that it has no jurisdiction "where the action is not binding on private parties or the agency itself." *Gray*, 875 F.3d at 1108. The Secretary argued, and the Federal Circuit agreed, that the M21-1 is not binding. The Federal Circuit's holdings in *DAV* and *Gray*, premised on the secretary's arguments, grossly understate the role of the M21-1. While it might not be binding as a formal matter, it is certainly binding in effect. And, as explained *infra*, VA itself has embraced this view in a recent case before the CAVC.

The Federal Circuit recognized that the M21-1 provisions *are* binding on "the front-line benefits adjudicators located in each VA Regional Office" (RO), and are thus binding on thousands of veterans. *Gray*, 875 F.3d at 1105-06; *Id.* at 1114 (Dyk, J., dissenting); *see also Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009). The majority of claims are decided at the 58 ROs across the nation. Often, the M21-1 is the only commonality, which fortifies the expansive role and substantive impact of this manual. "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." *Gray*, 875 F.3d at 1114 (Dyk, J., dissenting).

The Federal Circuit recognized that "compliance with this Manual revision by all internal VA adjudicators will affect the concerned veterans, at least initially." *Gray*, 875 F.3d at 1108. Because the front-line adjudicators rely on the M21-1, "initially" is longer than it might seem. *Id.* A veteran will need to file a claim for benefits, receive a Rating Decision, appeal it with a Notice of Disagreement (NOD), receive a Statement of the Case (SOC) (averaging 500 days from NOD to SOC), appeal it to the Board (averaging 37 days from SOC to VA Form 9), receive a decision from the Board (averaging 2,073 days from VA Form 9 to Board's disposition of the appeal), and appeal it to the CAVC.[2] Considering the length of the adjudication process, "initially" means waiting an average of 7.2 years for Board review of the M21-1 provision. *Id.* This estimate does not include wait times for hearings or remands (average remand time factor is 492 days) along the way. *Id.* It also does not include the time from the filing of a claim to receipt of a Rating Decision and filing of a NOD, or the time to adjudicate the appeal at the CAVC, nor does it include any post-remand adjudication. Meaning, if a veteran decides to challenge a M21-1 provision as the Federal Circuit asserts Congress intends, the process would take almost a decade. In the case of a problematic M21-1 provision, ROs will be bound to apply flawed policy

2. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *Annual Report FY 2017*, p. 25 (2018), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2017AR.pdf (last visited July 18, 2018).

thereby triggering even more appeals to the Board. *Gray* sanctions the VA's ability to invite injustice into the earliest part of the adjudication process free from review for many years.

More troubling, the Board regularly defers to the M21-1. Where the Board defers to and bases its opinion on the M21-1, a veteran may file an appeal at the CAVC to challenge that M21-1 provision. However, at the CAVC, the Secretary will argue, as it frequently does, that *Auer* deference applies to the M21-1 because it represents the agency's reasonable and considered interpretation of its own regulations. *See Auer* v. *Robbins*, 519 U.S. 452 (1997); *see, e.g.*, *Urban v. Shulkin*, 29 Vet. App. 82, 90 (2017) ("The Court accepts the Secretary's argument that his M21-1 provision as to implementation of § 4.96(a) illustrates his fair and considered view on the matter."). *Auer* deference, therefore, will serve to insulate both the relevant M21-1 provision and the individual case adjudication when it goes to court, thereby barring any effective remedy for the veteran. In other words, precluding preenforcement judicial review of the M21-1 will likely also prevent an effective post-enforcement remedy as well.

VA has made clear its intent to bind the Board with the M21-1 to evade judicial review of manual provisions, as demonstrated by the Secretary's recent oral argument before the CAVC in the *Overton* case. *Overton v. O'Rourke*, Vet. App. 17-125 (Vet. App. June 20, 2018).[3] Like Mr. Gray, Mr. Overton is a veteran of the Vietnam era who contends that his service in Da Nang

3. The audio recording of the oral argument is available at http://www.uscourts.cavc.gov/oral_arguments_audio.php (last visited July 18, 2018).

Harbor warrants the presumption of exposure to tactical herbicides including Agent Orange. The Board rejected Mr. Overton's argument related to probability of exposure based on his location in Da Nang Harbor, with little discussion or explanation as to its findings other than to cite to the M21-1. *See* Oral Argument at 24:37, *Overton*, Vet. App. 17-125.

The Secretary argued that the Board was correct to rely on the M21-1 as evidence of the Secretary's interpretation of its own regulation. *Id.* at 26:21. When questioned how the Secretary could advance this argument, yet also say the M21-1 was not binding on the Board, the Secretary responded that "it would have been possible" for the Board to reach a conclusion that differed from the M21-1, but "the Board would have been incorrect . . . because it would be making a finding that was contrary to the Secretary's interpretation of its own regulation." *Id.* at 27:03. Judge Allen expressed his concern for this position asking:

> How could the Department of Justice have stood before the Federal Circuit and said the M21-1 is not binding if . . . the Board would have been in error if it went against what the Secretary said in the M21-1? . . . That's just . . . legalese for saying the Board is bound by this because if they don't follow it, they're wrong.

Id. at 27:14.

The Secretary argued that the CAVC should apply *Auer* deference in reviewing the Board's decision deferring to the M21-1. *Id.* at 29:45. The Secretary went on to suggest that *Auer* deference could overcome a

failure to provide adequate reasons and bases, which 38 U.S.C. § 7104(d)(1) and 38 C.F.R. § 19.7(b) imposes on the Board. The Secretary stated because "the Board ultimately reached the correct conclusion. . . there's no prejudicial error, and the error existing with reasons or bases would be harmless because [the Board] reached the correct ultimate determination." *Id.* at 32:34; *see also* 38 C.F.R. §20.1102. If the Secretary is correct, there is no point for judicial review at all in such cases, as the result is predetermined, because the M21-1 is binding.

Judge Allen astutely pointed out that "as an institution, th[e harmless error] argument leads to the conclusion that the department is *engaged in a massive bait and switch*." Oral Argument at 35:40, *Overton*, Vet. App. 17-125 (emphasis added). He explained:

> [T]he department stood up before the Federal Circuit and said nobody can challenge the M21-1 in an Administrative Procedure Act proceeding because it's not binding, and the Federal Circuit agreed because it was not binding on the Board. And now before us, the Department is taking the position, it doesn't matter that the Board treated it as binding or not because you can look right through to the interpretation in the M21-1 and you, Court, have to defer to it under *Auer* . . . the effect of that being, that the Department has closed off a regulatory challenge to something that it says isn't a law . . . so it's not challengeable under the APA, but yet before us, you say, but it doesn't matter what the Board says about it one way or the other you just have to defer to what the Secretary says, which then essentially gives it

> the same force that you told the Federal Circuit it doesn't have.

Id. Judge Allen identified this argument as a way for the Secretary "to have [his] cake and eat it too." *Id*. at 38:19.

Based on the Secretary's arguments to the CAVC in *Overton*, it is clear the Secretary expects the Board to defer to the M21-1 in making its decisions. And, even when the Board simply applies the M21-1 without independently considering whether it is correct (or even whether it is entitled to *Auer* deference), the Secretary's position is that that blind adherence does not constitute reversible error. Therefore, contrary to what VA argued to the Federal Circuit in *DAV* and *Gray*, *Overton* exposes that the M21-1 *is* effectively binding and VA knows this to be true.

The Secretary's behavior moves the mark by shifting the Secretary's "position" on the same issue depending on the day and tribunal, as Judge Allen pointed out in *Overton*. These "wins" for the Secretary amount to losses for veterans. We must not forget that "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett* v. *Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

III. The Federal Circuit's Jurisdictional Holding Causes Significant Hardship to Veterans

Congress "created a paternalistic veterans' benefits system to care for those who served their country in uniform." *Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002). Congress' longstanding "solicitude" for veterans is "plainly reflected in the VJRA, as well as in subsequent

laws that 'place a thumb on the scale in the veteran's favor. . . .'" *Henderson v. Shinseki*, 562 U.S. 428, 440-41 (2011) (citations omitted). "[I]n the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight." *Hodge v. West*, 155 F.3d. 1356, 1363 (Fed. Cir. 1998). "The government's interest in veterans cases is *not* that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett*, 466 F.3d at 1044. The Federal Circuit's holding in *Gray* evokes concerns that through the application of the "wrongly decided" *DAV*, the VA system emerges devoid of fairness, contrary to Congress' intention that the scales of justice be tipped in the veteran's favor. *Gray*, 875 F.3d at 1110, 1116 (Dyk, J., dissenting).

In the case below, the Federal Circuit felt compelled by the VA's choice to promulgate the rules "within an administrative staff manual" instead of publishing them in the Federal Register. *DAV*, 859 F.3d at 1078; *Gray*, 875 F.3d at 1108. In holding the M21-1 exempt from review under § 502, the Federal Circuit's holding in *Gray* sanctioned the VA's choice to imbed a controversial, key provision in the M21-1 instead of formally in the Federal Register. This result emboldens VA to brand "statements of general policy" and "interpretations of general applicability" as mere internal "instructions to staff" to shield them from preenforcement review. 5 U.S.C. § 552 (a)(1)(D); (a)(2)(C).

The Federal Circuit's jurisdictional holding only serves to proliferate excessive delays, unjust decisions, and resulting hardship disabled veterans face in the VA system. The adjudication process is complicated and protracted. Currently, 347,404 cases await initial

adjudication at the ROs, with 77,215 pending for more than 125 days.[4] For veterans who appeal, the process is lengthy due to its complex, non-linear structure.[5] At the end of FY 2017, the Board had 153,513 pending cases and anticipated that in FY 2018, 65,774 new substantive appeals would be filed and the Board would receive 93,180 new cases.[6]

The practical effect of the *DAV* and *Gray* holdings is to sanction the VA's ability to promulgate a rule that is isolated from review at the Federal Circuit for almost a decade. *Id.* Adjudicating the legality of a M21-1 provision by wading through the VA appeals system—rather than directly at the Federal Circuit—not only causes hardship to veterans in the delay and improper adjudications at the agency level, but it also contributes to the backlog at the appeals level. While we appreciate the Federal Circuit recognizing "the costs [the *Gray*] outcome imposes on Petitioners and the veterans they represent," the situation is more dire than the holding in *Gray* suggests. *Gray*, 875 F.3d at 1109.

During the years it takes for the M21-1 provision challenge to work through the VA's system, countless other veterans will be denied benefits based on the

4. U.S. Dep't of Veterans Affairs, Veterans Benefits Administration Reports, *Detailed Claims Data, Monday Morning Workload Report* (July 16, 2018), https://benefits.va.gov/reports/detailed_claims_data.asp (last visited July 18, 2018).

5. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *Veterans Appeals Process Briefing*, p. 10 (Jan. 6, 2016), https://www.bva.va.gov/docs/Veterans-Appeals-Process-Briefing.pdf. (last visited July 18, 2018).

6. BVA, *Annual Report FY 2017*, *supra* note 1 at 22, 24.

same provision. Of those veterans who receive a Rating Decision, only 11 to 12 percent will appeal.[7] As of 2015, there were an estimated 6.4 million Vietnam era veterans with a median age of 68 years old, while approximately 9,410,179 veterans are 65 or older.[8] Considering the ages of veterans affected by *Gray*, the severity of the diseases listed on the presumptive list for herbicide exposure, and the average length of the appeals process, a number of these veterans will die appealing the VA's flawed policy. For veterans with severely disabling conditions who served during the Vietnam era such as Mr. Gray, or for even older veterans of earlier service periods, a ten-year delay for an opportunity to be heard is prohibitive.

Where the Board, even though not statutorily bound, defers to the M21-1—as it regularly does—or fails to correct the application of a policy incompatible with the law, those thousands of individual cases will flood the CAVC to resolve application of the same underlying flawed policy contained within the M21-1.

Thus, Judge Dyk's concerns are illuminated by the facts. "*DAV* imposes a substantial and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain

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7. BVA, *Veterans Appeals Process Briefing*, *supra* note 4 at 10.

8. U.S. Dep't of Veterans Affairs, *Profile of Vietnam War Veterans*, p. 3-4 (July 2017), https://www.va.gov/vetdata/docs/SpecialReports/Vietnam_Vet_Profile_Final.pdf. (last visited July 18, 2018); U.S. Dep't of Veterans Affairs, *VA Utilization Profile FY 2016*, p. 4 (Nov. 2017), https://www.va.gov/vetdata/docs/Quickfacts/VA_Utilization_Profile.pdf (last visited July 18, 2018).

preenforcement judicial review of a purely legal question that is already ripe for [this Court's] review." *Gray*, 875 F.3d at 1110 (Dyk, J., dissenting).

While the issue in *Gray* affects tens of thousands of veterans, the Federal Circuit's jurisdictional holding has the potential to impact every case before VA that applies a M21-1 provision. Of approximately 18,599,716 veterans, 9.7 million used at least one benefit provided by the Veterans Benefits Administration (VBA) in FY 2016.[9] Approximately 4.6 million veterans receive some form of compensation or pension benefits. *Id.* at 17. Thus, a single provision in the M21-1 can affect millions of veterans, cause years of delays, and produce an overwhelming ingress of cases to the backlogged Board and potentially onto the CAVC. Such a result cannot be the intention of Congress.

Nor is it compatible with the VA's own mission statement or core values. The VA's mission is "[t]o fulfill President Lincoln's promise 'To care for him who shall have borne the battle, and for his widow, and his orphan' by serving and honoring the men and women who are America's Veterans."[10] The VA's core values "underscore the obligations inherent in VA's mission: Integrity, Commitment, Advocacy, Respect, and Excellence" and

9. U.S. Dep't of Veterans Affairs, *Profile of Veterans: 2015*, p. 4, 17 (February 2018), https://www.va.gov/vetdata/docs/SpecialReports/Profile_of_Veterans_2016.pdf (last visited July 18, 2018).

10. U.S. Dep't of Veterans Affairs, *About VA: Mission, Vision, Core Values & Goals*, https://www.va.gov/about_va/mission.asp (last visited July 18, 2018).

include a commitment to "be truly Veteran-centric by identifying, fully considering, and appropriately advancing the interests of Veterans and other beneficiaries." *Id.*

The VA's choice not to publish an effectively binding policy in the Federal Register, and further advancing its position that the same provision is not subject to preenforcement review, defies the VA's promise to veterans. Allowing veterans to languish for years in a cloud of uncertainty created and perpetuated by VA further undermines public confidence in our ability to honor and care for our veterans.

The Federal Circuit's jurisdictional holding is made even more problematic by the simple truth that the VA's position is often contrary to law.[11] In FY 2017, the CAVC reversed, remanded, reversed in part, or remanded in part 76 percent of appealed Board decisions.[12] Judicial review serves to prevent these mistakes from harming veterans who know little about the appeals system, let alone the law. Because of the VA's history before the courts, its mandate to serve veterans, and the current morass of the VA adjudication process, VA should invite the clarity and

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11. *See, e.g., Johnson v. McDonald*, 762 F.3d 1362 (Fed. Cir. 2014); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001); *DAV v. Gober*, 234 F.3d 682 (Fed. Cir. 2000).

12. United States Court of Appeals for Veterans Claims, *Annual Report: Fiscal Year 2017*, at 3 (2017), http://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf (last visited July 18, 2018).

transparency that comes from judicial review, instead of fighting to shield its rules in the M21-1.

CONCLUSION

For the foregoing reasons, in addition to those stated in the petition, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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