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 AMICUS CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM IN SUPPORT OF PETITIONER

BARTON F. STICHMAN
NATIONAL VETERAN LEGAL SERVICES PROGRAM
1600 K Street, NW
Suite 500
Washington, D.C. 20006
(202) 621-5677

STEPHEN B. KINNAIRD
COUNSEL OF RECORD
SARAH BESNOFF
DANIEL EMAM
PAUL HASTINGS LLP
stephenkinnaird@paulhastings.com
875 15th Street, N.W.
Washington, D.C. 20005
(202) 551-1700

COUNSEL FOR AMICUS CURIAE

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae is the National Veterans Legal Services Program (NVLSP). NVLSP is a 501(c)(3) nonprofit organization that has worked since 1980 to ensure that the government delivers to our nation's twenty-two million veterans and active duty personnel the benefits to which they are entitled because of disabilities associated with their military service to our country. NVLSP publishes the "Veterans Benefits Manual," an exhaustive guide for advocates who help veterans and their families obtain benefits from the Department of Veterans Affairs (DVA). NVLSP provided critical leadership in supporting the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988), which created the Court of Appeals for Veterans Claims and bestowed upon it the authority to review a final DVA decision denying a claim of benefits. Since the Veterans' Judicial Review Act passed in 1988, NVLSP has directly represented thousands of veterans in individual appeals to the Court of Appeals for Veterans Claims (CAVC). NVLSP has also filed class action lawsuits challenging the legality of various DVA rules and policies. Its expertise bears directly on the issues before the Court.

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[1] Counsel for petitioner and the Solicitor General received advance notice of the intent of amicus curiae to file this brief, and both parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel, party, or person other than amicus curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION

In the Veterans' Judicial Review Act, Congress authorized the United States Court of Appeals for the Federal Circuit to review veterans' pre-enforcement challenges to DVA actions "to which section 552(a)(1) or 553 of title 5 (or both) refers . . . ." 38 U.S.C. § 502 ("section 502"). Section 552(a)(1) requires Federal Register publication of, among other things, "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).

Under a plain reading of sections 502 and 552(a)(1), DVA's interpretive rules promulgated through its M21-1 Adjudication Procedure Manual ("M21-1 Manual" or "Manual") are subject to judicial review. Yet, a divided Federal Circuit reached a contrary result by holding that interpretive rules issued in the M21-1 Manual are outside the scope of section 552(a)(1) because subsection (a)(2) required only public inspection, not Federal Register publication, of "administrative staff manuals and instructions to staff that affect a member of the public[,]" 5 U.S.C. § 552(a)(2)(C). Accordingly, the court of appeals held that it did not have jurisdiction to adjudicate a pre-enforcement challenge of an interpretive rule issued in the M21-1 Manual. Pet. 13a. If that wrongly decided holding is permitted to stand, veterans will be prevented from obtaining prompt Article III review of unlawful M21-1 rules. Instead, a veteran seeking to challenge an unlawful M21-1 rule would face a lengthy and backlogged

process of going to a regional DVA office, appealing to the Board of Veterans Appeal (BVA), then the U.S. Court of Appeals for Veterans Claims (CAVC), and only then, being permitted to seek review with the Federal Circuit. *See* 38 U.S.C. §§ 7101(A), 7525, 7292. By denying veterans the right to seek pre-enforcement adjudication of unlawful M21-1 rules, the Federal Circuit "imposes a substantial and unnecessary burden on individual veterans requiring that they undergo protracted agency adjudication in order to obtain pre-enforcement judicial review of a purely legal question that is already ripe for our review." Pet. 15a-16a (Dyk, J., dissenting).

Amicus agrees with the Petitioner that the Federal Circuit's holding turned on an erroneous holding that Sections 552(a)(1) and 552(a)(2) are mutually exclusive, and that the interpretive Manual rule at issue here only fell in the latter category. *See* Pet. 16-20. Interpretive rules promulgated in the Manual lie in both categories, and the two sections are not mutually exclusive. An interpretive Manual provision at issue that falls under section 552(a)(1) is sufficient to authorize pre-enforcement review under section 502, regardless of whether the Manual as a whole must be available for public inspection under section 552(a)(2). Of particular note, even the DVA abandoned this mutual exclusivity argument in its briefing on Gray's rehearing. In response to Gray's rehearing petition, the DVA conceded that the Federal Circuit can "entertain[] direct challenges to 'interpretations 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. Nevertheless, the majority reaffirmed

the categorical holding of its prior precedent that the Federal Circuit "do[es] not have jurisdiction to review actions that fall under § 552(a)(2)." Pet. 8a. For all the reasons set forth in the Petition, this erroneous holding must be reversed.

Rather than restate the arguments that are well set forth in the petition, Amicus focuses on the practical realities that underscore the urgency of this Court's review. First, the vast majority of veterans' benefits claims are decided in nonpublic decisions by ratings officers (typically non-lawyers) upon whom the M21-1 Manual is indisputably binding; only a small percentage of those decisions are appealed to the BVA. Lawyers are rarely involved in ratings decisions, and most veterans pursue their claims either *pro se* or with volunteer representatives who are forbidden to receive fees. Class actions procedures in the Court of Appeals for Veterans Claims are in their infancy and undeveloped. *See e.g.*, *Monk v. Shulkin*, 855 F.3d 1312, 138 (Fed. Cir. 2017); *Skaar v. Wilkie*, No. 17-2574, 2018 WL 2293485, at *1 (Vet. App. May 21, 2018). Congress granted broad pre-enforcement review of both interpretive and substantive rules precisely because large numbers of veterans benefits claims will be improperly denied if case-by-case adjudication is the only mechanism available.

Second, the erroneous interpretation of 38 U.S.C. § 502 and 5 U.S.C. § 552(a)(1) blessed by the Federal Circuit incentivizes strategic behavior by the DVA to avoid both Federal Register publication of interpretive and substantive rules under section 552(a)(1), and notice-and-comment procedures for the promulgation of substantive rules mandated by 5

U.S.C. § 553. The DVA may simply bury such rules in the Manual, and they will escape pre-enforcement review. It is no accident that the DVA chose to amend their inland waterways rule by Manual revision, even though the original definition was adopted by notice-and-comment rulemaking. *See* Pet. 4a. Indeed, the M21-1 Manual is replete with substantive rules that should have been adopted by notice-and-comment rulemaking. If the Government succeeds in its position here, effectively insulating both substantive and interpretive rules in the M21-1 from prompt judicial review, the DVA will shift more and more of its rulemaking into Manual revisions, depriving veterans and the organizations that represent them of the Federal Register publication guaranteed by section 552(a)(1) and the notice-and-comment protections of section 553 that must accompany administrative rulemakings. The Administrative Procedure Act (APA) protections of Federal Register publication, and notice-and-comment before a substantive rule is adopted, are vital to the ability of veterans' organizations like NVLSP to protect veterans. This Court's correction of the decision below would go a long way to restoring the primacy of APA protections if the DVA is deprived of the strategic advantage of simply revising the M21-1 Manual and escaping both those statutory protections and judicial review.

Third, even though the decision specifically concerns interpretive rules, the rationale adopted by the Federal Circuit also stymies essential pre-enforcement review of agency rules of procedure that are often outcome-determinative.

Fourth, the Federal Circuit placed specific emphasis on the provision that 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. Pet. 11a, and held that "where the action is not binding on private parties or the agency itself, we have no jurisdiction to review it." Pet. 12a. NVLSP agrees with Petitioner that pre-enforcement review applies to any agency action within 5 U.S.C. §§ 552(a)(1) and 553, regardless of whether it is binding. *See* Pet. 24. But the practical reality is that the BVA frequently treats the Manual as binding, and relies on it as authoritative with no independent analysis. Rational adjudication of veterans' benefits claims requires this Court to grant the petition and restore the pre-enforcement judicial review that Congress intended for the welfare of veterans.

ARGUMENT

I. Without pre-enforcement judicial review, veterans would face a cumbersome, lengthy adjudication process that would take roughly six years.

In its relatively short history, the United States has had a prodigious tradition of assisting veterans whom have suffered ailment as a result of protecting the country during war time. This tradition even predates the founding of the Republic. *See* History of VA https://www.va.gov/about_va/ vahistory.asp, (citing social programs to care for pilgrims wounded at war with the Peqout Indians). During the revolutionary war, local communities within the several states would take it upon themselves to care

for their wounded soldiers. *Id*. After the founding, "Congress began providing veterans pensions in early 1789, and after every conflict in which the Nation has been involved, Congress has, in the words of Abraham Lincoln, 'provided for him who has borne the battle, and his widow and his orphan.'" *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Congress established the Veterans Administration in 1930, and since that time the VA or its successor, the DVA, "has been responsible for administering the congressional program for veterans' benefits." *Id.*

Today, the DVA is a massive bureaucracy, requiring veterans to navigate a daunting amount of red tape just to secure their substantive rights and receive the benefits rightfully owed to them. Benefits are principally directed to veterans who file claims with the DVA as a result of their service-connected conditions, as well as low income veterans. *See* Stichman et al., 1-10 Veterans Benefits Manual 3.1.1, (2017). The DVA claims process is an "aberrational oddity to scholars of administrative procedure." James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 Admin. L. Rev. 223, 226 (2001).

The start of this dauntingly complex administrative process begins with determination of a claim by a DVA Regional Officer (RO). The ROs are civil servants and are not required to have legal training. Jeffrey Parker, *Two Perspectives on Legal Authority within the Department of Veterans Affairs Adjudication*, 1 Veterans L. Rev. 208, 216, 218 (2009). There are currently 56 Regional Offices for the

administration of veterans benefits located throughout the country. U.S. DEP'T OF VET. AFF., VETERANS BENEFITS ADMINISTRATION, *About VBA,* https://www.benefits.va.gov/benefits/about.asp (last visited Jul. 20, 2018).

The ROs review the veteran's claims against the M21-1 Manual. Because the DVA benefits system is nominally non-adversarial, with the RO supposed to assist the veteran in obtaining his benefits, *see Walters,* 473 U.S. at 310-11, most veterans proceed either *pro se* or with the aid of a volunteer service representative (typically from an organization like the American Legion). *See* The American Legion: Veterans Benefits Center, https://www.legion.org/veteransbenefits (last visited Jul. 18, 2018); *see also* 38 U.SC. §§ 5901-5904. Lawyers, whose fees are restricted by statute and DVA regulation, 38 C.F.R. § 14.636, are scarce in this initial round of adjudication. Craig Kabatchnik, *After the Battles: The Veteran's Battles with the VA*, 35 Hum. R. Mag. 2 (2008).

As DVA officials admit, the ROs apply the Manual as binding authority, and even as substantive rules:

> [T]he front line VA adjudicators at the local VA offices (VBA adjudicators) are predominantly lay adjudicators, VA career employees who have undergone extensive training in veterans benefits law. . . .
>
> The VBA adjudicator's cumulative and specialized military knowledge has been largely acquired through a combination of administrative and quasi-legal sources, such as the VA Adjudication Procedure Manual . . . .

> ***
>
> Although manuals were meant only to provide procedures for *applying* laws and regulations, and were not meant to become substantive rules, the procedural versus substantive rule distinction is not always clear or maintained. . . .
>
> The "administrative" perspective recognizes VA's practice of using administrative directives in the applications of laws and regulations in VA claims adjudication. In this view, the sub-regulatory VA directives such as manuals and circulars that direct the application of laws and regulations tend also to be recognized as authoritative for the adjudicator's use in decision making.

Parker, *supra*, at 211, 213, 216-17. As the Federal Circuit rightly held, while the M21-1 Manual does not bind the BVA, it does bind the ROs. *See* Pet. 5a.

The veteran who disagrees with the ratings decision has the right to an administrative appeal to the Board of Veterans Appeals (the "Board" or "BVA"). By regulation, the Board is not bound by the M21-1. See 38 U.S.C. § 7104(c) ("The Board [of Veterans' Appeals] shall be bound in its decisions by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department."); 38 C.F.R. § 19.5 ("The Board is not bound by Department manuals, circulars, or similar administrative issues.").

Veterans who receive an adverse rating decision commonly do not appeal to the BVA, even when they may have meritorious positions. The veteran may be easily discouraged or dealing with psychiatric or other medical issues that cause them to forego

appeals; moreover, because veterans are often unrepresented, or represented only by non-lawyers, they may not be aware of all possible legal challenges to a ratings decision that could be made. Thus, for the vast majority of veterans, the M21-1 Manual provisions that the ROs apply are decisive.

As Judge Dyk observed,

> 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).

Pet. 24a-25a.

The reality is that for the average veteran, the Manual encompasses the beginning and end of their review. Prompt pre-enforcement judicial review of Manual provisions is plainly necessary to ensure that unlawful Manual provisions are not permitted to apply to veterans before one of the only 4% of veterans that seeks appellate review challenges the rule on appeal.

II. The Federal Circuit is incentivizing the DVA to avoid APA protections by promulgating interpretive and substantive rules solely through its manuals.

The meaning of the Administrative Procedures Act (APA) is plain. An agency must publish all interpretive and substantive rules in the Federal Register, 5 U.S.C. § 552(a)(1), and (for the latter) provide sufficient notice to the public to allow comment before publication, *id.* § 553. An agency must also allow public inspection of the entirety of "administrative staff manuals and instructions to staff that affect a member of the public[,]" *id.* § 552(a)(2)(C), but that requirement does not allow an agency to hide interpretive and substantive rules in manuals and escape the statutory requirements that apply to them. *See Morton v. Ruiz*, 415 U.S. 199, 232-36 (1974) (holding that provisions of the Indian Affairs Manual should have been published in the Federal Register pursuant to § 552(a)(1)(D)).

Congress applied those same rules to the DVA, and then authorized pre-enforcement challenges to such interpretative and substantive rules in section 502 of Title 38, no doubt recognizing that (given the nature of veterans benefit determinations outlined above) such review was necessary to allow efficient vetting of the legality of DVA's rules. 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).

Under the Federal Circuit's holding below, the DVA can insulate both interpretive and substantive protections, and avoid pre-enforcement judicial review, simply by promulgating them through the Manual. The DVA has frequently added various interpretive and substantive rules to the Manual through amendments, escaping both publication and notice-and-comment protections - and now, under the decision, also avoiding prompt judicial review.

The very Manual provision at issue here is an amendment to a definition that was first promulgated through notice-and-comment rulemaking. In May 1993, the DVA promulgated regulations through notice-and-comment rulemaking establishing presumptive service connection for certain diseases associated with exposure to herbicides in Vietnam. App. 3a-4a (citing 38 C.F.R. § 3.307(a)(6)(iii) (1993); Diseases Associated with Service in the Republic of Vietnam, 58 Fed. Reg. 29,107,109 (May 19, 1993)). Under this regulation, the definition of service in the Republic of Vietnam included "service in the waters offshore." 38 C.F.R. § 3.307(a)(6)(iii); *see* Pet. 6a.

In 2001, the DVA issued a formal rule limiting its prior regulation and denying the presumption to veterans who served on ships offshore without entering "inland waterways" or setting foot on Vietnamese soil. 66 Fed. Reg. 23,166, 23,166 (May 8, 2001). In 2009, the DVA again restricted the eligible veterans by issuing a guidance letter which defined "inland waterways" to include only some, but not all, bays and harbors. Pet. 6a. In *Gray v. McDonald*, Gray successfully challenged that letter interpretation in the course of his suit appealing the denial of his benefits claim. Pet. 6a. The CAVC held that the definition of inland waterways in the guidance letter was "arbitrary," "irrational," "aimless and adrift[,]" and "inconsistent with the identified purpose of the statute . . . . *See* 27 Vet. App. 313, 316, 325-27 (2015); *see also* Pet. App. 6a. Yet, the DVA went back and amended its M21-1 Manual to again promulgate a restrictive, and "arbitrary," and "irrational," and "aimless," and "inconsistent" definition of "inland waterways" outside of notice-and-comment rulemaking. Pet. 7a-8a, 46a-47a. At that point, rather than wade through the appeal of a denial of benefits process all over again, Gray moved for pre-enforcement judicial review of the Manual. With the Federal Circuit's opinion, the DVA has been rewarded for seeking to limit benefits due to veterans under its regulations by issuing "arbitrary and "irrational" rules through its Manual.

This is only one of many examples of substantive rules promulgated through the Manual, but without Federal Register publication or notice-and-comment rulemaking. For example, in 2010 the DVA established a metric of chronicity to determine

whether a veteran was suffering from a chronic disability. M21-1MR, Part III. Subpart iv.6.C. Here, to establish service connection for a disability, the claimed disability must be chronic, that is, it must have persisted for a period of six months. The Manual goes as far as explaining that in order to measure whether chronic disability exists, the RO must measure the six-month period of chronicity from the earliest date on which all pertinent evidence establishes that the signs or symptoms of the disability first manifest. Furthermore, if a disability is subject to intermittent episodes of improvement and worsening within a six-month period, consider the disability to be chronic. M21-1MR, Part III. Subpart iv.6.C. These are clear substantive rules that affect benefit eligibility, but have escaped Federal Register publication and notice-and-comment rulemaking.

Indeed, the BVA often identifies substantive rules embedded in the Manual. *See, e.g., Redacted*, Bd. Vet. App. 1006917 (Feb. 24, 2010) (citing *Nunez-Perez v. Peake*, No. 07-1405 (Vet. App. Jan. 14, 2009) (unpublished single-judge disposition)); *Redacted*, Bd. Vet. App. 100433 (Jan. 28, 2010) (same); *Redacted*, Bd. Vet. App. 0917194 (May 7, 2009) (same). For example, the Board has recognized that the many M21-1 provisions governing post-traumatic stress disorder (PTSD) are substantive rules. *Redacted*, Bd. Vet. App. 1217542, at *4 (May 16, 2012) ("The provisions in M21-1 . . . which address PTSD claims based on personal assault are substantive rules which are the equivalent of VA regulations, and are binding on VA."); *Redacted*, Bd. Vet. App. 1140116 (Oct. 28, 2011) (same); *c.f. Cohen v. Brown*, 10 Vet.

App. 128, 139 (1997) (same); *Hayes v. Brown*, 5 Vet. App. 60, 67 (1993) (same). The placement of a rule "in a procedural manual cannot disguise its true nature as a substantive rule." *Fugere v. Derwinski*, 1 Vet. App. 103, 107 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992), and accordingly the BVA, as required by court precedent, must treat those particular substantive provisions as binding rules. *C.f. Hamilton v. Derwinski*, 2 Vet. App. 671, 675 (1992) (same); *Buzinski v. Brown*, 6 Vet. App. 360, 369 (1994) (noting that *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982), held that "VA handbooks, circulars, and manuals" may have the "force and effect of law . . ." if they prescribe substantive rules).

But the fact that in a given adjudication the BVA may treat an M21-1 provision as substantive and binding does not cure the DVA's persistent violations of the APA in promulgating all rules without Federal Register publication, and substantive rules without notice-and-comment. The best opportunity for veterans' rights organizations to protect veterans is in notice-and-comment proceedings for substantive rules under section 553, and (if necessary) in pre-enforcement challenges to both interpretive and substantive rules under section 502. Those opportunities vanish if the DVA is permitted to conduct rulemaking through manual revision, and if the Federal Circuit abdicates review.

The DVA has amended the M21-1 many times in the last three years. *See generally* U.S. Dep't of Veterans Affairs, Announcements, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018 (changes to M21-1 Parts

I, III, and IV). By promulgating substantive and interpretive rules through the Manual, the DVA has shielded them from Federal Register publication and notice-and-comment rulemaking. The Federal Circuit's opinion further incentivizes the DVA to engage in this strategic behavior by also denying prompt judicial review of Manual-promulgated rules. Depriving veterans of pre-enforcement judicial review to challenge such rules adversely affects their right to the administrative process.

III. The Decision Below Likewise Improperly Curtails Pre-Enforcement Judicial Review of Agency Rules of Procedure.

Although the rule at issue in this case is interpretive, the APA also requires Federal Register publication of agency "rules of procedure," 5 U.S.C. § 552(a)(1)(C), and Congress has likewise granted pre-enforcement review of such rules, 38 U.S.C. § 502. But the DVA commonly issues procedural rules in M21-1 revisions, and under the decision below such rules—which are often outcome-determinative for a given veteran—are improperly insulated from pre-enforcement review.

The BVA has consistently recognized that the Manual contains binding evidentiary development procedures. *See, e.g., Redacted*, Bd. Vet. App. 1011007 (Mar. 24, 2010) (remanding where Board failed to comply with the Manual's provisions regarding evidentiary proof of exposure to ionizing radiation); *see also Campbell v. Gover*, 14 Vet. App. 142, 144 (2000) (holding that VA was obligated to comply with the applicable M21-1MR provisions concerning service-connected death claims and

remanding for compliance with that provision and applicable regulations); *Patton v. West*, 12 Vet. App. 272, 282 (1999) (holding that the Board failed to comply with the duty to assist requirement when it failed to remand the case for compliance with evidentiary development called for by the M21-1MR). "Indeed, the Court has held that the M21-1MR procedures are tantamount to VA's governing regulations and, thus, are considered binding on the Board." *Redacted*, Bd. Vet. App. 1300803, at *6 (Jan. 9, 2013).[2]

This line of cases is particularly relevant in the context of herbicide exposure: "Pertinent provisions of the VA Adjudication Manual set forth procedures that VA ***must follow*** to verify herbicide exposure in locations other than the Republic of Vietnam, particularly in Thailand and in other locations."

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[2] "[T]he United States Court of Appeals for Veterans' Claims has consistently held that the evidentiary development procedures provided in VA's Adjudication Procedure Manual, M21-1MR, are ***binding***." *Redacted*, Bd. Vet. App. 1146760, 2011 WL 7276203, at *2 (Dec. 22, 2011) (quoting *Patton v. West*, 12 Vet. App. 272, 282 (1999)) (emphasis added); *see also Redacted*, Bd. Vet. App. 1535112, 2015 WL 5909132 (Aug. 17, 2015) (same); *Redacted*, Bd. Vet. App. 1311777, 2013 WL 2900062, at *2 (Apr. 9, 2013) (same); *Redacted*, Bd. Vet. App. 1219614, 2012 WL 3266382, at *2 (June 5, 2012) (same); *Redacted*, Bd. Vet. App. 1206760, 2012 WL 1336160, at *2 (Feb. 24, 2012) (same); *Redacted*, Bd. Vet. App. 1201502, 2012 WL 768245, at *3 (Jan. 13, 2012) (same); *Redacted*, Bd. Vet. App. 1109736, 2011 WL 1801523, at *2 (Mar. 11, 2011) (same); *Redacted*, Bd. Vet. App. 1107783, 2011 WL 1356423, at *6 (Feb. 28, 2011) (same); *Redacted*, Bd. Vet. App. 1005030, 2010 WL 1475690, at *2 (Feb. 3, 2010) (same); *Redacted*, Bd. Vet. App. 1004637, 2010 WL 1475275 at *2 (Feb. 1, 2010); *Redacted*, Bd. Vet. App. 0836817, 2008 WL 5224783, at *2 (Oct. 27, 2008) (same); *Redacted*, Bd. Vet. App. 0900917, 2009 WL 680619, at *2 (Jan. 9, 2009) (same).

Redacted, Vet. App. Dkt No. 09-37-995, at *11-12 (Jan. 29, 2015) (emphasis added).[3] *See also Redacted*, Bd. Vet. App. Dkt No. 11-14-485, at *8, 10 (Sept. 28, 2017) (citing to the Manual regarding a presumption that the DVA will make regarding herbicide exposure); *Redacted*, Bd. Vet. App. Dkt No. 13-15-489. at *9-10 (Nov. 10, 2016) (citing to the Manual regarding the DVA's extension of the presumption of exposure to Agent Orange to Vietnam-era veterans who served in Thailand); *Redacted*, Bd. Vet. App. Dkt No. 14-13-432 at 4-5 (Feb. 11, 2016) (citing Manual how the "VA has extended the presumption of exposure to Agent Orange and the presumption of service connection for ischemic heart disease"); *Redacted*, Bd. Vet. App. Dkt No. 14-22-782, at *16, 19 (Jan. 19, 2016) ("The provisions of M21-1, Part IV, Subpart ii, 1.H.5a, b, contain instructions and information pertaining to contention regarding herbicide in Thailand during the Vietnam era."); *Redacted*, Bd. Vet. App. Dkt No. 12-28-055, at *3-4, 6, 8 (Feb. 19, 2015) (stating that the Manual "provides guidance for adjudication of claims based on exposure to herbicides during service in Thailand during the Vietnam era" and citing it authoritatively); *Redacted*, Bd. Vet. App. Dkt No. 12-04-516, at *10, 11 (Nov. 17, 2014) (citing to the Manual for a provision regarding when the "VA will concede herbicide exposure" and for delineation of which duty stations are covered by presumption); *Gary R. Schmidt*, Bd. Vet. App. 09-47-564, at *4-5 (July 31, 2014) ("[T]he Board finds that

[3] Board of Veterans' Appeals Decisions are available at https://www.data.va.gov/dataset/board-veterans-appeals-decisions.

service connection cannot be granted on a special consideration basis via the RO manual.").

In some instances, the procedures are pro-veteran, but that does not diminish the importance of pre-enforcement judicial review. The procedures often are only minimally pro-veteran, or help only a subset of veterans but not others, and either law or policy counsels that different procedures should be employed. Congress fully intended such rules to be subject to pre-enforcement judicial review, but the decision below prevents that.

IV. As a practical matter, the BVA treats Manual provisions as binding, even if formally they are not.

The fourth reason why this Court's review is critical is that the BVA does not consistently safeguard the veteran from misconceived rules that are promulgated in the M21-1 Manual. Even though the BVA is not formally bound by the Manual, 38 C.F.R. § 19.5, in practice the BVA commonly treats its provisions as binding *de facto*. The BVA's review, which many veterans do not invoke, is no substitute for adherence to APA procedures and pre-enforcement review.

As an initial matter, just as the Government has taken inconsistent positions on the scope of section 502 review, *see* Pet. 25-26, it has been inconsistent in its position on whether the M21-1 Manual binds the BVA. Even though VA regulations of the time provided that "[i]n its appellate decisions, the Board is not bound by agency manuals, circulars and similar administrative issues not approved by the Administrator," 38 C.F.R. § 19.103(b) (1985), the

Solicitor General argued the opposite to this Court in urging a narrow construction of judicial review statutes. The Solicitor General declared that the DVA "manuals constitute 'instructions of the Administrator' that *are binding on the Board of Veterans Appeals* under 38 U.S.C. 4004" [now 38 U.S.C. § 7104(c)], and urged this Court to reject a statutory construction that would enable judicial review of such provisions. *See* Brief for Resp., *Trayner v. Turnage*, Nos. 86-622, 86-737, 1987 WL 880254 (Aug. 6, 1987) (emphasis added) (citing as an example of a binding instruction, Manual M21-1, ch. 50, § 50.40a.(1), prescribing policies for disability adjudications.).

In practice, the Board has repeatedly cited to the M21-1 Manual as authoritative. *See, e.g.*, *Redacted* , Bd. Vet. App. Dkt No. 10-12-960, at *3-4 (Sept. 21, 2017) (citing to the Manual for criteria the DVA uses for determining whether those who served in or near the Korean DMZ were exposed to herbicides); *Redacted*, Bd. Vet. App. Dkt No. 12-20-203, at *19-20 (Aug. 10, 2017) (citing the Manual for an explanation of a "threshold factor" that must be met); *Redacted*, Bd. Vet. App. Dkt No. 14-39-429, at *5 (Mar. 3, 2017) (denying benefits because "his service does not coincide with any of the Department of Defense' listed units recognized" in the Manual); *Redacted*, Bd. Vet. App. Dkt No. 14-17-184, at *8 (Jan. 4, 2017) (citing the Manual as authority on what the "VA recognizes" as criteria for service connected disability benefits for hearing loss); *Redacted*, Bd. Vet. App. Dkt No. 13-12-327, at *10 (Sept. 4, 2015) (citing the Manual for rules involving entitlement to separate compensable disability ratings for partial

meniscectomy); *Redacted*, Bd. Vet. App. Dkt No. 07-20-253, at *13 (Nov. 15, 2013) (citing to the Manual for DVA criteria for service connection for in-service exposure to asbestos).

In various opinions, the Board has used equivocating language to describe the binding nature of the Manual, and then proceeded to apply it authoritatively. "While the Adjudication Manual is *not necessarily* binding on the Board, it is a document that is closely followed by the AOJ . . ." *Redacted*, Bd. Vet. App. 1648253, at *2 (Dec. 28, 2016) (remanding for failure to follow the Manual) (emphasis added); *see also Redacted*, Bd. Vet. App. 1725309 (July 3, 2017); *Redacted*, Bd. Vet. App. 1547667, at *2 (Nov. 12, 2015) (same, "not necessarily").

It is unsurprising that the Board, in practical reality, repeatedly treats the Manual as effectively binding authority. A given BVA judge may have unfamiliarity with a particular Manual provision and lack the wherewithal to challenge the position that the DVA as a whole has taken in promulgating a Manual amendment; moreover, frequently the veteran who appears before the BVA, whether represented or unrepresented, is unlikely to assist the BVA in questioning the validity of the Manual provision. For practical purposes, the BVA more often than not will defer to and rely upon the Manual, even if it has the formal authority to disregard it. Thus, as outlined above, few veterans' cases wend their way to the BVA, and when they do the BVA (in the NVLSP's experience) is by practice and disposition unlikely to question the validity of a Manual provision.

Finally, the DVA regularly demands deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to its interpretive rules set forth in agency manuals; thus, its position is that such rules are not binding of their force, but are controlling under *Auer*. *See Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011) (The "VA interpretations of its own regulations in [the M21–1] are controlling as long as they are not plainly erroneous or inconsistent with the regulation.'" (internal citations omitted) (demanding *Auer* deference to agency manual rules); *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009) (same); *see also* Gov't Br. 31, *Gazelle v. McDonald*, 868 F.3d 10006 (Fed. Cir. 2017) (No. 16-1932), 2016 WL 6883024. In a recent case, the CAVC criticized the DVA for, on the one hand, telling the Federal Circuit that Manual provisions are not binding, but on the other hand telling the CAVC that the Board (and the courts) must give *Auer* deference to the very M21-1 provision at issue in this case. *See Overton v. O'Rourke*, Vet. App. Dkt No. 17-0125 (June 20, 2018).[4] At the oral argument heard in *Overton* on June 20, 2018, the CAVC judge laid out the inconsistency of the DVA's position:

> THE COURT (35:40): I need to go back to your harmless error point, because I think, and I don't mean this pejoratively against you personally, but as an institution, that argument leads to the conclusion that the Department is engaged in a massive bait and switch, and let me explain to you why. The Department stood up before the Federal

[4] The audio recording of the oral argument can be downloaded at http://www.uscourts.cavc.gov/oral_arguments_audio.php.

> 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, so long as it's reasonable," right? And so isn't the effect of that being that the Department has closed off a regulatory challenge to something that it says isn't a law, right? 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. That seems really wrong.

Id. The DVA's position on *Auer* deference renders the Manual provisions effectively binding on the BVA.

These flaws in BVA review simply underscore why case-by-case adjudication is not the primary means by which Congress intended for the rules governing veterans to be vetted by the courts. Congress applied the same APA protections to the DVA that govern other agencies, and then provided for robust pre-enforcement review that is the only practical means for veterans' rights organizations to challenge wayward or unlawful rules before they harm veterans. Denying pre-enforcement challenges to Manual provisions simply allows the DVA to hide

unlawful rules in the Manual, and escape prompt judicial review, at great cost and burden to veterans.

CONCLUSION

For all the foregoing reasons, it is critically important that this Court grant review and decide the reviewability of interpretive and substantive rules that appear only in M21-1 provisions. The proper answer – that such provisions are reviewable – will have the beneficial effect that the Government will cease its evasion of the APA and use proper Federal Circuit publication and notice-and-comment rulemaking instead of amending rules in the M21-1 without comment and without prompt judicial review.

Respectfully submitted,

STEPHEN B. KINNAIRD
Counsel of Record

PAUL HASTINGS LLP
875 15th Street, N.W.
Washington, DC 20005
stephenkinnaird@paulhastings.com
(202) 551-1700

Counsel for Amicus Curiae
National Veterans Legal Services
Program

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