No. 17-1679

In the Supreme Court of the United States

ROBERT H. GRAY,
Petitioner,
v.
ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent.

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

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES

Page(s)

STATUTES AND REGULATIONS

OTHER AUTHORITIES

ARGUMENT

Unsurprisingly, the Government does not even try to defend the theory that 5 U.S.C. § 552(a)(1) and (a)(2) are mutually exclusive, even though (1) it advanced that theory to the Federal Circuit in this case and *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*); (2) the Federal Circuit adopted that theory in both cases; and (3) the Government has subsequently interpreted the decisions to rest on that theory. Pet. 10-14 & n.5, 16-18, 22-24, 28-29.

Instead, the Government embraces a brand-new argument that the Federal Circuit did not adopt and that is even *less* defensible than its mutual exclusivity approach. In a nutshell, the Government's new theory is that the M21-1 Manual contains *no* rules of "general applicability" because it is conclusively binding only on front-line agency adjudicators, but not on the Board of Veterans Appeals. That theory is plainly wrong: It violates the ordinary meaning of "general applicability"; it contradicts the Administrative Procedure Act's legislative history; it departs from the prevailing interpretation of Section 552(a)(1)(D) in the courts of appeals; and it is inconsistent with the Government's insistence that the M21-1 Manual receive *Auer* deference. No wonder neither the Government, nor the Federal Circuit, nor anyone else has previously embraced this new argument.

Notably, the Government does not seriously challenge the view of Judge Dyk—and Gray's amici—that the question presented is of "exceptional importance" to our Nation's veterans. Pet. App. 37a. Nor does the Government deny that its position

means that when VA issues unlawful rules, veterans will typically have to undergo *years* of expensive and potentially irrelevant litigation before they can challenge the legality of those rules before an Article III tribunal. That is precisely the opposite of what Congress intended when it enacted Section 502. This Court should grant certiorari and give veterans back their day in court.

A. The Federal Circuit Embraced The Mutual Exclusivity Theory, And The Government Continues To Press It In Lower Courts

1. The Government grudgingly concedes that VA's panel briefs in this case and *DAV* argued that Sections 552(a)(1) and (a)(2) are mutually exclusive. BIO 14 (conceding that VA argued that "'because M21-1 Manual provisions are expressly governed by § 552(a)(2),' they were not subject to Section 552(a)(1)" (citation omitted)); *see also* Pet. 10-14 & n.5, 16-18, 22-24, 31-32.

The Government no longer defends its flawed mutual exclusivity theory. It now contends that, although the Federal Circuit ruled in VA's favor, it rejected VA's bogus theory and instead relied on "different reasons" of its own creation. BIO 14; *see id.* at 22-23. That is not correct, as multiple passages from *DAV* and the decision below readily illustrate.

In *DAV*, for instance, the Federal Circuit stated that "Congress expressly exempted from § 502 challenges to agency actions which fall under § 552(a)(2)." 859 F.3d at 1077-78; *see also id.* at 1075 (referring to Section 502's purported "express exclusion of agency actions subject to § 552(a)(2)"). But Section 502 does not "expressly exempt[]" actions

falling under Section 552(a)(2); it does not mention Section 552(a)(2) *at all*. Section 502 therefore could at most *impliedly* "exempt[]" actions falling under Section 552(a)(2). And it would do that only if no action falling under Section 552(a)(2) could possibly also fall under Section 552(a)(1)—if, in other words, the two provisions were mutually exclusive. The erroneous notion of mutual exclusivity is the only premise that makes *DAV*'s "expressly exempted" and "express exclusion" statements even halfway coherent. Unable to explain these statements, the Government simply ignores them. *See* BIO 22-23.

The Government likewise ignores the substantively equivalent statement by the panel in this case: "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)." Pet. App. 8a. Again, the second sentence, emphatically rejecting jurisdiction over any actions falling under Section 552(a)(2), makes sense only if such actions are *necessarily* excluded from Section 552(a)(1). As in *DAV*, the decision below rests fundamentally on the notion of mutual exclusivity. *See* Pet. 12-14.

2. Ignoring the passages above, the Government relies on Judge Taranto's concurrence in the denial of rehearing en banc to support the view that *DAV* and the decision below did not rest on the premise of mutual exclusivity. BIO 22 (citing Pet. App. 32a-33a). But Judge Taranto was the *only* member of the en banc court to express this view. The three dissenting judges explained that *DAV did* rely on "the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive." Pet. App. 25a (Dyk, J., dissenting); *see id.*

at 37a (Dyk, J., dissenting from denial of rehearing en banc). No Federal Circuit judge has contradicted the dissenters or expressed agreement with Judge Taranto. And Judge Taranto himself offered no real alternative explanation of the Federal Circuit's holding. *See* Pet. 24 n.6.

3. As Gray explained in his petition, VA is continuing to advocate its "mutual exclusivity" interpretation of *DAV* and the decision below—even *after* filing its rehearing-stage brief purporting to reject that interpretation. Pet. 28 (citing 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). The Government's opposition in this Court does not dispute Gray's characterization of VA's *Krause* brief. It simply ignores that brief altogether. Given that the Government's opposition here was signed by one of the same attorneys who signed the completely inconsistent *Krause* brief, that silence is remarkable.

It is also telling. The Government's unwillingness to disavow its *Krause* brief signals that the Government will continue to advance its mutual exclusivity interpretation of *DAV* and the decision below whenever it is convenient. The Court should put the kibosh on this sort of gamesmanship.

B. The Government's Newfound Interpretation Of Section 552(a)(1)(D) Is Wrong

Having disavowed the Federal Circuit's mutual exclusivity rationale, the Government now pretends that the court held that the challenged M21-1 Manual provisions do not qualify as "interpretations *of general applicability* formulated and adopted by the agency" under Section 552(a)(1)(D) (emphasis added),

irrespective of whether they are also covered by 552(a)(2). But that creative reimagination of the Federal Circuit's reasoning is both mistaken and at odds with the prevailing interpretation of Section 552(a)(1)(D) in other circuits.[1]

1. The Government does not dispute the Federal Circuit's conclusion that the manual provisions are "interpretation[s] adopted by the agency." Pet. App. 11a. It argues only that they are not interpretations "of *general applicability*" because they are not conclusively binding on the Board. BIO 19-21. The Government is incorrect.

"When a term goes undefined in a statute, we give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). Accordingly, the "rather obvious definition of 'general'" in Section 552(a)(1)(D) is "that which is neither directed at specified persons nor limited to particular situations." *Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987). By covering only "general" interpretations, for example, Section 552(a)(1)(D) excludes IRS letter rulings "in which interpretations of the tax laws are made and applied to a specific set of facts." *Tax Analysts & Advocates v. IRS*, 505 F.2d 350, 352-53 (D.C. Cir. 1974) (citation omitted); *see id.* at 353 (noting that such letter rulings instead fall within Section 552(a)(2)(B)).

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[1] Beyond its flawed analysis of Section 552, VA also claims that Gray "ha[s] not disputed" that Section 553 "'is not at issue.'" BIO 17 (quoting Pet. App. 8a). That too is incorrect: At every stage of this case, Gray has argued that jurisdiction also exists under Section 502's cross-reference to Section 553. *See* Pet. 10, 14, 16-17.

The APA's legislative history confirms this point. The APA definition of "rule" encompasses "an agency statement of *general or particular* applicability" designed to interpret the law. 5 U.S.C. § 551(4) (emphasis added). Congress included the phrase "or particular" "in order to avoid controversy and assure coverage of rulemaking addressed to named persons." H.R. Rep. No. 79-1980 (Comm. Amendment), *reprinted in* Legislative History of Administrative Procedure Act at 283 & n.1 (1946); *see also Am. Broad. Cos. v. FCC*, 682 F.2d 25, 31-32 (2d Cir. 1982) (rate-setting decision concerning specific carrier was rule of particular applicability not subject to Section 552(a)(1)(D)'s publication requirement).

Furthermore, when Congress included the phrase "of general applicability" in Section 552(a)(1)(D), it indicated that the phrase was equivalent to "not . . . addressed to and served upon named persons." S. Rep. No. 89-813 at 6 (1965); *see Nguyen*, 824 F.2d at 700. An interpretation of general applicability is thus one that is not limited to the circumstances of specific individuals.

Under the plain meaning of Section 552(a)(1), the challenged M21-1 Manual provisions are undoubtedly interpretations of general applicability. They apply to *all* veterans claiming to have "served in the Republic of Vietnam," 38 C.F.R. § 3.307(a)(6)(iii), and they adopt principles applicable to *all* waters in and around Vietnam, *see* Pet. App. 46a-50a. In no sense are they limited to specific individuals or circumstances. The Government does not even try to argue otherwise. *See* BIO 18-21.

2. Instead of simply applying Section 552(a)(1)(D)'s plain text, the Government proffers a new test under which the manual interpretations lack

"general applicability" because they do not bind the Board. BIO 20-21. This argument is wrong twice over.

To start, the Government provides no authority for the proposition that whether an interpretation is of "general applicability" turns on whether it is binding on a particular subcomponent of the agency. Nor does either the decision below or *DAV*.[2] And Gray is not aware of any such authority. That is because what makes an interpretive rule generally applicable is that it is not limited to particular individuals or situations. The degree to which an interpretive rule formally binds agency subcomponents does not change whether it is "of general applicability."

In any event, the Government's brief mischaracterizes the degree to which the Board *is* bound by the M21-1 Manual. The Government's claim that "the Board may choose not to follow" the manual (BIO 21) suggests unfettered discretion to ignore or contradict the manual. But that is not how either the Board itself or VA (in other cases) sees it.

As amicus National Veterans Legal Services Program shows (at 19-21), the Board routinely treats the M21-1 Manual as binding. Indeed, the Board has repeatedly stated that it owes the M21-1 Manual the equivalent of *Auer* deference and therefore *must* follow it so long as it reasonably interprets VA

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[2] *DAV* did cite authority for the proposition that because M21-1 Manual provisions are not conclusively binding on the Board, they are not *substantive* (*i.e.*, legislative) rules. *See* 859 F.3d at 1077. But whether or not a rule is *substantive* is a different inquiry from whether or not an interpretive rule is *generally applicable*. In this and other cases, VA has repeatedly confused these important distinctions of administrative law. *See* Pet. 11 n.5, 28 n.8.

regulations. In one recent decision, for instance, the Board stated that because it was "unable to conclude that the VA [M21-1] Adjudication Manual's interpretation of the regulations is plainly erroneous or inconsistent with the regulation," the manual was "controlling." [Title Redacted], No. 12-11 139, 2017 WL 2905538, at *8 (Bd. Vet. App. May 12, 2017); *see also, e.g.*, [Title Redacted], No. 10-08 246, 2016 WL 3650559, at *10 (Bd. Vet. App. May 11, 2016) (citing M21-1 Manual and observing that "[t]he Board defers to VA's reasonable interpretation of its own laws and regulations"); [Title Redacted], No. 10-34 322, 2013 WL 7222774, at *3 (Bd. Vet. App. Dec. 23, 2013) (treating M21-1 Manual as "controlling authority"). As Justice Scalia explained, granting this sort of deference to an interpretive rule makes it in practice "every bit as binding as a substantive rule." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1212 (2015) (concurring in the judgment).

Thankfully, the Veterans Court recently clarified that the Board "can't simply cite an M21-1 provision without further analysis" and call it a day. *Overton v. Wilkie*, No. 17-0125, 2018 WL 4502199, at *5 (Vet. App. Sept. 19, 2018).[3] But at the same time, it "can't ignore . . . a relevant provision" of the manual either. *Id.* Whether this will result in something formally less than *Auer* deference at the Board remains to be seen. But even if so, both the Government and the Federal Circuit agree that *courts* must give the M21-1

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[3] *Overton* concerned the same M21-1 Manual provisions at issue here. The Veterans Court remanded the case to the Board without resolving the validity of those provisions, holding only that the Board had inadequately explained its decision. *Id.* at *6-7.

Manual *Auer* deference—and so in practice the Board will surely defer to its provisions as well. *See Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011); *Overton*, 2018 WL 4502199, at *6. At a minimum, the fact that the Board must consult and consider the manual's interpretations makes them "of general *applicability*" to Board proceedings under Section 552(a)(1)(D). *See New Oxford American Dictionary* 76 (3d ed. 2010) (defining "applicable" as "relevant or appropriate").

To sum up: The challenged manual provisions apply to all veterans. Their impact is concededly "both real and far reaching." Pet. App. 10a. They bind the frontline adjudicators who conclusively resolve the 96% of cases that are *not* appealed to the Board. Pet. App. 24a-25a (Dyk, J., dissenting). And the Board must consider them, knowing that they will eventually receive formal *Auer* deference from the courts. Given all this, VA's contention that they are somehow not of "general applicability" is impossible to credit.

3. The Government's brand-new interpretation of "general applicability" also conflicts with the conjunctive, two-prong test applied by multiple courts of appeals. As the Government acknowledges (at 19), those courts hold that "[a]n interpretation is not of 'general applicability' if '(1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results.'" *Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988) (citation omitted); *see also* Pet. 21.

Under the Government's theory of *DAV* and the decision below, the Federal Circuit added a third requirement to that test, under which an

interpretation will be "of general applicability" only if it is *also* (3) binding on all subcomponents of the agency. BIO 20-21. No other court has ever embraced that extra requirement, which creates a circuit conflict warranting this Court's attention.

Indeed, the Government's newly-minted third prong is outcome dispositive in this case, because the manual provisions at issue here so plainly satisfy the two-prong test applicable in other circuits. As for the first prong, the Federal Circuit recognized that the provisions do not merely clarify or explain existing law, but rather constitute a "change in policy" that expressly *alters* VA's view of the legal status of certain waters. Pet. App. 7a; *see also id.* at 49a (noting that VA "will no longer" treat certain bays and harbors as inland waters). As for the second prong, VA has *itself* "concede[d] that the impact of its manual changes is both real and far reaching." *Id.* at 10a.

In short, the manual provisions at issue here would qualify as interpretations of general applicability in any circuit that has adopted the standard two-prong test. Whether the Federal Circuit rejected that conclusion based on the mutual-exclusivity theory (Gray's view), or the not-binding-on-the-Board theory (VA's view), the circuit split is real.

C. The Federal Circuit's Decision Inflicts Serious Harm On Veterans

Below, Judge Dyk explained that the Federal Circuit's decision "imposes a substantial and unnecessary burden on individual veterans," Pet. App. 15a, and that the question presented is therefore of "exceptional importance," *id.* at 37a. Gray's petition elaborated on these points and also showed

how the Federal Circuit's rule will allow VA to insulate interpretive rules from preenforcement review. Pet. 29-35.

The Government's opposition brief never denies that the scope of Section 502 jurisdiction is exceptionally important to veterans. The most it can muster is that the Federal Circuit's "analysis of the *particular* agency guidance document at issue *in these cases* presents no issue of broad importance." BIO 21 (emphasis added). That is just wrong: The guidance document at issue will potentially affect tens of thousands of Vietnam veterans.

In any event, the Government does not explain how the logic of the decision below can be confined to these "particular" manual provisions. And it can't. The Federal Circuit's misinterpretation of Section 552(a) will apply to *any* interpretive rule, no matter how sweeping or important, that VA promulgates through the M21-1 Manual, so long as VA chooses not to publish it in the Federal Register.

That means an enormous range of important interpretive rules will be immune from preenforcement review. Instead, veterans will need to spend upwards of six years slogging through the notoriously backlogged VA claims system, just to bring pure legal challenges in the Federal Circuit that could easily have been resolved up front. Pet. 32-33. The fact that the validity of these particular manual provisions *might* eventually be addressed in individual benefits cases (BIO 23-24) is no reason to deny certiorari.

VA's other argument—that veterans opposing an unlawful rule can instead petition VA for a new rulemaking, wait for a denial, and then seek direct

review of that denial (BIO 24)—is equally unpersuasive. Veterans should not be forced to wait the months or years it might take VA to deny a rulemaking petition before getting their day in court. Moreover, the Federal Circuit has held—at VA's urging—that such petition denials are subject to an "extremely limited and highly deferential standard of review." *Serv. Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369, 1375 (Fed. Cir. 2016). Delayed review, under an unusually demanding standard, is no substitute for the straightforward, pro-veteran scheme Congress actually enacted in Section 502.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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