No. 17-1679

IN THE

Supreme Court of the United States

ROBERT H. GRAY,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON 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), AMVETS, MILITARY OFFICERS ASSOCIATION OF AMERICA (MOAA), VETERANS OF FOREIGN WARS OF THE UNITED STATES (VFW), AND VIETNAM VETERANS OF AMERICA (VVA) 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, that works to develop high standards of service and representation for all persons seeking VA benefits before the agency and federal courts.

AMVETS is a non-partisan, volunteer-led organization formed by World War II veterans of the United States military. AMVETS seeks to enhance and safeguard earned entitlements for the 20 million American veterans in the U.S. who have served honorably and to improve the quality of life for them, their families, and the communities where they live through leadership, education, advocacy, and services.

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.

Veterans of Foreign Wars of the United States (VFW) is the nation's oldest and largest combat veterans'

1. Counsel of record for the Petitioner and Respondent 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.

organization, advocating on behalf of all veterans with nearly 1.7 million members and 2,037 VA-accredited VFW representatives.

Vietnam Veterans of America (VVA) is a Congressionally-chartered national veterans service organization that is expressly dedicated to ensuring the rights of Vietnam-era veterans. VVA assists veterans and their families, both members and non-members, in the prosecution of claims for benefits by providing them with *pro bono* legal representation before the agency and the Board of Veterans' Appeals.

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 court's preclusion of preenforcement judicial review is burdensome to veterans, VA, and the courts. The Federal Circuit's holding below serves to proliferate excessive delays, erroneous decisions, and hardship on disabled veterans.

As such, *amici* have a strong interest in seeking to have this Court 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 the Court should overturn it.

First, the Federal Circuit's decision should be overturned because it "imposes a substantial and unnecessary burden on individual veterans." *Gray,* 875 F.3d at 1110 (Dyk, J., dissenting). By needlessly foreclosing efficient, preenforcement judicial review of purely legal questions in the *pro-veteran* system, *DAV* and the decision below cause grave hardship to disabled veterans who already face excessive delays and burdens in the claims adjudication process. With implementation of Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017), on the horizon, the need for VA's policy to be articulated to veterans clearly is critical to fundamental and procedural fairness.

Second, the Federal Circuit relied, in part, on the misguided assessment that the M21-1 is not binding on VA. However, the M21-1 is undeniably binding on all front line adjudicators who make the initial decisions veterans will either accept or spend many years appealing. Further, even if the M21-1 is not formally binding on the Board of Veterans' Appeals (Board), it is binding in effect. Failure to correct problematic provisions at the outset of adjudication burdens the adjudicators who are bound to apply the M21-1, and later correct those erroneous decisions. Redundant work at the agency means long delays for veterans, which burdens both VA and veterans.

Finally, the Federal Circuit's holding is burdensome to courts. The Court of Appeals for Veterans Claims (CAVC) is forced to wait to consider a problematic provision until many years after it has first been implemented and begun yielding numerous correspondingly erroneous decisions. Thus, the CAVC will have to hear many more individual cases challenging the same provision, years after they have begun to accrue, instead of settling the underlying issue at the outset.

For these reasons, the Court should reverse the decision below.

ARGUMENT

I. THE FEDERAL CIRCUIT'S JURISDICTIONAL HOLDING CAUSES SIGNIFICANT HARDSHIP TO VETERANS.

"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 v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (emphasis added). 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). 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 [Veterans' Judicial Review Act], 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).

In the case below, the Federal Circuit felt restricted by 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 1108-09. The Court found these rules "not binding on the Board itself." *Id.* The Federal Circuit found that jurisdiction failed until the specific provisions were "applied to the facts of [a veteran's] case." *DAV*, 859 F.3d at 1078. In holding the M21-1 exempt from review under § 502, the Federal Circuit's holding in *Gray* sanctioned VA's choice to imbed a controversial, key provision in the M21-1 instead of formally promulgating it 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).

We agree with the assessment of the relevant statutes as set forth in Petitioner's opening brief (Pet'r's Br.). Pet'r's Br. 20-52. In addition to the legal error detailed in that brief, the practical result for veterans of the holding below is a lack of clarity of VA's rules and procedures, which undermines systemic fairness. The burden to veterans is exacerbated by the length of delays for adjudication at the Regional Offices (ROs) and Board, meaning disabled veterans will be forced to jump through administrative hurdles and hang on through appellate delays, for many

years until their cases are finally heard by the court. Only then will they receive clarity as to the rules that VA applied to their case years earlier. Such a process is backwards, and hardly fair. The rules should be clear to veterans at the outset.

In a recent, nonprecedential decision, the Federal Circuit noted the importance of the M21-1 in the context of fundamental fairness and due process. *Hudick v. Wilkie*, No. 2017-2234, 2018 U.S. App. LEXIS 33799, ___ Fed. Appx. ___, (Fed. Cir. Dec. 3, 2018). "It cannot be that the VA may tell a veteran how to establish a service connection for his prostate cancer only to move the goalposts once he has done so." *Id*. at 20. Such a process would be arbitrary and violate due process. *Id*. at 20-21; *see also Qwest Corp. v. F.C.C.*, 689 F.3d 1214, 1228 (10th Cir. 2012); *Cushman v. Shinseki*, 576 F.3d 1290, 1297 n.1 (Fed. Cir. 2009); *F.E.R.C. v. Triton Oil & Gas Corp.*, 750 F.2d 113, 116, (D.C. Cir. 1984). Along these lines, preenforcement judicial review simply establishes where the goalposts are and whether the field is appropriate to advance.

A. Because the Manual is Binding on Front Line Adjudicators, the Federal Circuit's Holding Ensures Erroneous Regional Office Decisions for Many Years, Which Creates Substantial Hardship to Veterans.

"Established with the intent of serving those who have served their country, the veterans' disability benefits system is meant to support veterans by providing what are often life-sustaining funds. Instead, many veterans find themselves trapped for years in a bureaucratic labyrinth, plagued by delays and inaction." *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring).

Below, the Federal Circuit recognized that the M21-1 provisions are binding on "the front-line benefits adjudicators located in each VA Regional Office," 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. "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 M21-1 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"; however, because the front-line adjudicators rely on the M21-1, and the process itself takes so long, "initially" is longer than it might seem. *Gray*, 875 F.3d at 1108. The adjudication process is complicated and protracted. Currently, 355,638 cases await initial adjudication at the ROs, with 83,665 pending for more than 125 days.[2] For veterans who appeal, the process is lengthy due to its complex, non-linear structure.[3]

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2. U.S. Dep't of Veterans Affairs, Veterans Benefits Administration Reports, *Detailed Claims Data, Monday Morning Workload Report* (November 26, 2018), https://benefits.va.gov/reports/detailed_claims_data.asp.

3. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *Veterans Appeals Process Briefing*, 10 (Jan. 6, 2016), https://www.bva.va.gov/docs/Veterans-Appeals-Process-Briefing.pdf.

Under the current "legacy" system, a veteran needs 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.[4] 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 in accordance with the Federal Circuit's holding, the process would take closer to a decade before that challenge would first reach the court.

In February 2019, VA is scheduled to implement a new appeals system under the Veterans Appeals Improvement and Modernization Act of 2017, (hereafter, "Appeals Reform"). *See* Appeals Reform, 131 Stat. 1105. Logistically, once Appeals Reform is implemented, VA will be operating two appeals systems concurrently until all "legacy" appeals are completed. "In [Fiscal Years] 2019 and 2020, VBA anticipates having two distinct workloads for the 2,100 appeals FTEs [(Full Time Employees)] to

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

address: 1) legacy appeals under the former process and 2) claims in the new appeals system."[5]

At the end of Fiscal Year (FY) 2017, the Board had 153,513 pending cases and anticipated that in FY 2018, the Board would receive 93,180 new cases and 65,774 new substantive appeals would be filed.[6] Currently 70,320 hearing requests are pending before the Board.[7] In FY 2018, the Board held 16,626 hearings and signed 85,288 decisions,[8] which reflects an increase of 33,277 decisions from FY 2017.[9] The Board hopes to hold 21,358 hearings in FY 2019.[10] Even if the Board meets or exceeds its goals, there will still remain a sizeable backlog of legacy appeals at the Board.

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5. U.S. Dep't of Veterans Affairs, Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeal System, Public Law 115-55, Section 3, 11, November 2018 Update, https://benefits.va.gov/benefits/docs/appeals-report-201811.pdf.

6. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *Annual Report FY 2017*, *supra* note 4, at 22, 24.

7. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *What does the Board Do? Number of Hearings Pending*, https://www.bva.va.gov/ (last visited December 18, 2018).

8. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *Board of Veterans Appeals – Hearings*, https://www.bva.va.gov/docs/Board-Hearing-Status.pdf.

9. U.S. Dep't of Veterans Affairs, Comprehensive Plan for Processing Legacy Appeals and Implementing the Modernized Appeal System, *supra* note 5, at 6.

10. U.S. Dep't of Veterans Affairs, Board of Veterans Appeals, *Board of Veterans Appeals – Hearings*, *supra* note 8.

Adjudicating the legality of a M21-1 provision by wading through the VA appeals system—rather than directly and promptly at the Federal Circuit—causes hardship to veterans by ensuring, if not mandating, an erroneous decision at the preliminary level. Veterans who seek relief are then forced to wait for many years and navigate the complex legacy appeals process or learn the new system under Appeals Reform. It also contributes to 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 VA's system, countless other veterans will be denied benefits based on the same provision. Of those veterans who receive a Rating Decision, only 11 to 12 percent will appeal.[11] 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.[12] 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, common sense

11. BVA, *Veterans Appeals Process Briefing*, *supra* note 3, at 10.

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

dictates that a number of these veterans will die appealing 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.

Veterans of younger generations do not necessarily have lower risk of perishing during the adjudication process. *See, e.g.*, Han K. Kang et al., *Suicide Risk among 1.3 Million Veterans Who Were on Active Duty During the Iraq and Afghanistan Wars*, 25 ANNALS OF EPIDEMIOLOGY 96-100 (2015) (noting a 41% to 61% higher risk of suicide in veterans who served on active duty during the Iraq and Afghanistan Wars regardless of whether they served in a war zone relative to the U.S. general population). Our veterans deserve better.

Gray sanctions VA's ability to invite injustice into the earliest part of the adjudication process free from review for many years. It is antithetical to a pro-veteran system to protect the very aspect of the process, one very easily reviewable by the court on a preenforcement basis, that causes so many problems for the veterans it is designed to serve and the employees trying to achieve this goal of service. There is neither fairness nor "appearance of fairness" in upholding such a backwards process. *Hodge*, 155 F.3d. at 1363. If not veterans, and not VA adjudicators, and not the courts, who, if anyone, or what, if anything, does the jurisdictional holding prepare for success?

As Judge Moore recognized recently in her concurrence in *Martin*, ". . . even when veterans win on appeal, they have lost years of their lives living in constant uncertainty,

possibly in need of daily necessities such as food and shelter, deprived of the very funds to which they are later found to have been entitled." *Martin*, 891 F.3d at 1350 (Moore, J., concurring).

Practically speaking, the suffering extends beyond veterans.

> The delays faced by veterans affect not just them, but their families and friends as well. Even if a veteran is fully entitled to benefits, should he die during the pendency of the resolution (or appeal) of his disability benefits claim, the veteran and his family lose the right to the deserved benefits unless the veteran has a spouse, minor children, or dependent parents. *See Youngman v. Shinseki*, 699 F.3d 1301, 1304 (Fed. Cir. 2012). Adult children and extended families, who have provided years of financial or other support to the veteran because he was not receiving his disability benefits, cannot recover the benefits the veteran was entitled to during that time.

Id.

Nor is the result of the Federal Circuit's holding compatible with VA's own mission statement or core values. VA's mission is "[t]o fulfill President Lincoln's promise '[t]o 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."[13] VA's

13. U.S. Dep't of Veterans Affairs, *About VA: Mission, Vision, Core Values & Goals*, https://www.va.gov/about_va/mission.asp.

core values "underscore the obligations inherent in VA's mission: Integrity, Commitment, Advocacy, Respect, and Excellence" and include a commitment to "be truly Veteran-centric by identifying, fully considering, and appropriately advancing the interests of Veterans and other beneficiaries." *Id.*

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 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 VA's ability to honor and care for our veterans.

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 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).

II. THE FEDERAL CIRCUIT'S JURISDICTIONAL HOLDING IS BURDENSOME FOR VA.

A. Prohibiting Preenforcement Judicial Review of Legal Questions Breeds Errors in the Adjudication Process.

The holding below burdens VA because it promotes inefficiencies within the adjudication process, requiring duplicative work at the already backlogged ROs. As discussed above, the M21-1 is binding on the front line

adjudicators. Problematic or not, they are bound to follow the M21-1 and issue decisions accordingly. Even where decisions do not specifically cite the M21-1, they often use language found only in the Manual's provisions.

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.[14] Approximately 4.6 million veterans receive some form of compensation or pension benefits. *Id.* at 17. In theory and in practice, a good number of cases where a problematic provision was applied will come back to the front line adjudicators for some form of revision, while new claims are added every day. The result is more work, which could have been eliminated by preenforcement judicial review. Thus, a single, problematic 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, eventually, to the CAVC.

It is no secret that, for years, VA has been struggling with a backlog.[15] What started as a backlog of claims at

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

15. *See, e.g.*, U.S. Gov't Accountability Office, GAO-15-50, Veterans' Disability Benefits: Improvements Could Further Enhance Quality Assurance Efforts, Veterans' Disability Benefits 2 (2014); *see also* U.S. Gov't Accountability Office, GAO-17-234, VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions, 1 (2017).

the ROs, has turned into a backlog of appeals.[16] When public and political concern drew attention to the backlog of claims, VA adjusted its focus on reducing wait times at the earliest point in the process, the claims phase. *Id*. Adjusting focus to clearing the claims backlog led to noticeable delays in the appeals process, and ultimately, to the current predicament. *Id*. at 14. As discussed in the section above, the appeals backlog exists at the ROs, after the timely filing of a Notice of Disagreement through the filing of a Formal Appeal, until that appeal is certified and transferred to the Board.

Delay and backlog also exist at the Board itself.[17] Federal Circuit Judge Moore's concurrence in *Martin*, recognizes that "certification of an appeal only moves a veteran's case out of the hands of the VBA and into the hands of the Board where the case enters a new bureaucratic morass. Once the appeal has been certified (the two-page form which takes VA on average 773 days to complete), a veteran must wait, on average, another **321 days** for the appeal to be docketed by the Board." *Id*. at 1349 (emphasis in original).

This struggle triggered passage and enactment of Appeals Reform. 131 Stat. 1105 (2017). The VA has stated that Appeals Reform is on track for implementation in February 2019.[18] As discussed above, in FYs 2019 and

16. U.S. Gov't Accountability Office, GAO-17-234, *supra* note 15.

17. U.S. Gov't Accountability Office, GAO-17-234, VA Disability Benefits: Additional Planning Would Enhance Efforts to Improve the Timeliness of Appeals Decisions 20 (2017).

18. *Is VA Ready for Full Implementation of Appeals Reform?: Hearing Before the H. Comm. on Veterans Affairs*, 115th Cong. 2

2020, VA will be running two different systems—the legacy system and the new system—concurrently. Under the legacy system, when a veteran files an appeal, that appeal, whether involving one or multiple claims, follows one path. Under appeals reform, the veteran may select a different path for each claimed condition within a decision. Appeals Reform, 131 Stat. at 1108. There are five options: file a request for higher level review, file a supplemental claim, or appeal directly to the Board and select one of three lanes. *Id*. The three Board lanes include a lane that provides for a hearing before the Board and an opportunity to submit evidence; a lane that provides opportunity to submit additional evidence without a hearing; and a lane that provides only for direct review by the Board without a hearing or opportunity to submit additional evidence. *Id.* at 1111. It is not yet clear whether appeals will increase in the new system, but that possibility exists.

As Judge Moore noted regarding appeals reform in *Martin*, "[t]he Board has reported that it has set a goal for itself of completing appeals (in which no additional evidence is submitted and no hearing is requested) in an average of 365 days. This is not law and there are no consequences for the Board's failure to comply with its own goal." *Id.* at 1351 (Moore, J., concurring).

(2018) (statement of James Byrne, Acting Deputy Secretary of Veterans Affairs, Department of Veterans Affairs) https://docs.house.gov/meetings/VR/VR00/20181212/108768/HHRG-115-VR00-Wstate-ByrneJ-20181212-U1.pdf; *but see* U.S. Gov't Accountability Office, GAO-19-272T, VA Disability Benefits: Planning Gaps Could Impede Readiness for Successful Appeals Implementation 13-16 (2018).

The Federal Circuit's interpretation of 38 U.S.C. § 502 and 5 U.S.C. §§ 552, 553, as set forth in *DAV* and followed in *Gray,* allows VA to make and perpetuate incorrect decisions, until many years later when the CAVC can decide that the provision was wrong in the first instance. By this point, the error will have proliferated. VA will need to rework erroneous decisions many times over.

These years of wasted energy for VA have further consequences. In the cases where the errant provisions were applied, veterans will have received bad decisions. Only some will file appeals on those bad decisions. Some will drop out of the process believing the law does not protect them; others still will not understand what the law does or says; others, due to their ages and disabilities, will die. Thus, imposing additional workload burdens on an already backlogged VA, while it will be concurrently implementing two systems -- including a new system that VA will have to learn -- is bad for VA. And, if it is bad for VA because it imposes more unnecessary, erroneous work on adjudicators, it is bad for veterans.

B. 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. However, 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 on the Board as a formal matter, it is certainly binding in effect.

The Board regularly defers to and bases its opinions on the M21-1. *See, e.g.*, *Overton v. Wilkie*, No. 17-0125, 2018 U.S. App. Vet. Claims LEXIS 1251 (Vet. App. Sept. 19, 2018); *Urban v. Shulkin*, 29 Vet. App. 82, 90 (2017); *Douglas v. Wilkie*, No. 17-1614, 2018 U.S. App. Vet. Claims LEXIS 1490 (Vet. App. November 8, 2018) (nonprecedential). The CAVC, at times, has accepted the Board's reliance on the M21-1 as illustration of the Secretary's "fair and considered view on the matter." *Urban v. Shulkin*, 29 Vet. App. at 90.

In a recent nonprecedential decision by the Federal Circuit, *Hudick v. Wilkie*, the court suggested that the Board can bind itself to apply the M21-1 where the Board indicates during the adjudication process that the M21-1 will apply. No. 2017-2234 at *19 ("Regardless of whether the M21 Manual is binding on the Board in all cases and setting aside the question of whether the Compensation Bulletin is binding VA policy, the Board made these authorities binding here."). Citing *Morton v. Ruiz*, 415 U.S. 199 (1974), the Federal Circuit states that "[e]ven when an agency's rules lack the force of law, it may still be compelled to follow them." *Hudick*, No. 2017-2234 at *16. The court recognized that "[t]he contrary conclusion by the Veterans Court is difficult to reconcile with its own practice or the guarantee of procedural fairness provided by the Due Process Clause." *Id.* at *19-20 (citing *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994)).

The court in *Hudick*, however, stopped short of deciding whether the specific provision at issue would be binding in every case. But, following the Court's logic in *Hudick*, the Board can be bound by the Manual if it chooses to apply provisions of the M21-1. Even, whereas in

Hudick, the Board attempted to deviate from the M21-1, which the Federal Circuit in *DAV* and *Gray* found not to be binding, the holding in *Hudick* confirms that the M21-1 is binding in effect.

The Federal Circuit was not wrong in *Hudick*. What is wrong is the lack of clarity the courts have provided in attempting to justify the problematic holdings of *DAV* and *Gray* -- premised on the Federal Circuit's conclusion that the M21-1 is not binding -- while dealing with the actual very binding nature of the M21-1.

The Federal Circuit's jurisdictional holding is made more problematic by the simple truth that VA's position is often contrary to law.[19] In FY 2017, the CAVC reversed, remanded, reversed in part, or remanded in part 76 percent of appealed Board decisions.[20] Judicial review serves to prevent these mistakes from harming veterans who know little about the appeals system, let alone the law. Because of 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 transparency that comes from judicial review, instead of fighting to shield its rules in the M21-1.

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19. *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).

20. U.S. Court of Appeals for Veterans Claims, *Annual Report: Fiscal Year 2017*, 3 (2017), http://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf.

III. THE FEDERAL CIRCUIT'S JURISDICTIONAL HOLDING IS BURDENSOME TO COURTS.

The effect of the Federal Circuit's holdings in *Gray* and *DAV*, coupled with the M21-1's binding nature on VA adjudicators, diminishes judicial efficiency, allows VA to disregard the Court's interpretation of the law, and upends the balance between the agency and the judiciary.

A. It is a Matter of Numbers: More Appeals at the Agency Means More Appeals at the Courts.

The Federal Circuit's holding serves to diminish judicial efficiency and will further add to the courts' case load for two main reasons: veterans will have to *individually* appeal their cases to the CAVC, and perhaps further to the Federal Circuit, and the CAVC will have to *individually* remand these cases, where the Board relied on the improper M21-1 provision.

As detailed above, where a provision of the M21-1 is improper, rather than addressing the impropriety at the outset, the veteran will need to spend nearly a decade and file several appeals to get to the CAVC. Only then, will the veteran be afforded judicial review of the M21-1 provision and, as detailed above, by that time, hundreds, if not thousands, of other veterans will be on the same path winding their way to the court. This result is sure to swell the court's already growing docket, with no real benefit to any party.

The facts of the underlying case highlight this problem. Mr. Robert Gray filed his claim with VA in 2007. VA updated the M21-1 provision regarding the definition of

"service in the RVN or its inland waterways" in February 2016. *Gray v. McDonald*, 27 Vet. App. 313, 316 (2015); M21-1 Manual, part IV, subpart ii, ch. 1, ¶ H.2.a (2016). Thus, after a decade of appeals for Mr. Gray and three years of adjudication at VA under the updated M21-1 provision, neither Mr. Gray nor similarly-situated veterans have been afforded proper judicial review or clarity, until now.

When this case was before the Federal Circuit in 2017, the court had the opportunity to review the propriety of the M21-1 provision; however, because it held that it could not do so, numerous claims are still pending at the CAVC, many of which are stayed pending the resolution of this case.[21] But for this Court's decision, the Federal Circuit's holding below could lead to a quagmire for the CAVC. Once these stays are lifted, the CAVC will be faced with individual challenges to the same M21-1 provision. If the CAVC's decision in *Overton* is any indication, the court will likely adjudicate each case individually and remand many back to the Board. *Id.*

In *Overton*, the appellant served in Da Nang Harbor and, like Mr. Gray, challenged the M21-1's exclusion of this harbor from its definition of "service in the RVN or its inland waterways." *Id.* at *2, 6-8. Relying on the Federal Circuit's holding that the Board is not bound by the M21-1, the CAVC found that the Board erred in relying on the nonbinding M21-1 provision without conducting any additional analysis. *Id.* at *12-13. The

21. *See, e.g.*, *Bohle v. Wilkie,* Vet. App. 18-1458, *LeBlanc v. Wilkie*, Vet. App. 18-915; *Shafer v. Wilkie*, Vet. App. 17-3318; *Akers v. Wilkie*, Vet. App. 17-2145; *Coleman v. Wilkie*, Vet. App. 17-1335; *Bush v. Wilkie*, Vet. App. 16-3954; *Spiegel v. Wilkie*, Vet. App. 16-2054; *Hudson v. Wilkie*, Vet. App. 15-4455.

CAVC thus remanded the case for the Board to provide an adequate rationale, to include a reasoned explanation for why it found the M21-1 to be an accurate guideline for its decision. *Id.* at *13.

The holdings in *Gray* below, and *Overton*, skirt the question of the propriety of the M21-1 provision at issue. Ultimately, this creates longer delays for ailing and aging veterans and surviving spouses, burdens the Board with readjudicating cases with no assurance of a better outcome for veterans, and unnecessarily adds to the courts' dockets. Thus, the Federal Circuit's holding that it is precluded from preenforcement review of a M21-1 provision yields a series of improper decisions with downstream issues for the courts. As the courts muddle through even more individual cases requiring readjudication of the same issue, so too are veterans adversely impacted, having to wait even longer for a decision and clear guidance as to the applicable rules.

B. The M21-1 is Imperfect.

The Federal Circuit's holding is harmful as it serves to insulate the M21-1, which is often imperfect, from the judiciary for many years. *See also 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).

As detailed above, the M21-1 is binding on the first-level adjudicators and binding in effect on all VA adjudicators. Therefore, where the M21-1 is imperfect, first-level adjudicators must continue to rely on it, and render erroneous decisions. The courts must wait to address such errors until a veteran has applied, been denied, and appealed the case for nearly a decade. Where the M21-1 and the law diverge, the Federal Circuit's holding below has allowed VA adjudicators to follow the M21-1 and ignore the law.

Judge Allen noted this problem in a recent oral argument before the CAVC in *Burton*.[22] *Burton v. Wilkie*, No. 16-2037, 2018 U.S. App. Vet. Claims LEXIS 1314 (Vet. App. September 28, 2018), (*Burton* Oral Argument). In *Burton*, the Court noted that the M21-1 was inconsistent with the holding in *Johnson*, which the Federal Circuit had decided in July 2017, one year prior to the July 2018 oral argument in *Burton*. *Johnson v. Shulkin*, 862 F.3d 1351, 1354-56 (Fed. Cir. 2017); *see Burton* Oral Argument at 28:00. VA conceded that they had not updated the M21-1 to reflect the holding in *Johnson* but argued that a proposed rule to change the M21-1 was pending. *Burton* Oral Argument at 28:10. Judge Allen questioned the Secretary as to why a proposed rule to change the M21-1 was necessary when the Federal Circuit instructed as to the proper interpretation of the law. *Id.* at 29:12. He went on to discuss the gravity of VA's choice to stall, noting that the front line adjudicators rely on the M21-1 to dictate how they adjudicate cases. *Id.* at 31:31.

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

Judge Schoelen also noted that part of the court's "understanding of why the M21-1 is not binding is because it can be changed willy-nilly and, so, if it can be changed willy-nilly, we need some willy-nilly here" to update the M21-1 to reflect the Federal Circuit's holding. *Id.* at 29:47.

The *Burton* case highlights another of the detrimental effects of the Federal Circuit's decision in *Gray*. Namely, because the M21-1 is not subject to preenforcement judicial review, but is binding in effect, VA can use the M21-1 to either reflect changing case law or *resist* it. The choice to resist renders the courts' holdings moot where VA does not timely change the M21-1 or otherwise issue notice of change in practice and procedure in compliance with the law to the first-level adjudicators, who continue to follow the erroneous M21-1, rather than the established law.

C. The Federal Circuit's Holding Upends the Balance between VA and the Judiciary.

The Veterans Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), created the CAVC and bestowed jurisdiction on the Federal Circuit to handle challenges to VA decisions and regulations as a means of checks and balances against the agency. 38 U.S.C. § 502. However, contrary to Congress' intent, the holding below allows VA to avoid preenforcement review of the M21-1, while also potentially insulating the provisions from post-enforcement judicial correction. VA continues to argue before the courts that the M21-1 provisions should be afforded *Auer* deference. *See Auer v. Robbins*, 519 U.S. 452 (1997); *see, e.g., Urban*, 29 Vet. App. at 90 ("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."). Thus, the Secretary can shield its M21-1 provisions from the courts on the front end based on the holding below, and on the back end citing *Auer* deference, effectively insulating the provisions from proper judicial review at all stages of the process.

Under this landscape, there is no effective remedy for the veteran; precluding preenforcement judicial review of the M21-1 will likely also prevent an effective post-enforcement remedy as well. This fact supports the above argument that the Manual is binding in effect.

The Secretary employed this exact strategy in *Overton*. No. 17-0125, 2018 U.S. App. Vet. Claims LEXIS 1251.[23] In *Overton*, the M21-1 provision at issue was the same provision that the Federal Circuit found was not entitled to preenforcement judicial review in *Gray*. *Id*. at *2, 6-8. On appeal to the Court, rather than continuing to argue that the M21-1 provision was not binding, the Secretary pivoted, and argued that the Board was correct to rely on the M21-1 as evidence of the Secretary's interpretation of its own regulation. Oral Argument at 26:21, *Overton*, No. 17-0125. 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:

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

> 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.

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*." *Id.* at 35:40 (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.

Ultimately, in *Overton*, the CAVC did not afford *Auer* deference as the Secretary had implored, in part due to the fact that it was not raised in the briefing and deemed waived, and in part because the lack of rationale in the Board's decision frustrated judicial review as to whether *Auer* could even apply. *Overton*, No. 17-0125 at *15-16.

However, if in a different case, *Auer* is timely raised in briefing and the Board decision states it relied on the Manual as the Secretary's reasonable interpretation of its regulations, the Court might be compelled to accept the Secretary's position. Judicial review in such cases would serve no real point, as the result would be predetermined, because the M21-1 is effectively binding. 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 it 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*, 466 F.3d at 1044. This shifting of goalposts is precisely what the Federal Circuit cautions against in *Hudick*. No. 2017-2234 at *20.

Allowing VA to create its own M21-1 provisions, avoid preenforcement review, bind front line adjudicators to the provisions, and assert *Auer* deference at the court, affords VA rules and practice "splendid isolation" from the courts. Upending the checks and balances system between the agency and the judiciary harms disabled veterans, misguided VA adjudicators, and hardworking courts, and cannot be what Congress intended when it "created a paternalistic veterans' benefits system to care for those who served their country in uniform." *Jaquay*, 304 F.3d at 1280.

These interpretive errors belie the flawed conclusion below.

CONCLUSION

For the foregoing reasons, in addition to those stated in the petition, the Court should reverse the decision below.

Respectfully submitted,

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