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 VETERANS LEGAL SERVICES PROGRAM, AND MILITARY ORDER OF THE PURPLE HEART, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are the National Veterans Legal Services Program (NVLSP) and the Military Order of the Purple Heart, Inc. ("the Order") (collectively, "Amici"). 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 (CAVC) 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 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 amici 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 amici curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The Order is a non-profit veterans service organization formed for the protection and mutual interest of all who have been awarded the Purple Heart. The Order is chartered by the U.S. Congress. *See* 36 U.S.C. § 140501. The Purple Heart is a combat decoration awarded only to those members of the armed forces of the United States wounded by a weapon of war in the hands of the enemy. It is also awarded posthumously to the next of kin in the name of those who are killed in action or die of wounds received in action.

Composed exclusively of Purple Heart recipients, the Order is the only veterans service organization composed strictly of combat veterans. The Order conducts welfare, rehabilitation, and service work for hospitalized and needy veterans and their families. The Order's flagship program is its National Service Program which exists to assist veterans and their families regarding benefits claims. The Order is greatly concerned with the outcome of this case as it directly affects the adjudication of veterans' benefits claims.

INTRODUCTION

In the Veterans' Judicial Review Act, Congress authorized the United States Court of Appeals for the Federal Circuit to review veterans' preenforcement 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 generally applicable interpretive rules promulgated through its M21-1 Adjudication Procedure Manual ("M21-1 Manual" or "Manual"), including the provision at issue in this matter, hereinafter referred to as "the Waterways Provision,"[2] 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 preenforcement challenge of an interpretive rule issued in the M21-1 Manual. Pet. 13a.

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[2] The Waterways Provision is found at Part IV, Subpart ii, Chapter 1, Section H, Topic 2 of the M21-1 Manual.

Amici agree with the Petitioner that the Federal Circuit misinterpreted Sections 552(a)(1) and 552(a)(2) as mutually exclusive, and erroneously held that the interpretive Manual rule at issue here only fell in the latter category. *See* Br. 35-37.

Interpretive rules promulgated in the Manual may lie in both categories, and the two sections are not mutually exclusive. Congress required Federal Register publication of all generally applicable interpretive rules, but only required agencies to make available for public inspection entire agency manuals. But that does not authorize an agency like DVA to evade section 552(a)(1) by issuing a generally applicable rule in a manual. An interpretive Manual provision at issue that falls under section 552(a)(1) is sufficient to authorize preenforcement 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, erroneously arguing that while Section 502 authorizes review of "VA regulations and certain other generally applicable actions," the Waterways Provisions lacked general applicability. Gov't Opp. to Rehr'g 1; *see also* Gov't Opp. to Pet. 26 (internal citation omitted). 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 Petitioner's brief, this erroneous holding must be reversed.

Rather than restate the arguments that are well set forth in the petition, Amici focuses on five points. First, it would be unreasonable to impute to Congress the intent to exclude interpretive rules simply because they are promulgated in the M21-1 Manual. 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 Board of Veterans' Appeals ("BVA" or "the Board"). 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 CAVC 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 preenforcement review of both interpretive and substantive rules, whether embodied in the Manual or not, precisely because large numbers of veterans benefits claims will be improperly denied if case-by-case adjudication is the only mechanism available.

Second, the Federal Circuit erroneously held that it lacked jurisdiction to review interpretive rules that were not binding upon the BVA. The court of appeals placed undue significance on the DVA regulation that, as a general matter, declares Manual provisions to be non-binding on the BVA. Once again, a court must look to the substance of the rule in question. The Board is indisputably bound by "regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." 38 U.S.C. § 7104(c). Although DVA

regulations provide that Manual provisions are generally not binding, 38 C.F.R. § 19.5, some do qualify as an "instruction of the Secretary." *See* 38 U.S.C. § 7104(c). The Waterways Provision, issued by the Secretary himself without any grant of discretion of adjudicators to deviate from that rule, is such an instruction. *See* JA83 (Secretary: "I did not reach this decision lightly," describing the Waterways Provision, and the specific exclusion of Da Nang Harbor).

Third, even assuming *arguendo* that the Waterways Provision is not binding, Amici agree with Petitioner that preenforcement review applies to any agency action within 5 U.S.C. §§ 552(a)(1) and 553, regardless of whether it is binding upon the BVA. *See* Pet. 24. Nothing in 38 U.S.C. § 502 makes judicial review turn on whether a particular interpretive rule or policy statement is binding on the BVA. Furthermore, the practical reality is that the BVA frequently treats the Manual as binding, and relies on it as authoritative with no independent analysis. Additionally, Congress understood that most veterans' claims for benefits do not progress to the BVA, and are decided by the regional offices based on Manual provisions. Rational adjudication of veterans' benefits claims requires this Court to restore the preenforcement judicial review that Congress intended for the welfare of veterans.

Fourth, the Federal Circuit's erroneous interpretation of 38 U.S.C. § 502 and 5 U.S.C. § 552(a)(1) 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. 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) requires Federal Register publication of all substantive and interpretive rules, and additional requirements of notice and comment before a substantive rule is adopted, are vital to the ability of veterans' organizations like NVLSP and the Order 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. Even though the decision specifically concerns interpretive rules, the rationale adopted by the Federal Circuit also stymies essential preenforcement review of agency rules of procedure that are often outcome-determinative.

In sum, if the wrongly decided holding is permitted to stand, veterans will be prevented from obtaining prompt Article III review of unlawful Secretary's Instructions, interpretive and substantive rules, only because the DVA avoided the requirements of notice-and-comment rulemaking and

hid them as M21-1 rules. 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 BVA, then the 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 preenforcement 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 preenforcement judicial review of a purely legal question that is already ripe for our review." Pet. 15a-16a (Dyk, J., dissenting). This Court should restore the statutory scheme Congress intended.

ARGUMENT

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

The start (and for the majority of veterans, most often the end) of a dauntingly complex administrative process begins with determination of a claim by a Ratings Officer (RO) in a Regional Office. 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 Dec. 21, 2018).

The ROs are tasked with simply reviewing the veterans' 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 v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 310-11 (1985), 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 Dec. 21, 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 . . . .

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> 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, the M21-1 Manual binds the ROs. *See* Pet. 5a.

Because the DVA Manuals are binding on its ROs, the M21-1's language narrowly defining "inland waterways" in the Waterways Provision effectively forecloses Navy veterans who served in ports, harbors, bays and open waters from receiving benefits as a result of their service-connected illnesses.

Moreover, the RO's decision is the final one for most veterans. The vast majority of veterans—roughly 96%—do not pursue their claims beyond their applications to the ROs. Pet. 24a-25a (Dky, J., dissenting). Even if a veteran chooses to pursue his or her claims beyond his or her claim application, he or she faces a process that is considered 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 veteran who disagrees with the ratings decision has the right to an administrative appeal to the BVA. By regulation, the Board is not bound by the M21-1 Manual, unless it is an instruction of the Secretary. *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.

Thus, the reality is that for the average veteran, the Manual encompasses the beginning and end of their review. Congress understood that prompt preenforcement judicial review of Manual provisions, usually engineered by veterans' rights organizations, is plainly necessary. Otherwise, unlawful Manual provisions would apply to the 96% of veterans who do not seek appellate review.

II. The Waterways Provision still has a binding effect, regardless of its publication via the M21-1 Manual.

The Federal Circuit erroneously held that it did not have jurisdiction to review a preenforcement

challenge because the Waterways Provision was "contained within an administrative staff manual," and not published in the Federal Register. Pet. 11a-12a. The Federal Circuit placed specific emphasis on the provision that the Board remains "bound only by 'regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department'"—and not the M21-1 Manual. 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 (quoting 38 U.S.C. § 7104(c)).

As an initial matter, nothing in section 502 makes judicial review turn on whether a policy statement or interpretive rule is binding; it simply provides that "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review." 38 U.S.C. § 502. Indeed, interpretive rules and policy actions are generally considered to be "non-binding action[s]." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). But even if *arguendo* judicial review were limited to a subset of "binding" policy statements and interpretive rules, that would still require review of the Waterways Provision. Regardless of the method of publication used, the DVA has repeatedly argued, and the BVA has held on numerous occasions, that certain Manual provision are nonetheless binding on the BVA. Moreover, the Waterways Provision is an "instruction of the Secretary," which is binding on the BVA, and thus reviewable. *See* 38 U.S.C. § 7104.

1. Congress intended judicial review of all generally applicable interpretive and substantive rules and policy statements of the Secretary.

By virtue of 38 USC § 502, Congress authorized judicial review of "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" issued by the Secretary. 5 U.S.C. § 552(a)(1)(D) (emphasis added). The key distinction is whether the policy statement or interpretive rule is "generally applicable." *Compare* § 552(a)(2) (providing for public inspection but not Federal Register publication of other agency policy statements and rules).

The accepted definition of "interpretative rules" is "rules or statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers...." TOM C. CLARK, ATTORNEY GENERAL, ATTORNEY GENERAL'S MANUAL ON THE ADMINISTRATIVE PROCEDURE ACT, at 30 n.3 (1947), http://www.law.fsu.edu/library/admin/1947iii.html. The accepted definition of "general statements of policy" is "statements issued by an agency to advise the public prospectively of the manner in which the agency proposes to exercise a discretionary power." *Id.* Agency documents of "general applicability" are those "relevant or applicable to the general public, the members of a class, or the persons of a locality, as distinguished from named individuals and

organizations." 2 Fed. Reg. 2450, 2451-52 (Nov. 12, 1937).

Neither definition requires that the rule be binding either internally or externally. Moreover, a policy statement or interpretive rule of general applicability need not apply to *all veterans*; it just needs to be applicable to a class of persons, rather than specifically named persons. *See* H.R. Rep. No. 79-1980 (Comm. Amendment), *reprinted in Legislative History of the Administrative Procedure Act* 283 & n.1 (1946) (defining a Rule subject to the APA as one that is not targeted to "named persons"); *see also* 60 Stat. at 238 (similarly defining FOIA as applying to rules not addressed to "named persons").

To determine whether a rule is one of "general applicability," a Court should employ a straightforward statutory analysis analyzing the rule under this ordinary meaning of "general applicability." *See, e.g.*, *Star Athletica L.L.C. v. Varsity Brands, Inc.*, 137 S.Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the [statutory] text, giving each word its 'ordinary, contemporary, common meaning.'") (citation omitted). Under this analysis, there is no question that the Waterways Provision is a statement of general policy or an interpretative rule. The Waterways Provision defines the class of eligible veterans (i.e., all veterans who served in the Republic of Vietnam) and is not directed to a delimited set of named persons.[3]

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[3] Amici note that certain courts of appeals have ignored a straightforward statutory analysis and instead invented a conjunctive, two-prong test under which an interpretation is de facto deemed "generally applicable," unless it (1)

It is irrelevant to judicial review whether a generally applicable policy statement or interpretive rule happens to be published in a Manual. Congress required the entirety of agency manuals to be available for public inspection, 552(a)(2)(C). But that requirement does not qualify the requirement of 552(a)(1)(D) that any interpretative rule or policy statement of general applicability by the Secretary be subject to judicial review. The Secretary cannot escape judicial review by violating the APA and publishing a statement only in the M-21 Manual and not in the Federal Register.

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expresses "only a clarification or explanation of existing laws or regulations, and (2) results in "no significant impact upon any segment of the public." *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (internal citation omitted); *accord Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988); *D&W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *Kahn v. United States*, 753 F.2d 1208, 1222 n.8 (3d Cir. 1985). Even under this test, the Waterways Provision remains a rule of "general applicability." First, the Waterways Provision adopted a novel interpretation of the definition of "inland waterways" entirely distinct from prior DVA guidance. Second, it cannot be disputed that the Waterways Provision has a "significant impact" on tens of thousands of veterans. Pet. App. 10a (VA "concedes that the impact of its manual changes is both real and far reaching"). The NVLSP alone is representing before the CAVC approximately eighteen veterans affected by the Waterways Provision. Thus, under either test, the Waterways Provision is a rule of "general applicability."

2. The DVA has repeatedly argued, and the BVA has consistently found, that certain rules published in the M21-1 are binding on the BVA.

Even if a manual provision is judicially reviewable only if binding, this Court should find that Waterways Provision qualifies. Just as the Government has taken inconsistent positions on the scope of section 502 review, *see* Pet. 25-26, it has also been inconsistent in its position on whether the M21-1 Manual binds the BVA. Even though DVA 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* Br. 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.).[4]

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[4] In 1988, effective in 1989, Congress changed the title of the head of Veterans Administration from the Administrator to the Secretary of the Department of Veterans Affairs. Department of Veterans Affairs Act, PL

In fact, the BVA has consistently recognized that the Manual contains binding evidentiary development procedures.[5] "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). 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." *Redacted*, Vet. App. Dkt No. 09-37-995, at *11-12 (Jan. 29, 2015) (emphasis added).[6]

100–527 (HR 3471), PL 100–527, October 25, 1988, 102 Stat 2635.

[5] *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. Gober*, 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).

[6] *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

Further, 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*.[7] In a recent case, the CAVC criticized the DVA for, on the one

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

[7] *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 1006 (Fed. Cir. 2017) (No. 16-1932), 2016 WL 6883024.

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).[8] 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 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

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

> 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 binding on the BVA.

Thus, there are multiple examples of rules published in the M21-1, which the DVA has argued or the BVA has found, are nonetheless binding. For the Federal Circuit to now hold otherwise does nothing but incentivize the DVA to bury rules in the M21-1 that it does not want subjected to notice-and-comment rulemaking and preenforcement review; even as the DVA intends for the rules to be uniformly applied by the BVA.

3. The Waterways Provision is a binding Instruction of the Secretary.

Regardless of the binding nature of the entire M21-1, the Waterways Provision is plainly an "instruction of the Secretary" within the meaning of 38 U.S.C. § 7104(c) and is therefore binding on the Board. A brief history of the Waterways Provision proves instructive. 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. Pet. 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 Secretary 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 process for a denial of benefits all over again, Gray moved for preenforcement judicial review of the Manual.

This rule change was at the explicit instruction of the Secretary. The Secretary explained his decision in a letter to Senator Blumenthal (who wrote with

concern about the exclusion of veterans who served in Da Nang Harbor):

> As a result of the Court of Appeals for Veterans' Claims remand in *Gray v. McDonald*, VA has re-evaluated and clarified its policy concerning these inland waterways where we will presume exposure to herbicides. That policy is as follows: Inland waterways are fresh water rivers, streams, canals, and similar waterways…Specifically excluded are all other coastal water features, particularly bays and harbors, including Da Nang Harbor. As we have long done, VA will continue to extend a presumption of exposure to Agent Orange to any Veteran who went ashore.
>
> **I did not reach this decision lightly.** I take very seriously our solemn obligation to fulfill President Lincoln's promise "*To care for him who shall have borne the battle, and for his widow, and his orphan*," but I must also consider the current state of the pertinent science when considering creation or expansion of presumptions.

JA83 (emphasis added).

The BVA is bound by this "instruction of the Secretary." 38 U.S.C. § 7104(c); *see generally* Veterans' Benefits Act of 1957, Pub. L. No. 85-56, Title XIII, § 1304, 71 Stat. 83, 128. As a general matter, any instruction to claims adjudicators by the Secretary (or under his delegated authority) that defines a rule that affords the adjudicator no discretion to depart is a binding instruction of the Secretary, and judicially reviewable even under the Federal Circuit's test. Here, the Secretary *himself* has taken personal responsibility for the rule; thus, his own words define this as an Instruction of the

Secretary, specifically with respect to Da Nang Harbor veterans. *Id.* ("I did not reach this decision lightly.").[9]

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In conclusion, a finding that all rules published in the M21-1 are not binding on the BVA stands in conflict with the DVA's own positions on the *Auer* deference that should be afforded to interpretive rules, and the binding nature of the Agency's rules of procedure. Notably, 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 preenforcement review of such rules, 38

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[9] Amici note that the Office of General Counsel of the Department of Veterans Affairs has previously released a guidance that the M21-1 provisions may not be binding instructions of the Secretary. Vet. Aff. Op. Gen. Couns. Prec. 07-92, https://www.va.gov/ogc/docs/1992/PREC_07-92.doc ("[W]e conclude that the provisions of M21-1 do not constitute "instructions of the Secretary" within the meaning of 38 U.S.C. § 7104(c)."). However, the question of whether a directive is an "instruction of the Secretary" depends upon its practical and substantive effect, and the DVA's opinion that the *format* of the instruction (issuance as a manual provision) exempts it from the statute is untenable. Moreover, at a minimum, that opinion did not contemplate a situation in which the Secretary had publicly confirmed that he had personally issued the rule, and considered it binding. The situation here clarifies that publication of a rule in the M21-1 alone does not end the inquiry into whether it is a binding rule.

U.S.C. § 502. Under the Federal Circuit's decision when the DVA issues such procedural rules in the form of M21-1 revisions, such rules—which are often outcome-determinative for a given veteran—are improperly insulated from preenforcement review. In some instances, the procedures are pro-veteran, but that does not diminish the importance of preenforcement 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 preenforcement judicial review, but the decision below prevents that.

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

Even assuming *arguendo* that the Waterways Provision is not an Instruction of the Secretary and 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 preenforcement review. To the extent this Court were to limit the scope of judicial review, it should not curtail review of provisions like the Waterways Provision that are binding in practical effect.

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 and the Order's experience) is by practice and disposition unlikely to question the validity of a Manual provision.

***

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 preenforcement review that is the only practical means for veterans' rights organizations to challenge wayward or unlawful rules before they harm veterans. Denying preenforcement 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.

IV. 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 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 preenforcement 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 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 preenforcement 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. *See supra* § II. 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.

The Waterways Provision is only one of many examples of 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. Under that provision, 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). 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 preenforcement 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 preenforcement judicial review to challenge such rules adversely affects their right to the administrative process.

CONCLUSION

For all the foregoing reasons, this Court should reverse the judgment of the Federal Circuit and interpret the judicial review provisions in line with congressional intent. 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,

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DECEMBER 21, 2018

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

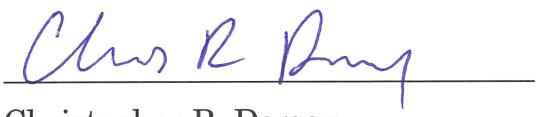
BRIEF OF AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM, AND MILITARY ORDER OF THE PURPLE HEART, INC. IN SUPPORT OF PETITIONER

CERTIFICATE OF COMPLIANCE

As required by Supreme Court Rule 33.1(h), I certify that the document contains 8,750 words, excluding the parts of the document that are exempted by Supreme Court Rule 33.1(d).

I declare under penalty of perjury that the foregoing is true and correct.

Executed on December 21, 2018.



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No. 17-1679

ROBERT H. GRAY,

Petitioner,

v.

PETER O'ROURKE, ACTING SECRETARY OF VETERANS AFFAIRS,

Respondent.

AFFIDAVIT OF SERVICE

I HEREBY CERTIFY that on December 21, 2018, three (3) copies of the BRIEF OF AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM, AND MILITARY ORDER OF THE PURPLE HEART, INC. IN SUPPORT OF PETITIONER in the above-captioned case were served, as required by U.S. Supreme Court Rule 29.5(c), on the following:

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Sworn to and subscribed before me this 21st day of December 2018.

CHRISTOPHER R. DORSEY
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My commission expires July 31, 2018.