No. 17-1679

IN THE

Supreme Court of the United States

ROBERT H. GRAY, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF THE AMICUS CURIAE

Blue Water Navy Vietnam Veterans Association, Inc., (BWNVVA) is a non-profit corporation organized under the laws of Colorado who has been granted tax exempt status under § 501c(3) of the Internal Revenue Code. BWNVVA's purpose is to promote public awareness of Blue Water Navy Vietnam Veteran issues and to obtain the presumption of exposure to Agent Orange for members of the Armed Forces of the United States who served afloat off the coast of the Republic of Vietnam during the Vietnam War. BWNVVA members include both those who have been denied benefits despite their exposure to Agent Orange as well as the survivors of those who were denied benefits and later died from complications of Agent Orange. BWNVVA has advocated for legislation in Congress to correct the VA intransigence on this matter. Accordingly, BWNVVA has a clear interest in this matter, however does not have a stake in either party.[1]

INTRODUCTION

Since 2002, the VA has refused to grant the presumption of exposure to "Blue Water Navy"

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. All parties have provided written consent to the filing of this brief. A copy of written consent from the Petitioner and the Respondent was provided to the Clerk upon filing.

veterans who served in bays, harbors and the territorial seas of the Republic of Vietnam.[2]

In a 2-1 decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) the court below applied *Chevron*[3] deference to overturn the Court of Appeals for Veterans Claims decision[4] to overturn the denial of the presumption of exposure to those who served off the coastline. On rehearing, the *Haas* Court noted that they did not apply the pro-veteran canon of construction required by *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct.1197 (2011). *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir 2008). Additionally, *Haas* only addressed areas off the coast and did not include the bays and harbors of the Republic of Vietnam.

In *Gray v. McDonald*, 27 Vet.App. 313 (2015), the Court of Appeals for Veterans Claims distinguished *Haas* by noting that the veteran served in Da Nang Harbor, while Commander Haas did not enter any harbor. The *Gray* court found that since the bays and harbors were outside the scope of *Haas*, they were free to review the VA policy. Noting that the rivers, which are awarded the presumption of exposure under the VA policy, discharge into the bays and harbors, the *Gray* court confirmed that river water would mix with

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[2] Previously the crews of ships operating within the Vietnam Service Medal demarcation area, approximately 100 nautical miles from shore, were granted the presumption.

[3] The *Chevron* Court found that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

[4] *Haas v. Nicholson* 20 Vet.App. 257 (Vet.App. 2006).

the saltwater brought in via tidal surge from the South China Sea. As the rivers were heavily sprayed with Agent Orange their discharge "plume" would carry the herbicide and petroleum mix for some distance into the harbors, bays and the South China Sea.

The *Gray* court determined that the exclusion of Da Nang Harbor from the "inland waterways" category did not comply with the intent of the underlying statute and regulation. *Gray*, 27 Vet. App. at 324-26. The Veterans Court went on to explain that the intent of the statute and regulation was "providing compensation to veterans based on the likelihood of [their] exposure to herbicides." *Id.* at 322.

The *Gray* Court declined to rewrite the regulation but invited the VA to reevaluate its definition of inland waterways---particularly as it applies to Da Nang Harbor. *Id.* at 327. The Secretary did not appeal *Gray* and the decision became final. *Gray* remains good law. *Overton v. Wilkie*, 30 Vet. App. 257, 264 (2018)

Instead of complying with the mandate of the *Gray* court, the Secretary "doubled down" on his irrational policy and on February 6, 2016 issued a change to his M21-1 Manual which continued to use depth and ease of entry, rather than the probability of exposure, as the criteria for inclusion in their definition of "inland waterways." The new regulation actually tightens the definition, removing "Qui Nhon Bay Harbor" and "Ganh Rai Bay" from the inland waters list. No reason was provided.

Amicus filed a timely petition for judicial review under 38 U.S.C. § 502. The court below dismissed that petition along with the companion case of *Gray v. Secretary of Veterans Affairs*, in a 2-1 decision, over a strong dissent by Judge Dyk. *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017).

The court below reasoned that the M21-1 Manual was an interpretive rather than a substantive regulation and did not meet the threshold criteria of 38 U.S.C. § 502. This criteria required that the regulation be issued pursuant to the rulemaking provisions of 5 U.S.C. § 553 or 5 U.S.C. § 552(a)(1). Instead the court below found that the regulation was issued under 5 U.S.C. § 552(a)(2).

A petition for reconsideration *en banc* was denied 7-3.

SUMMARY OF THE ARGUMENT

Considering the well settled presumption in favor of judicial review it seems odd indeed to preclude veterans from obtaining a review of arbitrary and capricious administrative decisions. The decision of the court below has deprived veterans, and only veterans, of their right to seek their day in court to challenge the actions of the Secretary of Veterans Affairs when he promulgates regulations via his M21-1 Adjudication Manual. This allows the Secretary to circumvent the Congressionally mandated user friendly process to obtain veterans' benefits.

Congress and this Court have historically required a neutral pathway for review of governmental

decisions. Judicial review supports the Constitutional separation of powers doctrine by providing checks and balances on the otherwise unchecked powers of the Executive.

Since World War II, the United States has promoted a special relationship with its veterans. In enacting the Veteran's Judicial Review Act and Veterans' Benefits Improvement Act of 1988, the legislative history noted that Congress designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between .R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95 (emphasis added).

Here, the court below has taken an inelastic and rigid approach to judicial review of the Secretary's decisions. Ignoring settled principles of administrative law, and the pro-veteran canon of construction, the court below has created a separate class of citizens, military veterans, who must accept the dictates of the federal bureaucracy without recourse. This not only strips veterans of meaningful review, but creates conflicts with other Circuits. This Court's should restore judicial review of VA decisions and resolve the conflict between the Federal Circuit and the United States Court of Appeals for the District of Columbia Circuit. In *Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016). The D.C. Circuit specially found that review of the M-21-1

Adjudication Manual and other VA actions were reviewable by the Federal Circuit in 38 U.S.C. § 502.

ARGUMENT

I. VA HAS USED THE M21-1 ADJUDICATION MANUAL AS A MEANS TO PROMULGATE BINDING REGULATIONS OF GENERAL APPLICABILITY INSULATED FROM JUDICIAL REVIEW OF ARBITRARY AND CAPRICIOUS ACTIONS

A. The Action of the Court Below Effectively Denies Judicial Review of the Secretary's Decisions.

Barred from review in the federal district court by the Veterans Judicial Reform Act and *Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016), veterans are left powerless to challenge irrational, arbitrary and capricious actions by the VA without wading through the cumbersome and elongated appeals system.

The actions of the court below go further than the divesture of 90,000 Blue Water Navy veterans from judicial review under the Administrative Procedures Act, and may even survive the current controversy.[5] They allow the Secretary of Veterans Affairs to bypass judicial review in all cases involving benefits by merely issuing regulatory changes via their M21-1 Manual.

[5] Congress is considering but has not adopted a bill to extend the presumptions of exposure. Although the bill passed the House of Representatives 382-0, strong opposition by the VA has resulted in multiple holds on the bill in the Senate. The bill is not expected to pass.

Since APA review of the actions of the Secretary of Veterans Affairs originate in the court below, this Court represents the only supervisory body on matters dealing with 38 U.S.C. § 502 actions.

Chief Justice John Marshall's historic opinion in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) addressed a fundamental question of remedies as follows:

> If [a party] has a right, and that right has been violated, do the laws of his country afford him a remedy?
>
> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

5 U.S. (1 Cr.) at 162-63.

The court below conceded that the impact of the VA action was both real and far reaching. Despite this finding, they declined to recognize a remedy to challenge that action. *Gray, supra.*, 875 F.3d at 1107-08.

Here the court below has carved a loophole in the judicial review provisions of the Administrative Procedures Act that allows the agency to promulgate rules that are binding on agency employees without the possibility of judicial review.

Without judicial review under the Administrative Procedures Act, a court will not have jurisdiction over the Secretary's M21-1 regulations until an appeal is ripe for review. The court below noted that, in the instant case, the deteriorating health needs of the veterans made resolution critical. *Gray*, 875 F.3d at 1109. They also conceded that these veterans are now forced to undergo the years-long process for individual applications and rulemaking petitions. *Id.* As Petitioner noted in his opening brief, It "takes over *five and a half years* on average" for an individual benefits case to be resolved by the Board, and then nearly an *additional* year for it to be fully adjudicated by the Veterans Court. *Martin v. O'Rourke*, 891 F.3d 1338, 1350-51 (Fed. Cir. 2018) (Moore, J., concurring); U.S. Court of Appeals for Veterans Claims, *Annual Report: Fiscal Year 2017*, at 3 (2017). *See Gray* Merits brief at 6.

While individual cases affecting veterans are coming through the appellate pipeline, these cases have been pending for years. Veterans now complaining of injuries due to toxic exposure has the better part of a decade of waiting ahead of them. This type of delay is unacceptable in a supposedly non-adversarial pro-veteran adjudication system. Intervention by this Court is necessary to help streamline the process by recognizing pre-enforcement judicial review of arbitrary and capricious rules

Not only the Blue Water Navy veterans, but millions of other veterans are having their medical and compensation benefits stymied by agency use of interpretive manuals to promulgate regulations. Although not binding on the Board of Veterans

Appeals, *Id.* at 1108, there is no evidence to show the Board is willing to ignore interpretive manuals such as the M-21-1 Manual. At a minimum, these manuals are considered persuasive authority. In addition, the M21-1 Manual is binding on Veterans Benefits Administration employees.

This Court has repeatedly ruled that the APA creates a presumption favoring judicial review of administrative action," *Sackett v. E.P.A.*, 588 U.S. 120, 128-29, 132 S. Ct. 1367, 1373 (2012). This presumption can only be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "'fairly discernible' in the detail of the legislative scheme." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 673, 106 S. Ct. 2133, 2137 (1986).

It is well settled that the APA's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51, 75 S.Ct. 591, 594 (1955). While the preclusion of judicial review may be inferred from the statutory purpose, this can only be done upon a showing of "'clear and convincing evidence' of a contrary legislative intent." *Barlow v. Collins* 397 U.S. 159, 167, 90 S.Ct. 832, 838 (1970). No such clear and convincing evidence was presented to the court below and none was cited in the opinion.

What the court below has done is recognize an agency created loophole for a class of citizens, in this case veterans, that decisively pokes holes in their Congressionally mandated judicial review safety net. Contrary to *Marbury* the veterans are left without a

real remedy to resolve the arbitrary and capricious actions of the Secretary. This contrasts with the pro-veteran, non-adversarial envisioned by Congress. Judicial review is required to ensure that the veterans do not fall prey to the irrational actions of the bureaucracy.

B. The Court Below Erred in Finding That the Secretary's Regulation Did Not Come Within the Scope of 38 U.S.C. § 502.

The gravamen of the holding in the court below was that they lacked jurisdiction because the regulation in question was promulgated via the interpretive M21-1 Manual rather than through the substantive notice and comment procedures of 5 U.S.C. § 553. *Gray*, 875 F.3d at 1111. The Court further found that the M21-1 Manual was an administrative staff manual that fell under the provisions of 5 U.S.C. § 552(a)(2) for which there was no jurisdiction.[6] *Id* at 1108.

While the case below was pending, a separate panel of the court below decided *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) ("*DAV*"), which also held that the court had no jurisdiction to review regulations promulgated by the Secretary via the M21-1 Manual.

In his dissent Judge Dyk wisely analyzed the *DAV* decision and properly concluded that it was wrongly decided. Like the case below, *DAV* held that because the M21-1 Manual is an interpretive rather than a

[6] 38 U.S.C. § 502 grants jurisdiction for rulemaking brought under 5 U.S.C. § 553 and 5 U.S.C. § 552(a).

substantive regulation, it did not trigger jurisdiction under 38 U.S.C. § 502. The court below decided that DAV compelled the same result in the instant case. *Gray*, 875 F.3d at 1108.

To a large extent, the jurisdictional question turns on how to classify the VA's Manual under 5 U.S.C. § 552(a)(1) and/or 5 U.S.C. § 552(a)(2). The latter provision provides in pertinent part:

> Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—
> . . . .
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and]
> (C) administrative staff manuals and instructions to staff that affect a member of the public;

As they did in *DAV* decision the court below held that the M21-1 Manual was an administrative staff manual. Judge Dyk correctly pointed out that this holding, as with the holding in *DAV*, was incorrect because it conflicted with the precedent of other Circuits and the previous precedent of the Federal Circuit.

In contrast to the majority opinion, the veterans and Judge Dyk argued that the Manual fell within the scope of 5 U.S.C. § 552(a)(1)(D) as "statements of general policy or interpretations of general applicability formulated and adopted by the agency." *Gray*, 875 F.3d at 1111. In his excellent analysis, Judge Dyk notes that

the majority opinion and the reasoning of *DAV* were erroneous and established a "substantial and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain pre-enforcement judicial review of a purely legal question that is already ripe for our review." Gray, 875 F.3d at 1110 (Dyk, J dissenting).

The M21-1Manual is binding on Veterans Benefits Authority personnel. Although not strictly binding on the Board of Veterans Appeals, it constitutes strong persuasive authority and is often relied upon or cited by the Board. *Morton v. West*, 13 Vet. App. 205 (1999) ([Board of Veterans' Appeals (Board or BVA)] cannot ignore provisions of the Manual M21–1). More importantly, the M21-1 Manual is binding on virtually every claim for benefits filed at the VA. Adjudicators making the initial benefit determination must follow this manual. *Carter v. Cleland*, 643 F.2d 1, 5 (D.C. Cir. 1980). Judge Dyk noted that 96% of the cases decided by VA employees were bound by the manual.

The propriety of this type of interpretive regulation has historically been considered reviewable by other Circuits, even if not subject to the notice and comment requirements of 5 U.S.C. § 553. Judge Dyk's dissent illustrated this trend when he referred to *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000) which dealt with review of EPA guidance issued, without notice and comment, under the Clean Air Act. Other EPA regulations as well as the interpretive guidance of other regulations have been found to be reviewable. *Nat. Res. Def. Council v. Envtl. Prot. Agency*, 643 F.3d

311, 320 (D.C. Cir. 2011), *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 163-65 (D.C. Cir. 1997); *W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983) (en banc), *Linoz v. Heckler*, 800 F.2d 871, 878 n.11 (9th Cir. 1986).

Within the Federal Circuit, pre-*DAV* jurisprudence also allowed judicial review of interpretive manuals and even a general counsel's opinion. *Snyder v. Secretary of Veterans Affairs*, 858 F.3d 1410, 1413 (Fed. Cir. 2017). The same holds true for a letter addressing the procedures for benefit awards, because, as in this case, it affected substantive as well as procedural rights. Military Order of the Purple Heart supra., 580 F.3d at 1296 (Fed. Cir. 2009). *See, also*, *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991). *Gray*, 875 F.3d at 1115. (Dyk, J dissenting).

Here the Manual is more than a procedural handbook, it has a clear and potentially devastating impact upon the rights of veterans to obtain benefits during the early days of the disability. Delays in service connection leads to delays in medical treatment which is often fatal. Not only is this Court's intervention necessary to resolve the conflict between Circuits, it also represents and important question of the law which should be adjudicated by this Court. Settling this question could save the lives of countless veterans.

In another agency, this regulation would have been published in the Federal Register. The regulation is a statement of the general course and method by which its functions are channeled and determined, constitutes a rule of procedure and is an interpretation

of general applicability formulated and adopted by the agency. The Manual is also a policy statement that "explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permit indiscretion under some extant statute or rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C.Cir. 2014). It serves to "appris[e] the regulated community of the agency's intentions as well as informing the exercise of discretion by agents and officers in the field." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir.1987); *Ass'n of Flight Attendants CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). Thus it should be subject to review under the APA.

As Judge Dyk's dissent pointed out, the language of 38 U.S.C. § 502 did not require any restrictions on judicial review of VA action. *Gray*, 875 F.3d at 1112. The dissent reiterated the "well-settled presumption that agency actions are reviewable," unless Congress clearly precludes such review. *Gray*, 875 at 1112. As discussed *supra*., this Court has concurred in that view.

It is well settled that "the starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring). See, also *Rubin v. United States*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). The accepted definition of "general" can be summarized in pertinent part by the *Merriam-Webster Dictionary*:

1: involving, applicable to, or affecting the whole
2: involving, relating to, or applicable to every member of a class, kind, or group
3: not confined by specialization or careful limitation
4: belonging to the common nature of a group of like individuals
5: applicable to or characteristic of the majority of individuals involved

https://www.merriam-webster.com/dictionary/general

With 96% of the cases being decided, at least initially, in accordance with the M-21 Manual, the plain meaning of the word "general" encompasses the manual.

The inquiry does not end here, however. In addition to the "plain meaning" rule, another canon of statutory construction is relevant. While 5 U.S.C. § 552 is not normally considered a veteran's statute, it was incorporated into veteran's law by 38 U.S.C. § 502 and should be construed pursuant to the pro-claimant canon of construction.

The pro-claimant or pro-veteran canon has been repeatedly recognized as an accepted canon of statutory construction. This Court unanimously re-affirmed "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). *See, also*, Pet. At 3. *See, also*, *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id.* at 1316.

Since the days of World War II, the United States, has properly recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Military veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). The United States adopted the "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). This led to the pro-claimant canon which requires interpretative ambiguities to be resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Accordingly, even if there was some ambiguity to the word "general," that ambiguity must be resolved in favor of the veteran. This is especially important given the government's reliance upon Judge Taranto's concurrence in the court below that § 552(a)(1) and § 552(a)(2) are not mutually exclusive. See Pet. App. 32a-33a (Taranto, J., concurring in the denial of rehearing en banc) Assuming Judge Taranto is correct,[7] then

[7] Mr. Gray, in his merits brief, included an excellent discussion of the government's shifting arguments on the issue of mutual exclusivity. Amicus concurs and adopts their analysis. It is obvious that the VA was able to confuse the court below with their ever changing approach to a doctrine they embrace only when it benefits their anti-veteran position.

there is absolutely no reason why the M21-1 Manual could not be found to be within the scope of both subsections. While the government has conceded that "the criteria that Section 552(a)(1) and (2) establish overlap." they have not explained why the manual does not fall squarely within that overlap.

Accordingly, the majority and better view is that the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review the M21-1 Manual in the instant and similar cases. Judge Dyk's analysis is the correct one and petitioner Blue Water Navy Vietnam Veterans Association prays that this Court resolve the Circuit conflict and this important point of law by reversing the court below.

C. The Decision in the Court Below Creates a Conflict with the Court of Appeals for the District of Columbia Circuit Case of *Blue Water Navy VietnamVeterans Association, Inc. and Military-Veterans Advocacy, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016)

The "mutually exclusive" issue discussed *supra*, is not the only case of the government shifting arguments to support an untenable position. In *Blue Water*, the Secretary argued successfully that the Veteran's Judicial Reform Act vests Administrative Procedures Act jurisdiction over the Secretary's actions solely in the Court of Appeals for the Federal Circuit. *Blue Water Navy Vietnam Veterans Ass'n*, *supra*, 830 F.3d at 577.

The Court of Appeals for the District of Columbia reasoned as follows:

> Appellants [BWNVVA] say that this direct-review exception extends only to VA regulations and not to "interpretations" like the agency actions they challenge. But Federal Circuit case law makes clear that an agency policy need not be promulgated as a regulation, via notice and comment, to be reviewable under section 502. To the contrary, the Federal Circuit has explained that section 502 permits it to directly review a wide range of "rules promulgated by the Department of Veteran[s] Affairs, including substantive rules of general applicability, statements of general policy and interpretations of general applicability." *LeFevre*, 66 F.3d [1191]at 1196 [Fed. Cir. 1995]; *see also Military Order of the Purple Heart of the USA v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1296 (Fed.Cir.2009) (holding that the VA's procedural change, adopted in a letter and not via notice-and-comment rulemaking, was a "rule" subject to review under section 502).

Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald, 830 F.3d at 577.

In *Blue Water*, the Secretary argued as follows:

> [V]eterans may bring an APA action challenging the policy directly in the Federal Circuit. Given these alternative avenues for judicial review, even if the VJRA did not expressly preclude review of Blue Water's claims, Blue Water would have an adequate remedy in a court that would render a cause of action under the APA unavailable.

Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald, Brief for Defendant-Appellee., 2015 WL 7777567 (C.A.D.C.), 10-11.

The Secretary went on to argue:

> The policy that Blue Water purports to challenge constitutes an interpretation[] of general applicability.

Id. at 22.

In *Blue Water*, *supra*., the Secretary argued that the M21-1 Manual provisions at issue here would be reviewable under Section 502. *Blue Water Navy Vietnam Veterans Ass'n*, *supra*, 830 F.3d at 577. Here the Secretary argued that the policy delineated by the M21-1 Manual was an interpretation of general applicability. *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, Brief for Defendant-Appellee., 2015 WL 7777567 (C.A.D.C.), at 22. The Secretary had specifically argued that a remedy to challenge the policy existed in the Federal Circuit. *Id*, at 10-11.

In *Blue Water*, the DC Circuit specifically found that they did not have to grant relief because a remedy actually existed in the Federal Circuit. The DC Circuit obviously believed that such a remedy existed and that the veterans objections fell within the "wide range of rules promulgated by the Department of Veterans Affairs." *Blue Water*, 830 F.3d at 577.

In an implicit recognition of *Blue Water*, the court below did not invite the veterans to return to the federal district court, or transfer the matter to the

federal district court. Instead they merely confirmed the absence of a remedy for the veterans without explaining why the presumption of judicial review did not apply. This is a "Catch 22" with a vengeance.

The question remains whether the VA's exclusion policy via interpretative regulations are interpretations of general applicability within the scope of 5 U.S.C. § 552(a)(1). The District of Columbia Circuit says yes, the Federal Circuit says no.

CONCLUSION

Amicus prays that the Court finds that VA's M21-1 Manual amendments should be subject to judicial review under 38 U.S.C. § 502 at least because they represent a revision under 5 U.S.C. § 552(a)(1)(E) of a prior VA "interpretation of general applicability.

Respectfully Submitted,

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