No. 17-1679

In the Supreme Court of the United States

ROBERT H. GRAY, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT

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QUESTION PRESENTED

Whether the pre-enforcement review provision of the Veterans' Judicial Review Act, 38 U.S.C. 502, authorizes direct review in the Federal Circuit of particular revisions to Part IV, Subpart ii, Chapter 1, Section H, Topic 2 of the Department of Veterans Affairs' Adjudication Manual—an interpretive provision that does not bind the agency's adjudication of any veteran's claim for disability compensation benefits.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 875 F.3d 1102.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. A petition for rehearing was denied on March 21, 2018 (Pet. App. 29a-37a). The petition for a writ of certiorari was filed on June 19, 2018, and was granted on November 2, 2018. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Pertinent statutory and regulatory provisions are reproduced in the appendix to this brief. App., *infra*, 1a-17a.[1]

[1] Unless otherwise noted, all statutory citations in this brief are to the current version of the United States Code.

STATEMENT

1. Veterans who served our Nation are entitled to compensation for disabilities arising from their service. 38 U.S.C. 1110, 1131; see *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011). A veteran applying for disability benefits usually must establish that his disability is "'service-connected,'" meaning that it was "incurred or aggravated" in the "line of duty." 38 U.S.C. 101(16); see 38 U.S.C. 5107(a). With respect to certain disabilities, however, Congress has determined that demonstrating a connection to service in individual cases is overly burdensome. In those circumstances, Congress has obviated the need for individualized proof of service-connection by providing that veterans who served in particular places at particular times and develop particular disabilities are presumptively entitled to benefits. See 38 U.S.C. 1112, 1116-1118.

As relevant here, veterans who "served in the Republic of Vietnam" during the period when the United States used the herbicide Agent Orange (January 9, 1962 to May 7, 1975), and who develop specified diseases associated with exposure to Agent Orange, are presumptively entitled to disability benefits. 38 U.S.C. 1116(a)(1)(A); see Agent Orange Act of 1991 (Agent Orange Act), Pub. L. No. 102-4, 105 Stat. 11; see also *Haas* v. *Peake*, 525 F.3d 1168, 1171-1172 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009) (elaborating the history and health effects of Agent Orange). A veteran who does not qualify for the presumption of service-connection based on his time and place of service may demonstrate an entitlement to benefits by showing that he was actually exposed to herbicides during service and that the exposure caused his disability. 38 U.S.C. 101(16).

2. A veteran may assert his entitlement to disability benefits by filing a claim with the United States Department of Veterans Affairs (VA), which administers the benefits system through the Veterans Benefits Administration (VBA). 38 U.S.C. 5101; see 38 U.S.C. 301(b) and (c)(3). The veteran may file a disability claim in person, by mail, or online. See VA, *How to File a VA Disability Claim*, https://www.va.gov/disability/how-to-file-claim/. Veterans may be represented *pro bono* or at limited cost by counsel or by representatives of a recognized veterans service organization. See 38 U.S.C. 5902-5904; 38 C.F.R. 14.626-14.637.

VA adjudicates disability benefits claims through "a two-step process." *Henderson*, 562 U.S. at 431. First, VBA employees in one of the agency's 56 regional offices make "an initial decision on whether to grant or deny benefits." *Ibid.* Second, "if a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by the Board of Veterans' Appeals [(Board)], a body within the VA that makes the agency's final decision in cases appealed to it." *Ibid.*[2]

a. In adjudicating benefits claims at the first stage of the process, the relationship between a veteran and VA is intended to be "as informal and nonadversarial as possible." *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323-324 (1985). A veteran thus "faces no time limit for filing a claim." *Henderson*, 562 U.S.

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[2] Once the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, takes effect, claimants will be able to request review of an initial VBA decision by a higher-level VBA adjudicator before appealing to the Board. § 2(g)(1), 131 Stat. 1107; see 38 U.S.C. 5104B. That option did not exist at the time of the administrative proceedings concerning petitioner's claim for benefits.

at 431. Once a claim is filed, VBA employees in VA's regional offices—known as Veterans Service Representatives—have "a statutory duty to assist veterans in developing the evidence necessary to substantiate their claims." *Id.* at 431-432. In evaluating claims, "VA must give veterans the 'benefit of the doubt' whenever positive and negative evidence on a material issue is roughly equal." *Id.* at 432 (quoting 38 U.S.C. 5107(b)). The denial of a claim is subject to challenge at any time based on "clear and unmistakable error," 38 U.S.C. 5109A, and a veteran may reopen a claim at any time by presenting "new and material evidence," 38 U.S.C. 5108; see, *e.g.*, *Shinseki* v. *Sanders*, 556 U.S. 396, 402 (2009) (describing VA's reopening of a World War II veteran's claim 42 years after its initial denial).

When processing claims in the field, VBA employees rely on VA's *Adjudication Procedures Manual M21-1* (Manual), an online "resource" into which VA "consolidates its policy and procedures" regarding claims adjudication. *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) (*DAV*).[3] The Manual currently contains nine parts, each of which includes multiple subparts, chapters, sections, topics, and blocks that prescribe in detail the steps that VBA personnel may undertake to process and decide claims for disability compensation and other benefits. For example, Part III, Subpart ii, Chapter 1, Section C, Topic 1, Block a explains how to perform the first step in the claims screening process—recording the date the claim

[3] All provisions of the Manual can be accessed through the Table of Contents on VA's website. See https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Contents.

was received. Manual III.ii.1.C.1.a. The Manual's provisions are not "binding on anyone other than the VBA employees," Pet. App. 5a, and they evolve frequently. "Any VBA employee can request changes to the Manual through submission of an online form," *DAV*, 859 F.3d at 1074, and the revision will be reflected in the Manual if a team at VA headquarters approves. In 2018, the Manual was revised approximately 300 times.[4]

The informal and evolving Manual helps VA frontline adjudicators "process claims benefits quicker and with higher accuracy." *DAV*, 859 F.3d at 1074 (citation omitted). By any measure, the agency's task is immense. In the past three years, the number of disability compensation claims received by the VBA has increased nearly 24%, from approximately 960,000 in 2014 to nearly 1.2 million in 2017. See Office of Budget, VA, *FY2016 Budget Submission*, Vol. III, at 165; Office of Budget, VA, *FY2019 Budget Submission*, Vol. III, at 163-164. With older veterans living longer and new veterans returning from the battlefield every day, VA adjudicators now receive and process more claims for veterans' benefits than at any previous time in our Nation's history.

b. A veteran who disagrees with the regional office's resolution of her claim may appeal to the Board at any time within one year of the decision. 38 U.S.C. 7105(b)(1)(A). The Board conducts "*de novo* review" and renders the "agency's final decision" on the claim. *Henderson*, 562 U.S. at 431; see 38 U.S.C. 7104. A veteran may request a hearing and submit new evidence in support of his claim while it is pending before the Board. 38 U.S.C. 7107, 7113. In deciding claims, the Board is

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[4] https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000075494/M21-1%20Changes%20By%20Date.

bound by "the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department"—the agency's General Counsel. 38 U.S.C. 7104(c).

Under VA regulations, the Board is "not bound by [VA] manuals, circulars, or similar administrative issues." 38 C.F.R. 19.5; see Pet. App. 5a ("[T]he Board * * * is not bound by any directives in the [Manual] and need not defer to any administrator's adherence to those guidelines."); *DAV*, 859 F.3d at 1077 ("The [Manual] is binding on neither the agency nor tribunals."). The "Board must independently review" any matter in the Manual that informs its decision. *Overton* v. *Wilkie*, 30 Vet. App. 257, 259 (2018). If "the Board chooses to rely on the [Manual] as a factor in its analysis or as the rule of decision, it must provide adequate reasons or bases for doing so" apart from the Manual itself. *Ibid.* Failure to do so constitutes reversible error. *Ibid.* ("The Board may not simply rely on the nonbinding [Manual] position without analysis.").

3. For most of our Nation's history, administrative decisions regarding veterans' benefits were subject to virtually no judicial review. See *Henderson*, 562 U.S. at 432 & n.1; see also *Johnson* v. *Robison*, 415 U.S. 361, 366-374 (1974); *Hayburn's Case*, 2 U.S. (2 Dall.) 409, 409-410 (1792). In 1988, Congress enacted the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, 102 Stat. 4105, which authorized limited judicial review of VA final decisions on veterans' benefits claims and certain other agency actions.

a. The VJRA created a new Article I court, now called the United States Court of Appeals for Veterans Claims (Veterans Court), and authorized it to hear appeals from Board decisions on benefits claims. See

§ 301(a), 102 Stat. 4113; 38 U.S.C. 7251. The Veterans Court has jurisdiction to hear appeals by a veteran (but not by VA), 38 U.S.C. 7252(a), and to "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action," 38 U.S.C. 7261(a)(1). The Veterans Court may also "compel action of the Secretary unlawfully withheld or unreasonably delayed"; "hold unlawful and set aside" VA decisions that are "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; and set aside factual findings that are "clearly erroneous." 38 U.S.C. 7261(a)(2)-(4).

Either a veteran or VA may appeal an adverse decision of the Veterans Court to the Federal Circuit. 38 U.S.C. 7292(d). In such appeals, the Federal Circuit has jurisdiction to decide, *inter alia*, "all relevant questions of law," including the lawfulness of "any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the" Veterans Court. 38 U.S.C. 7292(d)(1). The Federal Circuit also has jurisdiction to accept certification by a judge or panel of the Veterans Court of "a controlling question of law" as "to which there is a substantial ground for difference of opinion" and the resolution of which would "materially advance[]" the "ultimate termination of the case." 38 U.S.C. 7292(b)(1).

b. The VJRA also authorizes direct Federal Circuit review of certain VA actions outside the context of an individual benefits adjudication. 38 U.S.C. 502. Such pre-enforcement review is available for "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." *Ibid.* The first of those cross-referenced provisions, Section 552(a)(1) of Title 5, is

part of the Freedom of Information Act (FOIA), 5 U.S.C. 552. Section 552(a)(1) provides:

> Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—
>
> (A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;
>
> (B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;
>
> (C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;
>
> (D) 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; and
>
> (E) each amendment, revision, or repeal of the foregoing.
>
> Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published.

5 U.S.C. 552(a)(1).

The second of the cross-referenced provisions, 5 U.S.C. 553, is part of the Administrative Procedure Act (APA), 5 U.S.C. 551 *et seq.*, 701 *et seq.* Section 553 outlines requirements for notice-and-comment rulemaking, 5 U.S.C. 553(b)-(d), but states that those requirements do "not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. 553(b)(3)(A). Section 553 also provides that each "agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. 553(e).

Pre-enforcement review of a VA action under the VJRA "shall be in accordance with chapter 7 of title 5." 38 U.S.C. 502. Chapter 7 of Title 5 contains the APA's judicial-review provisions. See 5 U.S.C. 701-706. Those provisions authorize a reviewing court to, among other things, "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions found to be * * * arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. 706(1) and (2)(A). Those provisions also state that "[a]gency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review," and that a "preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704.

c. Aside from the limited judicial review provided by the VJRA and by other narrow review provisions not at issue in this case, VA's decisions "under a law that affects the provision of benefits" are "final and conclusive and may not be reviewed by any other official or by any

court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. 511(a).

4. Petitioner Robert Gray served honorably in the United States Navy during the Vietnam War. *Gray* v. *McDonald*, 27 Vet. App. 313, 316 (2015). Of particular relevance here, petitioner served aboard the U.S.S. *Roark*, a *Knox*-class frigate that anchored in Da Nang Harbor along the coast of the former Republic of Vietnam in 1972. *Ibid.*[5]

a. In 2007, petitioner filed a claim for disability benefits based on several medical conditions associated with potential exposure to Agent Orange. Pet. App. 6a; see *Gray*, 27 Vet. App. at 316. As noted above (see p. 2, *supra*), although most veterans who apply for disability benefits must show that their disabilities are connected to their military service, the Agent Orange Act establishes a presumption of service-connection for veterans who "served in the Republic of Vietnam" between January 9, 1962 and May 7, 1975 and later develop one of the specified health conditions. 38 U.S.C. 1116(a)(1)(A). Under that framework, the central question in petitioner's case was whether his naval service, which included entering Da Nang Harbor in 1972, constituted service "in the Republic of Vietnam" within the meaning of the Agent Orange Act. See *Gray*, 27 Vet. App. at 318.

Under VA regulations issued in 1993 to implement the Agent Orange Act, service "in the Republic of Vietnam," 38 U.S.C. 1116(a)(1)(A), "includes service in the

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[5] The former Republic of Vietnam, also known as South Vietnam, was overtaken by North Vietnam in 1975 and is now part of the Socialist Republic of Vietnam. See Central Intelligence Agency, *The World Factbook: Vietnam*, https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html.

waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam," 38 C.F.R. 3.307(a)(6)(iii). In a General Counsel opinion and subsequent Federal Register notice, VA interpreted that regulation to require service either on the Republic of Vietnam's "landmass" or on its "inland waterways," on the rationale that "Agent Orange was sprayed only on land, and therefore the best proxy for exposure is whether a veteran was present within the land borders of the Republic of Vietnam." *Haas*, 525 F.3d at 1181, 1189, 1192. For Navy veterans like petitioner, VA's interpretation essentially distinguished between "brown water" veterans who served on Vietnam's internal waterways and "blue water" veterans who served at sea. See *Gray*, 27 Vet. App. at 320. The Federal Circuit upheld that interpretation in 2008. *Haas*, 525 F.3d at 1197; see *id.* at 1193 ("Drawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable.").

The regional office denied petitioner's claim because petitioner concededly had not served "on the ground" in Vietnam. *Gray*, 27 Vet. App. at 316 (citation omitted). Petitioner supplemented his claim several times, arguing that his service on a ship that entered Da Nang Harbor constituted service on an "inland waterway." *Id.* at 317 (citation omitted). While the regional office was considering those claims, VA issued a letter and a bulletin that clarified its understanding of the term "inland waterways" as that term was used in the General Counsel opinion and Federal Register notice described above. Pet. App. 6a (citation omitted). The letter defined "inland waterways" to include "rivers, estuaries, canals, and delta areas inside the country," but to exclude

"open deep-water coastal ports and harbors where there is no evidence of herbicide use," including Da Nang Harbor. *Ibid.* (citation omitted). Relying on that interpretation, the regional office concluded that petitioner was not eligible for the presumption of service-connection in the Agent Orange Act, and it further concluded that petitioner had not presented evidence of actual exposure to Agent Orange. *Gray*, 27 Vet. App. at 318. On de novo review, the Board affirmed. *Ibid.*

b. Petitioner appealed to the Veterans Court, which vacated the Board's decision and remanded in relevant part. Pet. App. 6a; see *Gray*, 27 Vet. App. at 319-327. The court concluded that the Board's interpretation of "inland waterways" was "inconsistent with the regulatory purpose and irrational," because it defined "inland waterways" within "the Republic of Vietnam" for purposes of the Agent Orange Act based on water depth rather than on the likelihood of exposure to Agent Orange. *Gray*, 27 Vet. App. at 322-324. Specifically, the court held that the Board had not adequately explained why "inland waterways" included shallow coastal waters like Quy Nhon Bay Harbor and Ganh Rai Bay, but not the deeper coastal waters of Da Nang Harbor. *Id.* at 324; see *id.* at 325 (describing the "struggle to classify the gray area where brown inland waterways meet blue offshore waters"). The court remanded for the Board to reevaluate the meaning of "inland waterway"—"particularly as it applies to Da Nang Harbor"—consistent with the emphasis on the likelihood of exposure to Agent Orange that underlies VA's regulation. *Id.* at 326-327.

c. Following the Veterans Court's decision, VA reviewed the available scientific evidence and concluded that it did not support a presumption of exposure to

Agent Orange for "service on the offshore open waters" —that is, "the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence." Pet. App. 7a (citation omitted). In February 2016, VA accordingly amended the Manual to provide new guidance to the regional offices on how to determine whether particular waterways constitute "inland waterways" under VA's interpretation of its regulations implementing the Agent Orange Act. *Ibid.* (citation omitted). The new provision, which petitioner calls the Waterways Provision (Pet. Br. 10), is contained in Part IV, Subpart ii, Chapter 1, Section H, Topic 2 of the Manual.

The Waterways Provision first states that "[i]nland waterways" are "fresh water rivers, streams, and canals, and similar waterways," which are "distinct from ocean waters and related coastal features * * * such as a bay or inlet." Pet. App. 46a-47a (emphasis omitted); see Manual IV.ii.1.H.2.a. It then states that "[o]ffshore waters are the high seas and any coastal or other water feature, such as a bay, inlet, or harbor, containing salty or brackish water and subject to regular tidal influence." Pet. App. 47a-48a (emphasis omitted); see Manual IV.ii.1.H.2.b. The provision accordingly instructs that the two shallow bays referenced by the Veterans Court (Qui Nhon Bay Harbor and Ganh Rai Bay), as well as the deeper coastal waters of Da Nang Harbor, are all "offshore waters" as the Waterways Provision uses that term. Pet. App. 48a; see Manual IV.ii.1.H.2.c.[6]

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[6] The Manual states that, "[i]n the interest of maintaining equitable claim outcomes among shipmates, VA will continue to extend the presumption of exposure to Veterans who served aboard vessels

d. In November 2016, the Board issued its decision on remand in petitioner's case. *In re Gray*, Bd. Vet. App. No. 1642510, 2016 WL 7656674 (Nov. 3, 2016). The Board stated that the question before it was "whether [petitioner] served on inland waterways during service, or more specifically whether anchoring in Da Nang Harbor is appropriately characterized as service on an inland waterway rather than service in waters offshore of the Republic of Vietnam for purposes of" VA's binding regulation, 38 C.F.R. 3.307(a)(6)(iii). 2016 WL 7656674, at *4. The Board explained that the Waterways Provision of the Manual is "not binding" on that question, but that it is "instructive on the definition of inland waterways and offshore waters for the purposes of entitlement to presumptive service connection." *Ibid.* The Board concluded that treating Da Nang Harbor as an offshore waterway was consistent with the binding VA regulation, governing Federal Circuit and Veterans Court precedent, available scientific evidence, and "previous VA guidance." *Id.* at *4-*6. The Board accordingly denied petitioner's claim. *Id.* at *6.

e. Petitioner appealed the Board's decision to the Veterans Court. *Gray* v. *Wilkie*, No. 16-4042 (filed Dec. 12, 2016). At the joint request of petitioner and VA, however, that appeal has been stayed since April 2017 pending developments in other litigation. See 16-4042 Docket entry (Apr. 13, 2017).

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that entered Qui Nhon Bay Harbor or Ganh Rai Bay during specified periods that are already on VA's 'ships list.'" Pet. App. 49a; see Manual IV.ii.1.H.2.c. The Manual further explains, however, that "VA will no longer add new vessels to the ships list, or new dates for vessels currently on the list, based on entering Qui Nhon Bay Harbor or Ganh Rai Bay or any other offshore waters." *Ibid.*; see also J.A. 90-92.

5. While the Board was considering petitioner's claim on remand, petitioner filed a petition in the Federal Circuit seeking pre-enforcement review of the Waterways Provision of the Manual. Pet. App. 2a; see J.A. 8-16. The court of appeals dismissed the petition for lack of jurisdiction. Pet. App. 1a-28a.[7]

a. The court of appeals explained that the pre-enforcement review provision of the VJRA, 38 U.S.C. 502, confers jurisdiction to review only VA "actions that are subject to 5 U.S.C. §§ 552(a)(1) and 553," not "actions that fall under § 552(a)(2)." Pet. App. 8a. The court stated that the "parties agree that § 553," which sets requirements for notice-and-comment rulemaking, "is not at issue in this proceeding." *Ibid.* The court described the "debate" among the parties as "whether the manual provisions challenged in this action fall under § 552(a)(1), giving [the court] authority to consider them in the context of this action, or § 552(a)(2), prohibiting [the court's] review here." *Id.* at 8a-9a.

The court of appeals observed that the "relevant part" of Section 552(a)(1), which the VJRA cross references, requires Federal Register publication 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," as well as "each amendment,

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[7] The Blue Water Navy Vietnam Veterans Association (BWNVVA), a veterans' advocacy group, filed a similar petition. See Pet. App. 2a. The court of appeals consolidated the petitions and dismissed both in the decision below. *Ibid.* BWNVVA subsequently filed a petition for a writ of certiorari, see *Blue Water Navy Viet. Veterans Ass'n* v. *Wilkie*, No. 17-1693 (filed June 18, 2018), which remains pending before this Court.

revision, or repeal of the foregoing." Pet. App. 9a (quoting 5 U.S.C. 552(a)(1)(D)-(E)). The court then compared that provision to Section 552(a)(2), which the VJRA does not cross reference, and which requires an agency to make available in an electronic format "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register," and "administrative staff manuals and instructions to staff that affect a member of the public." *Ibid.* (quoting 5 U.S.C. 552(a)(2)(B)-(C)). The court described its then-recent holding in *DAV*, *supra*, that when "manual provisions are interpretations adopted by the agency, not published in the Federal Register, not binding on the Board itself, and contained within an administrative staff manual, they fall within § 552(a)(2) —not § 552(a)(1).'" *Id.* at 11a (quoting *DAV*, 859 F.3d at 1078). The court concluded that its reasoning in *DAV* "compel[led] the same result here"—"where the action is not binding on private parties or the agency itself," the court of appeals has "no jurisdiction to review it." *Id.* at 12a.

The court of appeals added that its decision "does not leave" veterans in petitioner's position "without recourse," because "'a veteran adversely affected by a M21-1 Manual provision can contest the validity of that provision'" in direct review of an individual benefits determination. Pet. App. 12a (brackets and citation omitted). The court observed that this was the procedural route by which a veteran had obtained judicial review in *Haas*, thus generating the Federal Circuit's leading decision on VA's interpretation of the Agent Orange Act. *Ibid.* The court of appeals further explained that "[petitioner] and several other veterans" already had pend-

ing Veterans Court appeals that presented such challenges. *Id.* at 13a n.1. The court also noted that individual veterans or advocacy groups "may petition the VA for rulemaking" with respect to the criteria to be used in determining whether the Agent Orange Act applies. *Id.* at 12a-13a; see *Blue Water Navy Viet. Veterans Ass'n* v. *McDonald*, 830 F.3d 570, 577 (D.C. Cir. 2016) (explaining alternative mechanisms for review).

b. Judge Dyk concurred in the judgment and dissented in part. Pet. App. 15a-28a. He agreed that the panel was bound by the court of appeals' decision in *DAV*, *supra*. Pet. App. 15a. He further agreed "with *DAV* that the Manual is not the type of document that is reviewable because it is subject to the notice-and-comment rulemaking provisions of § 553." *Id.* at 19a. He disagreed, however, with the *DAV* court's conclusion that the Waterways Provision is not "an interpretation of general applicability under § 552(a)(1)." *Ibid.*

c. Petitioner sought rehearing en banc, which the court of appeals denied by a vote of 7-3. Pet. App. 29a-30a. Judge Taranto concurred in the denial of rehearing. *Id.* at 32a-36a. He observed that petitioner's arguments for rehearing "rest[ed] almost entirely on the asserted need * * * to repudiate the premise" that Sections 552(a)(1)(D) and 552(a)(2)(C) are "mutual[ly] exclusive." *Id.* at 32a-33a. He explained that no such repudiation was needed because the panel decision does not "stand[] for the proposition that, if an agency pronouncement is within § 552(a)(2)(C) * * * , the pronouncement cannot also be within § 552(a)(1)(D)." *Id.* at 32a. Judge Taranto added that, because the validity of the "particular [VA] pronouncement at issue here * * * is currently under consideration in cases involving individual benefits claims," the Federal Circuit could

"consider th[at] particular Manual pronouncement through an individual benefits case at roughly the same time as it would consider the pronouncement" through a Section 502 proceeding. *Id.* at 33a.

Judge Dyk, joined by Judges Newman and Wallach, dissented from the denial of rehearing "[f]or the reasons set forth in the panel dissent." Pet. App. 37a.

6. On December 7, 2018, the en banc Federal Circuit heard argument in *Procopio* v. *Wilkie*, No. 17-1821, which presents the question whether service "in the Republic of Vietnam" for purposes of the Agent Orange Act, 38 U.S.C. 1116(a)(1)(A), includes service in the "territorial sea" off the coast of Vietnam, *Procopio* v. *McDonald*, No. 15-4082, 2016 WL 6816244, at *6 (Vet. App. Nov. 18, 2016) (citation omitted). If the Federal Circuit ultimately resolves that question in favor of the veteran, its decision would necessarily mean that petitioner qualifies for the presumption of service-connection under the Agent Orange Act, see *Gray*, 27 Vet. App. at 318, 326.

SUMMARY OF ARGUMENT

A. For purposes of the VJRA provision that authorizes pre-enforcement review of certain VA actions, 38 U.S.C. 502, the Waterways Provision is not an action to which 5 U.S.C. 552(a)(1) "refers." Petitioner contends that the Waterways Provision is a VA "interpretation[] of general applicability formulated and adopted by the agency" within the meaning of 5 U.S.C. 552(a)(1)(D). That argument lacks merit.

Petitioner argues that any agency interpretation that extends beyond a particular case or fact pattern is necessarily one "of general applicability." 5 U.S.C. 552(a)(1)(D). But Section 552(a)(1)(D) also refers to "statements of general policy," and the word "general"

in that context would be superfluous under petitioner's reading, since a "policy" necessarily extends to more than one person or case. Petitioner's theory would suggest, moreover, that a vast array of nonbinding interpretations set forth in staff manuals or similar documents must be published in the Federal Register.

Section 552(a)(1) further provides that, if an agency fails to publish in the Federal Register a document that the provision requires to be so published, a person who lacks actual notice of the terms of the document "may not * * * be required to resort to, or be adversely affected by," the matter that the agency unlawfully failed to publish. 5 U.S.C. 552(a)(1). That language suggests a focus on materials that have binding effect either on persons who deal with the agency or on the agency itself. Under that approach, the Waterways Provision falls outside Section 552(a)(1)(D) because it does not bind VA or any benefits claimant. Although the Manual is binding on frontline adjudicators, any veteran who receives an adverse benefits determination from the VBA may appeal to the Board, which conducts de novo review and is not bound by the Manual in conducting its own independent analysis. By contrast, interpretations set forth in published VA regulations or precedential General Counsel opinions are binding on the Board and are covered by Section 552(a)(1)(D).

FOIA's broader structure reinforces the conclusion that Section 552(a)(1)(D) does not encompass the Waterways Provision. The various categories of agency materials that Section 552(a)(1) requires to be published in the Federal Register are characterized by their broad sweep and applicability to the agency as a whole. The materials described in Section 552(a)(2), by

contrast, which must be made publicly available in electronic format but need not be published in the Federal Register, are characterized by their narrow applicability, and they have at most a limited binding effect. By cross-referencing Section 552(a)(1) but not Section 552(a)(2), the VJRA makes clear that only the former type of VA materials are subject to pre-enforcement review. The Waterways Provision is far more similar to the agency materials that Section 552(a)(2) designates for electronic access than to those that Section 552(a)(1) designates for Federal Register publication.

B. The VJRA also authorizes pre-enforcement review of VA actions to which 5 U.S.C. 553 "refers." Section 553 requires agencies to utilize notice-and-comment procedures before engaging in certain types of actions. Although petitioner asserted in his opening brief below that VA was required to use notice-and-comment procedures before including the Waterways Provision in the Manual, petitioner does not press that argument in this Court. Rather, petitioner argues that Section 553 "refers" to the Waterways Provision and agency interpretations like it by explicitly *excluding* "interpretative rules" from Section 553's notice-and-comment requirements.

Because petitioner did not raise that argument in his certiorari petition, and advanced it in the Federal Circuit only in his petition for rehearing en banc, this Court should not consider it. In any event, the argument lacks merit. A VA action to which Section 553 "refers" is one that is *encompassed* by Section 553, *i.e.*, an action to which Section 553's notice-and-comment requirements apply. As petitioner now acknowledges, VA's adoption of the Waterways Provision was not subject to those requirements.

C. Even if the Waterways Provision constituted an "action of the Secretary to which section 552(a)(1) or section 553 of title 5 (or both) refers," and was therefore "subject to judicial review" under the VJRA, 38 U.S.C. 502, petitioner's current challenge would be barred. The VJRA requires that any pre-enforcement review of the specified categories of VA actions must be conducted in accordance with the judicial-review provisions of the APA. Because the Waterways Provision is not binding on the Board, it is not "final agency action" subject to immediate review under the APA, 5 U.S.C. 704. The VJRA therefore does not authorize petitioner's current challenge.

By contrast, binding VA actions like regulations and precedential General Counsel opinions are "final agency action[s]" for APA purposes and are subject to pre-enforcement review under the VJRA. 5 U.S.C. 704. And while the Waterways Provision is not subject to direct pre-enforcement review in the Federal Circuit, petitioner has alternative means available to obtain judicial review of the interpretation that Provision reflects. Most significantly, in petitioner's pending appeal from VA's denial of his individual benefits claim, petitioner can argue that he served "in the Republic of Vietnam" for purposes of the Agent Orange Act, and he can obtain judicial review of the legal standard that the Board applied in reaching a contrary conclusion.

ARGUMENT

VA decisions regarding veterans' benefits are typically reviewable, if at all, through appeals from denials of individual claims. See 38 U.S.C. 511(a), 7104, 7105. The VJRA's authorization of pre-enforcement review under specified circumstances, 38 U.S.C. 502, consti-

tutes an important but limited exception to that principle. Pre-enforcement review is available only for a VA action to which 5 U.S.C. 552(a)(1) or 553 refers, and it may be conducted only in accordance with the judicial-review provisions of the APA.

The VA action challenged here—an interpretation of an interpretation of a regulation, contained in a subprovision of a manual that does not bind the agency—is not among the narrow class of actions that are subject to pre-enforcement review under 38 U.S.C. 502. The Waterways Provision is neither an "interpretation[] of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D), nor a substantive rule promulgated through the notice-and-comment procedures of 5 U.S.C. 553. And even if it satisfied one or both of those criteria, pre-enforcement review still would be unavailable, because the VJRA authorizes such review only in accordance with the APA's judicial-review provisions, and the Waterways Provision is not "final agency action" reviewable under 5 U.S.C. 704. Petitioner may challenge the VA interpretation embodied in the Waterways Provision, but only in the course of appealing an adverse VA benefits decision that relies on that interpretation.

A. The Waterways Provision Is Not Reviewable Under The VJRA's Cross-Reference To 5 U.S.C. 552(a)(1)

The VJRA authorizes pre-enforcement review of a VA action "to which section 552(a)(1) * * * of title 5 * * * refers." 38 U.S.C. 502. Section 552(a)(1), which is part of FOIA, requires federal agencies to "publish in the Federal Register for the guidance of the public" several categories of documents, including "descriptions of its central and field organization," "statements of the general course and method by which its functions

are channeled and determined," and "rules of procedure." 5 U.S.C. 552(a)(1)(A)-(C). Section 552(a)(1)(D) requires agencies to publish "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). Section 552(a)(1)(E) requires each agency to publish "each amendment, revision, or repeal of" documents within the enumerated categories. 5 U.S.C. 552(a)(1)(E). Finally, Section 552(a)(1) states that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a)(1).

The Waterways Provision, contained in Part IV, Subpart ii, Chapter 1, Section H, Topic 2 of the VA Adjudication Manual, "conveys guidance to VA adjudicators" on how to determine whether certain coastal waterways are "inland waterways" and therefore encompassed by a prior VA interpretation of a regulation that interprets the Agent Orange Act's reference to "the Republic of Vietnam." Pet. App. 6a-7a, 11a (brackets and citations omitted). The Waterways Provision is "not binding on private parties or the agency." *Id.* at 12a. Any veteran dissatisfied with a VA adjudicator's decision involving the Waterways Provision may appeal to the Board, which must conduct "*de novo* review" of the claim, *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011), and may not rely on any Manual provision without "independently reviewing the matter" and "provid[ing] a reasoned explanation" for its conclusion, *Overton* v. *Wilkie*, 30 Vet. App. 257, 264 (2018).

Petitioner does not suggest that the Waterways Provisions must be published in the Federal Register under Section 552(a)(1)(A)-(C). Nor does he contend that the Waterways Provision falls within Section 552(a)(1)(D)'s requirement that agencies publish in the Federal Register "substantive rules of general applicability adopted as authorized by law," or (at least in this Court) within Section 552(a)(1)(D)'s requirement that agencies publish in the Federal Register "statements of general policy * * * formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D). Petitioner instead argues (Pet. Br. 20) that the Waterways Provision is subject to pre-enforcement review because it is an "interpretation[] of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D). The court of appeals correctly rejected that assertion. The text, structure, purpose, and history of the VJRA and FOIA all confirm that petitioner cannot obtain pre-enforcement review of nonbinding guidance contained in an agency manual that merely clarifies an existing interpretation.

1. Section 552(a)(1)(D) does not encompass the Waterways Provision

Section 552(a)(1)(D)'s directive that agencies publish in the Federal Register "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D), must be read in conjunction with Section 552(a)(2), which also addresses agency interpretations. Section 552(a)(2)(B) requires an agency to "make available for public inspection in an electronic format * * * interpretations which have been adopted by the agency and are not published in the Federal Register." 5 U.S.C. 552(a)(2)(B). FOIA thus distinguishes between interpretations "of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D),

and interpretations "adopted by the agency" that "are not published in the Federal Register," 5 U.S.C. 552(a)(2)(B). The two categories of "interpretations" described in those provisions must be distinct, since interpretations in the first category are required to be published in the Federal Register, while the second category is defined in part by reference to the *absence* of Federal Register publication.

Courts have accordingly long read Sections 552(a)(1)(D) and 552(a)(2)(B) in tandem, see, *e.g.*, *Capuano* v. *National Transp. Safety Bd.*, 843 F.2d 56, 57-58 (1st Cir. 1988) (Breyer, J.), and concluded that they "can only mean that interpretations of general applicability are to be published in the Federal Register while all other interpretations adopted by an agency" need not, *Anderson* v. *Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (citation omitted). Respected commentators have taken the same view. See, *e.g.*, Kenneth Culp Davis, *Administrative Law Treatise* § 3A.7, at 125 (Supp. 1970) (Davis); 15 *Federal Procedure* § 38.26 (2011); 1 James T. O'Reilly, *Federal Information Disclosure* § 6.3 (2017). Petitioner appears to agree that interpretations that "fit within Section 552(a)(2)(B)" cannot also "fit within" Section 552(a)(1)(D). Pet. Br. 23.[8]

That distinction is critical here. Although the VJRA authorizes pre-enforcement review of an "action of the Secretary to which section 552(a)(1) * * * refers," it

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[8] There has been extensive discussion in this litigation about whether Sections 552(a)(1)(D) and 552(a)(2)(C) are mutually exclusive. See Pet. Br. 35-38; Pet. 16-22; Pet. App. 25a (Dyk, J., dissenting in part and concurring in the judgment); Pet. App. 32a (Taranto, J., concurring in the denial of rehearing en banc). Whatever the merits of that debate, it does not affect the fact that Sections 552(a)(1)(D) and 552(a)(2)(B) are mutually exclusive.

does not mention Section 552(a)(2). 38 U.S.C. 502. Congress thus authorized pre-enforcement review of "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D), but not of "interpretations * * * adopted by the agency," 5 U.S.C. 552(a)(2)(B). See *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 859 F.3d 1072, 1077-1078 (Fed. Cir. 2017); see also *Cyan, Inc.* v. *Beaver Cnty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018) ("[W]hen Congress wants to refer only to a particular subsection or paragraph, it says so.") (brackets and citation omitted).

Although the need to distinguish between those terms presents a "troublesome problem," Davis § 3A.7, at 125, at least two textual differences shed light on their respective meanings. First, Section 552(a)(1)(D) describes an interpretation "of general applicability," while Section 552(a)(2)(B) does not. 5 U.S.C. 552(a)(1)(D). Second, Section 552(a)(1)(D) is subject to the proviso that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. 552(a)(1). Section 552(a)(2)(B) is not subject to that limitation.

a. Relying on dictionary definitions of "'general'" and "'applicable,'" petitioner contends that any "interpretation of a legal provision that governs an entire category or class of people to which that provision is relevant, and not just specific individuals or particular fact patterns," is an interpretation "'of general applicability.'" Pet. Br. 21; see *id.* at 22-32 (relying on other sources distinguishing between "'interpretations of general applicability'" and "case-specific" or "fact-specific"

interpretations) (citation omitted). That argument lacks merit. Relevance to more than one person or fact pattern is a *necessary*, but not a *sufficient*, condition for an interpretation to be one "of general applicability." 5 U.S.C. 552(a)(1)(D).

As an initial matter, petitioner's construction of "general" in Section 552(a)(1)(D) as simply the opposite of "specific" cannot be squared with other words in the same provision. 5 U.S.C. 552(a)(1)(D). Immediately before its reference to "interpretations of general applicability," Section 552(a)(1)(D) describes "statements of general policy." *Ibid.* "[I]dentical words and phrases within the same statute should normally be given the same meaning," *Hall* v. *United States*, 566 U.S. 506, 519 (2012) (citation omitted), and that common-sense understanding applies with particular force to "the same word, *in the same statutory provision*," *United States* v. *Santos*, 553 U.S. 507, 522 (2008) (opinion of Scalia, J.). But if "general" means simply broader than one person or case, the word would be superfluous in Section 552(a)(1)(D)'s reference to "statements of general policy," because a "policy" necessarily extends to more than one person or case. 5 U.S.C. 552(a)(1)(D); see, *e.g.*, *Merriam Webster's Collegiate Dictionary* 901 (1996) (defining "policy" as "a high-level overall plan embracing the general goals and acceptable procedures especially of a governmental body").

Petitioner's expansive conception of the "interpretations of general applicability" that agencies must publish in the Federal Register also contradicts decades of FOIA case law and administrative practice. 5 U.S.C. 552(a)(1)(D). As then-Judge Breyer explained for the First Circuit more than 30 years ago, courts that have considered nonbinding instructions in agency manuals

of the kind at issue here have "unanimously held that publication in the Federal Register under § 552(a)(1) is not required." *Capuano*, 843 F.2d at 58; see, *e.g.*, *Notaro* v. *Luther*, 800 F.2d 290, 291 (2d Cir. 1986) (per curiam) (holding that the United States Parole Commission did not need to publish a nonbinding "training aid" considered in adjudicating a prisoner's parole request).

This Court, moreover, has repeatedly considered agency interpretations contained in nonbinding agency manuals that were not published in the Federal Register. See, *e.g.*, *Washington State Dep't of Soc. & Health Servs.* v. *Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (addressing "administrative interpretations" in the Program Operations Manual System (POMS) of the Social Security Administration (SSA)); *Shalala* v. *Guernsey Mem'l Hosp.*, 514 U.S. 87, 90-91 (1995) (similar with respect to Medicare Provider Reimbursement Manual); *Schweiker* v. *Hansen*, 450 U.S. 785, 789 (1981) (per curiam) (similar with respect to precursor to the POMS, a "13-volume handbook for internal use by thousands of SSA employees" that did "not bind the SSA"). Manuals like these are filled with nonbinding interpretations that assist agency employees in processing claims brought by a broad swath of the public. "Clearly it is in the public interest for an agency with over 80,000 employees, making more than 1,250,000 disability determinations alone a year * * * to issue housekeeping instructions to its employees in the interest of uniform, fair and efficient administration." *Hansen* v. *Harris*, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting), rev'd, 450 U.S. 785 (1981). Under petitioner's approach, however, all of those interpretations would appear to constitute "interpretations of general applicability" that must be published in the Federal Register.

5 U.S.C. 552(a)(1)(D). Petitioner recognizes that Section 552(a)(1)(D) cannot be read to require agencies to publish so many materials as to "bloat the Federal Register to the point of bursting." Pet. Br. 22. His proposed reading, however, would have just that effect.[9]

b. As noted above, the "interpretations of general applicability formulated and adopted by the agency" that are described in Section 552(a)(1)(D) are distinct from the "interpretations adopted by the agency" described in Section 552(a)(2)(B). Interpretations in the former category must be of "general applicability," and they are subject to the proviso that a person lacking actual notice "may not * * * be required to resort to, or be adversely affected by," a matter that the agency has unlawfully failed to publish. 5 U.S.C. 552(a)(1). Both those distinctions shed light on the publication requirement in Section 552(a)(1)(D), and both indicate that this requirement applies only to interpretations that have some binding effect on either the agency or the public. *Ibid.*; see *Morton* v. *Ruiz*, 415 U.S. 199, 232-236 (1974).

i. As initially enacted, Section 3(a) of the APA required agencies to publish in the Federal Register "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." APA § 3(a), 60 Stat. 238. The APA further provided that "[n]o person shall

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[9] Petitioner suggests that requiring Federal Register publication of the Waterways Provision "faithfully serves Congress's goal of 'the guidance of the public.'" Pet. Br. 22 (quoting 5 U.S.C. 552(a)(1)). But that goal is equally, if not better, served by making the Waterways Provision available online on the same VA website that veterans use to submit their disability-compensation claims.

in any manner be required to resort to organization or procedure not so published." *Ibid.* The Senate Report accompanying the APA explained that Section 3(a) "forbids secrecy of rules binding or applicable to the public, or of delegations of authority." S. Rep. No. 752, 79th Cong., 1st Sess. 12 (1945); see H.R. Rep. No. 1980, 79th Cong., 2d Sess. 22 (1946) (similar). The understanding that only "binding" agency interpretations must be published in the Federal Register followed directly from the Federal Register Act, ch. 417, 49 Stat. 500 (1935), which required publication of documents that the President determined to "have general applicability and legal effect." § 5(a)(2), 49 Stat. 501.

The *Attorney General's Manual on the Administrative Procedure Act* (1947) (*APA Manual*)—a resource this Court "ha[s] often found persuasive," *Norton* v. *Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004)—similarly indicates that Section 3(a) applied paradigmatically to binding regulations. The *APA Manual* summarized Section 3(a) as pertinent to "'substantive rules,'" adding that "[s]tatements of general policy and interpretations need be published only if they are formulated and adopted by the agency for the guidance of the public," a matter that the APA "leaves each agency free to determine for itself." *APA Manual* 22; see Randy S. Springer, *Gatekeeping and the* Federal Register*: An Analysis of the Publication Requirement of Section 552(a)(1)(D) of the Administrative Procedure Act*, 41 Admin. L. Rev. 533, 536 (1989) ("The legislative history of the APA emphasizes that the essential function of the *Federal Register* is to provide notice of government regulations."). Courts interpreting the original APA accordingly described Section 3(a) as applicable to rules "which the public is required to obey or with

which it is to avoid conflict." *Airport Comm'n of Forsyth Cnty.* v. *Civil Aeronautics Bd.*, 300 F.2d 185, 188 (4th Cir. 1962); see, *e.g.*, *United States* v. *449 Cases, Containing Tomato Paste*, 212 F.2d 567, 578 (2d Cir. 1954) (Frank, J., dissenting) (explaining that Section 3(a) required publication of "binding standards").

ii. Section 552(a) took its current form with the enactment of FOIA in 1966. Act of July 4, 1966; Pub. L. No. 89-487, 80 Stat. 250; see Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codifying FOIA in 5 U.S.C. 552). Among other changes, FOIA separated the "interpretations of general applicability formulated and adopted by the agency" that must be published in the Federal Register under 5 U.S.C. 552(a)(1)(D) from the "interpretations * * * adopted by the agency" that must only be made available under 5 U.S.C. 552(a)(2)(B). FOIA also "imposed" a "new sanction * * * for failure to publish" the required materials in the Federal Register, S. Rep. No. 813, 89th Cong., 1st Sess. 6 (1965)—the proviso that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published," 5 U.S.C. 552(a)(1); see *Ruiz*, 415 U.S. at 233 & n.27. The *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967) (*FOIA Memorandum*)—on which this Court has relied in construing Section 552, see, *e.g.*, *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 169 (2004)—explains that Congress enacted that new sanction to deprive noncompliant agency "rules, statements of policy, and interpretations" of general applicability of their "'force and effect,'" *FOIA Memorandum* 10-13 (citation omitted). That reference to "force

and effect" reflects the same understanding that underlies the Federal Register Act and the initial APA —that only binding agency materials, such as regulations, would constitute interpretations of general applicability subject to the publication requirement.

Accordingly, in the decades since FOIA's enactment, courts have consistently held that Section 552(a)(1)(D)'s "requirement for publication attaches only to matters which if not published would adversely affect a member of the public." *New York* v. *Lyng*, 829 F.2d 346, 354 (2d Cir. 1987) (quoting *Hogg* v. *United States*, 428 F.2d 274, 280 (6th Cir. 1970), cert. denied, 401 U.S. 910 (1971)); see *ibid.* (collecting cases from other courts of appeals adopting the same rule); see *Cathedral Candle Co.* v. *United States Int'l Trade Comm'n*, 400 F.3d 1352, 1370 (Fed. Cir. 2005) (same); *Federal Procedure* § 38:26 (same); Colleen R. Courtade, Annotation, *What Rules, Statements, and Interpretations Adopted by Federal Agencies Must be Published*, 77 A.L.R. Fed. 572 (1986 & Supp. 2018-2019) (same). That will be true only of interpretations that are "binding on" the agency or on persons who interact with it. Pet. App. 12a.

This Court's decision in *Morton* v. *Ruiz*, *supra*, is instructive. Relying on Section 552(a)(1)(D) and the "sanction" for an agency's failure to publish material that "'adversely affect[s]'" a member of the public, the Court in *Ruiz* concluded that the Bureau of Indian Affairs (BIA) could not enforce a provision of a staff manual that had a "substantive" effect on Indians seeking benefits. 415 U.S. at 233, 235. The Court explained that BIA's failure to treat the manual provision "as a legislative-type rule" that must be published under Section 552(a)(1)(D) rendered it "ineffective" and deprived it of "binding effect." *Id.* at 236; see *id.* at 235 (noting the

government's argument that the provision would be "endowed with the force of law" only if it was "published in the Federal Register"). The Court's analysis underscores that Section 552(a)(1)(D) is best read to require, at a minimum, that an "interpretation[] of general applicability formulated and adopted by the agency" have a "binding effect" on the agency or interested members of the public. Pet. App. 12a.

iii. Under that approach, the Waterways Provision falls outside Section 552(a)(1)(D) because it does not bind VA or any benefits claimant. The provision appears only in an internal manual that "conveys guidance to VA adjudicators," Pet. App. 11a (brackets and citation omitted), who use that guidance to "gather[] information necessary to determine whether" VA's separate "regulatory test" is satisfied, *Haas* v. *Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008). Although the Manual is binding on frontline adjudicators, any veteran who is dissatisfied with the adjudicator's decision may appeal to the Board and obtain de novo review. 38 U.S.C. 7104(a); see *Henderson*, 562 U.S. at 431.

In conducting that review, the Board is "not bound by Department manuals, circulars, or similar administrative issues." 38 C.F.R. 19.5. Rather, the Board is "bound in its decisions" only "by the 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). And even when the Board's position ultimately accords with the interpretation in the Manual, "[t]he Board may not simply rely on the nonbinding [Manual] position without analysis," but instead "must provide adequate reasons or bases for" its decision. *Overton*, 30 Vet. App. at 259.

The Board's decisions illustrate the nonbinding character of the Manual. According to a database search conducted by VA, the Board has cited the Manual in less than five percent of its decisions over the past three years. In many of the cases in which it has cited the Manual, the Board has emphasized that it is nonbinding. And in a number of cases, the Board has expressly *rejected* interpretations contained in the Manual. For example, the Board rejected guidance in the Manual instructing that a veteran's submission of medical records constitutes submission of a claim for purposes of determining when a veteran is entitled to disability compensation. See *Title Redacted*, Bd. Vet. App. No. 18122784, 2018 WL _____ (July 31, 2018) (rejecting Manual IV.ii.2.C).[10] In explaining its decision, the Board contrasted the nonbinding provisions in the Manual with "the generally applicable rules" in the relevant statutes and VA regulations, and it concluded that the interpretation in the Manual was "not persuasive" and therefore "not for application" to its decision. *Ibid.* In another case, the Board rejected a Manual provision instructing that a veteran's death should be presumed to be connected with his service if a service-connected disability is shown on a death certificate. See *Title Redacted*, Bd. Vet. App. No. 1633157, 2016 WL 5850298, at *7 (Aug. 22, 2016) (rejecting Manual IV.iii.2.A.1.B). The Board noted that it had "considered" the Manual provision and a related VA letter but did "not find them controlling," given that "the most probative evidence indicates that [a particular veteran's] service-connected disabilities did not cause or contribute to his death." *Ibid.*

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[10] The decision is available at https://www.va.gov/vetapp18/files7/18122784.txt.

Although the Board's rejections of Manual provisions made it more difficult for the veterans in those cases to obtain benefits, that is not always the case. In a number of decisions, the Board has rejected Manual provisions in favor of interpretations more advantageous to veterans. For example, the Board rejected the Manual's interpretation of the term "original claim" for purposes of determining the effective date of disability-benefits compensation under the Fully Developed Claim program, thereby allowing a veteran to receive additional benefits. *Title Redacted*, Bd. Vet. App. No. 18102879, 2018 BVA Lexis 83337 (May 16, 2018) (rejecting Manual III.i.3.B.4.a). The Board cited the Federal Circuit's decision in this case as a basis for departing from the Manual's interpretation. *Ibid.* In other cases, the Board has departed from interpretations in the Manual to, *inter alia*, award benefits based on a more generous interpretation of "moderate" or "marked" limitations on movement, *Title Redacted*, Bd. Vet. App. No. 1800365, 2018 WL 1195436 (Jan. 4, 2018) (rejecting Manual III.iv.4.A.4.o); adopt a more forgiving standard for determining a veteran's competency, *Title Redacted*, Bd. Vet. App. No. 1427401, 2014 WL 3959707 (June 17, 2014) (rejecting Manual III.iv.8.A.4.a); and allow for easier verification of the dependent status of a veteran's spouse, *Title Redacted*, Bd. Vet. App. No. 1639810, 2016 BVA Lexis 46159 (Sept. 30, 2016) (rejecting multiple Manual provisions).

The Board's willingness to reject Manual interpretations across a broad category of cases underscores that the Manual is not binding on the Board either in theory or in practice. Contra Pet. Br. 41-43. And because the Board renders the "agency's final decision" on disability-benefits claims, *Henderson*, 562 U.S. at 431; see 38 U.S.C.

7104, its independent interpretation is the only one that can "adversely affect[]" a member of the public, 5 U.S.C. 552(a)(1). The Waterways Provision of the Manual is accordingly not subject to the Federal Register publication requirement of Section 552(a)(1) and thus not subject to pre-enforcement review under the VJRA, 38 U.S.C. 502.

c. Petitioner suggests (Pet. Br. 38-39) that limiting the term "interpretations of general applicability" to binding interpretations would nullify the inclusion of such interpretations in Section 552(a)(1)(D) because "*[n]o* interpretive rule—whether generally applicable or not—truly binds all final agency decisionmakers." Pet. Br. 39. That is not correct. Although an interpretive rule is not legally binding "on regulated parties," *National Mining Ass'n* v. *McCarthy*, 758 F.3d 243, 251-253 (D.C. Cir. 2014) (Kavanaugh, J.); see *Perez* v. *Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1206 (2015), an agency can direct its own personnel to follow particular interpretations. Indeed, as noted above, Congress directed that the Board "shall be bound" not only "by the regulations of the Department," but also by the "instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." 38 U.S.C. 7104(c).

A precedential opinion of the VA General Counsel is the prototypical example of an interpretation that binds the agency, falls within Section 552(a)(1)(D), and therefore can be challenged in a pre-enforcement action in the Federal Circuit under 38 U.S.C. 502. Indeed, a number of the Federal Circuit's decisions exercising pre-enforcement review under the VJRA have involved precedential General Counsel opinions. See, *e.g.*, *Snyder* v. *Secretary of Veterans Affairs*, 858 F.3d 1410, 1412-

1413 (Fed. Cir. 2017) (explaining that a precedential General Counsel opinion is reviewable under Section 502 as "a formal agency action that is binding on the Board"); *Splane* v. *West*, 216 F.3d 1058, 1062, 1064, (Fed. Cir. 2000) (explaining that a precedential General Counsel opinion "binding on the Board by statute" but not binding "outside the agency" is reviewable under Section 502); see also Pet. App. 12a (observing that the Federal Circuit has found particular VA interpretations to be encompassed by Section 552(a)(1) "precisely because they had a binding effect on parties or entities other than internal VA adjudicators").

The VJRA's legislative history reflects the same understanding. The House Report describes the VJRA as authorizing pre-enforcement "review [of] VA policy as expressed in VA regulations and interpretations by the General Counsel." H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 26 (1988) (VJRA House Report). The Senate Report likewise characterizes the pre-enforcement review provision as a way to "submit the VA's institutional decisions—i.e., regulations—to court review." S. Rep. No. 418, 100th Cong., 2d Sess. 112 (1988) (VJRA Senate Report).

As the court of appeals correctly explained, VA's decision to provide guidance to agency adjudicators about the meaning of "inland waterways" through an amendment to the Manual, rather than through a more formal mechanism such as a precedential General Counsel opinion, "comes at a price." Pet. App. 13a (quoting *Mortgage Bankers*, 135 S. Ct. at 1204). A precedential General Counsel opinion (or a substantive rule) would have been directly reviewable in the Federal Circuit under Section 502, but it also would have bound the Board.

Because VA choose to proceed instead through a revision to the Manual, review of VA's interpretation must occur through an appeal from an individual determination, but the Board in resolving that appeal will not be bound by the interpretation in the Manual. Pet. App. 13a-14a; see also *id.* at 14a (noting that "agencies' 'interpretations contained in . . . agency manuals . . . do not warrant'" deference under *Chevron U.S.A. Inc.* v. *Natural Res. Def. Council, Inc.*, 467 U.S. 837 (1984)) (quoting *Christensen* v. *Harris Cnty.*, 529 U.S. 576, 587 (2000) (citations omitted)).

2. The broader structure of FOIA reinforces the conclusion that the Waterways Provision does not fall within Section 552(a)(1)(D)

In interpreting a statute, "a word is given more precise content by the neighboring words with which it is associated." *United States* v. *Williams*, 553 U.S. 285, 294 (2008); see, *e.g.*, *Freeman* v. *Quicken Loans, Inc.*, 566 U.S. 624, 634-635 (2012). The Manual provision at issue here is a far better fit with the neighboring words of Section 552(a)(2) than with those of Section 552(a)(1).

As detailed above, Section 552(a)(1) identifies various categories of materials that agencies must "publish in the Federal Register for the guidance of the public." 5 U.S.C. 552(a)(1); see 5 U.S.C. 552(a)(1)(A)-(E); pp. 8-9, *supra*. In addition to "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D), materials subject to Section 552(a)(1)'s publication requirement include "descriptions of [the agency's] central and field organization"; "statements of the general course and method by which [the agency's] functions are channeled and determined, including the nature and requirements of all formal and

informal procedures available"; and "rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations," 5 U.S.C. 552(a)(1)(A)-(C). Those requirements are characterized by their broad sweep and applicability to the agency as a whole. Section 552(a)(1)(D) also requires publication of "substantive rules of general applicability adopted as authorized by law," 5 U.S.C. 552(a)(1)(D), which bind the whole agency and have the "force and effect of law," *Mortgage Bankers*, 135 S. Ct. at 1203 (citation omitted).

By contrast, Section 552(a)(2), in enumerating the materials agencies must "make available for public inspection in an electronic format," describes materials that are characterized by their narrow applicability and have at most a limited binding effect. 5 U.S.C. 552(a)(2). In addition to "interpretations which have been adopted by the agency and are not published in the Federal Register," 5 U.S.C. 552(a)(2)(B), Section 552(a)(2) requires electronic access to "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," and "administrative staff manuals and instructions to staff that affect a member of the public," 5 U.S.C. 552(a)(2)(A) and (C). As a matter of VA practice, final opinions and orders in the adjudication of cases are always nonprecedential and therefore have no binding effect beyond the individual veteran's case. 38 C.F.R. 20.1303. Concurring and dissenting opinions of course have no binding effect even in the case in which they are issued. And VA administrative staff manuals and staff instructions likewise do not bind the agency. 38 C.F.R. 19.5.

As an interpretation of an interpretation of a regulation that implements a statute, and that does not bind the agency in any adjudication, the Waterways Provision is far more similar to the agency materials that Section 552(a)(2) designates for electronic access than to those that Section 552(a)(1) designates for Federal Register publication. The structure of the statute thus underscores that the Waterways Provision is a "interpretation[] which ha[s] been adopted by the agency," 5 U.S.C. 552(a)(2)(B), rather than an "interpretation[] of general applicability formulated and adopted by the agency" under 5 U.S.C. 552(a)(1)(D). See, *e.g.*, *NLRB*. v. *Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (reading FOIA provision in light of "the other provisions of the Act").

Finally, VA's decision to make the interpretation at issue here available online in its adjudication manual, rather than publishing it in the Federal Register, reflects the agency's own judgment that the interpretation is not generally applicable and subject to Section 552(a)(1)(D). Cf. *American Mining Cong.* v. *Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (explaining that a rule the agency chooses not to publish in the Code of Federal Regulations is less likely to be a legislative rule); *Brock* v. *Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (Scalia, J.) (similar). To be sure, VA cannot insulate from pre-enforcement review an interpretation described in Section 552(a)(1)(D) simply by placing it in the Manual and declining to publish it in the Federal Register. See Pet. App. 12a. But Congress's decision to include "administrative staff manuals and instructions to staff that affect a member of the public" in Section 552(a)(2) rather than Section 552(a)(1) still has interpretive significance. 5 U.S.C. 552(a)(2)(C). Although the court below did not

treat Sections 552(a)(1) and 552(a)(2)(C) as mutually exclusive, it correctly viewed "[t]he differences in language between" the two as "inform[ing] how to read each provision." Pet. App. 32a (Taranto, J., concurring in the denial of rehearing en banc).

B. The Waterways Provision Is Not Reviewable As A VA Action To Which 5 U.S.C. 553 "Refers"

The VJRA authorizes direct Federal Circuit review of any VA action "to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. 502. Section 553(b) of Title 5, which prescribes the contents that an agency must include in a notice of proposed rulemaking, states that those requirements "do[] not apply" to, *inter alia*, "interpretative rules." 5 U.S.C. 553(b)(A); see *Mortgage Bankers*, 135 S. Ct. at 1206 (describing Section 553's "exemption of interpretive rules from the notice-and-comment process"). Petitioner argues in the alternative (Br. 43-48) that the Waterways Provision is reviewable under the VJRA because it is an interpretive rule, and Section 553 "refers" to "interptetative rules" in the language that *excludes* them from notice-and-comment requirements. That argument is both forfeited and wrong.

1. Petitioner did not properly preserve this argument below or in this Court. The Federal Circuit stated that "[t]he parties agree that § 553 is not at issue in this proceeding." Pet. App. 8a. The petition for a writ of certiorari did not mention that statement, let alone contest it. The Court therefore should decline to consider petitioner's current argument. See, *e.g.*, *Chandris, Inc.* v. *Latsis*, 515 U.S. 347, 353 n.* (1995) (refusing to consider argument because "petitioners did not raise the issue in the petition for certiorari").

Petitioner likewise failed to preserve his current Section 553 argument below. In his opening brief to the Federal Circuit, petitioner argued that the Waterways Provision was inconsistent with Section 553, and therefore invalid, because VA had not promulgated it through notice-and-comment rulemaking. Pet. C.A. Second Corrected Br. 26-29. That argument rested on the premise that the Waterways Provision is *actually subject* to Section 553's notice-and-comment requirements. With respect to the Federal Circuit's jurisdiction, petitioner stated that "[b]oth APA provisions set forth at 5 U.S.C. § 552(a)(1)(D) and § 553(b) are implicated by [VA's] Final Rule." *Id.* at 2. After the government's responsive brief argued that the court of appeals lacked jurisdiction under Section 502, Gov't C.A. Br. in Opp. 29-35, petitioner contended in his reply brief that the court had Section 502 jurisdiction based on Section 552(a)(1)(D), without citing Section 553, Pet. C.A. Reply Br. 11-14. Because petitioner appeared to have abandoned any jurisdictional argument based on Section 553, the Federal Circuit understandably concluded that the VJRA's cross-reference to Section 553 was not at issue in this case. See Pet. App. 8a.

Petitioner contends that he "has consistently invoked Section 502's cross-reference to Section 553 as a basis for jurisdiction." Pet. Br. 47. But quite apart from petitioner's failure to cite Section 553 in his Federal Circuit reply brief, the Section 553 argument that petitioner advances in this Court is fundamentally different from any jurisdictional theory suggested in his opening brief below. In his Federal Circuit opening brief, petitioner argued that the Waterways Provision is an action to which Section 553's notice-and-comment require-

ments *actually apply*. If that were correct, the Waterways Provision would unquestionably be an action to which Section 553 "refers." In this Court, by contrast, petitioner argues that Section 553 "refers" to the Waterways Provision (and actions like it) only by *exempting* such actions from notice-and-comment requirements. Petitioner first made *that* argument in his petition for rehearing below, Pet. C.A. Reh'g Br. 15-16, but courts do not generally consider issues raised for the first time in rehearing petitions. See, *e.g.*, *United States* v. *Levy*, 379 F.3d 1241, 1242 (11th Cir. 2004) (per curiam) (collecting cases), vacated and remanded on other grounds, 545 U.S. 1101 (2005).

2. In any event, petitioner's current argument lacks merit. "An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers," 38 U.S.C. 502, is one that is *encompassed by* Section 552(a)(1) or Section 553, *i.e.*, an action to which one or both of those provisions apply. Adjacent language in Section 553 reinforces that conclusion. In addition to exempting interpretive rules from notice-and-comment rulemaking requirements, Section 553 states that those requirements do not apply to such matters as "a military or foreign affairs function of the United States." 5 U.S.C. 553(a). On petitioner's approach, a litigant could bring a preenforcement challenge to VA's action on "a military or foreign affairs function of the United States," on the theory that Section 553 "refers" to such actions by excluding them from its coverage. *Ibid.* Petitioner invokes the interpretive principle "that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." Pet. Br. 45 (quoting *Henderson*, 562 U.S. at 441). But that principle applies only when a statute is genuinely ambiguous, see,

e.g., *Nielson* v. *Shinseki*, 607 F.3d 802, 808 n.4 (Fed. Cir. 2010); *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004), and there is no genuine ambiguity here.

C. The Waterways Provision Is Not Reviewable Under Section 502 Because It Is Not Final Agency Action

1. Even if the Waterways Provision constituted an "action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers," and was therefore "subject to judicial review" under the VJRA, 38 U.S.C. 502, petitioner's current challenge still could not go forward. After authorizing judicial review of the specified categories of VA actions, the VJRA provides that "[s]uch review shall be in accordance with chapter 7 of title 5"—that is, the judicial-review provisions of the APA. *Ibid.*; see 5 U.S.C. 701-706. Those provisions authorize judicial review of "final agency action," while stating that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. 704. Because the Waterways Provision is not a "final agency action" that would be subject to pre-enforcement review under the APA, the VJRA does not authorize petitioner's current request for pre-enforcement review under the VJRA.

a. Under the APA, an agency determination is "final" if (1) the action "mark[s] the 'consummation' of the agency's decisionmaking process," and (2) the action is one from which "'rights or obligations have been determined'" or from which "'legal consequences will flow.'" *Bennett* v. *Spear*, 520 U.S. 154, 177-178 (1997) (citations omitted); see, *e.g.*, *United States Army Corps of Eng'rs* v. *Hawkes Co.*, 136 S. Ct. 1807, 1813 (2016). The Waterways Provision does not satisfy either requirement. As

explained above, the Waterways Provision—like other provisions of the Manual—is not binding on the Board, which renders the "agency's final decision" on disability benefits claims, *Henderson*, 562 U.S. at 431, and which must conduct de novo review of any appeal from an adverse adjudication in the regional office without giving controlling weight to an interpretation in the Manual. See Pet. App. 11a-12a; *Overton*, 30 Vet. App. at 259. Accordingly, reference to the Manual does not mark the consummation of the agency's decision making process, and no "rights," "obligations," or "legal consequences" result from the Waterways Provision itself. *Bennett*, 520 U.S. at 178 (citation omitted). Such legally binding consequences can flow only from the agency's adjudication of an individual claim in a given case. See, *e.g.*, *Reno* v. *Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 (1993) (explaining that a regulation related to the provision of government benefit could be challenged only when applied to the claimant); *Lujan* v. *National Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (similarly requiring a "case-by-case approach").

b. Enforcing the "final agency action" requirement of the APA judicial-review provisions is consistent with both the text and purpose of 38 U.S.C. 502. To be sure, Section 502 establishes a mechanism for judicial review of VA actions that is distinct from the VJRA provisions that govern review of individual benefits determinations. To that extent, Section 502 is properly characterized as authorizing "pre-enforcement review." But because the VJRA requires such review to be conducted "in accordance with" the APA, *ibid.*, it cannot properly be read to authorize *immediate* review of *every* VA action to which 5 U.S.C. 552(a)(1) or 553 refers.

Section 552(a)(1)(A) of Title 5, for example, requires an agency to publish in the Federal Register "descriptions of its central and field organization." 5 U.S.C. 552(a)(1)(A). Section 552(a)(1)(B) requires an agency to publish "statements of the general course and method by which its functions are channeled and determined." 5 U.S.C. 552(a)(1)(B). The VJRA cannot sensibly be read to allow freestanding challenges to VA communications of that character in the absence of any concrete effect on individual "rights or obligations" or other "legal consequences." *Bennett*, 520 U.S. at 178 (citation omitted). Reading Section 502's cross-reference as incorporating the APA's "final agency action" requirement avoids that unlikely result.

Enforcing the "final agency action" requirement would leave room for litigants to challenge a significant category of binding agency actions under Section 502. "[S]ubstantive rules of general applicability," 5 U.S.C. 552(a)(1)(D), are generally final and subject to direct challenge. See, *e.g.*, *Abbott Labs.* v. *Gardner*, 387 U.S. 136, 150-151 (1967). And although many "statements of general policy or interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D), may be nonbinding and therefore nonfinal, see, *e.g.*, *Association of Flight Attendants-CWA* v. *Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015), that is not true of all agency actions that fit into that category. As explained above, precedential opinions of the VA General Counsel are binding on the Board by statute, 38 U.S.C. 7104(c), so they are properly considered "interpretations of general applicability formulated and adopted by the agency" under 5 U.S.C. 552(a)(1)(D) and therefore subject to pre-enforcement review under the VJRA, 38 U.S.C. 502. See *Snyder*, 858 F.3d at 1412-

1413; *Splane*, 216 F.3d at 1062; see also, *e.g.*, *Whitman* v. *American Trucking Ass'ns*, 531 U.S. 457, 478-479 (2001) (concluding that agency "interpretation" in a preamble to a rule was "final agency action" because it was "conclusive").

Limiting pre-enforcement review under Section 502 to final agency action in accordance with the APA also reflects the fundamental compromise underlying the VJRA. Contrary to petitioner's vision of "expansive" pre-enforcement review (Pet. Br. 2), Congress in the VJRA created a tailored judicial-review scheme that channeled most challenges to VA decisions to the newly established Veterans Court through appeals of individual benefits determinations. The VJRA scheme was "intended to afford the maximum possible deference to the [Board's] expertise as an arbiter of the specialized types of factual issues that arise in the context of claims for VA benefits, while still recognizing and providing for the possibility of error in [the Board's] factual determinations." VJRA Senate Report 60. As noted above, the VJRA House and Senate Reports mention the prospect of pre-enforcement review of "VA policy as expressed in VA regulations and interpretations by the General Counsel," VJRA House Report 26, and "VA's institutional decisions—i.e., regulations," VJRA Senate Report 112, but do not suggest anything resembling the "expansive" judicial review petitioner envisions (Pet. Br. 2). Indeed, the House Report reiterates the "basic administrative principles that a reviewing court ought not to be put in a position where it has no idea of an agency's views on a particular legal question," and that the "the law should encourage agencies to resolve disputes * * * without court intervention, since the agency is in the best position to understand the effect of

a changed position and to make the most informed decision on the best means of implementing any change in its position." VJRA House Report 27.

Petitioner's sweeping reading of Section 502 would fundamentally alter the balance that has prevailed for the past 30 years under the VJRA. Under his proposed construction, countless provisions of the Manual would constitute "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. 552(a)(1)(D), subject to pre-enforcement review under 38 U.S.C. 502. But see Pet. App. 34a (Taranto, J., concurring in the denial of rehearing en banc) (observing that "[f]ew challenges to Manual pronouncements have been brought through § 502."). That destabilizing result would conflict with the history and purpose of the VJRA, and with the settled principle of administrative law that interpretive rules are generally not reviewable before their application in particular cases. See *Huerta*, 785 F.3d at 717.

2. Although petitioner's current facial challenge to the Waterways Provision is not judicially cognizable, petitioner has alternative avenues for contesting the interpretation that the Provision reflects. He may petition VA to conduct a rulemaking, see 5 U.S.C. 553(e), and to adopt his preferred construction of the phrase "in the Republic of Vietnam" as used in the Agent Orange Act, 38 U.S.C. 1116(a)(1)(A). If VA denies his petition, he may seek direct review of that denial in the Federal Circuit. Pet. App. 13a & n.1; see *Preminger* v. *Secretary of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011) (per curiam).

Petitioner can also argue, in his pending appeal from VA's denial of disability benefits, that he served "in the

Republic of Vietnam" as that term is properly understood, and that the interpretation reflected in the Waterways Provision should be rejected. At the joint request of petitioner and VA, that appeal has been stayed in the Veterans Court for nearly two years while this litigation proceeds. The Federal Circuit also recently confirmed the availability of class-action review before the Veterans Court, which could offer another vehicle for petitioner to challenge VA's interpretation. See *Monk* v. *Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017). Litigants before the Veterans Court seeking faster review of VA interpretations may petition that court to certify certain controlling legal questions to the Federal Circuit. See 38 U.S.C. 7292(b). And litigants who object to what they perceive as unreasonable delay may petition the Veterans Court to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2); see *Blue Water Navy Viet. Veterans Ass'n* v. *McDonald*, 830 F.3d 570, 578 (D.C. Cir. 2016) (describing this option).

In seeking to overturn VA's adverse benefits determination, moreover, petitioner may benefit from the efforts of other veterans. As Judge Taranto explained below in his concurrence from the denial of rehearing en banc, other individual benefits adjudications that are currently pending before the Federal Circuit raise related questions about the proper understanding of the phrase "in the Republic of Vietnam" under the Agent Orange Act. Pet. App. 33a-34a. The Federal Circuit recently granted en banc review and heard oral argument in one such case, *Procopio* v. *Wilkie*, No. 17-1821 (argued Dec. 7, 2018), in which the veteran contends that the "Republic of Vietnam" necessarily includes the

territorial seas off the coast. Appellant Br. at 19-29, *Procopio*, *supra* (No. 17-1821). If the Federal Circuit adopts that position, petitioner will qualify for the presumption of exposure to Agent Orange, and he will have no need to pursue his pre-enforcement challenge.

3. In support of his proposed construction of the VJRA, petitioner suggests that Congress enacted the pre-enforcement review provision of the VJRA "because VA gets it wrong so often." Pet. Br. 50; see *id.* at 49 & n.14 (citing cases in which courts have ruled against VA). As an initial matter, every one of the cases petitioner cites was decided *after* enactment of the VJRA and thus could not have informed Congress's purpose. In enacting the VJRA, moreover, Congress lauded VA as "one of the most generous benefactory agencies in the world," VJRA House Report 25, and explained that the new legislation was "not based on a belief that the current preclusion of judicial review of [Board] decisions results in wide-spread injustices; to the contrary, there is little evidence that most claimants are not satisfied with the resolution of their claims for VA benefits," VJRA Senate Report 30.

Petitioner is of course correct that courts have invalidated some VA actions. But courts—including this Court—have also upheld many VA actions. See, *e.g.*, *Shinseki* v. *Sanders*, 556 U.S. 396, 399 (2009); *Veterans Justice Grp., LLC* v. *Secretary of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016); *Service Women's Action Network* v. *Secretary of Veterans Affairs*, 815 F.3d 1369 (Fed. Cir. 2016); *Haas*, 525 F.3d at 1173-1175. Petitioner also laments (Pet. Br. 1-2, 50-52) the slow pace of the VA adjudication process. VA shares that dissatisfaction, and

the agency is working to improve its efficiency in processing the record-high number of claims it now receives. See p. 5, *supra*.

Ultimately, the question in this case is not whether petitioner can obtain review of his disagreement with VA over the scope of the Agent Orange Act, but only which court provides that review at which stage in the process. Both the VJRA's creation of an appeals mechanism through the Board and the Veterans Court (with pre-enforcement review available as a limited exception for final interpretations that bind the entire agency), and the well-established principle of administrative law that nonbinding and nonfinal agency interpretations are generally not reviewable before enforcement, strongly indicate that the Waterways Provision is reviewable only through the usual process.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. 5 U.S.C. 552(a)(1) and (2) (2012 & Supp. V 2017) provide:

Public information; agency rules, opinions, orders, records, and proceedings

(a) Each agency shall make available to the public information as follows:

(1) Each agency shall separately state and currently publish in the Federal Register for the guidance of the public—

(A) descriptions of its central and field organization and the established places at which, the employees (and in the case of a uniformed service, the members) from whom, and the methods whereby, the public may obtain information, make submittals or requests, or obtain decisions;

(B) statements of the general course and method by which its functions are channeled and determined, including the nature and requirements of all formal and informal procedures available;

(C) rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations;

(D) 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; and

(E) each amendment, revision, or repeal of the foregoing.

Except to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published. For the purpose of this paragraph, matter reasonably available to the class of persons affected thereby is deemed published in the Federal Register when incorporated by reference therein with the approval of the Director of the Federal Register.

(2) Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—

(A) final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases;

(B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register;

(C) administrative staff manuals and instructions to staff that affect a member of the public;

(D) copies of all records, regardless of form or format—

(i) that have been released to any person under paragraph (3); and

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of subsequent requests for substantially the same records; or

(II) that have been requested 3 or more times; and

(E) a general index of the records referred to under subparagraph (D);

unless the materials are promptly published and copies offered for sale. For records created on or after November 1, 1996, within one year after such date, each agency shall make such records available, including by computer telecommunications or, if computer telecommunications means have not been established by the agency, by other electronic means. To the extent required to prevent a clearly unwarranted invasion of personal privacy, an agency may delete identifying details when it makes available or publishes an opinion, statement of policy, interpretation, staff manual, instruction, or copies of records referred to in subparagraph (D). However, in each case the justification for the deletion shall be explained fully in writing, and the extent of such deletion shall be indicated on the portion of the record which is made available or published, unless including that indication would harm an interest protected by the exemption in subsection (b) under which the deletion is made. If technically feasible, the extent of the deletion shall be indicated at the place in the record where the deletion was made. Each agency shall also maintain and make available for public inspection in an electronic format current indexes providing identifying information for the public as to any matter issued, adopted, or promulgated after July 4, 1967, and required by this paragraph to be made available or published. Each agency shall promptly publish, quarterly or more frequently, and distribute (by

sale or otherwise) copies of each index or supplements thereto unless it determines by order published in the Federal Register that the publication would be unnecessary and impracticable, in which case the agency shall nonetheless provide copies of such index on request at a cost not to exceed the direct cost of duplication. Each agency shall make the index referred to in subparagraph (E) available by computer telecommunications by December 31, 1999. A final order, opinion, statement of policy, interpretation, or staff manual or instruction that affects a member of the public may be relied on, used, or cited as precedent by an agency against a party other than an agency only if—

(i) it has been indexed and either made available or published as provided by this paragraph; or

(ii) the party has actual and timely notice of the terms thereof.

2. 5 U.S.C. 704 provides:

Actions reviewable

Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action. Except as otherwise expressly required by statute, agency action otherwise final is final for the purposes of this section whether or not there has been presented or determined an application for a declaratory order, for any form of

reconsideration, or, unless the agency otherwise requires by rule and provides that the action meanwhile is inoperative, for an appeal to superior agency authority.

3. 38 U.S.C. 502 provides:

Judicial review of rules and regulations

An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

4. 38 U.S.C. 511 provides:

Decisions of the Secretary; finality

(a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.

(b) The second sentence of subsection (a) does not apply to—

(1) matters subject to section 502 of this title;

(2) matters covered by sections 1975 and 1984 of this title;

(3) matters arising under chapter 37 of this title; and

(4) matters covered by chapter 72 of this title.

5. 38 U.S.C. 1116(a) provides:

Presumptions of service connection for diseases associated with exposure to certain herbicide agents; presumption of exposure for veterans who served in the Republic of Vietnam

(a)(1) For the purposes of section 1110 of this title, and subject to section 1113 of this title—

(A) a disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975; and

(B) each additional disease (if any) that (i) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having positive association with exposure to an herbicide agent, and (ii) becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military,

naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, and while so serving was exposed to that herbicide agent,

shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

(2) The diseases referred to in paragraph (1)(A) of this subsection are the following:

(A) Non-Hodgkin's lymphoma becoming manifest to a degree of disability of 10 percent or more.

(B) Each soft-tissue sarcoma becoming manifest to a degree of disability of 10 percent or more other than osteosarcoma, chondrosarcoma, Kaposi's sarcoma, or mesothelioma.

(C) Chloracne or another acneform disease consistent with chloracne becoming manifest to a degree of disability of 10 percent or more within one year after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

(D) Hodgkin's disease becoming manifest to a degree of disability of 10 percent or more.

(E) Porphyria cutanea tarda becoming manifest to a degree of disability of 10 percent or more within a year after the last date on which the veteran performed active military, naval, or air service in

the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

(F) Respiratory cancers (cancer of the lung, bronchus, larynx, or trachea) becoming manifest to a degree of disability of 10 percent or more.

(G) Multiple myeloma becoming manifest to a degree of disability of 10 percent or more.

(H) Diabetes Mellitus (Type 2).

(3) For purposes of this section, the term "herbicide agent" means a chemical in an herbicide used in support of the United States and allied military operations in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975.

6. 38 U.S.C. 7104 (2012 & Supp. V 2017) provides:

Jurisdiction of the Board

(a) All questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary. Final decisions on such appeals shall be made by the Board. Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation.

(b) Except as provided in section 5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be readjudicated and allowed and a claim based upon the same factual basis may not be considered.

(c) The Board 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.

(d) Each decision of the Board shall include—

(1) a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of fact and law presented on the record;

(2) a general statement—

(A) reflecting whether evidence was not considered in making the decision because the evidence was received at a time when not permitted under section 7113 of this title; and

(B) noting such options as may be available for having the evidence considered by the Department; and

(3) an order granting appropriate relief or denying relief.

(e)(1) After reaching a decision on a case, the Board shall promptly mail a copy of its written decision to the claimant at the last known address of the claimant.

(2) If the claimant has an authorized representative, the Board shall—

(A) mail a copy of its written decision to the authorized representative at the last known address of the authorized representative; or

(B) send a copy of its written decision to the authorized representative by any means reasonably likely to provide the authorized representative with a copy of the decision within the same time a copy would be expected to reach the authorized representative if sent by first-class mail.

7. 38 U.S.C. 7252 provides:

Jurisdiction; finality of decisions

(a) The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

(b) Review in the Court shall be on the record of proceedings before the Secretary and the Board. The extent of the review shall be limited to the scope provided in section 7261 of this title. The Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule.

(c) Decisions by the Court are subject to review as provided in section 7292 of this title.

8. 38 U.S.C. 7261 provides:

Scope of review

(a) In any action brought under this chapter, the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to bene-

fits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.

(b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title and shall—

(1) take due account of the Secretary's application of section 5107(b) of this title; and

(2) take due account of the rule of prejudicial error.

(c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.

(d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

9. 38 U.S.C. 7292 provides:

Review by United States Court of Appeals for the Federal Circuit

(a) After a decision of the United States Court of Appeals for Veterans Claims is entered in a case, any party to the case may obtain a review of the decision

with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation (other than a refusal to review the schedule of ratings for disabilities adopted under section 1155 of this title) or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the Court in making the decision. Such a review shall be obtained by filing a notice of appeal with the Court of Appeals for Veterans Claims within the time and in the manner prescribed for appeal to United States courts of appeals from United States district courts.

(b)(1) When a judge or panel of the Court of Appeals for Veterans Claims, in making an order not otherwise appealable under this section, determines that a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion and that there is in fact a disagreement between the appellant and the Secretary with respect to that question of law and that the ultimate termination of the case may be materially advanced by the immediate consideration of that question, the judge or panel shall notify the chief judge of that determination. Upon receiving such a notification, the chief judge shall certify that such a question is presented, and any party to the case may then petition the Court of Appeals for the Federal Circuit to decide the question. That court may permit an interlocutory appeal to be taken on that question if such a petition is filed with it within 10 days after the certification by the chief judge of the Court of Appeals for Veterans Claims. Neither the application for, nor the granting of, an appeal under this paragraph shall stay proceedings in the Court of Appeals for Vet-

erans Claims, unless a stay is ordered by a judge of the Court of Appeals for Veterans Claims or by the Court of Appeals for the Federal Circuit.

(2) For purposes of subsections (d) and (e) of this section, an order described in this paragraph shall be treated as a decision of the Court of Appeals for Veterans Claims.

(c) The United States Court of Appeals for the Federal Circuit shall have exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought under this section, and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision. The judgment of such court shall be final subject to review by the Supreme Court upon certiorari, in the manner provided in section 1254 of title 28.

(d)(1) The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law.

(2) Except to the extent that an appeal under this chapter presents a constitutional issue, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case.

(e)(1) Upon such review, the Court of Appeals for the Federal Circuit shall have power to affirm or, if the decision of the Court of Appeals for Veterans Claims is not in accordance with law, to modify or reverse the decision of the Court of Appeals for Veterans Claims or to remand the matter, as appropriate.

(2) Rules for review of decisions of the Court of Appeals for Veterans Claims shall be those prescribed by the Supreme Court under section 2072 of title 28.

10. 38 C.F.R. 3.307(a) provides in pertinent part:

Presumptive service connection for chronic, tropical, or prisoner-of-war related disease, disease associated with exposure to certain herbicide agents, or disease associated with exposure to contaminants in the water supply at Camp Lejeune; wartime and service on or after January 1, 1947.

(a) *General.* A chronic, tropical, or prisoner of war related disease, a disease associated with exposure to certain herbicide agents, or a disease associated with

exposure to contaminants in the water supply at Camp Lejeune listed in § 3.309 will be considered to have been incurred in or aggravated by service under the circumstances outlined in this section even though there is no evidence of such disease during the period of service. No condition other than one listed in § 3.309(a) will be considered chronic.

* * * * *

(6) *Diseases associated with exposure to certain herbicide agents.* * * *

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(iii) A veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975, shall be presumed to have been exposed during such service to an herbicide agent, unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service. The last date on which such a veteran shall be presumed to have been exposed to an herbicide agent shall be the last date on which he or she served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam.

* * * * *

11. 38 C.F.R. 19.5 provides:

Criteria governing disposition of appeals.

In the consideration of appeals, the Board is bound by applicable statutes, regulations of the Department of Veterans Affairs, and precedent opinions of the General Counsel of the Department of Veterans Affairs. The Board is not bound by Department manuals, circulars, or similar administrative issues.