Nos. 17-1679 and 17-1693

In the Supreme Court of the United States

ROBERT H. GRAY, PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC., PETITIONER

v.

ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

The Department of Veterans Affairs (VA) administers the federal program that provides benefits to veterans with service-connected disabilities. Under the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, a person adversely affected by a final decision of the Board of Veterans' Appeals (Board) on a claim for veterans benefits may seek judicial review in the United States Court of Appeals for Veterans Claims, followed by review in the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7252, 7292. Other than the adjudication of individual veterans-benefits claims, the VJRA authorizes judicial review in the Federal Circuit only of "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. 502. Section 553 refers to notice-and-comment rulemaking. 5 U.S.C. 553. Section 552(a)(1), a provision of the Freedom of Information Act, 5 U.S.C. 552 (2012 & Supp. V 2017), enumerates several categories of agency actions that must be published in the *Federal Register*, including (as relevant here) "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). The court of appeals held that it lacked jurisdiction under 38 U.S.C. 502 to review petitioners' preenforcement challenges to internal VA guidance to employees for initial adjudication of claims. That guidance is contained in an administrative staff manual that is not binding on the Board in rendering final decisions on claims for benefits. The question presented is as follows:

Whether 38 U.S.C. 502 vests the court of appeals with jurisdiction over petitioners' preenforcement challenges to the VA's guidance to employees in its manual.

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No. 17-1679

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a[2]) is reported at 875 F.3d 1102.

[1] Robert Wilkie, Secretary of Veterans Affairs, is automatically substituted for his predecessor, former Acting Secretary of Veterans Affairs Peter O'Rourke. See Sup. Ct. R. 35.3.

[2] "Pet. App." refers to the appendix to the petition for a writ of certiorari in No. 17-1679.

JURISDICTION

The judgment of the court of appeals was entered on November 16, 2017. Petitions for rehearing were denied on March 21, 2018 (Pet. App. 29a-37a). The petition for a writ of certiorari in No. 17-1679 was filed on June 19, 2018, and the petition for a writ of certiorari in No. 17-1693 was filed on June 18, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Department of Veterans Affairs (VA) administers the federal program that provides benefits to veterans with service-connected disabilities. *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011); see 38 U.S.C. 301(b). The Secretary of Veterans Affairs is authorized to adopt regulations implementing federal benefits laws, including regulations regarding (*inter alia*) the procedure for adjudicating claims and the "nature and extent of proof and evidence" required "to establish the right to benefits." 38 U.S.C. 501(a)(1). The Secretary also is charged with adjudicating claims for benefits, including resolving "all questions of law and fact necessary to a decision" whether benefits will be awarded. 38 U.S.C. 511(a).

The Veterans Benefits Administration (VBA) within the VA is responsible for the VA disability adjudication system. Through the VA's regional offices and claims adjudicators, the VBA develops the record in individual cases and decides claims through a multi-step process. See 38 U.S.C. 5100 *et seq.* Claims for benefits are received and processed by a VA regional office, which renders an initial decision. See *Henderson*, 562 U.S. at 431. A veteran who is dissatisfied with the regional office's decision may seek de novo review by the Board

of Veterans' Appeals (Board), a component of the VA. See *ibid.*; see also 38 U.S.C. 301(c)(5), 7101 *et seq.*

The VBA has consolidated its policies and procedures for adjudicating disability-benefits claims into a guidance manual, the Adjudication Procedures Manual M21-1 (M21-1 Manual), which the VA publishes online.[3] See *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) (*DAV*). The M21-1 Manual provides guidance to VBA employees in order to "allow the VBA to process claims benefits quicker and with higher accuracy." *Ibid.* (brackets and citation omitted). VBA employees can request changes to the M21-1 Manual. *Ibid.*

The M21-1 Manual is not "binding" on the Board. Pet. App. 5a; see *DAV*, 859 F.3d at 1077. Under the VA's regulations, in conducting de novo review of decisions on claims for benefits, the Board is bound by "applicable statutes," VA "regulations," and "precedent opinions of the General Counsel of the [VA]," but it is "not bound by [VA] manuals, circulars, or similar administrative issues." 38 C.F.R. 19.5. The Board thus "is not bound by any directives in the M21-1 Manual and need not defer to any administrator's adherence to those guidelines." Pet. App. 5a.

b. Judicial review of the VA's determinations regarding benefits is available only as specifically provided in Title 38 of the United States Code. See 38 U.S.C. 511 (precluding judicial review except for matters subject to particular, enumerated provisions of

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[3] See United States Dep't of Veterans Affairs, Adjudications Procedures Manual M21-1, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000073398/M21-1%20Table%20of%20Contents.

Title 38). With exceptions not relevant here, the only avenues to judicial review are (1) review of individual veterans-benefits decisions at the conclusion of the administrative process, 38 U.S.C. 7252, 7266, 7292, and (2) preenforcement review of VA rules and certain other enumerated actions of general applicability, 38 U.S.C. 502; see *Blue Water Navy Vietnam Veterans Ass'n* v. *McDonald*, 830 F.3d 570, 573-574 (D.C. Cir. 2016).

i. The Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, provides for judicial review of the VA's final decisions on claims for benefits. See *Henderson*, 562 U.S. at 432. A claimant who is dissatisfied with the Board's decision may appeal to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court that has exclusive jurisdiction to review decisions of the Board. 38 U.S.C. 7252, 7266.

Decisions of the Veterans Court may in turn be appealed to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292(b)(1). In addition, if a judge or panel of the Veterans Court determines in a benefits case that "a controlling question of law is involved with respect to which there is a substantial ground for difference of opinion," and "that the ultimate termination of the case may be materially advanced by the immediate consideration of that question," a party to the case may file a petition in the Federal Circuit requesting interlocutory review. *Ibid.* In adjudicating benefits cases within its jurisdiction, the Federal Circuit shall "decide all relevant questions of law," including challenges to 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).

ii. In addition to authorizing direct review of a VA decision on a claim for benefits, the VJRA authorizes preenforcement review of certain VA actions. Section 502 vests the Federal Circuit with exclusive jurisdiction to review "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. 502. Section 553 of Title 5 addresses notice-and-comment rulemaking, including petitions filed by interested persons "for the issuance, amendment, or repeal of a rule." 5 U.S.C. 553(e). The Federal Circuit has held that 38 U.S.C. 502 "vests [that court] with jurisdiction to review the Secretary's denial of a request for rulemaking made pursuant to § 553(e)." Pet. App. 13a (quoting *Preminger* v. *Secretary of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011)).

Section 552 of Title 5, the Freedom of Information Act (FOIA), addresses the public availability of various agency actions and records. Section 552(a) requires various categories of government records to be made available in different ways. Section 552(a)(1), which is cross-referenced in 38 U.S.C. 502, provides that "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public," 5 U.S.C. 552(a)(1), five categories of documents:

> (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.

Ibid.

Other provisions of Section 552(a) variously require specified types of documents that are not required by Section 552(a)(1) to be published in the *Federal Register* to be made available in other ways. Section 552(a)(2) requires agencies to "make available for public inspection in an electronic format": "final opinions" and "orders" in adjudicated cases; "statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register"; "administrative staff manuals and instructions to staff that affect a member of the public"; and "copies of all records" that have been released upon request and that have been or are likely to be the subject of multiple requests, along with an index of such records. 5 U.S.C. 552(a)(2) (2012 & Supp. V 2017). Still other types of records need be made available to members of the public only upon request. 5 U.S.C. 552(a)(3). Documents that fall within these categories but that are not referred to in 5 U.S.C. 552(a)(1) are not subject to judicial review under 38 U.S.C. 502.

2. a. To receive disability compensation for an illness under the veterans-benefits program, a veteran

generally must establish that the disability is service connected, meaning that it was "incurred or aggravated[ ] in [the] line of duty in the active military, naval, or air service." 38 U.S.C. 101(16). In the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, Congress established a framework for compensating veterans for illnesses that may have been caused by herbicides including Agent Orange, which was used for defoliation during the Vietnam War. The Agent Orange Act establishes a presumption of service connection for certain veterans who develop certain diseases that may have been caused by exposure to such herbicides. If a veteran who "served in the Republic of Vietnam" between January 9, 1962 and May 7, 1975, develops a disease associated with herbicide exposure, the disease ordinarily "shall be considered to have been incurred in or aggravated by such service." 38 U.S.C. 1116(a)(1)(A). If a veteran does not qualify for the presumption of service connection, he still may demonstrate his entitlement to benefits by proving that he was actually exposed to herbicides and that the exposure caused his disability. 38 U.S.C. 101(16).

The Secretary has promulgated regulations to implement the Agent Orange Act. See Pet. App. 3a-4a. As relevant here, the regulations define the term "served in the Republic of Vietnam" to include "service in the 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). The Secretary has long interpreted that regulation to require that a veteran who served on a ship offshore must have set foot on the land mass of Vietnam in order to have "served in the Republic of Vietnam." See, *e.g.*, 66 Fed. Reg. 23,166 (May 8, 2001); 62 Fed. Reg. 51,274

(Sept. 30, 1997). The Secretary has explained that requirement as follows:

> Because herbicides were not applied in waters off the shore of Vietnam, limiting the scope of the term *service in the Republic of Vietnam* to persons whose service involved duty or visitation in the Republic of Vietnam limits the focus of the presumption of exposure to persons who may have been in areas where herbicides could have been encountered.

62 Fed. Reg. at 51,274. In addition to the Secretary's regulations, provisions of the M21-1 Manual "direct[ ] VA adjudicators regarding the proper handling of disability claims from Vietnam-era veterans," Pet. App. 5a, including how to determine whether a claimant's military service qualifies as "service in the Republic of Vietnam" under the Agent Orange Act, M21-1 Manual, Pt. IV, Subpt. ii, Ch. 1, Sec. H; see Pet. App. 46a-50a.

b. In 2008, the Federal Circuit addressed the application of these provisions. See *Haas* v. *Peake*, 525 F.3d 1168, cert. denied, 555 U.S. 1149 (2009). The Veterans Court in *Haas* had concluded that the interpretation of "serv[ed] in the Republic of Vietnam" in the VA's regulations was unreasonable, and that the M21-1 Manual provisions addressing the issue constituted substantive rules adopted without notice and comment in violation of the Administrative Procedure Act (APA), 5 U.S.C. 553. *Haas*, 525 F.3d at 1173-1175 (citation omitted). The Federal Circuit reversed. *Id.* at 1175-1197.

The Federal Circuit held that the phrase "served in the Republic of Vietnam" in the Agent Orange Act, 38 U.S.C. 1116(a)(1)(A), is ambiguous, and it deferred to the Secretary's construction of the statute in the regulations. *Haas*, 525 F.3d at 1185-1186. The court held that it was not unreasonable for the VA to "limit the

presumptions of exposure and service connection to servicemembers who ha[ve] served, for some period at least, on land," and that the VA's interpretation of Section 3.307(a)(6)(iii) "did not rise to the level of being 'plainly erroneous or inconsistent with the regulation.'" *Id.* at 1193 (citation omitted). The court recounted the VA's historical policies concerning "service in the Republic of Vietnam," and it concluded that the VA's interpretation of Section 3.307(a)(6)(iii) was entitled to substantial deference. *Id.* at 1186-1191. The court explained that "[d]rawing a line between service on land, where herbicides were used, and service at sea, where they were not, is prima facie reasonable," and it declined "to substitute [its] judgment for that of the agency and impose a different line." *Id.* at 1193.

The Federal Circuit also rejected the contention that the M21-1 Manual's provision addressing service connection for exposure to Agent Orange constituted a substantive rule adopted in violation of the APA. *Haas*, 525 F.3d at 1195-1197. The court held that the M21-1 Manual's Agent Orange provision was an interpretive statement, not "a substantive rule that could not be changed without compliance with formal notice-and-comment rulemaking procedures." *Id.* at 1195. The court explained that the M21-1 Manual "'is an internal manual used to convey guidance to VA adjudicators,'" and that "'[i]t is not intended to establish substantive rules beyond those contained in statute and regulation.'" *Id.* at 1196 (quoting 72 Fed. Reg. 66,218, 66,219 (Nov. 27, 2007)). The court additionally explained that the M21-1 Manual provision at issue "did not set forth a firm legal test for 'service in the Republic of Vietnam,' but simply provided guidance as to how an adjudicator should go about gathering information necessary to

determine whether the regulatory test had been satisfied." *Ibid.* The provision furnished "reasonably easily applied guidance for adjudicators in an effort to obtain consistency of outcome," but "it did not define the boundaries of the [VA's] legal responsibility with precision." *Ibid.*

3. Petitioner in No. 17-1679, Robert Gray, is a veteran who served in the U.S. Navy during the Vietnam War, including aboard a vessel that entered Da Nang Harbor. Pet. App. 6a; see *Gray* v. *McDonald*, 27 Vet. App. 313, 316 (2015). In 2007, while *Haas* was pending in the Federal Circuit, Gray submitted a claim for disability benefits based on medical conditions that he contended had resulted from exposure to Agent Orange. Pet. App. 6a. The VA regional office and the Board denied Gray's claim because his service did not qualify him for the presumption of exposure under 38 C.F.R. 3.307(a)(6)(iii), and because he had not established direct exposure to Agent Orange. See *Gray*, 27 Vet. App. at 316-318. At the time, the M21-1 Manual instructed adjudicators to consider "service in the Republic of Vietnam" to be "service in the [Republic of Vietnam] or its inland waterways." Pet. App. 6a (citation omitted). In a 2009 letter, the VA had further explained that it defined "inland waterways" to mean "rivers, estuaries, canals, and delta areas inside the country," but not "open deep-water coastal ports and harbors where there is no evidence of herbicide use." *Ibid.* (citations omitted). The agency therefore did not consider Da Nang Harbor, where Gray had served, to constitute part of Vietnam's inland waterways.

Gray appealed to the Veterans Court, and in 2015 the court vacated the Board's decision in relevant part. *Gray*, 27 Vet. App. at 319-328. The Veterans Court

found the definition of "inland waterways" that the VA had applied to be "both inconsistent with the regulatory purpose and irrational." *Id.* at 322; see *id.* at 322-324. In particular, the court found that the VA's exclusion of coastal water features such as Da Nang Harbor from the definition of "inland waterways," based on their water depth, was unrelated to the likelihood of exposure to Agent Orange. *Ibid.* The court also held that the VA had failed adequately to explain why its definition of "inland waterway" included Quy Nhon Bay and Gahn Rai Bay but excluded all other ports and harbors, including Da Nang Harbor where Gray had served. *Id.* at 324. The Veterans Court remanded Gray's case to the VA for further proceedings. *Id.* at 328. The court instructed the VA on remand to reevaluate its definition of "inland waterway"—"particularly as it applies to Da Nang Harbor"—consistent with Section 3.307(a)(6)(iii)'s emphasis on the likelihood of exposure to Agent Orange. *Id.* at 326-327. The VA did not appeal.

4. a. After the Veterans Court's 2015 decision in Gray's case, the VA revised the relevant provisions of the M21-1 Manual. Pet. App. 6a-8a. In reexamining the M21-1 Manual's provisions, "the VA surveyed the available scientific evidence" concerning troop exposure to Agent Orange in Vietnam, "including documents submitted in July 2015 by counsel for" petitioner in No. 17-1693, Blue Water Navy Vietnam Veterans Association (Blue Water), an organization representing a number of veterans (known as "'Blue Water' veterans") who served in the open waters surrounding Vietnam. *Id.* at 4a, 6a. The VA determined that, because "Agent Orange was not sprayed over Vietnam's offshore waters," there was no "medical or scientific evidence to support a presumption of exposure for service on the offshore open waters,"

which the VA further defined as "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." *Id.* at 6a-7a (citation omitted). In February 2016, VA accordingly revised the M21-1's instructions concerning how adjudicators are to determine whether a claimant served on an inland waterway or offshore of Vietnam. *Ibid.* "[T]he VA instructed its adjudicators to exclude all service in ports, harbors, and bays from presumptive service connection, rather than service in only some of those waterways." Pet. App. 8a; see M21-1 Manual Pt. IV, Subpt. ii, Ch. 1, Sec. H, ¶ 2 (Pet. App. 46a-50a).

b. In November 2016, the Board issued its decision on remand in Gray's case. *In re Gray*, No. 1642510, 2016 WL 7656674 (Bd. Vet. App. Nov. 3, 2016). Noting that "no new argument or relevant evidence ha[d] been submitted since the [Veterans] Court's April 2015 decision," the Board "reexamine[d] [Gray's] claim in light of the specific findings and direction of the Court." *Id.* at *3. In doing so, the Board found the revised M21-1 Manual's guidance "probative" in determining whether Gray had "served on inland waterways during service," but the Board emphasized that the M21-1 Manual was "not binding on the Board" and was merely "instructive." *Id.* at *4; see *id.* at *6. The Board further determined that the guidance was consistent with Federal Circuit precedent and with "previous VA guidance," and that it was "not contradicted by the facts of the case." *Id.* at *6. The Board ultimately "f[ound] that the preponderance of the evidence [wa]s against [Gray's] claim that he was exposed to herbicides while in service and therefore that he c[ould]not be presumed to be service-connected for" the disabilities for which he claimed benefits. *Ibid.*

Petitioner Gray appealed the Board's decision to the Veterans Court. *Gray* v. *Wilkie*, No. 16-4042 (docketed Dec. 12, 2016). That appeal remains pending. On April 18, 2018, at the parties' joint request, the Veterans Court stayed further proceedings in the appeal pending its decision in *Overton* v. *Wilkie*, No. 17-125 (argued June 20, 2018), in which the same M21-1 Manual provisions are also at issue. 4/18/18 Order, *Gray*, *supra* (No. 16-4042).[4]

5. Meanwhile, in 2016, petitioners each filed separate petitions in the court of appeals seeking review under 38 U.S.C. 502 of the VA's February 2016 revisions of the M21-1 Manual. Pet. App. 2a. The court of appeals consolidated the petitions for oral argument and, in a combined decision, dismissed both petitions for lack of jurisdiction. *Id.* at 1a-14a.

a. The court of appeals explained that, under 38 U.S.C. 502, the court has jurisdiction to adjudicate only preenforcement challenges to 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 parties agree[d] that § 553," governing notice-and-comment rulemaking, "[wa]s not at issue." *Ibid.* The only disputed question thus was "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.

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[4] Before that stay order was entered, the parties had twice jointly requested, and the Veterans Court had granted, stays in Gray's appeal pending proceedings in the Federal Circuit in this litigation. See 1/10/18 Order, *Gray*, *supra* (No. 16-4042); 4/13/17 Order, *Gray*, *supra* (No. 16-4042).

In the court of appeals, the VA "contend[ed] that, because M21-1 Manual provisions are expressly governed by § 552(a)(2)," they were not subject to Section 552(a)(1), and that "th[e] court may not review them unless and until they are applied in and govern the resolution of an individual action." Pet. App. 9a. The court of appeals agreed with the VA's conclusion that the M21-1 Manual provisions were not subject to Section 552(a)(1), but for different reasons. *Id.* at 10a-14a. The court explained that, in its decision in *DAV*, *supra*—a decision issued after the oral argument in these cases—the court had held that it lacked jurisdiction under Section 502 over challenges "to another revision to the M21-1 Manual." Pet. App. 10a. After concluding that "the challenged M21-1 Manual revisions 'did not amount to a § 553 rulemaking,'" the *DAV* court had "held that the revisions 'clearly fell under' § 552(a)(2) and not § 552(a)(1)." *Id.* at 11a (quoting *DAV*, 859 F.3d at 1077-1078) (brackets omitted). The court in *DAV* had "explained that 'where, as [in that case], 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).'" *Ibid.* (quoting *DAV*, 859 F.3d at 1078) (brackets omitted).

The court of appeals concluded that its reasoning in *DAV* "compel[led] the same result here." Pet. App. 11a. The court explained that "the manual provision at issue here is an interpretation adopted by the agency," but it is one that merely "'conveys guidance to VA adjudicators'" in "an administrative staff manual" and that does not bind the Board. *Ibid.* (brackets and citation omitted). The court further explained that, although VA front-line adjudicators' use of the M21-1 Manual would

affect veterans "initially," the "Board is not bound to accept adjudications premised on [adjudicators'] compliance" with that guidance. *Id.* at 12a. The court emphasized that "it is not the moniker applied to this VA policy statement that is controlling," and it observed that in other cases it "ha[d] found agency actions reviewable under § 552(a)(1) precisely because" those actions, unlike the M21-1 Manual provisions at issue here and in *DAV*, "had a binding effect on parties or entities other than internal VA adjudicators." *Ibid.*

The court of appeals also observed that its decision "does not leave [p]etitioners without recourse." Pet. App. 12a. "[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 "under 38 U.S.C. § 7292." *Ibid.* (citation omitted). The court observed that "Gray and several other veterans" already had pending Veterans Court appeals that presented such challenges. *Id.* at 13a n.1. In addition, interested persons may petition the VA to engage in rulemaking—as petitioner Blue Water already has done—and may seek judicial review if the request is denied. *Id.* at 12a-13a; see *id.* at 13a n.1 (noting that counsel for petitioners had "informed [the court]" at oral argument "that a petition for rulemaking regarding the definition of 'inland waterways' is pending before the VA" (citation omitted)).

b. Judge Dyk dissented in part and concurred in the judgment. Pet. App. 15a-28a. Although Judge Dyk agreed that the panel was bound by the court of appeals' decision in *DAV*, *supra*, he viewed *DAV* as inconsistent with the statute and with precedents of the Federal Circuit and other courts of appeals. Pet. App. 15a-16a; see *id.* at 19a-28a.

6. Petitioners sought rehearing en banc, which the court of appeals denied. Pet. App. 29a-31a.

a. Judge Taranto concurred in the denial of rehearing. Pet. App. 32a-36a. In his view, petitioners' arguments for rehearing "rest[ed] almost entirely on the asserted need for th[e] court [of appeals] to repudiate the premise," imputed by petitioners to the panel opinion and *DAV*, that Section 552(a)(1) and (2) are "mutually exclusive." Pet. App. 32a-33a. Judge Taranto disagreed with that reading of the Federal Circuit's opinions, stating that neither the panel decision here nor *DAV* "stand[s] for the proposition that, if an agency pronouncement is within [5 U.S.C.] 552(a)(2)(C) * * * , and so must be made available to the public in an electronic format, the pronouncement cannot also be within § 552(a)(1)(D) * * * , and so must be published in the Federal Register." *Id.* at 32a.

Judge Taranto also "s[aw] no other justification for en banc review." Pet. App. 33a. He observed that, because the validity of the "particular [VA] pronouncement at issue here" in the M21-1 Manual "is currently under consideration in cases involving individual benefits claims in the" Veterans Court, 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. *Ibid.* He also stated that en banc review was not warranted "to answer the more general question of § 502's application to [such] pronouncements," given that "[f]ew challenges to Manual pronouncements have been brought through § 502." *Id.* at 34a.

b. 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.

ARGUMENT

The court of appeals correctly held that 38 U.S.C. 502 does not vest it with jurisdiction over petitioners' preenforcement challenges to internal guidance that does not bind the Board in adjudicating claims for benefits. The court's decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held that the M21-1 Manual provisions that petitioners challenged are not among the limited set of VA actions for which preenforcement review is authorized by 38 U.S.C. 502.

a. The principal method for obtaining judicial review of VA actions affecting claims for veterans' benefits is direct review of a final VA decision on an individual veteran's claim. 38 U.S.C. 7252, 7266, 7292. Section 502 creates a limited additional avenue for judicial review, authorizing review in the Federal Circuit of "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. 502. That limited authorization for preenforcement review does not encompass the M21-1 Manual provisions at issue here.

As the court of appeals explained, and petitioners have not disputed, Section 553 "is not at issue" here. Pet. App. 8a. Section 553 governs notice-and-comment rulemaking, including petitions to issue or rescind such rules. See 5 U.S.C. 553. The M21-1 Manual is not a notice-and-comment regulation, and petitioners do not contend that it was required to be adopted in that manner. Instead, the only disputed question is whether the M21-1 Manual provisions are agency actions to which 5 U.S.C. 552(a)(1) "refers." They are not.

Section 552(a) of Title 5, part of the FOIA, establishes a "hierarchy" of agency documents and imposes different requirements for making the various categories of documents available. Pet. App. 32a (Taranto, J., concurring in the denial of rehearing en banc); see 5 U.S.C. 552(a) (2012 & Supp. V 2017). Certain documents, enumerated in Section 552(a)(1), must be published in the *Federal Register*; others need only be made available for public inspection in an electronic format, 5 U.S.C. 552(a)(2) (2012 & Supp. V 2017); and still others need only be made available upon request, 5 U.S.C. 552(a)(3). Section 502 authorizes preenforcement review only of those agency actions covered by Section 552(a)(1), specifically cross-referencing that particular paragraph. 38 U.S.C. 502. The court of appeals correctly held that the M21-1 Manual provisions at issue here, concerning service connection for potential Agent Orange exposure, are not reviewable because they do not fall within any of the categories listed in Section 552(a)(1). Pet. App. 10a-12a.

The only provision of Section 552(a)(1) that arguably encompasses the M21-1 Manual provisions is subparagraph 552(a)(1)(D), which requires publication in the *Federal Register* 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." 5 U.S.C. 552(a)(1)(D). The court of appeals concluded, and petitioners do not appear to dispute, that the M21-1 Manual provisions are not "substantive rules of general applicability." *Ibid.*; see Pet. App. 11a; see also 72 Fed. Reg. at 66,219 (explaining that the M21-1 Manual "is not intended to establish substantive rules beyond those contained in statute and regulation"); cf. 17-1679 Pet. 24 n.6,

28-29 n.8. The M21-1 Manual provisions therefore could be covered by Section 552(a)(1)(D) only if they constitute "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. 552(a)(1)(D). The court of appeals correctly concluded that they do not.

As petitioner Gray observes (17-1679 Pet. 21), courts of appeals have held that "[a]n interpretation is not of 'general applicability'" within the meaning of Section 552(a)(1)(D) "if '(1) only a clarification or explanation of existing laws or regulations is expressed; and (2) no significant impact upon any segment of the public results.'" *Stuart-James Co.* v. *SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988) (quoting *Anderson* v. *Butz*, 550 F.2d 459, 463 (9th Cir. 1977)), cert. denied, 490 U.S. 1098 (1989). An agency statement thus falls outside Section 552(a)(1)(D) if it "merely explain[s] an already existing regulation" and "d[oes] not 'adopt new rules or substantially modify existing rules, regulations, or statutes.'" *Ibid.* (citation omitted).

The statutory context also indicates that, in determining which VA actions are subject to preenforcement review, Congress placed particular importance on whether a statement of policy or interpretation has "general" applicability. Section 552(a)(1)(D)'s repeated use of the "general" qualifier sets it apart from otherwise-parallel language in Section 552(a)(2)(B), which requires "statements of policy and interpretations" simpliciter that are "not published in the Federal Register" to be made available through other means. 5 U.S.C. 552(a)(2)(B). Congress's inclusion of that "general" qualifier in Section 552(a)(1), and its omission of the term in Section 552(a)(2), are presumed to be intentional. See *Russello* v. *United States*, 464 U.S. 16, 23

(1983). And Congress's precise cross-reference in Section 502, reaching Section 552(a)(1) but not Section 552(a)(2), suggests that Congress did not intend policy statements and interpretations that lack "general" applicability to be reviewable outside the context of an individual benefits determination. See *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)).

Those considerations support the court of appeals' determination that the M21-1 Manual provisions at issue here fall outside Section 552(a)(1)(D). The M21-1 Manual "is an internal manual used to convey guidance to VA adjudicators." 72 Fed. Reg. at 66,219. The M21-1 Manual's Agent Orange service-connection provisions merely clarify and explain how first-line adjudicators should proceed in applying the VA's regulations. See M21-1 Manual Pt. IV, Subpt. ii, Ch. 1, Sec. H, ¶ 2 (Pet. App. 46a-50a). As the court of appeals observed in addressing an earlier version of the provisions, they do not "set forth a firm legal test" but "simply provide guidance as to how an adjudicator should go about gathering information necessary to determine whether the regulatory test had been satisfied." *Haas* v. *Peake*, 525 F.3d 1168, 1196 (Fed. Cir. 2008), cert. denied, 555 U.S. 1149 (2009). The provisions are designed to "provide[ ] reasonably easily applied guidance for adjudicators in an effort to obtain consistency of outcome," not to "define the boundaries of the [VA's] legal responsibility with precision." *Ibid.*

The fact that the M21-1 Manual's provisions do not bind the Board in rendering its ultimate decision in any individual case further supports the conclusion that they fall outside Section 552(a)(1)(D). Pet. App. 11a-12a.

Although the adjudicator making an initial determination on a claim for benefits must consult the M21-1 Manual, the Board reviews those determinations de novo, see *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011), and in conducting that review "[t]he Board is not bound" by the M21-1 Manual's guidance, 38 C.F.R. 19.5. The Board underscored that point in its 2016 decision on remand in Gray's case, explaining that it was not required to follow the M21-1 Manual's guidance, and considering that guidance only to the extent the Board found it "probative" and consistent with the statute, regulations, and other VA guidance. *In re Gray*, No. 1642510, 2016 WL 7656674, at *4 (Bd. Vet. App. Nov. 3, 2016); see *id.* at *5-*6. The guidance's effect in any particular case cannot be known ex ante because the Board may choose not to follow it. For the same reason, the guidance cannot fairly be described as having "general applicability," 5 U.S.C. 552(a)(1)(D), because the Board may decline to apply it in any or all cases.

The court of appeals thus correctly held that the M21-1 Manual provisions that petitioners challenge here fall outside Section 552(a)(1) and therefore are not reviewable. Petitioners do not identify any decision in which this Court or another court of appeals has reached a contrary conclusion. And petitioners' disagreement with the court of appeals' analysis of the particular agency guidance document at issue in these cases presents no issue of broad importance that would warrant this Court's review.

b. Petitioners make little effort to explain how the M21-1 Manual's Agent Orange service-connection provisions satisfy Section 552(a)(1)(D)'s requirements. Petitioner Gray contends (17-1679 Pet. 16-17, 21) that Section

552(a)(1) "'refer[s]' to interpretive rules" that have "general applicability," including "generally-applicable rules embedded in agency manuals." But he fails to show that this reference encompasses the M21-1 Manual provisions at issue here. Instead, like the dissent below, petitioner Gray principally contends that the court of appeals erred by assuming that Section 552(a)(1) and (2) are "mutually exclusive." *Id.* at 17-18, 22-23; see Pet. App. 25a (Dyk, J., dissenting in part and concurring in the judgment) ("Implicit to [the] reasoning" of *Disabled American Veterans* v. *Secretary of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) (*DAV*), on which the panel relied here, "is the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive."). According to Gray and the dissent, the panel's ruling rests on the premise "that any VA manual provision that is covered by (a)(2) is therefore *not* covered by (a)(1)." 17-1679 Pet. 17; Pet. App. 25a (Dyk, J., dissenting in part and concurring in the judgment).

That criticism is misplaced. See Pet. App. 32a-33a (Taranto, J., concurring in the denial of rehearing en banc). In noting and attaching weight to the textual differences between Section 552(a)(1) and (2), the court of appeals did not deem the provisions mutually exclusive; it simply recognized that "[t]he differences in language between" them can "inform how to read each provision." *Id.* at 32a (Taranto, J., concurring in the denial of rehearing en banc). Section 552(a)(1) and (2) describe different categories of documents and impose different requirements for making those documents publicly accessible. In some respects, the criteria that Section 552(a)(1) and (2) establish overlap. For example, certain documents covered by Section 552(a)(1), such as "rules of procedure," 5 U.S.C. 552(a)(1)(C), can also fall

within Section 552(a)(2) if, for example, they are reprinted in an "administrative staff manual[]," 5 U.S.C. 552(a)(2)(C); 17-1679 Pet. 18-19.

Petitioner Gray points (17-1679 Pet. 18) to the panel's description of the disputed issue as "whether the manual provisions challenged in this action fall under § 552(a)(1), giving [the court of appeals] authority to consider them in the context of this action, or § 552(a)(2), prohibiting [the court's] review here." Pet. App. 8a-9a. He cites (17-1679 Pet. 18) the panel's quotation of the Federal Circuit's prior conclusion in *DAV* that the M21-1 Manual provisions at issue in that case "fall within § 552(a)(2)—not § 552(a)(1)." Pet. App. 11a (quoting *DAV*, 859 F.3d at 1078). Those statements do not reflect an assumption that no document can fall within both provisions. Instead, they are sensibly understood as distinguishing documents that fall within Section 552(a)(1)'s narrower scope from those that do not meet Section 552(a)(1)'s criteria but do satisfy those of Section 552(a)(2)—for example, a statement of policy or interpretation that is not "general."

c. Petitioners contend that the decision below "effectively denies judicial review of the Secretary's decisions." 17-1693 Pet. 6 (capitalization omitted); see 17-1679 Pet. 29-35. That is incorrect.

Under the court of appeals' reading of 38 U.S.C. 502, the availability of preenforcement review is not determined by the label the VA attaches to a particular action. Pet. App. 12a. Moreover, mechanisms other than Section 502 permit veterans adversely affected by VA determinations to obtain judicial review. *Ibid.* Veterans may obtain judicial review of VA policies in the course of litigating individual benefits cases under 38 U.S.C. 7292. Where the validity of a particular VA

policy presents a controlling question of law that would materially advance the litigation, the Veterans Court may certify the question for interlocutory Federal Circuit review. 38 U.S.C. 7292(b). In addition, an interested person may petition the VA to engage in rulemaking and, if the VA denies the request, may seek direct review of the VA's denial.

Indeed, petitioners and others are currently pursuing those other avenues to obtain judicial review of the analysis that should be used to determine whether a particular veteran "served in the Republic of Vietnam." See Pet. App. 12a-13a & n.1; *id.* at 33a-34a (Taranto, J., concurring in the denial of rehearing en banc). Petitioner Gray and others have pending Veterans Court appeals that present this issue. *Id.* at 13a n.1 (majority op.). Gray's case has been stayed at the parties' joint request because another case pending in the Veterans Court, *Overton* v. *Wilkie*, No. 17-125 (argued June 20, 2018), involves the same M21-1 Manual provisions. See p. 13 & n.4, *supra*. Petitioner Blue Water has submitted a petition for rulemaking to the agency. Pet. App. 13a n.1. There is consequently no reason to suppose that petitioners' inability to invoke Section 502 will insulate the VA's decisions from judicial review altogether.

2. Petitioners contend that the decision below conflicts with decisions of other courts of appeals. 17-1679 Pet. 21-22, 26; 17-1693 Pet. 12, 14-17. That is incorrect.

a. Petitioner Gray argues (Pet. 22) that the decision below departs from decisions of other courts of appeals by "holding that Sections 552(a)(1) and (a)(2) are mutually exclusive." He contends (Pet. 21-22) that other circuits have treated "interpretations of general applicability" as falling within Section 552(a)(1)(D) even if they may also fall within Section 552(a)(2)—for example, if

they are "embedded in agency manuals." As explained above, that argument rests on a misreading of the Federal Circuit's opinion. See pp. 22-23, *supra*.

b. Petitioner Blue Water, echoing Judge Dyk's dissent, contends (17-1693 Pet. 12) that the decision below is inconsistent with decisions of other courts of appeals holding that interpretive rules were judicially reviewable even though the rules were not promulgated pursuant to 5 U.S.C. 553. See Pet. App. 19a-20a (Dyk, J., dissenting in part and concurring in the judgment). That is incorrect.

The decisions that Blue Water cites (17-1693 Pet. 12) addressed or assumed the reviewability—not under 38 U.S.C. 502, but under the APA or other statutes—of actions taken by other agencies. See *Natural Res. Def. Council* v. *EPA*, 643 F.3d 311, 319-320 (D.C. Cir. 2011) (holding that EPA guidance constituted final agency action); *Appalachian Power Co.* v. *EPA*, 208 F.3d 1015, 1020-1023 (D.C. Cir. 2000) (same); *Aulenback, Inc.* v. *Federal Highway Admin.*, 103 F.3d 156, 163-168 (D.C. Cir. 1997) (holding that challenge to Federal Highway Administration manual was reviewable under Hobbs Act, 28 U.S.C. 2341 *et seq.*, and 28 U.S.C. 2321, but was not ripe for review in the case before the court); *Linoz* v. *Heckler*, 800 F.2d 871, 877-878 (9th Cir. 1986) (reviewing agency rule that court concluded was required to be, but was not, adopted in conformity with APA's notice-and-comment requirements); *Western Coal Traffic League* v. *United States*, 719 F.2d 772, 780 (5th Cir. 1983) (en banc) (reviewing Interstate Commerce Commission's guidelines), cert. denied, 466 U.S. 953 (1984). Those courts' analyses of reviewability under the APA or other statutory review mechanisms do not bear on the scope of Section 502, under which the availability of preenforcement

judicial review depends on whether the challenged action falls within a particular provision of FOIA.

c. Petitioners also suggest that the decision below is inconsistent with the D.C. Circuit's decision in *Blue Water Navy Vietnam Veterans Ass'n* v. *McDonald*, 830 F.3d 570 (2016). 17-1679 Pet. 26; 17-1693 Pet. 14-16. That is incorrect. In *Blue Water*, the plaintiffs (including petitioner Blue Water) filed suit in federal district court, broadly challenging the VA's policy governing veterans' benefits with respect to Agent Orange exposure. 830 F.3d at 573. The district court dismissed the suit for lack of jurisdiction, and the D.C. Circuit affirmed. *Id.* at 573, 579.

The D.C. Circuit held that the challenge in *Blue Water* was barred by 38 U.S.C. 511(a), which precludes judicial review of the Secretary's legal and factual determinations regarding claims for benefits except as authorized by specific provisions of Title 38, including 38 U.S.C. 502 and the provisions applicable to review of the VA's decisions in individual benefits cases, 38 U.S.C. 7252, 7292. 830 F.3d at 573-579. The court rejected the plaintiffs' contention that foreclosing district-court actions challenging the VA's policy "leaves veterans without a remedy." *Id.* at 576. The court observed that veterans may challenge, and have challenged, VA policies in the course of litigating individual benefits claims. See *id.* at 578 (citing *Haas*, *supra*). The court also explained that Section 502 authorizes review of "VA regulations and certain other generally applicable actions," including VA "interpretations" that are not "promulgated as a regulation, via notice and comment." *Id.* at 577.

The D.C. Circuit did not opine, however, on whether any *particular* VA publication would be reviewable under Section 502. The plaintiffs had broadly assailed the VA's Agent Orange policy in general. See 830 F.3d

at 572-573. In concluding that no challenge to that overarching policy or any of its subcomponents could be brought in district court, the D.C. Circuit had no occasion to decide whether any of the subsidiary VA documents on which the plaintiffs' allegations were predicated would fall within Section 502.

d. Petitioners also are mistaken in contending that the VA has taken inconsistent positions on this issue in other litigation. 17-1679 Pet. 25-26; 17-1693 Pet. 15-16. Petitioners assert that the VA argued in *Blue Water* that VA actions such as the M21-1 Manual provisions at issue here would be reviewable under Section 502. 17-1679 Pet. 26; 17-1693 Pet. 15-16. That is incorrect. The VA contended on appeal that the district court had correctly dismissed the plaintiffs' challenge because "Congress in the VJRA specified that judicial review of VA policies 'may be sought only in the United States Court of Appeals for the Federal Circuit.'" Gov't Br. at 13, *Blue Water*, *supra* (No. 15-5109) (citation and emphasis omitted). In response to the plaintiffs' contention that review under Section 502 would be unavailable because the VA had adopted its Agent Orange policy through the M21-1 Manual, the VA explained that the M21-1 Manual "merely echo[es] the VA regulations themselves." *Id.* at 21. The plaintiffs in substance thus "s[ought] to challenge the VA's regulations interpreting the Agent Orange Act," and that challenge "must be pursued in the Federal Circuit." *Ibid.*

In the alternative, the VA further argued that, if the plaintiffs' challenge "were construed as a challenge to the 'Secretary's interpretation of the substantive regulation' rather than the regulation itself," it would be reviewable under Section 502 because the broad "policy that Blue Water purports to challenge constitute[d] an

'interpretation of general applicability'" that "ha[d] repeatedly been documented in the Federal Register." Gov't Br. at 21-22, *Blue Water*, *supra* (No. 15-5109) (brackets omitted). That representation reflected the VA's understanding of the Federal Circuit's then-controlling precedent in *Military Order of the Purple Heart of the USA* v. *Secretary of Veterans Affairs*, 580 F.3d 1293, 1296 (2009) (*Purple Heart*), which predated the court's decision in *DAV*, *supra*. Following *DAV*, however, the court of appeals in this case correctly held that the particular provisions of the M21-1 Manual that petitioners challenge here are not reviewable under Section 502 because they fall outside the scope of 5 U.S.C. 552(a)(1) as properly construed.[5]

Petitioner Gray also contends that, in *Block* v. *Shinseki*, 558 U.S. 1048 (2009), the VA "conceded" in opposing certiorari that a VA document entitled the Agent Orange Program Guide "qualified as a 'general statement of policy' under Section 552(a)(1)(D)." 17-1679 Pet. 25 (citation omitted). At issue in that case was

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[5] In *Purple Heart*, the Federal Circuit held that it had jurisdiction over a Section 502 challenge to a VA "Fast Letter," in which the VA had established a procedure for the redetermination of certain regional office decisions without participation by the claimant. The court found the Fast Letter reviewable on the ground that the letter fell within the APA's definition of a "rule." 580 F.3d at 1294-1296. In *DAV*, however, the Federal Circuit clarified that the jurisdictional inquiry under Section 502 turns on whether Section 552(a)(1) or 553 specifically refers to the challenged action. See *DAV*, 859 F.3d at 1078. The *DAV* court also distinguished the Fast Letter at issue in *Purple Heart* from the M21-1 Manual, explaining that, "[w]hile Congress explicitly designated administrative staff manuals as agency actions falling under § 552(a)(2), it did not similarly specify whether VA letters are agency actions subject to § 552(a)(1) or § 552(a)(2)." *Id.* at 1076.

whether Section 502's vesting of exclusive jurisdiction in the Federal Circuit over the cases it covers required dismissal of a district-court suit challenging the Agent Orange Program Guide that was filed in 1979 and was pending when Section 502 was enacted. See Br. in Opp. at 2, 5-6, *Block*, *supra* (No. 09-225). In opposing certiorari, the government endorsed the court of appeals' conclusion that the suit should be dismissed. See *id.* at 5-7.

The government's brief in opposition in *Block* did not concede that the Agent Orange Program Guide was in fact a "general statement of policy"; rather, it observed that the district court, in addressing the merits, had described it as such. See Br. in Opp. at 4, *Block*, *supra* (No. 09-225). And regardless of whether Section 502 would have authorized review of that challenge, the court of appeals in *Block* correctly determined that the suit should be dismissed because review in a freestanding district-court action was precluded by 38 U.S.C. 511. See also Br. in Opp. at 7-8 n.3, *Block*, *supra* (No. 09-225) (observing that review may have been barred under the precursor to Section 511 even when the suit was commenced in 1979). None of the purported conflicts that petitioners allege warrants this Court's review.

CONCLUSION

The petitions for writs of certiorari should be denied.

Respectfully submitted.

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