No. 18-1360

In the Supreme Court of the United States

ROBERT G. THORNTON,

Petitioner,

–v–

UNITED STATES OF AMERICA
AND ROBERT WILKIE, SECRETARY OF THE
VETERANS ADMINISTRATION, IN HIS OFFICIAL CAPACITY,

Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the District of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether a veteran has a right to meaningful access to the courts and administrative agencies under the First Amendment of the Constitution when the government concealed evidence during adjudication, engaged in a continuing of pattern of systematic, deliberate fabrication of false statements and obstruction of justice, including, but not limited to, creating a false and fraudulent Board of Veterans Affairs (BVA) Decision based on fraudulently concealing material evidence this veteran had submitted timely appeal as uncovered by his FOIA request and terminating this veteran's appeal thereby completely foreclosing any further remedy, then published on petitioners official Veterans Affairs website for veterans (VA.gov).

2. Whether it is a violation of this veteran's First and Fifth Amendment rights when the VA and the District Court use the presumption of regularity and, or 38 U.S.C. § 511(a) non-review preclusion clause to ignore rebuttal evidence to defendants motion to dismiss (MTD), and to plaintiff's Federal Rule of Civil Procedure (FRCP) 12(b)1 OMTD and 60(b)3.

3. Whether a veteran has a constitutional right to a fair hearing on the merits of his disability claim decided according to fundamentally fair procedures and that the initial and subsequent determinations has been subject to nothing but deferential review that continues with the same concealed evidence during adjudication, misstatements of material facts, misstatements of law, fraudulent submissions and omissions.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Robert G. Thornton respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the D.C. Circuit.

OPINIONS BELOW

The D.C. Circuit issued its panel decision on August 22, 2018. (App.1a). The District Court for the District of Columbia issued its memorandum Opinion on December 11, 2017. (App.3a) Both opinions are unpublished.

JURISDICTION

The petition for rehearing en banc was denied on November 29, 2018. On February 21 2019, Chief Justice Roberts granted an extension of time within which to file a petition for a writ of certiorari to and including until April 28, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 38 U.S.C. §§ 511, 7104, 7252, 7261, and 7292 are set forth in the appendix to the petition. (App.22a)

INTRODUCTION

Our Nation has made a solemn commitment to those who serve in the Armed Forces to provide medical care and appropriate benefits for disability occurring while in service to their country. Congress responded creating a benefits system with its Congressional mandate of pro-claimant and non-adversarial and paternalistic system of non-bias awarding of benefits to veterans. (H.R. Rep. No. 105-52, at 4 (1997)) However, this system of adjudication is premised on the Veterans Administration acting within that Congressional mandate. This case shows by clear and convincing evidence that the VA engaged in a ten year pattern of acting outside their statutory mandate. Petitioner has shown that his opportunity to meaningfully litigate has been "completely foreclosed," *Harbury I*, 233 F.3d at 609. *See Harbury III*, 536 U.S. at 416, 122 S.Ct. 2179 "Conspiracy to Deny Plaintiffs' Constitutional Rights" and "Failure to Act to Prevent Denial of Plaintiffs' Constitutional Rights" *Id.*

A. Discussion

The most egregious continuing violation by the said defendants' is their creating a fraudulent BVA Tribunal decision in May 31, 2018, which had the legal effect of completely foreclosing this veteran's EED appeal, and then publishing it on their official website (VA.gov) 3 this without informing this veteran of same by letter to the rendering of the fraudulent decision, nor the decision itself. Furthermore, the basis for that fraudulent BVA decision was in the VA

alleging this veteran had not filed a VA Form-9 to perfect his appeal; this being the 2nd time the VA erroneously stated the VA form 9 was[1] untimely June 12, 2015 and[2] May 31, 2018 for failure to submit a timely VA Form 1-9 a continuing violation of a 1st amendment constitutional right. Only after this veteran filed his Freedom of Information Act (FOIA) inquiry with the BVA did he learn of the fraudulent BVA decision. Certainly this Court must take up this case on behalf of all veterans and their families since such blatant continuous violations of VA's omnipotence of law by these defendants. "denied a remedy for their underlying claims" and that such remedy was "completely foreclosed"; and that "it was the defendants' actions that have cut off [the plaintiffs'] remedy"

The First Amendment protects the right of every American to meaningful access to the Courts to confront government wrongdoing; certainly veterans are entitled

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[1] However in this petitioner's claim, the RO [*Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 896–897 (1984)], issued a June 12, 2015 decision, while petitioner's writ of mandamus was pending, thus taking the appeal out of appellant status. The RO erroneously denied the January 28, 2015 VA form 9 appeals to the (BVA) Board of Veterans Appeals as untimely.

[2] This is in response to your Privacy Act request dated August 6, 2018 which was received in this office on August 14, 2018. Upon looking in VACOLS, it appears that your claim was closed out on May 31, 2018 for failure to submit a timely VA Form 1-9 . . . There is no letter in VBMS or LCM from BVA to you announcing that decision. Upon looking in VBMS, it is clear that a VA Form 1-9, signed by you on May 3, 2018 and received by the Board and added to your file on May 7, 2018 is present in the file . . . the status of your claim has been changed and the May 31, 2018 disposition removed.

to the same fairness and honest application of the rule of law.[3] It appears the untimely decisions that are erroneous are a nexus to Fast Letter 07-19 requires that all regional office decisions awarding a lump sum of $250,000 or more, or having a retroactive effective date of eight years or more, Fast Letter 07-19[4] and continued in Fast Letter 08-24. *Machado v. Derwinski*, 928 F.2d 389, 392 (Fed. Cir. 1991) 38 U.S.C. § 3004(a) (1989)

1. A Decision Based Fraud Is Not a Decision

Mr. Justice Miller delivered the opinion of the court. He said in part: "There is no question of the general doctrine that fraud vitiates the most solemn

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[3] Congress amended the Act to require such notification: In the case of a decision by the Secretary under section 211(a) of this title affecting the provision of benefits to a claimant, the Secretary shall, on a timely basis, provide to the claimant (and to the claimant's representative) notice of such decision. The notice shall include an explanation of the procedure for obtaining review of the decision. 38 U.S.C. § 3004(a) (1989) (emphasis added).

[4] Fast Letter 07-19 states that if the C & P Service determines that the award is "improper" it will provide "specific corrective action." The Fast Letter directs that regional office decisions granting Extraordinary Awards shall not be disclosed to the veteran or his representative that the claimant is not to be informed that the C & P review occurred, and that the claimant is not to be informed if the C & P Service reduced the original award. The C & P Service Bulletin describes this procedure as "new C & P policy." . . . Fast Letter 08-24 requires the same C & P review of the same large awards, by the same procedure as in Fast Letter 07-19, but instead of calling the decisions of the regional offices "initial rating decisions," they are called "draft rating decisions," and the C & P review is not called an "administrative review," but "pre-promulgation review." The procedure is unchanged.

contracts, documents, and even judgments. There is also no question that many rights originally founded in fraud become . . . no longer open to inquiry in the usual and ordinary methods. . . . *United States v. Throckmorton*, 98 U.S. 61 (1878)

Mr. Justice Black also said. . . . . tampering with the administration of justice as indisputably shown here involves far more than injury to a single litigant. It is a wrong against the institutions set up to protect and safeguard the public, institutions in which fraud cannot complacently be tolerated consistent with the good order of society" *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (1944);

"Of course, the district court cannot overrule the Supreme Court and its standing ruling must be summarily reversed." The standing ruling of the district court is in direct conflict with Supreme Court precedent in *Henderson v. Shinseki,* 562 U.S. (2011) and said ruling must be summarily reversed by this court"

Supreme Court pronouncements on questions of constitutionality are final and binding for all other courts and governmental authorities, whether state or federal.

The best-known power of the Supreme Court is judicial review, or the ability of the Court to declare a Legislative or Executive act in violation of the Constitution, is not found within the text of the Constitution itself. The Court established this doctrine in the case of *Marbury v. Madison*, (1803). "[w]hen an attorney misrepresents or omits material facts to the court, or acts on a client's perjury or distortion of evidence, his conduct may constitute a fraud on the court." Rule 3.3 Candor Toward The Tribunal.

2. "Statement of Facts Factual Allegations Included in the Complaint and Ignored by District Court"

See this applicant's Complaint filed in the D.C. District Court, April 5, 2017

21.

23. Plaintiff alleges that what the Gen. Counsel did was knowingly submit a fraudulent document "June 12, 2015 decision stating the Petitioner's Substantive Appeal dated January 28, 2015 was "untimely" and further stating erroneously, that the SOC was issued on June 3, 2014 when, in fact, it was issued June 4, 2014 in response to the June 4, 2014 DRO decision. The legal effect was the mooting the issue before the CAVC of certifying the Substantive Appeal to the (BVA) Board of Veterans Appeals dated January 28, 2015.

29. a.(1) CAVC 14-1601 (GC) EDWARD V. CASSIDY JR. substituted and submitted (2) false documents; (1) Petitioner's notice requesting an SOC dated 2, Oct 1989 (Exhibits 003) concealing the NOD of 24, OCT 1989 to VARO-ST.PETE; (2) Petitioner's NOD (2) dated Nov 27, 2013 substituted by the notice dated Nov 15, 2013 that his former attorney no longer representing this Petitioner (Exhibits 042) concealing 2nd addendum to his NOD. CAVC 14-1601.

31. DRO/BCF concealed what the Hearing Officer Finley C. Johnson stated; A hearing was

conducted on 1-5-90 at the St. Petersburg Regional Office Exhibits 010 page 7, last paragraph Lines 8-9; January 1990;

Hearing Officer Finley C. Johnson;

"I will make a decision on the issues that you have put forth and if my decision were to remain unfavorable to you on either one or both of those conditions then you would be provided a Statement of the Case.";

32. DRO/BCF misstated VA rules "as was customary at that time, a Hearing Officer's Decision, not a SOC, was completed on 2-12-90" and concealed and avoided specific evidence presented in the Nov 7, 9, 27 2013 NOD/ addendums; specifically avoided NOD(#2) with a substituted document that concealed this evidence; 38 C.F.R. § 3.157(b) Report of Medical Examination for Disability Evaluation (VA form 21-2545); 38 C.F.R. § 3.156 (c)(1) new service records; Joint Services Records Research Center 07 01 2008. M21-1MR, Part I, Chapter 5, Section C,D and CAVC *Suttman v. Brown*, 5 Vet. App. 127, 132 (1993) (where application "reasonably reveals "that claimant is seeking a particular benefit, VA is required to adjudicate the issue of claimant's entitlement to that benefit)

35. (GC) EDWARD V. CASSIDY and DRO/BCF (is a senior technical expert) working in concert; their Methods are characterized by an "almost systematic concealment of the truth" that resulted in misstatements of

facts and submission of fraudulent evidence presented to the CAVC 14-1601.

36. (GC) BOBBIRETTA E. JORDAN CAVC 15-2059; knowingly submitted a false document as evidence, the June 12, 2015 Notice of decision stating the Jan 28, 2015 VA form 9 appeal to the BVA was untimely, which was material in the CAVC's decision.

37. What the GC omitted is the June 4, 2014 DRO Decision Granting EED PTSD of March 1, 2007 based on the Notice of Disagreement from of November 7, 2013". This constitutes a deliberate omission of a material fact that, if presented to the CAVC would have disclosed that the SOC could not have been issued in response to the Notice of Decision of December 13, 2012.

38. The (GC) BOBBIRETTA E. JORDAN (027J) knowingly presented false evidence. In submission of Record; Management Center Letter, dated June 15, 2015 REQUEST NO. 376/272/NAN knowing it was in conflict with Records Management Center Letter, dated March 18, 2015 REQUEST NO. 376/278/MMW; fraudulently stated to the CAVC that the FOIA requested records were tendered to the Petitioner, thus concealing those records were destroyed by VA.

39. General Counsel BOBBIRETTA E. JORDAN (027J) in concert with VAROPITTS Director Jennifer Stone-Barash and the DRO/CG (identified as initials CG) and Kathy Austin, the Chief of Customer Service Division of the

Milwaukee (RMC) Records management Center together conspired to conceal material evidence and terminate the VA form 9 appeal to the (BVA) CAVC 15-2059, of which they did. Petitioner did timely file the VA form 9 appeal to the (BVA) on Jan 2015.

43.

44. VAROPITTS Director Jennifer Stone-Barash issued the June 12, 2015 Notice denying the VA form 9 as untimely. The letter further states; On February 14, 2015, we sent you correspondence informing you we accepted the following on appeal based on our October 23, 2014 decision: PTSD, Hearing Loss, Tinnitus, Otitis Externa, Dizziness, Special Monthly Compensation. Our records indicate that an employee mistakenly considered your untimely Form 9 as a Notice of Disagreement and sent you an Appeals Election Letter in error.

45. Plaintiff, on June 26, 2015, faxed General Counsel BOBBIRETTA E. JORDAN (027J) and VAROPITTS Director Jennifer Stone-Barash stating the untimely decision was erroneous stating the specific material facts supporting this conclusion, attached to the fax was the DRO decision of June 4, 2015 granting EED on PTSD of March 1, 2007 and the June 4, 2014 DRO SOC denying EED on PTSD earlier than March 1, 2007. Plaintiff never received a response from either the General Counsel or the Director before the submitting their response brief.

This fax was sent and received 2 ½ weeks before the submission of their response brief of July 13, 2015. The defendants were clearly aware of said fraud when submitting of their July 13, 2015 response brief to the CAVC (veteran's court).

47.

53. Defendant further alleges that DRO/CG (identified by the initials CG) in concert with VA General Counsel BOBBIRETTA E. JORDAN (027J) and VAROPITTS Director Jennifer Stone-Barash conspired to conceal that the petitioner had filed a timely appeal, engaging in unlawful conduct and further alleges on information and belief and based on that information and belief that Respondent engaged in a common plan to block Petitioner's claim from reaching the Board of Veterans Appeals (BVA).

54. DRO/CG on June 9, 2015 (identified by the initials CG) in concert with VA General Counsel BOBBIRETTA E. JORDAN (027J) and VAROPITTS Director Jennifer Stone-Barash conspired to conceal that the petitioner had filed a timely appeal. The DRO/CG whom had issued the Dec 11, 2012 decision stating "This decision is considered a full grant of benefits sought on appeal" and the June 12, 2015 decision "stating the Petitioner's Substantive Appeal dated January 28, 2015 was "untimely" is identified by the initials CG, knowingly filed falsified evidence, therefore ostensibly—and falsely—distinguish this

petitioner's long standing EED claim. The claim for (EED) PTSD was on Petitioner's Substantive Appeal filed July 27, 2010 which DRO/CG issued the 12/11/12 DRO decision on stating "This decision is considered a full grant of benefits sought on appeal" thus concealing said claim for PTSD/EED on appeal to the BVA. This is the second (2) time that DRO/CG issued an erroneous decision to prevent the appeal going forward to the (BVA) Board of Veterans Appeal.

62.

64. DRO/BCF concealed and avoided specific evidence presented in the Nov 7, 9, 27 2013 NOD/addendums, specifically Addendum to NOD (2) substituted document that addressed this evidence; 38 C.F.R. § 3.157(b); Report of Medical Examination for Disability Evaluation (VA form 21-2545); 38 C.F.R. § 3.156(c)(1)

"*Iqbal* and *Twombly* pleading standard" The initial inquiry thus consists of locating and assessing the factual allegations contained in the pleadings.

Ashcroft v. Iqbal, 556 U.S. 662 (2009) S.Ct."

B. Statutory Framework

We start with the premise that the rights to assemble peaceably and to petition for a redress of grievances are among the most precious of the liberties safeguarded by the Bill of Rights. These rights, moreover, are intimately connected, both in origin and in

purpose, with the other First Amendment rights of free speech and free press. "All these, though not identical, are inseparable." *Thomas v. Collins*, 323 U.S. 516, 323 U.S. 530 (1945). *See De Jones v. Oregon*, 299 U.S. 353, 299 U.S. 364 (1937).

And:

The First Amendment would, however, be a hollow promise if it left government free to destroy or erode its guarantees by indirect restraints so long as no law is passed that prohibits free speech, press, petition, or assembly as such. We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do, in fact, provide a helpful means of dealing with such an evil. *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. Connecticut*, 310 U.S. 296 (1940).U.S. Supreme Court; *Mine Workers v. Illinois Bar Assn.*, 389 U.S. 217 (1967)

1st Amendment "meaningful access" is not a flexible concept. The VA's use of fraud, concealment of material evidence, rendering material misrepresentations and omissions, destroying relevant medical records, filing false documents with the CAVC and creating a fake, false, fraudulent BVA decision which they then published without any official notice to this petitioner as required by VA regulations, in a continuing violation of these actions that engages in a conspiratorial conduct, systematic and clandestine misapplication of disability regulations all of which constitute prohibited conduct "denied a remedy for their underlying claims" and that such remedy was

"completely foreclosed"; and that "it was the defendants' actions that have cut off [the plaintiffs'] remedy" from meaningful access as guaranteed by the 1st Amendment.

Second Circuit's decision in Disabled American *Veterans v. United States Department of Veterans Affairs*, 962 F.2d 136 (1992), held only that a district court has jurisdiction to consider "facial challenges" to the constitutionality of "legislation affecting veterans' benefits."

Issues of VJRA preclusion necessarily depend on precisely what a particular plaintiff is asking the district court to decide, and results accordingly vary from claim to claim. The decision below (*Broudy v. Mather*, 460 F.3d 106, 114 (D.C. Cir. 2006) illustrates the point.

It is this petitioner's information and belief and based thereon that the VA bureaucracy now seeks to shield itself from scrutiny behind Section 511. But that provision affords no protection from petitioner systemic challenge. The government ignores that Section 511, by its plain language, precludes judicial review only of a "decision" by the Secretary. No decision is challenged in this case. Yet the government's reading of Section 511 apparently would preclude any systemic challenge of VA actions that engaged in a conspiratorial conduct, systematic and clandestine misapplication of disability regulations involving intentional fraud, concealment, material misrepresentations and omissions in an alleged decision making in Extraordinary Awards"

As this petition demonstrates the D.C. Circuit has held that "§ 511(a) prevents district courts from

hearing a particular question only when the Secretary has 'actually decided' the question. Where there has been no such decision, § 511(a) is no bar." *Broudy v. Mather*, 460 F.3d 106, 114 (D.C. Cir. 2006) (brackets and citation omitted).

Defendants attempt to distinguish *Broudy* on the ground that it "did not involve complaints of decisions" in adjudication "but instead complaints that the government had concealed evidence" during adjudication . . . Broudy's express holding, which explains that no "decision" is being challenged. Thus, Section 511(a) bars judicial review only where a plaintiff seeks collateral review of a benefits decision. Here, no decision has even been made by the Secretary, and petitioner seeks to have no benefits determination overturned.

C. Whether or Not This Petitioner Was Treated Fairly

An important case;

Mr. Cushman has a constitutional right to have his claim for veteran's disability benefits decided according to fundamentally fair procedures. That initial determination has been subject to nothing but deferential review, on a record that still contained the altered document. *Cushman v. Shinseki*, 576 F.3d 1290, 1293 (Fed. Cir. 2009)

"The source of the fundamental unfairness that tainted the initial evaluation of Mr. Cushman's claim was never removed from any prior proceedings. Therefore, none of the subsequent appeals and rehearings that Mr. Cushman received satisfied his

due process right to a fair hearing on the merits of his disability claim."

Moreover, the court held that §§ 4061 and 4092, which provide the COVA and the Court of Appeals for the Federal Circuit with "exclusive jurisdiction" over decisions of the Board of Veterans' Appeals and empower the COVA to "decide all relevant questions of law, [and] interpret constitutional, statutory, and regulatory provisions. . . . " do not extend to the COVA exclusive jurisdiction to decide facial constitutional challenges to legislation affecting veterans. The district court therefore should proceed to address the merits of the Veterans' claims that 511a preclusion clause non-review deprives them of equal protection of the law . . . The court should conclude that plaintiff had made a strong showing of irreparable harm because (1) deprivation of a constitutional right in itself is irreparable harm . . .

This Court has held, where Congress precludes judicial review of agency "determinations," that does not bar review of the practices and procedures used to make determinations. *Bowen*, 476 U.S. at 675-678. "In Bowen, we applied the basic principle underlying these doctrines to an agency's conduct, secretive conducts prevent[ed] plaintiffs from knowing of a violation of rights." 476 U.S. at 481.

While it is well established that the district courts possess only that jurisdiction which has been conferred on them by Congress, *Finley v. United States*, 490 U.S. 545, 548 (1989), it also is clear that the Article III district courts have power to rule on the constitutionality of acts of Congress. *Ameron, Inc. v. U.S. Army Corps of Eng'rs*, 787 F.2d 875, 890 (3rd Cir.

1986), cert. dismissed, 488 U.S. 918 (1988). The VA contention that, pursuant to the Veterans' Judicial Review Act of 1988 (which amended § 211(a)), Congress vested exclusive jurisdiction in the COVA over constitutional challenges to federal statutes affecting veterans' benefits, implicates issues of constitutional separation of powers. *Mistretta v. United States*, 488 U.S. 361, 382-83 (1989) (court must exercise vigilance to ensure that no provision of law threatens the integrity of the judicial branch); *Johnson v. Robison*, 415 U.S. 361, 366 (1974). The district court, cognizant of the principle that courts should "avoid an interpretation of a federal statute that engenders constitutional issues if a reasonable alternative interpretation poses no constitutional question," *Gomez v. United States*, 490 U.S. 858, 864 (1989), determined that there was such a reasonable alternative here: § 211(a) could be literally construed to exclude judicial review only of "decision[s] by the Secretary," and not of facial constitutional challenges. *Robison*, *supra*, 415 U.S. at 366-74 (holding that prior version of the statute did not preclude judicial review of action challenging the constitutionality of veterans' benefits legislation).

In *Stoll v. Gottlieb*, noted that federal courts, as a practical matter, must have the power to interpret and determine whether they have subject-matter jurisdiction. Additionally, such a determination, even if erroneous. However, because courts have jurisdiction to determine their own jurisdiction. Kansas City S. Ry., 624 F.2d at 825 (citations omitted) (quoting *Lubben*, 453 F.2d at 649) . . . accord Cent. Vt. Pub. Serv., 341 F.3d at 190.

See Stein, supra note 4, 549.02 (finding that courts will retain jurisdiction when the administrative remedy is inadequate, dismissal would result in irreparable injury, the agency is acting beyond its authority, and further agency proceedings would be futile).

It is well recognized that "a statute, even if not void on its face, may be challenged because [its] invalid as applied."

Whitney v. California, 274 U.S. 357, 378, 47 S.Ct. 641, 649, 71 L.Ed. 1095 (1927) (Brandeis, J. concurring), and that "[a] statute may be invalid as applied to one state of facts and yet valid as applied to another." *Dahnke-Walker Milling Co. v. Bondurant*, 257 U.S. 282, 289, 42 S.Ct. 106, 108, 66 L.Ed.2d 239 (1921).

Public Citizen v. United States Dep't of Justice, 491 U.S. 440, 470 (1989) (Kennedy, J., concurring) (noting that absurd result principle allows judiciary to avoid applying statute's plain meaning).

In the District Court on petitioner's instant case, the court either used the presumption of regularity and, or 38 U.S.C. § 511(a) (non-review)] in making their decision. The district court's MOJ repeated defendants' language they stated in their motion to dismiss without acknowledging this petitioner's rebuttal evidence stated in his Opposition to the MTD, nor this petitioner's FRCP 60(b)3 motion.

> 04/17/2018 MINUTE ORDER denying 14 Motion to Set Aside the Judgment.
>
> "was able to "fully and fairly" present his case by disputing any of Defendant's factual characterizations in his Opposition to the Motion Plaintiff to Dismiss"

District court in his minute order indicated "either" the court did not look at the petitioner's Opposition to the Motion To Dismiss (OMTD) rebuttal of factual allegations, alleging this is subject to 511a non-review or the district court is stating petitioner failed to rebut factual allegations in the OMTD, which are contradictory to the OMTD and FRCP 60(b)3 citing said factual disputed allegations in the said motion and OMTD.

Finally, unlike § 502, § 511 does not grant exclusive jurisdiction to any agency or court over a class of legal claims, except challenges to "decision[s]" within the meaning of § 511 that have actually been made by the Secretary. Nothing in § 511 prevents claims that could be (but have not yet been) adjudicated by the Secretary, and then reviewed by the Court of Veterans Claims and the Federal Circuit, from being raised in another court of competent jurisdiction instead. Our view in this regard accords with that of the D.C. Circuit:

> Section 511(a) does not give the VA exclusive jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits. Rather, it simply gives the VA authority to consider such questions when making a decision about benefits, and . . . prevents district courts from "review[ing]" the Secretary's decision once made.

Broudy v. Mather, 460 F.3d 106, 112 (D.C. Cir. 2006) (emphasis added). Thus in *Broudy,* the plaintiffs' claim that VA officials had obstructed their access to

benefits proceedings by withholding or covering up relevant information was not barred by § 511 because "the Secretary ha[d] never decided th[o]se questions." *Id.* at 114. This exactly mirrors this petitioner's case.

The Federal Circuit agrees as well. In *Hanlin v. United States*, 214 F.3d 1319 (Fed. Cir. 2000), that court explained:

> "We do not read [§ 511] to require the Secretary, and only the Secretary, to make all decisions related to laws affecting the provision of benefits. Rather, once the Secretary has been asked to make a decision in a particular case (*e.g.*, through the filing of a claim with the VA), 38 U.S.C. § 511(a) imposes a duty on the Secretary to decide all questions of fact and law necessary to a decision in that case."

Petitioner's appeal of the early effective date has never been decided, therefore the district court had jurisdiction to hear his lawsuit. This is an abridgement of this petitioner's rights to meaningful access guaranteed by the 1st Amendment

D. Statement of Issues and Omissions

MOJ filed 11 December 2017 . . . APPENDIX the court in deciding to dismiss (MTD) relied on Defendant's material misstatements and concealment of evidence under the "presumption of regularity". The plaintiff then file a FRCP 60(b)3, (11), (1) motion to set aside the judgment based on 8 specific counts of material misstatements, concealing evidence and material misstatement of the Law.

MOJ . . . Case 1:17-cv-00623-CRC Document 13 Filed 12/11/17, Page 7-8 district court Cites;

38 U.S.C. § 7105(d)(1). The veteran then has 60 days to file a Substantive Appeal to the Board of Veterans Appeals. *Id.* (§ 7105(d)(3) . . . APPENDIX

However the law says;

> 38 U.S.C. 7105(d)(1); 38 CFR 19.26 and 19.29. The claimant must file a substantive appeal within 60 days from the date of the mailing of the statement of the case, "or within the remainder of the one-year period from the date VA mailed the original decision to the claimant," whichever is later. 38 U.S.C. 7105(d)(3); 38 CFR 20.302(b).

(https://www.federalregister.gov/ . . . /board-of-veterans-appeals-rules-of-practice-time-for filing a substantive appeal)

While this appeal was pending the Defendants filed MSA 06/14/2018. This after plaintiffs' had filed his opening brief to the appeals court 05/29/2018, appealing the district courts abuse of discretion in FRCP 60b(3) motion and a 2nd motion under FRCP 60b(3) based on separated fraud on the court in Defendants reply to the 60b(3) material misstatements of facts. APPENDIX

Filed: 06/14/2018 APPELLEES' MOTION FOR SUMMARY AFFIRMANCE, Page 3

The Statement of the Case informed Mr. Thornton that he must appeal that decision within 60 days. *Thornton v. McDonald*, 626 F. App'x 1007, 1007 (Fed. Cir. 2015). . . . APPENDIX

Citing; *Thornton v. McDonald*, 626 F. App'x 1007, 1007 (Fed. Cir. 2015).

Case: 15-7107 Fed. Cir. 2015: 18-2 Page: 2 Filed: 12/15/2015

The SOC informed Mr. Thornton that an appeal "must be filed within 60 days from the date that the [VA] mails the Statement of the Case to the appellant, or within the remainder of the 1-year period from the date of mailing of the notification of the determination being appealed, whichever period ends later." APPENDIX

06/14/2018 Page 4 APPELLEES' MOTION FOR SUMMARY AFFIRMANCE

On June 12, 2015, however, the VA informed Mr. Thornton that his appeal would not be accepted because he failed to file it within 60 days of the VA's June 4, 2014, Statement of the Case. *Id*. . . APPENDIX

Citing; the said June 12, 2015 Notice: it stated *inter alia*, that the Statement of Case was issued to you on June 3, 2014. Therefore you had until August 2, 2014 to submit your substantive appeal. Accordingly, we cannot accept your VA Form 9 "Appeal To Board Of Veterans' Appeals" received February 2, 2015, as your substantive appeal as the time limit to continue your appeal has passed. APPENDIX

Again, these fraudulent factual statements and omissions are a continuing violation of misstatement of material fact (fraud) and material misstatement of the Law and violate this petitioner's right guaranteed by the 1st Amendment; meaningful access. FRCP 12 (b)1.

In a factual attack, on the other hand, the defendant challenges the factual basis underlying the court's subject matter jurisdiction with extrinsic evidence, essentially making the argument that the allegations supportive of jurisdiction are not true. *Cunningham*, 492 F.Supp.2d at 447. Because this Court must be satisfied at all times that it has the power to hear the case, it "may consider evidence outside the pleadings" "to resolve factual issues bearing on jurisdiction." *Gould Electronics*, 220 F.3d at 176; *Gotha v. U.S.*, 115 F.3d 176, 179 (3d Cir. 1997); *Int'l Ass'n of Machinists*, 673 F.2d at 711. Once the defendant presents extrinsic evidence contesting the jurisdictional facts set forth in the complaint, the court must permit the plaintiff to respond. *Gould Electronics*, 220 F.3d at 177. "The court may then determine jurisdiction by weighing the evidence presented by the parties," "evaluating for itself the merits of the jurisdictional claims." *Id.*; *Mortensen v. First Federal Sav. & Loan Ass'n*, 549 F.2d 884, 891 (3d Cir. 1977) (emphasis added). In making this evaluation, no presumption of truthfulness attached to the allegations set forth in the complaint. *Mortensen*, 549 F.2d at 891, *Id.* Rather, the challenge must be evaluated solely on the merits of the evidence submitted on jurisdiction.

VIII. Specific Motions

G. Motions for Summary Disposition

Motions for summary affirmance or summary reversal must be filed within 45 days of the date the case is docketed. Parties are encouraged to file such motions where a sound basis exists for summary disposition. . . .

E. Factual Background

The VA must assist veterans in obtaining evidence needed to support disability benefits claims. 38 U.S.C. § 5103A(a)(1), VA actions in this case violates 38 U.S.C. § 5103A(a)(1) as, in this case, VA engaged in conspiratorial conduct, systematic and clandestine misapplication of disability regulations involving fraud, concealment of evidence, material misrepresentations and omissions in an alleged decision making in Extraordinary Awards"

This outcome is absurd. "The government's interest in veterans' cases is not that it shall win, but rather that justice shall be done." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

Plaintiff has filed a cause of action in District Court seeking declaratory and injunctive relief, and challenging the constitutionality of non-review provision of the VJRA, 511(a), as well as seeking enforcement of the statute. Specifically, Plaintiffs seek declaratory relief for: (1) denial of due process in violation of the Fifth Amendment of the United States Constitution, and; (2) denial of meaningful access to the courts in violation of the First and Fifth Amendments.

Petitioner initially filed a disability claim in 1970. In May 1971 Thornton was given a medical examination Report of Medical Examination for Disability Evaluation (VA form 21-2545 . . . the examining doctor noted; the examination was for compensation purposes. A report of a VA examination, as here, will be accepted as an informal claim for benefits under an existing law or for benefits under a liberalizing law or VA issue, if the report relates to a disability that may

establish entitlement. 38 C.F.R. § 3.157(a). And the Court has held that raising a pending claim in connection with a challenge to the effective date decision is procedurally proper. *Ingram v. Nicholson*, 21 Vet. App. 232, 249, 255 (2007); *McGrath v. Gober*, 14 Vet. App. 28, 35 (2000) (a claim that has not been finally adjudicated remains pending for purposes of determining the effective date for that disability).

CONTINUING VIOLATION CONSPIRATORIAL MISCONDUCT AND OMISSIONS;

Plaintiff in October 14, 2008 (NOD) notice of disagreement requested an (EED) for PTSD specifically citing; Report of Medical Examination for Disability Evaluation (VA form 21-2545) of May 1971. *See* . . . M21-1MR, Part I, Chapter 5, Section C,D and CAVC *Suttman v. Brown*, 5 Vet. App. 127, 132 (1993) (where application "reasonably reveals "that claimant is seeking a particular benefit, VA is required to adjudicate the issue of claimant's entitlement to that benefit)

November 2008 Thornton requested a DRO De Novo Review 38 CFR § 3.2600 . . .

February 2009 Thornton submitted an expert medical report by Dr. Jones. Titled PTSD_ Addendum Dated: 02.01.09. Dr. Jones is qualified as an expert examiner and expert witness and has functioned in both capacities at the VARO level. As such, his findings are expert clinical opinions.

July 2010 DRO De Novo Review issued an SOC [38 C.F.R. § 3.2600] that did not address any of the issues in petitioner's notice of disagreement (NOD) nor did the DRO comment on the evidence submitted in support

of the unadjudicated informal claim raised in the 2008 NOD. Therefore no proper De Novo review was performed and the unadjudicated claim for PTSD remained pending.

August 1, 2010 Thornton filed VA form 9 appeal to the BVA again requested an (EED) for PTSD specifically citing; Report of Medical Examination for Disability Evaluation (VA form 21-2545) of May 1971. *See . . . McGrath v. Gober*, 14 Vet. App. 28, 35 (2000)

Subsequently, on December 11, 2012 the DRO issued a decision but did not address the unadjudicated EED PTSD claim that remained pending and was on appeal VA form 9 ; the Report of Medical Examination for Disability Evaluation (VA form 21-2545) May 1971 was the informal claim. However, he did state, this decision is considered a full grant of benefits sought on appeal, again taking the appeal out of appellant status.

In May 2014, petition for a writ of mandamus with the CAVC, which has the power to compel action of the Secretary unlawfully withheld or unreasonably delayed pursuant to 38 U.S.C. § 7261(a)(2) Again, the RO issued an erroneous June 4, 2014, DRO Decision granting an EED on PTSD of March 1, 2007, for what petitioner has information and belief and based thereon asserts that the purpose of the RO choosing a date for the EED which was somehow based on a letter from petitioner totally unrelated to his EED appeal was to moot petitioner's Petition for Extraordinary Relief which was before the CAVC. The RO stated this unrelated document was the unadjudicated informal claim of March 1, 2007; concealing the NOD of November 2013 which specifically cited Report of Medical

Examination for Disability Evaluation (VA form 21-2545) of May 1971 as the informal claim. This is the third substituted document [see factual allegation 29.a.(1) CAVC 14-1601 (GC) EDWARD V. CASSIDY JR] the VA substitute to the CAVC 14-1601 in their reply to support this erroneous decision this mooting the writ to the CAVC.

On January 28, 2015, the petitioner filed a timely VA form 9 appeal to the BVA, again requesting an (EED) for PTSD specifically citing the Report of Medical Examination for Disability Evaluation (VA form 21-2545) of May 1971 which is the Un-adjudicated claim.

However in this petitioner's claim, the RO [*Sure-Tan Inc. v. NLRB*, 467 U.S. 883, 896-897 (1984)], issued a June 12, 2015 decision, while petitioner's writ of mandamus was pending, thus taking the appeal out of appellant status. The RO erroneously denied the January 28, 2015 VA form 9 appeals to the (BVA) Board of Veterans Appeals as untimely. As a result the CAVC stated:

Thornton v. McDonald, 2015 WL 4591675 (Vet. App. July 15-2059 July 30, 2015

(1) The RO wrote that "the petitioner should have submitted his VA Form 9 no later than one year following notification of the adverse decision you are appealing, or 60 days from the date our Statement of the Case was sent to you, whichever is later. In your case, we notified you on December 13, 2012, of the adverse decision. You filed a Notice of Disagreement on November 7, 2013. A Statement of Case was issued to you on June 3, 2014. Therefore you had until August 2, 2014 to submit your substantive appeal . . .

(2) The CAVC Judge wrote in her opinion that; Whether the Court agrees with the RO's decision that the petitioner did not submit a timely VA Form 9 is immaterial at this juncture. The Court cannot review the RO's decision until the petitioner appeals it . . .

(3)) And she opined further: To reiterate, the petitioner has, in the RO's view, lost his opportunity to appeal its June 2014 decisions because he did not timely submit a VA Form 9. Based on the present posture of this case, the Court cannot order the RO to certify his appeal and forward it to the Board because he does not have an appeal eligible for Board review." . . . APPENDIX In *Dacoran v. Brown*, 4 Vet. App. 115 (1993), for example, the CVA denied a widow's petition for a writ of mandamus with respect to her constitutional challenges to the 1945 Recruitment Act. The court noted that constitutional challenges will be "presented to this Court only in the context of a proper and timely appeal taken from such decision made by the VA Secretary through the BVA." *Id.* At 119.

As noted above, this petitioner in the present case would be unable to bring a claim before a VA regional office, much less appeal such a claim to the BVA or CAVC. Regarding its ability to address constitutional issues through the All Writs Act, the court stated:

Although this Court also has authority to reach constitutional issues in considering petitions for extraordinary writs under 28 U.S.C. § 1651(a), the Court may, as noted above, exercise such authority only when a claimant has demonstrated that he or she has no adequate alternative means of obtaining the

relief sought and is clearly and indisputably entitled to such relief. *See Erspamer v. Derwinski*, 1 Vet. App. 3, 7(1990)]. Where, as here, a claimant remains free to challenge the constitutionality of a statute in the U.S. district court, she has not demonstrated that she lacks adequate alternative means of obtaining the relief sought. *See, Dacoran v. Brown*, 4 Vet. App. 115 (1993).

Id. Thus, the very courts that were established by the VJRA recognize not only the jurisdiction of district courts for constitutional claims but, more importantly for this issue, recognize the limited jurisdiction that they themselves possess. Accordingly, the Court finds that the VA claims adjudication system is not an adequate alternative forum for Plaintiffs' claims. The Court therefore finds, at this stage of the proceedings, that Plaintiffs have satisfied the requirements for a valid waiver of sovereign immunity under the APA.

December 17, 2015 Petitioner filed a NOD in response to the erroneous June 12, 2015 decision denying the January 28, 2015 VA form 9 appeal as untimely to the (BVA) Board of Veterans Appeals that mooted plaintiffs' mandamus before the CAVC (veterans courts). Plaintiff filed an (NOD) notice of disagreement with the RO to preserve his (EED) earlier effective dates going back decades of unadjudicated claims in his pending appeal to the BVA.

Petitioner in April 2017 filed a complaint with the D.C. District Court alleging an applied challenge to the 511a non-review preclusion clause citing the VJRA 511a preventing the CAVC and the CAFC from jurisdiction to facial challenges to the statue.

The D.C. District Court dismissed the complaint as to lack of jurisdiction, the petitioner appealed to the UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT No. 18-5049 in February 2018, while this appeal was pending the RO issues SOC to the NOD of December 17, 2015 challenging the erroneous untimeliness decision of June 12, 2015.

VA issued an SOC in March 22, 2018: you have filed a Notice of Disagreement with our action . . . We have enclosed a Statement of the Case, a summary of the law and evidence concerning your claim;

ISSUE: Whether a timely substantive appeal was received in response to VA Statement of Case issued June 4, 2014.

DECISION: The substantive appeal received February 2, 2015 was untimely

However, issue whether a timely substantive appeal was received "VA Statement of Case issued June 4, 2014" is inapposite to what is cited in REASONS AND BASES of the SOC: "In your case, we notified you on December 13, 2012, of our decision on your claim for benefits. You filed a Notice of Disagreement on November 7, 2013. A Statement of Case was issued to you on June 3, 2014. Therefore you had until August 2, 2014 to submit your substantive appeal."

However, this is also inapposite to the statements by defendant VA in their Motion To Dismiss (MTD):

"The VA, however, on June 12, 2015, informed Mr. Thornton that his appeal would not be accepted because he had failed to file it within 60 days after the VA's

June 4, 2014, Statement of the Case, as he was required to do."

The VA in the MTD to the district court, the continuing violation of (fraud) material misstatement of fact to what this document cited: which was included and cited in MOJ-D.C. District Court and in the MSA to the D.C. Appeals court . . . *See* above

Citing; June 12, 2015 Notice "In your case, we notified you on December 13, 2012, of our decision on your claim for benefits. You filed a Notice of Disagreement on November 7, 2013. A Statement of Case was issued to you on June 3, 2014" this document was attached to the complaint. . . Appendix.

However, this is apposite to statements by VA in the MTD. The MTD Cited before the D.C. District Court stating the SOC was issued on June 4, 2014.

Case 1:17-cv-00623-CRC Document 6-1 Filed 07/05/17 Page 10 of 17, MTD;

The VA, however, on June 12, 2015, informed Mr. Thornton that his appeal would not be accepted because he had failed to file it within 60 days after the VA's June 4, 2014, Statement of the Case, as he was required to do.

On May 3, 2018 the petitioner files the VA form 9 to the BVA with the RO in response to the March 22, 2018 SOC. Received by VA on May 7, 2018.

Petitioner in July 2018 noted on the VA's e-benefits website that it said his appeal was complete. Petitioner who's 100% mentally disabled was in a state of confusion and panic. How could a BVA decision be made without him knowing? Petitioner was directed to the

VA.gov website, an official VA website, and found that the BVA heard his case and his longstanding, ten year, wait was over and it was denied. The notice on VA.gov stated that petitioner could appeal to the CAVC within 120 days of the May 31, 2018

VA.gov website states;

"Your appeal was closed . . . You didn't take an action VA requested in order to continue your appeal . . . If you disagree with the Board's decision, you can appeal to the Court of Appeals for Veterans Claims. You'll need to hire a VA-accredited attorney to represent you, or you may represent yourself. You'll need to file your Court appeal by September 28, 2018."

For more information, you can:

Review the document "Your Rights to Appeal Our Decision" enclosed with the Board's decision.

Petitioner calls and writes the BVA and was told a decision was sent. The petitioner requests a copy to be sent to him and waits for another approximately 30 days without receiving a response. Petitioner filed a Freedom of Information (FOIA) request to get a response. The VA, after learning that the petitioner became aware of the fraudulent BVA decision, simply change the status of the claim stating the status of your claim has been changed and the May 31, 2018 disposition removed, again concealing yet another fraud that the VA had perpetuated on the petitioner.

On August 29, 2018 petitioner receives a response from the FOIA officer at the BVA, to wit: *See* attached FOIA/BVA response . . .

There is no letter in VBMS or LCM from BVA to you announcing that decision. Upon looking in VBMS, it is clear that a VA Form 1-9, signed by you on May 3, 2018 and received by the Board and added to your file on May 7, 2018 is present in the file. I am not competent to know how this will affect your claim, but after consulting with a Board attorney the status of your claim has been changed and the May 31, 2018 disposition removed. (*Id.* emphasis added)

Had this Petitioner not discovered the VA's fraudulent BVA Decision, his appeal would have been permanently terminated and the earlier effective dates going back decades would have been gone forever. It is petitioner's information and belief and based thereon that the VA would have alleged I failed to file my appeal by September 28, 2018; again through a continuing violation in a systematic and clandestine misapplication of disability regulations involving fraud, concealment of evidence, material misrepresentations and omissions in an alleged decision making in Extraordinary Awards.

Further, the FOIA officer's response was on August 29, 2018, which was 30 days from the date of appeal being terminated as untimely and the CAVC would have found the appeal untimely. Had petitioner not had an account with VA.gov he would have never known about the fraudulent BVA decision and the EED decades of the un-adjudicated pending claims would be gone forever. On November 29, 2018, the Circuit Court of Appeals for D.C. ruled:

November 29, 2018

"See Upon consideration of the petition for rehearing en banc and the supplement thereto, and the

absence of a request by any member of the court for a vote, it is ORDERED that the petition be denied."

THE PETITION FOR REHEARING EN BANC

09/20/2018 . . . Page 15, USCA Case #18-5049 Document #1751857 Filed: 09/20/2018 Page 215-216 ADDENDUM 176-177;

SUPPLEMENTAL APPENDIX F [FRAUD UPON THIS COURT] EVIDENCE IN SUPPORT OF EN BANC HEARING;

VA, continues the prohibited conduct on the same issues, now before this court, in and after the D.C. Appeal Docketing and filing of Plaintiff's Brief (untimely filing of VA form 9 and prohibited conduct)

REASONS FOR GRANTING THE PETITION

This Case Is An Ideal Vehicle To Decide This Question Of National Importance which affect 20 million veterans and their families.

I. THIS INSTANT PETITION PRESENTS A QUESTION OF PARAMOUNT NATIONAL IMPORTANCE IN NEED OF PROMPT RESOLUTION

Ensuring that eligible veterans and combat veterans receive meaningful access to the VA and the appeals courts—which the Nation has promised them in return for their service—is one of the Nation's highest priorities.

a. President Donald Trump Remarks on VA Corruption

Trump spoke at the Veterans of Foreign Wars convention in Charlotte, N.C . . . Trump described the VA as the most corrupt federal agency and vowed that his administration would fix it. July 26, 2016 NIKKI WENTLING/STARS AND STRIPES

The Conduct of the VA would "shock the conscience"

The conduct of the VA at all levels RO, DRO, District Manager, Records Management, General Counsel would shock the conscience of every veteran, veterans family, future man and women whom would consider serving in the military, as well as every citizen whom believes in the constitution and the pro-claimant system of the VA of which congress established to assure the American people that the United States would honor those whom gave so much for their country.

The corruption has to stop; this is not an isolated incident as noted below;

b. Lawrence Gottfried and Jill L. Rygwalski

Gottfried's actions, and those of another department attorney under investigation, have raised questions about the integrity of the veterans' appeals process.

The Washington Post By Toni Locy August 22, 1994. Lawrence R. Gottfried pled guilty to one count of unlawful concealment, removal, and mutilation of government records in violation of 18 U.S.C. § 2071.

United States of America, US Court of Appeals for the District of Columbia Circuit, 58 F.3d 648 (D.C. Cir. 1995) Argued April 18, 1995. Decided June 27, 1995.

"Woman Jailed in Veterans' Forgery Case", Washington Post, September 09, 1995.

Jill Rygwalski, were altering. WASHINGTON— U.S. District Judge James Robertson sentenced Jill L. Rygwalski, a former attorney for the Board of Veterans Appeals, to 15 months in prison Friday for tampering with veterans' files . . . 77 veterans died after Rygwalski had sent their cases back to local veterans offices for more work. Board officials still have to determine whether she tampered with any of those cases.

CONCLUSION

This combat veteran, who received combat injuries in Viet Nam when he was serving as NCOIC of a 20-man forward signal detachment at age 19, has been waiting for more than ten years to have his appeal on the issue of his PTSD Early Effective Date (EED) heard by the BVA.

This case is unique because it demonstrates with real and actual proof in his C-file and VA source documents that when the defendant VA engages in a continuing scheme of actual fraud, under the color of law, in order to prevent this veteran from having his appeal heard by the BVA, he is foreclosed from having any recourse through the courts. Petitioner filed two

petitions for extraordinary relief via a writ of mandamus However; the defendant used fraudulent means to moot the case. The General Counsel also filed false documents and made false statements to the CAVC —all ignored by that CAVC since this veteran was not appealing a BVA decision, therefore, the CAVC is barred from looking at facts to law pursuant to 38 U.S.C. 511(a) ["511(a)], the preclusion clause. This veteran then filed his appeal with the Federal District Court of Appeals for the Federal Circuit (CAFC)—three times—on the same issue. The CAFC could not look at fact to law either because the BVA had not ruled on petitioners' case, or could not rule on something that the CAVC had not ruled on, therefore, this veteran filed a lawsuit in the D.C. District Court, a trial court. However, even though the evidence of unlawful acts was attached as Exhibits and incorporated by reference in that complaint, the district court chose to render a decision on the MTD using the presumption of regularity. This is evidenced by the district court's repeating almost verbatim the positive averments made by defendants in their MTD; this even though petitioner rebutted those false averments. Defendants' motion to dismiss was sustained. because petitioner was characterized by the defendants as attempting to have the said court rule on the VA Secretary's decision and therefore he had no jurisdiction to rule on this veteran's complaint citing 38 U.S.C. § 511(a) prohibiting him from looking at facts to law. However, this veteran's complaint clearly stated that he was questioning the methods the defendants were using—not the decision of the Secretary. The fact is that this veteran's appeal to the BVA on the EED for the PTSD has never been heard to date and therefore there was no board decision

on benefits. Again, this veteran was appealing on the defendants' use, under the color of law; of prohibited conduct outside of their statutory mandate—in other words—a crime. As such each appellate court that reviewed his case read this appeal (and the district court his lawsuit) chose not to *see* a constitutional challenge. Why? This veteran filed two FRCP 60(b)3 motions, (fraud against the court); the first one the district court denied that motion—this in the face of several misstatement of fact and of law evidenced by the exhibits to the complaint, and the second one, the district court refused to docket it characterizing it as plaintiff asking for permission to file it, which the district court denied. These FRCP 60(b)3 motions all VA source documents which the defendants' attorney, the Deputy U.S. attorney stipulated to. And even when the said defendants' attorneys filed a Motion Summary Affirmance, defendants counsel misstated facts and law and in the continuing deprivation of constitutional rights constitutes irreparable harm. The en banc judges did not think these issues warranted rehearing, including the issue that that this Court has ruled on in VA cases; a claims processing rule such as is before this Court is non-jurisdictional unless Congress attaches jurisdictional consequences to such rules—which this Court ruled, it has not., the appellate judges did not vote for rehearing (*see Henderson v. Shinseki*, 562 U.S. (2011)).

The First Amendment protects the right of every American to meaningful access to the Courts to confront government wrongdoing; certainly veterans are entitled to the same fairness and honest application of the rule of law. Plaintiff maintains that his right of "meaningful access to the courts" has been deprived

and interfered with, and "the continuing deprivation of constitutional rights constitutes irreparable harm."

This case is of national importance to all Americans but specifically to veterans and their families.

The non-adversarial, pro-claimant, paternalistic VA adjudicatory system only affords justice if the government employees of the VA and government attorneys obey the law, including the Rules of Federal Procedure.

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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