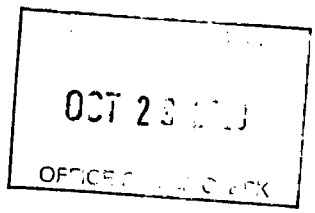
No. 20-726

In the Supreme Court of the United States

In re Stephanie Michael



ON PETITION FOR WRIT OF MANDAMUS TO THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS

PETITION FOR A WRIT OF MANDAMUS

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QUESTIONS PRESENTED

Congress "balances two important interests" affecting provision of VA benefits —"the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *See Pearson v. Callahan*, 555 U.S. 223 (2009). Specific text, legislative history, and purposes of the Administrative Procedure Act, 38 U.S.C. 511(a) and Veterans Judicial Review Act of 1988 are legislative actions in furtherance of this expressed congressional intent.

Even so, the U.S. District Court for the Southern District of Texas grants of qualified immunity, *forum non conveniens*, and *res judicata* conclude based on Government's litigation position that because her claims involve "VA benefit matters"— veteran's suits did not arise from "circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." *See* 28 C.F.R. 15.4. The questions presented are "not merely semantic but...of considerable practical importance for judges and litigants. *See Henderson v. Shinseki*, 562 U.S. 428 (2011):

1. Whether agency actions affecting the provision of VA benefits under applicable law may be reviewed by any other official or by any court of competent jurisdiction by an action in the nature of mandamus or otherwise in exceptional circumstances provisions for prior exclusive opportunity for review under Veterans Judicial Review Act of 1988 is inadequate.

2. Whether mandamus action by this court is appropriate.

IN RE STEPHANIE MICHAEL

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FEDERAL RULES CIVIL PROCEDURE

PETITION FOR WRIT OF MANDAMUS

Petitioner pro se, Stephanie Michael respectfully petitions for writ of mandamus to the U.S. District Court for the Southern District of Texas. May it please the court, in the alternative, the petition may be properly construed as a writ for certiorari to the U.S. Court of Appeals for the Fifth Circuit under the circumstances.

PARTIES TO THE PROCEEDINGS

Stephanie Michael is the Plaintiff-Appellant, Pro Se, here and in the proceedings below.

The U.S. District Court for the Southern District of Texas or in the alternative the U.S. Court of Appeals for the Fifth Circuit are the parties to this mandamus action. In the proceedings below, the United States was the Defendant, under FTCA interested parties include the Department of Veterans Affairs, and Department of Justice.

The U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for Federal Circuit would not acknowledge the United States as party to her petitions for relief under 28 U.S.C 2201 of Declaratory Judgment Act. Motions presented addressing the caption were denied Accordingly, the Secretary of the Department of Veterans Affairs is construed as the Defendant in those proceedings.

OPINIONS BELOW

All opinions below are unpublished. *Michael v. United States,* No. 12-cv-03093, 2013 U.S. Dist. LEXIS 189859 (S.D. Tex. Feb. 11, 2013). *Michael v. United*

States, No. 14-2421, 2015 WL 11123316, at *1 (S.D. Tex. Feb. 3, 2015). *Michael v. United States*, 616 F. App'x 146 (5th Cir. 2015). *Michael v. United States*, 136 S. Ct. 2013 (2016). *Michael,* 2016 WL 7448386, at *1., USCAVC, November 9, 2016, *Michael v. McDonald,* No. 16-3356, 2016 WL 7448386 (Vet. App. Dec. 28, 2016). *Michael v. Shulkin*, Court of Appeals, Fed. Cir. 2017-1569, June 12, 2017.

JURISDICTION

Veteran invokes this Court's jurisdiction under 28 U.S.C. 1651 or in the alternative 28 U.S.C. 1254(1).

CONSTITUTIONAL AND LEGISLATIVE PROVISIONS INVOLVED

U.S. Constitution- Article I, Article II, and Article III; Fifth Amendment-Due Process Clause

Statutes- 5 U.S.C. 551, et seq. of the Administrative Procedure Act, 5 U.S.C. 701, et seq. Administrative Procedure Act, 38 U.S.C. 501, et seq. Department of Veterans Affairs Codification Act of 1991; 28 U.S.C. 1346; 28 U.S.C. 2671 et seq. Federal Tort Claims Act. 38 U.S.C. 7251, et seq. Veterans Judicial Review Act of 1988.

Regulations: 38 C.F.R. 1.579, 1.580; 38 CFR part 14; 38 CFR part 20; 28 CFR part 14, 28 CFR part 15.

Pertinent text of constitutional and legislative provisions is reprinted in the Appendix on pages App. 39a- 83a

STATEMENT

1. This action involves questions of law necessary to the determination of whether specific indicia of the Administrative Procedure Act, 38 U.S.C. 511(a), and Veterans Judicial Review Act of 1988 serve as clear and convincing legislative intent to preclude review of agency actions affecting provision of benefits by the Secretary of the Department of Veterans Affairs under the provisions of 28 U.S.C. 1346 and 28 U.S.C. 2671, et seq. of the Federal Tort Claims Act under the circumstances here.

38 U.S.C. 501, et seq of the Department of Veterans Affairs Codification Act of 1991, statutorily defines the authority and duties of the Secretary of an executive Department of Veterans Affairs, consistent with 5 U.S.C. 551, et seq. of the Administrative Procedure Act. Authority of the Secretary includes duty to prescribe all rules and regulations which are necessary or appropriate" for those delegated authority "to carry out the laws administered by the Department, to act "within the limitations of such delegations, redelegations, or assignments, because "all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary." See 38 U.S.C. 501.

Congress balances two important interests affecting provision of VA benefits —the need to hold public officials accountable when they exercise power irresponsibly", by amendment of 5 U.S.C. 701, et seq. of the Administrative Procedure Act and by enactment of 38 U.S.C. 38 U.S.C. 7251, et seq. of the Veterans

Judicial Review Act of 1988, Congress establishes an Article I court of the United States with jurisdiction limited to review of final Board of Veterans Appeals actions. See 28 U.S.C. 451, which addresses the equally important "need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." See *Pearson v. Callahan,* 555 U,S. 223 (2009)

38 U.S.C 511, both important and mandatory serves "in effect as a specialized forum selection clause", that is unambiguous and unequivocal. See *R. de Quijas v. Shearson/American Express.* "In the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary" the U.S. Court of Appeals for Veterans Claims has authority to "hold unlawful and set aside or reverse such finding if the finding is clearly erroneous."38 U.S.C. 7261(4). Applicable regulations establish authority and duties of Secretary's delegates in capacity of Board of Veterans Appeals and those of VA legal counsel with distinguishable procedural requirements and function. 38 CFR part 14; 38 CFR part 20.

"In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court." 38 U.S.C. 7261(c). In other words, the Court of Appeals for Veterans Claims can review the Board's decision, but it cannot review whether VA Regional Counsel errs by exercise of discretion to determine the Secretary is amenable to review of Board of Veterans Appeals actions "by any

other official or by any court, whether by an action in the nature of mandamus or otherwise" to determine whether Board of Veterans Appeals actions in this case are "final and conclusive" because the Secretary decided all questions of law and fact...under a law that affects the provision of VA benefits." See 38 U.S.C. 511(a). As a result, remedy under the provisions of the Veterans Judicial Review Act is inadequate of unavailable, so the Board action, upon review by VA legal counsel and Department of Justice officials, issuance of notice of administrative exhaustion required by 28 U.S.C. 2675(a), the decision of VA legal counsel and Department of Justice officials to forgo the safeguard provided by the Veterans Judicial Review Act of 1988, the agency action "is subject to judicial review in civil or criminal proceedings for judicial enforcement." 5 U.S.C. 703, APA, 38 CFR 14.600(b).

2. "The Board is a body within the VA that makes the agency's final decision in cases appealed to it. §§7101, 7104(a). *Henderson v. Shinseki*, 562 U.S. 428 (2011). However, there are two specific circumstances Board of Appeals actions upon judicial review by U.S. Court of Appeals for Veterans Claims may render provisions of the Veterans Judicial Review Act of 1988 inadequate. "A veteran may also reopen a previously denied claim at any time by presenting "new and material evidence," 38 U. S. C. §5108, and decisions by a regional office or the Board are subject to challenge at any time based on "clear and unmistakable error," §§5109A, 7111." *Henderson,* 562 at 428.

This Supreme Court recently granted certiorari to review a circumstance that arises from a circumstance by which "the Board of Veterans' Appeals, Court of Appeals for Veterans Claims, and Federal Circuit affirmed, citing deference to an agency's reasonable reading of its own ambiguous regulations." *See Kisor v. Wilkie. Kisor,* like this veteran meets the statutory requirements of basic entitlement to service-connected compensation with the venerable distinction as an honorably discharged veteran disabled as a result of active duty service in the United States Marine Corps in the combat theater of the Vietnam War. *See* 38 U.S.C. 1110. This veteran meets the statutory requirements of basic entitlement to service-connected compensation as an honorably discharged veteran disabled as a result of active duty service in the United States Marine Corps with service during Desert Storm period of war. She too sought remedy in proceedings under the Veterans Judicial Review Act to no avail.

Based on presentation of "new and material evidence"— "Kisor moved to reopen his claim. The VA" (regional office)..."granted those benefits only from the date of his motion to reopen, not (as Kisor had requested) from the date of his first application. The Board of Veterans' Appeals—a part of the VA—affirmed that retroactivity decision, based on its interpretation of an agency rule governing such claims." In *Kisor's* case, "the Court of Appeals for Veterans Claims affirmed." *Kisor,* 588 U.S.___2019.

3. This veteran eventually realized the U.S. Court of Appeals for Veterans Claims could not review de novo "findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court." See 38 U.S.C. 7261(c). Because applicable regulations establish a procedure for the Secretary to exercise discretion to decide whether it was amenable to process under the Veterans Judicial Review Act of 1988; or to potentially expose the United States to suit should Board of Veterans Appeals actions be found actionable under 5 U.S.C. 552a of the Privacy Act; and for veteran to bring an action under the Federal Tort Claims Act upon the denial of her administrative tort claims— the Article I Court cannot and will not justify under law the exercise of such discretion.

38 CFR part 20, Board of Veterans Appeals: Rules of Practice, Subpart M, Privacy Act is unambiguous. "A request for amendment of an appellate decision under the Privacy Act (5 U.S.C. 552a) may be entertained...The Board will review a request for correction of factual information set forth in a decision...The denial will satisfy the procedural requirements of § 1.579 of this chapter." *See* 38 CFR 20.1201.

Issuance of denial of a motion alleging Board violations of the Privacy Act is a final and conclusive decision the VA benefit matter "reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise" is agency action with "specific attention to one or more of the four standards (*e.g.,* accuracy, relevance, timeliness, and completeness)" and meets "statutory, procedural, or

constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." See 38 U.S.C. 511(a), See 38 CFR 1.580, See Citizens to Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971).

The Board denials satisfy procedural requirements "for each individual to be able to exercise fully, his or her right under 5 U.S.C. 552a" law "affecting the provision of benefits by the Secretary." See 38 CFR 1.579(b); 38 CFR 20.1201; 38 U.S.C. 511(a). Here, Houston VA Regional Counsel was "designated as responsible for the amendment of records...evaluate and grant or deny requests to amend; review initial adverse determinations upon request, and assist requesters desiring to amend or appeal initial adverse determinations or learn further of the provisions for judicial review." See 38 CFR 1.579(b)(1)(2).

4. Veteran properly presented her administrative tort claims on Standard Form 95 of judicial record and attachments to Houston VA Regional Counsel. "After review the Secretary's designee refused "to amend the record in accordance with" her request and she was advised of her "right to file with the Department of Veterans Affairs a concise statement setting forth the reasons for his or her disagreement with the Department of Veterans Affairs refusal and... provisions for judicial review of the reviewing official's determination. (5 U.S.C. 552a(g)(1)(A)). See 38 CFR 1.579(c).

Under these circumstances, it is required the "Department of Veterans Affairs will clearly note any part of the record which is disputed; provide "copies of

a concise statement of the Department of Veterans Affairs reasons for not making the amendments requested to other agencies" in this case— the U.S. Department of Justice, "to whom the disputed record has been disclosed. (5 U.S.C. 552a(d)(4)) (38 U.S.C. 501)" See 38 CFR 1.579(b).

5. "The regulations issued by the Department of Justice at 28 CFR part 14 are applicable to claims asserted under the Federal Tort Claims Act, including such claims that are filed with VA. The regulations in §§ 14.600 through 14.605 of this part supplement the regulations at 28 CFR part 14." 38 CFR 14.600(b). Veteran inquired about procedure for "filing a claim against the United States, predicated on a negligent or wrongful act or omission of an employee of the Department of Veterans Affairs acting within the scope of his or her employment" was properly "furnished a copy of SF 95, Claim for Damage, Injury, or Death." 38 CFR 14.604(a)

Accordingly, she was advised "to submit the executed claim directly to" Houston VA Regional Counsel, "having jurisdiction of the area wherein the occurrence complained of took place." She was further advised to "submit the information prescribed by 28 CFR 14.4 to the extent applicable, she did so. On (date) Her claims were then "deemed to have been presented when the Department of Veterans Affairs" received her "executed SF 95." See 38 CFR 14.604(b).

The written notice of final denials of judicial record were sent to veteran by certified mail return receipt # states VA benefit matters by law cannot be considered under the Federal Tort Claims Act, therefore her claims are non-payable. She is further advised if she is dissatisfied...with the agency action", she "may file suit in an appropriate U.S. District Court, in accordance with sections 1346 and 2671-2680, title 28, United States Code of the Federal Tort Claims Act which provides administrative tort claim denied may be presented to a federal district court for judicial consideration. App. "The Board consists of a Chairman, Vice Chairman, Deputy Vice Chairmen, Members and professional, administrative, clerical, and stenographic personnel to include those in capacity of Veterans Law Judge and acting Veterans Law Judge *See* 38 CFR 20.101.

This action involves the "split enforcement" scheme," of the Federal Tort Claims Act "in which Congress divided regulatory power between two entities. Martin, 499 U.S., at 151." *See Kisor,* supra at 588 at. Accordingly, Congress does not consent to proceedings for review of the notice of administrative exhaustion required by 28 U.S.C. 2675(a)—actions of officials of the Department of Justice and VA legal counsel are not subject to review under the provisions of the Veterans Judicial Review Act of 1988. "An action against the United States under 28 U.S.C. 2671-2680 is the exclusive remedy under these circumstances." 38 CFR 14.605 (a)."

5. Applicable regulations establish procedure an authority for "the United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice is authorized to make the statutory certification that the covered person" in this instance Houston VA Regional Counsel and officials of the Department of Justice "was acting at the time of the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy. *See* 28 CFR 15.4 App.17a.

Here, the U.S. Attorney for the Southern District of Texas certifies Houston VA Regional Counsel and Department of Justice denial of her administrative tort claims colorable under the provision of 5 U.S.C. 552a of the Privacy Act, do not constitute as incident that "arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." *See* 28 CFR 15.4. The Government cites statutory provisions of the Administrative Procedure Act, 38 U.S.C. 511(a), and Veterans Judicial Review Act as clear and convincing evidence she has no standing, there is no waiver of sovereign immunity for her FTCA claims, and the U.S. District court lacks jurisdiction, therefore privileges of qualified immunity, *forum non conveniens*, and *res judicata* issued by the U.S. District Court for the Southern District of Texas are appropriate under the circumstances here. App.1a, App.14a.

Upon initial dismissal based on grant of qualified immunity and *forum non conveniens* ""without

prejudice to presentation in a court of competent jurisdiction" by the district court of her initial FTCA claims, she did not appeal to the U.S. Court of Appeals for the Fifth Circuit. She presented yet another motion to the Board, the Board denied her VA benefit claims, the U.S. Court of Appeals for Veterans Claims granted VA General Counsel motions to dismiss. She presented a second administrative tort claim subsequently denied by Houston VA Regional Counsel and Department of Justice officials. She again timely filed an action against the United States under the Federal Tort Claims Act in the district court. App.17a.

6. In the proceedings of her second FTCA claims, the U.S. District Court for the Southern District of Texas denied her motions for relief from void judgment, motions to strike, reconsideration, and motion for interlocutory resolution of the jurisdictional question by the U.S. Court of Appeals for the Fifth Circuit under the collateral order doctrine were all denied. On, the district court concluded all elements of res judicata were present and granted Government's motion based on the grants of qualified immunity and *forum non conveniens* from her prior action and dismissed her FTCA claims "with prejudice with refiling in the U.S. District Courts of the United States." App.20a , App.23a,

U.S. Court of Appeals for the Fifth Circuit affirmed the grants of dismissal by the U.S. District Court for the Southern District of Texas based on the Government's litigation and cited *Zuspann v. Brown,* 60 F.3d, 1156 (1995), a precedent opinion applicable to a Bivens action naming several VA officials as the respondents to suits involving VA benefit matters. Veterans subsequently filed petition for certiorari and

rehearing to this Supreme Court, each denied. Upon denial of her petitions for certiorari by this Court, the judgments below remain the final determination. App.24a.

Veteran presented a motion for leave to proceed in the U.S. Court of Appeals for Veterans Claim. On, in support of her motion to invoke exercise of its jurisdiction, she presented the judicial orders of this Supreme Court and the lower courts which in effect conclude based on the Government's litigation affidavits the notice of administrative exhaustions of record required by 28 U.S.C. 2675(a) must be construed as final and conclusive Board of Veterans Appeals decisions involving "matters covered by chapter 72" title 38, United States Code and the Article I court of the United States is an alternative venue to review "claims asserted under the Federal Tort Claims Act" subsequently denied. App. 28a, App.29a.

7. The U.S. Court of Appeals for Veterans Claims is a court of the United States, established under the provisions of the Veterans Judicial Review Act of 1988. 28 U.S.C. 451. Therefore, "whether or not further relief is or could be sought" the Court of Appeals for Veterans Claims "may declare the rights and other legal relations of any interested party seeking such declaration" and "any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such." See 28 U.S.C 2201 In response to her motion, the U.S. Court of Appeals for Veterans Claims accords no effect to the precedent or judicial orders of this Supreme Court and lower courts nor to any argument, evidence, or

reasoning by the Government or this veteran. App.30a.

8. The Court of Appeals for the Federal Circuit affirmed the U.S. Court of Appeals for Veterans Claims decision it could not grant declaratory relief by issuance of an order under 28 U.S.C. 2201 of Declaratory Judgment Act., Now, veteran has no opportunity for review of adverse agency actions under laws affecting the provision of VA benefits because her claims are unreviewable in proceedings under the 38 U.S.C. 7251, et seq. of the Veterans Judicial Review Act of 1988 in the U.S. Court of Veterans Appeals, the court specified by statute and a barred "with prejudice to refiling in any U.S. District Court" venue in a proceeding against the United States as provided by 28 U.S.C. 1346 and 28 U.S.C. 2671, et seq. of the Federal Tort Claims Act the U.S. District Court for the Southern District of Texas. App. 32.

REASONS TO GRANT WRIT

"The issuance of a writ of mandamus to a lower court is warranted when a party establishes that "(1) 'no other adequate means [exist] to attain the relief he desires,' (2) the party's 'right to issuance of the writ is "clear and indisputable,"' and (3) 'the writ is appropriate under the circumstances."' *Hollingsworth* v. Perry, 558 U.S. 183, 190 (2010) (per curiam) (quoting *Cheney v. United States Dist. Court,* 542 U.S. 367, 380-381 (2004). All three requirements are clearly met here. The grants of qualified immunity, *forum non conveniens*, and *res judicata* issued by the U.S. District Court for the Southern District of Texas are void judicial actions which purport to "modify, abridge, and enlarge the substantive rights of the litigants...enlarge or diminish the jurisdiction of federal courts"...and fail to strictly construe "waivers of sovereign immunity." *See United States v. Sherwood*, 312 U.S. 584, 585-590 (1941).

"Congress expressly established the Judiciary and not the Department as the adjudicator...of private rights of action —it is fundamental "that an agency may not bootstrap itself into an area in which it has no jurisdiction" *See Adams Fruit v. Barrett Co., Inc.,* 494 U. S. 638, 649-650. (1990). "Judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez* v. *Mortgage Bankers Assn.*, 575 U. S. 92, 119 (2015)." The Department of Veterans Affairs and Department of Justice, executive agencies ability to exercise of judicial and legislative authority unchecked here "is in serious tension with the Constitution, the APA, and over 100 years of judicial decisions." See *Baldwin v. United States.*

Here, U.S. Court of Appeals for the Fifth Circuit also departs from "certain basic principles that limit the power of every federal court...they have only the power that is authorized by Article III of the Constitution and the statutes enacted by Congress pursuant thereto. *See, e.g., 5 U. S. Madison,* 1 Cranch 137, 5 U. S. 173-180 (1803)." *Bender v. Williamsport Area School District*, 475 U.S. 534, 541 (1986). In the alternative, this court may wish to construe this as a writ for certiorari; vacate and remand the judgments to provide relief from the void judicial actions at issue because "every federal appellate court has a special obligation to "satisfy itself not only of its own jurisdiction, but also that of the lower courts in a cause under review," even though the parties are prepared to concede it. *Mitchell v. Maurer,* 293 U. S. 237, 293 U. S. 244 (1934).(citations omitted). *Bender,* supra, at 541-543.

Furthermore, the Fifth Circuit leaves to this Court to answer the question of whether "38 U.S.C. "§ 511, creates a specific appellate review structure for disputes involving veterans benefits and the Department of Veteran Affairs" and "the detailed nature of the procedural and appellate structure contained within the Veterans' Judicial Review Act clearly indicate Congress' intent to confine" all "decisions affecting veteran's benefits within this structure." See *Zuspann v. Brown* F. 894 (W.D. Tex. 1994); *Zuspann v. Brown*, 60 F.3d, 1156 (5thCir.1995); See *Zuspann v. Brown*, cert. denied, 516 U.S. 1111, 116 S. Ct. 909, 133 L. Ed. 2d 841 (1996).

Either way, this action provides an appropriate vehicle for this Supreme Court "to correct seriously erroneous interpretation of statutory language" of the Administrative Procedure Act, 38 U.S.C.§511(a), and

the Veterans Judicial Review Act of 1988; revisit precedent opinions that undermine "congressional policy as expressed in other legislation" applicable to agency actions affecting provision of benefits by the Secretary. *R. de Quijas v. Shearson/Am.Express,* 490 U.S. 477, 484 (1989).

A. Veteran has no other adequate means to obtain relief from void judicial grants of qualified immunity, *forum non conveniens,* and *res judicata*.

Absent plenary action and relief by this Supreme Court from void grants of qualified immunity, *forum non conveniens*, and *res judicata* favorable toward the Government– the orders of the U.S. District Court for the Southern District of Texas at issue, effectively and unlawfully deprive veteran of relief benefits she is basically entitled to by law and her clear and indisputable legislative and constitutional rights to remedy under law. See U.S. Const., Fifth Amendment 5 U.S.C. 702; 38 U.S.C. §1110.

This action reinforces why this Court retains *Auer v. Robbins*, 519 U.S. 452 (1997) and *Bowles v. Seminole Rock* and Sand, 325 U.S. 410 (1945)–doctrine this court describes as "potent in its place, but cabined in its scope." See, *Kisor v. Wilkie,* 588 U.S.___2019. By reinforcing its limits, *Auer* doctrine "thus serves to ensure consistency in federal regulatory law for everyone who needs to know what it requires" and "enables the agency to fill out the regulatory scheme Congress has placed under its supervision." *See Kisor v. Wilkie,* 588 U.S.___2019.

Applicable VA regulations establish "an action against the United States under 28 U.S.C. §§ 2671-2680 is the exclusive remedy under these circumstances." See 38 C.F.R. §14.605. App. Yet, "the focal point for judicial

review" by the U.S. District Court for the Southern District of Texas, was not the notice of administrative exhaustion required by 28 U.S.C. §2675(a) of judicial record, "the incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." *See Florida Power & Light v. Lorion*, 470 U.S. 729, 743 (1985) (internal citations omitted)., See 28 C.F.R. § 15.4(b). So, left with no other recourse, upon denial of certiorari by this Supreme Court, veteran presented motion for leave to proceed in the U.S. Court of Appeals for Veterans Claims venue for review of the notice of administrative exhaustion required by 28 U.S.C. §2675(a).

The Article I Court gives no effect to any precedent opinion or judicial orders of this Supreme Court, the U.S. Courts of Appeals or the U.S. District Courts; any litigation position, evidence, or reasoning by the Government, Secretary, or this veteran that it is "subject to the instructions and supervision of the Assistant Attorney General in charge of the Civil Division or his or her designee." See 28 C.F.R. §15.4(c). Should this court continue to exercise silence under the circumstances, this veteran, like many other VA benefit claimants will continue to suffer irreparable harm as a result of not only the loss of benefits as a means to improve their quality of life and liberty, but the privileges and enjoyment of protections of rights provided them by the Due Process Clause of Fifth Amendment of the U.S.. Constitution and congressional action.

In "conduct of litigation reserved...to officers of the Department of Justice, under the direction of the Attorney General, the Government "undermines the ability of the Judiciary to perform its checking function on the other branches."— The Judiciary's checking power is its authority to apply the law in cases or controversies properly before it. See Baldwin at (internal citations omitted). Here, although the U.S. Constitution stipulates "executive agencies enjoy only "the executive Power." Art. II, §1" yet by judicial abdications, "they arguably exercise "the judicial Power of the United States," which is vested in the courts; still the Courts without question defer to executive agency reading of law applicable to Article III and statutory requirements to the extent "the Executive is free to dictate the outcome of cases through erroneous interpretations" and "the courts cannot check the Executive by applying the correct interpretation of the law." *See Baldwin v. United States.*

Now veteran asks this Court to "look to such evidence as "'specific language or specific legislative history" of the Administrative Procedure Act, 38 U.S.C. §511(a), and Veterans Judicial Review Act of 1988 "that is a reliable indicator of congressional intent" for review of agency actions affecting the provision of VA benefits "that is 'fairly discernible in the detail of the legislative scheme.'" *Bowen v. Michigan Academy of Family Physicians, supra,* at 476 U. S. 673. "*See Traynor v. Turnage*, 485 U.S. 535, 542 (1988).

B. Specific indicia such as text, structure, history and purposes of the Administrative Procedure Act. U.S.C. 511(a), and the Veterans Judicial Review Act of 1988 establish fundamental and fatal judicial error under the circumstances here.

In this case, the district court fatally, fundamentally and erroneously presumes a diligent "United States Attorney for the district where the civil action or proceeding is brought, or any Director of the Torts Branch, Civil Division, Department of Justice" would not 1)knowingly present "to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating" that an adverse action on a claim properly asserted under the Federal Tort Claims Act taken by Department of Justice officials and VA legal counsel is a Board of Veterans Appeals matter covered by 38 U.S.C. §7251, et seq. of the Veterans Judicial Review Act of 1988 and "that to the best of the" officer of the court's "knowledge, information, and belief, formed after an inquiry into whether" applicable agency regulations establish grants of qualified immunity, *forum non conveniens*, and *res judicata* is "reasonable under the circumstances" if it indeed was not. See Fed. Rule Civ. P. 11(b), 28 C.F.R.§ 15.4(b).

Such conduct directed at the judicial machinery by litigation affidavits of the Department of Justice officials at issue here persuades the district court it properly purports to by judicial order: 1) effectuate repeal by implication the expressed waiver of sovereign immunity APA; 2) diminishes its own jurisdiction and expands that of the U.S. Court of Appeals for Veterans Claims, and 3) modify and

abridge veterans clear and indisputable legislative right to remedy sought, so the Government can enjoy privileges of qualified immunity, *forum non conveniens*, and *res judicata*. . See *United States v. Sherwood,* 312 U.S. at 584-590 (1941). "The Constitution carefully imposes structural constraints on all three branches, and the exercise of power free of those accompanying restraints subverts the design of the Constitution's ratifiers" and here, the Department of Justice in conduct of litigation usurps and "exercises judicial and legislative power...free of these safeguards." *See Baldwin v. United States*

"Federal Courts have an independent obligation to ensure that they do not exceed the scope of their jurisdiction, and therefore they must raise and decide jurisdictional questions that the parties either overlook or elect not to press." *Henderson v. Shinseki*, 562 U.S. 428, 432 (c.*f Arbaugh v. Y&H, Corp.* 500 U.S, at 514 (2006)) Here, the Government elected not to press: 1) VA regulations establish Board of Veterans Appeals are subject to the requirements and judicial enforcement of 5 U.S.C. §551, et seq. of the Administrative Procedure Act.[38 C.F.R. part 20: Board of Veterans Appeals, Subpart M, Privacy Act] 2) 5 U.S.C. §703 of the APA establish in the inadequacy of prior exclusive opportunity for review under the provisions of the Veterans Judicial Review Act, "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement.'"; and 3) VA regulations establish procedural requirements for claims asserted under the Federal Tort Claims Act involving VA benefit matters and "a "split enforcement" scheme, in which Congress divided regulatory power between two entities" in this case the Department of Justice and Department of

Veterans Affairs. "*Martin*, 499 U. S., at 151." *See Kisor v. Shinseki*, 588 U.S.___2019 n. 16, [38 C.F.R. §§14.600-14.605].

1. The U.S. District Court errs by failing to raise and decide independently based on specific indicia of the Administrative Procedure Act (APA) existence of a waiver of sovereign immunity.

"The doctrine of qualified immunity protects government officials "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)." *Pearson v. Callahan*, 555 U.S. 223 (2009). "The statutory text and reasonable inferences from" the Administrative Procedure Act "give a clear answer against the Government's arguments that" Congress does not provide a waiver of sovereign immunity to suit involving VA benefit matters in an action against the United States under the Federal Tort Claims Act *Brown v. Gardner,*513 U.S. 115, 117-122 (1994). The judicial orders based on executive agency litigation affidavits face head on an "encounter head-on the "cardinal rule . . . that repeals by implication are not favored...there is ample independent evidence that the legislative intent was to the contrary." *See Morton v. Mancari*, 417 U.S. 535, 549 (1974) (internal citations omitted).

"This clear textually grounded conclusion is also fatal to the Government's remaining principal arguments: that Congress" by enactment of the Veterans Judicial

Review Act of 1988 and the review preclusion clause of 38 U.S.C. §511(a) serves as a statutorily expressed exemption of agency actions affecting the provision of VA benefits from the procedural requirements of the Administrative Procedure Act "or, alternatively," Supreme Court "silence serves as an implicit endorsement of" the lower courts adoption of the Government's litigation position effectuates the "repeal by implication" of the APA as law applicable to agency actions affecting the provision of VA benefits "deserves judicial deference due to its undisturbed endurance." *See Brown v. Gardner*, 513 U.S. 115, 117-122 (1994).

a. 5 U.S.C. §551, et seq. of the Administrative Procedure Act establishes procedural requirements applicable to executive agency action affecting provision of VA benefits at issue here.

5 U.S.C. §551, et seq. of the Administrative Procedure Act (APA) is law applicable to agency actions of the Department of Justice and Department of Veterans Affairs affecting the provision of the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. 38 U.S.C. § 511(a)(b)(4). "Neither the legislative nor the executive branch of the Government of the United States can assign to the judicial branch any duties other than those that are properly judicial, to be performed in a judicial manner." See *Muskrat v. United States* 219 U.S. 346, 352 (1911). Congress does not and cannot impose a duty upon a court abdicate its own statutory, procedural, or constitutional authority and duties to ratify executive agency actions that do not "meet statutory, procedural, or constitutional requirements. 5 U.S.C. §§ 706(2)(A), (B), (C), (D)." *See Citizens to*

Preserve Overton Park v. Volpe, 401 U.S. 402, 414 (1971).

Congress stipulates actions of the Department of Justice and Department of Veterans Affairs in this case are subject to "the requirements or privileges relating to evidence or procedure apply equally to agencies and persons"; "each agency.is granted the authority necessary to comply with the requirements of this subchapter through the issuance of rules or otherwise"; and "subsequent statute", in this case the Veterans Judicial Review Act and 38 U.S.C. §511— "may not be held to supersede or modify this subchapter, chapter 7", title 5, United States Code "except to the extent that it does so expressly." See 5 U.S.C. 559, APA.

To that end, VA regulations, 38 C.F.R. part 20: Board of Veterans Appeals, Rules of Practice establish Board set forth procedural requirements to be construed to secure a just and speedy decision in every appeal." See 38 C.F.R. §20.1. 38 C.F.R. §20.1201 is unambiguous: A request for amendment of an appellate decision under the Privacy Act (5 U.S.C. §552a) may be entertained." Board of Veterans Appeals denial action to deny veteran's motions for reconsideration and revision based on clear and unmistakable error are colorable as violations of 5 U.S.C. §552a of the Privacy Act, "will satisfy the procedural requirements of 1.579 of this chapter which establish procedural requirements "for whatever additional means may be necessary for each individual to be able to exercise fully, his or her right under 5 U.S.C. §552a." 38 C.F.R. § 1.579(b).

It is of judicial record, the Secretary's designee, Houston VA Regional Counsel informs veteran of "Department of Veterans Affairs refusal and "provisions for judicial review of the reviewing official's determination by issuance of notice of administrative exhaustion required by 28 U.S.C. §2675(a). See 28 C.F.R. §14.9, 5 U.S.C. §552a(g)(1)(A))."Whenever any agency" this includes the Department of Justice and Department of Veterans Affairs "fails to comply with any other provision of this section, or any rule promulgated thereunder, in such a way as to have an adverse effect on an individual, the individual may bring a civil action against the agency, and the district courts of the United States shall have jurisdiction." 5 U.S.C. 552a(g)(1)(A)(D)." In this circumstance "the United States is the proper party defendant, not the Secretary." App. See 5 U.S.C. §552a(g)(1-5), 28 U.S.C. §1346(b). "An action against the United States under 28 U.S.C. §§2671-2680 is the exclusive remedy under these circumstances." See 38 C.F.R. §14.605(a).

b. 5 U.S.C. §701, et seq. of the Administrative Procedure Act establish the procedural requirements for judicial review of executive agency actions under the circumstances.

"By Pub.L. No. 94-574, Act of October 21, 1976, 90 Stat. 2721, Congress "enacted a partial waiver of the sovereign immunity defense" amending 5 U.S.C. §701, et seq. of the Administrative Procedure Act."[1] As a result, agency actions affecting the provision of VA benefits are subject to the requirements for judicial review procedural standards of the APA. As required by 5 U.S.C. §551, et seq of the Act, the VA must publish "rules and regulations which are necessary or

appropriate to carry out the laws administered by the Department and are consistent with those laws" which include the Federal Tort Claims Act, "subsequent statute whose enforcement is not the exclusive domain of the VA." *See Traynor v. Turnage*, 485 U.S. 535, 541-545, 38 U.S.C. §501(a). Accordingly, action of the U.S. Attorney General and the "Secretary's action is subject to judicial review pursuant to § 701 of the Administrative Procedure Act." *See Overton Park.*, 401 U.S. at 413 (1971). "There is no indication here that Congress sought to limit or prohibit judicial review" of final Board of Veterans Appeals actions on decisions colorable under 5 U.S.C. §552a of the Privacy Act to review in a proceeding under the Veterans Judicial Review Act in the U.S. Court of Appeals for Veterans Claims venue and" the exemption for action "committed to agency discretion" does not apply, as the U.S. Attorney General and "Secretary does have "law to apply" rather than wide-ranging discretion." Overton Park, 401 U. S. at 410-413. (1971).

Still, veteran "is suffering legal wrong because of agency action" by the Department of Justice and Department of Veterans Affairs"; and "adversely affected and aggrieved by the deprivation of relief benefits and access to her right to remedy within the meaning" of 5 U.S.C. §552a of the Privacy Act; 28 U.S.C. §1346; and 28 U.S.C. §§2671-2680 of the Federal Tort Claims Act. 5 U.S.C. §701, et seq provides a waiver of sovereign immunity under the circumstances— so she "is entitled to judicial review thereof. *See* 5 U.S.C. §702. App. App. The Government omits from its motion to dismiss the APA provision applicable to the form of proceeding and venue which articulates while it is the expressed intent of Congress

for the Veterans Judicial Review Act to constitute "prior, adequate, and exclusive opportunity for judicial review" of Board of Veterans Appeals actions of the Secretary. It is material fact and law that "in the absence or inadequacy thereof" the remedy provided by the Veterans Judicial Review Act, consistent with procedural requirements established by agency regulations, veteran may bring "any applicable form of legal action, including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus, in a court of competent jurisdiction." See 5 U.S.C. §703. App.17a.

c. Agency actions that render the Veterans Judicial Review Act inadequate invokes APA waiver of sovereign immunity to an action against the United States under these circumstances.

Congress "balances two important interests" with the Veterans Judicial Review Act of 1988—the need to hold public officials accountable when they exercise power irresponsibly and the need to shield officials from harassment, distraction, and liability when they perform their duties reasonably." *See Pearson v. Callahan*, 555 U.S. 223, 228 (2009). "The generally applicable standards of § 706 require the reviewing court to engage in a substantial inquiry" in this case, into whether the 38 U.S.C. §511(a) and the Veterans Judicial Review Act of 1988 are in furtherance of these vital interests purposes— or indeed effectuate the "repeal by implication" applicable provisions of the Administrative Procedure Act. Certainly, the Secretary's" and U.S. Attorney General's "decision is entitled to a presumption of regularity...But that presumption is not to shield his action from a thorough, probing, in-depth review." *See Overton*

Park, 401 U.S. 402, 415 (1971) (internal citations omitted).

"Regulations issued by the Department of Justice at 28 CFR part 14 are applicable to claims asserted under the Federal Tort Claims Act, including such claims that are filed with VA. The regulations in §§ 14.600 through 14.605 of this part supplement the regulations at 28 CFR part 14." 38 C.F.R. §14.600(b). Yet, the "United States Attorney" for the Southern District of Texas, certifies by litigation affidavits the notice of final denial required by 28 U.S.C. §2675(a) is "not incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." 28 C.F.R. §15.4. App.

2. The district court errs by deference to Government's argument specific indicia of 38 U.S.C. 511(a) diminishes its jurisdiction and expands the jurisdiction of U.S. Court of Appeals for Veterans Claims.

"Only Congress may determine a lower federal court's subject-matter jurisdiction U. S. Const., Art. III, §1." See *Kontrick v. Ryan,* 540 U.S. 443, The equation, the Government advances overlooks a critical difference between a rule governing subject-matter jurisdiction", 38 U.S.C. §7252 of the Veterans Judicial Review Act of 1988, which establishes the limited subject matter and personal jurisdiction of the U.S. Court of Appeals for Veterans Claims and 38 U.S.C. §511(a) of the Department of Veterans Affairs Codification Act of 1991; "an inflexible claim-processing rule" applicable to the authority and duties established under "law

that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans" and review of those decisions necessary to a determination of rights privileges, and benefits. See 38 U.S.C. 511(a)(b)(4). *See Kontrick,* supra.

38 U.S.C. §211(a) is a repealed provision once applicable to finality of agency actions affecting provision of VA benefits. 38 U.S.C. 511, valid statutory authority added by Pub. L. 102–83, § 2(a), Aug. 6, 1991, 105 Stat. 388 in its entirety provides:

> (a) The Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans. Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise.
>
> (b)The second sentence of subsection (a) does not apply to—
>
> (1) matters subject to section 502 of this title;
> (2) matters covered by sections 1975 and 1984 of this title;
> (3) matters arising under chapter 37 of this title; and
> (4) matters covered by chapter 72 of this title.

Essentially, 38 U.S.C. §511 serves "in effect as a specialized forum selection clause" necessary to furtherance of judicial enforcement of 5 U.S.C. §551, et seq. of the Administrative Procedure Act as law applicable to Board of Veterans Appeals action *See R. de Quijas v. Shearson/Am. Express.* 38 U.S.C. §511, is an "important and mandatory" rule that seeks "to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times. Henderson, supra at 432 (internal citations omitted). The statutorily expressed caveat stipulates the requirements for "the decision of the Secretary" to be determined "final and conclusive" and be construed properly as such "matters covered by Chapter 72 of this title." See 38 U.S.C. §511(a)(b)(4). "Within the limitations of such delegations, redelegations, or assignments, all official acts and decisions of such officers and employees shall have the same force and effect as though performed or rendered by the Secretary." 38 U.S.C. §512(a). So, "the Secretary shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." Otherwise, the agency action may "be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. §511(a).

3. Specific indicia of the Veterans Judicial Review Act of 1988 establishes an action under the Federal Tort Claims Act is the exclusive remedy in this case.

38 U.S.C. §7251, et seq of the Veterans Judicial Review Act of 1988 as amended establishes under Article I of the Constitution of the United States, a

court of record to be known as the United States Court of Appeals for Veterans Claims. The jurisdiction of the Court of Veterans Appeals is specifically defined by statute at 38 U.S.C. § 7252,in a provision entitled "Jurisdiction; finality of decisions" which states the Article I Court, "shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals.... The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252 (emphasis supplied)." *See In the Matter of the Fee Agreement of Bruce Tyler Wick v. Jesse Brown, Secretary of the Department of Veterans Affairs*, 40 F.3d 367 (Fed. Cir. 1994).

In *Wick*, the U.S. Court of Appeals for the Federal Circuit considered what it deemed a more fundamental question: "whether *Wick's* motion was properly before the Court of Veterans Appeals." *In re Wick, supra at.* The more fundamental question here is whether veteran's claims asserted under the Federal Tort Claims Act were properly before the U.S. District Court for the Southern District of Texas— or whether they were properly before the U.S. Court of Appeals for Veterans Claims.

After her initial dismissal of her FTCA claims from the U.S. District Court, veteran again sought action in a proceeding against the Secretary in the U.S. Court of Appeals for Veterans again to no avail after yet another Board of Veterans Appeals denial. The extent of the review" by the Court of Appeals for Veterans Claims " shall be limited to the scope provided in section 7261 of this title." See 38 U.S.C. § 7252(b). The Court of Appeals for Veterans Claims has authority and duty to determine whether the Board

members acting in delegated authority of the Secretary errs by denial of veteran's motion alleging clear and unmistakable error in its determination of her benefits. "In the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous." 38 U.S.C. §7261(4).

But when VA General Counsel, in conduct of "litigation arising" under the Veteran's Judicial Review Act of 1988 "involving any employee of the Board of Veterans Appeals "thereof in his or her official capacity" moves for a motion to dismiss for lack of subject matter jurisdiction, the Board decision is no longer a matter within the Article I court's jurisdiction. 38 C.F.R.§14.500(a). By statute and regulations, the actions of the Board and VA General Counsel are mutually exclusive. "In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court." 38 U.S.C. §7261(c).

Specific text of the statutorily expressed review preclusion clause of the Veterans Judicial Review Act, like the discretionary function exception of 28 U.S.C 2680 serves the purpose of preventing "judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." *See Berkovitz v. United States*, at 486 U. S. 537. (1988).

Here, "established governmental policy, as expressed or implied by statute, regulation, or agency guidelines,

allows" VA General Counsel "to exercise discretion, there is a strong presumption that the agent's acts are grounded in policy when exercising that discretion." *United States v. Gaubert* at 499 U. S. 322-325. So, now —"the prior adequate exclusive opportunity for judicial review" of Board of Veterans Appeals action under the provisions of the Veterans Judicial Review Act is rendered unavailable and inadequate and therefore "agency action is subject to judicial review in civil or criminal proceedings for judicial enforcement. 5 U.S.C. §703, APA.

In this case, because "the law gives an answer — "then a court has no business deferring to any other reading, no matter how much the agency insists it would make more sense. Deference in that circumstance would "permit the agency.... to create *de facto* a new regulation." See *Christensen*, 529 U. S., at 588." *See Kisor v. Wilkie,* 588 U.S. ___ 2019.

C. Mandamus is appropriate under the circumstances

This Court concludes mandamus is appropriate "to confine an inferior court to a lawful exercise of 33 its prescribed jurisdiction," Roche v. Evaporated Milk Ass'n, 319 U.S. 21, 26 (1943); "to prevent a lower court from interfering with a coequal branch's ability to *discharge its constitutional responsibilities," Cheney,* 542 U.S. at 382; and to correct "particularly injurious or novel privilege ruling[s]," Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 110 (2009). The district court's stark departure from "fundamental principles of judicial review of agency action," *Florida Power &*

Light, 470 U.S. at 743 systemically and summarily inflicts "immediate and irreparable" harm to VA benefits claimants while imposing minimal burdens, if any, on the Government...who already requested much of the same relief (in an effort to stave off") any judicial review by exceeding lawful authority by certification to reviewing courts it is entitled to grants of qualified immunity, *forum non conveniens*, and *res judicata* under the circumstances here.

"Not only must an agency's decreed result be within the scope of its lawful authority, but the process by which it reaches that result must be logical and rational...It follows that agency action is lawful only if it rests "on a consideration of the relevant factors." *See Michigan v. EPA*, 576 U.S. 473 (2015) (internal quotation marks omitted). "The courts are not at liberty to pick and choose among congressional enactments, and when two statutes are capable of coexistence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari, supra,* at 551.

It is not the duty of the Courts to go "to the precipice of administrative absolutism. Under its rule of deference, agencies are free to invent new (purported) interpretations of statutes and then require courts to reject their own prior interpretations." *See Baldwin*, supra. "A court must also make an independent inquiry into whether the character and context of the agency interpretation entitles it to controlling weight." *See e.g., Christopher* v. *SmithKline Beecham Corp.*, 567 U.S.

142, 155. (2012). "This Court has laid out some especially important markers to identifying when Auer deference is and is not appropriate. To begin with, the regulatory interpretation must be the agency's authoritative or official position, rather than any more *ad hoc* statement not reflecting the agency's views. *See Kisor v. Wilkie*, 588 U.S. ____2019.

Department of Justice litigation conduct here does not "reflect its " fair and considered judgment" and though it indeed does "implicate its substantive expertise"— "the basis for deference ebbs " because "the subject matter of a dispute" to interpret Article III and statutory provisions applicable to standing, subject matter jurisdiction, and sovereign immunity "is distant from the agency's ordinary duties" and authority set forth by the procedural requirements of promulgated, and published regulations applicable to the agency actions at issue. *See Auer,* 519 U. S., at 462. The district court had a duty to "decline to defer...to a merely " 'convenient litigating position,' " *Christopher*, 567 U.S., at 155, or an "interpretation that creates "unfair surprise" to regulated parties" in this case a VA benefit claimant, *See Long Island Care at Home, Ltd. v. Coke*, 551 U.S. 158, 170. (2007).

By the constitution, the government thereof is divided into three distinct and independent branches, and that it is the duty of each to abstain from, and to oppose, encroachments on either." Muskrat, supra at, 352. "It is intolerable for the judicial system to treat people this way, and there is not even a technical justification for condoning this bait and switch." *See Bowles v. Russell*, 551 U.S. 205 (2007), *Justice Souter,*

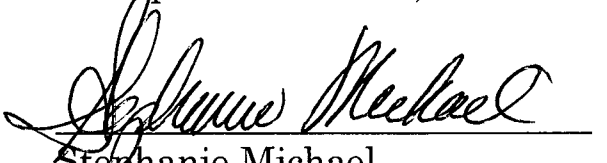
justification for condoning this bait and switch." *See Bowles v. Russell*, 551 U.S. 205 (2007), *Justice Souter, with whom Justice Stevens, Justice Ginsburg, and Justice Breyer join, dissenting.*

CONCLUSION

The Court should vacate the orders and issue a writ of mandamus to the district court ordering it to exercise its Article III and statutory authority to review the "incident out of which the suit arose under circumstances in which Congress has provided by statute that the remedy provided by the Federal Tort Claims Act is made the exclusive remedy." See 28 CFR 15.4. In the alternative, the Court should treat this as a petition for certiorari, grant the petition, and reverse the court of appeals decision below.

Respectfully submitted,

/s/Stephanie Michael,



Stephanie Michael
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