

No. 17-1679

In the
Supreme Court of the United States

ROBERT H. GRAY,

Petitioner,

v.

ROBERT WILKIE,

SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

SUPPLEMENTAL BRIEF FOR PETITIONER

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SUPPLEMENTAL BRIEF

Petitioner Robert Gray submits this supplemental brief pursuant to this Court's Rule 15.8 to advise the Court of the Federal Circuit's recent decision in *Conyers v. Secretary of Veterans Affairs*, Nos. 16-2259 & 18-1435, 2018 WL 4777857 (Fed. Cir. Oct. 3, 2018). That decision clarifies the Federal Circuit's understanding of its prior ruling in *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*), and supports Mr. Gray's pending petition for certiorari, which is scheduled for consideration at the Court's October 12, 2018 Conference.

A key dispute between the parties in this case is whether the Federal Circuit's decisions in *DAV* and below rest on the premise that 5 U.S.C. § 552(a)(1) and (a)(2) are mutually exclusive. *See* Pet. 16-20; BIO 14, 22-23; Pet. Reply 2-4. The Government has conceded that the mutual exclusivity theory is wrong, but it asserts that the Federal Circuit did not rely on that theory in *DAV* or in the decision below. BIO 14, 17-23.

Conyers confirms that *DAV* did, in fact, embrace the erroneous mutual-exclusivity theory. There, the Federal Circuit summarized *DAV*'s holding as follows:

[I]n that case, this Court found the M21-1 Manual unreviewable under § 502 . . . because the production of an administrative staff manual was expressly exempt from the publication requirements of § 552(a)(1) under § 552(a)(2). *See DAV*, 859 F.3d at 1075 (“Section 502’s express exclusion of

agency actions subject to § 552(a)(2) renders the M21-1 Manual beyond our § 502 jurisdiction . . .”).

Conyers, 2018 WL 4777857, at *3.

As Mr. Gray has explained, *DAV*'s conclusion that Section 552(a)(2)'s reference to agency staff manuals amounts to an “express exclusion” of such manuals from Section 552(a)(1) is based entirely on the false premise that Sections 552(a)(1) and (a)(2) are mutually exclusive. Pet. 16-20; Pet. Reply 2-4. *Conyers* perpetuates *DAV*'s false premise by invoking that decision's “express exclusion” language and explaining that *DAV* held that manuals are “expressly exempt” from Section 552(a)(1) because they fall “under [Section] 552(a)(2).” *Conyers*, 2018 WL 4777857, at *3 (citation omitted).

Conyers thus confirms that the Government's interpretation of *DAV* is mistaken. *DAV* did *not* implicitly rely on a never-before-articulated interpretation of “general applicability,” as the Government now maintains (BIO 17-21), but rather on the mutual-exclusivity theory that the Government itself concedes is incorrect (BIO 14, 22-23). The Federal Circuit's continued embrace of this erroneous theory strongly supports this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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