No. 17-1679

In the Supreme Court of the United States

ROBERT H. GRAY,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF PETITIONER

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QUESTION PRESENTED

Whether the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review an interpretive rule reflecting VA's definitive interpretation of its own regulation, even if VA chooses to promulgate that rule through its adjudication manual.

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OPINIONS BELOW

The opinion of the Federal Circuit (Pet. App. 1a-28a) is reported at 875 F.3d 1102. The opinion of the Federal Circuit denying rehearing (Pet. App. 29a-37a) is reported at 884 F.3d 1379.

JURISDICTION

The Federal Circuit entered its judgment on November 16, 2017, and it denied Petitioner Robert Gray's rehearing petition on March 21, 2018. Pet. App. 1a, 29a-31a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory and regulatory provisions are reproduced in the addendum to this brief.

INTRODUCTION

The Department of Veterans Affairs (VA) has a single, overriding mission: to care for the men and women who have risked their lives serving our Nation. The sad reality, though, is that VA often falls short of that noble goal. This case is about the circumstances in which veterans can invoke Article III jurisdiction to enforce their rights and hold VA accountable when the agency loses its way.

It is no secret that VA has had its share of problems in recent years. Front-page scandals have revealed malfeasance, corruption, and mistreatment of veterans at VA hospitals. The VA's disability claims system is notoriously backlogged and inefficient, with hundreds of thousands of veterans waiting for their claims to be adjudicated in an agency process that averages nearly six years to run its course. And VA regularly promulgates regulations that misinterpret federal statutes and violate the core

requirements of the Administrative Procedure Act (APA)—usually in ways that do "nothing to assist, and much to impair, the interests of those the law says [VA] is supposed to serve." *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from the denial of certiorari).

This case involves Congress's effort to mitigate the last of these failings. The Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988), imposes an Article III judicial check on unlawful VA rulemaking. It does so by granting the Federal Circuit jurisdiction to adjudicate preenforcement challenges to any VA action "to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. § 502. By design, the scope of that jurisdiction is expansive: Section 502's cross-references encompass any substantive rule, interpretive rule, and general statement of policy. *See* 5 U.S.C. §§ 552(a)(1), 553(b)(A), (d)(2).

By providing this specialized review mechanism in the Federal Circuit, Congress protected veterans and allowed them to challenge unlawful VA rules directly in court, without having to slog through the painfully slow disability claims process. But the Federal Circuit's decisions in this case and *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) (*DAV*), have now sharply curtailed the rights of veterans to bring such challenges. Contrary to the unambiguous language of the relevant statutes, the Federal Circuit held that it *lacks* jurisdiction to review VA interpretive rules that VA promulgates through publication in its adjudication manual.

The Federal Circuit's jurisdictional holding is wrong and should be overturned. That holding

misreads the unambiguous statutory text and undermines its clear purpose. Not even the Government defends the Federal Circuit's rationale. And although the Government has now concocted a brand-new theory to justify the result below—and thus to deprive veterans of judicial review—that theory is equally unmoored from the text, purpose, and history of the relevant statutes. However the Federal Circuit's decision is rationalized, its result is contrary to law and imposes "significant hardship" on our Nation's veterans. Pet. App. 25a (Dyk, J., dissenting) (citation omitted).

This Court should restore the VJRA's important check on VA rulemaking and hold that the Federal Circuit has jurisdiction to hear petitioner's challenge. The decision below should be reversed.

STATEMENT OF THE CASE

A. The Federal Circuit's Jurisdiction Over VA Rules

1. In the VJRA, Congress for the first time authorized judicial review of "the adjudication of veterans' benefits claims," and it did so in a way that is "decidedly favorable to veterans." *Henderson v. Shinseki*, 562 U.S. 428, 440-41 (2011). Most importantly, the VJRA authorized veterans to bring preenforcement challenges to the validity of any VA substantive rule, interpretive rule, or general policy statement directly in the Federal Circuit.

That authorization is embodied in 38 U.S.C. § 502, the jurisdictional provision at the heart of this case. As relevant here, Section 502 states that:

> An action of the [VA] Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such

> review shall be in accordance with [the judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706] and may be sought only in the United States Court of Appeals for the Federal Circuit.

38 U.S.C. § 502.

The scope of Section 502's jurisdictional grant is undeniably broad—it encompasses *any* VA action "to which section 552(a)(1) or 553 of title 5 (or both) refers." *Id.* Section 552(a)(1) is a provision of the Freedom of Information Act (FOIA) that requires publication in the Federal Register of various types of agency pronouncements, including "substantive rules" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D).

Section 553 is the APA provision governing agency rulemaking. Like Section 552(a)(1)(D), Section 553 refers to both "substantive rule[s]" (which the provision says can be promulgated only following notice and comment), and "interpretative rules" and "statements of policy" (which are exempted from those notice-and-comment requirements). *Id.* § 553(b)(A), (d)(2).[1]

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[1] The terms "interpretative" and "interpretive" are interchangeable. *See Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 & n.1 (2015). The APA defines "rule" as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

By cross-referencing Sections 552(a)(1) and 553, Congress intended to give the Federal Circuit jurisdiction to adjudicate direct APA challenges to the validity of significant rules and policies. The purpose of Section 502 was to ensure that VA follows its APA "responsibilities . . . with respect to agency rules and interpretations of agency authority." H.R. Rep. No. 100-963, at 27 (1988). And at least until *DAV* and the decision below, Section 502 had fulfilled that purpose, providing the jurisdictional basis for a long list of cases in which VA rules and policies were found to violate the APA.[2]

2. Apart from Section 502, the Federal Circuit also has jurisdiction to review the denial of individual benefits claims. Such claims are originally adjudicated at one of 56 VA regional offices, *see* Pet. App. 8a, and they are first subject to review by the Board of Veterans' Appeals (Board) and the U.S. Court of Appeals for Veterans Claims (Veterans Court), *see* 38 U.S.C. §§ 7101(a), 7252(a). In the course of reviewing individual claims decisions, the Federal Circuit has authority to adjudicate the validity of particular VA rules and policies to the extent they are implicated in each case. *See id.* § 7292 (authorizing review of legal questions).

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[2] *See, e.g.*, *Military Order of the Purple Heart v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1296-98 (Fed. Cir. 2009); *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1318-19 (Fed. Cir. 2006); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1347 (Fed. Cir. 2003); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1348-49 (Fed. Cir. 2003); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1368 (Fed. Cir. 2001).

Needless to say, this mechanism for seeking judicial review of unlawful VA rules and policies is far slower and less efficient than direct judicial review under Section 502. It "takes over *five and a half years* on average" for an individual benefits case to be resolved by the Board, and then nearly an *additional* year for it to be fully adjudicated by the Veterans Court. *Martin v. O'Rourke*, 891 F.3d 1338, 1350-51 (Fed. Cir. 2018) (Moore, J., concurring); U.S. Court of Appeals for Veterans Claims, *Annual Report: Fiscal Year 2017*, at 3 (2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf. Indeed, the process takes so long that veterans often die while awaiting final resolution of their claims, which in many cases threatens to extinguish their rights even to fully deserved benefits. *See Martin*, 891 F.3d at 1350 (Moore, J., concurring) (noting that only "a spouse, minor children, or dependent parents" can receive a veteran's posthumous benefits); Office of Audits and Evaluations, VA Office of Inspector General, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* 12 (2018), https://www.oversight.gov/sites/default/files/oig-reports/VAOIG-16-01750-79.pdf (*Review of Timeliness*) (noting that 1,600 veterans participating in VA appeals died in the first quarter of 2016 alone).

To its credit, VA has itself admitted that the appeals process for benefits claims is "broken" and deeply "frustrating" to veterans. *Review of Timeliness* 15.

B. VA's Restrictive Interpretation Of The Agent Orange Act

1. In the 1960s and early 1970s, the United States used various herbicides to clear heavily forested areas

in Vietnam during the Vietnam War. *See* S. Rep. No. 100-439, at 64 (1988). Countless U.S. service members were exposed to those herbicides, which have been linked to various adverse health effects. In 1991, Congress made it easier for such veterans to obtain disability compensation by promulgating the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11.

In general, veterans seeking disability benefits based on military service must establish "service connection"—*i.e.*, that "the disability is causally related to an injury sustained in the service." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985); *see* 38 U.S.C. § 101(16). But it was traditionally "extremely difficult" for Vietnam veterans who had been exposed to herbicides to satisfy that requirement, given the passage of time and the lack of information about precisely where and when the United States deployed the herbicides. *Blue Water Navy Vietnam Veterans Ass'n v. McDonald*, 830 F.3d 570, 572-73 (D.C. Cir. 2016); *see* Pet. App. 3a.

The Agent Orange Act helps solve that problem. It creates an automatic presumption of service connection for any veteran who (1) "during active military, naval, or air service, served in the Republic of Vietnam" between January 9, 1962, and May 7, 1975; and (2) develops one of several diseases medically linked to herbicides. 38 U.S.C. § 1116(a)(1) (requiring VA to presume that the veteran was exposed to herbicides and that the disease was "incurred in or aggravated by such service").

2. Over the past 20 years, VA has repeatedly narrowed its understanding of which Vietnam War veterans "served in the Republic of Vietnam" and thus qualify for the Agent Orange Act's automatic

presumption. In 1993, VA issued a regulation interpreting the phrase "'[s]ervice in the Republic of Vietnam'" to include "service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii). Through a VA General Counsel opinion and statements in the Federal Register, VA later interpreted this regulation to exclude from the service-connection presumption veterans who served on ships offshore without entering "inland waterways" or setting foot on Vietnamese soil. *See* 66 Fed. Reg. 23,166, 23,166 (May 8, 2001); VA Op. Gen. Counsel Prec. 27-97, at 3-5 (1997). In other words, VA interpreted the Act and regulation to encompass so-called "brown water" veterans, who served on rivers and other inland waterways, but to exclude "blue water" veterans, who served only in offshore waters.

This narrow interpretation was challenged by a blue-water veteran in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), *cert. denied*, 555 U.S. 1149 (2009). A divided panel of the Federal Circuit upheld VA's interpretation. The court first held that the meaning of "service in the Republic of Vietnam" under the Act was ambiguous and that VA's implementing regulation was a permissible interpretation of that phrase. *Id.* at 1183-86. The court then held that VA had reasonably interpreted its regulation to exclude blue-water veterans who never set foot on Vietnamese soil. *Id.* at 1186-95. That interpretation, the court concluded, was entitled to *Auer* deference. *Id.* at 1190 (citing *Auer v. Robbins*, 519 U.S. 452, 462 (1997)).

Although *Haas* affirmed VA's decision to apply the presumption to service on inland waterways but not offshore waters, it did not address how to draw the

line between "inland" and "offshore." In 2009, VA addressed that issue in a guidance letter, which narrowly defined "inland waterways" to include "rivers, estuaries, canals, and delta areas," but not "open deep-water coastal ports and harbors where there is no evidence of herbicide use." Pet. App. 6a (citation omitted).

Petitioner Robert Gray, a Navy veteran, successfully challenged this interpretation in the course of appealing the Board's denial of his individual benefits claim. *See Gray v. McDonald*, 27 Vet. App. 313 (2015). Gray served aboard a destroyer that anchored several times in Da Nang Harbor. *Id.* at 316. Even though Da Nang Harbor is "nearly totally surrounded by land" and is located entirely "within the territorial boundaries of Vietnam," the Board concluded that, under VA's interpretive guidance, it was not an inland waterway and that therefore Gray was not entitled to the service-connection presumption. *Id.* at 317 (citation omitted).

The Veterans Court vacated the Board's decision, concluding that "the manner in which VA defines inland waterways is both inconsistent with the regulatory purpose and irrational." *Id.* at 322. VA's decision to exclude Da Nang Harbor, the court found, was not based on any analysis of "the likelihood of exposure to herbicides." *Id.* Moreover, VA inexplicably *did* treat other bays and harbors as inland waterways, leading to "inconsistent" and "arbitrary outcomes." *Id.* at 324-25. Because the Veterans Court could not "discern any rhyme or reason" in VA's "aimless" and "adrift" interpretation, it remanded Gray's case to the Board and instructed VA to reconsider its position. *Id.* at 324, 327-28.

3. In February 2016, VA announced a retooled and further-narrowed interpretation of the Agent Orange Act and its implementing regulation. Although this new interpretation was approved by the VA Secretary himself—who assured Senator Richard Blumenthal that he "did not reach this decision lightly," JA83—it was not published in the Federal Register.

Instead, VA incorporated the new interpretation into its *Adjudication Procedures Manual, M21-1* (M21-1 Manual). The M21-1 Manual contains "all of [VA's] policies and procedures for adjudicating claims for VA benefits." Pet. App. 37a (Dyk, J., dissenting from the denial of rehearing en banc) (citation omitted). VA regularly uses the M21-1 Manual to set forth its formal interpretations of key statutes and regulations.[3] VA's new interpretation of the Agent Orange Act appeared in revisions to a provision of the M21-1 Manual that this brief will hereafter refer to as the "Waterways Provision." *See* JA58-79.[4]

As revised, the Waterways Provision continues to limit the Agent Orange Act's statutory presumption to those Vietnam veterans who set foot on Vietnamese soil or served in Vietnam's "inland waterways." JA66-76. But the Manual now defines "inland waterways" to "end at their mouth or junction to other offshore water features." JA60-61. This narrower definition thus excludes "all Navy personnel" who served in *any* of Vietnam's "ports, harbors, and bays from

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[3] *See, e.g.*, Pet. App. 4a-5a; *Smith v. Shinseki*, 647 F.3d 1380, 1384 (Fed. Cir. 2011); *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009).

[4] The Waterways Provision is found at Part IV, Subpart ii, Chapter 1, Section H, Topic 2 of the M21-1 Manual.

presumptive service connection." Pet. App. 8a. As the Manual itself makes clear, this changed definition excludes several bays and harbors that VA had previously treated as inland waterways. JA63-64 (excluding Qui Nhon Bay Harbor and Ganh Rai Bay).

By incorporating its new definition of "inland waterways" into the M21-1 Manual, VA ensured that the effect of this definition would be "both real and far reaching." Pet. App. 10a. The M21-1 Manual formally binds all front-line VA benefits adjudicators working in VA's 56 regional offices throughout the country. *Id.* at 5a, 8a. Those adjudicators issue the final decisions in 96% of all claims for veterans' benefits, *id.* at 24a-25a (Dyk, J., dissenting), and they "are not authorized to independently determine that any particular coastal feature, such as bay, harbor, or inlet, is an inland waterway," JA63. Moreover, VA regularly demands—and receives—*Auer* deference to its interpretive rules set forth in agency manuals, both in Article III courts and before the Board.[5]

C. The Proceedings In This Case

1. In March 2016, while his individual benefits claim was still pending, Gray filed a petition for review of the new Waterways Provision in the Federal Circuit pursuant to 38 U.S.C. § 502. JA8-16. As noted, that statute provides that "[a]n action of the [VA] Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review." The "Statement of Subject Matter Jurisdiction" in Gray's opening brief asserted that the new Manual

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[5] *See, e.g.*, *Smith*, 647 F.3d at 1385; [Title Redacted], No. 12-11 139, 2017 WL 2905538, at *8 (Bd. Vet. App. May 12, 2017); *see also* Gov't Br. 31, *Gazelle v. McDonald*, 868 F.3d 1006 (Fed. Cir. 2017) (No. 16-1932), 2016 WL 6883024.

provision constituted a "statement[] of general policy" or an "interpretation[] of general applicability" under Section 552(a)(1)(D), as well as a rule "refer[red]" to by Section 553. Pet'r C.A. Br. 1-2; *see also* JA9.

In response, VA repeatedly acknowledged that the Waterways Provision contained "interpretive statements" that apply to all "regional office adjudicat[ions]." Pet. App. 51a-57a, 60a; *see id.* at 9a-10a.[6] And it did not deny that the Waterways Provision was an interpretation of general applicability—and thus within the plain language of Section 552(a)(1)(D).

Nonetheless, VA asserted that the petition should still be dismissed for lack of jurisdiction because agency manuals are more clearly referenced in 5 U.S.C. § 552(a)(2)(C). *See* Pet. App. 57a-59a. That provision describes materials that agencies must make available for public inspection, including "administrative staff manuals" and "instructions to staff that affect a member of the public." 5 U.S.C. § 552(a)(2)(C). VA argued that Sections 552(a)(1) and (a)(2) are mutually exclusive, and that the new rule at issue here is covered by Section 552(a)(2)(C)—and thus not by Section 552(a)(1)(D)—because the former provision "more specifically" refers to agency manuals. Pet. App. 58a ("Although the M21-1 also contains interpretive rules arguably referred to by subsection (a)(1), the manual is more specifically referenced in subsection (a)(2)."). VA went on to assert that, "[p]ursuant to the 'commonplace' canon of statutory construction 'that the specific governs the general,' the M21-1 is governed by subsection (a)(2),

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[6] For ease of reference, relevant excerpts of the Government's Federal Circuit merits brief are reproduced at Pet. App. 51a-61a.

not (a)(1)." *Id.* (citation omitted).[7] VA reiterated its mutual-exclusivity interpretation at oral argument. *See Gray* Oral Arg. 32:40-32:55, 36:45-36:57; *see also* BIO 14 (acknowledging that VA advanced a mutual-exclusivity argument below).[8]

2. After oral argument, a different panel of the Federal Circuit decided *DAV*. There, a veterans organization had sought Federal Circuit review of a different revision to the M21-1 Manual, in which VA made it harder for Gulf War veterans to establish that certain disabilities were service-connected. *See DAV*, 859 F.3d at 1074. As in this case, VA argued that even though the Manual provision at issue "is an interpretive rule," it was exempt from judicial review under Section 502 because—and only because—it appeared in the Manual. Gov't Br. 16-17, 29-33, *DAV*, 859 F.3d 1072 (No. 16-1493), 2016 WL 5845985 (*DAV* Gov't Br.).

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[7] *See also* Pet. App. 58a-59a ("By specifically including section 552(a)(1), [38 U.S.C. § 502] . . . excludes actions referred to in the immediately following subsection, (a)(2)."); *id.* at 52a ("[T]he M21-1 revisions at issue in Mr. Gray's petition are referred to in 5 U.S.C. § 552(a)(2), which is beyond the scope of this Court's section 502 jurisdiction."); *id.* at 53a ("Although section 552(a)(1) refers to interpretive rules, the February 2016 revisions appear in an administrative staff manual that is specifically referenced in subsection 552(a)(2), which is omitted from this Court's jurisdictional statute in 38 U.S.C. § 502.").

[8] In addition to its mutual-exclusivity argument, VA's brief also argued—confusingly and incorrectly—that Section 502's cross-reference to Section 552(a)(1) only encompasses "substantive rules." Pet. App. 57a ("Because the M21-1 revisions are not substantive rules under section 553, the Court must conclude that they are nevertheless 'substantive rules' under section 552(a)(1) to exercise its section 502 jurisdiction.").

The Federal Circuit's decision in *DAV* embraced VA's mutual-exclusivity argument and dismissed the petition for lack of jurisdiction. 859 F.3d at 1075-78. The court framed the jurisdictional question as turning on whether the manual provision at issue "more readily" fell under Section 552(a)(1) *or* (a)(2), and it declared that "Congress expressly exempted from § 502 challenges to agency actions which fall under § 552(a)(2)." *Id.* at 1075, 1077-78. The court then held that interpretive rules in the Manual "fall within § 552(a)(2)—not § 552(a)(1)," because VA had chosen to promulgate them "within an administrative staff manual" instead of publishing them in the Federal Register. *Id.* at 1077-78.

3. In November 2016, a divided panel in this case applied *DAV* and held that it lacked jurisdiction to adjudicate Gray's petition. Pet. App. 1a-28a.

The panel majority began its discussion by asserting that "[t]he parties agree that § 553 is not at issue in this proceeding." Pet. App. 8a. The majority cited nothing in the record to support this conclusion, and it overlooked the parties' substantial briefing on Section 553. *See supra* at 11-12; Pet App. 54a-57a.

Turning to Section 552, the majority started by reiterating *DAV*'s mutual-exclusivity holding and rejecting the notion that an agency action can fall within both Section 552(a)(1) *and* (a)(2). Pet. App. 8a-9a (stating that jurisdiction turned on "whether the manual provisions challenged in this action fall under § 552(a)(1), giving us authority to consider them in the context of this action, *or* § 552(a)(2), prohibiting our review" (emphasis added)). The panel agreed that the Waterways Provision is properly classified as an "interpretive rule," and it acknowledged the persuasive "force" of Gray's argument "that a manual

provision can fall under § 552(a)(1) where, regardless of its designation, it constitutes an interpretive rule of general applicability that adversely affects the rights of an entire class of Vietnam veterans." *Id.* at 9a-10a, 13a-14a.

Nevertheless, the majority reiterated *DAV*'s categorical holding that the Federal Circuit "*do[es] not* have jurisdiction to review actions that fall under § 552(a)(2)." Pet. App. 8a. This is true, the court said, "regardless of the extent to which the manual provision might be considered interpretive or a statement of policy" under § 552(a)(1). *Id.* at 11a.

Judge Dyk dissented in part. He agreed that *DAV* controlled, but said that *DAV* "was wrongly decided." Pet. App. 15a. Judge Dyk emphasized that *DAV* rests on "the notion that § 552(a)(1) and § 552(a)(2) are mutually exclusive"—a notion for which "[t]here is no support" and that contradicts this Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974), and decisions of the Federal Circuit and other courts of appeals. Pet. App. 25a-26a.

Judge Dyk also highlighted the significant harm that the Federal Circuit's rule would inflict on veterans. He noted that *DAV*'s rule "imposes a substantial and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain preenforcement judicial review of a purely legal question that is already ripe for our review." *Id.* at 15a-16a. And he also emphasized that "[r]eview of the Manual revisions is essential given the significant 'hardship that would be incurred if [the Federal Circuit] were to forego judicial review.'" *Id.* at 25a (internal alterations and citation omitted).

4. Gray petitioned for rehearing en banc, again arguing that because the Waterways Provision is "refer[red]" to by both Sections 552(a)(1) and 553, the Federal Circuit had jurisdiction to review it under Section 502. He explained in detail why VA's argument that Sections 552(a)(1) and (a)(2) are mutually exclusive is wrong, and why *DAV* and the panel in this case erred in embracing it. He also explained that the panel had no basis for asserting that "§ 553 is not at issue in this proceeding." Pet. App. 8a.

VA's response to the rehearing petition was remarkable. Having successfully persuaded the court in both *DAV* and this case to adopt its mutual-exclusivity interpretation of Section 552, VA suddenly refused to defend that interpretation. But VA nonetheless urged the court to deny rehearing. It argued that *DAV* and the panel in this case had not actually adopted the mutual-exclusivity interpretation that VA had advanced in its merits brief. Gov't C.A. Reh'g Opp. 1, 5-14. Instead, VA asserted that *DAV* and the panel had "[i]mplicit[ly]" concluded that the M21-1 Manual "provisions were not interpretations of 'general applicability' subject to section 552(a)(1)(D)" for some other, *completely unstated* reason. *Id.* at 6.[9]

[9] Despite abandoning the mutual-exclusivity theory for purposes of opposing Gray's rehearing petition, the Government subsequently reasserted that theory in an effort to deny a different veteran judicial review in a later case. *See* Gov't Br. 24-26, *Krause v. Sec'y of Veterans Affairs*, No. 17-1303 (Fed. Cir. Mar. 19, 2018), 2018 WL 1905196; Pet. 28 (discussing Government's *Krause* brief). The Government's opposition to certiorari in this case later expressly disavowed the mutual-

With respect to Section 553, VA claimed that Gray had "not presented [it] as a basis for the Court's jurisdiction," *id.* at 14—an assertion contradicted both by Gray's express invocation of Section 553 in his brief's "Statement of Subject Matter Jurisdiction," and by VA's own brief, which had spent several pages explaining why Section 553 did not provide a jurisdictional hook. *See* Pet. App. 54a-57a. VA did not respond to the substance of Gray's argument that Section 553 "refers" to interpretive rules.

5. The Federal Circuit denied rehearing en banc, over dissents from Judges Dyk, Newman, and Wallach. Pet. App. 29a-37a. The dissenting judges explained that because the M21-1 Manual contains "'all of [VA's] policies and procedures for adjudicating claims for VA benefits,'" the reviewability of those provisions under § 502 is an issue "of exceptional importance" that will have a "widespread impact on the efficient adjudication of veterans' claims." *Id.* at 37a (Dyk, J., dissenting from the denial of rehearing en banc) (citation omitted).

SUMMARY OF ARGUMENT

"[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992). Led astray by the mutual-exclusivity argument the Government has now abandoned, the Federal Circuit failed to give "this first canon" of statutory interpretation due weight. *Id.* at 254. A straightforward reading of Section 502's cross-references to Sections 552(a)(1) and 553 shows that each independently authorizes

exclusivity theory, once and for all (we think). BIO 22-23; *see infra* at 37-38.

the Federal Circuit's review of the Waterways Provision.

I. Section 502 gives the Federal Circuit jurisdiction to review any VA action referred to in Section 552(a)(1), which includes "interpretations of general applicability." 5 U.S.C. § 552(a)(1)(D). As a matter of ordinary meaning, an interpretation of a legal provision is "of general applicability" if it applies broadly to an entire class of people affected by the provision, and is not limited to specific individuals or circumstances. That understanding of the term is consistent with Section 552(a)(1)'s history and purpose, and it tracks the settled administrative-law definition of "general applicability" repeatedly applied by Congress and federal agencies since at least the 1930s.

Under this straightforward reading of the statutory text, the M21-1 Manual's Waterways Provision is clearly an interpretation of general applicability: That interpretation broadly sets forth VA's considered view of the Agent Orange Act and its implementing regulation. The interpretation governs all veterans who claim to have served "in the Republic of Vietnam" and to all waters in and around Vietnam, and it is not limited to specific individuals. The Federal Circuit thus has jurisdiction to adjudicate Gray's challenge.

Below, the Government successfully persuaded the Federal Circuit that because the M21-1 Manual is an "administrative staff manual" referenced in Section 552(a)(2), the Waterways Provision cannot be an interpretation of general applicability under Section 552(a)(1). But the key premise of this argument—the notion that Sections 552(a)(1) and (a)(2) are mutually exclusive—is flat wrong. Even the

Government now admits it. This Court should easily reject the rationale of the decision below.

The Government's new theory is that the Waterways Provision is not "of general applicability" because it is not binding on the Board. That argument misfires. Whether or not an interpretive rule is generally applicable turns on who or what the substance of that interpretation governs, not on the extent to which that interpretation binds particular agency officials. Indeed, *no* interpretive rule is legally binding on the agency as a whole. And to the extent that *practical* considerations are what matter, the M21-1 Manual does essentially bind the Board. The fact that the Board must consider it in every case, and frequently defers to it, only further confirms that the interpretations it contains are generally applicable.

II. Section 502 also gives the Federal Circuit jurisdiction to review any VA action to which 5 U.S.C. § 553 "refers." Section 553 unambiguously—and repeatedly—refers to interpretive rules. It specifies that interpretive rules need not go through notice-and-comment or be published 30 days before their effective date. *Id.* § 553(b)(A), (d)(2). The Government has itself described Section 553 as "expressly" and "categorically" excluding "interpretive rules" from the APA's notice-and-comment requirements. Section 502's cross-reference to Section 553 thus provides an alternative and independent basis for the Federal Circuit's jurisdiction in this case.

III. Although the ordinary meaning of the text of Sections 502, 552(a)(1), and 553 suffices to resolve this case, policy considerations strongly reinforce that meaning. VA has an unfortunate history of adopting legally dubious rules and policies. Giving Section 502

its full breadth serves as a vital check on the agency. It is critical that veterans be able to bring preenforcement challenges to unlawful rules and policies without having to endure years of slow-motion adjudication before the agency and Veterans Court. Gray's own Sisyphean effort to obtain benefits, which is now entering its second decade, amply illustrates the importance of giving Section 502 its full scope. For all of these reasons, the Federal Circuit's restrictive interpretation cannot stand.

ARGUMENT

I. SECTION 502'S CROSS-REFERENCE TO SECTION 552(a)(1) AUTHORIZES REVIEW OF THE WATERWAYS PROVISION

A. The Waterways Provision Is An Interpretation "Of General Applicability"

Section 502 gives the Federal Circuit jurisdiction to review any VA action to which 5 U.S.C. § 552(a)(1) "refers." Among other things, Section 552(a)(1) refers to "interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). The Waterways Provision readily fits within this statutory language. The Government has never disputed the Federal Circuit's conclusion that this provision sets forth "an interpretation adopted by the agency." Pet. App. 11a. The only question, then, is whether the interpretation is "of general applicability." It is.

1. The Ordinary Meaning Of "General Applicability" Is Dispositive

a. Section 552(a)(1)'s key phrase—"interpretations of general applicability"—is not defined elsewhere in FOIA. "When a term goes

undefined in a statute, we give the term its ordinary meaning." *Taniguchi v. Kan Pac. Saipan, Ltd.*, 566 U.S. 560, 566 (2012). This Court has repeatedly embraced this ordinary-meaning approach to interpreting provisions of FOIA. *See, e.g.*, *Milner v. Dep't of Navy*, 562 U.S. 562, 569-73 (2011); *United States v. Weber Aircraft Corp.*, 465 U.S. 792, 798-804 (1984).

An "interpretation" is simply an explanation of the meaning of something. *Webster's Third New International Dictionary* 1182 (1961) (*Webster's Third*). In context, Section 552(a)(1)'s reference to "interpretations" plainly refers to interpretations of *legal provisions*, such as statutes or regulations.

The ordinary meaning of "general" is "[n]ot specifically limited or determined in application; relating or applicable to a whole class of objects, cases, or occasions." 6 *Oxford English Dictionary* 430 (2d ed. 1989); *see also id.* (of a rule or law: "[a]pplicable to a variety of cases"); *Black's Law Dictionary* 614 (5th ed. 1979) ("Pertaining to . . . the genus or class, as distinguished from that which characterizes the species or individual").

Finally, "applicable" means "capable of being applied" or "having relevance." *Webster's Third* 105; *see also New Oxford American Dictionary* 76 (3d ed. 2010) (*New Oxford*) ("relevant or appropriate").

Accordingly, an "interpretation[] of general applicability" is an interpretation of a legal provision that governs an entire category or class of people to which that provision is relevant, and not just specific individuals or particular fact patterns. Or as the Ninth Circuit has put it, the "rather obvious definition" of "interpretation of 'general' applicability"

in Section 552(a)(1)(D) is an interpretation "neither directed at specified persons nor limited to particular situations." *Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987).

b. Giving "interpretations of general applicability" its ordinary meaning faithfully serves Congress's goal of "the guidance of the public." 5 U.S.C. § 552(a)(1). By requiring formal publication of interpretations that will apply to entire classes of parties, Section 552(a)(1) ensures that the public has notice of how the agency understands—and will apply—potentially ambiguous statutory and regulatory provisions. It thereby "enable[s] the public 'readily to gain access to the information necessary to deal effectively and upon equal footing with the Federal agencies.'" *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 4 (June 1967) (*Attorney General's FOIA Memorandum*) (quoting S. Rep. No. 88-1219, at 3 (1964)).

At the same time, Section 552(a)(1)(D) does not require publication of the countless party- and fact-specific interpretations that agencies adopt every day—and the publication of which would bloat the Federal Register to the point of bursting. Section 552(a)(1) excludes, for example, the numerous opinion letters issued by the Department of Labor. Although such letters often contain agency "interpretation[s]," they are in the form of "opinions as to the application of the law to particular facts presented by specific inquiries." 29 C.F.R. § 790.17(d). Such case-specific interpretations are quintessentially of particular applicability. *See, e.g.*, *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 168 (2012) (describing

and distinguishing opinion letters based on their specific facts).

Likewise excluded are Internal Revenue Service (IRS) letter rulings and technical advice memoranda, which contain interpretations based on specific sets of facts. *See* 26 C.F.R. § 301.6110-2(d), (f). As the IRS has conceded, these guidance documents contain interpretations adopted by the agency and therefore fit within Section 552(a)(2)(B). *Tax Analysts & Advocates v. IRS*, 505 F.2d 350, 352-53 (D.C. Cir. 1974). But because they are limited to specific facts and individuals, they are not "of general applicability" and so are outside the scope of Section 552(a)(1)(D). *See* 142 Cong. Rec. 8201 (1996) (describing "IRS private letter rulings" as "classic examples of rules of particular applicability").

Countless other examples of case-specific agency interpretations also exist. *See, e.g.*, 10 C.F.R. § 205.85 (authorizing case-specific "interpretation[s]" by Department of Energy); 17 C.F.R. § 202.2 (Securities and Exchange Commission); 18 C.F.R. § 385.1901(b)(2) (Federal Energy Regulatory Commission). The ordinary meaning of "general applicability" appropriately excludes these myriad fact- and party-specific interpretations from Section 552(a)(1)(D)'s publication requirement.

c. Applying Section 552(a)(1)(D)'s ordinary meaning, the Waterways Provision easily qualifies as an interpretation of general applicability. As the Government has conceded, that provision is undeniably "interpretive": It sets forth VA's definitive understanding of both the Agent Orange Act and its implementing regulations by providing general definitions of "inland waterways" and "offshore waters," thereby giving meaning to the key

statutory phrase "in the Republic of Vietnam." JA60-66; *see also* Pet. App. 11a, 14a; *id.* at 51a-57a (VA's Federal Circuit brief repeatedly describing Waterways Provision as "interpretive").

Moreover, the interpretation set forth in the Waterways Provision is also of "general applicability": It is not limited to specific individuals, but rather applies equally to *all* veterans claiming to have served "in the Republic of Vietnam." Nor is the interpretation limited to a specific fact pattern; its definitions equally govern *all* service by U.S. military personnel in waters in and around Vietnam.

Because the Waterways Provision is an interpretation of general applicability, it is subject to judicial review in the Federal Circuit under Section 502. The Federal Circuit's decision otherwise should be reversed.

2. Section 552(a)(1)(D)'s History Reinforces The Ordinary Meaning

The ordinary meaning of "general applicability" is sufficient to resolve this case. But any doubt about that meaning is easily dispelled by the historical context in which Congress enacted FOIA in 1966. When Congress employed the "general applicability" formulation in Section 552(a)(1)(D), it did not write on a clean slate: That phrase had already repeatedly been used, in multiple statutes and regulations, to cover any interpretation not limited to named individuals or particular facts. Congress embraced that settled understanding of "general applicability" in Section 552(a)(1)(D).

a. The relevant history begins with Congress's 1935 enactment of the Federal Register Act (FRA), which created the Federal Register. The FRA

required the publication there of "such documents or classes of documents as the President shall determine from time to time have *general applicability* and legal effect." Pub. L. No. 74-220, § 5(a)(2), 49 Stat. 500, 501 (1935) (emphasis added). In 1937, Congress amended the FRA to require the regular codification of all agency documents "hav[ing] *general applicability* and legal effect" in what would become the Code of Federal Regulations. Pub. L. No. 75-158, § 11(a), 50 Stat. 304, 304 (1937) (emphasis added).

That same year, the Administrative Committee on the Federal Register issued regulations implementing the FRA's new codification requirement. Those regulations explained that agency documents "of general applicability" were those "relevant or applicable to the general public, the members of a class, or the persons of a locality, *as distinguished from named individuals or organizations*." 2 Fed. Reg. 2450, 2451-52 (Nov. 12, 1937) (emphasis added). The Committee later issued additional regulations making clear that the exact same definition of "general applicability" also governed the FRA's publication requirement. *See* 11 Fed. Reg. 9833, 9836 (Sept. 7, 1946); 24 Fed. Reg. 2343, 2346, 2354 (Mar. 26, 1959); *see also* 1 C.F.R. § 40.9 (1966).

Just like the FRA and its implementing regulations, the original 1946 APA also made clear that an agency statement "of general applicability" is one that addresses a class rather than specific named persons. Section 2(c) of the APA defined the term "rule" as "any agency statement of *general or particular* applicability" designed to implement, interpret, or prescribe law or policy. Pub. L. No. 79-404, § 2(c), 60 Stat. 237, 237 (1946) (emphasis added). Congress made clear that it included the phrase "or

particular" in that definition "in order to . . . assure coverage of rule making addressed to named persons." H.R. Rep. No. 79-1980 (Comm. Amendment), *reprinted in Legislative History of the Administrative Procedure Act* 283 & n.1 (1946); *see also Attorney General's Manual on the Administrative Procedure Act* 22-23 (1947) (*APA Manual*). In doing so, it thereby implicitly recognized that rules of "general applicability" are those *not* directed to "named persons." The APA's distinction between rules of general and particular applicability thus tracked the distinction as understood under the FRA.

When Congress enacted Section 552(a)(1)(D) in 1966, it acted against the statutory and regulatory backdrop established by the FRA and APA. For nearly 30 years, the settled understanding was that agency statements "of general applicability" were those directed generally to classes or categories of individuals or conduct—and not addressed to named individuals or specific fact patterns. Congress endorsed that settled understanding when it incorporated the same language in Section 552(a)(1)(D)'s publication requirement for interpretive rules. *See, e.g.*, *Sekhar v. United States*, 570 U.S. 729, 733 (2013) ("[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947))).

b. The textual evolution of the publication requirement from the APA to FOIA further confirms that an "interpretation of general applicability" encompasses any interpretation not directed to specific individuals or targeted to a particular set of

facts. Indeed, FOIA's legislative history could hardly be clearer on that point.

The roots of FOIA's publication requirement trace back to Section 3 of the original APA, which Congress enacted in 1946. Section 3(a)(3) required agencies to publish in the Federal Register, *inter alia*, "substantive rules adopted as authorized by law and statements of general policy or *interpretations* formulated and adopted by the agency for the guidance of the public, *but not rules addressed to and served upon named persons in accordance with law*." 60 Stat. at 238 (emphasis added). That provision thus required publication of interpretations that would apply *generally*, but not those governing only specific individuals.

The Attorney General's 1947 *APA Manual* confirms that understanding. It explained that in light of the exemption for "rules addressed to and served upon named persons," Section 3(a)(3) did not require publication of "[a]n advisory interpretation relating to a specific set of facts." *APA Manual* 22-23. "For example," the Manual said, an agency's response "to an inquiry from a member of the public as to the applicability of a statute to a specific set of facts need not be published." *Id.* at 23. By contrast, general interpretations of a provision that would apply to an entire class of people potentially affected by that provision *would* have to be published.

When Congress enacted FOIA in 1966, it amended the APA's publication requirement and introduced the "of general applicability" language now at issue in this case. As relevant here, FOIA modified Section 3(a)(3) to require publication of:

> substantive rules *of general applicability* adopted as authorized by law, and statements of general policy or interpretations *of general applicability* formulated and adopted by the agency ~~for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law~~.

Pub. L. No. 89-487, § 3, 80 Stat. 250, 250 (1966) (FOIA additions in italics and deletions in strikethrough). That language was subsequently codified and appears in the current version of Section 552(a)(1)(D).

Notably, FOIA's legislative history makes clear that Congress's addition of the phrase "of general applicability"—and its deletion of the exception for "rules addressed to and served upon named persons in accordance with law"—made no substantive change in the law. Indeed, the 1965 Senate Judiciary Committee report described FOIA's amendment as a "technical change" and explained that "[Section 3(a)'s] phrase '* * * but not rules addressed to and served upon named persons in accordance with law. * * *' was stricken" as unnecessary, "because section 3(a) as amended only requires the publication of rules of general applicability." S. Rep. No. 89-813, at 6 (1965); *see also* S. Rep. No. 88-1219, at 4 (1964) ("It is believed that only rules, statements of policy, and interpretations of general applicability should be published in the Federal Register; those of particular applicability are legion in number and have no place in the Federal Register and are presently excepted but by more cumbersome language."); *Attorney General's FOIA Memorandum* 10 (noting that FOIA's

change to the APA publication requirement was "formal only," and emphasizing that the "of general applicability" limitation "exclude[s] rules addressed to and served upon named persons").

FOIA's history thus shows that Congress viewed the "general applicability" language as expressing the same idea as the original APA requirement, but in a more straightforward way. Just like the APA language that it replaced, Section 552(a)(1)'s "of general applicability" formulation served to exclude interpretations addressed to "named persons" or "relating to a specific set of facts." *APA Manual* 22-23.

3. Congress And Federal Agencies Have Subsequently Endorsed The Ordinary Meaning

In the five-plus decades since FOIA became law, the settled administrative-law understanding of "general applicability" discussed above has endured. Congress and the Executive Branch have repeatedly recognized that this formulation encompasses interpretations applicable to a class of people, but not to named individuals or specific facts. A handful of important examples prove the point.

First, and most notably, the opening provision of the Code of Federal Regulations—1 C.F.R. § 1.1—reaffirms the longstanding FRA definition and states that the phrase "[d]ocument having general applicability and legal effect" means

> any document [with legal effect] relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations.

Although originally adopted for purposes of the FRA's publication and codification requirements, that definition is equally well-suited to defining the identical "general applicability" language in Section 552(a)(1)(D).

The Court need not take petitioner's word for it. For more than 40 years, the United States Navy has expressly applied 1 C.F.R. § 1.1's definition of "general applicability" when determining what interpretive statements must be published in the Federal Register under Section 552(a). 40 Fed. Reg. 36,325, 36,325 (Aug. 20, 1975) (codified at 32 C.F.R. § 701.64(a)(4) (2018)). The Navy's approach is straightforward and correct: There is no plausible reason "general applicability" would mean anything different under FOIA than what it means in the FRA.[10]

Second, Congress has also reaffirmed the longstanding view of what counts as a rule of "general applicability" in subsequent legislation, The Congressional Review Act of 1996 (CRA) requires agencies to submit any "rule" to Congress for consideration (and possible veto) before it takes effect. 5 U.S.C. § 801. Although the CRA generally adopts the APA's broad definition of "rule" (which includes rules of both "general and particular applicability," *id.* § 551(4)), the CRA expressly exempts "rule[s] of

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[10] Two weeks before this brief was filed, the Navy repealed 32 C.F.R. Part 701, Subpart E on the ground that it concerned only internal Navy procedures. 83 Fed. Reg. 62,249, 62,249 (Dec. 3, 2018). The Navy did not suggest that it has abandoned its longstanding view that 1 C.F.R. § 1.1's definition of "general applicability" applies to Section 552(a)(1)(D)'s publication requirement.

particular applicability" from its submission-to-Congress requirement, *id.* § 804(3)(A).

The CRA's sponsors explained that the carve-out for rules of particular applicability has the effect of exempting "letter rulings or other opinion letters to individuals who request a specific ruling on the facts of their situation." 142 Cong. Rec. at 8201. "IRS private letter rulings and Customs Service letter rulings," they noted, "are classic examples of rules of particular applicability." *Id.* These and other rules directed "to a particular person or particular entities" fall outside the CRA's ambit. *Id.*

The Government Accountability Office (GAO), which plays an important role in implementing the CRA, has adhered to the settled understanding of the distinction between rules of general and particular applicability. Importantly, GAO has recognized that an interpretation of general applicability need not "apply to the population as a whole. Rather, all that is required is a finding that it has general applicability within its intended range, regardless of the magnitude of that range." GAO, *Opinion on Whether Trinity River Record of Decision is a Rule*, B-287557, at 9 (May 14, 2001), https://www.gao.gov/assets/210/201768.pdf. For example, GAO noted, a workplace safety regulation limiting exposure to a given chemical compound is a rule of general applicability "even though it applies to a very small percentage of the working public." *Id.* It suffices that the rule "is intended to protect all workers in the covered range." *Id.* Such a rule is relevant to "members of a class, or persons in a locality, as distinguished from named individuals or organizations." 1 C.F.R. § 1.1.

Third, the Executive Branch has also recently reaffirmed the settled understanding of what counts as a "generally applicable" rule. Since 2007, the President has required federal agencies to follow the Office of Management and Budget (OMB) "Final Bulletin for Agency Good Guidance Practices," which establishes "policies and procedures" concerning "significant guidance documents." 72 Fed. Reg. 3432, 3432 (Jan. 25, 2007). Because OMB limited the definition of "significant guidance documents" to those having "general applicability," OMB has explained that the Final Bulletin's policies and procedures do not apply to "correspondence such as opinion letters or letters of interpretation prepared for or in response to an inquiry from an individual person or entity." *Id.* at 3435. Accordingly, OMB explained, the Bulletin's requirements "should not inhibit the beneficial practice of agencies providing informal guidance to help specific parties." *Id.*

As the discussion above makes clear, Congress and federal agencies have spent decades developing and enforcing a consistent understanding of what "general applicability" means in the context of administrative law. Just as its plain text indicates, an "interpretation of general applicability" is an interpretation that is not directed toward a specific individual or set of facts but that instead applies to the public at large or members of a class. That settled understanding should strongly inform this Court's interpretation of the identical phrase in Section 552(a)(1)(D).

4. At A Minimum, Section 552(a)(1)(D) Encompasses Interpretations That Change VA Policy And Have A Significant Impact On Veterans

For the reasons discussed above, the Court should give the phrase "interpretations of general applicability" in Section 552(a)(1)(D) its ordinary meaning, which readily encompasses the Waterways Provision. That straightforward statutory analysis is enough to resolve this case. *See, e.g.*, *Star Athletica, L.L.C. v. Varsity Brands, Inc.*, 137 S. Ct. 1002, 1010 (2017) ("We thus begin and end our inquiry with the [statutory] text, giving each word its 'ordinary, contemporary, common meaning.'" (citation omitted)).

Several courts of appeals, however, have taken a different approach to determining whether an interpretation is "of general applicability." These courts have adopted a two-prong test under which an interpretation is generally applicable unless it both (1) expresses "only a clarification or explanation of existing laws or regulations," and (2) results in "no significant impact upon any segment of the public." *Anderson v. Butz,* 550 F.2d 459, 463 (9th Cir. 1977) (quoting *Lewis v. Weinberger*, 415 F. Supp. 652, 659 (D.N.M. 1976)); *accord Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988); *D & W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *Kahn v. United States*, 753 F.2d 1208, 1222 n.8 (3d Cir. 1985); *see also* BIO 19.

This test has been criticized as lacking a firm grounding in the statutory text (which says nothing about "impact") and too vague to be applied consistently (what makes an impact "significant"?). *See, e.g.*, Victor H. Polk, Jr., *Publication Under the*

Freedom of Information Act of Statements of General Policy and Interpretations of General Applicability, 47 U. Chi. L. Rev. 351, 356-64 (1980). Those critiques are persuasive, and we see no good reason for the Court to depart from the ordinary meaning of the statutory text. *See Milner*, 562 U.S. at 573 (rejecting judicially developed test because "[i]t is disconnected from [FOIA] Exemption 2's text"). But even under this two-part test, the Waterways Provision undoubtedly qualifies as an interpretation of general applicability.

First, the provision adopts an interpretation of "inland waterways" (and hence of "in the Republic of Vietnam") that is indisputably new and different from VA's prior interpretation. Below, VA itself described the Waterways Provision as "provid[ing] a new policy for the determination of 'inland waterways.'" Resp. C.A. Br. 2. The Federal Circuit likewise recognized that the revision was "a change in policy." Pet. App. 7a. And the Manual itself makes explicit that VA was changing its view of the legal status of certain waters. JA64 (noting that VA "will no longer" treat certain bays and harbors as inland waterways).

Second, by any rational measure, VA's new interpretation has a significant impact on a segment of the public. Below, VA *itself* "concede[d] that the impact of its manual changes is both real and far reaching." Pet. App. 10a. Rightly so. Benefits for tens of thousands of veterans are on the line. The new interpretation expressly excludes waters that VA had previously considered "inland waterways." And this new interpretation is binding on the frontline adjudicators who conclusively resolve the 96% of cases that are not appealed to the Board. *Id.* at 24a-25a (Dyk, J., dissenting).

Accordingly, even if this Court were to adopt the atextual view of "interpretation of general applicability" embraced by the decisions cited above, VA's interpretation here still qualifies and is subject to review under Section 502.

B. The Federal Circuit's View That Sections 552(a)(1) And (a)(2) Are Mutually Exclusive Is Mistaken

In its brief below, the Government did not deny that the Waterways Provision fits within the ordinary meaning of Section 552(a)(1)(D)'s term "interpretations of general applicability." Instead, the Government's *only* argument was that because this interpretation appeared in the M21-1 Manual, it was referred to "more specifically" by Section 552(a)(2)(C)—which requires agencies to make "administrative staff manuals" available for public inspection, without also requiring publication in the Federal Register. Pet. App. 58a. That supposedly "more specific[]" reference mattered, the Government claimed, because "section 502 jurisdiction only extends to actions to which [Section 552](a)(1) refers, and does not extend to actions referred to in (a)(2)." *Id.* In other words, the Government argued that Sections 552(a)(1) and (a)(2) are mutually exclusive: Anything clearly *in*cluded in (a)(2) is necessarily *ex*cluded from (a)(1). *See id.* at 58a-59a; *accord DAV* Gov't Br. 29-33; *see also supra* at 12-13.

In both *DAV* and the decision below, the Federal Circuit bought into the Government's mutual-exclusivity theory of Section 552. *See DAV*, 859 F.3d at 1075, 1077-78; Pet. App. 8a; *id.* at 25a (Dyk, J., dissenting) (noting that *DAV* rested on "the notion that § 552(a)(1) and § 552(a)(2) are mutually

exclusive”). But that theory is plainly wrong. Nothing in the text, structure, or purpose of Section 552(a) indicates that an agency action must fall into *either* (a)(1) *or* (a)(2), but not both.

As a textual matter, it is obvious that certain types of agency statements fit within *both* (a)(1) and (a)(2). For example, (a)(1) expressly covers “descriptions of [an agency’s] central and field organization” and “rules of procedure,” but such information is also regularly addressed in agency manuals and staff instructions encompassed by (a)(2). *See* Pet. App. 25a-26a (Dyk, J., dissenting); *Herron v. Heckler*, 576 F. Supp. 218, 232-33 (N.D. Cal. 1983) (holding that provisions of agency manual “clearly fall within *both*” Section 552(a)(1)(D) and (a)(2)(C)).

The possibility of overlap between (a)(1) and (a)(2) is also perfectly consistent with Section 552’s structure and purpose. Agency pronouncements can be governed by the requirements of both (a)(1) and (a)(2) without conflict or absurdity. Suppose, for instance, that an agency writes a staff manual that contains, among other things, statements of general policy. The manual as a whole must be “ma[d]e available for public inspection” under (a)(2); the statements of general policy must also be “publish[ed] in the Federal Register” under (a)(1). 5 U.S.C. § 552(a)(1), (2).

By contrast, the Federal Circuit’s mutual-exclusivity theory undermines the statute’s structure and purpose. Section 552(a)(1) is designed to force agencies to formally publish, in the Federal Register, rules and policies of general applicability. If, as *DAV* presumes, anything described in Section 552(a)(2) is necessarily *not* subject to (a)(1), then agencies can evade the publication requirement simply by

embedding materials that would otherwise fall under (a)(1) in staff manuals and staff directives. That obviously cannot be correct.[11]

On top of everything else, the Federal Circuit's mutual-exclusivity theory of Section 552(a) is also inconsistent with this Court's decision in *Morton v. Ruiz*, 415 U.S. 199 (1974). *See* Pet. App. 26a (Dyk, J., dissenting). There, the Court addressed whether a provision of a Bureau of Indian Affairs manual was subject to Section 552(a)(1)'s publication requirement. *Ruiz*, 415 U.S. at 231-33. Although the agency described the manual as "solely an internal-operations brochure," the Court found that it actually contained "important" agency policies concerning benefits eligibility that fell within Section 552(a)(1) and therefore should have been published in the Federal Register. *Id.* at 232-35. *Ruiz* thus confirms what the statutory text makes plain: Section 552(a)(2)'s reference to administrative manuals does *not* categorically exempt such manuals from Section 552(a)(1).

Notably, even the Government has now admitted in its Brief in Opposition that Sections 552(a)(1) and

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[11] Below, VA embraced the notion that it can unilaterally thwart judicial review simply by embedding important rules in its M21-1 Manual. *See Gray* Oral Arg. 32:39-32:55 (arguing that "publish[ing] [the challenged provision] in the administrative staff manual is a choice the agency is entitled to make," that VA's choice "has certain effects," and that one of those effects "is that it divests [the Federal Circuit] from direct review under [Section] 502"); *id.* at 36:44-36:57 ("The [Section 502] question is where do they publish it. If they choose to publish it in the Federal Register, then it is reviewable, because it would be under [Section] 552(a)(1), so it would be within this court's [Section] 502 jurisdiction. But where they choose to put it in an administrative staff manual, it is not.").

(a)(2) are not mutually exclusive. *See* BIO 22-23 (conceding that "certain documents covered by Section 552(a)(1) . . . can also fall within Section 552(a)(2)"). The Government has thus abandoned the *only* argument it made before the Federal Circuit to support the idea that the Waterways Provision is not covered by Section 552(a)(1)(D). This Court should accept the Government's concession and repudiate the Federal Circuit's analysis in *DAV* and the decision below.

C. The Government's New Focus On Whether The Manual "Binds" The Board Is Mistaken

Despite abandoning the mutual-exclusivity theory it successfully pressed in the Federal Circuit, the Government nonetheless still insists that the Waterways Provision falls outside Section 552(a)(1)(D). *See* BIO 19-21. But the only argument the Government now offers to explain why the provision's interpretation is *not* "of general applicability" is that "the M21-1 Manual's provisions do not bind the Board in rendering its ultimate decision in any individual case." *Id.* at 20.

The Government's focus on whether the Manual "binds" the Board is misplaced many times over. First, it has zero foundation in Section 552's text. Second, as a theoretical matter, the idea that only "binding" interpretations are generally applicable makes no sense. *No* interpretive rules are formally binding on the final agency decisionmaker, so this characteristic cannot determine whether or not an interpretation is generally applicable. And third, as a practical matter, since the Board must consider M21-1 Manual in every case, and since the Manual

currently receives *Auer* deference, its provisions are as close to binding as interpretations can be.

1. The Government provides no authority for its atextual proposition that whether an interpretation is "of general applicability" turns on whether it is binding on a particular agency decisionmaker. Nor does either the decision below or *DAV*.[12] And Gray is not aware of any such authority. Indeed, the Government's novel interpretation flies in the face of both the statutory text and more than 80 years of consistent legislative and regulatory usage of the phrase "general applicability." *See supra* at 20-32.

2. More fundamentally, the Government's argument is inconsistent with basic principles of administrative law. *No* interpretive rule—whether generally applicable or not—truly binds all final agency decisionmakers. *See, e.g.*, *Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537 (D.C. Cir. 1988) (rejecting "suggesti[on] that an interpretive rule or policy statement might bind [an] agency"); 1 Richard J. Pierce, *Administrative Law Treatise* § 6.6, at 474 (5th ed. 2010) ("Ordinarily, interpretative rules do not bind an agency.").

Among the chief defining characteristics of an interpretive rule are that it lacks "the force and effect of law" and that it can be adopted, amended, or repealed "freely," without notice-and-comment procedures. *Perez v. Mortgage Bankers Ass'n*, 135 S.

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[12] *DAV* did cite authority for the proposition that because M21-1 Manual provisions are not conclusively binding on the Board, they are not *substantive* (*i.e.*, legislative) rules. *See* 859 F.3d at 1077. But whether or not a rule is *legislative* is a different inquiry from whether or not an interpretive rule is *generally applicable*.

Ct. 1199, 1204, 1207 (2015) (citation omitted); *see* 5 U.S.C. § 553(b)(A). Because an agency is thus free to revise its interpretive rules at any time, it is not bound by them in the same way that it is bound by its legislative rules. Instead, "the agency remains free in any particular case to diverge from whatever outcome [a] policy statement or interpretive rule might suggest." *Vietnam Veterans of Am.*, 843 F.2d at 537.

To be sure, interpretive rules *can* be made binding on lower-level agency employees, like those in VA's regional offices. As OMB explained in its 2007 Final Bulletin, "agencies can appropriately bind their employees to abide by agency policy"—as expressed in interpretive rules and statements of policy—"as a matter of their supervisory powers over such employees." 72 Fed. Reg. at 3437; *see Splane v. West*, 216 F.3d 1058, 1064 (Fed. Cir. 2000) ("[T]he interpretive rule . . . was certainly binding on agency officials insofar as any directive by an agency head must be followed by agency employees.").

But even where "[a]n interpretative rule binds an agency's employees . . . it does not bind the agency itself." *Warder v. Shalala*, 149 F.3d 73, 82 (1st Cir. 1998) (alteration in original) (citation omitted). Senior agency decisionmakers are always free to deviate from an interpretive rule and must consider arguments in favor of doing so. *See* 72 Fed. Reg. at 3436 (guidance documents must "not foreclose consideration by the agency of positions advanced by affected private parties"); Peter L. Strauss, *Publication Rules in the Rulemaking Spectrum: Assuring Proper Respect for an Essential Element*, 53 Admin. L. Rev. 803, 818 (2001) ("[An interpretive rule] can be freely altered at any point before it has been concretely applied—and, indeed, the agency

issuing it must be prepared to treat it as provisional, in the sense that it must permit arguments for its alteration to be made in any proceeding to apply it."); Ronald M. Levin, *Rulemaking and the Guidance Exception*, 70 Admin. L. Rev. 263, 346-51 (2018).

Because *no* interpretive rules are formally binding on final agency decisionmakers, that characteristic cannot serve to distinguish interpretive rules that are of general applicability from those that are not. *Contra* BIO 21. The Government's reliance on this characteristic—which instead distinguishes those rules that are interpretive from those that are *legislative*—is thus fundamentally misplaced. Whether an interpretation is generally applicable does not depend on whether it formally binds particular agency decisionmakers. Rather, as the statutory language indicates, it depends on whether the interpretation is limited to specific individuals or facts.

3. To the extent the Court looks beyond Section 552(a)(1)(D)'s text—and past the formal rules of administrative law—and considers the extent to which the M21-1 Manual is binding as a *practical* matter, that simply confirms the Waterways Provision's status as an interpretation of "general applicability." In the real world, interpretations in the Manual are virtually always followed by VA and its various components, including the Board.

To start, such interpretations are formally binding on VA's frontline Regional Office employees who initially determine a veteran's eligibility for benefits. Fewer than 5% of the benefits decisions by these frontline adjudicators are appealed to the Board. Pet. App. 24a-25a (Dyk, J., dissenting). That means that the M21-1 Manual's "provisions constitute the last

word for the vast majority of veterans." *Id.* at 25a. The Federal Circuit agrees that the Manual's provisions are binding on VA Regional Offices, *see id.* at 5a, 12a, and the Government has not disputed that point.

Those interpretations also often dictate the Board's analysis. The Veterans Court has made clear that the Board must consider any relevant M21-1 Manual provisions when adjudicating a benefits appeal. *Overton v. Wilkie*, 30 Vet. App. 257, 264 (2018). Those provisions will be inherently influential, but they will be even more important when they set forth a legal interpretation that the VA Secretary has *personally* approved and "did not reach . . . lightly." JA83.

Moreover, the Board has also repeatedly stated that it must give Manual provisions the equivalent of *Auer* deference—that is, that it must adhere to an interpretation of a VA regulation in the Manual unless that interpretation is "plainly erroneous or inconsistent with the regulation." *Auer v. Robbins*, 519 U.S. 452, 461 (1997) (citation omitted). In one recent decision, for instance, the Board stated that because it was "unable to conclude that the VA [M21-1] Adjudication Manual's interpretation of the regulations is plainly erroneous or inconsistent with the regulation," the Manual was "controlling." [Title Redacted], No. 12-11 139, 2017 WL 2905538, at *8 (Bd. Vet. App. May 12, 2017).[13]

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[13] *See also, e.g.*, [Title Redacted], No. 10-02 945, 2018 WL 2679096, at *4 (Bd. Vet. App. Apr. 11, 2018) (looking "to the M21-1 for the Secretary's position on the meaning" of a term and noting that the "agency's interpretation of its own regulation in the M21 is controlling unless that interpretation is plainly

Such deference by the Board is only natural, given that courts sitting above the Board currently give the M21-1 Manual *Auer* deference. *See, e.g.*, *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011); *Urban v. Shulkin*, 29 Vet. App. 82, 88-90 (2017). And as Justice Scalia explained, granting *Auer* deference to an interpretive rule makes it in practice "every bit as binding as a substantive rule." *Perez*, 135 S. Ct. at 1212 (concurring in part and concurring in the judgment).

In sum, the interpretation in the Waterways Provision (1) formally binds the frontline adjudicators who conclusively resolve the vast majority of benefits claims, and (2) must be considered by, and will likely receive deference from, the Board in any appeal. The important role that this interpretation will thus play in *every* relevant case only bolsters the conclusion that it is "of general applicability." The Government offers no good reasons to depart from the ordinary and long-settled meaning of that term.

II. SECTION 502'S CROSS-REFERENCE TO SECTION 553 ALSO AUTHORIZES REVIEW

The Federal Circuit has jurisdiction for a second reason as well: Section 502 also makes reviewable any action to which 5 U.S.C. § 553 "refers." And Section 553 repeatedly refers to "interpretative" rules, without Section 552(a)(1)(D)'s qualifier that

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erroneous or inconsistent with the regulation"); [Title Redacted], No. 10-08 246, 2016 WL 3650559, at *10 (Bd. Vet. App. May 11, 2016) (citing M21-1 Manual and observing that "[t]he Board defers to VA's reasonable interpretation of its own laws and regulations"); [Title Redacted], No. 10-34 322, 2013 WL 7222774, at *3 (Bd. Vet. App. Dec. 23, 2013) (treating M21-1 Manual as "controlling authority").

such rules be "of general applicability." The Government has conceded that the Waterways Provision qualifies as an "interpretive" rule. And although the Government has asserted that Gray did not invoke the cross-reference to Section 553 as a basis for jurisdiction, that is demonstrably incorrect.

A. Section 553 Unambiguously "Refers" To Interpretive Rules

Section 502 makes reviewable any action "to which section 552(a)(1) *or 553* of title 5 (or both) *refers*." 38 U.S.C. § 502 (emphasis added). In this case and others, the Government has acted as if Section 502's cross-reference to Section 553 encompasses only legislative rules subject to notice-and-comment procedures. *See*, *e.g.*, Pet. App. 54a ("Section 553 refers to substantive rules that must comply with notice-and-comment procedures."); BIO 17 ("Section 553 governs notice-and-comment rulemaking . . . ."). That is incorrect. While Section 553 does indeed discuss legislative rules, it also plainly "refers" to interpretive rules.

1. To "refer to" something is simply to "mention or allude to" it. *New Oxford* 1466; *see also Webster's Third* 1907 (to "point" or "allude" to). In addition to legislative rules, Section 553 also twice directly mentions *interpretive* rules.

First, Section 553(b) sets forth a general requirement that agencies must publish a notice of any proposed rulemaking in the Federal Register. But Section 553(b) goes on to say that, "[e]xcept when notice or hearing is required by statute," this requirement "does not apply . . . to *interpretative rules*." 5 U.S.C. § 553(b)(A) (emphasis added).

Second, Section 553(d) states that rules must generally be published 30 days before their effective date. But it expressly exempts from this requirement, *inter alia*, "*interpretative rules* and statements of policy." 5 U.S.C. § 553(d)(2) (emphasis added).

Notably, the Government has itself repeatedly acknowledged that Section 553 directly refers to interpretive rules. In *Perez*, for example, the Solicitor General explained that Section 553 "*expressly* and *categorically* exempts the 'formulat[ion],' 'amend[ment],' and 'repeal[]' of *interpretive rules* from the [APA's] notice-and-comment rulemaking procedures." Gov't Reply Br. 1-2, *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199 (2015) (Nos. 13-1041, 13-1052) (emphasis added) (alteration in original); *see also id.* at 4 (same point); *Perez* Gov't Br. 3, 31 (same). There is no world in which Section 553 could "expressly exempt" interpretive rules from those procedures without "refer[ring]" to those rules, which is all that Section 502 requires.

2. For the reasons noted, applying the ordinary meaning of Section 502's text, Section 553 clearly "refers" to interpretive rules. But any doubt on that score would be resolved by "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (citation omitted) (applying canon to statutory deadline for appealing Board decisions); *see also, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor.").

Section 502 is undeniably a statute enacted for the benefit of veterans. It allows them to bring speedy preenforcement challenges to VA rules and policies that unlawfully prevent them from obtaining

benefits, without having to spend years slogging through the individual claims process. *See generally Henderson*, 562 U.S. at 440-41 (noting that VJRA's authorization of judicial review is "decidedly favorable to veterans"). Accordingly, under the pro-veteran canon of interpretation, any question about the reach of Section 502's key term ("refers") should be resolved in veterans' favor, by allowing them to challenge a broader range of VA actions—including interpretive rules.

3. There is no question that the Waterways Provision is an interpretive rule. Although the Government has disputed whether that provision is "of general applicability" (and therefore whether it must be published in the Federal Register), it has repeatedly acknowledged that the provision is an "interpretive statement[]," which is just another way of saying interpretive rule. *E.g.*, Pet. App. 51a-57a; *see* 5 U.S.C. § 551(4) (defining "rule" as a class of agency "statement[s]"). That is sufficient for purposes of Section 502. As an interpretive rule, the Waterways Provision is a VA action "refer[red]" to by Section 553. It is therefore subject to judicial review under Section 502.

B. Gray Has Consistently Invoked Section 553 As A Basis For Jurisdiction

The Government has never identified any flaw in Gray's argument that Section 553 "refers" to interpretive rules such as the Waterways Provision. Instead, it has dodged the merits of this argument by latching onto the Federal Circuit's assertion that Section 553 is not at issue in this case. Pet. App. 8a; *see* BIO 13, 17; Gov't C.A. Reh'g Opp. 14. That assertion was wrong when the Federal Circuit first

made it and remains wrong no matter how many times the Government repeats it. Gray has consistently invoked Section 502's cross-reference to Section 553 as a basis for jurisdiction, and there is no reason for the Court not to consider his argument on its merits.

Below, the Federal Circuit asserted—without citation—that "[t]he parties agree that § 553 is not at issue in this proceeding." Pet. App. 8a. That statement is baffling. Gray has *never* agreed that Section 553 is not at issue here—quite the contrary. The jurisdictional statement in Gray's initial petition for review in the Federal Circuit expressly invoked Section 502's cross-references to *both* Section 552(a)(1) *and* Section 553. JA9. Likewise, the "Statement of Subject Matter Jurisdiction" in his opening brief asserted that the Waterways Provision was a rule "refer[red]" to by Section 553. Pet'r C.A. Br. 1-2. The *Government* certainly thought Section 553 was at issue: It spent several pages of its brief arguing that Section 502's cross-reference to Section 553 did *not* support jurisdiction. *See* Pet. App. 53a-57a. And Gray's counsel did not disavow his position at oral argument, where Section 553 was discussed at some length. How the Federal Circuit concluded that Section 553 was not at issue is a mystery.

Gray attempted to correct the Federal Circuit's misunderstanding below. His rehearing petition argued that the panel was simply wrong in thinking that Gray had conceded the irrelevance of Section 553, and it explained that the Waterways Provision was an interpretive rule "refer[red]" to by that section. Gray C.A. Reh'g Pet. 15-16. The Federal Circuit denied rehearing without explaining its error or addressing Gray's argument. *See* Pet. App. 29a-

30a. Gray then reiterated his Section 553 argument in his petition for certiorari, Pet. 10, 14, 16-17; Pet. Reply 5 n.1. Moreover, the Section 553 issue is squarely encompassed within the scope of Gray's question presented. Gray has thus properly preserved this issue for the Court's review.

III. SECTION 502 IS A VITAL CHECK ON UNLAWFUL VA ACTION AND MUST BE GIVEN ITS FULL SCOPE

1. As explained above, ordinary principles of statutory interpretation establish that the Waterways Provision embodies both an "interpretation[] of general applicability" and also an "interpretative rule." It is therefore an action "to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. § 502. And it is accordingly "subject to judicial review" in the Federal Circuit. *Id*. Because that result is not remotely absurd, this Court's "sole function" is to "enforce [the statutory scheme] according to its terms." *Carr v. United States*, 560 U.S. 438, 458 (2010) (citation omitted). As the Court has itself explained, its role "is to apply the statute as it is written—even if we think some other approach might 'accor[d] with good policy.'" *Burrage v. United States*, 134 S. Ct. 881, 892 (2014) (alteration in original) (quoting *Commissioner v. Lundy*, 516 U.S. 235, 252 (1996)).

In point of fact, though, giving Section 502's cross-references their full breadth *does* accord with good policy. As this Court well knows, VA regularly adopts rules and interpretations that violate important statutes or regulations designed to protect veterans. *See*, *e.g.*, *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1977 (2016) (finding VA

"disregard[ed]" statutory text in refusing to award contract to veteran-owned small businesses); *Henderson*, 562 U.S. at 438-41 (rejecting VA's view that deadline for appealing to Veterans Court is jurisdictional); *Brown*, 513 U.S. at 122 (denying deference to VA regulation that "flies against the plain language of the statutory text").[14] Shockingly, the Government is ordered to pay veterans' attorneys' fees in somewhere between 50% and 70% of cases filed in the Veterans Court, because it has taken a "position [that] is not 'substantially justified'" by law. *Astrue v. Ratliff*, 560 U.S. 586, 601 & n.2 (2010) (Sotomayor, J., concurring) (citation omitted). And close to 80% of VA decisions appealed to the Veterans

[14] *See also, e.g.*, *Johnson v. McDonald*, 762 F.3d 1362, 1365-66 (Fed. Cir. 2014) (VA tried to "redefine the plain language of a regulation"); *Military Order of the Purple Heart v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1297-98 (Fed. Cir. 2009) (VA rule "was not implemented in compliance with the requirements of the [APA]" and failed to "comport with the governing [r]egulations"); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1338, 1346 (Fed. Cir. 2003) (VA promulgated "unreasonable" regulation that was "contrary to the statutory mandate" by "impos[ing] on claimants an arbitrary new deadline" that narrowed veterans' ability to submit evidence); *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1349 (Fed. Cir. 2003) (VA regulation wrongly "impose[d] a misleading hurdle" by failing to "notify[] unsuspecting claimant[s] that [they have] a full year to submit" mitigating evidence); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1368 (Fed. Cir. 2001) (VA "failed to explain its rationale for interpreting . . . virtually identical statutes in conflicting ways"); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 699 (Fed. Cir. 2000) (VA imposed heightened pleading requirements on veterans that were "contrary to the [statute]").

Court are either overturned or remanded. *Henderson*, 562 U.S. at 432.

Precisely because VA gets it wrong so often, Congress has authorized direct challenges to VA rules and policies—to ensure that the Federal Circuit will step in to protect veterans when the agency wanders off track. As that court has explained, Section 502 reflects Congress's "preference for preenforcement review of [VA] rules." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003). That preference is eminently reasonable. When a VA rule or policy is arguably unlawful on its face and ripe for review, there is no reason to impose on veterans the "substantial and unnecessary burden" of enduring "protracted agency adjudication" before getting into an Article III court. Pet. App. 15a-16a (Dyk, J., dissenting).

And "substantial burden" is putting it mildly. The VA's individual claims process has been fairly characterized as a "bureaucratic labyrinth, plagued by delays and inaction," where "many veterans find themselves trapped for years." *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring). As noted above, it can take ages for an individual benefits case to wind its way through the VA, the Board, the Veterans Court, the Federal Circuit, and (perhaps) ultimately here. Indeed, on average it takes a total of approximately *six years* for a veteran's claim to proceed through the Regional Office, the Board, and the Veterans Court. *See supra* at 6. Each year, thousands of veterans die before their claims and appeals are finally resolved. *See supra* at 6.

2. Gray's case illustrates the importance of allowing veterans to bring the full range of preenforcement challenges that Section 502 authorizes—including challenges to interpretive rules in the M21-1 Manual. Gray served our country for more than three years, with honor and distinction, in the Vietnam War. During that time, he served aboard the U.S.S. *Roark*, a destroyer escort that anchored multiple times in Vietnam's Da Nang Harbor. *Gray v. McDonald*, 27 Vet. App. 313, 316-17 (2015). He was exposed to potentially harmful herbicides, and he now suffers from related disabilities, including diabetes, neuropathy, and heart disease. *Id.*

For over 11 years—*since 2007*—Gray has been diligently pursuing his administrative and legal remedies, thus far to no avail. Pet. App. 6a. Although he briefly succeeded in overturning VA's "arbitrary" and "irrational" prior interpretation of "inland waterways," *Gray*, 27 Vet. App. at 324-26, VA simply responded by issuing the even *more* restrictive 2016 interpretation. *See supra* at 9-11.

Gray's challenge to the new interpretation has merit: VA still wrongly rejects the presumption of service connection for Navy veterans who served in Vietnam's bays and harbors, even though (1) they undeniably served within the international-law boundaries of the Republic of Vietnam (which is what the statute requires), and (2) the best evidence shows that such veterans *were* exposed to the herbicides deemed harmful by the Agent Orange Act. VA's prior interpretation of the statute and regulations arbitrarily ignored that evidence, *Gray*, 27 Vet. App. at 322-24, and its 2016 interpretation commits essentially the same mistake, *see* Pet'r C.A. Br. 18-26.

Under Section 502, Gray has every right to have his challenge to the Waterways Provision heard by the Federal Circuit *now*. Gray is 65 years old, and his diabetes and other ailments have left him in increasingly poor health. There is no reason he should be forced to endure years more wandering in the VA "labyrinth" when Congress has plainly authorized his challenge to go forward. This Court should restore Congress's important check on VA rulemaking and allow Gray's case to proceed.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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ADDENDUM

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5 U.S.C. § 551

§ 551. Definitions

For the purpose of this subchapter—

* * *

(4) "rule" means the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency and includes the approval or prescription for the future of rates, wages, corporate or financial structures or reorganizations thereof, prices, facilities, appliances, services or allowances therefor or of valuations, costs, or accounting, or practices bearing on any of the foregoing;

(5) "rule making" means agency process for formulating, amending, or repealing a rule;

* * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act;

* * *

5 U.S.C. § 552

§ 552. Public information; agency rules, opinions, orders, records, and proceedings

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

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

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

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

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

(D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency; and

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

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

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

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

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

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

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

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

(ii)(I) that because of the nature of their subject matter, the agency determines have become or are likely to become the subject of

subsequent requests for substantially the same records; or

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

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

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

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

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

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

(3)(A) Except with respect to the records made available under paragraphs (1) and (2) of this subsection, and except as provided in subparagraph (E), each agency, upon any request for records which (i) reasonably describes such records and (ii) is made in accordance with published rules stating the time, place, fees (if any), and procedures to be followed, shall make the records promptly available to any person.

(B) In making any record available to a person under this paragraph, an agency shall provide the

record in any form or format requested by the person if the record is readily reproducible by the agency in that form or format. Each agency shall make reasonable efforts to maintain its records in forms or formats that are reproducible for purposes of this section.

(C) In responding under this paragraph to a request for records, an agency shall make reasonable efforts to search for the records in electronic form or format, except when such efforts would significantly interfere with the operation of the agency's automated information system.

(D) For purposes of this paragraph, the term "search" means to review, manually or by automated means, agency records for the purpose of locating those records which are responsive to a request.

(E) An agency, or part of an agency, that is an element of the intelligence community (as that term is defined in section 3(4) of the National Security Act of 1947 (50 U.S.C. 401a(4))) shall not make any record available under this paragraph to—

(i) any government entity, other than a State, territory, commonwealth, or district of the United States, or any subdivision thereof; or

(ii) a representative of a government entity described in clause (i).

* * *

5 U.S.C. § 553

§ 553. Rule making

(a) This section applies, according to the provisions thereof, except to the extent that there is involved—

(1) a military or foreign affairs function of the United States; or

(2) a matter relating to agency management or personnel or to public property, loans, grants, benefits, or contracts.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

(1) a statement of the time, place, and nature of public rule making proceedings;

(2) reference to the legal authority under which the rule is proposed; and

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

Except when notice or hearing is required by statute, this subsection does not apply—

(A) to interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice; or

(B) when the agency for good cause finds (and incorporates the finding and a brief statement of reasons therefor in the rules issued) that notice and public procedure thereon are impracticable, unnecessary, or contrary to the public interest.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

(d) The required publication or service of a substantive rule shall be made not less than 30 days before its effective date, except—

(1) a substantive rule which grants or recognizes an exemption or relieves a restriction;

(2) interpretative rules and statements of policy; or

(3) as otherwise provided by the agency for good cause found and published with the rule.

(e) Each agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.

5 U.S.C. § 801

§ 801. Congressional review

(a)(1)(A) Before a rule can take effect, the Federal agency promulgating such rule shall submit to each House of the Congress and to the Comptroller General a report containing—

(i) a copy of the rule;

(ii) a concise general statement relating to the rule, including whether it is a major rule; and

(iii) the proposed effective date of the rule.

(B) On the date of the submission of the report under subparagraph (A), the Federal agency promulgating the rule shall submit to the Comptroller General and make available to each House of Congress—

(i) a complete copy of the cost-benefit analysis of the rule, if any;

(ii) the agency's actions relevant to sections 603, 604, 605, 607, and 609;

(iii) the agency's actions relevant to sections 202, 203, 204, and 205 of the Unfunded Mandates Reform Act of 1995; and

(iv) any other relevant information or requirements under any other Act and any relevant Executive orders.

(C) Upon receipt of a report submitted under subparagraph (A), each House shall provide copies of the report to the chairman and ranking member of each standing committee with jurisdiction under the rules of the House of Representatives or the Senate to report a bill to amend the provision of law under which the rule is issued.

(2)(A) The Comptroller General shall provide a report on each major rule to the committees of jurisdiction in each House of the Congress by the end of 15 calendar days after the submission or publication date as provided in section 802(b)(2). The report of the Comptroller General shall include an assessment of the agency's compliance with procedural steps required by paragraph (1)(B).

(B) Federal agencies shall cooperate with the Comptroller General by providing information relevant to the Comptroller General's report under subparagraph (A).

(3) A major rule relating to a report submitted under paragraph (1) shall take effect on the latest of—

(A) the later of the date occurring 60 days after the date on which—

(i) the Congress receives the report submitted under paragraph (1); or

(ii) the rule is published in the Federal Register, if so published;

(B) if the Congress passes a joint resolution of disapproval described in section 802 relating to the rule, and the President signs a veto of such resolution, the earlier date—

(i) on which either House of Congress votes and fails to override the veto of the President; or

(ii) occurring 30 session days after the date on which the Congress received the veto and objections of the President; or

(C) the date the rule would have otherwise taken effect, if not for this section (unless a joint resolution of disapproval under section 802 is enacted).

(4) Except for a major rule, a rule shall take effect as otherwise provided by law after submission to Congress under paragraph (1).

(5) Notwithstanding paragraph (3), the effective date of a rule shall not be delayed by operation of this chapter beyond the date on which either House of Congress votes to reject a joint resolution of disapproval under section 802.

(b)(1) A rule shall not take effect (or continue), if the Congress enacts a joint resolution of disapproval, described under section 802, of the rule.

(2) A rule that does not take effect (or does not continue) under paragraph (1) may not be reissued in substantially the same form, and a new rule that is substantially the same as such a rule may not be issued, unless the reissued or new rule is specifically authorized by a law enacted after the date of the joint resolution disapproving the original rule.

(c)(1) Notwithstanding any other provision of this section (except subject to paragraph (3)), a rule that would not take effect by reason of subsection (a)(3) may take effect, if the President makes a determination under paragraph (2) and submits written notice of such determination to the Congress.

(2) Paragraph (1) applies to a determination made by the President by Executive order that the rule should take effect because such rule is—

(A) necessary because of an imminent threat to health or safety or other emergency;

(B) necessary for the enforcement of criminal laws;

(C) necessary for national security; or

(D) issued pursuant to any statute implementing an international trade agreement.

(3) An exercise by the President of the authority under this subsection shall have no effect on the procedures under section 802 or the effect of a joint resolution of disapproval under this section.

(d)(1) In addition to the opportunity for review otherwise provided under this chapter, in the case of any rule for which a report was submitted in accordance with subsection (a)(1)(A) during the period beginning on the date occurring—

(A) in the case of the Senate, 60 session days, or

(B) in the case of the House of Representatives, 60 legislative days,

before the date the Congress adjourns a session of Congress through the date on which the same or succeeding Congress first convenes its next session, section 802 shall apply to such rule in the succeeding session of Congress.

(2)(A) In applying section 802 for purposes of such additional review, a rule described under paragraph (1) shall be treated as though—

(i) such rule were published in the Federal Register (as a rule that shall take effect) on—

(I) in the case of the Senate, the 15th session day, or

(II) in the case of the House of Representatives, the 15th legislative day,

after the succeeding session of Congress first convenes; and

(ii) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(B) Nothing in this paragraph shall be construed to affect the requirement under subsection (a)(1) that a

report shall be submitted to Congress before a rule can take effect.

(3) A rule described under paragraph (1) shall take effect as otherwise provided by law (including other subsections of this section).

(e)(1) For purposes of this subsection, section 802 shall also apply to any major rule promulgated between March 1, 1996, and the date of the enactment of this chapter.

(2) In applying section 802 for purposes of Congressional review, a rule described under paragraph (1) shall be treated as though—

(A) such rule were published in the Federal Register on the date of enactment of this chapter; and

(B) a report on such rule were submitted to Congress under subsection (a)(1) on such date.

(3) The effectiveness of a rule described under paragraph (1) shall be as otherwise provided by law, unless the rule is made of no force or effect under section 802.

(f) Any rule that takes effect and later is made of no force or effect by enactment of a joint resolution under section 802 shall be treated as though such rule had never taken effect.

(g) If the Congress does not enact a joint resolution of disapproval under section 802 respecting a rule, no court or agency may infer any intent of the Congress from any action or inaction of the Congress with regard to such rule, related statute, or joint resolution of disapproval.

5 U.S.C. § 804

§ 804. Definitions

For purposes of this chapter—

(1) The term "Federal agency" means any agency as that term is defined in section 551(1).

(2) The term "major rule" means any rule that the Administrator of the Office of Information and Regulatory Affairs of the Office of Management and Budget finds has resulted in or is likely to result in—

(A) an annual effect on the economy of $100,000,000 or more;

(B) a major increase in costs or prices for consumers, individual industries, Federal, State, or local government agencies, or geographic regions; or

(C) significant adverse effects on competition, employment, investment, productivity, innovation, or on the ability of United States-based enterprises to compete with foreign-based enterprises in domestic and export markets.

The term does not include any rule promulgated under the Telecommunications Act of 1996 and the amendments made by that Act.

(3) The term "rule" has the meaning given such term in section 551, except that such term does not include—

(A) any rule of particular applicability, including a rule that approves or prescribes for the future rates, wages, prices, services, or allowances therefor, corporate or financial structures, reorganizations, mergers, or acquisitions thereof,

or accounting practices or disclosures bearing on any of the foregoing;

(B) any rule relating to agency management or personnel; or

(C) any rule of agency organization, procedure, or practice that does not substantially affect the rights or obligations of non-agency parties.

38 U.S.C. § 502

§ 502. Judicial review of rules and regulations

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

Pub. L. No. 74-220, 49 Stat. 500

July 26, 1935

AN ACT

To provide for the custody of Federal proclamations, orders, regulations, notices, and other documents, and for the prompt and uniform printing and distribution thereof.

* * *

SEC. 5. (a) There shall be published in the Federal Register (1) all Presidential proclamations and Executive orders, except such as have no general applicability and legal effect or are effective only against Federal agencies or persons in their capacity as officers, agents, or employees thereof; (2) such documents or classes of documents as the President shall determine from time to time have general applicability and legal effect; and (3) such documents or classes of documents as may be required so to be published by Act of the Congress: *Provided*, That for the purposes of this Act every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect.

(b) In addition to the foregoing there shall also be published in the Federal Register such other documents or classes of documents as may be authorized to be published pursuant hereto by regulations prescribed hereunder with the approval of the President, but in no case shall comments or news items of any character whatsoever be authorized to be published in the Federal Register.

SEC. 6. There is established a permanent Administrative Committee of three members

consisting of the Archivist or Acting Archivist, who shall be chairman, an officer of the Department of Justice designated by the Attorney General, and the Public Printer or Acting Public Printer. The Director of the Division shall act as secretary of the committee. The committee shall prescribe, with the approval of the President, regulations for carrying out the provisions of this Act. . . .

* * *

Pub. L. No. 75-158, 50 Stat. 304

June 19, 1937

AN ACT

To amend the Federal Register Act.

* * *

"SEC. 11. (a) On July 1, 1938, and on the same date of every fifth year thereafter, each agency of the Government shall have prepared and shall file with the Administrative Committee a complete codification of all documents which, in the opinion of the agency, have general applicability and legal effect and which have been issued or promulgated by such agency and are in force and effect and relied upon by the agency as authority for, or invoked or used by it in the discharge of, any of its functions or activities on June 1, 1938. The Committee shall, within ninety days thereafter, report thereon to the President, who may authorize and direct the publication of such codification in special or supplemental editions of the Federal Register.

* * *

1 C.F.R. § 1.1

§ 1.1 Definitions.

As used in this chapter, unless the context requires otherwise—

* * *

Document includes any Presidential proclamation or Executive order, and any rule, regulation, order, certificate, code of fair competition, license, notice, or similar instrument issued, prescribed, or promulgated by an agency;

Document having general applicability and legal effect means any document issued under proper authority prescribing a penalty or course of conduct, conferring a right, privilege, authority, or immunity, or imposing an obligation, and relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations;

* * *