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 FOR AMICUS CURIAE THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF THE PETITIONER


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## INTEREST OF AMICUS CURIAE[1]

The National Law School Veterans Clinic Consortium ("NLSVCC") submits this brief in support of the position of Petitioner Robert H. Gray. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.[2]

The NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The Consortium's mission is, working with like-minded stakeholders, to gain support and advance common interests with the Department of Veterans Affairs ("VA"), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

The NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. The NLSVCC is keenly interested in this case in light of the important

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[1] The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

[2] Counsel participating in this briefing are identified in the signature block above. NLSVCC wishes to thank and acknowledge Professor Erika Lietzen, Esq., of the University of Missouri School of Law.

jurisdictional issue presented and respectfully submits that pre-enforcement judicial review of generally applicable provisions in the VA's *Adjudication Procedures Manual, M21-1* (the "M21-1 Manual") is critical to protecting the interests of our nation's veterans.

## SUMMARY OF THE ARGUMENT

Congress provided for judicial review of the Secretary of Veterans' Affairs's (the "Secretary") actions and decisions in enumerated and distinct instances. The Veterans' Judicial Review Act, Pub. L. No. 100–687, 102 Stat. 4105 (1988) (the "VJRA") grants the United States Court of Appeals for the Federal Circuit ("Federal Circuit") jurisdiction to review "[a]n action of the Secretary to which Section 552(a)(1) or 553 of Title 5 (or both) refers." 38 U.S.C. § 502. Section 552(a)(1) is a provision of the Freedom of Information Act ("FOIA") requiring publication in the Federal Register of various agency items including "substantive rules of general applicability" 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 agency rulemaking provision of the Administrative Procedure Act ("APA"). It applies to both substantive rules, which need notice and comment, and interpretative rules and statements of policy, which do not. 5 U.S.C. § 553(d)(1)–(2). In addition, Section 553 grants a right to the public to petition for the issuance, amendment, or repeal of a rule. *Id.* at § 553(e). The Federal Circuit also has jurisdiction to review individual

VA claims decisions, after the veteran exhausts a notoriously arduous appeal process. 38 U.S.C. § 7292.

In this case, Petitioner Gray seeks judicial review of a provision in VA's internally-binding M21-1 Manual. The challenged provision excludes veterans who served off the Vietnam coastline during the Vietnam War ("Blue Water Navy Veterans") from a "service connection" presumption linking specified disabilities to Agent Orange. *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1106, 1107 (Fed. Cir. 2017) (discussing M21-1 Manual, part IV, subpart ii, ch. 1, ¶ H.2.a (2016)). The Federal Circuit held that it lacked jurisdiction under Section 502 to review the M21-1 Manual provision because the court found the provision not to be a Section 552(a)(1) agency action. *Id.* at 1104, 1107.

The decision below effectively allows the Secretary to evade judicial review. The Secretary disagrees with this conclusion, asserting Petitioner Gray has two other options for judicial review. Br. for Resp't in Opp'n, *Gray v. Wilkie*, Nos. 17-1679, 17-1693, 2018 WL 4298030, at *23-*24 (2018). The two options are an individual benefits appeal under Section 7292(b) and judicial review arising after the denial of a Section 553(e) rulemaking petition.

The flaw in the Secretary's reasoning is that it treats separate and distinct options for judicial review as comparable and interchangeable. They are not. Denying claimants preemptive challenges under Section 502 deprives veterans of prompt and efficient relief by an Article III court and insulates the Secretary

from oversight. Neither an individual benefits appeal nor a petition for rulemaking provides complete relief because both processes involve unnecessary delay. Further, review of a denial of a petition for rulemaking is substantively narrow and deferential.

There is no other equivalent mechanism to Section 502 review available to a veteran to secure relief in the circumstances underlying this appeal. The Federal Circuit's refusal to exercise jurisdiction wrongly burdens veterans by requiring "protracted agency adjudication in order to obtain pre-enforcement judicial review of a purely legal question that is already ripe for . . . review." *Id.* at 1110 (Dyk, J., dissenting in part and concurring in the judgment as compelled by *Disabled American Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077–78 (Fed. Cir. 2017)).

Protracted and futile proceedings are especially detrimental for Blue Water Navy Veterans claiming exposure to Agent Orange. Because the Secretary excludes Blue Water Navy Veterans from the Agent Orange service connection presumption, these veterans must prove on a case-by-case basis that they were exposed to Agent Orange during their service. *See Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, 830 F.3d 570, 572–73 (D.C. Cir. 2016). Proving such exposure is an unduly burdensome task. Congress established the presumption of exposure because it recognized the difficulty a veteran faced in establishing that his disease resulted from exposure to Agent Orange in Vietnam. *Id.* (citing *LeFevre v. Sec'y of Veterans Affairs*, 66 F.3d 1191, 1197 (Fed. Cir. 1995)).

As discussed below, time is of the essence for these veterans who are older and ailing. Judicial review under Section 502 of substantive M21-1 Manual provisions is critical to protecting the interests of Blue Water Navy Veterans.

## ARGUMENT

### A. Judicial Review of the M21-1 Manual Provision in an Individual Benefits Appeal Is Inadequate

Challenging the M21-1 Manual provision in an individual benefits appeal is an inadequate remedy because it is unduly burdensome. And, even though interlocutory review by the Federal Circuit is possible, the process remains inadequate.

#### 1. A Benefits Appeal Is An Unduly Burdensome Route to Challenge a M21-1 Manual Provision

Reaching the Federal Circuit through an individual benefits appeal is certainly possible, but just because something is possible does not make it practical or adequate. Processing an individual benefits claim and the subsequent appeal, in order to challenge a provision of the M21-1 Manual, takes considerably longer than direct judicial review of the same rule. The "Life Cycle of a VA Appeal," as published by the VA in 2016,

graphically illustrates the process a veteran must traverse in an individual benefits appeal.[3]

The recently enacted Veterans Appeals Improvement and Modernization Act of 2017 was designed to speed up the individual benefits appeals process. Nonetheless, the procedural changes under the new law remain complex, containing many steps and avenues. *See* Veterans Appeals Improvement and Modernization Act of 2017, https://benefits.va.gov/benefits/appeals-faq.asp?_ga=2.23647160.325542980.1545056083 and https://www.bva.va.gov/docs/Decision_Review_Process_Slides.pdf (last visited Dec. 17, 2018). The new Act was not designed to address purely legal challenges to M21-1 Manual provisions; it was designed to ameliorate the extraordinary delays in individual veterans benefits cases.

History demonstrates that sending a pure legal challenge to a VA rule through the individual benefits appeals process unnecessarily and significantly delays a decision—which is against the veteran's best interest and antithetical to the pro-veteran policy underlying veterans benefits law. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) ("VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant.")

Section 7292 provides the Federal Circuit has jurisdiction to review a case, "[a]fter a decision of the United States Court of Appeals for Veterans Claims is

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[3] This graph is reproduced in the Appendix.

entered in a case." This decision only happens after the VA Regional Office and Board of Veterans' Appeals (the "Board") proceedings have concluded. *See* U.S. Dep't of Veterans Affairs, *File a VA Disability Appeal*, https://www.va.gov /disability/file-an-appeal/ (last visited Dec. 17, 2018).

The process starts with the veteran filing an individual benefits claim, then receiving a decision from the VA Regional Office, then filing a Notice of Disagreement ("NOD"), and then, finally, filing a VA Form 9. Only after that drawn-out process—which can take years as reflected in the Life Cycle of a VA Appeal—would the veteran's challenge move to the Board. *Id.*

After exhausting the appeal with the Board, the veteran proceeds through the appeals process of the United States Court of Appeals for Veterans Claims ("Veterans Court"). 38 U.S.C. § 7252(a). After years of effort, a negative finding by the Veterans Court can be appealed to the Federal Circuit. 38 U.S.C. § 7292(c).

The process takes years, with the most significant delays occurring at the Board level. On average, the Board takes over three and one half years to issue a decision after the veteran files VA Form 9. U.S. Dep't of Veterans Affairs, *Annual Report Fiscal Year (FY) 2017*. Bd. of Veterans' Appeals 25 (2017), https://www.bva.va.gov/Chairman_Annual_Rpts.asp (last visited Dec. 17, 2018). That statistic does not include the one year and 135 days that it typically takes the VA to

respond to the NOD filed before the case ever makes it to the Board. *Id.* This five-year-plus delay also assumes the appeal is not remanded, though over half of the Board's decisions are remanded in some part. *Id.* at 30 (noting 56.7%, or 29,832 cases, were remanded in FY 2017). Remand typically adds one year and 127 days to a Board appeal. *Id.* at 25. Thus, at this time, a remanded Board appeal takes approximately six years and 180 days from NOD to disposition, with unsuccessful challenges taking five years and 53 days. *Id.* Once a veteran's challenge reaches the Veterans Court, it will take an additional 10 to 21.4 months to resolve. *Annual Report, FY 2017*, United States Court of Appeals for Veterans Claims 3, https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf (last visited Dec. 11, 2018). Only 2.2% of Veterans Court appeals move on to the Federal Circuit. *Id.* at 2, 4.

VA's own forecasts show this process will become even more time-consuming in coming years. From FY 2014 to FY 2017, the Board's backlog of pending cases ballooned from 66,778 to 153,513, a roughly 130% increase. *Id.* at 33. That backlog, plus FY 2018 cases alone, would take the Board nearly five years to clear at its current pace. *Id.* at 27. Furthermore, there are almost 100,000 cases annually, which will cause the backlog to increase exponentially. *Id.* at 24. The ballooning backlog further undermines the Secretary's assertion that the individual benefits adjudication process presents a reasonable and fair opportunity for judicial review of M21-1 Manual provisions.

Veterans Court Chief Judge Robert Davis recently acknowledged the issue presented by the backlog and delay, describing the VA appeals system as "horribly flawed" with a backlog that "contributes to poor decision-making." Ben Kessling, *Hundreds of Thousands of Veterans' Appeals Dragged Out by Huge Backlog*, The Wall Street Journal (Aug. 22, 2018), https://www.wsj.com/articles/hundreds-of-thousands-of-veterans-appeals-dragged-out-by-huge-backlog-1534935600.

This lengthy process increases the likelihood that veterans will drop claims or even die before a final disposition is reached in their cases. For those who do persevere, the Federal Circuit disposes of Veterans Court appeals relatively quickly—approximately nine months on average. U.S. Ct. of Appeals for the Fed. Cir., *Median Time to Disposition in Cases Terminated After Hearing or Submission* (2018), http://www.cafc.uscourts.gov/sites/default/files/Median%20Disposition%20Time%20for%20Cases%20Terminated%20after%20Hearing%20or%20Submission%20(Detailed%20table%20of%20data%202006-2015).pdf. Regardless of the Federal Circuit's speedy review, it nevertheless takes the better part of a decade to go from a VA decision on a benefits claim to a Federal Circuit disposition.

Therefore, the Secretary's contention that Vietnam veterans can simply use the individual benefits adjudication process to challenge a M21-1 Manual provision ignores the inefficient and extended process that elderly veterans must undertake. The median age of Vietnam veterans is 68-years-old. *Profile of Vietnam War Veterans from the 2015 American Community*

*Survey*, U.S. Dep't of Veterans Affairs 3–4 (July 2017), https://www.va.gov/vetdata/docs/SpecialReports/Vietnam_Vet_Profile_Final.pdf. The Secretary's suggestion means that Vietnam veterans would have to go through the daunting appeals process deep into their seventies before a final disposition would be rendered. Given that the life expectancy of an American male is approximately 76.1 years, the sad reality is that many Vietnam veterans will pass away before a final disposition occurs. U.S. Dep't of Health and Human Services, *Mortality in the U.S., 2016*, Ctr. for Disease Ctrl. and Prevention (Dec. 2017), https://www.cdc.gov/nchs/data/databriefs/db293.pdf.

While the Federal Circuit's holding does not insulate the Secretary's decisions from judicial review altogether, it effectively removes that option for the 90,000 Blue Water Navy Veterans who are dying at a rate of 523 veterans per day. Patricia Kime, *House Votes to Expand Benefits for Vietnam 'Blue Water Navy' Vets*, Military Times (May 19, 2016), https://www.militarytimes.com/veterans/2016/05/19/house-votes-to-expand-benefits-for-vietnam-blue-water-navy-vets/; Tom Philpott, *Ailing 'Blue Water' Vietnam Veterans Are Closer to Gaining VA Benefits*, Military Update (May 10, 2018), http://www.moaa.org/Content/Publications-and-Media/News-Articles/2018-Military-Update/Ailing--Blue-Water--Vietnam-Veterans-Are-Closer-to-Gaining-VA-Benefits.aspx. As the Federal Circuit itself recognized, these veterans are ailing and their urgency in the Section 502 claim is "understandable." *Gray*, 875 F.3d at 1109.

In a system where "the importance of systemic fairness and the appearance of fairness carries great weight," an individual benefits appeal does not fairly provide an opportunity to challenge a VA rule. *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998). If "[t]he government's interest in veterans cases is *not* that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them," the Federal Circuit's decision in this case *cannot* stand. *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (emphasis added).

### 2. The Availability of an Interlocutory Appeal Does Not Make Relief Adequate

The Secretary cites specifically to the availability of interlocutory review as an additional mechanism for judicial review beyond Section 502. Br. for Resp't in Opp'n, *Gray v. Wilkie*, Nos. 17-1679, 17-1693, 2018 WL 4298030, at *23-*24 (2018). Section 7292(b) expressly empowers the Veterans Court with the discretionary authority to certify a controlling question of law that would materially advance the litigation for interlocutory Federal Circuit review. However, this level of review does not obviate the delays described above.

Since the promulgation of the Federal Courts Improvement Act, which conferred upon the Federal Circuit interlocutory appellate jurisdiction from specialized federal courts (including the Veterans Court), Congress gave the Federal Circuit the equivalent authority

as regional circuit courts to hear interlocutory appeals related to two of the most commonly invoked exceptions to the final-judgment rule: controlling questions of law and injunctions. *See* Federal Courts Improvement Act of 1982, Pub. L. No. 97–164, § 125, 96 Stat. 25, 36. With this authority, the Federal Circuit hears an interlocutory appeal one-third of the time; between 1995 and 2010, 34% of the 117 petitions submitted for permissive interlocutory review were granted by the Federal Circuit. Alexandra B. Hess et al., *Permissive Interlocutory Appeals at the Court of Appeals for the Federal Circuit: Fifteen Years in Review (1995–2010)*, 60 Am. U. L. Rev. 757, 764 (2011). It does not appear that the Veterans Court has ever entered an order for interlocutory review. And, a determination by the Veterans Court rejecting a request for interlocutory review is not appealable to the Federal Circuit. *See Aleut Tribe v. United States*, 702 F.2d 1015, 1019 (Fed. Cir. 1983) (holding that the Federal Circuit lacks jurisdiction to hear an interlocutory appeal under Section 1292(b) if certification is not granted by the lower court).

This alternative avenue of obtaining judicial review through Section 7292(b), which the Secretary points to, still involves long delays in adjudication. Functionally, Section 7292(b) provides a veteran the opportunity to move from the Veterans Court to the Federal Circuit slightly faster than normal, but it does nothing to shorten the overall adjudication process. Section 7292(b) yields only a marginal and inconsequential difference.

### B. Veterans Cannot Secure Adequate Review of the Underlying Dispute by Filing Rulemaking Petitions Under Section 553(e) of the Administrative Procedure Act

The Secretary argues that even if Petitioner cannot invoke Section 502 of the VJRA for rules promulgated in the M21-1 Manual, Petitioner is not foreclosed from judicial review because a petition for rulemaking may still be filed under Section 553(e) of the APA. Br. for the Resp't in Opp'n at 24, *Gray v. Wilkie*, No. 17-1679, 2018 WL 3055684, *cert. granted* (U.S. Nov. 2, 2018). The Secretary is correct that Section 502 does not foreclose Petitioner from filing a petition for rulemaking under Section 553(e) and that the grant or denial of the petition may still be subject to judicial review. These assertions, however, fail to account for (a) the fact that the Section 553(e) petition process does not provide Petitioner Gray the proper standard of review and (b) the delay involved in the, ultimately unnecessary, Section 553(e) process would be prejudicial to aging Vietnam veterans. For these reasons, a Section 553(e) petition is an inadequate and untenable replacement for direct judicial review of M21-1.

#### 1. A Section 553(e) Petition Does Not Provide Petitioner Gray with the Proper Standard of Review

The Secretary implies the Federal Circuit has no jurisdiction over interpretive rules set forth in the M21-1 Manual in part because judicial review is available through the avenues of an individual benefits

appeal and a Section 553(e) petition for rulemaking. Br. for Resp't in Opp'n, *Gray v. Wilkie*, Nos. 17-1679, 17-1693, 2018 WL 4298030, at *23-*24 (2018). Further, the Secretary argues that the M21-1 Manual interpretive rules are non-binding because even though individual adjudicators are bound by them, the Board is not. *Id*. at *20-*21. Despite this assertion, the Secretary has nonetheless argued that M21-1 Manual rules must be afforded *Auer* deference when the courts have reviewed M21-1 Manual rules in individual benefits cases. *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011).

Because the government assumes that M21-1 Manual rules are not binding, it is likely that, under this view, judicial review of the Secretary's response to a Section 553(e) petition is limited only to whether the Secretary's denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353 (Fed. Cir. 2011) (citing *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 527–28 (2007)). The *Preminger* court found that this form of differential review is "extremely limited" because "an agency's refusal to institute rulemaking proceedings is at the high end of the range" of levels of deference given to agency action under the "arbitrary and capricious" standard. *Id.* at 1353 (citing *American Horse Protection Association v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987)). The goal of this review is to ensure that the agency offered a public explanation for its refusal to engage in rulemaking. *Id.* at 1353 (citing *Lyng*, 812

F.2d at 4–5 (D.C. Cir. 1987)). And, in *Service Women's Action Network v. Secretary*, the Federal Circuit explained that "in only the 'rarest and most compelling of circumstances' is it appropriate to overturn an agency judgment not to institute a rulemaking.'" 815 F.3d 1369, 1375 (Fed. Cir. 2016) (citing *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 818 (D.C. Cir. 1981)).

Determining whether the Secretary's response to a petition is arbitrary and capricious is not an adequate substitute for direct judicial review because Congress expressed a "preference for preenforcement review of [the Secretary's] rules" through Section 502. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003). Furthermore, M21-1 Manual rules qualify, under Section 552(a)(1)(D), as "interpretations of general applicability formulated and adopted by the agency," which the Federal Circuit has explicit jurisdiction to review under Section 502. The Secretary proposes that M21-1 Manual rules are in part not generally applicable because "the Board may decline to apply it in any or all cases." Br. for the Resp't in Opp'n at 13, *Gray v. Wilkie*, No. 17-1679, 2018 WL 3055684, *cert. granted* (U.S. Nov. 2, 2018). Contrary to this assertion, the Board has in fact determined that it owes deference to the M21-1 Manual. *See*, *e.g.*, [Title Redacted], No. 12-11 139, 2017 WL 2905538, at *8 (Bd. Vet. App. May 12, 2017) (the Board found the M21-1 Manual was "controlling"); *see also* Reply Br. for the Petitioner at 5-6, *Gray v. Wilkie*, No. 17-1679, 2018 WL 4613563, *cert. granted* (U.S. Nov.

2, 2018) (explaining in detail why the rules are both binding and of general applicability).

Nonetheless, even if the Secretary is correct that the rules are not binding on the Board, the Secretary is incorrect that binding status determines whether the rules are of general applicability. M21-1 Manual rules are of general applicability because they apply to *all* veterans who initiate a benefits adjudication; the rules are not limited to specific or named individuals.[4] Furthermore, adjudicators, who by the Secretary's own admission are bound by the M21-1 Manual, provide final resolution for 96% of all benefits cases. *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102, 1114 (Fed. Cir. 2017) (Dyk, J., *dissenting in part*).

Because the M21-1 Manual is subject to review under Section 502, Petitioner Gray is entitled to a less deferential standard of review[5] than that offered by the Secretary's denial of a Section 553(e) petition and, furthermore, to a review that examines the merits of the existing rule. The Secretary's implication that Petitioner Gray can seek judicial review of the M21-1 Manual similar to that of direct review through a Section 553(e) petition is therefore erroneous.

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[4] This argument is examined and explained in detail in Petitioner's Reply Brief and is therefore not mirrored here.

[5] The less deferential standard of review appears to be *Auer* deference, however, in light of this Court's recent grant of cert. in *Kisor v. Wilkie*, the status of *Auer* is uncertain.

### 2. A Section 553(e) Petition Imposes an Additional Step and Unnecessary Delay

Even if Petitioner Gray would obtain the same result from judicial review of a Section 553(e) petition as he would under direct judicial review of the M21-1 Manual, the process imposes an unnecessary step. If, as the Secretary implies, the review of a denial would result in the same outcome as direct review, then there is no reason that Petitioner Gray need pursue an intermediary procedure that would lengthen an already arduous process. Furthermore, from an efficiency standpoint, direct review better allocates scarce judicial and agency resources by reducing time spent per case.

As stated in *supra*, pages 5-11 of this brief, veterans already face significant delay in pursuing individual benefits process. These delays mean that obtaining judicial review of M21-1 Manual provisions will take years. The Secretary's suggestion that the Section 553(e) petition process could serve as a viable alternative ignores the significant delays associated with this process. Should Section 502 be interpreted to not confer direct review upon the Federal Circuit, the remaining options impose significant hardship on veterans.

This Court has previously counseled that a fundamental right of procedural due process is the opportunity to obtain judicial review "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The delay in resolving Section

553(e) petitions therefore threatens to implicate veterans' due process rights. *See Fusari v. Steinberg*, 419 U.S. 379, 388 (1975); *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) ("*TRAC*") (holding that the tolerance for unreasonable delay lessens where human health and welfare are at stake); *see Cushman v. Shinseki*, 576 F.3d 1290, 1297–98 (2009) (concluding that both recipients of and applicants for entitlement to VA benefits retain a thoroughly protected property interest). Should Section 502 be interpreted to not confer jurisdiction over manual rules, there would be no effective means of judicial review because a significant number of veteran petitioners are too old to survive the petition review process. Courts warn that even if "[the agency] 'grants' the petition it can then delay indefinitely, without any recourse to the Petitioners." *See In re A Community Voice*, 878 F.3d 779, 785–86 (9th Cir. 2017). Therefore, because veterans law clearly implicates the human health and welfare of sensitive claimants, Section 553(e) is an inadequate and untimely method of judicial review. *See Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990).

Generally, Section 553(e) allows individuals to "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Once a petition has been received, an agency must "fully and promptly consider it." *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981) (citing S. Rep. No. 752, 79th Cong., 1st Sess. (1945)) (internal citations omitted); *see* 5 U.S.C. § 555(e). Agencies must conclude a determination regarding a Section 553(e) petition "within a reasonable time," and respond by

either granting or denying the petition. *Nat'l Parks Conservation Ass'n v. U.S. Dept. of Interior*, 794 F.Supp.2d 39, 44 (D. D.C. 2011). The receipt of a petition does not create a duty to engage in rulemaking, but merely requires that the agency consider the petition and respond to it in a timely manner. *Id.*

The procedures in Section 553(e), however, have proven to be an inadequate means of judicial review due in part to the tendency of agencies to delay in considering and responding to petitions. The hesitance of courts to find that an agency has unreasonably delayed only exacerbates this issue. A 2014 Administrative Conference of the United States Final Report indicated that "typically, it takes several years before a court will likely find a delay to be unreasonable, and about a decade or more before a finding of unreasonableness is a near certainty." Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking: Final Report to the Administrative Conference of the United States* 11 (Nov. 5, 2014), http://www.acus.gov/sites/default/files/documents/Final%20Petitions%20for%20Rulemaking%20Report%20%5B11-5-14%5D.pdf. And, even if an agency is found to have delayed, the typical remedy is to "ask the agency for a timetable concerning when it can respond, thereby adding additional delay." Sidney A. Shapiro & Richard W. Murphy, *Eight Things Americans Can't Figure out About Controlling Administrative Power*, 61 Admin. L. Rev. 5, 27 (2009).

An example of such delay can be seen in the Environmental Protection Agency's ("EPA") handling of the petitions at issue in *Ctr. for Environmental Health v.*

*McCarthy*, 192 F.Supp.3d 1036 (N.D. Cal. 2016). It took three years before the petitions, filed in 2006, were considered and granted. *Id.* at 1039. And, after granting the petitions, the EPA took no further action until 2014, when plaintiffs filed a lawsuit alleging delay at which time the agency concluded that it would not pursue finalization of the 2009 rulemaking. *Id.* Likewise, in *In re A Community Voice*, the EPA granted a Section 553(e) petition in 2009 only two months after it was filed. 878 F.3d at 783. After granting the petition and agreeing to engage in rulemaking, however, the EPA did little other than form an advisory panel and develop a survey. *Id.* Plaintiffs filed a mandamus petition in 2016, asking the court to find that the EPA unreasonably delayed the promulgation of a final rule. *Id.* The EPA, on the other hand, argued that it had been working diligently and estimated that a proposed rule would be issued in 2021, with the final rule following in 2023. *Id.* The court concluded that an eight-year delay with no concrete timetable was unreasonable. *Id.* at 787–88 (citing *TRAC*, 750 F.2d at 70 (D.C. Cir. 1984)).

Current literature and other available information are unclear as to the VA's exact timeline for handling petitions. This is due in part to the absence of a VA webpage listing petitions that have been filed with the agency. While *Ctr. for Environmental Health* and *In re A Community Voice* are not specific to veterans' disability benefits, they illustrate the lack of utility of a Section 553(e) petition and prove that the Section 553(e) process can be extraordinarily lengthy. There is a high likelihood that Section 553(e) forces

veterans to experience an unreasonable waiting period from the filing of a petition to the promulgation of a final rule. Given that the median age of veterans affected by *Gray* is 68, the likelihood that the veteran petitioner lives to see the claim resolved is low. *Profile of Vietnam War Veterans*, *supra* p. 13.

Section 502 should be interpreted to confer jurisdiction, thereby allowing veterans timely access to judicial review. To rule otherwise perverts the pro-veteran ethos and denies veterans adequate judicial review.

## CONCLUSION

This nation owes a duty to those who have been injured while defending it and its interests. To suggest that Section 553(e) and the lengthy petitioning process provides equal access to courts and equal justice to those who have been injured in the service of this country flies in the face of the government's interest that "all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). Even if the veteran petitioners were to survive to see justice, it would have been denied to them for far too long. In many cases, that justice will be delayed too long, and it will be too late. Consequently, this Court should hold that 38 U.S.C. § 502 confers jurisdiction upon the Federal Circuit to review an interpretive rule, even if the VA chooses to promulgate that rule through its Adjudication Manual.

Therefore, amicus curiae respectfully ask this Court to reverse the Federal Circuit's holding.

Respectfully submitted,

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