No.

IN THE

Supreme Court of the United States

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC., PETITIONER

v.

SECRETARY OF VETERANS AFFAIRS

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION(S) PRESENTED

I. Whether this Court Should Grant *Certiorari* to Resolve an Important Point of Law and a Conflict Between Circuits Concerning Judicial Review of an Interpretative VA Regulation Under the Administrative Procedures Act and Whether It Should Be Foreclosed Under 38 U.S.C. § 502 When the Veterans Judicial Reform Act Provides the Sole Avenue for Review of the Secretary's Decisions.

II. Whether the Decision in the Court below Creates a Conflict with the Court of Appeals for the District of Columbia Circuit Case of *Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016).

Rule 29.6

The Blue Water Navy Vietnam Veterans Association, Inc., is a tax exempt non-profit corporation pursuant to 26 U.S.C. § 501(c)(3) and organized under the laws of Colorado. There is no parent or publicly held company owning 10% or more of the corporation's stock.

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The Opinion of the Court of Appeals for the Federal Circuit denying the petition for rehearing and the petition for rehearing *en banc* is reported as *Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379, 1380 (Fed. Cir. 2018) and as shown in Appendix 29a-35a. The Opinion of the Court of Appeals for the Federal Circuit is dismissing the suit for lack of jurisdiction is reported at *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017) as shown in Appendix 1a-28a.

JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules. The final judgment of the United States Court of Appeals for the Federal Circuit denying the petition for rehearing and petition for rehearing *en banc* was entered on March 21, 2018. Appendix 29a-35a. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

RELEVANT PROVISIONS BELOW (see appendix)

Introduction

Considering the well settled presumption in favor of judicial review it seems odd indeed to preclude veterans from obtaining a review of arbitrary and capricious administrative decisions. The decision of the

court below has deprived veterans, and only veterans, of their right to seek their day in court to challenge the actions of the Secretary of Veterans Affairs when he promulgates regulations via his M21-1 Adjudication Manual. This allows the Secretary to circumvent the Congressionally mandated user friendly process to obtain veterans' benefits.

Congress and this Court have historically required a neutral pathway for review of governmental decisions. Judicial review supports the Constitutional separation of powers doctrine by providing checks and balances on the otherwise unchecked powers of the Executive.

Since World War II, the United States has promoted a special relationship with its veterans. In enacting the Veteran's Judicial Review Act and Veterans' Benefits Improvement Act of 1988, the legislative history noted:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it

> on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof. H.R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95 (emphasis added).

Here, the court below has taken an inelastic and rigid approach to judicial review of the Secretary's decisions. Ignoring settled principles of administrative law, and the pro-veteran canon of construction, the court below has created a separate class of citizens, military veterans, who must accept the dictates of the federal bureaucracy without recourse. This not only strips veterans of meaningful review, but creates conflicts with other Circuits. This Court's review is warranted to settle this important point of law and to resolve the conflict between the Federal Circuit and other Circuit Courts of Appeal.

STATEMENT

Since 2002, the VA has refused to grant the presumption of exposure to "Blue Water Navy" veterans who served in bays, harbors and the territorial seas of the Republic of Vietnam.[1]

[1] Previously the crews of ships operating within the Vietnam Service Medal demarcation area, approximately 100 nautical miles from shore, were granted the presumption.

In a 2-1 decision in *Haas v. Peake*, 525F.3d 1168 (Fed. Cir. 2008) the court below applied *Chevron*[2] deference to the VA's decision to deny the presumption of exposure to those who served off the coastline. On rehearing, the *Haas* Court noted that they did not apply the pro-veteran canon of construction required by *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct.1197 (2011). *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir 2008). Additionally, *Haas* only addressed areas off the coast and did not include the bays and harbors of the Republic of Vietnam.

In *Gray v. McDonald*, 27 Vet.App. 313 (2015), the Court of Appeals for Veterans Claims distinguished *Haas* by noting that the veteran served in Da Nang Harbor, while Commander Haas did not enter any harbor. The *Gray* court found that since the bays and harbors were outside the scope of *Haas*, they were free to review the VA policy. Noting that the rivers, which are awarded the presumption of exposure under the VA policy, discharge into the bays and harbors, the *Gray* court confirmed that river water would mix with the saltwater brought in via tidal surge from the South China Sea. As the rivers were heavily sprayed with Agent Orange their discharge "plume" would carry the herbicide/petroleum mix for some distance into the harbors, bays and the South China Sea.

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[2] The *Chevron* Court found that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

The *Gray* court determined that the exclusion of Da Nang Harbor from the "inland waterways" category did not comply with the intent of the underlying statute and regulation. *Gray*, 27 Vet. App. at 324-26. The Veterans Court went on to explain that the intent of the statute and regulation was "providing compensation to veterans based on the likelihood of [their] exposure to herbicides." *Id.* at 322.

The *Gray* Court declined to rewrite the regulation but invited the VA to:

> . . . reevaluate its definition of inland waterways---particularly as it applies to Da Nang Harbor---and exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure.

Id. at 327. The Secretary did not appeal *Gray* and the decision became final.

Instead of complying with the mandate of the *Gray* court, the Secretary "doubled down" on his irrational policy and on February 6, 2016 issued a change to his M21-1 Manual which continued to use depth and ease of entry, rather than the probability of exposure, as the criteria for inclusion in their definition of "inland waterways." The new regulation actually tightens the definition, removing "Qui Nhon Bay Harbor" and "Ganh Rai Bay" from the inland waters list. No reason was provided.

Petitioner filed a timely petition for judicial review under 38 U.S.C. § 502. The court below dismissed the

petition along with the companion case of *Gray v. Secretary of Veterans Affairs*, in a 2-1 decision, over a strong dissent by Judge Dyk. Appendix 15a-28a. The court below reasoned that the M21-1 Manual was an interpretive rather than a substantive regulation and did not meet the threshold criteria of 38 U.S.C. § 502. This criteria required that the regulation be issued pursuant to the rulemaking provisions of 5 U.S.C. § 553 or 5 U.S.C. § 552(a)(1). Instead the court below found that the regulation was issued under 5 U.S.C. § 552(a)(2). Appendix 11a.

A petition for reconsideration *en banc* was denied 7-3.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant *Certiorari* to Resolve an Important Point of Law and a Conflict Between Circuits Concerning Judicial Review of an Interpretative VA Regulation Under the Administrative Procedures Act and Whether It Should Be Foreclosed Under 38 U.S.C. § 502 When the Veterans Judicial Reform Act Provides the Sole Avenue for Review of the Secretary's Decisions.

A. The Action of the Court Below Effectively Denies Judicial Review of the Secretary's Decisions.

Barred from review in the federal district court by the Veterans Judicial Reform Act and *Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. v. McDonald*, 830 F.3d 570 (D.C.

Cir. 2016), veterans are left powerless to challenge irrational, arbitrary and capricious actions by the VA without wading through the cumbersome and elongated appeals system.

The actions of the court below go further than the divesture of 90,000 Blue Water Navy veterans from judicial review under the Administrative Procedures Act, and may even survive the current controversy.[3] They allow the Secretary of Veterans Affairs to bypass judicial review in all cases involving benefits by merely issuing regulatory changes via their M21-1 Manual. This gives rise to an important point of law that can only be settled by this Court. Since APA review of the actions of the Secretary of Veterans Affairs originate in the court below, this Court represents the only supervisory body on matters dealing with 38 U.S.C. § 502 actions.

Chief Justice John Marshall's historic opinion in *Marbury v. Madison*, 5 U.S. (1 Cr.) 137 (1803) addressed a fundamental question of remedies as follows:

> If [a party] has a right, and that right has been violated, do the laws of his country afford him a remedy?
>
> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties of government is to afford that protection.

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[3] Congress is considering but has not adopted a bill to extend the presumptions of exposure. Similar bills have been filed, without success, in the previous three Congress'.

5 U.S. (1 Cr.) at 162-63.

The court below conceded that the impact of the VA action was both real and far reaching. Despite this finding, they declined to recognize a remedy to challenge that action. *Gray*, *supra.*, 875 F.3d at 1107-08. Appendix 10a.

Here the court below has carved a loophole in the judicial review provisions of the Administrative Procedures Act that allows the agency to promulgate rules that are binding on agency employees without the possibility of judicial review. This represents an important point of law within the scope of Rule 10(c) that can only be addressed and should be addressed by this Court.

Without judicial review under the Administrative Procedures Act, a court will not have jurisdiction over the Secretary's M21-1 regulations until an appeal is ripe for review. The court below noted that, in the instant case, the deteriorating health needs of the veterans made resolution critical. *Gray*, 875 F.3d at 1109. Appendix 13a. They also conceded that these veterans are now forced to undergo the years-long process for individual applications and rulemaking petitions. *Id.*

Not only the Blue Water Navy veterans, but millions of other veterans are having their medical and compensation benefits stymied by agency use of interpretive manuals to promulgate regulations. Although not binding on the Board of Veterans Appeals, *Id.* at 1108, Appendix 11a. there is no evidence to show the Board is willing to ignore interpretive manuals such as the M-21-1 Manual. At a minimum, these manuals are

considered persuasive authority. In addition, the M21-1 Manual is binding on Veterans Benefits Administration employees.

This Court has repeatedly ruled that the APA creates a presumption favoring judicial review of administrative action," *Sackett v. E.P.A.*, 588 U.S. 120, 128-29, 132 S. Ct. 1367, 1373 (2012). This presumption can only be overcome by "specific language or specific legislative history that is a reliable indicator of congressional intent," or a specific congressional intent to preclude judicial review that is "'fairly discernible' in the detail of the legislative scheme." *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 673, 106 S. Ct. 2133, 2137 (1986).

It is well settled that the APA's "generous review provisions" must be given a "hospitable" interpretation. *Shaughnessy v. Pedreiro*, 349 U.S. 48, 51, 75 S.Ct. 591, 594 (1955). While the preclusion of judicial review may be inferred from the statutory purpose, this can only be done upon a showing of "'clear and convincing evidence' of a contrary legislative intent." *Barlow v. Collins* 397 U.S. 159, 167, 90 S.Ct. 832, 838 (1970). No such clear and convincing evidence was presented to the court below and none was cited in the opinion.

What the court below has done is recognize an agency created loophole for a class of citizens, in this case veterans, that decisively pokes holes in their Congressionally mandated judicial review safety net. Contrary to *Marbury* the veterans are left without a real remedy to resolve the arbitrary and capricious actions of the Secretary.

Petitioners pray that this Court will grant certiorari. This issue implicates an important point of law that uniquely affects the nation's 21 million veterans. Accordingly it is obviously within the scope of Rule 10 (c) that must be settled by this Court.

B. The Court Below Erred in Finding That the Secretary's Regulation Did Not Come Within the Scope of 38 U.S.C. § 502.

The gravamen of the holding in the court below was that they lacked jurisdiction because the regulation in question was promulgated via the interpretive M21-1 Manual rather than through the substantive notice and comment procedures of 5 U.S.C. § 553. *Gray*, 875 F.3d at 1111. Appendix 18a. The Court further found that the M21-1 Manual was an administrative staff manual that fell under the provisions of 5 U.S.C. § 552(a)(2) for which there was no jurisdiction.[4] *Id* at 1108. Appendix 11a.

While the case below was pending, a separate panel of the court below decided *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017)("*DAV*"), which also held that the court had no jurisdiction to review regulations promulgated by the Secretary via the M21-1 Manual.

In his dissent Judge Dyk wisely analyzed the *DAV* decision and properly concluded that it was wrongly decided. Like the case below, *DAV* held that because the M21-1 Manual is an interpretive rather than a substantive regulation, it did not trigger jurisdiction

4 38 U.S.C. § 502 grants jurisdiction for rulemaking brought under 5 U.S.C. § 553 and 5 U.S.C. § 552(a).

under 38 U.S.C. § 502. The court below decided that DAV compelled the same result in the instant case. *Gray*, 875 F.3d at 1108. Appendix 11a.

To a large extent, the jurisdictional question turns on how to classify the VA's Manual under 5 U.S.C. § 552(a)(1) and/or 5 U.S.C. § 552(a)(2). The latter provision provides in pertinent part:

> Each agency, in accordance with published rules, shall make available for public inspection in an electronic format—
> . . . .
> (B) those statements of policy and interpretations which have been adopted by the agency and are not published in the Federal Register; [and] (C) administrative staff manuals and instructions to staff that affect a member of the public;

As they did in *DAV* decision the court below held that the M21-1 Manual was an administrative staff manual. Judge Dyk correctly pointed out that this holding, as with the holding in *DAV*, was incorrect because it conflicted with the precedent of other Circuits and the previous precedent of the Federal Circuit.

In contrast to the majority opinion, the veterans and Judge Dyk argued that the Manual fell within the scope of 5 U.S.C. § 552(a)(1)(D) as "statements of general policy or interpretations of general applicability formulated and adopted by the agency." *Gray*, 875 F.3d at 1111. Appendix 18a. In his excellent analysis, Judge Dyk notes that the majority opinion and the reasoning of *DAV* were erroneous and established a "substantial

and unnecessary burden on individual veterans, requiring that they undergo protracted agency adjudication in order to obtain pre-enforcement judicial review of a purely legal question that is already ripe for our review." Gray, 875 F.3d at 1110 (Dyk, J dissenting). Appendix 16a.

The M21-1Manual is binding on Veterans Benefits Authority personnel. Although not strictly binding on the Board of Veterans Appeals, it constitutes strong persuasive authority and is often relied upon or cited by the Board. *Morton v. West*, 13 Vet. App. 205 (1999) ([Board of Veterans' Appeals (Board or BVA)] cannot ignore provisions of the Manual M21–1).

The propriety of this type of interpretive regulation has historically been considered reviewable by other Circuits, even if not subject to the notice and comment requirements of 5 U.S.C. § 553. Judge Dyk's dissent illustrated this trend when he referred to *Appalachian Power Co. v. Environmental Protection Agency*, 208 F.3d 1015, 1020-23 (D.C. Cir. 2000) which dealt with review of EPA guidance issued, without notice and comment, under the Clean Air Act. Other EPA regulations as well as the interpretive guidance of other regulations have been found to be reviewable. *Nat. Res. Def. Council v. Envtl. Prot. Agency*, 643 F.3d 311, 320 (D.C. Cir. 2011), *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 163-65 (D.C. Cir. 1997); *W. Coal Traffic League v. United States*, 719 F.2d 772, 780 (5th Cir. 1983) (en banc), *Linoz v. Heckler*, 800 F.2d 871, 878 n.11 (9th Cir. 1986).

Within the Federal Circuit, pre-*DAV* jurisprudence also allowed judicial review of interpretive

manuals and even a general counsel's opinion. *Snyder v. Secretary of Veterans Affairs*, 858 F.3d 1410, 1413 (Fed. Cir. 2017). The same holds true for a letter addressing the procedures for benefit awards, because, as in this case, it affected substantive as well as procedural rights. Military Order of the Purple Heart supra., 580 F.3d at 1296 (Fed. Cir. 2009). *See, also*, *Animal Legal Def. Fund v. Quigg*, 932 F.2d 920, 927 (Fed. Cir. 1991). *Gray*, 875 F.3d at 1115. (Dyk, J dissenting). Appendix 26a.

Here the Manual is more than a procedural handbook, it has a clear and potentially devastating impact upon the rights of veterans to obtain benefits during the early days of the disability. Delays in service connection leads to delays in medical treatment which is often fatal. Not only is this Court's intervention necessary to resolve the conflict between Circuits, it also represents and important question of the law which should be adjudicated by this Court. Settling this question could save the lives of countless veterans.

In another another agency, this regulation would have been published in the Federal Register. The regulation is a statement of the general course and method by which its functions are channeled and determined, constitutes a rule of procedure and is an interpretation of general applicability formulated and adopted by the agency. The Manual is also a policy statement that "explains how the agency will enforce a statute or regulation—in other words, how it will exercise its broad enforcement discretion or permit indiscretion under some extant statute or rule." *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 252 (D.C.Cir. 2014). It serves to "appris[e] the regulated community of the agency's intentions as well as informing the exercise

of discretion by agents and officers in the field." *Cmty. Nutrition Inst. v. Young*, 818 F.2d 943, 949 (D.C. Cir.1987); *Ass'n of Flight Attendants CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). Thus it should be subject to review under the APA.

As Judge Dyk's dissent pointed out, the language of 38 U.S.C. § 502 did not require any restrictions on judicial review of VA action. *Gray*, 875 F.3d at 1112. Appendix 19a. The dissent reiterated the "well-settled presumption that agency actions are reviewable," unless Congress clearly precludes such review. *Gray*, 875 at 1112. Appendix 19a. As discussed *supra*., this Court has concurred in that view.

Accordingly, the majority and better view is that the Federal Circuit has jurisdiction under 38 U.S.C. § 502 to review the M21-1 Manual in the instant and similar cases. Judge Dyk's analysis is the correct one and petitioner Blue Water Navy Vietnam Veterans Association prays that this Court resolve the Circuit conflict and this important point of law by granting *certiorari*.

II. The Decision in the Court Below Creates a Conflict with the Court of Appeals for the District of Columbia Circuit Case of *Blue Water Navy Vietnam Veterans Association, Inc. and Military-Veterans Advocacy, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016)

In *Blue Water*, the Secretary argued successfully that the Veteran's Judicial Reform Act vests Administrative Procedures Act jurisdiction over the Secretary's actions solely in the Court of Appeals for the

Federal Circuit. *Blue Water Navy Vietnam Veterans Ass'n, supra*, 830 F.3d at 577.

The Court of Appeals for the District of Columbia reasoned as follows:

> Appellants [BWNVVA] say that this direct-review exception extends only to VA regulations and not to "interpretations" like the agency actions they challenge. But Federal Circuit case law makes clear that an agency policy need not be promulgated as a regulation, via notice and comment, to be reviewable under section 502. To the contrary, the Federal Circuit has explained that section 502 permits it to directly review a wide range of "rules promulgated by the Department of Veteran[s] Affairs, including substantive rules of general applicability, statements of general policy and interpretations of general applicability." *LeFevre*, 66 F.3d [1191]at 1196 [Fed. Cir. 1995]; *see also Military Order of the Purple Heart of the USA v. Sec'y of Veterans Affairs*, 580 F.3d 1293, 1296 (Fed.Cir.2009) (holding that the VA's procedural change, adopted in a letter and not via notice-and-comment rulemaking, was a "rule" subject to review under section 502).

Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald, 830 F.3d at 577.

In *Blue Water*, the Secretary argued as follows:

> [V]eterans may bring an APA action challenging the policy directly in the Federal Circuit. Given

> these alternative avenues for judicial review, even if the VJRA did not expressly preclude review of Blue Water's claims, Blue Water would have an adequate remedy in a court that would render a cause of action under the APA unavailable.

Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald, Brief for Defendant-Appellee., 2015 WL 7777567 (C.A.D.C.), 10-11.

The Secretary went on to argue:

> The policy that Blue Water purports to challenge constitutes an interpretation[] of general applicability.

Id. at 22.

In an implicit recognition of *Blue Water*, the court below did not invite the veterans to return to the federal district court, or transfer the matter to the federal district court. Instead they merely confirmed the absence of a remedy for the veterans without explaining why the presumption of judicial review did not apply. This is a "Catch 22" with a vengeance.

The question remains whether the VA's exclusion policy via interpretative regulations are interpretations of general applicability within the scope of 5 U.S.C. § 552(a)(1). The District of Columbia Circuit says yes, the Federal Circuit says no.

This matter cries out for *certiorari* by this Court, not only to resolve the conflict between Circuits envisioned by Rule 10(a), but to resolve the conflicts

between the Secretary's own position concerning whether integrative manuals such as the M21-1 are interpretations of general applicability reviewable under 5 U.S.C. § 552(a)(1).

CONCLUSION

For the reasons delineated herein, petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Federal Circuit.

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