No. 17-1693

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

REPLY BRIEF

JOHN B. WELLS
Counsel of Record

769 Robert Blvd.
Suite 201D
Slidell, LA 70458
985-641-1855

CURRY & TAYLOR ♦ WASH D.C. ♦ (202) 350-9073

TABLE OF CONTENTS

TABLE OF AUTHORITIES

STATUTES

In the Supreme Court of the United States

NO. 17-1693

BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, INC.
Petitioner

v.

ROBERT WILKIE SECRETARY OF VETERANS AFFAIRS
Respondents

On Petition for Certiorari To The United States Court of Appeals for the Federal Circuit

Reply Brief for Petitioner

Two courts of appeals are divided over an important and recurring question of federal law: whether judicial review should be denied under 38 U.S.C. § 502 when the Veterans Judicial Reform Act provides the sole avenue for review of the Secretary's decisions promulgated in their M21-1 adjudication manual.

In response, the government does not dispute the issue's obvious importance, and it never questions that this case is an ideal vehicle for resolving the issue.

Nor can they overcome the dissent of Judge Dyk in the court below. They do not even attempt to contest the fact that the Federal Circuit's decision effectively deprives veterans of judicial review of agency decisions that directly affect their access to benefits.

Although they try to challenge the irreconcilable conflict between the District of Columbia and Federal Circuits, their analysis is without merit. This actually is the symptom of a larger split. *See, Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977), *accord D & W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986).

Accordingly, certiorari should be granted.

ARGUMENT

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.

It would be absurd to accept the government's implication that the Congress intended to strip judicial review under the Administrative Procedures Act

(APA) from veterans. As explained in the petition that is the effect of the decision in the court below.

Nowhere in their brief does the government address the well settled principle that there is a presumption in favor of juridical review recognized by *Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 673, 106 S. Ct. 2133, 2137 (1986), *Barlow v. Collins* 397 U.S. 159, 167, 90 S.Ct. 832, 838 (1970) and other precedential opinions of this court. Instead they argue that since the court below found that they did not have jurisdiction to review the M21-1 Manual, the veterans are simply out of luck.

If the court below lacks jurisdiction within the scope of veterans law, the APA provides no safety net to veterans. The government has certainly acted to shred that safety net leaving veterans no remedy for pre-enforcement interpretive regulations that are arbitrary and capricious.

The court below held that interpretive regulations must be decided under the Veteran's Judicial Reform Act on a case by case basis. This unnecessarily prolongs relief for the veteran and continues to clog a system that is already hopelessly backlogged. This is in contravention of the Federal Circuit's recent recognition of the difficulty in overcoming this backlog.

> In total the appeals process takes over five and a half years on average from the time a notice of disagreement is filed until the Board issues a decision, which often sets the stage for more proceedings on remand. In short, even when

> veterans win on appeal, they have lost years of their lives living in constant uncertainty, possibly in need of daily necessities such as food and shelter, deprived of the very funds to which they are later found to have been entitled.
>
> The delays faced by veterans affect not just them, but their families and friends as well. Even if a veteran is fully entitled to benefits, should he die during the pendency of the resolution (or appeal) of his disability benefits claim, the veteran and his family lose the right to the deserved benefits unless the veteran has a spouse, minor children, or dependent parents. Adult children and extended families, who have provided years of financial or other support to the veteran because he was not receiving his disability benefits, cannot recover the benefits the veteran was entitled to during that time. In the cases before us today, three of the veterans died while their cases were pending before the VA or this court.

Martin v. O'Rourke, 891 F.3d 1338, 1350 (Fed. Cir. 2018) (Moore, J concurring). (emphasis in original) (citations omitted). Judge Moore's analysis underscores what Speaker Paul Ryan has called the unofficial motto of the VA: "Delay, Deny Until They Die!" https://www.speaker.gov/general/delay-deny-until-you-die.

While individual cases affecting veterans are coming through the appellate pipeline, these cases have been pending for years. Veterans now complaining of injuries due to toxic exposure has the better part of a

decade of waiting ahead of them. This type of delay is unacceptable in a supposedly non-adversarial pro-veteran adjudication system. Intervention by this Court is necessary to help streamline the process by recognizing pre-enforcement judicial review of arbitrary and capricious rules.

Nor is the request for rule making an appropriate solution. This avenue is illusionary leaving the veteran at the mercy of the VA bureaucracy and delay.[1]

Allowing pre-enforcement judicial review will also help to relieve the unacceptable claims and appeals backlog. Pre-enforcement review will speed resolution of disputed issues for thousands of pending cases working their way through the appellate morass.

The government tries to distinguish the jurisprudence discussing the presumption in favor of judicial review in APA cases from 38 U.S.C. § 502. In their brief, the government argues:

> Those courts' analyses of reviewability under the APA or other statutory review mechanisms do not bear on the scope of Section 502, under which the availability of preenforcement judicial review depends on whether the challenged

[1] The request for rulemaking discussed at oral argument in the court below was filed on October 2, 2016. Despite meetings with former Secretaries McDonald and Shulkin the VA has not responded to the request. http://www.militaryveteransadvocacy.org/sites/default/files/Request%20for%20rule%20making%20Nha%20Trang%20and%20Da%20Nang.916._0.pdf

> action falls within a particular provision of FOIA.

Secretary's brief at 26. The Secretary's position is without merit.

As a threshold matter, the Freedom of Information Act (FOIA) is an integral part of the APA. Additionally, the pertinent provisions have been incorporated by reference into 38 U.S.C. § 502. Moreover, § 502 requires that the review of the Secretary's actions be "in accordance with chapter 7 of title 5," which is the judicial review provisions of the APA. The court below has ruled that:

> We review petitions under 38 U.S.C. § 502 in accordance with the standard set forth in the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701–706. *See Nyeholt v. Sec'y of Veterans Affairs*, 298 F.3d 1350, 1355 (Fed.Cir.2002) (citing *Disabled Am. Veterans*, 234 F.3d at 691). As such, we must "hold unlawful and set aside agency action" that we find to be arbitrary, capricious, an abuse of discretion, or otherwise contrary to law. 5 U.S.C. § 706(2);

Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs, 345 F.3d 1334, 1339 (Fed. Cir. 2003). In other words, the jurisprudence cited in the petition, showing an overwhelming presumption in favor of judicial review, is most germane.

To find otherwise does not make sense given the history of Congressional legislation and the jurisprudence of this Court making the process more

rather than less veteran friendly. It is hard to believe that Congress would have narrowed the scope of judicial review for veterans. That would run contrary to decades of pro-veteran legislation and of course the pro-veteran canon of construction.

This case is the best vehicle for resolving this important question. It affects a large segment of the population who have been stripped of their right to judicial review. The instant case gives the Court the opportunity to correct his injustice and provide an appropriate remedy.

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

In their opposition, the government asserts disagreement with Judge Dyk's dissent without providing an adequate analysis. They have framed the question to whether the M21-1 Manual has general applicability. Secretary brief at 19-20. They baldly assert that the M21-1 Manual did not have general applicability " because the Board may decline to apply it in any or all cases." Secretary's brief at 21.

As explained in the petition, the Board can and often does rely on the M21-1 Manual in formulating their decision. It is certainly relevant and persuasive authority in every Board case.

More importantly, the M21-1 Manual is binding on virtually every claim for benefits filed at the VA. Adjudicators making the initial benefit determination must follow this manual. *Carter v. Cleland*, 643 F.2d 1,

5 (D.C. Cir. 1980). *See, also,* Pet. App. 28a. Judge Dyk noted that 96% of the cases decided by VA employees were bound by the manual. App. 23a.

It is well settled that "the starting point in every case involving construction of a statute is the language itself." *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756, 95 S.Ct. 1917, 1935, 44 L.Ed.2d 539 (1975) (Powell, J., concurring). See, also *Rubin v. United States*, 449 U.S. 424, 101 S.Ct. 698, 66 L.Ed.2d 633 (1981). The accepted definition of "general" can be summarized in pertinent part by the *Merriam-Webster Dictionary*:

> 1: involving, applicable to, or affecting the whole
> 2: involving, relating to, or applicable to every member of a class, kind, or group
> 3: not confined by specialization or careful limitation
> 4: belonging to the common nature of a group of like individuals
> 5: applicable to or characteristic of the majority of individuals involved

https://www.merriam-webster.com/dictionary/general

With 96% of the cases being decided, at least initially, in accordance with the M-21 Manual, the plain meaning of the word "general" encompasses the manual.

The inquiry does not end here, however. In addition to the "plain meaning" rule, another canon of statutory construction is relevant. While 5 U.S.C. § 552 is not normally considered a veteran's statute, it was

incorporated into veteran's law by 38 U.S.C. § 502 and should be construed pursuant to the pro-claimant canon of construction.

The pro-claimant or pro-veteran canon has been repeatedly recognized as an accepted canon of statutory construction. This Court unanimously re-affirmed "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). *See, also,* Pet. At 3. *See, also, Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id.* at 1316.

Since the days of World War II, the United States, has properly recognized that "legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Military veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). The United States adopted the "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). This led to the pro-claimant canon which requires interpretative

ambiguities to be resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Accordingly, even if there was some ambiguity to the word "general," that ambiguity must be resolved in favor of the veteran. This is especially important given the government's reliance upon Judge Taranto's concurrence in the court below that § 552(a)(1) and § 552(a)(2) are not mutually exclusive. See Pet. App. 32a-33a (Taranto, J., concurring in the denial of rehearing en banc) Assuming Judge Taranto is correct, then there is absolutely no reason why the M21-1 Manual could not be found to be within the scope of both subsections. While the government has conceded that "the criteria that Section 552(a)(1) and (2) establish overlap." they have not explained why the manual does not fall squarely within that overlap.

The shifting patterns of the government and the court below and the division within that court make this case a suitable vehicle for resolving these important points of law. As indicated in the petition at 12 and Judge Dyk's dissent, Pet. App at 19a, the confusion among the Circuits is apparent and this Court should step in to clarify any misconceptions.

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)

The government denies the conflict between the court below and the D. C. Circuit in *Blue Water Navy Vietnam Veterans Association, Inc. v. McDonald*, 830 F.3d 570 (D.C. Cir. 2016). They claim that the DC Circuit held generically that pre-enforcement review of a VA rule is available only via the Federal Circuit and not via the district courts. The government went on to argue that:

> The D.C. Circuit did not opine, however, on whether any *particular* VA publication would be reviewable under Section 502.

Secretary's brief at 26-27. The Secretary's position is without merit. The *Blue Water* holding was much broader. The DC Circuit specifically held that the veterans has a remedy in the Federal Circuit. The court noted:

> [A]n exception to section 511(a)'s bar permits litigants to petition for direct review in the Federal Circuit—and only the Federal Circuit—of VA regulations and certain other generally applicable actions pursuant to 38 U.S.C. § 502. *See* 38 U.S.C. § 511(b)(1). Appellants 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 at 1196; *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).

Blue Water, 830 F.3d at 577. In contrast to the government's argument, the DC Circuit specifically found that they did not have to grant relief because a remedy actually existed in the Federal Circuit. The DC Circuit obviously believed that such a remedy existed and that the veterans objections fell within the "wide range of rules promulgated by the Department of Veterans Affairs."

Unfortunately, the court below limited their jurisdiction by finding that the M21-1 Manual was within the scope of § 552(a)(2) but not § 552(a)(1). Had the DC Circuit realized that the Federal Circuit would deny the veterans a remedy, their result might have been different.

While the published opinion in *Blue Water*, did not detail the specifics of the veterans Complaint, the underlying District Court decision was more precise.

The court noted that the case turned on "[t]he denial of the presumption [which] has been reiterated in a number of VA decisions, notices, and manuals, all of which Plaintiffs purport to challenge. *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, 82 F. Supp. 3d 443, 446 (D.D.C. 2015), *aff'd*, 830 F.3d 570 (D.C. Cir. 2016).[2] Contrary to the Secretary's contention in his brief at 27, the DC Circuit did have "occasion to decide whether any of the subsidiary VA documents on which the plaintiffs' allegations were predicated would fall within Section 502." They held that all of them did.

Additionally, the government asserts that the petition was in error when it stated the Secretary has taken inconsistent positions on this issue in other litigation. It is the government that is mistaken. In fact, in *Blue Water*, *supra*., the Secretary argued that the M21-1 Manual provisions at issue here would be reviewable under Section 502. *Blue Water Navy Vietnam Veterans Ass'n*, *supra*, 830 F.3d at 577. As explained in the petition, the Secretary argued that the policy delineated by the M21-1 Manual was an interpretation of general applicability. *Blue Water Navy Vietnam Veterans Ass'n, Inc. v. McDonald*, Brief for Defendant-Appellee., 2015 WL 7777567 (C.A.D.C.), at 22. The Secretary had specifically argued that a remedy to challenge the policy existed in the Federal Circuit. *Id*, at 10-11.

This case provides the perfect vehicle to resolve these issues of critical importance to veterans. As well

[2] The Complaint in the District Court case specifically referred to the M21-1 Manual in ¶s 5, 24, 25, 40, 53, 117, 119-127, 138, 150 and the prayer for relief. *Blue Water* 2013cv01187 doc. 1.

as exploring the limits of judicial review under veterans law, it provides the Court an opportunity to resolve the split between the Circuits. The conflict between the Circuits effectively places veterans in the twilight zone of judicial review. It is up to this Court to clarify the rights of the veterans to skip the bloated backlog system by seeking pre-enforcement judicial review of the Secretary's interpretive regulations.

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.

Respectfully Submitted,

John B. Wells
Counsel of Record
LAW OFFICE OF JOHN B. WELLS
769 ROBERT BLVD., SUITE 201D
SLIDELL, LA 70458
985-641-1855
JohnLawEsq@msn.com