

No. 25-

IN THE
Supreme Court of the United States

HUGH CAMPBELL MCKINNEY,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

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 PRESENTED

The Administrative Procedure Act (“APA”) provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule.” 5 U.S.C. § 553(e). Yet, that right is illusory: a citizen’s petition can intentionally languish at an agency for many years, only to be denied for reasons that utterly strain credulity and indeed even fail to address the central matter raised by the petitioner. And, in practice, the agency’s denial—no matter how deficient—is essentially unreviewable. Under 5 U.S.C. § 706(2)(A), a reviewing court is supposed to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” But the extremely deferential standard of review under *Massachusetts v. EPA*, 549 U.S. 497, 527-28 (2007) (quoting *Nat’l Customs Brokers & Forwarders Ass’n of Am., Inc. v. United States*, 883 F.2d 93, 96 (D.C. Cir. 1989), a 5-4 decision, precludes any meaningful inquiry into the denial.

The question presented is:

Whether the Court should overrule *Massachusetts v. EPA* with respect to the “extremely limited” and “highly deferential” standard of review applied to the denial of a rulemaking petition.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner is Hugh Campbell McKinney. Respondent is the Secretary of Veterans Affairs. No party is a corporation.

STATEMENT OF RELATED CASES

Pursuant to SCR 14.1(b)(iii), all proceedings in the lower courts directly related to this case are:

- *McKinney v. Sec'y of Veterans Affairs*, No. 2023-1930 (Fed. Cir.) (judgment dated Jan. 14, 2026).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Hugh Campbell McKinney (“McKinney”) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit entered January 14, 2026 denying McKinney’s Petition for Review of the denial of his rulemaking petition submitted to the Department of Veterans Affairs (“VA”).

OPINIONS BELOW

The decision of the court of appeals (App. 1a-23a) is published at 164 F.4th 884 (Fed. Cir. 2026). The decision of the Department of Veterans Affairs to deny McKinney’s petition for rulemaking is published at 85 Fed. Reg. 50973 (Aug. 19, 2020), App. 59a-66a, and 88 Fed. Reg. 15907 (Mar. 15, 2023), App. 50a-55a.

JURISDICTION

The court of appeals issued its opinion and judgment on January 14, 2026 (App. 1a-23a). This Court’s jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Pertinent parts of 5 U.S.C. § 553 and 5 U.S.C. § 706 are as follows:

5 U.S.C. § 553. Rule making

* * * * *

(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. § 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

* * * * *

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

* * * * *

**INTRODUCTION AND
STATEMENT OF THE CASE**

This case arises from eight (8) years of bureaucratic stonewalling, followed by a rulemaking petition denial that the Federal Circuit was effectively powerless to overturn. Not because the denial was well-reasoned. Not because it fairly engaged with the petitioner’s arguments or evidence. But because *Massachusetts v. EPA*, 549 U.S. 497 (2007), a 5-4 decision, instructs courts that review of a petition denial is “extremely limited” and “highly deferential”—a standard that, in practice, is virtually indistinguishable from no review at all. *See, e.g., Verizon & AT&T, Inc. v. FCC*, 770 F.3d 961, 966 (D.C. Cir. 2014) (quoting *Cellnet Commc’n, Inc. v. FCC*, 965 F.2d 1106, 1111 (D.C. Cir. 1992)) (“review of an agency’s denial of a

rulemaking ‘is evaluated with a deference so broad as to make the process akin to non-reviewability.’”).

Petitioner Hugh Campbell McKinney is a retired Army First Sergeant. While leading a mounted patrol in Kirkuk, Iraq, an improvised explosive device detonated close to his Humvee. The blast caused a traumatic brain injury. Twenty-one (21) months later, McKinney suffered a debilitating stroke. Four physicians—from both VA and private practice—agreed: the traumatic brain injury resulted in McKinney’s stroke.

Service members are covered by a federal, traumatic injury insurance program akin to commercial insurance policies that civilians often carry (but which would not cover those whose careers involve the hazards of duty in the uniformed services). The program, known as Traumatic Servicemembers’ Group Life Insurance (“TSGLI”), is overseen by the VA, with authority delegated to the uniformed services to adjudicate claims from their members. *See* 38 C.F.R. § 9.20(g) & (j). McKinney submitted a TSGLI claim, but it was denied because his stroke was considered a “physical illness or disease” rather than a qualifying traumatic injury.

At least beginning in 2010 with publication of a seminal, peer-reviewed research paper by thought leaders Drs. Brent Masel and Douglass DeWitt, a traumatic brain injury has been understood as “the beginning of a chronic disease process, rather than an event or final outcome.” Brent E. Masel & Douglas S. DeWitt, *Traumatic Brain Injury: A Disease Process, Not an Event*, *Journal of Neurotrauma* 27: 1529-1540 (Aug. 2010). The injury starts an “ongoing, perhaps lifelong, process that impacts

multiple organ systems.” *Id.* It is associated with increased incidences of seizures, sleep disorders, neurodegenerative diseases, neuroendocrine dysregulation, and psychiatric diseases, as well as non-neurological disorders . . . that may arise and/or persist for months to years post-injury.” *Id.* As of May 2021 (when Dr. Masel submitted rulemaking comments), the research paper had been cited by others, by one measure, over 800 times, including by the National Academy of Sciences (in 2019) and the Centers for Disease Control and Prevention (in 2021). By the end of 2022 (i.e., prior to final denial of the rulemaking petition), the research paper had been cited over 1,000 times.

The traumatic injury insurance was signed into law in 2005, years before the Masel and DeWitt paper was published. VA issued its interim final rule in December 2005, 70 Fed. Reg. 75,940 (Dec. 22, 2005), and the rule was deemed “final” in 2007, 72 Fed. Reg. 10,362 (Mar. 8, 2007), also years before publication of that medical research. Nevertheless, the regulation, with tweaks over the nearly two decades of its existence, otherwise has largely remained static with respect to its primary standards. Yet, the medical science concerning traumatic brain injuries has made major strides in the intervening years since the regulation was born.

McKinney submitted a petition for rulemaking to VA in March 2015, seeking to highlight the leaps in medical understanding of traumatic brain injuries especially since *circa* 2010, i.e., that traumatic brain injuries indeed do operate according to a “disease process” with losses directly traceable to the initial injury. The petition sought to amend VA’s TSGLI regulation to account for the advances in traumatic brain injury medical science

that occurred after VA promulgated the standards set forth in its original regulation. But the petition clearly struck a nerve with VA, which undertook massive delay (the petition was submitted on March 16, 2015 and finally denied *eight years later* on March 15, 2023), accompanied seemingly by a cover up, in order to sidestep the thrust of the petition.

VA's final denial of McKinney's rulemaking petition is a textbook example of pretext, circular logic, and arbitrary and capricious agency action. The VA relied on stale expert consultations conducted while secretly withholding McKinney's petition from those experts, misrepresented McKinney's personal health history (which should have been irrelevant to consideration of a rulemaking petition) to make those experts more skeptical of the changes he proposed to VA's regulation, and ultimately issued a denial that never addressed the central "disease process" argument in the rulemaking petition.

The Federal Circuit recognized that the VA's "protracted delay" was "regrettable." (App. 11a). But the court denied the petition for review anyway. The reason invoked the deference required by *Massachusetts v. EPA*: "there is nothing in the record that warrants setting aside the VA's decision in light of the highly deferential and extremely limited review we have over the VA's denial of a proposed rulemaking petition." (App. 23a). The standard—not the merits—controlled the outcome.

Massachusetts v. EPA's "extremely limited" standard is doubly infirm. It rests on a theoretical foundation that has since crumbled—the Court explicitly grounded the standard in *Chevron* deference and the deference-to-

agencies theory that *Chevron* embodied. 549 U.S. at 527, citing *Chevron U.S.A. Inc. v. NRDC*, 467 U.S. 837, 842-845 (1984). That justification is no longer tenable. And independent of that weakness, the standard conflicts with the APA's text, which makes no distinction between agency action and inaction for purposes of the arbitrary-and-capricious test, as well as with this Court's longstanding *State Farm* requirement that agencies engage in "reasoned decisionmaking" subject to genuine judicial scrutiny. *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983). These errors have been compounded by the lower courts, which have read the "extremely limited" standard as a nearly categorical license to sustain petition denials. This Court should grant certiorari and overrule *Massachusetts v. EPA* on this point.

A. TSGLI Program and Regulatory Background

The TSGLI program was established by Congress in May 2005 and became effective December 1, 2005, to provide financial assistance to servicemembers who suffer severe traumatic injuries. See 38 U.S.C. § 1980A.¹ Congress designed TSGLI to fill a financial "gap" in benefits during the period immediately after a servicemember suffers a traumatic injury—the moment when the need for additional financial resources becomes most acute, before veterans' benefits kick in. TSGLI is modeled after commercial Accidental Death and Dismemberment (AD&D) insurance, but adapted to account for the unique hazards of military service. Payments range from \$25,000 to \$100,000 and have not changed since the program's

1. Pub. L. No. 109-13, 119 Stat. 257, 260 (2005), codified at 38 U.S.C. § 1980A.

inception about two decades ago. As of fiscal year 2023, approximately 2.1 million servicemembers were enrolled, and over \$1.1 billion in cumulative benefits has been paid since the program began.

By regulation, TSGLI covers servicemembers who experience (1) a “traumatic event” that results in (2) a “traumatic injury” directly causing (3) a qualifying “scheduled loss.” 38 C.F.R. § 9.20. A “traumatic event” means, *inter alia*, the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living body. *Id.* at § 9.20(b)(1). A “traumatic injury” is defined as “physical damage to a living body that is caused by a traumatic event,” with an express exclusion for “physical illness or disease.” *Id.* § 9.20(c)(1)-(2). Qualifying scheduled losses include loss of limbs, severe burns, traumatic brain injury, paralysis, and loss of the ability to perform activities of daily living. *Id.* at § 9.20(e); 38 C.F.R. § 9.21(c).

The exclusion of “physical illness or disease” from TSGLI coverage is subject to five narrow exceptions. Under the regulation, TSGLI *does* cover physical illness or disease caused by: (1) a pyogenic infection, (2) biological weapons, (3) chemical weapons, (4) radiological weapons, or (5) accidental ingestion of a contaminated substance. 38 C.F.R. § 9.20(c)(2)(ii). When the VA promulgated these five exceptions in its December 2005 interim final rule, it explained its rationale in terms that are central to this case: the VA covered physical illness or disease from these five hazards specifically “[b]ecause the process by which such hazards produce immediate harm may be characterized as a *disease process*.” 70 Fed. Reg. at

75,941-42 (emphasis added). The VA further explained that these five hazards are “unique hazards of military service” under which “physical damage resulting in a covered loss would generally occur immediately and require prompt medical treatment.” *Id.* The VA’s own regulatory language thus made the “disease process” concept the load-bearing justification for the five enumerated exceptions.

To be eligible for any TSGLI benefit, a servicemember must suffer a scheduled loss within *two (2) years* of the traumatic injury. 38 C.F.R. § 9.20(d)(4). The VA itself acknowledged in promulgating the regulation that “it is difficult to determine with any accuracy the time period within which loss due directly to the traumatic injury can be expected to occur.” 70 Fed. Reg. at 75,942. Accordingly, the regulation allows a scheduled loss to occur up to two (2) years after the traumatic event, even if the loss occurs after the servicemember has been separated from duty. The two-year window reflects the VA’s recognition that harm from a traumatic event does not always manifest immediately.

The TSGLI regulation’s architecture thus contains a foundational tension. On the one hand, it excludes “physical illness or disease” from coverage in general—premised on the notion that illness or disease involves an “internal infection or degenerative process” rather than external trauma. 70 Fed. Reg. at 75,941. On the other hand, it expressly covers five categories of physical illness or disease caused by unique hazards of military service, precisely because those hazards produce harm through a disease process. And it allows a two-year window for that harm to manifest. The central question McKinney’s rulemaking petition raised—and which the VA refused to

meaningfully answer—is why explosive ordnance causing a traumatic brain injury should be treated differently from those five enumerated hazards, when improvised explosive devices are equally a unique hazard of military service that produce immediate bodily harm through a disease process.

B. Petitioner’s Rulemaking Petition, the VA’s Eight-Year Delay, and the Denial That Never Engaged with the Petition’s Core Argument

McKinney sustained a traumatic brain injury from the concussive force of an IED blast on October 9, 2005, while serving in Iraq as a platoon sergeant. Twenty-one (21) months later, on July 21, 2007—within the two-year coverage window—he suffered a debilitating stroke at age 46. For more than sixty (60) days after the stroke, he was unable to perform basic activities of daily living independently. McKinney’s health had been robust before his deployment; four physicians—two from the VA and two from private practice—have all opined that the explosion of the improvised explosive device caused a traumatic brain injury that in turn caused the stroke. He had no standard risk factors that would independently explain the stroke. His TSGLI claim was denied nonetheless, because the Army classified his stroke as a “physical illness or disease” rather than a qualifying traumatic injury.

The medical science underpinning McKinney’s claim had been developing rapidly. In August 2010, Drs. Brent Masel and Douglas DeWitt published a landmark, peer-reviewed paper establishing that a traumatic brain injury is “the beginning of a chronic disease process, rather than an event or final outcome.” Brent E. Masel & Douglas S.

DeWitt, *Traumatic Brain Injury: A Disease Process, Not an Event*, *Journal of Neurotrauma* 27: 1529-1540 (Aug. 2010). The science was not obscure or contested; it was foundational.

On March 16, 2015, McKinney submitted a 26-page petition for rulemaking to the VA, supported by extensive citations to the medical literature. The petition's argument was straightforward and grounded directly in the VA's own regulatory language. It observed that the VA had already recognized five categories of unique military hazards that produce immediate harm through a "disease process"—and that improvised explosive devices operate in exactly the same way. Just as exposure to biological or chemical weapons produces immediate bodily harm that then follows a disease process, traumatic brain injuries caused by blasts produce immediate bodily harm that follows a chronic disease process, with downstream conditions—including stroke—that may manifest within the two-year coverage window the VA's own regulation already contemplates. The petition sought to amend 38 C.F.R. § 9.20 to add a sixth category of physical illness or disease caused by unique hazards of military service, i.e., explosive ordnance (and hence covered by TSGLI).

The petition's central concept was the term "disease process." McKinney used the term thirty-four (34) times across his 26-page petition. Every major argument in the petition turned on this concept: that traumatic brain injuries follow a disease process just as the five enumerated exceptions from the 2005-07 rulemaking do; that the VA's own rationale for the five exceptions applies with equal force to improvised explosive device-induced traumatic brain injuries; and that the VA's regulation

already recognized the two-year window within which that disease process can produce a qualifying scheduled loss. The petition quoted the VA's own 2005 interim final rule language—"the process by which such hazards produce immediate harm may be characterized as a disease process," 70 Fed. Reg. at 75,941—and argued that this phrase applied with equal logical force to explosive ordnance and traumatic brain injuries. The petition also proposed a specific regulatory text amendment and a definition of "explosive ordnance" for inclusion in the regulation.

What followed was an eight (8) year odyssey of delay, broken promises, and bad-faith consideration. The VA initially denied the petition within five (5) months without any substantive analysis, then rescinded that denial after McKinney sought review at the court of appeals. The VA promised rulemaking by 2017; it did not publish a proposed rule until August 2020. 85 Fed. Reg. 50,973 (App. 59a-66a). During those years, the VA secretly kept the petition under an internal "embargo"—a document in the administrative record stated plainly that "VA cannot provide a copy of the petition or its initial response to the petitioner as the information is embargoed and cannot be released outside of our office." The VA consulted outside medical experts in 2015-16 without providing them a copy of the petition or the medical literature cited therein. When it did consult those experts, it misrepresented McKinney's personal health history, describing him as fifty-two (52) years old with a history of malignant hypertension, obesity, and smoking—none of which was true. (He was 54 at the time, but 44 when he was injured in Iraq and 46 when he suffered a stroke, had no such conditions, and as a practicing Mormon did not smoke.) These misrepresentations were

used to elicit more skeptical expert reactions. The VA's expert consultations then went stale for over seven (7) years before the final denial.

After McKinney submitted extensive additional comments—and after Dr. Masel, the co-author of the seminal journal article about brain injuries following a disease process, himself submitted comments supporting the petition, confirming that a traumatic brain injury “from explosive ordnance follows a disease process” and that the same rationale justifying the five enumerated exceptions “justifies a sixth Enumerated Exception for physical illness or disease due to explosive ordnance”—the VA issued its final denial on March 15, 2023. 88 Fed. Reg. 15,907 (App. 50a-55a). The denial came 2,921 days after McKinney had filed his petition.

The most revealing feature of the VA's denial is what it did not say. McKinney's petition used the term “disease process” thirty-four (34) times. The VA's August 2020 proposed denial did not use the term “disease process” *at all*. Zero times. The VA's March 2023 final denial used the term exactly once—and only to acknowledge a comment submitted by Dr. Masel: “We received another comment from a licensed physician . . . [who] stated that [a traumatic brain injury (TBI)] from explosive ordnance follows a disease process.” 88 Fed. Reg. at 15,909 (App. 55a). The VA then declined to engage with that comment on the merits. In a 26-page petition the thrust of which turned on whether traumatic brain injuries follow a disease process in the same way as (1) a pyogenic infection, (2) biological weapons, (3) chemical weapons, (4) radiological weapons, or (5) accidental ingestion of a contaminated substance, the VA's denial across both the proposed and

final rules managed to engage with this central concept—the very language the VA itself had used to justify the five enumerated exceptions—a combined total of one (1), non-substantive time.

Instead, the VA's denial pivoted to arguments that were either beside the point or internally contradictory. It argued that “the word ‘disease’ does not appear in the [TSGLI] statute”—ignoring that the VA's own regulation expressly covers “physical illness or disease” caused by the five enumerated exceptions, using the word “disease” repeatedly. 38 C.F.R. § 9.20(c)(2)(ii); 85 Fed. Reg. at 50,983 (App. 64a). It argued that traumatic brain injury-induced illness “may not immediately manifest” and “may have a latency of months to years,” *id.*, ignoring that the VA's own regulation already contemplates scheduled losses occurring up to two (2) years after the traumatic event, and that VA's own internal research identified over a dozen traumatic brain injury-linked conditions that manifest within two (2) years, including stroke (which the VA's own cited study showed occurring on average 543 days after a traumatic brain injury, i.e., less than two (2) years). It argued the coverage would be inconsistent with TSGLI's model of commercial AD&D insurance, *id.* at 50,982-83, ignoring that the VA itself had modeled TSGLI to account for “the unique needs of military personnel” and had already departed from commercial AD&D by covering five categories of illness and disease from unique military hazards. And it conceded that “IEDs are a unique hazard of military service,” *id.* at 50,982 (App. 63a)—the precise predicate for adding explosive ordnance to the regulation—while inexplicably declining to follow that concession to its logical conclusion.

In sum, the VA conceded the factual premise of McKinney’s petition (improvised explosive devices are a unique military hazard), acknowledged that traumatic brain injury-linked conditions including stroke can occur within the two (2) year coverage window, and offered no coherent explanation for why explosive ordnance should be treated differently from the five (5) unique hazards already enumerated in its regulation. What it never did—across either the proposed or final denial—was engage with the core legal and medical argument that traumatic brain injuries follow a disease process in the same way that the five already-recognized hazards do. The word “disease process” says it all: the VA invoked it to justify the five (5) exceptions it created, then refused to apply it when confronted with a sixth (6th) hazard that operates the same way.

C. The VA’s Denial and Petitioner’s Arguments Below

McKinney sought review in the Federal Circuit under 38 U.S.C. § 502. He advanced three main arguments: (1) the VA’s eight-year delay, secrecy, misrepresentation of his health history to outside experts, and failure to conduct its promised actuarial assessment constituted bad faith; (2) the administrative record was incomplete and required supplementation before meaningful review could occur; and (3) the VA’s denial was arbitrary and capricious because it failed to engage with the “disease process” argument at the heart of the petition, contradicted the VA’s own prior rulemaking rationales, and rested on pretextual justifications. McKinney also contested—and now presents to this Court—the “extremely limited” and “highly deferential” standard of review that *Massachusetts v. EPA* imposes on review of rulemaking petition denials.

D. The Federal Circuit's Decision

The Federal Circuit denied McKinney's petition. App. 1a-23a. Applying the "extremely limited" and "highly deferential" standard drawn from *Massachusetts v. EPA*, the court of appeals found the VA's eight (8) year delay "regrettable" but, inexplicably, not indicative of bad faith. App. 11a-13a. It found the administrative record adequate despite its sparseness. App. 14a-18a. And it upheld the VA's denial as representing sufficient "reasoned decisionmaking," App. 19a, under the deferential standard—even though the VA's proposed and final denials avoided altogether the term "disease process," failing to engage with the argument that McKinney had pressed thirty-four (34) times across his rulemaking petition and through eight (8) years of administrative proceedings.

The Federal Circuit acknowledged that McKinney's core argument was that the VA "arbitrarily and capriciously denied his rulemaking petition by (1) not addressing his 'disease process' argument." App. 18a. The court disagreed, inexplicably, finding it "incorrect that the VA did not address his 'disease process' argument." App. 19a. But the court's reasoning illustrates the problem: it credited the VA's oblique, non-responsive discussion of immediacy and causation as sufficient engagement with an argument the VA's own denial never named or confronted directly. App. 18a-23a. Under genuine arbitrary-and-capricious review, a petitioner who invokes a term thirty-four (34) times in a rulemaking petition, and receives a denial that uses it zero (0) times in response, has received no reasoned engagement at all. Under "extremely limited" review, nonsensical or nonexistent explanations for denying a petition prevail.

The court of appeals was transparent about the determinative weight of the deferential standard: “there is nothing in the record that warrants setting aside the VA’s decision in light of the highly deferential and extremely limited review we have over the VA’s denial of a proposed rulemaking petition.” App. 23a. The standard—not the merits of McKinney’s petition—controlled the outcome.

REASONS FOR GRANTING THE WRIT

I. *Massachusetts v. EPA*’s “Extremely Limited” Standard Has No Basis in the APA’s Text and Should Be Overruled.

Massachusetts v. EPA established, by a 5-4 vote, that judicial review of an agency’s denial of a rulemaking petition is subject to a standard that is “extremely limited” and “highly deferential.” 549 U.S. at 527-28. The “extremely limited” label the majority borrowed from D.C. Circuit precedent—*National Customs Brokers*—was adopted without independent statutory analysis and without engaging the dissent’s challenges. A standard adopted by a bare majority, without textual grounding, and explicitly rooted in a deference doctrine that has since been repudiated, stands on no durable foundation. It should now be overruled.

A. The standard’s theoretical foundation has collapsed: it was built on *Chevron* deference, which no longer exists.

Massachusetts v. EPA did not justify its “extremely limited” standard by reference to the APA’s text. Instead, the majority grounded the standard in *Chevron*

deference, invoking *Chevron's* rationale that “an agency has broad discretion to choose how best to marshal its limited resources and personnel to carry out its delegated responsibilities.” 549 U.S. at 527. The Court’s theory was that petition denials implicate the same kind of agency discretion that *Chevron* deference was designed to protect. As one commentator has observed, under the *Massachusetts v. EPA* framework, “an agency could argue that the statute was ambiguous and that it would adopt the meaning that did not require any action in response to a petition, and courts would have to honor that denial so long as the agency’s interpretation was reasonable (even if not preferred).”²

The depth of the deference problem before *Massachusetts v. EPA* illustrates how thoroughly *Chevron* infected petition review. Decades following the D.C. Circuit’s *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 817-18 (D.C. Cir. 1981), courts applied an especially lenient form of arbitrary-and-capricious review, overturning petition denials “only in the rarest and most compelling of circumstances.” *EMR Network v. FCC*, 391 F.3d 269, 273 (D.C. Cir. 2004). The two narrow categories where petitioners could prevail were: (a) clear error of law and (b) a fundamental change in the factual premises the agency had previously considered. See Jeffrey A. Rosen, *A Chance for a Second Look: Judicial Review of Rulemaking Petition Denials*, 35 Admin. & Reg. L. News 7 (Fall 2009). Both categories were themselves rooted

2. See Daniel E. Walters, *Rulemaking Petitions in a World Without Deference to Agencies: A New Lease on Life?*, 39 Nat. Resources & Env’t 9, 12 (Spring 2025) (noting that “*Massachusetts v. EPA* explicitly tethered its discussion of the standard of review for petition denial cases to the *Chevron* decision”).

in the *Chevron*-era premise that agencies otherwise enjoyed wide latitude to interpret ambiguous statutes to permit inaction. With that premise gone, the categorical narrowness of the pre-*Massachusetts v. EPA* framework has no remaining justification. And notably, this case fits *both* of those historical exceptions: the VA committed clear legal error by refusing to engage with the central argument of McKinney’s petition, and the factual premises underlying the 2005 regulation were fundamentally transformed by over a decade of research on traumatic brain injuries that the VA declined to acknowledge.

Courts deferred to agency denials of petitions for the same reasons they used to defer more generally to agency action: because *Chevron* and related doctrines established a general regime in which agencies received first choice among reasonable statutory interpretations. That regime has ended. *See, e.g., Walters, supra* (noting that *Massachusetts v. EPA* “explicitly tethered its discussion of the standard of review for petition denial cases to the *Chevron* decision”). *Massachusetts v. EPA*’s deferential standard for petition denials was a natural product of that broader environment, but it cannot survive the environment’s collapse. A standard explicitly rooted in a doctrine that has been repudiated stands on no foundation of its own.

Lower courts, meanwhile, have applied the “extremely limited” standard in ways that make its *Chevron*-derived logic explicit. In *Center for Food Safety v. Perdue*, for example, the court upheld a petition denial because the agency offered an “equally persuasive interpretation” of the relevant statute—even though the court found the agency’s reading “strained.” 527 F. Supp. 3d 1130, 1142 (N.D. Cal. 2021).

B. The APA’s text requires the same arbitrary-and-capricious review of petition denials as of all other agency action.

Section 706(2)(A) of the APA commands courts to “hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.” 5 U.S.C. § 706(2)(A). The statute draws no distinction based on the direction of the agency’s decision (to grant or deny the petition). It governs affirmative rulemaking and a refusal to engage in rulemaking alike. The same standard—arbitrary and capricious—applies to both. 5 U.S.C. § 706(2)(A).

The APA further provides that “[e]ach agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule,” 5 U.S.C. § 553(e), and separately requires that agencies provide “a brief statement of the grounds for denial” when rejecting such a petition. 5 U.S.C. § 555(e). Congress thus treated petition denials as a discrete species of final agency action subject to the same procedural and judicial-review requirements as affirmative rulemaking decisions. Had Congress intended a more deferential standard for petition denials, it would have said so.

Massachusetts v. EPA departed from this textual baseline by importing a super-deferential gloss that has no foothold in Section 706’s text. The courts of appeals have treated that gloss as binding across widely varying circumstances, regardless of the quality of the agency’s explanation or the strength of the petitioner’s showing. The label does all the work: reviewing courts satisfy themselves by invoking “extremely limited” review and

proceeding no further. *See, e.g., WWHT, Inc. v. FCC*, 656 F.2d at 817-18; *Flyers Rts. Educ. Fund, Inc. v. FAA*, 864 F.3d 738, 743, 746 (D.C. Cir. 2017); *Preminger v. Sec’y of Veterans Affs.*, 632 F.3d 1345, 1353 (Fed. Cir. 2011); *Am. Horse Prot. Ass’n, Inc. v. Lyng*, 812 F.2d 1, 4-5 (D.C. Cir. 1987); *Gulf Restoration Network v. McCarthy*, 783 F.3d 227, 244 (5th Cir. 2015) (holding agency’s “burden is slight” and requires only “some reasonable explanation as to why it cannot or will not exercise its discretion”).

This Court has long recognized that Congress, in enacting the APA, intended to create a system of rigorous judicial oversight of executive agency action. *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 415 (1971), required courts to conduct a “thorough, probing, in-depth review” of agency action. *State Farm* reinforced that mandate. And *Massachusetts v. EPA*’s “extremely limited” standard is irreconcilable with that tradition. It converts the APA’s substantive guarantee of meaningful review into a procedural formality.

Importantly, the textual argument applies across the full range of petition denials. Where a petition argues that a statute *requires* the agency to act, the denial raises a question of law that courts must resolve by independent judgment. There is no room for absolute, unwavering deference to an agency’s statutory interpretation where courts must identify the law’s single correct meaning. Where the petition argues the agency has exercised its discretion arbitrarily, the same *State Farm* standard applies that governs arbitrary-and-capricious challenges to affirmative rulemaking. In neither case does the text support an “extremely limited” standard. *Walters, supra*, at 12.

C. The standard is inconsistent with the separation of powers and the judicial duty of independent review.

The Constitution vests the “judicial Power” in the Article III courts. U.S. Const. art. III, § 1. As Chief Justice Marshall explained, “[i]t is emphatically the province and duty of the judicial department to say what the law is.” *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). The APA operationalizes this principle by charging reviewing courts with deciding “all relevant questions of law” and setting aside agency action that fails the statute’s standards. 5 U.S.C. § 706. These are judicial functions that courts must discharge with genuine independent judgment—not defer away.

Massachusetts v. EPA’s “extremely limited” standard subverts this constitutional assignment. By directing courts to be maximally deferential toward an agency’s decision not to act, the standard effectively transfers the reviewing function from the judiciary to the agency whose decision is under review. The agency becomes, in essence, the judge of the adequacy of its own reasoning. That is not how the separation of powers is supposed to work, and it is not what the APA provides.

This Court has moved consistently in the direction of restoring independent judicial oversight of the executive branch. The Court has confined regulatory deference doctrines that previously invited courts to abdicate their reviewing role, invoked the major questions doctrine to foreclose broad assertions of agency power, and reaffirmed that courts bear ultimate responsibility for ensuring executive action complies with the law. *Kisor v.*

Wilkie, 588 U.S. 558, 589 (2019) (limiting *Auer v. Robbins*, 519 U.S. 452 (1997)); *West Virginia v. EPA*, 597 U.S. 697, 724 (2022) (major questions doctrine). *Massachusetts v. EPA*'s standard for petition denials stands as an anomalous exception to that trajectory—insulating an entire category of agency decisions from the independent judicial scrutiny the Constitution and APA both require.

The structural problem is especially acute in the petition denial context. When an agency denies a rulemaking petition, the petitioner has no other mechanism to obtain a regulatory change. The sole option available to a petitioner is to follow the petition process and subsequently seek judicial review. Rulemaking petitions, as this Court held in *Massachusetts v. EPA*, are unlike nonenforcement decisions: they are “less frequent, more apt to involve legal as opposed to factual analysis, and subject to special formalities, including a public explanation.” 549 U.S. at 527, quoting *Am. Horse Prot. Ass’n*, 812 F.2d at 4. Those features, which the Court cited to justify *any* judicial review at all, equally support *genuine* judicial review. If that review is “extremely limited,” the check against arbitrary agency inaction disappears entirely, and an agency that wishes to preserve the regulatory status quo—regardless of what the record shows—faces no meaningful judicial accountability.

D. The standard cannot be squared with *State Farm*'s requirement of reasoned decisionmaking—or with *Massachusetts v. EPA*'s own practice.

Well before *Massachusetts v. EPA*, this Court held in *State Farm* that the arbitrary-and-capricious

standard requires agencies to engage in “reasoned decisionmaking”—to examine the relevant factors, consider the relevant evidence, and articulate a satisfactory explanation for their choices. 463 U.S. at 43. That framework is not confined to affirmative agency action. It applies equally when an agency decides not to regulate.

Massachusetts v. EPA’s “extremely limited” gloss is irreconcilable with *State Farm*. If a court’s review is truly “extremely limited,” it cannot meaningfully assess whether the agency examined the relevant evidence, considered the relevant factors, or offered a reasoned explanation. In this case, the VA never engaged with the central “disease process” argument McKinney raised across eight (8) years of proceedings. The Federal Circuit acknowledged as much, yet found the denial sufficient under the maximally deferential standard. That result would be impossible under genuine *State Farm* review.

Notably, *Massachusetts v. EPA* itself was internally inconsistent on this point. After announcing the “extremely limited” standard, the Court proceeded to review the EPA’s petition denial in a manner that commentators have described as a “far cry” from what one would expect of “highly deferential” review—holding that the agency’s alternative basis for denial “rests on reasoning divorced from the statutory text.”³ This self-contradiction within

3. See, e.g., Amy J. Wildermuth & Kathryn A. Watts, *Massachusetts v. EPA: Breaking New Ground on Issues Other Than Global Warming*, 102 Nw. U. L. Rev. 1029, 1040-41 (2007) (noting that the Court’s “actual review of the EPA’s reasons for declining to regulate” was a “far cry from what one would expect of ‘highly deferential’ review” and that “[t]here are petitions—and then there are petitions”).

Massachusetts v. EPA suggests that even the Court that announced the standard recognized its incompatibility with meaningful review. The lower courts have not followed the Court’s practice; they have followed its words, treating “extremely limited” as categorical permission to sustain petition denials with little scrutiny.

The Court’s actual practice in *Massachusetts v. EPA* reveals the correct standard: agencies must “ground [their] reasons for action or inaction in the statute.” 549 U.S. at 535; *see also* Rosen, *supra*, at 8 (noting the Court’s rejection of “policy, resource, and other discretionary considerations” as grounds for a petition denial, holding them “inappropriate” when divorced from the statutory text).

The Court proceeded to parse the EPA’s list of policy justifications—ranging from a desire to avoid piecemeal regulation to concerns about interfering with Presidential foreign policy—and rejected each one precisely because they were divorced from the statutory text. Policy, resource, and other prudential considerations that do not relate to the governing statute are impermissible grounds for a petition denial. Rosen, *supra*, at 8 Under that framework, a court reviewing a petition denial must ask whether the agency’s reasons are grounded in the statute—not whether the agency has offered any plausible explanation at all. The “extremely limited” label the Court used cannot be reconciled with the searching, statute-grounded inquiry the Court itself conducted.

As this Court observed in *Department of Commerce v. New York*, 588 U.S. 752, 784-85 (2019), when agency action tells “a story that does not match the explanation the

[agency] gave for [its] decision,” a court exercising proper review must say so. The “extremely limited” standard forecloses exactly that inquiry. It invites agencies to offer perfunctory, non-responsive justifications for petition denials, confident that reviewing courts are constrained from looking too closely. The result is that the right to petition for rulemaking—which Congress expressly provided—becomes an empty formality.

II. The Standard Converts the Statutory Right to Petition into a False Hope—as This Case Vividly Illustrates.

The rulemaking petition is a critical democratic mechanism. When an agency fails to act on a matter within its statutory authority—whether due to resource constraints, regulatory inertia, or political pressure to preserve the *status quo*—the petition process is often the only available means for affected parties to force a public reckoning with the agency’s inaction. In 2014, the Administrative Conference of the United States (“ACUS”) found that “few agencies have in place official procedures for accepting, processing, and responding to petitions for rulemaking” and that “[h]ow petitions are received and treated varies across—and even within—agencies.” *See* Admin. Conf. of the U.S., Recommendation 2014-6, Petitions for Rulemaking (Dec. 5, 2014). The current regime—in which petition denials face only “extremely limited” review—enables exactly this dysfunction.

That dysfunction is compounded by a pervasive lack of governmental transparency about the petition process itself. There is no uniform system for publishing petition denials: some agencies publish them in the Federal

Register, some make them available on their websites, and some appear not to publish them at all. Rosen, *supra*, at 9. This opacity perpetuates the conventional wisdom that agencies have plenary control over rulemaking petitions—an impression that “extremely limited” review does nothing to dispel. When petitioners cannot readily learn how agencies have handled petitions raising similar arguments, and when courts cannot meaningfully scrutinize the agency’s reasoning, the feedback loop that might otherwise discipline agency behavior is severed entirely.

The petition mechanism’s practical importance is compounded by the limits that *Norton v. Southern Utah Wilderness Alliance*, 542 U.S. 55 (2004), places on challenges to agency inaction generally. Under *Norton*, judicial review of an agency’s general failure to act is available only where “a plaintiff asserts that an agency failed to take a *discrete* agency action that it is *required to take*”—meaning “broad programmatic attack[s]” on agency administration are foreclosed, as are challenges to “discrete agency action that is not demanded by law.” *Id.* at 64-65. Rulemaking petitions are the mechanism that converts otherwise nonjusticiable inaction into a reviewable discrete agency action—the denial of the petition itself. But as one scholar has observed, this “workaround” becomes “a false hope for would-be challengers of agency inaction” when courts grant petition denials the same near-unreviewable status as the underlying inaction they were designed to redress. Walters, *supra*, at 11. *Massachusetts v. EPA*’s standard accomplishes exactly that, and the result is that the statutory right to petition provides meaningful leverage only as a theoretical matter.

This *McKinney* case is a paradigmatic illustration. Over eight (8) years, the VA: (1) kept McKinney’s petition under an internal “embargo”; (2) consulted medical experts without giving them a copy of the petition or the medical literature McKinney presented; (3) misrepresented McKinney’s personal health history (irrelevant to considering a rulemaking petition advocating a change in regulation) to bias those experts against his petition; (4) allowed those expert consultations to go stale for over seven (7) years before issuing a final denial; (5) failed to conduct the actuarial assessment it had promised; and (6) issued a denial that never addressed the core “disease process” argument. The Federal Circuit found all of this “regrettable” but legally insufficient to vacate the denial under the “extremely limited” standard. App. 11a.

That outcome is a direct consequence of the standard’s permissiveness. Because agencies know their petition denials will face only “extremely limited” scrutiny, there is little incentive to respond to petitions in a timely, transparent, or substantive manner. ACUS recognized exactly this problem over a decade ago, but the judicial tools needed to address it remain unavailable under *Massachusetts v. EPA*’s regime.

The structural asymmetry produced by the current standard is also deeply concerning. When an agency chooses to regulate, its action is subject to rigorous *State Farm* review: the agency must examine the relevant evidence, weigh the relevant factors, and articulate a reasoned explanation. When an agency chooses not to regulate—by denying a petition—the current standard demands only some facially plausible justification, however unresponsive to the petitioner’s arguments. There is no

principled reason to subject agencies to less scrutiny for refusing to regulate than for regulating. Both decisions carry significant consequences for affected parties. Both are equally susceptible to the arbitrary exercise of agency discretion. Both are equally committed by the APA to judicial review under the same standard. The asymmetry *Massachusetts v. EPA* creates and incentivizes inaction and insulates it from accountability.

This problem is especially acute in this case because of the pace at which traumatic brain injury research has advanced. McKinney's petition drew on peer-reviewed literature establishing traumatic brain injuries as a chronic disease process—including a seminal 2010 paper that had been cited over 1,000 times by the time of the final denial, including by the National Academy of Sciences and the Centers for Disease Control and Prevention. The VA, however, relied on expert consultations from 2015-16—seven (7) years prior—conducted without the benefit of McKinney's petition or the medical literature it cited. And the VA's final denial used the term "disease process" exactly one (1) time across both the proposed and final rules—not to engage with McKinney's argument, but only to note that a physician commenter had used the phrase. A court exercising genuine *State Farm* review would have no difficulty identifying the gap between a 26-page petition that used the term "disease process" thirty-four (34) times and a denial that never once engaged with it on the merits. Under "extremely limited" review, the Federal Circuit was effectively precluded from doing so.

Moreover, the VA's denial was internally contradictory in ways that ordinary arbitrary-and-capricious review would readily expose. The VA denied the petition in part

because traumatic brain injury-induced illness “may have a latency of months to years before manifesting.” 85 Fed. Reg. at 50,983 (App. 63a). Yet the VA’s own regulation permits scheduled losses occurring within two (2) years of a traumatic injury, 38 C.F.R. § 9.20(d)(4), and VA’s own research in the administrative record showed that multiple traumatic brain injury-induced conditions—including stroke, hypertension, coronary artery disease, and diabetes—manifest within two (2) years. The VA even cited a study showing that the average time between a traumatic brain injury and stroke onset was 543 days—well within the two (2) year window. A court exercising genuine *State Farm* review would have no difficulty concluding that this denial should not survive scrutiny. Yet the “extremely limited” standard allowed it to stand.

III. This Case Is an Ideal Vehicle.

This case presents the question of whether to overrule *Massachusetts v. EPA*’s extremely deferential standard with exceptional clarity. The Federal Circuit explicitly applied the standard and acknowledged it as controlling and outcome-determinative. App. 23a. The court’s holding that “there is nothing in the record that warrants setting aside the VA’s decision in light of the highly deferential and extremely limited review” makes plain that the standard, not the merits of McKinney’s petition, drove the result. *Id.*

The question is also cleanly preserved. McKinney contested the “extremely limited” standard before the Federal Circuit as inconsistent with the APA’s text. He now presents that argument to this Court, supported by the fully developed record below. There are no jurisdictional complications, no threshold issues that might prevent the

Court from reaching the merits, and no ambiguity about whether the standard was outcome-determinative.

This case also provides something that has been missing from the post-*Massachusetts v. EPA* case law: a suitable vehicle for exploring the outer boundaries of judicial review of petition denials. The lower courts have invoked “extremely limited” review to sustain petition denials without testing whether *Massachusetts v. EPA*’s own exacting practice—as opposed to its deferential label—represents the correct standard. The *McKinney* record, spanning eight (8) years of futile rulemaking, now provides this Court with exactly the vehicle that commentators anticipated: a case where the standard’s outcome-determinative effect is undeniable, the record of agency conduct is well-developed, and the question is ripe for clear resolution.

The record is also rich for a petition denial case. Indeed, the record here spans eight (8) years of agency action. It includes the petitioner’s rulemaking submission relying on extensive medical literature, the VA’s expert consultation summaries (including one containing the health-history misrepresentation), the VA’s Year-Ten Review report about TSGLI, and public comments from McKinney and from the co-author of the leading traumatic brain injury, “disease process” medical journal article. That record allows this Court to see precisely what “extremely limited” review conceals: substantive arbitrariness that more rigorous review would correct.

Finally, the case involves a veteran who suffered a combat injury and a stroke that four (4) physicians linked to that injury. His TSGLI claim has been denied,

and his rulemaking petition—the only avenue available to him to seek a change in the regulation that produced that denial—was rejected after eight (8) years with no meaningful judicial check. The human stakes could not be clearer. The need for this Court’s guidance also could not be more clear.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

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**APPENDIX A — OPINION OF THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT,
FILED JANUARY 14, 2026**

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

2023-1930

Petition for review pursuant to 38 U.S.C. Section 502.

HUGH CAMPBELL MCKINNEY,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

Decided: January 14, 2026

Before PROST, REYNA, and CHEN, *Circuit Judges.*

CHEN, *Circuit Judge.*

Hugh Campbell McKinney petitioned the United States Department of Veterans Affairs (VA's) to institute rulemaking to expand coverage of the Traumatic Servicemembers' Group Life Insurance (TSGLI) to include illness or disease caused by explosive ordnance. *See* Servicemembers' Group Life Insurance Traumatic Injury Protection Program, 88 Fed. Reg. 15,907 (Mar.

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15, 2023) (*Final Denial*). TSGLI covers servicemembers who suffer a traumatic injury and is designed to fill a gap between the time the injury occurs and when other benefits are available. This program is overseen by the VA, which also has the power to issue regulations enumerating various injuries that are covered. As it stands, the regulation covers physical damage to a servicemember caused by, among other things, application of external force or chemical, biological, or radiological weapons. The regulation, however, does not cover an illness or disease, with a few exceptions. The VA denied Mr. McKinney's petition to expand coverage due to several concerns, including that such coverage would be inconsistent with the types of injuries the TSGLI was designed to protect. Mr. McKinney now petitions this court under 38 U.S.C. § 502 to set aside the VA's denial. For the following reasons, we *deny* the petition.

BACKGROUND**I**

On May 11, 2005, the President signed into law the legislation establishing TSGLI to provide financial assistance to servicemembers who suffer severe traumatic injuries. J.A. 83. The purpose of the program is to address a “gap” in benefits identified by Congress: the period immediately after a service member suffers a traumatic injury when “the need for additional financial resources becomes most acute.” J.A. 17-18. TSGLI provides that “[a] member of the uniformed service who is insured under Servicemembers’ Group Life Insurance shall automatically

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be insured for traumatic injury in accordance with this section” and that “[i]nsurance benefits under this section shall be payable if the member, while so insured, sustains a traumatic injury . . . that results in a qualifying loss.” 38 U.S.C. § 1980A(a)(1). The benefit, however, is payable only if the loss “results directly from [the] traumatic injury . . . and from no other cause.” *Id.* § 1980A(c)(1).

Under the statute, a qualifying loss includes loss of limbs; total and permanent loss of sight, hearing, or speech; severe burns; paralysis; traumatic brain injury; and loss of ability to carry out the activities of daily living. *See id.* § 1980A(b)(1)(A-H). Additionally, the VA may prescribe additional qualifying losses by regulation. *Id.* § 1980A(b)(3). The VA defined these qualifying losses in 38 C.F.R. § 9.20.¹

According to 38 C.F.R. § 9.20, service members who experience (1) a traumatic event that results in (2) a traumatic injury directly causing (3) a qualifying “scheduled loss” are eligible to receive a TSGLI payment. The VA defined “traumatic event” as the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living body. 38 C.F.R. § 9.20(b)(1). Moreover, the VA defined “traumatic injury” as “physical damage to a living body that is caused by a traumatic event, as defined in [§ 9.20(b)].” *Id.* § 9.20(c)(1). However, “the term ‘traumatic injury’ *does*

1. In 2023, the VA modified 38 C.F.R. § 9.20 to expand the definition of a “traumatic event.” However, we will only be discussing the pre-2023 version of 38 C.F.R. § 9.20.

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not include damage to a living body caused by,” inter alia, “physical illness or disease, *except* if the physical illness or disease is caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance.” *Id.* § 9.20(c)(2) (emphasis added). The regulation thus draws a distinction, for the most part, between physical damage caused by a traumatic injury and damage caused by an illness or disease for TSGLI benefits purposes.

To be eligible for payment of benefits, service members must suffer a scheduled loss “within two years of the traumatic injury.” *Id.* § 9.20(d)(4). Additionally, the scheduled loss must “result[] *directly from* a traumatic injury and no other cause.” *Id.* § 9.20(d)(2) (emphasis added). This means that “if a pre-existing illness, condition, or disease or a post-service injury substantially contributed to the loss,” then the scheduled loss “does not result directly from a traumatic injury.” *Id.* § 9.20(d)(2)(i).

The VA explained that illness and disease were generally excluded from the definition of “traumatic injury” because “the term ‘injury’ refers to the results of an external trauma rather than a degenerative process.” Traumatic Injury Protection Rider To Servicemembers’ Group Life Insurance, 70 Fed. Reg. 75940, 75941 (Dec. 22, 2005), J.A. 24. The VA, however, carved out five exceptions for “physical illness or disease caused by a pyogenic infection, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance because including *immediate traumatic harm* due to those unique hazards of military service is consistent with the purpose

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of TSGLI.” *Id.* (emphasis added). Thus, the VA specified that diseases resulting from those hazards are within the definition of “traumatic injury.” *See* 38 C.F.R. § 9.20(c)(2)(ii).

II

Mr. McKinney is an Iraq war veteran who sustained a traumatic brain injury (TBI) from the concussive force of an improvised explosive device (IED) while deployed in 2005. Within two years of his TBI, Mr. McKinney suffered a stroke and submitted a claim for TSGLI benefits based on his stroke. Mr. McKinney’s application was denied because the United States Army determined that Mr. McKinney’s stroke was a physical illness or disease rather than a qualifying traumatic injury under 38 U.S.C. § 1980A(a)(1).

In March 2015, Mr. McKinney filed a petition for rulemaking, requesting the VA to, among other things, broaden the definition of “traumatic injury” in 38 C.F.R. § 9.20. *See* Petition for Rulemaking by Army First Sergeant Hugh Campbell McKinney, Retired, to Amend 38 C.F.R. § 9.20 Governing Traumatic Injury Protection (U.S. Dep’t of Veterans Affs. Mar. 16, 2015) (*Petition for Rulemaking*); J.A. 935. Mr. McKinney’s proposed amendment would expand “traumatic injury” to also cover damage to a living body resulting from any physical illness or disease *caused by* explosive ordnance. J.A. 938-39. Under this proposed amendment, the explosive ordnance caused Mr. McKinney’s TBI, which triggered a disease process that eventually led to Mr. McKinney’s

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stroke.² Accordingly, Mr. McKinney's stroke would also be covered by TSGLI.

Mr. McKinney asserted that there is no meaningful difference between physical illness or disease that is linked to explosive ordnance and the types of physical illness or disease already covered by the VA's regulation, i.e., illnesses or diseases caused by pyogenic infection, biological, chemical, or radiological weapons, and accidental ingestion of a contaminated substance. In Mr. McKinney's view, explosive ordnances such as IEDs "produce immediate harm" which then follows a "disease process" similar to the five already-covered exceptions. *See Petition for Rulemaking* at 1-2, J.A. 937-38.

The VA denied Mr. McKinney's petition on August 6, 2015. J.A. 973-75. However, as part of a ten-year anniversary review (Year-Ten Review) of the TSGLI program, the VA committed to (1) "analyze the relationship" between IED explosions and physical illness or disease development and (2) "conduct an actuarial assessment of any such regulatory amendment on the TSGLI program." *Id.* at 974. Mr. McKinney petitioned our court for review on October 5, 2015, and the VA rescinded its denial of Mr. McKinney's petition on December 1, 2015. The VA informed Mr. McKinney that it would not make a decision on the regulatory changes requested in his petition until

2. Since both parties discuss only TBIs caused by explosive ordnance, *see, e.g.*, Pet'r's Br. 15; Resp't's Br. 15, we will use "TBI" interchangeably with "TBI caused by explosive ordnance" when discussing the causal connection between explosive ordnance, TBI, and the downstream physical illness or disease.

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it completed its Year-Ten Review of the TSGLI program. We subsequently granted Mr. McKinney's unopposed motion to dismiss his petition for review and noted that Mr. McKinney planned to refile a petition for review once the VA completed the Year-Ten Review and took final action on his rulemaking petition.

Although the VA completed its Year-Ten Review in 2018, it did not take any action on Mr. McKinney's rulemaking petition in the accompanying report. Instead, the VA stated that it would "respond to [Mr. McKinney's] petition during the formal regulatory submission process for the TSGLI Year-Ten Review recommendations." J.A. 1369. As part of this process, the VA consulted with numerous medical experts, the majority of whom opined that it is nearly impossible to prove a causal relationship between exposure to an explosive ordnance and a specific, subsequent illness or disease such as a stroke, for example. *See* Servicemembers' Group Life Insurance Traumatic Injury Protection Program Amendments, 85 Fed. Reg. 50973, 50974 (Aug. 19, 2020) (*Proposed Denial*). On August 19, 2020, the VA issued a notice of proposed rulemaking in which it proposed to deny Mr. McKinney's petition. *See id.* at 50983.

On March 15, 2023, the VA published a final rule that denied Mr. McKinney's rulemaking petition because, in the agency's view, expanding coverage to include illness or disease that materializes long after exposure to explosive ordnance (1) would be inconsistent with TSGLI's purpose of providing compensation for injuries occurring immediately after a traumatic event; (2) would

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be inconsistent with commercial accidental death and dismemberment (AD&D) insurance policies after which TSGLI is modeled; (3) would risk the financial health of TSGLI; and (4) would be inconsistent with the statutory requirement that covered losses “result[] directly from a traumatic injury . . . and from no other cause.” 38 U.S.C. § 1980A(c)(1); see *Final Denial* at 15908-09. The VA reasoned that there are too many different variables that could cause the various diseases and illnesses associated with explosive ordnance, and therefore the VA declined to extend TSGLI coverage to those illnesses and diseases. *Final Denial* at 15909.

Mr. McKinney now petitions us for review. We have jurisdiction to review the VA’s denial of a petition for rulemaking under 38 U.S.C. § 502.

STANDARD OF REVIEW

“Pursuant to [38 U.S.C.] § 502, we review actions of the VA ‘in accordance with chapter 7 of title 5,’ i.e., under the relevant [Administrative Procedure Act] APA standard of review, 5 U.S.C. § 706.” *Preminger v. Sec’y of Veterans Affs.*, 632 F.3d 1345, 1353 (Fed. Cir. 2011) (citation omitted). That review must be based on the “whole record” before the agency as of its decision. 5 U.S.C. § 706; *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 419, 91 S.Ct. 814, 28 L.Ed.2d 136 (1971).

In reviewing an agency’s denial of a petition for rulemaking under 5 U.S.C. § 553(e), we must determine whether the agency’s decision was “arbitrary, capricious,

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an abuse of discretion, or otherwise not in accordance with law.” *Id.* at 414, 91 S.Ct. 814 (citation omitted). This is a highly deferential standard, and our review of an agency’s decision not to promulgate a requested rule is “extremely limited.” *Massachusetts v. EPA*, 549 U.S. 497, 527-28, 127 S.Ct. 1438, 167 L.Ed.2d 248 (2007) (citation omitted).

We must determine whether the VA’s denial of Mr. McKinney’s rulemaking petition provides a reasoned decision that adequately responds to the claims in the petition. *See, e.g., Serv. Women’s Action Network v. Sec’y of Veterans Affs.*, 815 F.3d 1369, 1374-75 (Fed. Cir. 2016) (in reviewing an agency’s denial of rulemaking petition, we ask “whether the agency employed reasoned decisionmaking in rejecting the petition.” (citation omitted)); *Preminger*, 632 F.3d at 1353 (“[A]n 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.” (citation omitted)). When denying a petition for rulemaking, the VA must provide “a brief statement of the grounds for denial.” 5 U.S.C. § 555(e). The procedural requirements are “minimal,” *Butte Cnty., Cal. v. Hogen*, 613 F.3d 190, 194 (D.C. Cir. 2010), and all that is required to satisfy the arbitrary and capricious standard under the APA is a “rational connection between the facts found and the choice made.” *Motor Vehicle Mfrs. Ass’n of the U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43, 103 S.Ct. 2856, 77 L.Ed.2d 443 (1983) (citation omitted). However, an unsupported denial or a “clear error in judgment” warrants reversal of a denial of a petition.

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Flyers Rts. Educ. Fund, Inc. v. FAA, 864 F.3d 738, 743 (D.C. Cir. 2017) (citation omitted).

DISCUSSION

Mr. McKinney advances three primary arguments in his petition for review.³ First, he contends that the VA's several-year delay and alleged misrepresentation of his personal health information to outside medical experts constitute bad-faith adjudication of his petition. *See Pet'r's Br.* 35, 40. Second, Mr. McKinney argues that because the rulemaking record is incomplete, it must be supplemented before we can conduct a proper review of the VA's denial of his rulemaking petition. *See id.* at 42-43. Finally, Mr. McKinney asserts that the VA's denial of his petition is arbitrary and capricious because the VA failed to reasonably account for (1) the medical literature indicating that explosive ordnance follows a "disease process" and (2) the VA's rationales in prior rulemaking that compel the opposite conclusion from the one reached by the VA here. *See id.* at 50-57. We disagree with Mr. McKinney's arguments, and address each in turn.

3. In a filing made on the eve of oral argument, Mr. McKinney belatedly contends that the "extremely limited" and "highly deferential" standard of review that applies to review of the VA's denial of a petition for rulemaking is no longer appropriate after *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369, 144 S.Ct. 2244, 219 L.Ed.2d 832 (2024), overruled *Chevron* deference. ECF No. 59 at 2 (citing *Loper Bright*, 603 U.S. at 412, 144 S.Ct. 2244); *see Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984). Mr. McKinney, however, does not explain why *Loper Bright* overturns the existing standard of review that applies to cases like this one. As this issue is not adequately briefed, we decline to consider it.

*Appendix A***I. Bad Faith**

Mr. McKinney identifies several examples of purported irregularities in the administrative record, arguing that they are “harbingers” of the VA’s bad faith. *Id.* at 35. In particular, he points to (1) the VA’s eight-year delay and supposed secrecy surrounding his rulemaking petition, and (2) the VA’s reliance on purportedly flawed and obsolete medical evidence as indications of bad faith. *See id.* at 35-42. For example, Mr. McKinney asserts that the administrative record contains outdated medical evidence predating a 2010 paper by Masel and Dewitt, a paper that supports his rulemaking petition because it purportedly proves the existence of a causal link between an explosive ordnance, i.e., a traumatic event, and certain physical illnesses and diseases. *Id.* at 37-38; *see also* J.A. 1493-1504 (Masel and Dewitt paper). Mr. McKinney additionally argues that the VA mischaracterized his health profile when consulting with outside medical experts, thereby biasing them to be “even more skeptical” of his rulemaking petition. *Id.* at 40 (citing J.A. 1291-92). Mr. McKinney contends that the medical evidence in the record is accordingly tainted and cannot be used to support the VA’s denial of his petition. *See id.* at 35-42. Mr. McKinney’s arguments are not persuasive.

While the VA’s protracted delay in addressing Mr. McKinney’s petition is regrettable, the purported irregularities he listed are inadequate to support setting aside its decision. *Cf. Flyers Rts.*, 864 F.3d at 747 (remanding because “information critically relied upon by the agency” was not available for review by the

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appellate court). As an initial matter, the authorities that Mr. McKinney cites fail to substantiate the proposition that the VA acted in bad faith simply because it took many years to render a final denial of his rulemaking petition. *See* Pet'r's Br. 35-40. The cited cases merely characterize the agency's delays in those cases as "unreasonable" or "egregious," but they do not opine on whether those delays are indicators of bad-faith conduct. *See, e.g., In re Am. Rivers & Idaho Rivers United*, 372 F.3d 413, 419-20 & n.12 (D.C. Cir. 2004) (agency's "six-year-plus delay is nothing less than egregious"). Indeed, one case attributes an unreasonable six-year delay to "bureaucratic inefficiency rather than bad faith." *Pub. Citizen Health Rsch. Grp. v. Brock*, 823 F.2d 626, 628 (D.C. Cir. 1987).

Moreover, although Mr. McKinney is correct that *some* of the VA's medical sources predate the Masel and Dewitt article, he does not explain why these citations evince bad faith. *See* Pet'r's Br. 37-38; J.A. 1493. Additionally, the VA also relied on sources postdating the Masel and Dewitt 2010 article, and Mr. McKinney does not explain why these sources fail to support the VA's denial of his rulemaking petition. *See* Pet'r's Br. 37-38. Likewise, Mr. McKinney does not offer any persuasive reason why the VA acted in bad faith by relying on its 2016 consultations with outside medical experts to deny his petition for rulemaking.

Mr. McKinney's contention that the VA biased the outside medical experts is unavailing. He selectively references a portion of one interview summary that allegedly shows the VA mischaracterized his health history to elicit "even more skeptical' reactions skewed

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to [the] VA's liking and against the rulemaking petition." Pet'r's Br. 40 (citing J.A. 1291-92). Even assuming the VA misrepresented Mr. McKinney's health history—an assumption we do not adopt—such a misrepresentation does not appear to have influenced the experts' views as to the medical theory underlying Mr. McKinney's petition: before "the facts of the petitioner's case [were] provided," the experts already explained that "if a biomarker showed that someone experienced a TBI and then later they experience a stroke, clinicians cannot definitely say the TBI caused the stroke as other factors . . . could have caused the stroke." J.A. 1291. Finally, to the extent Mr. McKinney is correct that the experts were misled in this particular interview, the record contains other interview summaries that do not mention or characterize Mr. McKinney's health history; each of these summaries likewise shows experts who are skeptical of Mr. McKinney's position that it is not difficult to show a causal relationship between exposure to explosive ordnance and downstream physical illness or disease. *See, e.g.*, J.A. 1288 ("Summary of Phone Conference with Col. Todd Rasmussen" stating it is "[v]ery difficult, next to impossible, to factually/scientifically prove causation between explosive ordnance and illness and disease in most cases"); J.A. 1289-90 ("Summary of Meeting with Dr. M. Sean Grady" stating that "today's science would most likely not allow a Servicemember to prove that one of these illnesses/diseases was a direct result of the blast injury"). Without more, we therefore cannot find that the VA acted in bad faith in relying on the medical evidence in the administrative record to deny Mr. McKinney's rulemaking petition.

*Appendix A***II. Incomplete Administrative Record**

Mr. McKinney also contends that the administrative record is incomplete and therefore unreviewable because (1) there is no record in the Amended Index of Rulemaking⁴ during five of the eight years that the petition was pending before the VA; (2) there is scant record of the VA meeting its statutory obligation to consult with the Department of Defense (DoD); (3) there is no actuarial assessment or relevant statistical data on which VA based its denial of the rulemaking petition; (4) there is no “Response Sheet” that Mr. McKinney separately obtained through a Freedom of Information Act request; and (5) there is piecemeal compilation of the record, which overcomes the presumption of regularity.⁵ Pet’r’s Br. 42-44 (citation omitted). We are not persuaded.

As the D.C. Circuit has explained, “the record needed to support an agency’s decision not to engage in rulemaking can be sparser than that needed to support rulemaking.” *Flyers Rts.*, 864 F.3d at 746. In the case of a denial of rulemaking, “the ‘record’ for purposes of review need only include the petition for rulemaking, comments pro and con where deemed appropriate, and the agency’s

4. The index contains a list of the records the VA relied on in its rulemaking process.

5. “The presumption of regularity provides that, in the absence of clear evidence to the contrary, the court will presume that public officers have properly discharged their official duties.” *Miley v. Principi*, 366 F.3d 1343, 1347 (Fed. Cir. 2004) (citing *Butler v. Principi*, 244 F.3d 1337, 1339 (Fed. Cir. 2001)).

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explanation of its decision to reject the petition.” *WWHT, Inc. v. FCC*, 656 F.2d 807, 817-818 (D.C. Cir. 1981). On review of the record, we are satisfied that it contains the evidence the VA considered and is therefore sufficient to permit our review.

First, the VA offered a reasonable explanation for the time-gap of agency inactivity in the administrative record—it reflects the fact that the VA prioritized its Year-Ten Review of the TSGLI program at the expense of processing rulemaking petitions. *See* Resp’t’s Br. 35-36. Mr. McKinney does not contest the VA’s explanation or explain why this gap frustrates our review. *See generally* Pet’r’s Reply Br. Accordingly, we decline to infer that this gap in the administrative record renders the record unreviewable.

Second, Mr. McKinney does not explain why he believes the record lacks proof that the VA has met its obligation to consult with the DoD. *See* 38 U.S.C. § 1980A(j) (“Regulations under this section shall be prescribed in consultation with the Secretary of Defense.”). In fact, the VA has produced its communications with the DoD, *see* J.A. 963 (discussing Year-Ten review with the DoD); J.A. 1341-42 (same); J.A. 1387 (DoD verbally signing off on the Year-Ten review), and Mr. McKinney does not dispute the veracity of those documents. He merely asserts that these communications are not enough under 38 U.S.C. § 1980A(j). Pet’r’s Reply Br. 2-3. Under the circumstances, we reject this argument.

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Third, Mr. McKinney does not explain why the VA is required by law to perform an actuarial assessment. The VA relies on a 2009 congressional report to show that adding illness or disease coverage to TSGLI would raise costs and require additional funding. *See* Resp't's Br. 37 (citing J.A. 572-74). Mr. McKinney is correct that the 2009 report only examines the increased costs associated with adding coverage for Post-Traumatic Stress Disorder (PTSD), a mental disorder that is "separately considered from physical illness or disease." Pet'r's Reply 4-5 (citation omitted). But the VA's larger point was to show that both the 2009 report and Mr. McKinney's petition would substantially expand TSGLI coverage, creating a significant additional financial burden on the program. That was a reasonable observation for the VA to make. But even if the VA cannot rely on the 2009 report, Mr. McKinney does not point to any law or regulation mandating the VA to perform an actuarial assessment. We accordingly decline to find that the record is unreviewable without such assessment.

Fourth, although the "Response Sheet" from the Air Force was not in the administrative record, Mr. McKinney does not show why this would render the record unreviewable. Contrary to Mr. McKinney's claim, the exclusion of the "Response Sheet" does not harm Mr. McKinney, as the sheet shows the Air Force's opposition to Mr. McKinney's petition. *See* J.A. 9047. In any event, the VA's denial of Mr. McKinney's petition is amply supported by the record, even without this omitted document. *See infra*. Since the record supporting a denial of rulemaking petition only requires "comments pro and

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con where deemed appropriate,” *WWHT*, 656 F.2d at 818, Mr. McKinney does not persuasively show why omission of the “Response Sheet” renders the record incomplete so as to frustrate our review. *See Oracle Am., Inc. v. United States*, 975 F.3d 1279, 1291 (Fed. Cir. 2020) (concluding that a remand is unnecessary when “there is no reason to believe that the [agency] decision would have been different” (citations omitted)).

Finally, Mr. McKinney does not show how the VA’s compilation of the record is so abnormal that the presumption of regularity is overcome. Mr. McKinney’s reliance on *Defenders of Wildlife v. Norton*, 239 F. Supp. 2d 9, 21 (D.D.C. 2002), *vacated in part*, 89 F. App’x 273 (D.C. Cir. 2004), is inapposite here. *See* Pet’r’s Br. 44. In *Defenders of Wildlife*, the district court deemed the missing records to be “significant” to the agency’s denial to initiate rulemaking. 239 F. Supp. 2d at 21 n.10. Here, Mr. McKinney does not contend that any missing documents were “significant,” or would otherwise meaningfully support his petition. *See generally* Pet’r’s Br. Additionally, unlike in *Defenders of Wildlife*, where some of the missing documents were deliberately withheld based on improper assertion of the deliberative process privilege, *see* 239 F. Supp. 2d at 21 n.10, there is no such active obstruction here. The VA instead worked with Mr. McKinney to include records that he believed warranted inclusion in the record. *See* J.A. 9049-67. Mr. McKinney did not provide clear evidence to the contrary to disturb the presumption that “what appears regular is regular.” *See Butler*, 244 F.3d at 1340 (citations omitted).

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Upon our review of the administrative record, we find that the purported gaps Mr. McKinney identified are not fatal to our review of the VA's denial of Mr. McKinney's rulemaking petition.⁶ The record not only contains comments pro and con where appropriate, but also includes the agency's explanation of its decision to reject Mr. McKinney's petition. *See WWHT*, 656 F.2d at 818. Accordingly, the record in this case has the required information for us to review whether the VA employed reasoned decisionmaking in rejecting the petition. *See Preminger*, 632 F.3d at 1353-54.

III. Arbitrary and Capricious Denial

Turning to the stated reasons for the denial of the rulemaking petition itself, Mr. McKinney argues that the VA's decision is arbitrary and capricious because it ignores the crux of his petition—that physical illnesses or diseases caused by explosive ordnances follow a “disease process” similar to the illnesses and diseases resulting from Section 9.20's five enumerated exceptions currently covered by TSGLI. Pet'r's Br. 50. In particular, Mr. McKinney asserts that the VA arbitrarily and capriciously denied his rulemaking petition by (1) not addressing his “disease process” argument; (2) taking a position contrary to its

6. Mr. McKinney asks us to order the VA to certify the completeness of its Rule 17 index, *see* Pet'r's Br. 49-50, and the VA represents that it is prepared to certify said index, *see* Resp't's Br. 42-43. We agree with Mr. McKinney that Fed. Cir. R. 17(b)(2) requires that an agency certify the index it provides. We accordingly order the VA to certify the index of rulemaking record consistent with the requirements of Rule 17(b)(2).

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own regulation; and (3) relying on congressional intent that is not clear. Upon our review of the record, we determine that the VA did not act arbitrarily or capriciously in denying Mr. McKinney's rulemaking petition. Instead, we find that the VA engaged in reasoned decisionmaking and was sufficiently responsive to Mr. McKinney's petition. Mr. McKinney's three arguments to the contrary are not persuasive, and we address them in turn.

First, Mr. McKinney is incorrect that the VA did not address his "disease process" argument in its denial of his rulemaking petition. The VA disagreed with Mr. McKinney's attempt to draw a direct comparison between illness or disease *caused by* Section 9.20's enumerated exceptions and illness or disease (such as stroke) *associated with* explosive ordnance because the latter relationship is far more attenuated. *See Final Denial* at 15908. According to the VA, "courts have interpreted the phrase 'direct result of a traumatic injury and no other cause' that 38 C.F.R. § 9.20(d)(2) uses to mean that a loss is not covered if a preexisting condition or disease 'substantially contributed' to the loss." *Id.* (citation omitted). In other words, TSGLI allows "[a] payment [to] be made . . . only for a qualifying loss that results directly from a traumatic injury . . . and from no other cause." 38 U.S.C. § 1980A(c)(1); *see also Proposed Denial* at 50983 ("The plain language of 38 U.S.C. [§] 1980A(a)(1) and (2), (b)(1), (c)(1) and (2) authorizes TSGLI benefits for a qualifying loss *resulting directly* from a 'traumatic injury.'" (emphasis added)). Under Section 9.20, the VA chose to allow for coverage for illness or disease caused by the five specified exceptions (such as chemical

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weapons) because “the physical damage resulting in a covered loss would generally occur immediately and require prompt medical treatment” and because the damage would immediately trigger the “disease process” causing the downstream illness or disease. Traumatic Injury Protection Rider To Servicemembers Group Life Insurance, 70 Fed. Reg. 75940, 75941 (Dec. 22, 2005), J.A. 23-24. The VA did not find the necessary proof of a similar, categorical causal relationship in this record for the theory underlying Mr. McKinney’s petition. Although the VA acknowledged that “several conditions . . . have a positive association with TBI,” the VA also found that “these conditions do not immediately manifest.” *Final Denial* at 15909. The VA further explained that “the types of long-term illnesses and diseases associated with TBI do not cause the immediate type of harm against which TSGLI is designed to protect.” *Id.* Mr. McKinney disputes this characterization, but the VA’s conclusion finds support in the administrative record.

Third-party medical doctors and researchers, for example, acknowledged that the long latent periods after exposure to an explosive ordnance before a physical illness or disease manifests make it “almost impossible in most cases to prove that the explosive ordnance, and no other factors, caused the illness/disease.” J.A. 1288; *see also* J.A. 1291 (two doctors noting that “many common symptoms of TBI are also symptoms of other psychological conditions”). Mr. McKinney does not explain why the VA acted arbitrarily or capriciously in crediting medical sources showing an inconclusive causal relationship between explosive ordnance, TBI, and subsequent illness or disease. In our view, the VA’s denial adequately responded

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to Mr. McKinney’s rulemaking petition, acknowledging the mixed record for and against granting Mr. McKinney’s petition. *See generally Final Denial; Proposed Denial; Motor Vehicle*, 463 U.S. at 43, 103 S.Ct. 2856.

Second, the VA did not arbitrarily and capriciously take a position contrary to its regulation in denying Mr. McKinney’s petition. The TSGLI program currently provides that to receive benefits, one “must suffer a scheduled loss . . . within two years of the traumatic injury.” 38 C.F.R. § 9.20(d)(4). According to Mr. McKinney, this provision proves one does not need a physical illness or disease to immediately manifest, as the VA claimed in its denial. Pet’r’s Br. 55 (citing *Proposed Denial* at 50983). Mr. McKinney contends that it is therefore arbitrary and capricious to deny his rulemaking petition just because the TBI-induced illnesses or diseases “may have a latency of months to years before manifesting.” *Id.*

Mr. McKinney misunderstands the VA’s denial of his rulemaking petition. He points to the Chen study⁷ the VA cited in its denial of his rulemaking petition, which shows that the average time between treatment for TBI and the onset of stroke was 543 days. Pet’r’s Br. 56; *see Final Denial* at 15909; *Proposed Denial* at 50983. Because 543 days is within the two-year eligibility period where one is eligible for TSGLI benefits, Mr. McKinney believes that the VA wrongfully denied his rulemaking petition. *See* Pet’r’s Br. 55-56.

7. *See* Yi-Hua Chen et al., *Patients with Traumatic Brain Injury: Population-Based Study Suggests Increased Risk of Stroke*, 42 *STROKE* 2733 (2011) (Chen study).

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The VA established the two-year eligibility period as a “response to concerns from the uniformed services that one year was not enough time for a member to decide whether to attempt to salvage a limb.” *Final Denial* at 15908. This eligibility period does not relate to the reason why the VA denied Mr. McKinney’s petition, which instead is based on the insufficiently proven causal relationship between downstream illnesses and diseases and explosive ordnance. *See id.* at 15909. The VA cited the Chen study, *see supra* n.7, showing the long latent period between TBI and stroke onset as further evidence that the direct causal relationship Mr. McKinney theorized in his rulemaking petition is less than clear. *See Proposed Denial* at 50982-83. The VA therefore did not take a position contradictory to its regulation.

Finally, Mr. McKinney is incorrect that there is no legislative support for the VA’s denial of his rulemaking petition. Mr. McKinney argues that the one-page congressional record discussing the establishment of TSGLI “provides no hint of the two year period that VA introduced in its TSGLI regulation,” and the VA cannot rely on the record to deny the rulemaking petition. Pet’r’s Br. 56 (emphasis in original). But the reason why the VA cited the TSGLI’s legislative history is because it shows that “Congress intended to provide TSGLI compensation for injuries, rather than diseases, that *occur immediately after* a traumatic event and that require prompt medical treatment.” *Final Denial* at 15909 (emphasis added); *see also* J.A. 18 (statement of Senator Craig discussing the purpose of the TSGLI program, which is to provide “immediate payment” to wounded veterans “to sustain

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them before their medical discharge from the services, when veterans benefits kick in”). The VA thus reasoned that covering physical illnesses or diseases that may manifest years after the traumatic event would be inconsistent with the program’s purpose. *Final Denial* at 15909. The VA further explained that “Congress knows how to include TSGLI coverage for diseases if it so desires, and it did not do so.” *Proposed Denial* at 50983 (citing *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 78 L.Ed.2d 17 (1983)).

CONCLUSION

We appreciate Mr. McKinney’s effort in urging the VA to amend its regulations to expand TSGLI coverage to a new category of conditions that can be caused by explosive ordnance. However, under the circumstances, the VA did not abuse its wide discretion in declining to amend its regulations. At bottom, many of the arguments raised involve agency policymaking choices that are beyond this court’s purview, and there is nothing in the record that warrants setting aside the VA’s decision in light of the highly deferential and extremely limited review we have over the VA’s denial of a proposed rulemaking petition.

We have considered Mr. McKinney’s remaining arguments and find them unpersuasive. For the foregoing reasons, we deny Mr. McKinney’s petition for review.

DENIED

Costs

No costs.

**APPENDIX B — STATUTORY PROVISIONS
AND REGULATIONS INVOLVED**

38 U.S.C. § 1980A. Traumatic injury protection

(a)

(1) A member of the uniformed services who is insured under Servicemembers' Group Life Insurance shall automatically be insured for traumatic injury in accordance with this section. Insurance benefits under this section shall be payable if the member, while so insured, sustains a traumatic injury on or after December 1, 2005, that results in a qualifying loss specified pursuant to subsection (b)(1).

(2) If a member suffers more than one such qualifying loss as a result of traumatic injury from the same traumatic event, payment shall be made under this section in accordance with the schedule prescribed pursuant to subsection (d) for the single loss providing the highest payment.

(b)

(1) A member who is insured against traumatic injury under this section is insured against such losses due to traumatic injury (in this section referred to as "qualifying losses") as are prescribed by the Secretary by regulation. Qualifying losses so prescribed shall include the following:

(A) Total and permanent loss of sight.

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- (B) Loss of a hand or foot by severance at or above the wrist or ankle.
 - (C) Total and permanent loss of speech.
 - (D) Total and permanent loss of hearing in both ears.
 - (E) Loss of thumb and index finger of the same hand by severance at or above the metacarpophalangeal joints.
 - (F) Quadriplegia, paraplegia, or hemiplegia.
 - (G) Burns greater than second degree, covering 30 percent of the body or 30 percent of the face.
 - (H) Coma or the inability to carry out the activities of daily living resulting from traumatic injury to the brain.
- (2) For purposes of this subsection:
- (A) The term “quadriplegia” means the complete and irreversible paralysis of all four limbs.
 - (B) The term “paraplegia” means the complete and irreversible paralysis of both lower limbs.
 - (C) The term “hemiplegia” means the complete and irreversible paralysis of the upper and lower limbs on one side of the body.

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(D) The term “inability to carry out the activities of daily living” means the inability to independently perform two or more of the following six functions:

- (i) Bathing.
- (ii) Continence.
- (iii) Dressing.
- (iv) Eating.
- (v) Toileting.
- (vi) Transferring.

(3) The Secretary may prescribe, by regulation, conditions under which coverage otherwise provided under this section is excluded.

(4) A member shall not be considered for the purposes of this section to be a member insured under Servicemembers’ Group Life Insurance if the member is insured under Servicemembers’ Group Life Insurance only as an insurable dependent of another member pursuant to subparagraph (A)(ii) or (C)(ii) of section 1967(a)(1) of this title [38 USCS § 1967(a)(1)].

(c)

(1) A payment may be made to a member under this section only for a qualifying loss that results directly

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from a traumatic injury sustained while the member is covered against loss under this section and from no other cause.

(2)

(A) A payment may be made to a member under this section for a qualifying loss resulting from a traumatic injury only for a loss that is incurred during the applicable period of time specified pursuant to subparagraph (B).

(B) For each qualifying loss, the Secretary shall prescribe, by regulation, a period of time to be the period of time within which a loss of that type must be incurred, determined from the date on which the member sustains the traumatic injury resulting in that loss, in order for that loss to be covered under this section.

(d)

(1) Payments under this section for qualifying losses shall be made in accordance with a schedule prescribed by the Secretary, by regulation, specifying the amount of payment to be made for each type of qualifying loss, to be based on the severity of the qualifying loss. The minimum payment that may be prescribed for a qualifying loss is \$25,000, and the maximum payment that may be prescribed for a qualifying loss is \$100,000.

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(2) As the Secretary considers appropriate, the schedule required by paragraph (1) may distinguish in specifying payments for qualifying losses between the severity of a qualifying loss of a dominant hand and of a qualifying loss of a nondominant hand.

(e)

(1) During any period in which a member is insured under this section and the member is on active duty, there shall be deducted each month from the member's basic or other pay until separation or release from active duty an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to provided coverage under this section, less any costs traceable to the extra hazards of such duty in the uniformed services.

(2) During any month in which a member is assigned to the Ready Reserve of a uniformed service under conditions which meet the qualifications set forth in section 1965(5)(B) of this title [38 USCS § 1965(5)(B)] and is insured under a policy of insurance purchased by the Secretary under section 1966 of this title [38 USCS § 1966], there shall be contributed from the appropriation made for active duty pay of the uniformed service concerned an amount determined by the Secretary (which shall be the same for all such members) as the share of the cost attributable to provided coverage under this section, less any costs traceable to the extra hazards of such duty in the uniformed services. Any amounts so contributed

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on behalf of any member shall be collected by the Secretary concerned from such member (by deduction from pay or otherwise) and shall be credited to the appropriation from which such contribution was made in advance on a monthly basis.

(3) The Secretary shall determine the premium amounts to be charged for traumatic injury protection coverage provided under this section.

(4) The premium amounts shall be determined on the basis of sound actuarial principles and shall include an amount necessary to cover the administrative costs to the insurer or insurers providing such insurance.

(5) Each premium rate for the first policy year shall be continued for subsequent policy years, except that the rate may be adjusted for any such subsequent policy year on the basis of the experience under the policy, as determined by the Secretary in advance of that policy year.

(6) The cost attributable to insuring members under this section for any month or other period specified by the Secretary, less the premiums paid by the members, shall be paid by the Secretary concerned to the Secretary. The Secretary shall allocate the amount payable among the uniformed services using such methods and data as the Secretary determines to be reasonable and practicable. Payments under this paragraph shall be made on a monthly basis or at such other intervals as may be specified by the

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Secretary and shall be made within 10 days of the date on which the Secretary provides notice to the Secretary concerned of the amount required.

(7) For each period for which a payment by a Secretary concerned is required under paragraph (6), the Secretary concerned shall contribute such amount from appropriations available for active duty pay of the uniformed service concerned.

(8) The sums withheld from the basic or other pay of members, or collected from them by the Secretary concerned, under this subsection, and the sums contributed from appropriations under this subsection, together with the income derived from any dividends or premium rate adjustments received from insurers shall be deposited to the credit of the revolving fund established in the Treasury of the United States under section 1869(d)(1) of this title [38 USCS § 1869(d)(1)].

(f) When a claim for benefits is submitted under this section, the Secretary of Defense or, in the case of a member not under the jurisdiction of the Secretary of Defense, the Secretary concerned, shall certify to the Secretary whether the member with respect to whom the claim is submitted—

(1) was at the time of the injury giving rise to the claim insured under Servicemembers' Group Life Insurance for the purposes of this section; and

(2) has sustained a qualifying loss.

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(g)

(1) Payment for a loss resulting from traumatic injury may not be made under the insurance coverage under this section if the member dies before the end of a period prescribed by the Secretary, by regulation, for such purpose that begins on the date on which the member sustains the injury.

(2) If a member eligible for a payment under this section dies before payment to the member can be made, the payment shall be made to the beneficiary or beneficiaries to whom the payment would be made if the payment were life insurance under section 1967(a) of this title [38 USCS § 1967(a)].

(h) Coverage for loss resulting from traumatic injury provided under this section shall cease at midnight on the date of the termination of the member's duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance. The termination of coverage under this section is effective in accordance with the preceding sentence, notwithstanding any continuation after the date specified in that sentence of Servicemembers' Group Life Insurance coverage pursuant to section 1968(a) of this title [38 USCS § 1968(a)] for a period specified in that section.

(i) Insurance coverage provided under this section is not convertible to Veterans' Group Life Insurance.

(j) Regulations under this section shall be prescribed in consultation with the Secretary of Defense.

*Appendix B***(k) Designation of fiduciary or trustee.**

(1) The Secretary concerned, in consultation with the Secretary, shall develop a process for the designation of a fiduciary or trustee of a member of the uniformed services who is insured against traumatic injury under this section. The fiduciary or trustee so designated would receive a payment for a qualifying loss under this section if the member is medically incapacitated (as determined pursuant to regulations prescribed by the Secretary concerned in consultation with the Secretary) or experiencing an extended loss of consciousness.

(2) The process under paragraph (1) may require each member of the uniformed services who is insured under this section to—

(A) designate an individual as the member's fiduciary or trustee for purposes of subsection (a); or

(B) elect that a court of proper jurisdiction designate an individual as the member's fiduciary or trustee for purposes of subsection (a) in the event that the member becomes medically incapacitated or experiences an extended loss of consciousness.

(l)

(1) If a claim for benefits under this section is denied, the Secretary concerned shall provide to the member

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at the same time as the member is informed of such denial a description of the following:

(A) Each reason for that denial, including a description of all the information upon which the denial is based and a description of the applicable laws, regulations, or policies, with appropriate citations, and an explanation of how such laws, regulations, or policies affected the denial.

(B) Each finding that is favorable to the member.

(2) Any finding favorable to the member as described in paragraph (1)(B) shall be binding on all subsequent reviews or appeals of the denial of the claim, unless clear and convincing evidence is shown to the contrary to rebut such favorable finding.

* * *

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38 C.F.R. § 9.20 Traumatic injury protection.

(a) What is traumatic injury protection? Traumatic injury protection provides for the payment of a specified benefit amount to a member insured by Servicemembers' Group Life Insurance who sustains a traumatic injury directly resulting in a scheduled loss.

(b) What is a traumatic event?

(1) A traumatic event is damage to a living being occurring on or after October 7, 2001, caused by:

(i) Application of an external force;

(ii) Application of violence or chemical, biological, or radiological weapons;

(iii) Accidental ingestion of a contaminated substance;

(iv) Exposure to low environmental temperatures, excessive heat, or documented non-penetrating blast waves; or

(v) An insect bite or sting or animal bite.

(2) A traumatic event does not include a medical or surgical procedure in and of itself.

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- (c) What is a traumatic injury?
- (1) A traumatic injury is physical damage to a living body that is caused by a traumatic event as defined in paragraph (b) of this section.
 - (2) For purposes of this section, the term “traumatic injury” does not include damage to a living body caused by—
 - (i) A mental disorder; or
 - (ii) A mental or physical illness or disease, except if the physical illness or disease is caused by a pyogenic infection, biological, chemical, or radiological weapons, or accidental ingestion of a contaminated substance.
 - (3) The term traumatic injury includes anaphylactic shock directly caused by an insect bite or sting or animal bite.
 - (4) For purposes of this section, all traumatic injuries will be considered to have occurred at the same time as the traumatic event.
- (d) What are the eligibility requirements for payment of traumatic injury protection benefits? You must meet all of the following requirements in order to be eligible for traumatic injury protection benefits.
- (1) You must be a member of the uniformed services who is insured by Servicemembers’ Group

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Life Insurance under section 1967(a)(1)(A)(i), (B) or (C)(i) of title 38, United States Code, on the date you sustained a traumatic injury, except if you are a member who experienced a traumatic injury on or after October 7, 2001, through and including November 30, 2005. (For this purpose, you will be considered a member of the uniformed services until midnight on the date of termination of your duty status in the uniformed services that established your eligibility for Servicemembers' Group Life Insurance, notwithstanding an extension of your Servicemembers' Group Life Insurance coverage under section 1968(a) of title 38, United States Code.)

(2) You must suffer a scheduled loss that results directly from a traumatic injury and from no other cause.

(i) A scheduled loss does not result directly from a traumatic injury and from no other cause if a pre-existing illness, condition, or disease or a post-service injury substantially contributed to the loss.

(ii) A scheduled loss results directly from a traumatic injury and no other cause if the loss is caused by a medical or surgical procedure used to treat the traumatic injury.

(3) You must survive for a period not less than seven full days from the date of the traumatic injury. The seven day period begins on the date and Zulu

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(Greenwich Meridean) time of the traumatic injury and ends 168 full hours later.

(4) You must suffer a scheduled loss under § 9.21(c) within two years of the traumatic injury.

(i) If a loss with a required time period milestone begins but is not completed within two years of the traumatic injury, the loss would nonetheless qualify for TSGLI if the requisite time period of loss continues uninterrupted and concludes after the end of the two-year period.

(ii) If a required time period for a loss is satisfied before the end of the two-year period and a member suffers another period of loss after expiration of the two-year time limit, the member is not entitled to TSGLI for this time period of loss.

(5) You must suffer a traumatic injury before midnight on the date of termination of your duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance. For purposes of this section, the scheduled loss may occur after the date of termination of your duty status in the uniformed services that established eligibility for Servicemembers' Group Life Insurance.

(e) What is a scheduled loss and what amount will be paid because of that loss?

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(1) The term “scheduled loss” means a condition listed in the schedule in §9.21(c) if directly caused by a traumatic injury and from no other cause. A scheduled loss is payable at the amount specified in the schedule.

(2) The maximum amount payable under the schedule for all losses resulting from traumatic events occurring within a seven-day period is \$ 100,000. We will calculate the seven-day period beginning with the day on which the first traumatic event occurs.

(3) A benefit will not be paid if a scheduled loss is due to a traumatic injury —

(i) Caused by —

(A) The member’s attempted suicide, while sane or insane;

(B) An intentionally self-inflicted injury or an attempt to inflict such injury;

(C) Diagnostic procedures, preventive medical procedures such as inoculations, medical or surgical treatment for an illness or disease, or any complications arising from such procedures or treatment, unless the diagnostic procedure or medical or surgical treatment is necessary to treat a traumatic injury;

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(D) Willful use of an illegal substance or a controlled substance unless administered or consumed on the advice of a medical professional; or

(ii) Sustained while a member was committing an act that clearly violated a penal law classifying such an act as a felony.

(4) A benefit will not be paid for a scheduled loss resulting from —

(i) A physical or mental illness or disease, whether or not caused by a traumatic injury, other than a pyogenic infection or physical illness or disease caused by biological, chemical, or radiological weapons or accidental ingestion of a contaminated substance; or

(ii) A mental disorder whether or not caused by a traumatic injury.

(5) Amount Payable under the Schedule of Losses.

(i) The maximum amount payable for all scheduled losses resulting from a single traumatic event is limited to \$ 100,000. For example, if a traumatic event on April 1, 2006, results in the immediate total and permanent loss of sight in both eyes, and the loss of one foot on May 1, 2006, as a direct result of the same traumatic event, the member will be paid \$ 100,000.

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(ii) If a member suffers more than one scheduled loss from separate traumatic events occurring more than seven full days apart, the scheduled losses will be considered separately and a benefit will be paid for each loss up to the maximum amount according to the schedule. For example, if a member suffers the loss of one foot at or above the ankle on May 1, 2006, from one event, the member will be paid \$ 50,000. If the same member suffers loss of sight in both eyes from an event that occurred on November 1, 2006, the member will be paid an additional \$ 100,000.

(6) Definitions. For purposes of this section and § 9.21—

(i) The term biological weapon means biological agents or microorganisms intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(ii) The term chemical weapon means chemical substances intended to kill, seriously injure, or incapacitate humans through their physiological effects.

(iii) The term contaminated substance means food or water made unfit for consumption by humans because of the presence of chemicals, radioactive elements, bacteria, or organisms.

(iv) The term external force means a sudden or violent impact from a source outside of the

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body that causes an unexpected impact and is independent of routine body motions such as twisting, lifting, bending, pushing, or pulling.

(v) The term ingestion means to take into the gastrointestinal tract by means of the mouth.

(vi) The term medical professional means a licensed practitioner of the healing arts acting within the scope of his or her practice, including, e.g., a licensed physician, optometrist, nurse practitioner, registered nurse, physician assistant, or audiologist.

(vii) The term medically incapacitated means an individual who has been determined by a medical professional to be physically or mentally impaired by physical disability, mental illness, mental deficiency, advanced age, chronic use of drugs or alcohol, or other causes that prevent sufficient understanding or capacity to manage his or her own affairs competently.

(viii) The term pyogenic infection means a pus-producing infection.

(ix) The term radiological weapon means radioactive materials or radiation-producing devices intended to kill, seriously injure, or incapacitate humans through their physiological effects.

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(f) How does a member make a claim for traumatic injury protection benefits?

(1)

(i) A member who believes he or she qualifies for traumatic injury protection benefits must complete and sign Part A of the TSGLI Benefits Form and submit evidence substantiating the member's traumatic injury and resulting loss. A medical professional must complete and sign Part B of the Application for TSGLI Benefits Form.

(ii) If a medical professional certifies in Part B of the Application for TSGLI Benefits Form that a member is unable to sign Part A of the Form because the member is medically incapacitated, the Form must be signed by one of the following: The member's guardian; if none, the member's agent or attorney acting under a valid Power of Attorney; if none, the member's military trustee.

(iii) If a member suffered a scheduled loss as a direct result of the traumatic injury, survived seven full days from the date of the traumatic event, and then died before the maximum benefit for which the service member qualifies is paid, the beneficiary or beneficiaries of the member's Servicemembers' Group Life Insurance policy should complete an Application for TSGLI Benefits Form.

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(2) If a member seeks traumatic injury protection benefits for a scheduled loss occurring after submission of a completed Application for TSGLI Benefits Form for a different scheduled loss, the member must submit a completed Application for TSGLI Benefits Form for the new scheduled loss and for each scheduled loss that occurs thereafter and for each increment of a scheduled loss that occurs thereafter. For example, if a member seeks traumatic injury protection benefits for a scheduled loss due to coma from traumatic injury and/or the inability to carry out activities of daily living due to traumatic brain injury (§ 9.21(c)(17)), or the inability to carry out activities of daily living due to loss directly resulting from a traumatic injury other than an injury to the brain (§ 9.21(c)(20)), a completed Application for TSGLI Benefits Form must be submitted for each increment of time for which TSGLI is payable. Also, for example, if a member suffers a scheduled loss due to a coma, a completed Application for TSGLI Benefits Form should be filed after the 15th consecutive day that the member is in the coma, for which \$25,000 is payable. If the member remains in a coma for another 15 days, another completed Application for TSGLI Benefits Form should be submitted and another \$25,000 will be paid.

(g) How will the uniformed service decide a TSGLI claim?

(1) Each uniformed service will certify its own members for traumatic injury protection benefits

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based upon section 1032 of Public Law 109-13, section 501 of Public Law 109-233, and this section. The uniformed service will certify whether a member was insured under Servicemembers' Group Life Insurance at the time of the traumatic injury and whether the member sustained a qualifying traumatic injury and qualifying loss.

(2) The uniformed service office may request additional evidence from the member if the record does not contain sufficient evidence to decide the member's claim.

(3) The uniformed service office shall consider all medical and lay evidence of record, including all evidence provided by the member, and determine its probative value. When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of TSGLI benefits, the uniformed service shall give the benefit of the doubt to the member.

(4) Notice of a decision regarding a member's eligibility for traumatic injury protection benefits will include an explanation of the procedure for obtaining review of the decision, and all negative decisions shall include a statement of the basis for the decision and a summary of the evidence considered.

(h) How does a member or beneficiary appeal an adverse eligibility determination?

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(1) Each uniformed service has a three-tiered appeal process. The first tier of appeal is called a reconsideration, followed by a second-level appeal and then a third-level appeal. A member, beneficiary, or other person eligible to submit a claim under paragraph (f)(1)(ii) or (iii) may submit an appeal using the appeal process of the uniformed service that issued the original decision.

(i) Reconsideration.

(A) Reconsideration of an eligibility determination, such as whether the loss occurred within 730 days of the traumatic injury, whether the member was insured under Servicemembers' Group Life Insurance when the traumatic injury was sustained, or whether the injury was self-inflicted or whether a loss of hearing was total and permanent, is initiated by filing, with the office of the uniformed service identified in the eligibility decision within one year of the date of a denial of eligibility, a written notice of appeal that identifies the issues for which reconsideration is sought.

(B) The uniformed service TSGLI office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and issue a decision on the claim.

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(ii) Second-level appeal.

(A) A second-level appeal of the reconsideration decision is initiated by filing, with the second-level appeal office of the uniformed service within one year of the date of the reconsideration decision, a written notice of appeal that identifies the issues being appealed.

(B) The uniformed service second-level appeal office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not previously part of the record before the uniformed service, and issue a decision on the claim.

(iii) Third-level appeal.

(A) A third-level review of the second-level uniformed service appeal office is initiated by filing, with the third-level appeal office of the uniformed service within one year of the date of the decision by the second-level appeal office of the uniformed service, a written notice of appeal that identifies the issues being appealed.

(B) The uniformed service third-level appeal office will review the claim, including evidence submitted with the notice of appeal by or on behalf of the member that was not

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previously part of the record before the uniformed service, and issue a decision on the claim.

(2) If a timely notice of appeal seeking reconsideration of the initial decision by the uniformed service or seeking review of the decision by the second-level uniformed service appeal office is not filed, the initial decision by the uniformed service or the decision by the second-level uniformed service appeal office, respectively, shall become final, and the claim will not thereafter be readjudicated or allowed except as provided in paragraph (h)(3).

(3) New and material evidence.

(i) If a member, beneficiary, or other person eligible to submit a claim under paragraph (f)(1)(ii) or (iii) submits new and material evidence with respect to a claim that has been finally disallowed as provided in paragraph (h)(2), the uniformed service office will consider the evidence, determine its probative value, and readjudicate the claim. New and material evidence is evidence that was not previously part of the record before the uniformed service, is not cumulative or redundant of evidence of record at the time of the prior decision and is likely to have a substantial effect on the outcome.

(ii) A decision finding that new and material evidence was not submitted may be appealed in accordance with paragraph (h)(1).

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(4) Nothing in this section precludes a member from pursuing legal remedies under 38 U.S.C. 1975 and 38 CFR 9.13. However, if a member files suit in U.S. district court after an adverse initial decision on a TSGLI claim by a uniformed service, the member may not file an appeal pursuant to paragraph (h)(1) if the lawsuit is pending before a U.S. district court, a U.S. court of appeals, or the U.S. Supreme Court or the time for appeal or filing a petition for a writ of certiorari has not expired. If a member files suit in U.S. district court after filing an appeal pursuant to paragraph (h)(1), the appeal will be stayed if the lawsuit is pending before a U.S. district court, a U.S. court of appeals, or the U.S. Supreme Court or the time for appeal or filing a petition for a writ of certiorari has not expired.

(i) Who will be paid the traumatic injury protection benefit? The injured member who suffered a scheduled loss will be paid the traumatic injury protection benefit in accordance with 38 U.S.C. 1980A except under the following circumstances:

(A) If a member has been determined by a medical professional, in Part B of the Application for TSGLI Benefits Form, to be medically incapacitated, the member's guardian or, or if there is no guardian, the member's agent or attorney acting under a valid Power of Attorney will be paid the benefit on behalf of the member.

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(B) If no guardian, agent, or attorney is authorized to act as the member's legal representative, a military trustee who has been appointed under the authority of 37 U.S.C. 602 will be paid the benefit on behalf of the member. The military trustee will report the receipt of the traumatic injury benefit payment and any disbursements from that payment to the Department of Defense.

(C) If a member dies before payment is made, the beneficiary or beneficiaries who will be paid the benefit will be determined in accordance with 38 U.S.C. 1970(a).

(j) The Traumatic Servicemembers' Group Life Insurance program will be administered in accordance with this rule, except to the extent that any regulatory provision is inconsistent with subsequently enacted applicable law.

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88 FR 15907

Vol. 88, No. 050, Wednesday, March 15, 2023

Title: Servicemembers' Group Life Insurance Traumatic Injury Protection Program

Action: Final rule.

Agency: Department of Veterans Affairs.

Identifier: RIN 2900-AQ53

SUMMARY: This final rule adopts, with changes, a proposed rule amending the Department of Veterans Affairs (VA) Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program regulations. This final rule allows nurse practitioners to sign a hospital or facility-approved pass for a member to leave a hospital or treating facility as part of the member's treatment plan. This final rule also responds to comments received during a reopened 60-day comment period on the response to a petition for rulemaking and withdraws a proposed revision to the TSGLI schedule of losses for traumatic injuries from burns.

SUPPLEMENTARY INFORMATION:

On August 19, 2020, VA published a proposed rule in the **Federal Register**, 85 FR 50,973, to amend its regulations governing the TSGLI program, and addressed and denied a petition for rulemaking submitted to VA on March 16,

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2015, requesting that VA amend the TSGLI regulations to cover traumatic injuries due to illness and disease caused by explosive ordnance. VA provided a 60-day comment period, which ended on October 19, 2020. We received comments from 10 individuals during this comment period. Overall, the comments supported our proposed rulemaking; however, several of the commenters made additional recommendations, which we address below.

On March 23, 2021, we published a supplemental notice of proposed rulemaking (SNPRM), 86 FR 15,448, that provided a new opportunity for the public to submit comments pertaining to our proposal to deny the petition for rulemaking requesting that VA amend the TSGLI regulations to cover traumatic injuries due to illness and disease caused by explosive ordnance. We received three comments during the SNPRM comment period and address these comments in this final rulemaking. In addition, we explain VA is withdrawing the proposed amendment to the TSGLI burn standard that was published in the **Federal Register** in August 2020.

* * *

7. Petition for VA To Engage in TSGLI Rulemaking

One comment was submitted by counsel representing a member who is appealing the uniformed services' denial of his TSGLI claim. In our proposed rulemaking we evaluated the commenter's petition for VA to engage in a TSGLI rulemaking that would add illness and disease to the TSGLI schedule if the illness or disease was caused

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by explosive ordnance. The commenter stated that VA did not explain why it did not grant the member's petition and why it adopted a two-year time period for a loss from a traumatic injury to occur. The comments also stated that losses from explosive ordnance such as stroke do occur within two years of members' exposure to explosive ordnance and VA's denial of the petition is arbitrary and capricious and violates the Administrative Procedure Act.

In the proposed rulemaking, we explained that we were proposing to deny the petition for rulemaking because covering losses from illness or disease resulting from explosive ordnance would be inconsistent with the plain language of the authorizing statute and the purpose of TSGLI to cover injuries occurring immediately after a traumatic event as losses due to illness or disease do not result from immediate traumatic harm unless the harm is caused by nuclear, biological, or chemical weapons. 85 FR at 50,983. We included immediate traumatic harm caused by nuclear, biological, and chemical weapons as exceptions to the TSGLI illness and disease exclusion because these weapons are unique to the hazards of military service. *Id.* As we further explained in the proposed rulemaking, the legislative history of the TSGLI authorizing statute shows that Congress intended to provide TSGLI compensation for injuries, rather than diseases, that occur immediately after a traumatic event and that require prompt medical treatment. *Id.* Thus, we proposed to deny the commenter's petition to provide TSGLI coverage for physical illness or disease caused by TBI because losses from illness or disease caused by TBI may not immediately manifest but may manifest many years after the member's TBI. *Id.* Further, although the commenter noted that one of the

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medical studies cited by VA in the proposed rule found an average time of 543 days between a TBI patient's use of health care services and the onset of stroke, we identified other scientific reports suggesting a longer latent period before clinical presentation of adverse health effects such as meningioma and an increase in risk of brain tumors. *Id.* Additionally, we cited to a report that showed a delayed onset of symptoms of Parkinson Disease following TBI. *Id.*

The commenter also stated that VA has not provided sufficient justification for adopting a two-year period for a loss to occur following a traumatic injury and that we have offered no actuarial or statistical data to support the denial of the petition for rulemaking. As stated previously, VA is obligated to manage TSGLI according to sound actuarial principles, and we have modeled TSGLI on commercial AD&D policies. The TSGLI two-year period to suffer a loss provides more extensive coverage than the coverage offered by most commercial AD&D insurers; further extending the loss period risks the financial health of TSGLI and would make it difficult for TSGLI adjudicators to determine if a nexus exists between a traumatic injury and a qualifying loss. Accordingly, we make no change based on this commenter's comments and deny the petition for rulemaking.

8. Comments Received During SNPRM Comment Period

We received three additional comments in response to our supplemental notice of proposed rulemaking providing a new opportunity for the public to submit

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comments pertaining to our proposal to deny the petition for rulemaking described in the previous section. One commenter indicated that the types of illnesses and diseases that result from exposure to low-level blasts often are not diagnosed until as long as a decade later and should be covered under TSGLI. VA considers low-level blasts a traumatic event and calculates the two-year period from the last documented blast. Any “immediate” losses, such as hospitalization or the inability to perform ADL from a TBI resulting from a low-level blast, are losses covered under TSGLI. Covering a disease or illness that occurs many years following a traumatic event would be contrary to Congressional intent that TSGLI provide benefits for losses from traumatic injuries that are suffered soon after a traumatic event. *See* 85 FR at 50,983. Therefore, we do not make a change based on this comment.

VA received one comment from counsel representing the member appealing the uniformed services’ denial of his TSGLI claim and who submitted the petition for rulemaking stating that our proposal to deny the petition to add illness and disease to the TSGLI schedule if the illness and disease was caused by explosive ordnance was arbitrary and capricious. The comment submitted was similar to a comment submitted during the prior notice and comment period. As stated previously, VA does not make any changes based on this comment because covering losses from illness or disease resulting from explosive ordnance would be inconsistent with commercial AD&D coverage after which Congress modeled TSGLI and the purpose of TSGLI to cover injuries occurring immediately after a traumatic event.

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We received another comment from a licensed physician and the author of a report to which we cited in our August 2020 **Federal Register** submission that proposed to deny the petitioner's request. The commenter stated that TBI from explosive ordnance follows a disease process and that losses from illness and disease caused by TBI that is caused by explosive ordnance should be covered under TSGLI. As we explained in the proposed rulemaking and in previous sections of this final rulemaking, the types of long-term illnesses and diseases associated with TBI do not cause the immediate type of harm against which TSGLI is designed to protect. Our research shows that, while several conditions, such as Alzheimer's Disease and dementia, have a positive association with TBI, these conditions do not immediately manifest, [*15910] and losses from these conditions usually do not occur until more than two years after TBI. Institute of Medicine of the National Academies, *Gulf War and Health—Vol. 9: Long-Term Effects of Blast Exposures* (2014), available at <https://doi.org/10.17226/18253>. We also identified a positive association between TBI and Parkinson's Disease, however the symptoms from Parkinson's Disease that would cause a member to suffer a loss do not appear within the two-year loss period, but usually appear as many as twenty years following a TBI. *Id.* Further, members who suffer immediate harm due to TBI caused by explosive ordnance and are hospitalized or suffer the loss of ADL are eligible for TSGLI payment if the loss occurs during the two-year period for TSGLI losses. Therefore, we do not make any changes based on this comment and deny the petition for rulemaking.

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86 FR 15448

Vol. 86, No. 054, Tuesday, March 23, 2021

Title: Servicemembers' Group Life Insurance Traumatic Injury Protection Program Amendments

Action: Supplemental notice of proposed rulemaking.

Agency: Department of Veterans Affairs.

Identifier: RIN 2900-AQ53

SUMMARY: On August 19, 2020, the Department of Veterans Affairs (VA) published a notice of proposed rulemaking to amend its regulations that govern the Servicemembers' Group Life Insurance Traumatic Injury Protection (TSGLI) program. This supplemental notice of proposed rulemaking (SNPRM) clarifies that VA's proposed denial of a petition for rulemaking, as set forth in that proposed rulemaking, is a proper subject for the submission of comments and provides a new opportunity for submission of such comments.

SUPPLEMENTARY INFORMATION: On August 19, 2020, VA published a notice of proposed rulemaking to amend VA regulations governing the TSGLI program. 85 FR 50973. That rulemaking also proposed to deny a petition for rulemaking requesting that VA:

1. Amend the definition of "traumatic event" in current § 9.20(b)(1) to include "application of . . . explosive ordnance . . . causing damage to a living being."

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2. Amend the definition of “traumatic injury” in current § 9.20(c)(2)(ii) to include a “physical illness or disease . . . caused by . . . explosive ordnance.”
3. Amend the list of exclusions in current § 9.20(e)(4)(i) to provide that a scheduled loss resulting from a “physical illness or disease caused by explosive ordnance” will not be excluded from TSGLI coverage.
4. Add the following definition of “explosive ordnance” to current § 9.20(e)(6): “all munitions containing explosives, . . . includ[ing], but . . . not limited to, improvised explosive devices (IEDs).”

This SNPRM does not propose any substantive changes to the previously published proposed rule. Rather, through this SNPRM, we simply seek to (1) clarify that VA proposes to deny the petition for rulemaking for the reasons set forth in the preamble to the proposed rulemaking, *see* 85 FR 50982-83, and (2) provide additional opportunity for public comment on that subject specifically because the August 2020 proposed rule may not have been entirely clear that the issues raised in the petition and the proposed denial thereof were subject to public comment.

VA hereby invites comments on the petition and the proposed denial thereof. Before making a final decision on the petition and the issuance of a final rulemaking, VA will consider all comments received during the comment period ending on October 19, 2020, in response to the August 2020 proposed rule and all comments received in response to this SNPRM by the closing date. If you

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submitted a comment regarding the petition in response to the August 2020 proposed rule, you do not need to submit the same comment again. This SNPRM does not reopen the other proposals that were contained in the August 2020 proposed rulemaking or request further comments on those proposals.

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85 FR 50973

Vol. 85, No. 161, Wednesday, August 19, 2020

Title: Servicemembers' Group Life Insurance Traumatic Injury Protection Program Amendments

Action: Proposed rule.

Agency: Department of Veterans Affairs.

Identifier: RIN 2900-AQ53

SUMMARY: The Department of Veterans Affairs (VA) proposes to amend its regulations that govern the Servicemembers' Group Life Insurance (SGLI) Traumatic Injury Protection (TSGLI) program, to clarify the eligibility criteria, add definitions, and explain the application and appeals processes, including the submission of supporting evidence and the interaction between the administrative appeals process and a Federal lawsuit on a claim. VA proposes to recodify the definitions in the current regulation that are pertinent to the schedule of losses, revise existing definitions, and add new definitions. VA would add a new regulation to codify the text at the beginning of the schedule of losses, recodify that schedule, and amend the criteria for certain losses in the schedule. This rulemaking also responds to a petition for rulemaking.

SUPPLEMENTARY INFORMATION: TSGLI provides up to \$100,000 of traumatic injury coverage to all

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servicemembers enrolled in SGLI. TSGLI provides a financial benefit to seriously injured SGLI insureds to assist them with expenses incurred during long periods of recovery and rehabilitation. Since the program began issuing benefits on December 22, 2005, through June 30, 2019, over \$1 billion has been paid to almost 18,500 injured servicemembers. TSGLI is modeled after commercial Accidental Death and Dismemberment [*50974] (AD&D) insurance coverage, specifically, the “dismemberment” portion of the coverage, although it deviates in some respects from the commercial AD&D model to account for the unique needs of military personnel. 70 FR 75,940 (Dec. 22, 2005). In developing these proposed amendments, VA considered industry practice and AD&D case law, the goals and purpose of the TSGLI authorizing statute, as well as analysis from a TSGLI Year-Ten Review and consultation with medical experts.

I. Year-Ten Review

After ten years of program implementation, VA initiated a comprehensive review of TSGLI regulations to assess proposals for improvements, clarify eligibility standards, identify opportunities for administrative and operational enhancements, and ensure consistency with congressional intent. VA reviewed approximately 1,850 TSGLI claims that had been adjudicated by the uniformed services and consulted with medical experts at 18 military, VA, and private medical facilities, including George Washington University Medical Center, Washington, DC; Navy Medical Center, San Diego, California; San Antonio Military Medical Center, San Antonio, Texas; University

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of Pennsylvania Hospital, Philadelphia, Pennsylvania; VA Amputation System of Care, VA Medical Center, Richmond, Virginia; VA Medical Center, Bay Pines, Florida; VA Polytrauma Center, Tampa, Florida; Walter Reed National Military Medical Center, Bethesda, Maryland; and Moss Rehabilitation Research Institute, Elkins Park, Pennsylvania (“experts”).

Areas addressed by the review include loss standards, application and appeals processes, forms, program exclusions, and definitions. A copy of the review can be found at https://www.benefits.va.gov/INSURANCE/docs/TSGLI_YTR.pdf. This comprehensive program review served as the basis for many aspects of this proposed rulemaking.

While VA was conducting the Year-Ten Review, a petition for rulemaking was submitted to the Secretary of Veterans Affairs on March 16, 2015. The petition is addressed in this notice of proposed rulemaking, which serves as the Secretary’s response to the petition.

* * *

III. Petition for Rulemaking

On March 16, 2015, a petition for rulemaking was submitted to the Secretary of Veterans Affairs requesting that VA:

1. Amend the definition of “traumatic event” in current § 9.20(b)(1) to include “application of . . . explosive ordnance . . . causing damage to a living being.”

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2. Amend the definition of “traumatic injury” in current § 9.20(c)(2)(ii) to include a “physical illness or disease . . . caused by . . . explosive ordnance.”
3. Amend the list of exclusions in current § 9.20(e)(4)(i) to provide that a scheduled loss resulting from a “physical illness or disease caused by explosive ordnance” will not be excluded from TSGLI coverage.
4. Add the following definition of “explosive ordnance” to current § 9.20(e)(6): “all munitions containing explosives, . . . includ[ing], but . . . not limited to, improvised explosive devices (IEDs).”

In considering this proposal, VA conducted a review of medical literature on the numbers, types, and onset period of illnesses and diseases resulting from explosive ordnance exposure. VA also interviewed a range of medical experts in the fields of traumatic brain injury, concussive force trauma, combat trauma, and retained toxic fragment impacts as well as epidemiologists and other medical researchers studying the impacts of blast injuries on today’s military. Based upon this review of the issue, VA denies the petition for rulemaking for the following reasons.

A. Definition of “Traumatic Event”

Current § 9.20(b) defines a “traumatic event” as “the application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance causing damage to a living

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being.” We agree with petitioner that IEDs are a unique hazard of military service. Therefore, since the start of the TSGLI program on December 1, 2005, explosion of an ordnance including an improvised explosive device causing damage to a living being has been considered as a traumatic event, *i.e.*, damage caused by application of external force due to fragments of debris propelled by the explosion or due to a member being thrown to the ground or into an object. *Gulf War & Health, Volume 7: Long-Term Consequences of Traumatic Brain Injury*, at 7 (2009). Between December 22, 2005, and July 31, 2019, the TSGLI program provided more than \$357 million in benefits to 6,207 servicemembers who suffered a traumatic injury due to an improvised explosive device, mortar attack, shrapnel, or rocket propelled grenade that resulted in a scheduled loss. VA, therefore, sees no need to amend § 9.20(b)(1) to include an explosive ordnance or to add a definition of improvised explosive device to § 9.20(e)(6).

B. Illness or Disease Caused by Explosive Ordnance

The petition seeks to amend current 38 CFR 9.20(c)(2) (ii) and (e)(4)(i) to ensure TSGLI coverage of physical illness or disease caused by TBI, which has been called a signature injury of the conflict in Iraq. Petition at 12-15. Petitioner contends that the harm caused by explosion of an ordnance is “just like” application of chemical, biological, and radiological weapons and accidental ingestion of a contaminated substance because they “produce immediate bodily harm but their biological effects may *not* immediately manifest” and “may have a latency of months to years before manifesting.” Petition

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at 23. Petitioner's request is inconsistent with the nature [*50983] of TSGLI, which is modeled on AD&D insurance, and congressional intent.

The plain language of 38 U.S.C. 1980A(a)(1) and (2), (b)(1), (c)(1) and (2) authorizes TSGLI benefits for a qualifying loss resulting directly from a "traumatic injury." The word "disease" does not appear in the statute. Consistent with the maxim "*expressio unius est exclusio alterius*," Congress knows how to include TSGLI coverage for diseases if it so desires, and it did not do so. *See Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion.").

VA implemented 38 U.S.C. 1980A in 2005 by defining the term "traumatic injury" in current 38 CFR 9.20(c)(1) to mean "physical damage . . . caused by" the "application of external force, violence, chemical, biological, or radiological weapons, or accidental ingestion of a contaminated substance." In the 2005 interim final-rule notice, VA stated that "[w]e believe that inherent in the term 'traumatic injury' is the notion that the injury occurs immediately." 70 FR 75,941; *see* 10 Couch on Insurance § 139:28, at 139-64 ("accidental bodily injury has been defined as a localized abnormal condition of the living body directly and contemporaneously caused by accident"). VA expressly excluded losses caused by a "disease" from TSGLI coverage in current 38 CFR 9.20(c)(2)(ii) and (e)(4) (i), which states that "traumatic injury" does not include damage to a living body caused by a disease, whether

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physical or mental in nature. 70 FR 75,941. VA stated that the “term ‘injury’ refers to the result of an external trauma rather than a degenerative process, while the “term ‘disease’ . . . refers to some type of internal infection or degenerative process.” *Id.* (citing VAOPGCPREC 86-90).

VA’s conclusion that TSGLI only extends to traumatic injuries which cause immediate harm and require immediate treatment as compared to diseases is supported by the legislative history when 38 U.S.C. 1980A was enacted in 2005. TSGLI coverage was intended for injuries occurring immediately after a traumatic event, *e.g.*, wounds suffered on the battlefield, and to provide financial support when the wounded servicemembers return home and are undergoing rehabilitation prior to medical discharge from service. *See* 151 Cong. Rec. 7454-55 (2005).

VA, however, defined “injury” to include physical illness or disease “caused by a pyogenic infection, chemical, biological or radiological weapons, or accidental ingestion of a contaminated substance” because “including immediate traumatic harm due to those unique hazards of military service is consistent with the purpose of TSGLI.” 70 FR 75,941 (emphasis added); 38 CFR 9.20(c)(2)(ii). VA stated that the “physical damage resulting in a covered loss would generally occur immediately and require prompt medical treatment.” 70 FR 75,941.

Scientific reports indicate that the consequences of a TBI may not become manifest for a long period of time. For

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example, the Institute of Medicine report, *Long-Term Consequences of Traumatic Brain Injury*, at 7, found a “weak but significant association between TBI and meningioma and of an increase in risk of brain tumors 10 years or more after TBI; that suggests a long latent period before clinical presentation.” *See also id.* at 355. A study showing a link between TBI and increased risk of stroke in the first five years after injury found that, in the cohort studied, the average time between a patient’s use of health care services and onset of stroke was 543 days for patients with TBI. Yi-Hua Chen, et al., *Patients with Traumatic Brain Injury: Population-Based Study Suggests Increased Risk of Stroke*, 42 *Stroke* 2733-39 (2011). Studies of occurrence of Parkinson’s disease following TBI also show a delayed onset. Lindsay Wilson, et al., *Traumatic Brain Injury 4: The Chronic and Evolving Neurological Consequences of Traumatic Brain Injury*, 16 *The Lancet* 813-825 (2017).

Because Congress intended to provide TSGLI compensation for “injuries” rather than diseases occurring immediately after a traumatic event and that require prompt medical treatment, the Secretary denies the petition to provide TSGLI coverage for physical illness or disease caused by TBI that “may not immediately manifest” and “may have a latency of months to years before manifesting.”

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