

No.

IN THE

Supreme Court of the United States

JAMES M. KERNZ,

Petitioner,

v.

DOUGLAS A. COLLINS, 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 Department of Veterans Affairs is the agency responsible for administering the benefits Congress has allocated to veterans in exchange for their service to this country. If an initial VA adjudicator denies a veteran's benefits claim, the veteran may appeal to the agency's appellate tribunal, the Board of Veterans' Appeals. A veteran may then appeal to the U.S. Court of Appeals for Veterans Claims (also called the Veterans Court). It is beyond dispute that, when a veteran appeals to the Veterans Court, the Board loses jurisdiction over the underlying claim.

Petitioner appealed to the Veterans Court from an obviously incorrect Board decision that deemed his intra-agency benefits appeal untimely. But before the Veterans Court acted, the Board purported to reopen Petitioner's case *sua sponte*. Solely because of this unauthorized action, a divided en banc Veterans Court dismissed Petitioner's pending appeal as moot. The Federal Circuit likewise dismissed Petitioner's further appeal, holding that there was no live case or controversy because the Board had given Petitioner the reopening he sought—even though the Board lacked the power to take this action, and even though the Board's unilateral actions placed Petitioner in a worse position.

The question presented is:

May an agency defeat the existence of a case or controversy in a reviewing court by taking unilateral, *ultra vires* action after the agency has lost jurisdiction following an appeal to the court?

PARTIES TO THE PROCEEDING

Petitioner (claimant-appellant below) is James M. Kernz.

Respondent (respondent-appellee below) is Douglas A. Collins.

RELATED PROCEEDINGS

Kernz v. Douglas A. Collins, Secretary of Veterans Affairs, No. 24-1171 (Fed. Cir. judgment entered Apr. 3, 2026).

Kernz v. Denis McDonough, Secretary of Veterans Affairs, No. 20-2365 (Vet. App. Order entered Oct. 4, 2023).

Kernz v. Denis McDonough, Secretary of Veterans Affairs, No. 200117-73605 (Bd. Vet. App. Order entered Sept. 7, 2023).

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INTRODUCTION

This veterans' case presents a question of wide-ranging structural importance: whether a federal agency can defeat the jurisdiction of its reviewing courts by taking unilateral, unauthorized action after a claimant has exercised his statutory right to judicial review. The Federal Circuit held that it can. That holding is wrong, dangerous, irreconcilable with elementary principles of jurisdictional transfer, and in direct conflict with the Seventh Circuit's precedent. This Court should grant certiorari and reverse.

The facts are straightforward. Petitioner James M. Kernz served in the Army from 1968 through 1970. Mr. Kernz was one of at least thousands of veterans whose appeals the Board of Veterans' Appeals erroneously rejected as untimely—an action later recognized as “obviously incorrect.” Pet. App. 5a. Mr. Kernz appealed to the Court of Appeals for Veterans Claims, which divested the Board of jurisdiction. *See Cerullo v. Derwinski*, 1 Vet. App. 195, 198 (1991); Pet. App. 14a. Yet while his appeal was pending, the Board unilaterally purported to reopen his case at the agency level. Solely because of that extra-jurisdictional action, a divided en banc Veterans Court dismissed Mr. Kernz's appeal as moot, reasoning that the Board had given him the relief he sought from the court. Pet. App. 41a-43a.

The Federal Circuit likewise dismissed Mr. Kernz's further appeal to the Article III courts, holding that there was no reviewable case or controversy. Pet. App. 12a. It reasoned that, because the Board's unlawful actions had supposedly corrected the error

challenged by Mr. Kernz’s appeal, he lacked standing to press that appeal. Pet. App. 3a-4a, 12a. That holding is fundamentally wrong: because the Board lacked jurisdiction to act once Mr. Kernz’s appeal was filed, the Board’s post-appeal actions had no legal effect and could not defeat the existence of a reviewable case or controversy.

The Federal Circuit’s erroneous holding means that an agency—here, VA—can evade judicial scrutiny by taking action after it has lost jurisdiction. This conclusion should trouble any court and calls out for this Court’s review. Under the holding below, any time an agency commits error and a claimant appeals, the agency can simply “correct” its mistake *sua sponte* and extinguish judicial review. The Federal Circuit’s holding amounts to a license for agency self-dealing that transforms Article III’s case-or-controversy requirement from a constraint on judicial power into a sword an agency can wield against the citizens who invoke that power.

This holding also opens a sharp circuit split. The Seventh Circuit has squarely held that an agency “may not divest the federal courts of jurisdiction by unilaterally reopening its administrative proceedings” after an appeal has been taken. *Drs. Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 677 (7th Cir. 2010).

The Federal Circuit’s contrary view is not only wrong analytically but also has severe systemic implications. Congress enacted the Veterans’ Judicial Review Act precisely because decades of unreviewable VA decisionmaking had failed the men and women

who served this country. The statute was designed to provide veterans with “fundamental justice” through independent judicial oversight of agency action. S. Rep. No. 100-418, at 50-51 (1988); *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 432 (2011). The Federal Circuit’s holding eviscerates that guarantee. It tells the Board that it may insulate its errors from scrutiny by taking purportedly corrective action that only a reviewing court should authorize.

The deprivation of judicial review has concrete negative consequences for Mr. Kernz. When appealing to the Board, Mr. Kernz elected a procedure that permitted 90 days to submit additional evidence. But the Board’s extra-jurisdictional actions created confusion about the deadline for Mr. Kernz’s submission. And even though Mr. Kernz submitted favorable evidence to the Board just 20 days after it sua sponte re-docketed his appeal, the Board refused to consider that evidence because it was supposedly too late. Pet. App. 82a-83a (Jaquith, J., dissenting). Mr. Kernz is materially worse off than he would have been had the reviewing courts fulfilled their function and placed Mr. Kernz’s claim in the position it should have been in all along, before the Board’s original error and its unauthorized “correction.”

This Court should grant certiorari and hold that agencies cannot evade judicial review through ultra vires action.

OPINIONS AND ORDERS BELOW

The decision of the United States Court of Appeals for the Federal Circuit is published at 171 F.4th

1364 and reproduced at Pet. App. 1a-21a. The decision of the Court of Appeals for Veterans Claims is published at 36 Vet. App. 372 and reproduced at Pet. App. 22a-85a. The opinion of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 86a-92a.

JURISDICTION

The Federal Circuit entered judgment on April 3, 2026. Pet. App. 2a. On May 22, 2026, this Court extended the due date for a petition for a writ of certiorari in Mr. Kernz's case to and including August 31, 2026. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 7252 provides in pertinent part:

The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision. The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate.

STATEMENT OF THE CASE

Congress provides veterans with the right to meaningful judicial review.

The Department of Veterans Affairs—first established in 1930 as the Veterans Administration—is a

Cabinet-level agency responsible for administering the federal statutes that entitle veterans and their dependents to various benefits. *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 309 (1985). For decades, veterans had essentially no access to judicial review of VA decisions. See *Brown v. Gardner*, 513 U.S. 115, 122 (1994). That changed in 1988, when Congress enacted the Veterans’ Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988). See *Henderson*, 562 U.S. at 432. Through the Veterans’ Judicial Review Act, Congress provided for direct judicial review of VA benefits rulings and thus created “a multi-tier[] framework for the adjudication of claims regarding veterans benefits.” *Beamon v. Brown*, 125 F.3d 965, 967 (6th Cir. 1997); see also *Bates v. Nicholson*, 398 F.3d 1355, 1363 (Fed. Cir. 2005) (“The passage of the Veterans’ Judicial Review Act ... provided veterans with their day in court.”).

The adjudication process begins with a veteran or other prospective beneficiary “fil[ing] a claim with the VA,” which is resolved in the first instance by adjudicators at VA’s regional offices. See *George v. McDonough*, 596 U.S. 740, 743 (2022). Veterans can submit evidence in support of their own claims, but—as part of the non-adversarial, claimant-friendly system Congress designed—VA also has a statutory duty to assist veterans in developing their claims, including an affirmative duty to obtain the evidence to substantiate the claim. See 38 U.S.C. § 5103A; *Henderson*, 562 U.S. at 431-32. If the regional office denies the claim, a veteran can appeal within the agency to the Board of Veterans’ Appeals. 38 U.S.C. §§ 5104C(a)(1)(C), 7105. The Board’s members function like administrative law judges; they can conduct

hearings, weigh evidence, and issue written decisions granting or denying a claim or remanding for further development. *Id.* §§ 7104(a), 7105(b)(1).

If the veteran thinks the Board has erred, he can appeal to the specialized U.S. Court of Appeals for Veterans Claims (the Veterans Court). *Id.* § 7252. The Veterans Court is an Article I tribunal, created as part of the Veterans’ Judicial Review Act, with exclusive jurisdiction over appeals from Board decisions. *Id.* § 7251. “[W]hen a timely [notice of appeal] is filed with [the Veterans Court] from a final [Board] decision, jurisdiction immediately lies in” the Veterans Court. *Cerullo*, 1 Vet. App. at 198. “Concurrent ... jurisdiction” between the Board and the Veterans Court “is impermissible.” *Id.* at 197; *see also Graves v. Principi*, 294 F.3d 1350, 1352 (Fed. Cir. 2002).

Only a claimant, and not the Secretary, may appeal from the Board to the Veterans Court. 38 U.S.C. § 7252(a). But either party may seek further review of the Veterans Court’s rulings by appealing to the Federal Circuit, which has exclusive jurisdiction. *Id.* § 7292. Review of the Federal Circuit’s decision is available by seeking certiorari from this Court. 28 U.S.C. § 1254(1).

The Board erroneously denies thousands of timely intra-agency appeals, including Mr. Kernz’s, as untimely.

The agency-level details of the VA claims process changed somewhat in 2017, when Congress enacted the Appeals Modernization Act (AMA), Pub. L. No. 115-55, 131 Stat. 1105 (2017), in an attempt to replace

the dysfunctional, “backlog[ged]” VA appeal system with a more streamlined process, *Mil.-Veterans Advoc. v. Sec’y of Veterans Affs.*, 7 F.4th 1110, 1118 (Fed. Cir. 2021). Among other things, the AMA established three review lanes at the Board, each with its own procedures, and allowed veterans to opt into a lane. *See id.* at 1119. Veterans with pending legacy appeals—that is, those who received an initial VA decision before the AMA took effect in 2019—can elect to participate in one of these new review lanes by filing a particular form furnished by VA. *See* 38 C.F.R. §§ 3.2400(c), 20.202.

Petitioner James M. Kernz chose to take advantage of this option provided by the AMA. Mr. Kernz served in the United States Army from July 1968 to April 1970. Pet. App. 22a. In 2016, he filed a claim for compensation for various disabling conditions linked to his military service. On December 18, 2019, a regional office denied Mr. Kernz’s claim. Pet. App. 4a. Pursuant to VA regulations, Mr. Kernz had 60 days (until February 18, 2020) to opt into and appeal under the modernized system. Pet. App. 26a n.13; 38 C.F.R. §§ 3.2400, 19.52(b). On January 17, 2020, Mr. Kernz “timely appealed” to the Board by filing the AMA appeal form and opting into a modernized review lane that afforded him 90 days to submit additional evidence in support of his claim. Pet. App. 4a-5a; CAFC App. 72-73.

On March 24, 2020, the Board sent Mr. Kernz a letter noting the December decision and the 60-day appeal period, acknowledging receipt of the January filing, yet inexplicably stating that Mr. Kernz’s claims were “no longer eligible for appeal” because the 60-

day period had passed. Pet. App. 97a-99a; *see* Pet. App. 26a-27a. This timeliness determination “was obviously incorrect.” Pet. App. 5a.

Mr. Kernz was not alone in receiving this puzzling rejection of his appeal. Since the implementation of the AMA, the Board has issued untold numbers of plainly erroneous notices to veterans attempting to opt into the modernized system, informing them that their timely appeals were untimely. The agency has refused to identify the full scope of the problem, citing “limitations in its electronic systems” that make it “too difficult to determine” which veterans are affected. Pet. App. 80a (Jaquith, J., dissenting); CAFC App. 564-565. Mr. Kernz’s counsel, however, has estimated the number of erroneous notices to be between 1,512 and 2,075. Pet. App. 80a-81a (Veterans Court dissent recounting these numbers).

On April 2, 2020, Mr. Kernz timely filed a notice of appeal in the Veterans Court, “identifying the March 24, 2020[] Board letter as the ‘decision’ he sought to appeal.” Pet. App. 27a; Pet. App. 5a. Mr. Kernz ultimately requested that the Veterans Court certify his appeal as a class action, encompassing all claimants similarly affected by the Board’s erroneous untimeliness decisions. Pet. App. 24a.

While Mr. Kernz’s Veterans Court appeal is pending, the Board purports to take further action on his claim.

After Mr. Kernz filed his appeal, thus transferring jurisdiction from the agency to the Veterans Court, “the Board acted *sua sponte*” and sent Mr.

Kernz two letters, both dated May 7, 2020. Pet. App. 5a; Pet. App. 27a-28a. One letter stated that the March untimeliness notice had been “erroneously issued” due to “administrative error.” Pet. App. 96a; *see* Pet. App. 28a. In the second letter, the Board purported to have docketed Mr. Kernz’s appeal, placed him in the requested review lane, and provided “90 days from the date of the Board’s receipt” of his appeal form “to submit new evidence.” Pet. App. 93a; *see* Pet. App. 28a.

After receiving these letters, Mr. Kernz filed a notice with the Veterans Court, arguing that the Board lacked jurisdiction to take this action due to his pending appeal. Pet. App. 28a. In response, the Secretary moved to dismiss Mr. Kernz’s appeal, arguing that the Board’s original untimeliness letter was not a final, appealable decision. Pet. App. 5a-6a; Pet. App. 28a-29a.

While the parties briefed these issues, the Veterans Court also pressed VA to provide more information on the underlying problem. The Court ordered the Secretary to respond to Mr. Kernz’s class-certification motion. Pet. App. 30a. And it ordered the Secretary to explain how VA determines the timeliness of submitted forms, to explain the electronic constraints in tracking and identifying calculation errors, and to provide a remedial plan as to how VA would identify and notify veterans who had received erroneous notification letters. CAFC App. 603.

On August 23, 2021—“[a] full year after learning that it had fumbled Mr. Kernz’s Board appeal” and two days before VA responded to the Veterans Court’s

order—the Board published a notice, posted on its website and distributed to some VA facilities, stating that it had learned that “a limited number of Veterans may have had their [AMA appeal forms] ... mistakenly rejected for being untimely.” Pet. App. 80a (Jaquith, J., dissenting); Pet. App. 31a; CAFC App. 606. The notice provided that if a veteran had filed a form and believed it was improperly rejected as untimely, they could send a letter to VA. Pet. App. 81a; CAFC App. 606.

The Veterans Court heard oral argument in this case twice, first before a panel and then before the full court. Pet. App. 5a-6a.

A divided en banc Veterans Court dismisses Mr. Kernz’s appeal as moot based on the Board’s ultra vires action.

In a 6-3 decision, the en banc Veterans Court dismissed Mr. Kernz’s appeal as moot. Pet. App. 22a, 41a. Applying Article III standards, the majority held that the Board’s post-appeal actions had provided Mr. Kernz with the relief he sought from the court—that is, reinstating his intra-agency appeal—and thus eliminated any case or controversy. Pet. App. 41a-43a, 46a-56a. The majority acknowledged that the Board had acted outside its jurisdiction, “emphasiz[ing] that *Cerullo* remains good law and continues to serve a critical role ... to prevent the Board from interfering with [Veterans Court] jurisdiction.” Pet. App. 56a. And the majority “reiterate[d] that, even when the goal is to award an appellant with all the relief he or she could obtain before the [Veterans] Court, the Board ... should seek the Court’s

permission as *Cerullo* requires.” Pet. App. 56a. Yet the majority effectively excused the Board’s unsanctioned post-appeal conduct in Mr. Kernz’s case. It reasoned that this case was supposedly unlike *Cerullo*, because the Board’s post-appeal actions in Mr. Kernz’s case purported to “correct its mistake” and therefore “resolve the controversy” that had been presented to the court on appeal. Pet. App. 48a-53a.

The majority cited the Seventh Circuit’s decision in *Doctors Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672 (7th Cir. 2010), as supposedly providing support for this “distinction” from *Cerullo*. There, as noted above (at 2), the Seventh Circuit held that an agency “may not divest the federal courts of jurisdiction by unilaterally reopening its administrative proceedings” after an appeal has been taken. *Id.* at 677. According to the Veterans Court majority, *Doctors Nursing* had disallowed post-appeal agency action from defeating judicial review because the agency action was not yet complete and therefore might not fully redress the appellate challenge. Pet. App. 51a-52a.

The Veterans Court majority believed that this fact distinguished the Seventh Circuit’s earlier decision in *Gao v. Gonzales*, 464 F.3d 728 (7th Cir. 2006), where the Board of Immigration Appeals was authorized to reopen its administrative proceedings despite an appeal challenging its initial refusal to do so. Pet. App. 52a-53a. The majority found this case to be more like *Gao*, concluding that “[t]he Board’s May 2020 actions provided [the] precise relief” Mr. Kernz was seeking on appeal. Pet. App. 43a, 52a-53a. The majority refused to consider Mr. Kernz’s showing of harm

from the Board’s actions—namely, the confusion over the evidentiary window and the resulting effects on his claim record—because it related “to the merits of his claim[], not the timeliness of his appeal.” Pet. App. 45a.

The two dissenting opinions called out the central flaw in the majority’s analysis. As then-Chief Judge Bartley’s dissent put it: “This case is not about mootness—it is about the Board overstepping its jurisdiction and acting in utter disregard of a veteran’s exercise of his right to judicial review.” Pet. App. 67a; *accord* Pet. App. 70a (“If the Board did not have jurisdiction over the appealed issue, it did not have legal authority to provide [Mr. Kernz] relief. And so, a live case or controversy still remains.”). Because the Board “had no authority” to act as it did, its post-appeal actions “are a legal nullity” and “incapable of mooting Mr. Kernz’s appeal.” Pet. App. 67a.

Moreover, the dissents illustrated how the majority’s central distinction of Mr. Kernz’s case from *Cerullo* was illusory. The Board’s unlawful actions had not ameliorated the injury from its error. On the contrary, the precise “harm the veteran feared ha[d] come to pass,” with the Board using the confusion its own actions had created about the 90-day evidentiary window to exclude the favorable evidence Mr. Kernz had submitted in support of his claim. Pet. App. 82a (Jaquith, J., dissenting) (footnote omitted); *see also* Pet. App. 69a (Bartley, J., dissenting and noting how the Board had given “different and conflicting evidence submission guidelines” that had “unsurprising[ly] [created] confus[ion]”).

The dissents likewise rebutted the majority’s claim to find support in Seventh Circuit precedent. The key distinction that the majority had missed between *Doctors Nursing* and *Gao*, Judge Bartley explained, was that the latter involved a statute expressly permitting the agency to take the post-appeal action it had taken. Pet. App. 71a. Because Congress has not authorized such concurrent jurisdiction in the veterans’ context, there was no authority for the Board to take post-appeal action here. *See id.*

Finally, both dissents warned of the future implications of the majority’s decision. Going forward, Judge Bartley cautioned, the Board can “unilaterally deprive veterans of their duly exercised right to judicial review and interfere with the Court’s independent consideration of those appeals.” Pet. App. 67a. As Judge Jaquith put it, “[t]he majority walks away from the mess the Board created, leaves victimized veterans adrift, and embraces but eviscerates *Cerullo* by clearly overruling the specific holding of that bedrock, foundational case: ‘[W]hen an appeal is pending before this Court no action may be taken affecting any case except by order of this Court upon terms specified by it.’” Pet. App. 83a (citation omitted). Congress charged the Veterans Court with “provid[ing] veterans with the independent judicial review ‘necessary in order to provide such claimants with fundamental justice.’” Pet. App. 75a (quoting S. Rep. No. 100-418, at 49). But the majority’s ruling, Judge Jaquith explained, “allows systemic ease and expedience to trump the veteran’s right to independent judicial review” and “imperil[s]” the Veterans Court’s “authority, utility, and credibility.” Pet. App. 75a.

The Federal Circuit dismisses Mr. Kernz's appeal, holding that the Board's ultra vires actions deprived him of standing.

The Federal Circuit dismissed Mr. Kernz's request for Article III judicial review, holding that Mr. Kernz lacked standing to pursue his appeal.¹ Pet. App. 12a. Although it invoked standing rather than mootness, the Federal Circuit's rationale was substantively the same as that of the Veterans Court majority.

Like the Veterans Court, the Federal Circuit facially disapproved of any dual jurisdiction between the Board and Veterans Court and maintained that its decision did "not disturb the Veterans Court's jurisprudence, including *Cerullo*, establishing the general rule [that] the Board does not have authority to alter a judgment while that judgment is pending appeal before the Veterans Court." Pet. App. 20a. Nonetheless, the Federal Circuit dismissed Mr. Kernz's appeal based solely on the Board's unauthorized post-appeal conduct. According to the Federal Circuit, because the Board had "*sua sponte* grant[ed] the entirety of the ... requested relief" after Mr. Kernz appealed to the Veterans Court, there was "no remaining case or controversy," and the Federal Circuit

¹ The Federal Circuit's opinion also addressed and dismissed a separate appeal filed by James J. Perciavalle, a non-attorney, VA-accredited agent who filed a claim for fees and was subjected to the same untimeliness error (and purported fix) as Mr. Kernz. Pet. App. 3a, 8a-9a.

therefore “lack[ed] jurisdiction” to consider the appeal. Pet. App. 3a, 12a.

Although its decision turned on the notion that the Board’s ultra vires actions gave Mr. Kernz “the entirety of the relief” he sought from the Veterans Court, the Federal Circuit declined to engage with Mr. Kernz’s showing that he was in fact harmed by the Board’s violation due to the resulting confusion and inconsistency concerning the evidentiary window for his Board appeal. Pet. App. 16a. Even though Mr. Kernz’s Veterans Court appeal challenged the agency’s untimeliness conclusion as to his AMA appeal form—a challenge that, if successful, would necessarily resolve the evidentiary window timing as well—the Federal Circuit reasoned (as the Veterans Court had) that this issue was not “presented to the Veterans Court in Mr. Kernz’s [notice of appeal],” and so Mr. Kernz could not pursue that issue in this appeal. Pet. App. 16a-19a.

REASONS FOR GRANTING THE WRIT

I. The Federal Circuit’s Decision Is Wrong And Will Have Systematic Consequences.

The Federal Circuit’s holding that VA can eliminate a veteran’s standing to appeal by taking ultra vires action after that veteran appeals to the Veterans Court cannot be squared with this Court’s precedents, with basic jurisdictional transfer principles, or with Congress’s clearly and repeatedly expressed intent that veterans receive meaningful judicial review in benefits cases.

**A. Ultra Vires Agency Action Cannot Defeat
A Reviewable Case Or Controversy.**

It is well-established and non-controversial that the filing of an appeal from the Board to the Veterans Court transfers jurisdiction to the court and leaves the agency without power to act on the underlying claim. *Cerullo*, 1 Vet. App. at 197-98; Pet. App. 14a (Federal Circuit acknowledging that “[t]he Board and the Veterans Court cannot simultaneously possess jurisdiction over the same claim”).

That means that the action Petitioner is challenging here—the Board reopening his case sua sponte despite his pending appeal in the Veterans Court—was taken without jurisdiction and could have no legal effect. When a tribunal loses the power to act, “its subsequent proceedings ... are not ... simply erroneous, but absolutely void.” *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 589 U.S. 57, 63-64 (2020); see *West Virginia v. EPA*, 597 U.S. 697, 723 (2022). Actions taken by the Board after it loses jurisdiction simply have no effect.

This conclusion reflects an elementary principle of jurisdictional transfer applicable in a wide range of contexts. When a party appeals to the court of appeals from the district court, “[t]he filing of a notice of appeal ... confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal.” *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982); see also *Coinbase, Inc. v. Bielski*, 599 U.S. 736, 740 (2023) (same); *Marrese v. Am. Acad. of Orthopaedic Surgeons*, 470 U.S. 373, 379 (1985) (same). When a

party removes a case from state court to federal court, “[o]nce a notice of removal is filed, ... [t]he state court loses all jurisdiction over the case, and, being without jurisdiction, its subsequent proceedings and judgment are not simply erroneous, but absolutely void.” *Roman Cath.*, 589 U.S. at 63-64.

The same is true when a party seeks review of an agency decision in federal court, as the Federal Circuit has elsewhere recognized. *See Zenith Elecs. Corp. v. United States*, 884 F.2d 556, 560 (Fed. Cir. 1989) (explaining that upon the filing of a challenge in the Court of International Trade, that court acquires “exclusive jurisdiction” and the agency lacks power to modify its orders).

And the same rule applies when a veteran appeals from a Board decision to the Veterans Court. From that moment on, the court, not the Board, has authority to act on the case. *See Cerullo*, 1 Vet. App. at 196-98. Thus, “[a]ny attempt by the [Board] or the [Board] Chairman to order reconsideration of a [Board] decision after an NOA has been timely filed with [the Veterans] Court is null and void unless the Court first orders a remand.” *Id.* at 196. In fact, after a notice of appeal has been filed, the Secretary must seek the Court’s permission to correct even a “minor, non-substantive” Board error. *Lauigan v. Brown*, 5 Vet. App. 358, 359 (1993) (citing *Zenith*, 884 F.2d at 560-61). “Not only is the concept of ‘concurrent or dual plenary jurisdiction impermissible’” in the veterans’ context, “but ‘allowance of dual jurisdiction raises the possibility that a court of appeals will expend extensive judicial time on a case only to have agency reconsideration nullify its efforts.’” *Encarnacion v.*

McDonough, 36 Vet. App. 194, 202 (2023). It follows that the Board simply lacks the authority to unilaterally divest the court of a reviewable case or controversy by taking further unauthorized actions after it has lost jurisdiction over the case.

The Federal Circuit in this case turned this axiom on its head. Instead of treating the actions the Board took after it lost jurisdiction as legal nullities, it gave them decisive and case-ending legal effect. The Federal Circuit held that no case or controversy remained because the Board, after losing jurisdiction to the Veterans Court, “*sua sponte* grant[ed] the entirety of the ... requested relief” by reinstating Petitioner’s intra-agency appeal. Pet. App. 3a, 12a. This error is fundamental. As the lead Veterans Court dissent correctly explained, because the Board “had no authority” to act as it did, its post-appeal actions “are a legal nullity” and “incapable of moot[ing] Mr. Kernz’s appeal.” Pet. App. 67a. Nothing the Board did after Petitioner appealed to the Veterans Court could affect the existence of a case or controversy either in the Veterans Court or in the Federal Circuit. Instead, as Judge Jaquith stressed in his separate dissent in the Veterans Court, any Board action after the filing of an NOA is a legal nullity that cannot “affect[] any case” pending before the Veterans Court. Pet. App. 83a; *see* Pet. App. 7a.

B. The Federal Circuit’s Holding Invites Agencies To Evade Judicial Review.

The Federal Circuit’s contrary conclusion authorizes VA to strategically evade judicial review. The Federal Circuit gave lip service to the principle that

the Board lacks jurisdiction after an appeal to the Veterans Court is filed. Pet. App. 14a. But it held that it lacked the power to review Petitioner’s case precisely because of the Board’s extra-jurisdictional acts. The upshot is that, absent intervention from this Court, no court can review VA’s disregard of the appellate prerogative of its reviewing courts. Not the Veterans Court—which held the case was moot due to the Board’s extra-jurisdictional actions. Pet. App. 41a-43a, 55a-57a. And not the Federal Circuit—which held Petitioner lacked standing on the same basis. Pet. App. 3a-4a. Under the decision below, any time the Board commits error and a veteran appeals, the Board could simply purport to “correct” its error sua sponte and defeat judicial review. As *Cerullo* warned, permitting such a practice “lead[s] to laxity in administrative review since the agency ha[s] a second opportunity to strengthen its case prior to judicial review,” 1 Vet. App. at 199, or curtail judicial review altogether, as happened here.

This circumvention of judicial review is directly contrary to Congress’s intent to provide for robust—not “lax”—judicial review of veterans’ benefits decisions. Congress provided for judicial review in the Veterans Court and in Article III courts as a critical safeguard in the uniquely pro-claimant veterans’ benefits system. *Henderson*, 562 U.S. at 440-41. The Veterans’ Judicial Review Act was enacted specifically to ensure that veterans would have recourse to the judiciary when VA adjudication went wrong. *See id.* at 441; *see also* S. Rep. No. 100-418, at 50-51 (“[P]roviding an opportunity for those aggrieved by VA decisions to have such decisions reviewed by a court, in a manner similar to that enjoyed by claimants before

almost all other Federal agencies, is necessary in order to provide such claimants with fundamental justice” and provide a “check on agency actions.”). The Federal Circuit’s holding eviscerates that guarantee by allowing the Board to insulate its errors from judicial scrutiny.

As one of the Veterans Court dissents explained, the position adopted by the Federal Circuit “empowers the Board to divest the Court of jurisdiction—and thereby control our docket—by manufacturing mootness through unilateral action whenever they fear an adverse precedential decision.” Pet. App. 84a. Such a result would thwart the “independent exercise of review authority” and authorize “agency interference with a veteran’s statutory right to judicial review.” Pet. App. 68a; *see also Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015) (“Congress rarely intends to prevent courts from enforcing its directives to federal agencies,” and there is a “‘strong presumption’ favoring judicial review of administrative action.”).

The Federal Circuit’s holding also extends beyond the veterans’ context. Under the decision below, any agency subject to the Federal Circuit’s jurisdiction—including the Patent Trial and Appeal Board, the Merit Systems Protection Board, and the International Trade Commission—presumably could invoke the same theory to defeat judicial review by “correcting” errors *sua sponte* after an appeal is docketed at the Federal Circuit. The decision improperly aggrandizes agency power and diminishes the judicial review systems Congress enacted to ensure lawful and consistent agency decisionmaking. *See infra* 30-31.

C. The Circumvention Of Judicial Review Here Was Highly Prejudicial To Petitioner.

The Federal Circuit's holding is wrong and thwarts Congress's careful design of the judicial review system for VA benefits decisions. That is reason enough to undo its decision. But even if a further showing of harm were necessary, the implications here were highly detrimental for Petitioner—contrary to the Federal Circuit's view. The denial of judicial review both in the Veterans Court and in the Federal Circuit profoundly prejudiced Petitioner's ability to secure the benefits to which he was entitled through his military service.

As noted (at 7), when Petitioner opted into the AMA system and selected the evidence-submission pathway, he was entitled by statute to a 90-day window, calculated from the date the Board received his appeal form, in which to submit new evidence for the Board's consideration. *See* 38 U.S.C. § 7113(c)(2); Pet. App. 4a-5a. But, because of the Board's erroneous untimeliness notice followed by its extra-jurisdictional acts, Petitioner cannot receive a benefits decision based on the evidentiary record as it should have existed.

That is so for two reasons. First, the Board's March 2020 untimeliness ruling, followed by its unauthorized May 2020 letters purporting to reinstate Petitioner's appeal, created confusion as to whether the evidentiary window was open and, if so, when it would close. Pet. App. 28a (Board's second May 2020 letter stating Mr. Kernz had "90 days from the date of

the Board’s receipt” of his appeal “to submit new evidence”); Pet. App. 17a; Pet. App. 44a-45a. Second, the Board’s unauthorized actions distorted the evidence in Petitioner’s file, causing VA to decline to consider evidence favorable to Petitioner that should have been included in his file, while allowing the introduction of new, unfavorable evidence because of the actions taken while the agency lacked jurisdiction. Petitioner submitted favorable evidence just 20 days after the Board notified him that it had erred. Pet. App. 82a. Yet the Board refused to consider that evidence. Pet. App. 45a; Pet. App. 82a-83a. And further, in any subsequent proceeding, the Board will be required by statute to consider negative medical evidence obtained by the regional office pursuant to the Board’s unauthorized remand—evidence that would not have been in the record but for the Board’s ultra vires actions. Pet. App. 5a; *see* 38 U.S.C. §§ 5107(b) (VA must “consider all information and lay and medical evidence” in the record at the time of its decision), 7104(a) (Board must consider “all evidence and material of record”).

Together, that means that Petitioner is substantially worse off than he would be if the proper limitations on agency action post-appeal had been observed, and if the Federal Circuit had not embraced a theory of Article III standing that precluded it from hearing Petitioner’s appeal precisely because of the agency’s disregard of its own jurisdiction.

The Federal Circuit dismissed this showing by reasoning that the evidentiary-window issue was not itself “presented to the Veterans Court in Mr. Kernz’s NOA,” meaning that Petitioner could not pursue it

before the Federal Circuit. Pet. App. 17a-18a. But this reasoning is flawed in multiple respects. To start, when Petitioner filed his notice of appeal to the Veterans Court, it would have made no sense for him to complain about the timing of an evidentiary window; the Board had told him he had *no* viable appeal, and therefore *no* evidentiary window. The evidentiary-window issue arose only later, because of the Board's unauthorized reinstatement of Petitioner's case, and Petitioner raised the issue with the Veterans Court at that time. Pet. App. 17a-19a. Moreover, the Federal Circuit's reasoning misses the point. Petitioner's challenge to the Board's untimeliness dismissal—if successful—would have resolved the evidentiary timing issue, because correction of the Board's error would have placed Mr. Kernz's claim in the position it should have been in all along. *See Cerullo*, 1 Vet. App. at 200-01 (describing remand procedure under which the Court controls the terms of any correction). Now, given the reviewing courts' failure to correct the agency's unlawful actions, Petitioner is in a materially worse position than he would otherwise have been.

II. The Decision Below Creates A Circuit Split.

Certiorari is warranted for the reasons given above. Review is additionally necessary because the decision below conflicts with the Seventh Circuit's decision in *Doctors Nursing*. As discussed above (at 11), the Seventh Circuit held there that an "agency may not divest the federal courts of jurisdiction by unilaterally reopening its administrative proceedings" after an appeal has been taken. 613 F.3d at 677. The Federal Circuit's decision that the Board's unilateral

post-appeal action defeated the jurisdiction of the reviewing courts endorses exactly what the Seventh Circuit forbade, resulting in an untenable circuit split.

In *Doctors Nursing*, a nursing home sued the Department of Health and Human Services challenging a final agency determination. *Id.* at 675. After the lawsuit was filed, the agency concluded on its own initiative that its contractors had erred and reopened its administrative proceedings. *Id.* The district court dismissed for lack of jurisdiction, and the Seventh Circuit reversed. *Id.* at 676, 681. The court held that “the agency may not divest the federal courts of jurisdiction by unilaterally reopening its administrative proceedings.” *Id.* at 677. Rather, “when one tribunal properly takes a case on appeal, the inferior tribunal transfers authority over the case.” *Id.* Thus, according to the Seventh Circuit, once jurisdiction has transferred to a reviewing court, nothing the agency does can alter the existence of a reviewable case or controversy.

The Seventh Circuit analogized the situation to that of the court of appeals reviewing the district court. *Id.* A district court cannot grant relief from its own judgment while an appeal is pending without the appellate court’s permission; “[o]therwise, a district court could eliminate a final judgment, and with it federal appellate jurisdiction.” *Id.* at 677-78 (citing *Griggs*, 459 U.S. at 61). Similarly, an agency cannot reopen its final decision without the reviewing court’s leave.

The Seventh Circuit explained that an alternative holding would mean that “any agency could strip jurisdiction from federal courts, seemingly at any stage of the proceeding, for any reason.” *Id.* at 679. The court warned that an agency could “reopen its proceedings and yank the case out of the courts” to “manipulate federal jurisdiction to frustrate litigants” and “prevent or at least postpone into perpetuity unfavorable precedent.” *Id.* That is exactly what the Federal Circuit’s decision here permits.

The Seventh Circuit distinguished its earlier decision in *Gao*, 464 F.3d 728, in which the agency’s reopening of an immigration case defeated federal jurisdiction. In that context, Congress had specifically authorized “concurrent review” by both the agency and the courts. *Doctors Nursing*, 613 F.3d at 678 (citing *Gao*, 464 F.3d at 729). Because no such concurrent jurisdiction existed in the Medicare system, it followed that the agency lacked the power to defeat the existence of a case or controversy after jurisdiction transferred to the reviewing court. *Id.*

The Seventh Circuit’s holding—that actions taken by an agency after jurisdiction has transferred to a reviewing court cannot deprive that reviewing court of jurisdiction—squarely dictates a contrary result on the facts here, where “concurrent or dual plenary jurisdiction” between the Board and the Veterans Court “is impermissible.” *Cerullo*, 1 Vet. App. at 197.

The split opened by the decision below is particularly striking because the Federal Circuit has previously authorized agency actions taken post-appeal

only where a statute explicitly permitted concurrent jurisdiction between the agency and the reviewing court, matching the Seventh Circuit’s analysis in circumstances analogous to *Gao*. See *Mil.-Veterans*, 7 F.4th at 1144 (statute “unambiguously permits claimants to file supplemental claims while judicial review of the same underlying claim or issue is pending in federal court”); *Roberts v. United States*, 242 F.3d 1065, 1066 (Fed. Cir. 2001) (statute expressly provided for “concurrent jurisdiction ... in both the district court and the Court of Federal Claims”). The Federal Circuit simply failed to draw the distinction recognized by the Seventh Circuit between the scenario in which Congress has permitted an agency to act after an appeal is taken (actions credited in *Gao*, *Mil.-Veterans*, and *Roberts*), and the scenario in which concurrent jurisdiction is forbidden, yet the agency purports to act anyway (actions given decisive effect below but properly discredited in *Doctors Nursing*).

The split is acknowledged. The Federal Circuit ignored *Doctors Nursing*, but both dissenting opinions in the Veterans Court highlighted the conflict: “*Doctors Nursing* ... reinforce[s] the principles underlying *Cerullo*, that the filing of an NOA divests an agency of jurisdiction over the appealed issue and that post-appeal agency action taken without jurisdiction will not moot that appeal.” Pet. App. 72a (Bartley, J., dissenting). The Veterans Court majority’s and the Federal Circuit’s reasoning “fails to account for [*Doctors Nursing*’s] holding that ‘the agency may not, during the pendency of judicial review, reopen and revise a final decision without permission from the court,’ lest the agency possess ‘the unreviewable power to

manipulate federal jurisdiction.” Pet. App. 84a (Jaquith, J., dissenting).

The Court should grant certiorari to resolve this conflict and restore the rule that agencies cannot evade judicial review through ultra vires action.

III. The Question Presented Is Recurring And Important.

A. The question presented is likely to recur—in other agency contexts and in the veterans’ context. Absent the limited circumstances where a statute permits concurrent jurisdiction, any agency action that is subject to a court’s review is also potentially subject to an agency trying to thwart that review by taking action after it has lost jurisdiction to the court. As to the veterans’ benefits context in particular, the question presented is virtually certain to recur now that the Veterans Court and the Federal Circuit have signaled to VA that its attempts at post-appeal action will not be subject to judicial scrutiny.

This case is not an isolated example of VA committing an obvious error that adversely affects veterans on a large scale; refusing even to identify the scope of the error, let alone provide meaningful correction; and instead purporting to fix the problem only for those individual claimants who attempt to seek judicial review. As described above (at 8), Petitioner is only one of the thousands of veterans affected by the particular error here—VA’s erroneous notices to legacy claimants who filed timely AMA appeal forms, inaccurately informing them their appeals were *untimely*. See Pet. App. 5a; Pet. App.

80a (Jaquith, J., dissenting). VA—the only entity with the ability to identify each veteran affected—has maintained that it will not do so because it would be too laborious. CAFC App. 564-565. Instead, VA took ultra vires action to reinstate the appeals of veterans (like Petitioner and Mr. Perciavalle) who challenged the error through appeal to the Veterans Court. *Supra* 8-9, 14 n.1. For anyone else, VA provided only a plainly deficient notice—posted where it would only be found by someone actively looking for it—that also set an arbitrary deadline of March 1, 2022, for veterans to contact VA if they believed their appeals had “been improperly rejected.” CAFC App. 606. As one Veterans Court judge put it, the limited response to this notice is “hardly surprising,” particularly when any veteran who happened upon the notice after March 2022 had been apprised that any response “would be pointless.” Pet. App. 82a (Jaquith, J., dissenting).

VA’s actions in this case mirror those it took recently in similar circumstances. Over the course of several years, a problem with VA’s electronic claims system caused the agency to erroneously close thousands of timely filed legacy appeals, without notifying the claimants it had done so. *See Freund v. McDonough*, 114 F.4th 1371, 1375 (Fed. Cir. 2024). A small number of claimants, represented by legal counsel, managed to identify the error and filed a mandamus petition and request for class certification with the Veterans Court. In response, VA reactivated the individual petitioners’ appeals, argued that this action mooted the Veterans Court case, and contended that it was too difficult to identify other affected claimants and provide them the same

remedy. *Id.* at 1375-76, 1378. The Federal Circuit ultimately rejected VA’s argument, applying the “inherently transitory” exception to mootness in the class-action context. *Id.* at 1376-79.

Apart from the difference in outcome, the other important distinction from this case is that *Freund* involved a mandamus petition that (unlike an appeal) did not deprive the agency of jurisdiction to act. *See* 16 Charles Alan Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 3932.1 (3d ed. 2017) (“Because it is not an appeal, a petition for an extraordinary writ does not transfer the case to the court of appeals and does not oust the district-court’s jurisdiction to carry on with its own proceedings.”). But the parallels between the two cases provide good reason to believe that VA may capitalize on the judicial permission slip it now has to selectively correct systemic errors only for those individuals who assert their right to judicial review—and only after they have invoked the jurisdiction of the Veterans Court. This likelihood of recurrence makes it critical for this Court to intervene now and address the problem.

B. The question presented is also exceptionally important—to administrative law, to the veterans’ benefits system, and to Petitioner.

As a general matter, the question presented runs to the core of the separation of powers. Here, an executive agency unilaterally divested two federal appellate courts (one Article I, one Article III) of jurisdiction to review that agency’s indisputably erroneous action. The Federal Circuit’s ruling invites similar maneuvers going forward, allowing agencies

to take unlawful or questionably lawful actions, wait to see if the affected party appeals, and then—despite plainly lacking jurisdiction at that point—reverse course and claim no harm, no foul. The court’s ruling creates intolerable ambiguity about which entity has power to act and when, and what the consequences of acting without that authority might be. Put simply, the question presented addresses a fundamental dynamic between different branches of government and warrants this Court’s review on that basis alone.

The question presented is also exceptionally important to veterans (along with their survivors and dependents, who are often eligible for VA benefits). At risk is their hard-won right to judicial review. Petitioner attempted to exercise that right, and the Board undermined him. The Federal Circuit’s ruling guarantees there will be no remedy for such agency overreach going forward—so long as VA can characterize its ultra vires actions as providing the same relief that the veteran was seeking from the court (whether or not the veteran himself agrees). This glaring loophole poses a serious risk to the right Congress specifically granted through the Veterans’ Judicial Review Act in 1988.

Permitting the Board to interfere with judicial review in this way not only deprives veterans of their statutory rights, but it also has practical consequences—namely, “procedural chaos” and invasion of the Veterans Court’s “independent exercise of review authority.” Pet. App. 68a (Bartley, J., dissenting). Here, while the Veterans Court “expended judicial time and resources on Mr. Kernz’s case, the Board took action after action on the very

same issue that was before the” court. Pet. App. 68a-69a (Bartley, J., dissenting); *see also Cerullo*, 1 Vet. App. at 197 (“The allowance of dual jurisdiction raises the possibility that a court of appeals will expend extensive judicial time on a case only to have agency reconsideration nullify its efforts.”). “[U]nsurprising[ly],” the Board’s and Veterans Court’s dueling control over the same issue “confused” Petitioner “about his legal obligations.” Pet. App. 69a (Bartley, J., dissenting); *see also Encarnacion*, 36 Vet. App. at 202 (“Action taken by the Secretary on an issue that is pending before this Court risks confusion as to governing procedures and deadlines.”).

Clarity in the cutoff for when an agency can and cannot act, and how that cutoff affects other procedural rights and obligations, is particularly critical in the veterans’ context, a system meant to be claimant-friendly and in which many claimants lack legal representation. *See, e.g., Disabled Am. Veterans v. Sec’y of Veterans Affs.*, 327 F.3d 1339, 1349 (Fed. Cir. 2003) (“[D]uring the non-adversarial stages of disputes over benefits, ... veterans rely on the strongly and uniquely pro-claimant character of the veterans’ benefits system and pursue their statutory entitlements without the assistance of legal counsel.”); *Thompson v. Shinseki*, 682 F.3d 1377, 1380 (Fed. Cir. 2012) (“[T]he veterans benefits context ... is intended to be uniquely proclaimant ... and ... veterans generally are not represented by counsel before the RO and the board.”). The Federal Circuit’s ruling instead invites uncertainty.

Moreover, that this issue divided the full Veterans Court demonstrates its importance. This

case was heard en banc, which is reserved for “question[s] of exceptional importance.” U.S. Court of Appeals for Veterans Claims, Internal Operating Proc. VII, <https://perma.cc/7GM6-SFDH>. That is unsurprising, given that what is at stake is the maintenance of fair and orderly independent judicial review and veterans’ statutory right to that review. It is also important given the circuit split created by the Federal Circuit’s ruling. *Supra* § II. As things stand, the agencies subject to the Federal Circuit’s purview can evade review by taking ultra vires action, whereas agencies subject to regional circuits’ oversight, including the Seventh Circuit, cannot.

Finally, the question presented is particularly important to Petitioner, who suffered actual harm from the Board’s unauthorized actions. As discussed above (at 8), when Petitioner appealed to the Board, he selected a review lane that permitted him 90 days to submit additional evidence in support of his claim. And Petitioner submitted such evidence 20 days after the Board ultimately (albeit unlawfully) informed him his appeal was docketed. *Supra* 22. But the Board “declined to consider the favorable evidence [Mr. Kernz] submitted” because the Board deemed it “too late.” Pet. App. 82a (Jaquith, J., dissenting). That evidence, had it been considered, could have been the difference between the Board granting Petitioner the benefits he sought and the Board remanding his case for further development. *See* VA, Board of Veterans’ Appeals Annual Report Fiscal Year 2024, at 15, <https://perma.cc/P4BP-S8U4> (explaining that “remand rates are nearly 21% lower under the AMA appeals process,” a statistic that demonstrates the difference Board-level evidence can make). The

Board's exclusion of this evidence was particularly harmful given that, following the Board's unauthorized remand to the regional office, the agency introduced *unfavorable* evidence into the record. See CAFC Oral Arg. at 4:55-5:20 (discussing introduction of unfavorable evidence on remand). That evidence (unlike Petitioner's favorable evidence) is now part of the record and seemingly must be considered as part of any future decision on Petitioner's claim. 38 U.S.C. §§ 5107(b), 7104(a); *supra* 22.

Neither the Veterans Court majority nor the Federal Circuit substantively addressed this harm. The Veterans Court majority declined to do so because "the evidence submitted pertains to the merits of [Petitioner's] claims, not the timeliness of his appeal." Pet. App. 45a. Similarly, the Federal Circuit refused to consider Petitioner's allegation of harm because "[a]ny 'confusion' as to the window for Mr. Kernz to submit new evidence, or any challenge Mr. Kernz may wish to press with respect to the Board's subsequent refusal to consider Mr. Kernz's new evidence, was not raised in his [notice of appeal] to the Veterans Court," which instead concerned the timeliness of his appeal to the Board. Pet. App. 18a.

Both courts missed the point. The evidentiary issues Petitioner raised are intertwined with the agency's procedural error, which was unquestionably the subject of Petitioner's request for judicial review. Indeed, the effects of that error on the evidentiary record illustrate the very "harm" that the Federal Circuit (and the Veterans Court majority) mistakenly thought was absent. Petitioner relied on these

evidentiary issues to show why, contrary to the courts' view, the Board's extra-jurisdictional actions had not provided complete relief but had instead caused further injury. Both courts erred in artificially distinguishing between procedure and merits in this context, refusing to consider the harm to Petitioner's claim while simultaneously issuing decisions that turned on a supposed lack of harm.

Nor is that harm counterbalanced by any supposed timing advantage from the Board's ultra vires actions. A concurring opinion to the Veterans Court's ruling suggested that "order[ing] VA to drag [Mr. Kernz's] claim back to the Board; shred the remand and associated development; dismiss his appeal and re-docket it; and have Mr. Kernz patiently wait (again) until the Board reviewed his case (again)" cannot be what "Congress expected." Pet. App. 66a (Falvey, J., concurring). True, but Congress also did not expect the agency to overstep the statutory bounds on its jurisdiction. The best remedy for that deviation is to set things back where they should have been all along, with Petitioner returned to the point of his original, timely appeal to the Board and his selection of the evidentiary-submission lane. In any event, it is far from certain which path will lead to a longer delay. *Contra* Pet. App. 65a (Falvey, J., concurring). Had the Veterans Court (or the Federal Circuit) ordered the relief Petitioner requested, his claim would be before the Board and potentially subject to validation based on the evidence he submitted. *See* VA, *Veteran choices for type of Board appeal influences wait times*, <https://perma.cc/J2WK-LUTR> (updated June 22, 2026) ("At the end of March 2026, the average days

pending for Veterans and dependents with appeals in the Evidence Submission docket was 260 days.”). Instead, Petitioner’s claim has been remanded back to the regional office, where he must await further development, a decision, and likely another appeal to the Board.

Ultimately, the debate about whether Petitioner will receive a faster resolution of his claim because of VA’s jurisdictional violation—as well as the debate about whether and how he was harmed by the effects on the evidentiary record—underscores the problem with the lower courts’ approach to this case. The prospective effects of an agency’s actions might not always be clear or certain. But it is clear that, in this case, the agency had no right to take the actions it did. And the clearest and best remedy for that violation is to treat the Board’s post-appeal actions as the legal nullity that they necessarily were.

IV. This Case Provides An Ideal Vehicle To Set Things Right.

This case provides an ideal opportunity for this Court to correct the Federal Circuit’s abdication of its duty as a reviewing court overseeing an administrative agency.

The Federal Circuit unambiguously decided the question presented, albeit incorrectly. It held that it must dismiss Petitioner’s appeal because the Board’s unauthorized post-appeal actions eliminated any case or controversy. Pet. App. 13a-15a. There can be no question that the Federal Circuit’s erroneous holding was outcome determinative; both the Veterans Court

and the Federal Circuit refused to address the merits of Petitioner’s appeal because of their improper reliance on VA’s extra-jurisdictional actions. Without the Federal Circuit’s flawed case-or-controversy conclusion, Petitioner would be entitled to a reversal of the Veterans Court’s mootness determination; vacatur of the Board’s original untimeliness determination (and its subsequent post-appeal actions); and, ultimately, remand to the agency to receive a proper consideration of his Board appeal.

This case is the best candidate for addressing the question presented. The Veterans Court has exclusive jurisdiction over Board decisions. 38 U.S.C. § 7252. And the Federal Circuit has exclusive jurisdiction over Veterans Court decisions. *Id.* § 7292. Given that both the en banc Veterans Court and the Federal Circuit—the only courts with jurisdiction to review VA actions—have held that the agency’s ultra vires actions can defeat judicial review, further development is both unlikely and unnecessary. This Court’s intervention is necessary to restore to veterans the right to judicial review that Congress granted them.

CONCLUSION

The Court should grant the petition.

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