

No. 26-284

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

**BRIEF OF JAMES J. PERCIAVALLE AS
AMICUS CURIAE SUPPORTING PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Since 2013, James J. Perciavalle, a veteran of the U.S. Army, has represented other veterans seeking benefits from the U.S. Department of Veterans Affairs as an accredited claims agent. Mr. Perciavalle is the founder and principal of the Veteran Advocates Group (VAG), a veterans' benefits firm that represents veterans across the country on their VA claims. He has helped thousands of veterans navigate the procedural and substantive rules governing VA benefits while submitting claims, gathering evidence, and seeking review before the agency's regional offices and the Board of Veterans' Appeals ("BVA").

In the decision challenged by the Petition in this case, the Federal Circuit denied Mr. Perciavalle's appeal alongside the Petitioner's. As with the Petitioner, Mr. Perciavalle's appeal to the BVA was erroneously dismissed by that administrative tribunal, and Mr. Perciavalle appealed that dismissal to the Court of Appeals for Veterans Claims ("Veterans Court"). While that appeal was pending, the BVA *sua sponte* reversed its dismissal decision, reopened its docket on his claim, and without conceding error to the court or seeking consent from Mr. Perciavalle, moved to dismiss his appeal at the Veterans Court as

¹ Pursuant to Supreme Court Rule 37.2, counsel for amicus curiae notified the parties of its intention to file this brief on September 25, 2026, 10 days prior to its due date. Pursuant to Supreme Court Rule 37.6, no counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

moot. Against long established Veterans Court precedent, and over Mr. Perciavalle's opposition, the Veterans Court granted the VA's motion based on its decision in Mr. Kernz's appeal, and when Mr. Perciavalle appealed the dismissal to the Federal Circuit, the circuit court dismissed both his appeal and Mr. Kernz's for lack of standing, agreeing with the VA that its unilateral actions had eliminated any case or controversy.

While Mr. Perciavalle is not seeking certiorari in his own case, he urges the Court to grant Mr. Kernz's petition for certiorari to overturn the Federal Circuit's ruling. Having dedicated his career to assisting and representing veterans, Mr. Perciavalle has an interest in protecting their right to independent judicial review of VA decisions. That right is fundamentally undermined by the Federal Circuit's decision to empower the VA to unilaterally withdraw its decisions from review during a pending appeal.

SUMMARY OF THE ARGUMENTS

Congress established judicial review of VA decisions out of recognition that "agency action that does not have the benefit of outside scrutiny may fail to address fully the legitimate needs of those the agency exists to serve."² As Congress recognized, independent judicial review over agency decisions serves not only to correct errors in individual cases, but also to

² Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S.11 & S.2292, 100th Cong. 109-122 (1988) (statement of Sen. Cranston).

check and deter agency conduct that is arbitrary, unreasoned, or otherwise astray from the agency's statutory mandate.³

These functions of judicial review are subverted, however, if an agency like the VA gains the power to unilaterally “yank” its challenged decisions from a court’s review during an active appeal whenever the agency believes that a pending appeal may lead to unfavorable precedent or otherwise become too risky or burdensome to defend. *See Drs. Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 678 (7th Cir. 2010); *Cerullo v. Derwinski*, 1 Vet. App. 195, 198 (1991). Here, the VA’s Board of Veterans’ Appeals has been erroneously dismissing the appeals of thousands of claimants via perfunctory letters from its intake branch. Only a small fraction of the claimants who receive erroneous dismissals have the knowledge or resources to appeal to the Veterans Court. But when they have done so, the VA’s response has been to seek to evade the court’s jurisdiction. In Mr. Perciavalle’s and Mr. Kernz’s appeals, the agency first moved to dismiss on the ground that the dismissal letters they received were not appealable “final decisions.” On that basis, the agency also refused to file the dismissal letter or agency record on the docket as it was obligated to do, forcing the claimants to respond to the motion without those records. Then, while that issue was pending a decision, the BVA *sua sponte* re-opened its own

³ *See* 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 ... is necessary in order to provide such claimants with fundamental justice” and provide a “check on agency actions”).

dockets for the appealed cases and unilaterally urged the Veterans Court to dismiss the appeals as moot.

Over the opposition of the individual claimants and the pointed dissents of three veterans law judges—and against established precedent prohibiting the VA from exercising concurrent jurisdiction over cases on appeal—the Veterans Court and Federal Circuit accepted the VA’s position, agreeing that the agency’s unilateral conduct stripped the courts of jurisdiction over the claimants’ appeals. As a result, numerous other similarly situated claimants have been forced to relitigate the same threshold question on the appealability of the VA’s dismissal letters.

This newly established power for the VA to unilaterally withdraw decisions from judicial review harms both individual claimants and the overall fairness of veterans’ benefits adjudication. In a system where disabled, elderly, and often impoverished veterans engage with the agency largely unrepresented and then must either proceed pro se or engage counsel on contingency to challenge VA decisions in court, the VA—as a well-resourced repeat litigant—already wields substantial power to shape the law and set the litigation burden that claimants face. Allowing the VA to also unilaterally strip courts of jurisdiction over meritorious appeals grants the agency unfettered leave to evade meaningful judicial oversight altogether.

This Court should grant the petition and safeguard veterans’ right to judicial review from agency interference.

ARGUMENT

I. Independent Judicial Review of VA Decisions is Critical to the Integrity of the Veterans Benefits Adjudication System.

For most of the century leading up to the Veterans Judicial Review Act of 1988 (“VJRA”), Congress allowed the VA and its predecessor to operate in “splendid isolation” from judicial review on the theory that the agency could police its own actions for the benefit of veterans without the scrutiny of external adjudicators. *See Brown v. Gardner*, 513 U.S. 115, 122 (1994) (citing H.R. Rep. No. 100-963, pt. 1, at 10 (1988)). But decades of experience proved that theory wrong. Years of reports from veterans advocates and congressional investigations revealed that erroneous denials of benefits were common and the agency’s actions were subject to internal incentives that systematically prioritized speed and cost-reduction over protection of veterans’ rights and entitlements.

Committee hearings leading up to the VJRA raised growing concerns about the effect of cost-cutting pressures within the executive branch on the quality of VA decisions.⁴ Veterans advocacy organizations testified about the tendency for VA decisions “during periods of fiscal restraint” to be “shaped more through the influence of the Office of Management and Budget and blatant political

⁴ Judicial Review Legislation: Hearing Before the S. Comm. on Veterans’ Affs. on S.11 & S.2292, 100th Cong. 109-122 (1988).

pressure than the intent of Congress.”⁵ One congressman noted that the BVA had implemented a quota system that gave its judges a 5 percent salary increase for completing an average of at least 40 cases per week—an incentive that motivated the agency adjudicators to prioritize speed over accuracy.⁶ Committee members also voiced concern about broader “policy decisions” and “questionable agency actions restricting, withholding, or withdrawing VA benefits” that were likely influenced by executive branch pressure to reduce costs.⁷ This included “stringent standards” for establishing PTSD service connection for Vietnam veterans and “unduly restrictive legal opinions from the Office of the General Counsel” denying veterans access to benefits such as reproductive care services for service-connected reproductive disorders.⁸

The perverse effects of these institutional forces are compounded by the vulnerability of VA claimants. Veterans seeking benefits are typically disabled and many are also elderly or impoverished. The claimants are prohibited from retaining paid counsel until they

⁵ Judicial Review of Veterans’ Affairs: Hearing Before the H. Comm. on Veterans’ Affs., 100th Cong. 319 (1988) (statement of Gordon Mansfield, Associate Exec. Dir. for Gov’t Relations, Paralyzed Veterans of America).

⁶ Judicial Review of Veterans’ Affairs: Hearing Before the H. Comm. on Veterans’ Affs., 100th Cong. 191 (1988) (opening statement of Rep. James J. Florio).

⁷ Judicial Review Legislation: Hearing Before the S. Comm. on Veterans’ Affs. on S.11 & S.2292, 100th Cong. 109-122 (1988) (statement of Sen. Cranston) at 112.

⁸ *Id.* at 112-113.

receive an adverse decision from the VA, and even then, most claimants who seek Board review do so without the benefit of legal counsel.⁹ *See* 38 U.S.C. § 5904(c)(1); *Jaquay v. Principi*, 304 F.3d 1276, 1280-81 (Fed. Cir. 2002) (en banc). Claimants depend heavily on the VA to help develop their claims and notify them of their procedural and substantive rights, yet they have little ability to hold the VA to its affirmative obligations.

To address these systemic barriers to fair and accurate adjudication within the VA, Congress created a two-tiered system of external review under the VJRA that would provide not only recourse for individual claimants to correct VA errors but also a platform for developing a uniform body of case law to guide and constrain agency decisions over time.

As a first layer of review, Congress established the Veterans Court as a specialized Article I tribunal with exclusive plenary jurisdiction to review all issues of fact and law in BVA decisions and to affirm, modify, reverse, or remand the agency’s decisions. 38 U.S.C. § 7252(a). Congress expected that “because of its special focus,” the court would be well situated to “assess whether the BVA properly understood its statutory obligation and acted correctly” and could perform this function “with a full understanding of

⁹ During BVA’s Fiscal Year 2024, for example, 65% of appellants proceeded without a private VA-accredited attorney or claims agent. *See* Bd. of Veterans’ Appeals, U.S. Dep’t of Veterans Affairs, Annual Report, Fiscal Year 2024, 46 (2024), <https://department.va.gov/board-of-veterans-appeals/annual-reports-to-congress/>.

the informal and generous nature of the VA's adjudication system and of the responsibilities assigned to the VA by the Congress."¹⁰ This would provide "more independent review by a body which is not bound by the Administrator's view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and the laws of the United States."¹¹ Over time, the result would be a "uniform" body of decisions reflecting the court's developing expertise.¹² These decisions would be published "in such form and manner as may be best adapted for public information and use." 38 U.S.C. § 7269. This contrasts with BVA decisions, which have no precedential value. *See* 38 C.F.R. § 20.1303; *Kisor v. Wilkie*, 588 U.S. 558, 590 (2019) (citing the Solicitor General's admission concerning BVA decisions). Indeed, individual decisions are not even reported by case name for ready citation.¹³

As a second layer of review established by the VJRA, Congress assigned the Federal Circuit to provide Article III review of the legal and constitutional questions decided by the Veterans Court. 38 U.S.C. § 7292(a),(c). This would ensure

¹⁰ 134 Cong. Rec. 31,771 (1988) (statement of Rep. G.V. Montgomery).

¹¹ *See* H.R. Rep. No. 100-963, pt. 1 (1988), at 26.

¹² 134 Cong. Rec. 31,771 (1988) (statement of Rep. G.V. Montgomery).

¹³ *See* Board of Veterans' Appeals, U.S. Department of Veterans Affairs Search Results, <https://search.usa.gov/search?affiliate=bvadections>.

“outside review by the independent branch of government established in our constitutional framework with the special responsibility of determining whether governmental action is legal and whether it is fundamentally fair.”¹⁴ Rejecting the VA’s position that “the VA’s interpretation of its statutory authority and regulations is to be given conclusive weight unless clearly shown to be arbitrary, capricious, an abuse of discretion, or contrary to law,”¹⁵ Congress elected to vest the Article III tribunal with “exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof” and to “interpret constitutional and statutory provisions, to the extent presented and necessary to a decision.” 38 U.S.C. § 7292(c).

To reinforce meaningful access to the judicial review established under the VJRA, Congress later enacted an amendment to the Equal Access to Justice Act to safeguard veterans’ rights to recoup attorney’s fees when they prevail in court against the VA, overturning contrary precedent from the Veterans Court. *Federal Courts Administration Act of 1992*, Pub. L. No. 102-572, § 506(a)-(c), 106 Stat. 4506, 4513-14 (overturning *Jones v. Derwinski*, 2 Vet. App. 231

¹⁴ Judicial Review Legislation: Hearing Before the S. Comm. on Veterans’ Affs. on S.11 & S.2292, 100th Cong. 114 (1988) (opening statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans’ Affs.).

¹⁵ Judicial Review Legislation: Hearing Before the S. Comm. on Veterans’ Affs. on S.11 & S.2292, 100th Cong. 508 (1988) (statement of Donald L. Ivers, General Counsel, Veterans Administration).

(1992)). In doing so, Congress sought to alleviate the “financial burdens” of obtaining legal representation that were forcing veterans to regularly pursue appeals of unjustified VA decisions *pro se*. *See* H.R. REP. 102-1006, 25, 1992 U.S.C.C.A.N. 3921, 3934.

The practical and institutional need for judicial review of VA decisions persists today. Claimants remain largely unrepresented at all stages of agency proceedings, and budget and output pressures on agency decision-making remain persistent. BVA decisions continue to be plagued by errors. The BVA denied benefits in roughly 19,000 cases it decided in FY 2024. The data suggests a significant percentage of those denials were at least partially erroneous: out of the 8,758 dispositions issued by the Veterans Court in FY 2025, 7,355 (84.0%) were at least partially favorable to the appellant—indicating one or more Board errors. Judicial review remains an essential mechanism for both ensuring the right outcome in individual cases and serving as a systematic check on the VA’s decision making.

II. The Power to Unilaterally Withdraw Decisions from Judicial Scrutiny Erodes the Core Functions of Judicial Review and Affords the VA Undue Influence over Veterans Law Precedent

While Congress established judicial review of VA decisions to constrain the agency’s action to its statutory mandate, the power to unilaterally divest reviewing courts of jurisdiction over its decisions eliminates the disciplining effect of judicial review on the quality

of VA decisions and puts the shaping of legal precedent into the agency's hands. In the context of Social Security appeals, the Seventh Circuit recognized over a decade ago the dangers of adopting a rule under which "any agency could strip jurisdiction from federal courts, seemingly at any stage of the proceeding, for any reason." *Drs. Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 679 (7th Cir. 2010)

In the social security context, Congress amended the social security statute in 1980 to eliminate prior provisions that permitted the Secretary of Health and Human Services to call back cases on judicial appeal without leave of Court. Social Security Disability Amendments of 1980, Pub.L. No. 96-265, 94 Stat. 441, 458 (codified at 42 U.S.C. § 405 (1980)); *see also Cerullo v. Derwinski*, 1 Vet. App. 195, 199 (1991) (comparing the amendment to the legislative history of the VJRA). In doing so, Congress noted the concern that the power to unilaterally resume jurisdiction over cases on appeal gave the "secretary potential authority to remand cases back so that they can be strengthened to sustain court scrutiny" and incentivized "laxity" in internal agency reviews because the agency could always have "another look at the case if the claimant decides to go to court." S. Rep. 96-408, 58, 1980 U.S.C.C.A.N. 1277, 1336. This is particularly concerning where only a small fraction of claimants is likely to appeal erroneous agency actions. An agency that issues a slew of poorly reasoned opinions can wait to see which, if any, claimants pursue an appeal and withdraw individual decisions from appeal without consequence.

The same strategy allows the VA to shape legal precedent to its advantage. As the Seventh Circuit recognized in *Doctors Nursing*, the ability to pick off individual appeals allows the VA to forestall adverse precedent:

If the agency became concerned that a Court of Appeals—or even the Supreme Court—might issue a decision adverse to its interests, it could reopen its proceedings and yank the case out of the courts, regardless of the amount of resources that had already been expended or the advanced stage of the case. Besides being highly inefficient, it would allow the agency to manipulate federal jurisdiction to frustrate litigants by increasing the time and expense required to pursue claims, and prevent or at least postpone into perpetuity unfavorable precedent.

Drs. Nursing & Rehab. Ctr. v. Sebelius, 613 F.3d 672, 679 (7th Cir. 2010). In dissenting from the Veterans Court’s dismissal of the Petitioner’s case, Veterans Law Judge Jaquith identified this same concern in the veterans law context: “[t]he majority 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.” *Kernz v. McDonough*, 36 Vet. App. 372, 399–400 (2023).

These concerns are not merely theoretical. The VA has already exercised its unilateral jurisdiction-stripping power to insulate itself from adverse rulings

on highly contested legal questions. Here, Mr. Kernz’s and Mr. Perciavalle’s appeals to the Veterans Court each implicated the critical question of whether summary dismissal letters issued by the BVA’s newly formed Case Review and Intake & Mail Management Branch (“CRIMBB”) constituted reviewable “final decisions” under 38 U.S.C. § 7252(a). The answer to this fundamental jurisdictional question determines whether claimants have any reliable recourse when their claims are dismissed because of a clerical error.

That issue was ripe for a decision after extensive motion practice in both Mr. Kernz’s and Mr. Perciavalle’s appeals before the Veterans Court. Yet rather than face a likely adverse precedential decision on the jurisdictional question and on the merits, the BVA unilaterally resumed its own jurisdiction over both cases to strip the reviewing courts of jurisdiction to decide the issue. As a result, the threshold appealability question remained unresolved for another two years after the first motions on the issue were briefed,¹⁶ deterring other claimants from challenging similar dismissal letters in court. Those who did challenge similar dismissals were forced to expend time and resources relitigating the question of appealability against the specter of a subsequent mootness dismissal.

¹⁶ The Veterans Court eventually addressed at least part of the appealability question in *Cardoza v. McDonough*, 37 Vet. App. 407 (2024) (holding in the claimant’s favor), and *Jones v. Collins*, 39 Vet. App. 154 (2026) (per curiam order) (distinguishing *Cardoza* and ordering dismissal), *appealed*, Fed. Cir. Dkt. No. 26-2234.

What’s more—since the *Kernz* decision, the VA has extended its jurisdiction-stripping power to moot cases presenting other legal issues—and exercised that power as late in proceedings as where the Veterans Court had already issued a decision. In *Sopko v. McDonough*, Vet. App. No. 23-4625, the CAVC issued a decision affirming the VA’s interpretation of the regulatory definition of “unfavorable ankylosis,” relying on the CAVC’s prior decision in *Chavis v. McDonough*, 34 Vet. App. 1 (2021). The Veterans Court’s decision squarely raised a highly contested issue of regulatory interpretation that was ripe for Federal Circuit review. Yet, soon after that decision, VA issued a decision granting the veteran his requested benefit. Even though the VA’s new decision relied on evidence obtained after its initial decision was appealed, and the VA sought neither a remand from the court nor consent from the claimant to a joint motion to dismiss, the Veterans Court withdrew its prior decision on the VA’s original decision and dismissed the appeal as moot, forestalling Federal Circuit review of the regulatory interpretation question.

In these cases, the court cannot police the agency’s exercise of its jurisdiction-stripping power because the court lacks jurisdiction to even inquire into the agency’s motivation. As the Seventh Circuit recognized, “under the agency’s theory, it would enjoy more than a presumption of regularity: its decision, and motivation, would effectively be unreviewable because the courts would have no jurisdiction over the case once a final decision had been reopened.” *Drs. Nursing & Rehab. Ctr.*, 613 F.3d at 680. This unchecked agency power was precisely what Congress sought to abate with the VJRA.

III. The Court Should Grant Certiorari to Restore the Protections of Independent Judicial Review

The VA's power to withdraw a decision during a pending appeal has broader implications than moot-ing individual appeals—it substantially widens the structural asymmetry between the VA and individual claimants in shaping veterans law.

As scholars have observed, the evolution of judicial precedent depends, in part, on the relative resources and incentives of the litigating parties. See Marc Galanter, *Why the "Haves" Come Out Ahead: Speculations on the Limits of Legal Change*, 9 Law & Soc'y Rev. 95, 100-02 (1974) (discussing the distinction between "one-shotters" and "repeat players," who are engaged in many similar litigations over time and thus are able to make choices aimed at securing favorable precedent for future cases); Daniel Epps & William Ortman, *The Defender General*, 168 U. Pa. L. Rev. 1469, 1482-93 (2020) (discussing systemic asymmetry in the development of precedent in criminal law). As observed in various contexts, a repeat-player like the VA has relatively low stakes in the outcome of any one case and can invest its resources in pursuing its long-run interests. Galanter at 98. By contrast, individual litigants like veterans seeking benefits must invest their limited resources in the individual case before them.

The VA has long exploited this power. The VA's historical practice suggests that even before *Kernz*, it has been acting to shape precedent, ending Veterans Court cases poised to set precedent that favors U.S.

military veterans. Over the past ten years, the Veterans Court has scheduled 384 cases for oral argument—an indication that the Veterans Court intends to issue a precedential decision in that case. Between the scheduling of oral argument and the scheduled argument date, VA settled out of 79 appeals, *i.e.*, more than 20% of cases scheduled for argument.¹⁷

The Federal Circuit’s decision in *Kernz* has significantly expanded this power, while immunizing it from judicial oversight. In prior cases, the VA had to obtain the individual appellant’s agreement and the Veterans Court’s consent to withdraw the decision on appeal from further judicial review. Those hurdles subjected the VA’s exercise of power to the court’s oversight and were often accompanied by a confession of error and an agreement to cover the claimant’s legal fees. The Federal Circuit’s decision in *Kernz* removes these basic constraints on the agency at the expense of the claimants’ right to any independent oversight of the VA’s actions. The Court should grant certiorari to vacate the decision and restore those fundamental protections Congress intended for the protection of veterans.

¹⁷ See U.S. Court of Appeals for Veterans Claims, Annual Report, [FY2016-FY2025], <https://www.uscourts.cavc.gov/report.php>.

CONCLUSION

The petition for certiorari should be granted.

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