

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
United States Court of Appeals for the
Federal Circuit**

**BRIEF *AMICUS CURIAE* OF
MILITARY-VETERANS ADVOCACY
SUPPORTING PETITIONER**

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October 5, 2026

TABLE OF CONTENTS

INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT.....	2
ARGUMENT	4
I. An Agency’s Extra-Jurisdictional Action is Never Harmless	4
II. The Federal Circuit Decision Has Deleterious Results	6
A. The Federal Circuit Decision Harms Petitioner Kernz.....	7
B. The Federal Circuit Decision Fails Other Veterans	11
C. Avoiding Judicial Review Harms the Administrative State	16
CONCLUSION.....	18

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Arizonans for Official English v. Arizona</i> , 520 U.S. 43 (1997).....	7
<i>Astrue v. Ratliff</i> , 560 U.S. 586 (2010).....	14
<i>Barrett v. Nicholson</i> , 466 F.3d 1038 (Fed. Cir. 2006).....	15
<i>Best Medical International, Inc. v. Elekta Inc.</i> , 46 F.4th 1346 (Fed. Cir. 2022)	7
<i>Bowen v. Michigan Academy of Family Physicians</i> , 476 U.S. 667 (1986).....	17
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979).....	9
<i>Cardoza v. McDonough</i> , 37 Vet. App. 407 (2024)	10
<i>Cerullo v. Derwinski</i> , 1 Vet. App. 195 (1992)	4, 6

<i>City and County of San Francisco, California v. EPA,</i> 604 U.S. 334 (2025).....	17, 18
<i>City of New Orleans v. U.S. S.E.C.,</i> 137 F.3d 638 (D.C. Cir. 1998).....	5
<i>Deposit Guaranty National Bank v. Roper,</i> 445 U.S. 326 (1980).....	9
<i>Doctors Nursing & Rehabilitation Center v. Sebelius,</i> 613 F.3d 672 (7th Cir. 2010).....	6
<i>Dow Chemical Co. v. U.S. E.P.A.,</i> 605 F.2d 673 (3d Cir. 1979)	15, 18
<i>Freund v. McDonough,</i> 114 F.4th 1371 (Fed. Cir. 2024)	7
<i>Friends of the Earth, Inc. v. Laidlaw Environmental Services (TOC), Inc.,</i> 528 U.S. 167 (2000).....	7
<i>Gambill v. Shinseki,</i> 576 F.3d 1307 (Fed. Cir. 2009) (Bryson, J., concurring)	15
<i>Gomez v. U.S.,</i> 490 U.S. 858 (1989).....	5
<i>Griggs v. Provident Consumer Discount Co.,</i> 459 U.S. 56 (1982).....	4

<i>Hain Celestial Group, Inc. v. Palmquist</i> , 607 U.S. 421 (2026).....	5
<i>Hollingsworth v. Perry</i> , 570 U.S. 693 (2013).....	8
<i>Honig v. Doe</i> , 484 U.S. 305 (1988).....	9
<i>Incyte Corp. v. Sun Pharmaceutical Industries, Inc.</i> , 136 F.4th 1096 (Fed. Cir. 2025)	8
<i>Jackson v. Nicholson</i> , 449 F.3d 1204 (Fed. Cir. 2006).....	4
<i>Jarrell v. Nicholson</i> , 20 Vet. App. 326 (2006)	5
<i>Lucia v. SEC</i> , 585 U.S. 237 (2018).....	16, 17, 18
<i>Marbury v. Madison</i> , 1 Cranch 137 (1803).....	18
<i>Ex parte McCardle</i> , 7 Wall. 506 (1868)	5
<i>In re Padilla</i> , 222 F.3d 1184 (9th Cir. 2000).....	4
<i>Patton v. Fitzhugh</i> , 131 F.4th 383 (6th Cir. 2025)	9

<i>Roman Catholic Archdiocese of San Juan v. Acevedo Feliciano</i> , 589 U.S. 57 (2020).....	5
<i>Ruiz v. U.S.</i> , 990 F.3d 1025 (7th Cir. 2021).....	5
<i>Sosna v. Iowa</i> , 419 U.S. 393 (1975).....	9
<i>Steel Co. v. Citizens for a Better Environment</i> , 523 U.S. 83 (1998).....	5
<i>United States Parole Commission v. Geraghty</i> , 445 U.S. 388 (1980).....	8
<i>United States v. Arthrex, Inc.</i> , 594 U.S. 1 (2021).....	16, 17, 18
<i>United States v. Chemical Foundation, Inc.</i> , 272 U.S. 1 (1926).....	18
<i>Veterans for Common Sense v. Shinseki</i> , 678 F.3d 1013 (9th Cir. 2012).....	12
<i>Weinstein v. Bradford</i> , 423 U.S. 147 (1975).....	10
<i>Zeidman v. J. Ray McDermott & Co.</i> , 651 F.2d 1030 (5th Cir. 1981).....	9

Statutes

28 U.S.C. § 1254(1).....	17
28 U.S.C. § 1295(a)(4)(A)	17
33 U.S.C. § 1369(b)(1)(F)	17
35 U.S.C. §§ 141(c), 319	17
38 U.S.C. § 211(a) (1964)	11
38 U.S.C. § 7292(a).....	12
38 U.S.C. § 7292(c)	12
38 U.S.C. § 7292(d).....	12
Act of Mar. 20, 1933, Pub. L. No. 73-2 § 5, 48 Stat. 8, 9	11
Veterans' Judicial Review Act, 38 U.S.C. § 7252(a)	12

Other Authorities

<i>Angela Drake et al., Review of Veterans Law Decisions of the Federal Circuit, 2021 Edition, 71 Am. U. L. Rev. 1619, 1621 (2022)</i>	14
H.R. Rep. No. 100-963 (1988), reprinted in 1988 U.S.C.C.A.N. 5782	12, 14

<i>Judicial Review and the Governmental Recovery of Veterans' Benefits</i> , 118 U. Pa. L. Rev. 288 (1969).....	11
<i>The Presumption of Regularity in Judicial Review of the Executive Branch</i> , Harv. L. Rev., Vol. 131:2431 (2018).....	18
Ridgway, James. <i>The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System</i> , NYU ANNUAL SURVEY OF AMERICAN LAW, Vol. 66:251 (Oct. 10, 2025).....	14, 15
Supreme Court Rule 37.2	1
Transcript of Oral Argument at 51:22– 52:25, <i>Astrue v. Ratliff</i> , No. 08-1322 (Feb. 22, 2010).....	14
U.S. Court of Appeals for Veterans Claims Fiscal Year 2024 Annual Report (https://www.uscourts.cavc.gov/docu ments/FY2024AnnualReport.pdf)	11
U.S. Court of Appeals for Veterans Claims Fiscal Year 2025 Annual Report (https://www.uscourts.cavc.gov/docu ments/FY2025AnnualReport.pdf)	11, 14

U.S. GEN. ACCOUNTING OFFICE, PROCESSING VETERANS' DISABILITY CLAIMS GAO-29-24 (1989) (https://www.gao.gov/assets/hrd-89-24.pdf).....	12
<i>VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. on Veterans' Affairs, 95th Cong. 2 (1977) (Sen. Alan Cranston Opening Statement)</i>	<i>12</i>
<i>Veterans Benefits System, NYU ANNUAL SURVEY OF AMERICAN LAW, Vol. 66:251 (Oct. 10, 2025)</i>	<i>14</i>

INTEREST OF *AMICUS CURIAE*¹

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates for service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates service members and veterans about their rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits.

MVA's interest lies at the heart of this case. The decision below allows the Department of Veterans Affairs (VA) to deprive veterans of judicial review by taking unauthorized action after an appeal has divested it of jurisdiction and then invoking that action to end the case. Put simply, that rule would allow the agency whose error caused the injury to decide whether the error is ever reviewed. Judicial review should therefore be available to veterans in all benefits cases. MVA accordingly has a strong interest in preserving the independent judicial review established by Congress and preventing *ultra vires* agency action from denying veterans appellate relief.

¹ Pursuant to Supreme Court Rule 37.2, counsel for amicus notified all known parties of intention to file a brief of amicus curiae in this case. No counsel for any party in this case authored this brief in whole or in part. No person or entity aside from amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Federal Circuit held that Mr. Kernz lacked standing to appeal because the Board of Veterans' Appeals had already granted the relief he sought. But the Board acted only after losing jurisdiction. The holding therefore rests on the mistaken premise that an agency's action taken without jurisdiction can be harmless. That assumption is wrong. If allowed to stand, that rule will harm Mr. Kernz, thousands of veterans in the same position, and judicial review of agency action more broadly.

An agency action taken without jurisdiction is never harmless. Mr. Kernz's notice of appeal gave jurisdiction to the Court of Appeals for Veterans Claims (Veterans Court) and removed the Board's authority to act. Anything the Board did after that was not just wrong, it was void. Harmless-error review assumes a legally effective act, and an act taken without jurisdiction is no act at all. The Board's good intentions cannot supply the authority it lacked. Letting the Board's *ultra vires* act end the case gives the agency control over whether judicial review happens at all.

The Board's extra-jurisdictional acts, combined with the Federal Circuit's refusal to reach the merits, effectively erased Mr. Kernz's injury. The court treated what was, at most, a mootness question as a standing defect and thus concluded that he *never* suffered a cognizable injury. The distinction matters: at least thousands of veterans received similar erroneous letters from the VA, and denying Mr. Kernz's standing prevents him from representing a

class of similarly injured veterans. A mootness analysis, by contrast, could have allowed him to remain the named plaintiff under any number of mootness exceptions, such as the doctrine for disputes that are “capable of repetition, yet evading review.” That exception is especially apt here because the Secretary maintains that the VA’s errors in the letters are not subject to court review. The court’s standing holding therefore forecloses both class certification and potential relief to Mr. Kernz under established mootness principles.

More broadly, the Federal Circuit decision fails veterans. For decades, VA decisions were shielded from judicial review, producing widespread errors and procedural failures. Congress enacted the Veterans’ Judicial Review Act (VJRA) to end that “splendid isolation” and subject VA decisions to independent review. Yet the decision below paves the way for the VA to avoid scrutiny by granting relief to only the few veterans who appeal, while leaving systemic errors unexamined. That result conflicts with the strongly pro-claimant character of the veterans’ benefits system and threatens the gains achieved under the VJRA.

The decision also weakens judicial review of agency action beyond the veterans’ benefits system. Under the Federal Circuit’s logic, an executive agency could prevent Article III review of constitutional questions merely by purporting to grant the individual challenger their requested relief. That result conflicts with the strong presumption that Congress intends judicial review of agency action. It is especially troubling here because the Board—

despite the presumption that agencies act with regularity—acted entirely without jurisdiction.

The Court should grant the petition and reaffirm the importance of judicial review of agency action.

ARGUMENT

I. AN AGENCY’S EXTRA-JURISDICTIONAL ACTION IS NEVER HARMLESS

The Federal Circuit’s fundamental error was treating the Board’s unauthorized, self-initiated remand as harmless, even while acknowledging that the Board “lacked jurisdiction” to correct “its erroneous timeliness determination.” Pet. App. 14a & n.3 (citing *Cerullo v. Derwinski*, 1 Vet. App. 195, 196, 198–201 (1992); *Jackson v. Nicholson*, 449 F.3d 1204, 1208 (Fed. Cir. 2006); *Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58–59 (1982)). Once a tribunal loses jurisdiction, any further action is “null and void.” *In re Padilla*, 222 F.3d 1184, 1190 (9th Cir. 2000); Pet. 16–18 (collecting cases).

The court nevertheless excused the jurisdictional violation on the ground that the Board had granted Mr. Kernz complete relief. *See* Pet. App. 13a, 16a, 18a. The Federal Circuit then framed that conclusion as a defect in standing, even though the Veterans Court cast it as an issue of mootness. But both conclusions rested on the same premise: the Board’s extra-jurisdictional conduct was harmless because it did not prejudice, and in fact benefited, Mr. Kernz. That premise is wrong.

Harmless-error review has no role here because it asks whether an error affected the outcome of an otherwise lawful proceeding. *See Ruiz v. U.S.*, 990 F.3d 1025, 1030 (7th Cir. 2021) (“At its core, harmless error review is an equitable doctrine allowing courts to decline to afford relief when an error does not affect an existing judgment.”). An act taken without jurisdiction, however, is “not simply erroneous, but absolutely void.” *Roman Cath. Archdiocese of San Juan v. Acevedo Feliciano*, 589 U.S. 57, 63–64 (2020) (cleaned up). The Veterans Court has likewise explained, “to hold that a lack of jurisdiction can be harmless error would be inconsistent with the well-established doctrine that parties cannot consent to agency jurisdiction and that the absence of jurisdiction cannot be waived.” *Jarrell v. Nicholson*, 20 Vet. App. 326, 334 (2006); *see also Gomez v. U.S.*, 490 U.S. 858, 876 (1989) (holding that harmless-error analysis does not apply when “an officer exceeds his jurisdiction”). After all, “[w]ithout jurisdiction the court cannot proceed at all in any cause.” *Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 7 Wall. 506, 514 (1868)).

Once Mr. Kernz sought judicial review, the Board lacked authority to remand the matter on its own. Its purported remand therefore had no legal force and could not cure its earlier error or supply the relief on which the Federal Circuit relied. *See Hain Celestial Grp., Inc. v. Palmquist*, 607 U.S. 421, 432 (2026) (“[A]n uncured jurisdictional defect means that ‘the judgment must be vacated,’ ... regardless of how efficient it might be to leave the judgment in place.”); *City of New Orleans v. U.S. S.E.C.*, 137 F.3d 638, 639

(D.C. Cir. 1998) (“[E]ven if the agency acts on the administrative reconsideration motion before argument is heard on the judicial review petition, the agency action does not cure the jurisdictional defect.”); *see also Drs. Nursing & Rehab. Ctr. v. Sebelius*, 613 F.3d 672, 677 (7th Cir. 2010); *Cerullo*, 1 Vet. App. at 196-98; Pet. App. 5a–6a. An error committed within a tribunal’s authority may be harmless, but an act taken without that authority is no act at all and can never be harmless.

The Board’s apparent wish to correct its mistake does not change the result. Good intentions cannot restore jurisdiction. *See Drs. Nursing*, 613 F.3d at 675 (holding that the agency’s extra-jurisdictional action remained unlawful despite its recognition that it had erred and that the appellant “was entitled to additional process before the agency”). The Board could not render its jurisdictional violation harmless by granting Mr. Kernz relief that it no longer had authority to give.

II. THE FEDERAL CIRCUIT DECISION HAS DELETERIOUS RESULTS

Even apart from the fundamental jurisdictional defect in the Board’s self-initiated remand, giving that remand case-ending effect has serious practical consequences. The ruling harms not only Mr. Kernz, but also other veterans and the integrity of agency proceedings.

A. The Federal Circuit Decision Harms Petitioner Kernz

The Board undisputedly erred by sending Mr. Kernz a letter dismissing his Board appeal. *See* Pet. App. 5a (“On March 24, 2020, the Board issued a letter stating that Mr. Kernz’s appeal was untimely and dismissing it. . . . The Board was obviously incorrect.”). That error denied Mr. Kernz the process prescribed by statute. *See* Pet. 21–23.

The Federal Circuit compounded the Board’s error by recasting what was, at most, a mootness question as a standing defect. Standing is measured when an appeal begins, and the Board’s later action could not erase an injury that already existed. *See Friends of the Earth, Inc. v. Laidlaw Env’t Servs. (TOC), Inc.*, 528 U.S. 167, 180 (2000) (analyzing “Article III standing at the outset of the litigation”); *Freund v. McDonough*, 114 F.4th 1371, 1377 n.4 (Fed. Cir. 2024) (“Because the petitioners suffered injuries traceable to the VA’s conduct and ‘likely to be redressed by a favorable judicial decision,’ at the time of filing they had standing.”) (quoting *Best Med. Int’l, Inc. v. Elekta Inc.*, 46 F.4th 1346, 1352 (Fed. Cir. 2022)).

When Mr. Kernz appealed on April 2, 2020, the Board had not yet attempted its unauthorized remand, and he had not received the relief he sought. Pet. 8–9 (citing Pet. App. 5a, 27a–28a). He therefore had standing when his appeal began. Later relief could, at most, affect mootness; it could not retroactively eliminate standing. *See Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 68, n.22 (1997) (“The requisite personal interest that must exist at the

commencement of the litigation (standing) must continue throughout its existence (mootness)).” (quoting *United States Parole Comm’n v. Geraghty*, 445 U.S. 388, 397 (1980)); *Incyte Corp. v. Sun Pharm. Indus., Inc.*, 136 F.4th 1096, 1099 (Fed. Cir. 2025) (“An appellant must have standing at the time of filing its appeal.”) (citing *Hollingsworth v. Perry*, 570 U.S. 693, 705 (2013)).

The court’s standing ruling has two immediate and concrete detrimental consequences.

First, the Federal Circuit’s decision jeopardizes relief for a large class of similarly situated veterans by eliminating the named plaintiff seeking to represent them. At least thousands of veterans received letters from the Board that prematurely and erroneously rejected their timely appeals—the conduct Mr. Kernz challenged in his appeal. Pet. App. 24a, 30a. In response to that systemic error, Mr. Kernz filed a Request for Class Certification and Class Action, which the Veterans Court denied after concluding Mr. Kernz’s appeal was moot. Pet. App. 25a. The proposed class includes “[a]ll claimants who have received or will receive the same or substantially similar letters from the Board that Mr. Kernz did, *i.e.* letters denying appellate eligibility/jurisdiction under the [AMA] and Legacy (non-modernized) review system for issues timely appealed via VA Form 10182.” Pet. App. 30a, n.31. Mr. Kernz estimated that the class is at least 1,512 to 2,075 members large. Pet. App. 81a (Jaquith, J. dissenting).

Had the Federal Circuit applied mootness principles, Mr. Kernz could still have pursued relief

on behalf of the putative class. *See Sosna v. Iowa*, 419 U.S. 393, 402 & n.11 (1975) (“The controversy may exist, however, between a named defendant and a member of the class represented by the named plaintiff, even though the claim of the named plaintiff has become moot.”); *Patton v. Fitzhugh*, 131 F.4th 383, 397–98 (6th Cir. 2025) ((recognizing a mootness exception for class action claims even if no pending motion for certification) (collecting cases)). But by giving retroactive effect to the Board’s extra-jurisdictional action, the Federal Circuit effectively prevented review of the class certification decision. *See, e.g., Deposit Guaranty Nat’l Bank v. Roper*, 445 U.S. 326, 339 (1980) (condemning acts of defendant to “buy off” individual plaintiff claims to prevent class certification, stating it “would be contrary to sound judicial administration”); *Zeidman v. J. Ray McDermott & Co.*, 651 F.2d 1030, 1050–51 (5th Cir. 1981) (collecting cases for proposition that government agencies cannot prevent a decision on class certification by mootng an individual plaintiff’s demand for relief). The ruling thus forces each affected veteran to bear the burden and expense of separately challenging the same systemic error. *See, e.g., Califano v. Yamasaki*, 442 U.S. 682, 701 (1979) (stating class actions save the court and parties resources by addressing issues “in an economical fashion”); *Deposit Guar.*, 445 U.S. at 339 (stating class actions may be more feasible economically).

Second, the Federal Circuit’s standing ruling foreclosed review under the “capable of repetition, yet evading review” exception to mootness. *E.g., Honig v. Doe*, 484 U.S. 305, 318–319 (1988). The Secretary

maintains that the erroneous Board letters are not themselves appealable, an issue that neither the Veterans Court nor the Federal Circuit addressed in Mr. Kernz’s case.² Pet. App. 6a, n.2. The same error may therefore recur against Mr. Kernz and other veterans. *E.g.*, *Cardoza v. McDonough*, 37 Vet. App. 407, 408–409 (2024); *see also Weinstein v. Bradford*, 423 U.S. 147, 149 (1975) (stating the “capable of repetition, yet evading review” doctrine applies when the challenged action was too short to be fully litigated before cessation and “there was a reasonable expectation the same complaining party would be subjected to the same action again.”). Indeed, the Board has issued “untold numbers” of notices wrongly informing veterans their appeals were untimely, and the agency has refused to determine the extent of an error that may affect thousands. Pet. 8 (citing Pet. App. 80a (Jaquith, J. dissenting)). Yet the Board purported to correct its error in Mr. Kernz’s case—albeit without jurisdiction—before his challenge could be fully litigated. *See* Pet. App. 7a, 18a; *see also Weinstein*, 423 U.S. at 149.

Had the Federal Circuit treated the Board’s action as potentially mooted Mr. Kernz’s claims, the “capable of repetition, yet evading review” exception could have preserved judicial review. By instead holding that Mr. Kernz never had standing, the court

² During the pendency of Mr. Kernz’s appeal at the Federal Circuit, the Veterans Court issued a decision in a separate proceeding concluding that such letters are appealable decisions. *See* Pet. 6a, n.2 (citing *Cardoza v. McDonough*, 37 Vet. App. 407 (2024)).

foreclosed that exception and insulated the Board's recurring error from judicial scrutiny.

B. The Federal Circuit Decision Fails Other Veterans

The Federal Circuit's decision harms not only Mr. Kernz, but also the thousands of veterans who depend on meaningful judicial review of VA errors. For example, in 2024, there were 8,937 appeals to the Veterans Court, and in 2025, that number jumped to 10,449. U.S. Court of Appeals for Veterans Claims Fiscal Year 2024 Annual Report at 1 (<https://www.uscourts.cavc.gov/documents/FY2024AnnualReport.pdf>); U.S. Court of Appeals for Veterans Claims Fiscal Year 2025 Annual Report at 1 (<https://www.uscourts.cavc.gov/documents/FY2025AnnualReport.pdf>). In dismissing Mr. Kernz's appeal, the court gave case-ending effect to the Board's *ultra vires* action and prevented review of the merits. Congress, however, enacted a statutory framework specifically to require and enable judicial review of veterans' benefits decisions. The decision below undermines that intentional design.

Initially, judicial review of VA decisions was barred by statute. *Judicial Review and the Governmental Recovery of Veterans' Benefits*, 118 U. Pa. L. Rev. 288, 288 (1969) (citing 38 U.S.C. § 211(a) (1964)); Act of Mar. 20, 1933, Pub. L. No. 73-2 § 5, 48 Stat. 8, 9 ("All decisions rendered by the Administrator of Veterans' Affairs . . . shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review."). Congress described the VA as

operating in “splendid isolation” from the courts. H.R. Rep. No. 100–963, pt. 1, p. 10 (1988). That isolation had costs: errors in benefits decisions were ubiquitous, veterans alleged that they were denied due process, and there were “significant problems” in claims and notice procedures. U.S. GEN. ACCOUNTING OFFICE, PROCESSING VETERANS’ DISABILITY CLAIMS GAO-29-24, 2 (1989) (<https://www.gao.gov/assets/hrd-89-24.pdf>). In addition, “hundreds of thousands of veterans, survivors, and dependents” who applied for benefits were denied benefits each year. *VA Administrative Procedure and Judicial Review Act: Hearing on S. 364 Before the S. Comm. on Veterans’ Affairs*, 95th Cong. 2 (1977) (Sen. Alan Cranston Opening Statement).

Congress responded by creating the Veterans Court to provide “a more independent review by a body which is not bound by the Administrator’s view of the law” and granting it “*exclusive* jurisdiction” to review VA decisions. *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1021–22 (9th Cir. 2012) (citing the Veterans’ Judicial Review Act, 38 U.S.C. § 7252(a)) (emphasis in original). Congress also gave the Federal Circuit exclusive appellate jurisdiction over “all relevant questions of law,” including constitutional and statutory questions decided by the Veterans Court. *Id.* at 1022 (citing 38 U.S.C. § 7292(a), (c), (d)). The Federal Circuit’s judgments were also made reviewable by this Court. 38 U.S.C. § 7292(c). Congress thus replaced agency self-policing with multilayered independent judicial review.

The Federal Circuit’s decision threatens to return the VA to that era of “splendid isolation.” By holding

that the Board's unauthorized attempt to correct its error eliminated Mr. Kernz's standing, the Federal Circuit gave the agency a mechanism to prevent judicial scrutiny of its mistakes. That rule recreates the system of agency self-policing that Congress enacted VJRA to end.

The need for independent judicial review is not merely historical. The government itself has acknowledged the troubling frequency with which its positions in veterans' cases are substantially unjustified:

CHIEF JUSTICE ROBERTS: Counsel, do you – do you dispute your friend's statement that 42 percent of the time in Social Security cases, the government's position is unjustified, and 70 percent of the time in Veterans cases?

MR. YANG (ASSISTANT TO THE SOLICITOR GENERAL): Well, I think that reflects the stakes often, Your Honor

CHIEF JUSTICE ROBERTS: So whenever it really makes a difference -- ... -- 70 percent of the time the government's position is substantially unjustified?

. . .

MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal. . . .

CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the

government more often than not takes a position that is substantially unjustified?

MR. YANG: It is an unfortunate number, Your Honor. And it is -- it's accurate.

Astrue v. Ratliff, 560 U.S. 586 (2010), Transcript of Oral Argument at 51:22–52:25, *Astrue v. Ratliff*, No. 08-1322 (Feb. 22, 2010). That “unfortunate” but “accurate” record confirms why independent judicial review is so important to the veterans’ benefits system.

Yet only about 0.5% of veterans claims are appealed to the Veterans Court. Ridgway, James. *The Veterans’ Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, NYU ANNUAL SURVEY OF AMERICAN LAW, Vol. 66:251 (Oct. 10, 2025) at 269. Many veterans lack representation because of the “non-adversarial system of veterans benefits” or do not appeal VA decisions. H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5795; see also *Angela Drake et al., Review of Veterans Law Decisions of the Federal Circuit*, 2021 Edition, 71 Am. U. L. Rev. 1619, 1621 (2022) (describing the “non-adversarial nature of veterans law”); U.S. Court of Appeals for Veterans Claims Fiscal Year 2025 Annual Report at 1 (stating 12% of veterans appeals are pro se at the time of filing). Against that backdrop, the Federal Circuit’s decision creates a perverse incentive—the VA could have a *de facto* policy to categorically deny veterans benefits, provide relief to only those veterans who complain or appeal, and then avoid judicial review by asserting it supplied “all

substantive relief [the veteran] requested.” *See* Pet. App. 14a.

That result is fundamentally at odds with the veterans’ benefits system’s uniquely pro-claimant design. *Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (stating the Supreme Court and Federal Circuit “have long recognized that the character of the veterans’ benefits statutes is strongly and uniquely pro-claimant”). “Congress’s intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country.” *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (internal quotations omitted). Congress enacted the VJRA to protect those veterans by subjecting VA decisions to meaningful judicial oversight. Since the VJRA established judicial review of VA decisions, the VA has granted a higher percentage of veterans’ claims and the amount of benefits awarded has increased. *The Veterans’ Judicial Review Act* at 267.

By giving the Board’s void actions case-ending effect, the Federal Circuit handed the agency the keys to the courthouse. If an agency can use its own post-appeal actions to end review, “the timing and venue of judicial review could be effectively controlled by the agency” itself. *Dow Chem. Co. v. U.S. E.P.A.*, 605 F.2d 673, 679 (3d Cir. 1979); Pet. 18–21. Congress enacted the VJRA to provide an independent check; not one that the Board could simply switch off.

C. Avoiding Judicial Review Harms the Administrative State

The harm extends beyond veterans' benefits. The Federal Circuit's reasoning threatens judicial review across the administrative state by allowing an agency to prevent courts from deciding important constitutional and statutory questions simply by attempting to correct the challenged action after judicial review begins. In *Lucia v. SEC*, for example, the Securities and Exchange Commission could have attempted to prevent Article III review by replacing an improperly appointed administrative law judge with one appointed in accordance with the Appointments Clause. *See* 585 U.S. 237, 243 (2018). Under the decision below, that belated correction would have eliminated Lucia's standing. As a result, the Court would not have had the opportunity to address the constitutional issue of whether SEC ALJs qualify as "Officers of the United States." *Id.* at 241. An agency's post-appeal effort to remedy a constitutional violation cannot erase the jurisdiction of the reviewing court.

Similarly, in *United States v. Arthrex, Inc.*, this Court addressed whether Patent Trial and Appeal Board administrative law judges could constitutionally exercise executive authority without review by a presidentially appointed, Senate-confirmed officer. 594 U.S. 1, 6, 10 (2021). Under the Federal Circuit's reasoning here, the PTO Director could have precluded appellate review simply by reviewing the challenged decision after Arthrex appealed. Pet. App. 13a ("[T]here is simply no

effectual relief we can provide him that he has not already received from the Board—and, hence, he lacks a cognizable injury in fact that is ‘likely to be redressed by a favorable judicial decision.’”). Congress could not have intended an agency’s post-appeal action to extinguish the judicial review it expressly authorized. *See* 35 U.S.C. §§ 141(c), 319, 28 U.S.C. §§ 1254(1), 1295(a)(4)(A).

The same problem arises in the regulatory context. In *City and County of San Francisco, California v. EPA*, the Environmental Protection Agency could have insulated its authority from judicial review by withdrawing the challenged permit conditions making permittees “responsible for the quality of the water in the body of water into which the permittee discharges pollutants.” 604 U.S. 334, 338 (2025). San Francisco challenged those “end-result” requirements as exceeding the EPA’s authority under the Clean Water Act. *Id.* at 338–39. Had the EPA withdrawn the challenged provisions after the appeal began, the Federal Circuit’s reasoning would have foreclosed appellate review of the agency’s authority. *See id.* at 339, 33 U.S.C. § 1369(b)(1)(F). The public would likewise have been left without guidance on the limits of that authority.

Lucia, *Arthrex*, and *EPA* illustrate the broader danger here. If agencies can terminate judicial review through post-appeal action, recurring legal violations may never produce precedent defining the limits of agency authority. That result conflicts with the “strong presumption” that Congress intends judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670

(1986) (citing *Marbury v. Madison*, 1 Cranch 137, 163 (1803)).

Article III courts were able to address the issues in *Lucia*, *Arthrex*, and *EPA*, in part, because the agencies acted with the regularity expected of agencies. See *United States v. Chem. Found., Inc.*, 272 U.S. 1, 14–15 (1926) (“in the absence of clear evidence to the contrary, courts presume that [public officers] have properly discharged their official duties”); *The Presumption of Regularity in Judicial Review of the Executive Branch*, Harv. L. Rev., Vol. 131:2431, at 2441 (2018) (“Congress is presumed to design schemes that are constitutional and, in implementation and operation, agencies are presumed to act regularly—that is, to remain faithful to Congress’s design.”). That presumption assumes that agencies act within their jurisdiction. When an agency acts *ultra vires*—as the Board undisputedly did here—it steps outside the legal framework that gives the presumption force. Giving such actions case-ending effect would turn Congress’s system of judicial review on its head by allowing agencies to dictate whether and when courts may review their conduct. *Dow Chem.*, 605 F.2d at 679. This Court’s intervention is needed to correct the Federal Circuit’s mistake and ensure that neither the VA nor any other agency may use unauthorized action to close the courthouse doors.

CONCLUSION

Amicus respectfully requests that the Court grant the petition.

Respectfully submitted,

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