No. 20-1321

United States Court of Appeals
For the Federal Circuit

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent,

Petition for Review of Changes to Department of Veterans Affairs Manual M21-1 pursuant to 38 U.S.C. § 502.

BRIEF OF AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM AND THE VETERANS OF FOREIGN WARS IN SUPPORT OF PETITION FOR INITIAL HEARING EN BANC

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CERTIFICATE OF INTEREST

Counsel for amici National Veterans Legal Services Program, the Veterans of Foreign Wars, and Paralyzed Veterans of America certifies the following:

1. The full names of every party represented by me are:

   - National Veterans Legal Services Program
   - The Veterans of Foreign Wars
   - Paralyzed Veterans of America

2. The full names of the real parties in interest represented by me are:
   - National Veterans Legal Services Program
   - The Veterans of Foreign Wars
   - Paralyzed Veterans of America

3. Parent corporations and publicly held companies that own 10 percent or more of the stock of the parties represented by me.

   None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in trial court or agency or are expected to appear in this court (and who have no or will not enter an appearance in this case are):

   <u>Paul Hastings LLP</u>
   Sarah G. Besnoff

   <u>National Veterans Legal Services Program</u>
   Barton F. Stichman

   <u>Veterans of Foreign Wars</u>
   John Muckelbauer

   <u>Paralyzed Veterans of America</u>
   Leonard Selfon

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by

this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

None.

Respectfully submitted,

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INTEREST OF AMICI CURIAE[1]

Amici Curiae are the National Veterans Legal Services Program (NVLSP), the Veterans of Foreign Wars (VFW), and Paralyzed Veterans of America (PVA) (collectively, "Amici"). NVLSP is a nonprofit organization that has worked since 1981 to ensure that the government delivers to our nation's veterans and active duty personnel the benefits to which they are entitled because of disabilities associated with their military service. NVLSP publishes the "Veterans Benefits Manual," an exhaustive guide for advocates who help veterans and their families obtain benefits from the Department of Veterans Affairs (DVA). NVLSP provided critical leadership in supporting the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (VJRA), which created the Court of Appeals for Veterans Claims (CAVC) and bestowed upon it the authority to review a final DVA decision denying a claim of benefits. NVLSP has directly represented thousands of veterans in individual appeals to CAVC, and filed class action lawsuits challenging the legality of various DVA rules and policies.

[1] Both parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no counsel, party, or person other than amici curiae or its counsel made a monetary contribution intended to fund the preparation or submission of this brief.

The VFW is a congressionally chartered veterans' service organization established in 1899. The VFW and its Auxiliary comprise over 1.7 million members and 2,050 VA-accredited VFW representatives. The VFW is the nation's largest organization of war veterans and its oldest major veterans' organization. The VFW was instrumental in establishing the DVA, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system.

PVA is a congressionally chartered, national, non-profit veteran service organization, established in 1946. PVA has approximately 17,000 member veterans living with an injury, disease, or other dysfunction of the spinal cord. PVA's mission includes promoting public education, medical research, and advocacy on behalf of its members. PVA provides assistance and representation without charge to members in their pursuit of benefits and healthcare, and pro bono legal representation before the federal courts.

INTRODUCTION

Amici write in support of this Court granting an initial hearing *en banc* to revisit the Court's holding in *Disabled American Veterans v. Secretary of Veterans Affairs* (*DAV*), 859 F.3d 1072 (Fed. Cir. 2017), relied upon in *Gray v. Secretary of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017), *cert. granted sub nom. Gray v. Wilkie*, 139 S. Ct. 451 (2018) (dismissed as moot on unrelated grounds). In *DAV*, this Court erroneously held that it did not have jurisdiction under the VJRA to review challenges to interpretive rules of general applicability promulgated by the DVA through the M21-1 Adjudication Procedures Manual ("M21-1" or "Manual"). That holding was wrong, and the Court should take this opportunity to overturn it.

In the VJRA, Congress granted this Court jurisdiction to review two types of veterans' preenforcement challenges to DVA agency actions defined under "section 552(a)(1) or 553 of title 5 (or both)..." 38 U.S.C. § 502. Section 552(a)(1), the focus of this brief today, is a Freedom of Information Act (FOIA) provision listing five categories of Agency promulgations, including "interpretations of general applicability formulated and adopted by the agency . . .

." 5 U.S.C. § 552(a)(1)(D).[2] Under a plain reading of the VJRA, the challenged rules here are 552(a)(1) "interpretations of general applicability," and thus, are subject to judicial review.

Nevertheless, in *DAV* and *Gray*, this Court found that they were not reviewable. *First*, the Court held that even challenged rules that fit under 552(a)(1) could nonetheless be excluded from judicial review if they were promulgated in the M21-1, an "administrative staff manual" under 552(a)(2)(C). *See DAV*, 859 F.3d at 1078; *Gray*, 875 F.3d at 1108. This Court erroneously found those provisions to be mutually exclusive: Section 552(a)(1)(D) describes types of Agency promulgations (*interpretations of general applicability*) that must be published in the Federal Register, while 552(a)(2)(C) describes a specific type of Agency document (*administrative staff manual*) that must be made public in electronic format. An interpretation of general applicability's appearance in an Agency manual does not change its reviewability under the VJRA. This Court's holding would improperly incentivize the Agency to shield itself from judicial review by promulgating rules solely through its manuals.

[2] Section 553 is an Administrative Procedure Act provision that governs agency rulemaking. *See* 5 U.S.C. § 553.

Second, because the DVA abandoned the mutual exclusivity argument in *Gray*, this Court instead held that an agency action which falls under 552(a)(1) is nonetheless not reviewable if it is not "binding." *Gray*, 875 F.3d at 1108. Nothing in the VJRA makes judicial review turn on whether a rule is "binding" on the BVA. Furthermore, the practical reality is 96% of all veterans' benefits cases are decided not by the BVA, but by ratings officers in Regional Offices, upon whom Manual rules are indisputably binding. Even for the 4% of cases that get appealed, the BVA frequently treats the Manual as binding. Rational adjudication of veterans' benefits claims requires this Court to restore the preenforcement judicial review that Congress intended for the welfare of veterans, and to overturn the Court's overreach in *DAV*.

I. The rules at issue in *DAV*, *Gray*, and here are reviewable under a plain reading of the VJRA.

The rules at issue in *DAV*, *Gray*, and here, were promulgated in the M21-1; they interpret statutes to provide binding guidance to ratings officers on how to adjudicate veterans' benefits claims. *See* NOVA Br. at 6-7. To determine whether these rules are "interpretations of general applicability" under 552(a)(1), this Court should "begin and end [its] inquiry with the [statutory] text," analyzing the rules under the "ordinary, contemporary, common meaning" of "general applicability."

Star Athletica L.L.C. v. Varsity Brands, Inc., 137 S.Ct. 1002, 1010 (2017).[3] A "[d]ocument having general applicability and legal effects means any document issued under proper authority…conferring a right, privilege…relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals and organizations." 1 C.F.R. § 1.1; 2 Fed. Reg. 2450, 2451-52 (Nov. 12, 1937); *see also* H.R. Rep. No. 79-1980 (Comm. Amendment), *reprinted in Legislative History of the Administrative Procedure Act* 283 & n.1 (1946); 60 Stat. at 238.

There is no question that the rules challenged here, as in *DAV* and *Gray*, are interpretations of general applicability. The provisions interpret statutes to define classes of eligible veterans for certain benefits; none is directed to a delimited set of named persons. NOVA Pet. 8-10.

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[3] Certain courts of appeals have ignored a straightforward statutory analysis and instead invented a conjunctive, two-prong test under which an interpretation is *de facto* deemed "generally applicable," unless it (1) expresses "only a clarification or explanation of existing laws or regulations, and (2) results in "no significant impact upon any segment of the public." *See, e.g*., *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (internal citation omitted). Even under this test, the relevant rules are generally applicable.

II. Generally applicable interpretations are reviewable under the VJRA regardless of their placement in the M21-1 Manual.

This Court ignored the plain language of 502, and instead created hurdles for veterans which do not exist in the statutory language. The Court held that a promulgation which "more readily" "fall[s] within § 552(a)(2)" does not "fall within § 552(a)(1)." Thus, because the challenged rules were promulgated in the M21-1, the Court held they were "more readily" 552(a)(2)(C) "administrative staff manuals," and not 552(a)(1) "interpretive rules of general applicability." *DAV*, 859 F.3d at 1077-78; *Gray,* 875 F.3d at 1114-15.

Amici agree with NOVA that this Court misinterpreted 552(a)(1) and (a)(2) as mutually exclusive and erroneously held that Manual interpretive rules only fell in the latter category. *See* NOVA Pet. 10-11. Even the DVA abandoned this mutual exclusivity argument in its briefing on Gray's rehearing. *Gray*, Gov't Opp. to Rehr'g 1; Gov't Opp. to Pet. 26 (internal citation omitted).

Congress required Federal Register publication of all generally applicable interpretive rules, but separately required agencies to make available for public inspection entire "administrative staff manuals…that affect a member of the public." § 552(a)(2)(C). Congress simply intended the public to have access to staff manuals that may affect its rights, but that does not authorize an agency like

DVA to evade 552(a)(1) by issuing a generally applicable rule in a manual. *See Morton v. Ruiz*, 415 U.S. 199, 232-36 (1974) (holding that provisions of the Indian Affairs Manual should have been published in the Federal Register pursuant to § 552(a)(1)(D)). A manual might include "interpretations of general applicability," but that does not mean that the "interpretations of general applicability" themselves are not reviewable.

If this Court's flawed mutual exclusivity theory is allowed to survive, the DVA can insulate substantive rules and generally applicable policy statements and interpretations, and avoid preenforcement judicial review, simply by promulgating them through the M21-1. The DVA has amended the M21-1 many times in the last three years. *See* U.S. Dep't of Veterans Affairs, Announcements, https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018 (changes to M21-1 Parts I, III, and IV). By promulgating rules through the M21-1, the DVA has shielded them from Federal Register publication and notice-and-comment rulemaking. This Court's precedent further incentivizes the DVA to engage in this strategic behavior by also denying prompt judicial review of Manual-promulgated rules.

III. The "binding" character of M21-1 Manual provisions does not affect judicial review.

Second, in *Gray*, faced with the DVA's abandonment of the mutual exclusivity argument, the Court invented a new, atextual requirement that the challenged promulgation must be "binding." *Gray*, 875 F.3d at 1102. The word "binding" does not appear in the VJRA. Indeed, interpretive rules and policy actions are generally considered to be "non-binding action[s]." *Ass'n of Flight Attendants-CWA, AFL-CIO v. Huerta*, 785 F.3d 710, 716 (D.C. Cir. 2015). The DOJ admits that applicable agency statements of future effect are sometimes not binding like substantive rules and adjudicatory orders. DOJ, Mem., *Limiting Use of Agency Guidance Documents in Affirmative Civil Enforcement Cases* (Jan. 25, 2018), at 1 n. 1, https://www.justice.gov/file/1028756/download. Importing a "binding" requirement for judicial review largely reads section 552(a) out of the VJRA.

Regardless, M21-1 interpretive rules *are binding* on the vast majority of veterans' benefits cases. Over 96% of veterans' benefits cases start and end with a decision by ratings officers in a Regional Office,[4] who are indisputably bound by

[4] The ROs are civil servants in 56 regional offices, and are not required to have legal training. Jeffrey Parker, *Two Perspectives on Legal Authority within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 216, 218 (2009); U.S. DEP'T OF VET. AFF., VETERANS BENEFITS ADMINISTRATION, About VBA, https://www.benefits.va.gov/benefits/about.asp.

the M21-1. *Gray,* 875 F.3d at 1114 (Dyk, J., dissenting); Parker, *supra*, at 211, 213, 216.

For the 4% of cases which are appealed—even though the "Board [of Veterans Appeals] is not bound by agency manuals…," 38 C.F.R. § 19.103(b) (1985)—the BVA has cited to the M21-1 as "binding on the Board" in its own opinions. *See, e.g*., *Redacted*, Bd. Vet. App. 1300803, at *6 (Jan. 9, 2013). In fact, the Solicitor General has declared that "manuals constitute 'instructions of the Administrator' that *are binding on the Board of Veterans Appeals* under 38 U.S.C. 4004 [now 38 U.S.C. § 7104(c)]." *See* Brief for Resp., *Trayner v. Turnage*, Nos. 86-622, 86-737, 1987 WL 880254 (Aug. 6, 1987) (emphasis added). Moreover, the DVA regularly demands deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to its M21-1 rules.[5] In a recent case, the CAVC criticized the DVA for, on the one hand, telling this Court that M21-1 provisions are not binding, but on the other hand telling the CAVC that the Board (and the courts) must give *Auer* deference to the very M21-1

[5] *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011) (demanding *Auer* deference to agency manual rules). It is an open question whether the Manual will continue to receive deference in light of the Supreme Court's narrowing of *Auer* in light of *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416-17 (2019).

provision at issue in *Gray*. *See Overton v. O'Rourke*, Vet. App. Dkt No. 17-0125 (June 20, 2018).[6]

"To say that the Manual does not bind the Board is to dramatically understate its impact on our nation's veterans. Review of the Manual revisions is essential given the significant 'hardship [that] would be incurred . . . if we were to forego judicial review.'" *Gray,* 875 F.3d at 1114 (Dyk, J., dissenting) (internal citation omitted). The "significant hardship" that veterans would face to individually challenge unlawful Manual promulgations has been called a "bureaucratic labyrinth, plagued by delays and inaction," where "many veterans find themselves trapped for years." *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed Cir. 2018) (Moore, J., concurring). On average, it takes approximately six years for a veteran's claim to proceed to final decision, and that is if the veteran can handle the mental and physical toll that this process requires. *See id*. at 1350-51 (Moore,

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[6] *Available at* http://www.uscourts.cavc.gov/oral_arguments_audio.php.

J., concurring).[7] Every year, thousands of veterans die before their claims are finally resolved.[8]

CONCLUSION

In sum, the Court did not base *DAV*'s and *Gray*'s limitations on its jurisdiction on the plain language of the VJRA. Rather, the Court placed two hurdles to review that Congress never imposed. Congress intended for veterans to have prompt Article III review of DVA rules, even if, and perhaps particularly if, such rules appeared only in a Manual. This matter should be heard *en banc* so that the full Court can restore the statutory scheme Congress devised, as written.

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[7] U.S. Court of Appeals for Veterans Claims, *Annual Report: Fiscal Year* 2017, at 3 (2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf.
[8] Office of Audits and Evaluations, VA Office of Inspector General, *Veterans Benefits Administration: Review of Timeliness of the Appeals Process* 12 (2018), https://www.oversight.gov/sites/default/files/oig-reports/VAOIG-16-01750-79.pdf.

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February 27, 2020

CERTIFICATE OF SERVICE

I, Stephen B. Kinnaird, hereby certify that on February 27, 2020, the foregoing document was filed using the Court's CM/ECF system and served on the parties' counsel of record via ECF.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) or Federal Rule of Appellate Procedure 28.1(e) x The brief contains 2,306 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii), or the brief uses a monospaced typeface and contains lines of text, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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