No. 20-1321

IN THE
United States Court of Appeals for the Federal Circuit

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

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for Initial Hearing En Banc
of Petition for Review Pursuant to 38 U.S.C. § 502

BRIEF OF MILITARY-VETERANS ADVOCACY INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

National Organization of Veterans' Advocates, Inc. **v.** Secretary of Veterans Affairs

Case No. 20-1321

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ■ (amicus) ☐ (name of party)

Military-Veterans Advocacy Inc.

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Military-Veterans Advocacy Inc.	Not Applicable	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 the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Not Applicable

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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). (The parties should attach continuation pages as necessary).

None

2/10/2020
Date

/s/ Melanie L. Bostwick
Signature of counsel

Please Note: All questions must be answered

Melanie L. Bostwick
Printed name of counsel

cc: Counsel of Record

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STATEMENT OF INTEREST[1]

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

On the surface, NOVA's petition challenges two rules promulgated by the Department of Veterans Affairs (VA). But the petition raises far broader issues, highlighting two erroneous legal principles currently enshrined in this Court's precedent that merit correction through an en banc decision. Because each error precludes meritorious challenges to VA rulemaking, MVA has a strong interest in the full Court hearing this case. MVA and its affiliated organization—Blue Water Navy Vietnam Veterans Association, Inc.—have previously litigated related

[1] No party's counsel authored this brief in whole or in part. No party, party's counsel, or any person other than amicus or its counsel contributed money intended to fund preparing or submitting this brief. All parties have consented to the filing of this brief.

reviewability issues in this Court, the D.C. Circuit, and the Supreme Court.

INTRODUCTION

Petitioner, the National Organization of Veterans' Advocates (NOVA), requests review of two final rules (the "Knee Rules") promulgated by the VA in its Adjudication Procedures Manual M21-1 (Manual). But under this Court's precedent, two obstacles impede a panel's review of the Knee Rules. First, this Court has held that it lacks jurisdiction to review any rules of decision that the VA chooses to promulgate through the Manual rather than through publication in the Federal Register, effectively permitting the agency to insulate its rules from review. *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1077-78 (Fed. Cir. 2017) (*DAV*). Second, this Court has repeatedly enforced its own local rule, which imposes a 60-day limitation period on challenges to VA rules, rather than the six-year limitation enacted by Congress. *Compare* 28 U.S.C. § 2401(a), *with* Fed. Cir. R. 47.12(a).

Both obstacles are improper. But no panel of this Court can overturn prior cases. En banc review can clear the way for review of the Knee Rules and other VA actions.

ARGUMENT

I. En Banc Review is Necessary to Restore This Court's Review of Rules Published in the Manual.

Three judges of this Court have recognized that *DAV* was wrongly decided and that this Court "should consider this issue of reviewability en banc because of the widespread impact on the efficient adjudication of veterans' claims." *Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379, 1382 (Fed. Cir. 2018) (Dyk, J., dissenting from denial of en banc, joined by Newman and Wallach, JJ.). The Supreme Court agreed that the issue was important enough to warrant certiorari review—a process that was short-circuited only by another decision of this Court mooting *Gray*. *See* Pet. 2, 12-13. Instead of waiting for the Supreme Court to intervene again, the en banc Court should act now to overturn *DAV*.

A. Section 502 grants this Court jurisdiction because 5 U.S.C. § 552(a)(1)(D) refers to the Knee Rules.

Congress vested this Court with jurisdiction to review any "action of the Secretary to which [5 U.S.C. § 552(a)(1) or § 553] refers." 38 U.S.C. § 502. Section 552(a)(1) refers to, among other things,

"substantive rules of general applicability," "statements of general policy," and "interpretations of general applicability" adopted by the agency. 5 U.S.C. § 552(a)(1)(D). This Court has jurisdiction over NOVA's petition at least because the Knee Rules are "interpretations of general applicability" under § 552(a)(1)(D).

Interpretation of the statute must start with the ordinary meaning of its text. *Milner v. Dep't of the Navy*, 562 U.S. 562, 569 (2011). The plain meaning of that statutory phrase is both clear and clearly applicable. "Interpretation" is well understood to mean "[t]he process of determining what … the law or a legal document means." Black's Law Dictionary 894 (9th ed. 2009). Thus, "interpretive rules" under the Administrative Procedure Act (APA) convey "the agency's construction of the statutes and rules which it administers." *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1811 (2019). The Knee Rules fit: both convey VA's construction of Diagnostic Codes in 38 C.F.R. § 4.71a, a regulation that the agency issued and administers. That remains true whether the VA publishes them in the Federal Register (as it should) or in its Manual.

"General applicability" is equally straightforward. "General" means "relating … to a whole class" and contrasts with "particular" or "specific," while "applicable" means "capable of being applied" or "having relevance." 6 Oxford English Dictionary 430 (2d ed. 1989); Black's Law Dictionary 614 (5th ed. 1979); Webster's Third New International Dictionary 105 (1961). Indeed, in drafting the statute, Congress signaled that "of general applicability" was interchangeable with "not … addressed to and served upon named persons." *Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987) (quoting S. Rep. No. 89-813, at 6 (1965)).

Regulations governing the Federal Register similarly define *documents* having "general applicability" as those "relevant or applicable to the general public, members of a class, or persons in a locality, as distinguished from named individuals or organizations." 1 C.F.R. § 1.1. The Knee Rules fit these definitions easily. Veterans who have undergone partial or total knee replacements, or who have unstable knees, are "members of a class," not "named individuals."

B. *DAV*'s jurisdictional holding is mistaken because § 502 does not expressly exclude jurisdiction over agency manuals.

Nevertheless, this Court held in *DAV* that it lacked jurisdiction under § 502 to review anything published in the Manual. 859 F.3d at 1075. But *DAV* is flawed.

DAV was correct that this Court cannot review a Manual provision just *because* it is in the Manual—§ 502 grants jurisdiction to review actions to which § 552(a)(1) (or § 553) refers, while "administrative staff manuals" in general are listed in § 552(a)(2). But the panel erred in stating that § 502 includes an "express exclusion of agency actions subject to § 552(a)(2) [that] renders the … Manual beyond our § 502 jurisdiction." 859 F.3d at 1075. Section 502 never mentions § 552(a)(2), much less expressly excludes it.

As a result, *DAV*'s requirement that a challenger demonstrate that a rule "more readily fall[s]" under § 552(a)(1) than under § 552(a)(2) is incorrect. Section 502 does not *withdraw* jurisdiction over review of generally applicable interpretive rules because they happen to be published in a staff manual. Agency interpretive rules that fall

within § 552(a)(1) are reviewable. Where the VA chooses to publish such rules is immaterial.

Nor can *DAV* be squared with this Court's recent recognition that a VA document that "explicitly interprets" a statute is an "interpretation[] of general applicability" under § 552(a)(1)(D). *Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376, 1380 (Fed. Cir. 2019). Many Manual provisions explicitly interpret statutes, and *Procopio*'s reasoning applies equally well to rules—like the Knee Rules—that interpret regulations.

Indeed, even the VA no longer seeks to defend *DAV*'s reasoning. *See* Pet. 14-15. Meanwhile, it has shown no reluctance to use *DAV* to shield change after change to its rules from review. *See, e.g.*, U.S. Dep't of Veterans Affairs, M21-1 Adjudication Procedures Manual – VA Changes By Date, https://tinyurl.com/usvkkkp (last visited Feb. 7, 2020) (cataloguing hundreds of changes from 2016-2020). The full Court should heed the Supreme Court's signal, take up NOVA's petition, and overturn *DAV*.

II. En Banc Review Is Also Important to Resolve the Conflict Between This Court's Local Rules and a Federal Statute.

DAV is not the only improper bar to this Court's review of the Knee Rules. Federal Circuit Rule 47.12(a) imposes another unlawful hurdle, barring challenges brought more than 60 days after the VA issues a rule. It thwarts not only Congress's "preference for preenforcement review," before the harsh effects of an erroneous VA rule fall on veterans, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003), but the six-year limitations period Congress expressly established. As with *DAV*, only the full Court can overturn holdings enforcing Rule 47.12(a)'s restrictions. It is critical that the Court do so to ensure a lawful and fair system for veterans affected by VA's actions.

A. 28 U.S.C. § 2401 sets a six-year limitations period that governs this Court's jurisdiction.

Although § 502 establishes the right to review of VA rulemaking decisions in this Court, it does not establish a limitations period. But Congress has established a default six-year limitations period that applies to all "civil action[s] … against the United States" in the absence of a more specific statutory limit. 28 U.S.C. § 2401(a).

Review of a VA rulemaking is unquestionably a "civil action … against the United States." Section 502 specifies that this Court's review of the VA's actions "shall be in accordance with chapter 7 of title 5" of the U.S. Code—the judicial review provisions of the APA. 38 U.S.C. § 502. Those provisions provide a right of review for persons "adversely affected or aggrieved by agency action" through an action naming "the United States, the agency by its official title, or the appropriate officer." 5 U.S.C. §§ 702-703. This action plainly falls within the ambit of § 2401(a).

Unsurprisingly, every circuit to consider the question has concluded that § 2401(a)'s six-year limitation period governs judicial review of agency action under the APA where no more specific statutory limit applies. *See, e.g.*, *Perez-Guzman v. Lynch*, 835 F.3d 1066, 1077 (9th Cir. 2016); *Sai Kwan Wong v. Doar*, 571 F.3d 247, 263 & n.15 (2d Cir. 2009); *Friends of Tims Ford v. Tenn. Valley Auth.*, 585 F.3d 955, 964 (6th Cir. 2009); *Nagahi v. I.N.S.*, 219 F.3d 1166, 1171 (10th Cir. 2000); *Instituto de Educacion Universal Corp. v. U.S. Dep't of Educ.*, 209 F.3d 18, 21 (1st Cir. 2000); *see also* Amicus Curiae Br. of Disabled Am.

Vets., *Brown v. Sec'y of Veterans Affairs*, No. 95-7067, 1996 WL 33453789, at *6 (Fed. Cir. Sept. 3, 1996) (collecting additional cases).

This Court has likewise acknowledged that "the statute of limitations in section 2401 applies to actions under section 502." *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1307 (Fed. Cir. 2008); *see also, e.g.*, *Block v. Sec'y of Veterans Affairs*, 641 F.3d 1313, 1317 (Fed. Cir. 2011). But it has nonetheless invoked Rule 47.12(a) to impose a 60-day limitation on those same actions—inexplicably cutting the statutory review period by more than 97%. *See, e.g.*, *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345 (Fed. Cir. 2011); *Jackson v. Brown*, 55 F.3d 589, 592 (Fed. Cir. 1995). The Court recognized this conflict more than two decades ago. *See Brown v. Sec'y of Veterans Affairs*, No. 95-7067, 1997 WL 488930, at *2 (Fed. Cir. Aug. 22, 1997). But in the time since, it has done nothing to clear up the confusion for veterans and their advocates and to provide them the full rights that Congress conferred on those seeking to challenge VA's actions. The Court should take the opportunity presented by Petitioner to do so.

B. Rule 47.12(a) exceeds this Court's rulemaking power because it directly conflicts with § 2401(a) and Congress's underlying policy.

En banc review is important because the status quo—in which the Court gives a local rule priority over an Act of Congress—is unlawful and thwarts not only Congress's command but also meritorious petitions for review like the one filed by NOVA here.

This Court's rules cannot conflict with federal statutes. *See* 28 U.S.C. § 2071(a) (local rules "shall be consistent with Acts of Congress"); *O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, 467 F.3d 1355, 1365 (Fed. Cir. 2006). In particular, no local rule can "restrict the jurisdiction conferred by a statute." *Willy v. Coastal Corp.*, 503 U.S. 131, 135 (1992). Neither may this Court refuse to exercise jurisdiction granted by Congress. *Mims v. Arrow Fin. Servs., LLC*, 565 U.S. 368, 376 (2012) ("Federal courts … 'have no more right to decline the exercise of jurisdiction which is given, than to usurp that which is not given.'" (citation omitted)).

Where Congress has put a class of cases within the jurisdiction of this Court—as § 502 does—and established a statute of limitations governing *when* those cases may be brought—as § 2401(a) does—this

Court must hear a case timely brought within that limit. *See, e.g.*, *Hamer v. Neighborhood Hous. Servs. of Chicago*, 138 S. Ct. 13, 21 (2017) (limitations period is "mandatory and jurisdictional" when "imposed by Congress"). No local rule can relieve it of that responsibility.

Neither could this Court acquire discretion to fashion a shorter limitations period by characterizing its rule as non-jurisdictional. "[T]he length of a limitations period reflects a value judgment concerning the point at which the interests in favor of protecting valid claims are outweighed by the interests in prohibiting the prosecution of stale ones. It is Congress, not this Court, that balances those interests." *Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) (citation omitted).

Of course, Congress can set a shorter time period if it chooses. And Congress knows precisely how to do so; it has enacted numerous statutes changing the limitation period for review of various agency actions to something other than six years. *See, e.g.*, 28 U.S.C. §§ 2342, 2344 (60-day limit for seven specific categories of agency review); 26 U.S.C. § 6511 (three- and two-year limit for taxpayer refund claims); 28 U.S.C. § 2409a(g) (twelve-year limit for Quiet Title Act suits). But it has not done so for this Court's review under § 502.

Congress has, however, been very clear about the interests that review protects. Because "[a] veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life … Congress has made clear that the VA is not an ordinary agency." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). Rather, the VA system is "unusually protective" of veterans. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011). To honor Congress's clear intent, courts "have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 441 (overturning this Court's "rigid" enforcement of a 120-day limitation period that was not "intended to carry … harsh consequences").

Rule 47.12(a) turns that pro-veteran system on its head. Individual veterans are not in the habit of monitoring VA rulemaking for rules that might someday affect them. Nor are they likely to have attorneys on watch for such developments; because "the [VA's] adjudicatory process is not truly adversarial … the veteran is often unrepresented during the claims proceedings," much less before it begins. *Sanders*, 556 U.S. at 412. As a result, veterans are highly

unlikely to detect new adverse rules from the VA in time to exercise their rights under § 502. And veterans' organizations like Petitioner NOVA and amicus MVA have limited resources and must themselves often rely on pro bono representation through outside firms. Rule 47.12(a) severely hampers that process: sixty days is simply too short a time to assess the effects of a new regulation, triage potential challenges, obtain outside counsel, and file a petition. As a result, the VA system that should be uniquely protective of veterans instead leaves them out in the cold.

Rule 47.12(a) lies outside this Court's rulemaking power and is at odds with the overarching policy governing veterans law. The Court should grant en banc hearing and eliminate the rule.

CONCLUSION

This Court should grant NOVA's petition for initial en banc review.

February 10, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on February 10, 2020.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a) and Fed. Cir. R. 35(g), because this brief contains 2599 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

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