20-1321

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

CORRECTED BRIEF OF AMICI CURIAE NATIONAL VETERANS LEGAL SERVICES PROGRAM, VETERANS OF FOREIGN WARS, AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER AND PRE-ENFORCEMENT REVIEW JURISDICTION

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July 14, 2020

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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 not entered or will not enter an appearance in this case are):

   Paul Hastings LLP
   Sarah G. Besnoff

   Veterans of Foreign Wars
   John Muckelbauer

   Paralyzed Veterans of America
   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.

6. Information required by Federal Rule of Appellate Procedure 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors and trustees in bankruptcy cases.

N/A.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

The National Veterans Legal Services Program ("NVLSP") is a 501(c)(3) 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 authorized it to review final DVA decisions denying benefits claims. Since then, NVLSP has directly represented more than 5,000 veterans in individual appeals to CAVC and filed class action lawsuits challenging the legality of various DVA rules and policies.

The Veterans of Foreign Wars of the United States ("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

[1] This brief is filed per this Court's invitation for amici to file briefs "without consent and leave of court." *See* Order Granting Petition For Hearing En Banc, Case No. 20-1321, Dkt 50 at 3-4 (Fed. Cir., May 6, 2020). 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.

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.

Paralyzed Veterans of America ("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

In *Disabled American Veterans v. Sec'y of Veterans Affairs* (*DAV*), 859 F.3d 1072 (Fed. Cir. 2017), this Court held 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 ("Manual"). That holding was wrong, and the Court should take this opportunity to overturn it.

The will of Congress governs the relationship between the DVA and the judicial branch, and as the agency's responsibilities have grown, Congress has repeatedly seen fit to ensure proper oversight. Relevant here is the VJRA, which empowered this Court to review veterans' pre-enforcement challenges to DVA actions referred to in "section 552(a)(1) or 553 of title 5 (or both)." 38 U.S.C. § 502. Section 552(a)(1), this brief's focus, lists five categories of agency promulgation, 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 are therefore subject to judicial review.

Nevertheless, in *DAV* this Court found similar rules unreviewable, holding that even challenged rules that were "interpretations of general applicability" under 552(a)(1) could nonetheless be excluded from judicial review if they could also be characterized as an "administrative staff manuals" under 552(a)(2)(C). *See DAV*, 859 F.3d at 1078. But sections 552(a)(1)(D) and 552(a)(2)(C) are not mutually exclusive: (a)(1)(D) describes types of Agency promulgations (interpretations of general applicability) that must be published in the Federal Register, while (a)(2)(C) describes a specific type of Agency document that must

[2] Section 553 addresses the procedural requirements for different types of agency rulemaking; it specifically refers to "interpretive rules" and "general statements of policy." *See* 5 U.S.C. § 553.

be made public in electronic format (administrative staff manual). Even the DVA recognized the absurdity of this mutual exclusivity argument and abandoned it in its Supreme Court briefing in *Gray v. Sec'y 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).

Instead, in the course of *Gray*, the DVA advanced, and the Court seemingly approved, another atextual construction of the statute, holding that an agency action falling under 552(a)(1) is unreviewable if it is not "binding" on the BVA. *Gray*, 875 F.3d at 1108. But nothing in the VJRA makes judicial review turn on whether a rule "binds" the BVA. Furthermore, the practical reality is that 96% of all benefits cases are resolved by Regional Offices (RO), upon whom Manual rules are indisputably binding. Even for the 4% of cases appealed, the BVA frequently treats the Manual as binding.

If this erroneous precedent stands, veterans will be unable to obtain prompt Article III pre-enforcement review of unlawful Manual rules. They will instead face a lengthy and backlogged process: going to a regional DVA office; appealing to the BVA; appealing again to the CAVC; and only then, finally, becoming eligible to seek this Court's review. Moreover, such a holding improperly incentivizes DVA to evade both judicial review and rulemaking procedure by promulgating rules through the Manual. The Administrative Procedure Act

(APA) protections of Federal Register publication of substantive, procedural, and interpretive rules, and the further safeguard of notice-and-comment before a substantive rule is adopted, are vital to the ability of veterans' organizations like NVLSP, VFW, and PVA to protect veterans. Rational adjudication of veterans' benefits claims requires restoring the pre-enforcement judicial review Congress intended for the welfare of veterans. *DAV* should therefore be overturned.

ARGUMENT

I. THIS COURT HAS JURISDICTION TO REVIEW CHALLENGES TO GENERALLY APPLICABLE INTERPRETIVE RULES DVA PROMULGATES VIA THE M21-1 MANUAL

A. The Rules at Issue Are Reviewable under a Plain Reading of the VJRA.

The rules at issue below (like those at issue in *DAV* and *Gray*) were promulgated in the Manual; they interpret statutes or regulations to provide binding guidance to ratings officers on how to adjudicate veterans' benefits claims. 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).

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). Moreover, a policy statement or interpretive rule of general applicability need not apply to all veterans; it just needs to be applicable to a class of persons, rather than specifically named persons. *See* H.R. Rep. No. 79-1980 (Comm. Amendment), *reprinted in Legislative History of the Administrative Procedure Act* 283 & n.1 (1946) (defining a Rule subject to the APA as one that is not targeted to "named persons"); *see also* 60 Stat. at 238 (similarly defining FOIA as applying to rules not addressed to "named persons"). *Accord Nguyen v. United States*, 824 F.2d 697, 700 (9th Cir. 1987) (a generally applicable interpretation is "neither directed at specified persons nor limited to particular situations"); *LeFevre v. Sec'y, Dep't of Veterans Affairs*, 66 F.3d 1191, 1196-97 (Fed. Cir. 1995) (rule that "prescribed the basis on which [VA] would adjudicate every claim . . . involving the issue" was generally applicable).

Per this authority, there is no question that the Manual provisions challenged here—which interpret provisions of the ratings schedule promulgated at 38 C.F.R. § 4.71a, *see* Pet'r. Br. 11-13, 22—are interpretations of general applicability. They are provisions interpreting regulations that VA administers to define classes of eligible veterans for certain benefits rather than provisions directed to a delimited set of named persons. The accepted definition of "interpretative rules" is "rules or

statements issued by an agency to advise the public of the agency's construction of the statutes and rules which it administers. . . ." Tom C. Clark, Attorney General, Attorney General's Manual on the Administrative Procedure Act, at 30 n.3 (1947), http://www.law.fsu.edu/library/admin/1947iii.html.[3] Because the challenged Manual provisions are generally applicable interpretations of a regulation, they are referred to in section 552(a)(1)(D) and are thus reviewable under section 502.

B. Generally Applicable Interpretations Are Reviewable under the VJRA Regardless of Their Placement in the Manual.

The holding of *DAV* and *Gray* misinterprets the plain language of section 502 and instead created hurdles for veterans that do not exist in the statutory language. *First*, the Court held that a promulgation which "more readily" "fall[s] within § 552(a)(2)" does not "fall within § 552(a)(1)"—because the challenged rules were promulgated in the Manual, 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.

[3] Certain courts of appeals forego straightforward statutory analysis and instead use 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); *accord Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988); *D&W Food Ctrs., Inc. v. Block*, 786 F.2d 751, 757 (6th Cir. 1986); *Kahn v. United States*, 753 F.2d 1208, 1222 n.8 (3d Cir. 1985). Even under this test, the relevant rules in cases like *DAV* and *Gray* are generally applicable.

But it is irrelevant to judicial review whether a generally applicable policy statement or interpretive rule happens to be published in a Manual.

This Court misinterpreted 552(a)(1) and (a)(2) as mutually exclusive and erroneously held that Manual interpretive rules only fall in the latter category. They in fact lie in both categories; the two sections are not mutually exclusive. An interpretive Manual provision's falling under 552(a)(1) is sufficient to authorize pre-enforcement review, regardless of whether the Manual as a whole must be available for public inspection under section 552(a)(2). Notably, even the DVA abandoned this mutual exclusivity argument in its briefing on *Gray*'s rehearing, and conceded this Court can "entertain[] direct challenges to 'interpretations of general applicability' subject to 552(a)(1)(D) that are published in the Manual." Gov't Reh'g Opp. at 12.

Congress required Federal Register publication of all generally applicable interpretive rules, but separately required agencies to make available for public inspection "administrative staff manuals . . . that affect a member of the public." 5 U.S.C. § 552(a)(2)(C). Congress simply intended the public to have access to staff manuals that may affect its rights. That does not authorize DVA to evade section 552(a)(1) by issuing a generally applicable rule in the 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

section 552(a)(1)(D)). Promulgation of "interpretations of general applicability" via a manual does not make them any less reviewable.

If *DAV*'s erroneous mutual exclusivity theory survives, DVA can insulate substantive rules and generally applicable policy statements and interpretations, and avoid pre-enforcement judicial review, simply by promulgating them through the Manual. And indeed, by acting through Manual, which the DVA has amended many times in the last three years, the agency has shielded itself from Federal Register publication and notice-and-comment rulemaking. *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). *DAV* incentivizes such behavior by foreclosing prompt judicial review of Manual-promulgated rules.

C. The So-Called "Binding" Character of Manual Provisions Does Not Affect Judicial Review.

DVA abandoned the mutual exclusivity argument in *Gray*. The Court, however, then reached the same conclusion by a different means: a new requirement that the challenged promulgation must be "binding" to be reviewable. *Gray*, 875 F.3d at 1102. But the word "binding" does not appear in the VJRA, and importing a "binding" requirement for judicial review errs because it largely reads

section 552(a)(1) out of the VJRA.[4] Regardless, the Manual is, in fact, binding on the vast majority of veterans' cases (96%), and de-facto treated as binding in the 4% of cases that are appealed.

1. *The Manual's interpretive rules constitute binding authority in nearly all benefits rulings.*

Congress granted broad pre-enforcement review of both interpretive and substantive rules under 38 U.S.C. § 502 precisely because large numbers of veterans benefits claims will be improperly denied if case-by-case adjudication is the only mechanism available.

The DVA is a massive bureaucracy, requiring veterans to navigate a daunting amount of red tape to secure their vested rights and benefits. Its claims process has been called an "aberrational oddity to scholars of administrative procedure," James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 226 (2001), and 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

[4] Interpretive rules and policy actions are generally considered "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.

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.[5] *See id*. at 1350-51 (Moore, J., concurring); U.S. Court of Appeals for Veterans Claims, Annual Report: Fiscal Year 2017, at 3 (2017), https://www.uscourts.cavc.gov/documents/FY2017AnnualReport.pdf. Every year, thousands of veterans die before their claims are finally resolved, and the DVA has admitted the appeals system is "broken." Office of Audits and Evaluations, VA Office of Inspector General, Veterans Benefits Administration: Review of Timeliness of the Appeals Process, 15 (2018), https://www.oversight.gov/sites/default/files/oig-reports/VAOIG-16-01750-79.pdf.

The entrance to the labyrinth is the RO adjudicator's determination of a claim. ROs employ civil servants who are not required to have legal training. *See* Jeffrey Parker, *Two Perspectives on Legal Authority within the Department of Veterans Affairs Adjudication*, 1 VETERANS L. REV. 208, 216, 218 (2009). They review claims against the binding edicts of the Manual. Because the DVA benefits system is non-adversarial, with the RO statutorily mandated to assist the veteran, *see Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 at 310-11 (1985), most veterans proceed either pro se or with the aid of a volunteer service

[5] These statistics pertain to "legacy" claims, that is, claims predating the Veterans Appeals Modernization Act ("AMA") of 2017. Legacy claims still dominate the BVA docket, and it will be several years before the effect of the new law on the appeals timeline becomes apparent.

representative (typically from an organization like the VFW and PVA), who is not a lawyer. *See, e.g.*, U.S. Dep't of Veterans Affairs Board of Veterans' Appeals, Annual Report Fiscal Year 2019, at 32 (2019), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf; The American Legion: Veterans Benefits Center, https://www.legion.org/veteransbenefit; *see also* 38 U.S.C. §§ 5901-5904. Lawyers, whose fees are restricted by statute and DVA regulation, *see* 38 C.F.R. § 14.636, are scarce in this initial round of adjudication. Craig Kabatchnik, *After the Battles: The Veteran's Battles with the VA*, 35 HUM. R. MAG. 2 (2008). Class actions procedures in the CAVC are in their infancy. The CAVC has approved class actions, *see, e.g., Monk v. Shulkin*, 855 F.3d 1312, 138 (Fed. Cir. 2017); *Skaar v. Wilkie*, No. 17-2574, 2018 WL 2293485, at *1 (Vet. App. May 21, 2018), but has yet to issue class action rules.

The outsized importance of the ROs in this administrative scheme means that Manual interpretive rules *are binding* on the vast majority of veterans' benefits cases. Over 96% of veterans' benefits cases begin and end with a nonpublic decision by an RO adjudicator who is indisputably bound by the Manual. *Gray*, 875 F.3d at 1114 (Dyk, J., dissenting); Parker, *supra*, at 211, 213, 216. DVA officials admit that RO adjudicators apply the Manual as binding authority:

> [T]he front line VA adjudicators at the local VA offices (VBA adjudicators) are predominantly lay adjudicators, VA career

> employees who have undergone extensive training in veterans benefits law. . . .
>
> The VBA adjudicator's cumulative and specialized military knowledge has been largely acquired through a combination of administrative and quasi-legal sources, such as the VA Adjudication Procedure Manual . . . .
>
> ***
>
> Although manuals were meant only to provide procedures for applying laws and regulations, and were not meant to become substantive rules, the procedural versus substantive rule distinction is not always clear or maintained. . . .
>
> The "administrative" perspective recognizes VA's practice of using administrative directives in the applications of laws and regulations in VA claims adjudication. In this view, the sub-regulatory VA directives such as manuals and circulars that direct the application of laws and regulations tend also to be recognized as authoritative for the adjudicator's use in decision making.

Parker, *supra*, at 211, 213, 216-17.

Veterans who receive an adverse rating decision commonly do not appeal to the BVA, even when they may have meritorious positions.[6] Such veterans may be discouraged or experiencing psychiatric or other medical issues that cause them to forego appeals. Moreover, because they were likely either unrepresented or represented by non-lawyers, they may not be aware of possible legal challenges to

[6] The BVA's graphic depiction of the "Life Cycle of a VA Appeal" for FY2016 shows the extent of the winnowing: of the around 1.2 million claimants, 161,236 (16.6%) filed a Notice of Disagreement, after which 64,501 (5.1%) filed formal appeals. *See* U.S. Dep't of Veterans Affairs Board of Veterans' Appeals, Annual Report Fiscal Year 2016, at 31 (2016), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2016AR.pdf.

the rating decision. Thus, for the vast majority of veterans, the Manual provisions the RO adjudicators apply are decisive, encompassing the beginning and end of the average veteran's review. Prompt pre-enforcement judicial review of Manual provisions is plainly necessary to ensure that unlawful ones do not apply before one of the only 4% of veterans who seek appellate review eventually has his or her day in court. And as the next section will show, even that residue of appellate review is in practice unlikely to serve any sort of robust oversight function.

2. *As a practical matter, the BVA treats Manual provisions as binding, even if formally they are not.*

The BVA does not consistently safeguard veterans from misconceived rules promulgated in the Manual; thus its review, which most veterans in any case do not invoke, is no substitute for adherence to APA procedures and pre-enforcement review. The BVA, in the experience of amici, is by practice and disposition unlikely to question the validity of a Manual provision; rather, it is likely to rely on it as authoritative with no independent analysis.

The Government itself has been inconsistent as to whether the Manual binds the BVA. Even though DVA regulations at the time provided that "[i]n its appellate decisions, the Board is not bound by agency manuals, circulars and similar administrative issues not approved by the Administrator," 38 C.F.R. § 19.103(b) (1985), the Solicitor General argued the opposite to the Supreme Court in urging a narrow construction of judicial review statutes. The Solicitor General

declared that the DVA "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)], and urged the Supreme Court to reject a statutory construction that would enable judicial review of such provisions. *See* Brief for Resp., *Trayner v. Turnage*, Nos. 86-622, 86-737, 1987 WL 880254, at *20 (Aug. 6, 1987) (emphasis added) (citing as an example of a binding instruction, Manual M21-1, ch. 50, § 50.40a.(1), prescribing policies for disability adjudications).[7]

In practice, the Board has repeatedly cited the Manual as authoritative. *See, e.g., Redacted*, Bd. Vet. App. 20005616, at *2 (Jan. 23, 2020) (citing the Manual's criteria for probability of service-connected asbestos exposure); *Redacted*, Bd. Vet. App. 19173231, at *6 (Sept. 19, 2019) (citing the Manual's specifications for the difference between "moderate" and "marked" limitation of ankle motion); *Redacted*, Bd. Vet. App. 1741446, at *3-4 (Sept. 21, 2017) (citing the Manual's criteria for determining whether those who served in or near the Korean DMZ were exposed to herbicides); Redacted, Bd. Vet. App. 1732584, at *19-20 (Aug. 10, 2017) (citing the Manual for an explanation of a "threshold factor" that must be met); *Redacted*, Bd. Vet. App. 1706559, at *5 (Mar. 3, 2017) (denying veteran's

[7] Amici note that the DVA's Office of General Counsel later released a guidance that Manual provisions may not be binding instructions of the Secretary. Vet. Aff. Op. Gen. Couns. Prec. 07-92, https://www.va.gov/ogc/docs/1992/PREC_07-92.doc ("[W]e conclude that the provisions of M21-1 do not constitute "instructions of the Secretary" within the meaning of 38 U.S.C. § 7104(c).").

benefits because "his service does not coincide with any of the Department of Defense' listed units recognized" in the Manual); *Redacted*, Bd. Vet. App. 1538066, at *10 (Sept. 4, 2015) (citing the Manual for rules involving entitlement to separate compensable disability ratings for partial meniscectomy); *Redacted*, Bd. Vet. App. 1337440, at *13 (Nov. 15, 2013) (citing the Manual's criteria for service connection for in-service exposure to asbestos).

Board opinions on this matter do not paint a clear picture. To be sure, recent BVA decisions wherein Manual guidelines are at issue usually acknowledge *DAV*. *See, e.g.*, *Redacted*, Bd. Vet. App. 20025578, at *2 (Apr. 14, 2020) ("[T]he Federal Circuit held the M21-1 is an internal manual used to guide VA adjudicators and does not establish substantive rules," meaning that "the Board is not bound by the M21-1" but rather "must independently review the matter the M21-1 addresses and if [it] chooses to rely on the M21-1 as a factor in its analysis or as the rule of decision, it must provide adequate reasons or bases for doing so"). But the Board's view that it is "required to discuss any relevant provisions contained in the M21-1," *Overton v. Wilkie*, 30 Vet. App. 257, 264 (2018), signals that in practice the Board continues to use the Manual as its source of (at least default) rules. *See, e.g.*, *Redacted*, Bd. Vet. App. 20028938, at *6 (Apr. 24, 2020) (noting *DAV* and *Overton* but then summarizing decision by saying "the Board has acted consistent with the Manual in this situation"); *Redacted*, Bd. Vet. App. A20005391 (Apr. 14,

2020) (noting *DAV* and *Overton* but then using the Manual's definition of "prostration" to uphold noncompensability rating for headaches).

The Board's treatment of the Manual as effectively binding authority is unsurprising. A given BVA judge may lack the wherewithal to challenge the position taken by the agency in amending it. Frequently, moreover, the veteran appearing before the BVA, whether represented or unrepresented, is unlikely to assist the BVA in questioning the validity of the Manual provision. For practical purposes, the BVA more often than not will defer to and rely upon the Manual, even if it has the formal authority to disregard it. BVA reliance on the Manual may become even more frequent because, as the BVA transitions from the "legacy" appeals system to proceedings under the AMA, the BVA will decide more cases based on the RO decision. By contrast to the legacy system's "open" appeals, in which the BVA frequently encountered evidence in the first instance and so addressed issues beyond the RO decision on appeal, the AMA largely cabins the BVA's review to the RO decision and record before the RO adjudicator. *See* 38 U.S.C. §§ 5103A(e)(2), 7113; *see also VA Claims and Appeals Modernization*, 83 Fed. Reg. 39,818, at 39,836 (Aug. 10, 2018) (noting the AMA's intended shift away from BVA remands). This shift toward review of the decisions of RO adjudicators, which are bound by the Manual, may as a practical matter result in more decisions in which the BVA defers to the Manual.

As might be expected, then, the DVA regularly demands—and this Court has granted—judicial deference under *Auer v. Robbins*, 519 U.S. 452 (1997), to its interpretive rules set forth in agency manuals; thus, its position is that such rules are not binding of their force, but are controlling under *Auer*. *See Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011) (The "VA interpretations of its own regulations in [the M21–1] are controlling as long as they are not plainly erroneous or inconsistent with the regulation." (internal citations omitted); *Thun v. Shinseki*, 572 F.3d 1366, 1369 (Fed. Cir. 2009) (same); *see also* Gov't Br. 31, *Gazelle v. McDonald*, 868 F.3d 10006 (Fed. Cir. 2017) (No. 16-1932), 2016 WL 6883024.[8]

Indeed, the CAVC has criticized the DVA for telling this Court that Manual provisions are non-binding for purposes of pre-enforcement review while also telling the CAVC that the Board (and the courts) must give *Auer* deference to the Manual provision at issue in *Gray*. *See Overton v. O'Rourke,* Vet. App. Dkt No. 17-0125 (June 20, 2018), *available at* http://www.uscourts.cavc.gov/oral_arguments_audio.php. At the oral argument heard in *Overton* on June 20, 2018, the CAVC judge laid out the inconsistency of the DVA's position:

> THE COURT (35:40): I need to go back to your harmless error point, because I think, and I don't mean this pejoratively against you

[8] It is an open question whether Manual provisions warrant deference in light of the Supreme Court's narrowing of *Auer* in *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416-17 (2019).

> personally, but as an institution, that argument leads to the conclusion that the Department is engaged in a massive bait and switch, and let me explain to you why. The Department stood up before the Federal Circuit and said, "Nobody can challenge the M21-1 in an Administrative Procedure Act proceeding because it's not binding." And the Federal Circuit agreed because it was not binding on the Board. And now before us, the Department is taking the position, "It doesn't matter that the Board treated it as binding or not, because you can look right through to the interpretation in the M21-1, and you, court, have to defer to it under Auer, so long as it's reasonable," right? And so isn't the effect of that being that the Department has closed off a regulatory challenge to something that it says isn't a law, right? So it's not challengeable under the APA. But yet before us you say, "But it doesn't matter what the Board says about it one way or the other, you just have to defer to what the Secretary says," which then essentially gives it the same force that you told the Federal Circuit it doesn't have. That seems really wrong.

Id. The DVA's position on *Auer* deference renders the Manual provisions effectively binding on the BVA. "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).

II. THIS COURT'S ERRONEOUS PRECEDENTS IMPROPERLY INCENTIVIZE THE DVA

A. This Court's Erroneous Holdings Incentivize the DVA to Avoid APA Protections by Promulgating Interpretive and Substantive Rules Solely through Its Manuals.

The aforementioned flaws in BVA review underscore why case-by-case adjudication is not the primary means by which Congress intended for the rules

governing veterans to be vetted by the courts. Denying pre-enforcement challenges to Manual provisions simply allows the DVA to hide unlawful rules in the Manual, and escape prompt judicial review, at great cost and burden to veterans.

Congress applied the same APA protections to the DVA that govern other agencies and then provided for robust pre-enforcement review that is the only practical means for veterans' rights organizations to challenge wayward or unlawful rules before they harm veterans. The APA's directive here is plain. An agency must publish all interpretive and substantive rules in the Federal Register, 5 U.S.C. § 552(a)(1), and (for the latter) provide sufficient notice to the public to allow comment before publication, *id*. § 553. An agency must also allow public inspection of the entirety of "administrative staff manuals and instructions to staff that affect a member of the public[,]" *id*. § 552(a)(2)(C), but that requirement does not allow an agency to hide interpretive and substantive rules in manuals, thereby escaping the applicable statutory requirements. *See Morton*, 415 U.S. at 232-36.

Given the nature of veterans benefit determinations outlined above, pre-enforcement review is necessary for efficient vetting of the legality of DVA's rules. Section 502 thus reflects Congress's "preference for preenforcement review of [VA] rules." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003). But under *DAV*, the DVA can

insulate both interpretive and substantive promulgations, and avoid pre-enforcement judicial review, simply by acting through the Manual. The DVA has frequently added interpretive and substantive rules to the Manual through amendments. *DAV* enables the agency to escape not only publication and notice-and-comment protections but also prompt judicial review.

The Manual provision at issue in *Gray*, for example, was an amendment to a definition first promulgated through notice-and-comment rulemaking. In May 1993, the DVA promulgated regulations through notice-and-comment rulemaking establishing presumptive service connection for certain diseases associated with exposure to herbicides in Vietnam. *Gray*, 875 F.3d at 1105 (citing 38 C.F.R. § 3.307(a)(6)(iii) (1993); 58 Fed. Reg. 29,107,109 (May 19, 1993)). Under this regulation, the definition of service in the Republic of Vietnam included "service in the waters offshore." 38 C.F.R. § 3.307(a)(6)(iii). In 2001, the DVA issued a formal rule limiting its prior regulation and denying the presumption to veterans who served on ships offshore without entering "inland waterways" or setting foot on Vietnamese soil. *See* 66 Fed. Reg. 23,166 (May 8, 2001). In 2009, the DVA again restricted the eligible veterans by issuing a guidance letter which defined "inland waterways" to include only some, but not all, bays and harbors.

In *Gray v. McDonald*, Gray successfully challenged that interpretation in the course of his suit appealing the denial of his benefits claim. The CAVC held the definition of inland waterways in the guidance letter "arbitrary," "irrational," "aimless and adrift[,]" and "inconsistent with the identified purpose of the statute. . . ." 27 Vet. App. 313, 316, 325-27 (2015). Nevertheless, the DVA went back and amended the Manual to promulgate another restrictive, "arbitrary," "irrational," "aimless," and "inconsistent" definition of "inland waterways," this time, without notice-and-comment rulemaking. At that point, rather than wade through the appeal of a denial of benefits process all over again, Gray moved for pre-enforcement judicial review of the Manual, but, under the *DAV* precedent, he was denied. *See Gray*, 875 F.3d at 1108 ("Our holding in *DAV* compels the same result here").

That is just one of many substantive rules promulgated through the Manual without Federal Register publication or notice-and-comment rulemaking. Indeed, the Manual is replete with substantive rules that should have been adopted by notice-and-comment rulemaking. In 2010, for example, the DVA established a metric of "chronicity" to determine whether a veteran was suffering from a chronic disability. M21-1MR, Part IV, Subpart ii, 2.D.1.o. To establish service connection for a disability, the claimed disability must be "chronic," that is, it must have persisted for six months. *Id*. The Manual explains that in deciding whether

chronic disability exists, the RO adjudicator must measure the six-month period of chronicity from the earliest date on which all pertinent evidence establishes that the signs or symptoms of the disability first manifest. *Id*. Furthermore, if a disability is subject to intermittent episodes of improvement and worsening within a six-month period, it is to be considered chronic. *Id*. These are clearly substantive rules affecting benefit eligibility that have escaped Federal Register publication and notice-and-comment rulemaking.

Indeed, the BVA often identifies substantive rules embedded in the Manual. *See, e.g., Redacted*, Bd. Vet. App. 1006917 (Feb. 24, 2010) (citing *Nunez-Perez v. Peake*, No. 07-1405 (Vet. App. Jan. 14, 2009) (unpublished single-judge disposition)); *Redacted*, Bd. Vet. App. 100433 (Jan. 28, 2010) (same); *Redacted*, Bd. Vet. App. 0917194 (May 7, 2009) (same). For example, the Board has recognized that the many Manual provisions governing post-traumatic stress disorder (PTSD) are substantive rules. *Redacted*, Bd. Vet. App. 1217542, at *4 (May 16, 2012) ("The provisions in M21-1 . . . which address PTSD claims based on personal assault are substantive rules which are the equivalent of VA regulations, and are binding on VA."); *Redacted*, Bd. Vet. App. 1140116 (Oct. 28, 2011) (same); *see also Cohen v. Brown*, 10 Vet. App. 128, 139 (1997) (same); *Hayes v. Brown*, 5 Vet. App. 60, 67 (1993) (same). Placing such a rule "in a procedural manual cannot disguise its true nature as a substantive rule." *Fugere v.*

Derwinski, 1 Vet. App. 103, 107 (1990), *aff'd*, 972 F.2d 331 (Fed. Cir. 1992). Accordingly the BVA must treat those particular substantive provisions as binding rules. *See Hamilton v. Derwinski*, 2 Vet. App. 671, 675 (1992); *Buzinski v. Brown*, 6 Vet. App. 360, 369 (1994) (noting that *Rank v. Nimmo*, 677 F.2d 692, 698 (9th Cir. 1982), held that "VA handbooks, circulars, and manuals" may have the "force and effect of law . . ." if they prescribe substantive rules).

But the fact that in a given adjudication the BVA may treat a Manual provision as substantive and binding does not cure the DVA's persistent violations of the APA in promulgating such rules without Federal Register publication and notice-and-comment. A key opportunity for veterans' rights organizations to protect veterans is notice-and-comment proceedings for substantive rules under section 553, and (if necessary) pre-enforcement challenges to both interpretive and substantive rules under section 502. That opportunity vanishes if the DVA is permitted to conduct rulemaking through manual revision, knowing this Court has forsworn pre-enforcement review. Agency success here ensures that the DVA's incentive will be to continue to shift more and more of its rulemaking into Manual revisions, depriving veterans and the organizations that represent them of the Federal Register publication guaranteed by section 552(a)(1) and the notice-and-comment protections of section 553 that must accompany administrative rulemakings.

B. The Decision below Likewise Improperly Curtails Pre-Enforcement Judicial Review of Agency Rules of Procedure.

Though *DAV* and *Gray* concerned interpretive rules, this Court's relevant holdings therein also stymie essential pre-enforcement review of agency rules of procedure that are often outcome-determinative.

The APA requires Federal Register publication of agency "rules of procedure," 5 U.S.C. § 552(a)(1)(C), and Congress has granted pre-enforcement review of such rules, 38 U.S.C. § 502. But the DVA commonly issues procedural rules in Manual revisions. Under *DAV* such rules—which are often outcome-determinative in any given benefits case—are improperly insulated from pre-enforcement review. The BVA recognizes that the Manual contains binding evidentiary development procedures. *See, e.g., Redacted*, Bd. Vet. App. 1011007 (Mar. 24, 2010) (remanding where Board failed to comply with the Manual's provisions regarding evidentiary proof of exposure to ionizing radiation); *see also Campbell v. Gober*, 14 Vet. App. 142, 144 (2000) (holding the DVA was obligated to comply with the applicable Manual provisions concerning service-connected death claims and remanding for compliance with that provision and applicable regulations); *Patton v. West*, 12 Vet. App. 272, 282 (1999) (holding that the BVA failed to comply with the duty to assist requirement by failing to remand for compliance with Manual-mandated evidentiary development). "Indeed, the Court

has held that [Manual] procedures are tantamount to [] governing regulations . . . binding on the Board." *Redacted*, Bd. Vet. App. 1300803, at *6 (Jan. 9, 2013).[9]

The procedures are sometimes pro-veteran, but that does not diminish the importance of pre-enforcement judicial review. Moreover, they are often only minimally pro-veteran, or help only a subset of veterans but not others, wherefore either law or policy counsels that different procedures should be employed. Congress fully intended such rules to be subject to pre-enforcement judicial review, but *DAV* prevents that.

CONCLUSION

This 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

[9] And further: "[T]he [CAVC] has consistently held that the evidentiary development procedures provided in VA's Adjudication Procedure Manual, M21-1MR, are *binding*." *Redacted*, Bd. Vet. App. 1146760, at *2 (Dec. 22, 2011) (quoting *Patton v. West*, 12 Vet. App. 272, 282 (1999)) (emphasis added); *see also Redacted*, Bd. Vet. App. 1535112 (Aug. 17, 2015) (same); *Redacted*, Bd. Vet. App. 1311777, at *2 (Apr. 9, 2013) (same); *Redacted*, Bd. Vet. App. 1219614, at *2 (June 5, 2012) (same); *Redacted*, Bd. Vet. App. 1206760, at *2 (Feb. 24, 2012) (same); *Redacted*, Bd. Vet. App. 1201502, at *3 (Jan. 13, 2012) (same); *Redacted*, Bd. Vet. App. 1109736, at *2 (Mar. 11, 2011) (same); *Redacted*, Bd. Vet. App. 1107783, at *6 (Feb. 28, 2011) (same); *Redacted*, Bd. Vet. App. 1005030, at *2 (Feb. 3, 2010) (same); *Redacted*, Bd. Vet. App. 1004637, at *2 (Feb. 1, 2010); *Redacted*, Bd. Vet. App. 0836817, at *2 (Oct. 27, 2008) (same); *Redacted*, Bd. Vet. App. 0900917, at *2 (Jan. 9, 2009) (same).

Article III review of DVA rules, even if, and perhaps particularly if, such rules appeared only in a Manual.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Stephen B. Kinnaird, hereby certify that on July 14, 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 Circuit Rules 29(b) and 32(b)(1). The brief contains 6,296 words, excluding the parts of the brief exempted by Federal Circuit Rule 32(b)(2) and Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft Word in a 14 point Times New Roman font.

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