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,

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

CORRECTED BRIEF OF AMICUS CURIAE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF PETITIONER AND PRE-ENFORCEMENT REVIEW JURISDICTION

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July 17, 2020

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-1321

Short Case Caption NOVA v. Secretary of Veterans Affairs

Filing Party/Entity The National Law School Veterans Clinic Consortium

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

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Date: 07/17/2020

Signature: /s/*Angela K. Drake*

Name: Angela K. Drake

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☑ None/Not Applicable	☑ None/Not Applicable
National Law School Veterans Clinic Consortium		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☐ Additional pages attached

NOVA v. Secretary of Veterans Affairs	No. 17-1839	
Military-Veterans Advocacy Inc. v. Secretary of Veterans Affairs	No. 20-1537	

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E) and the Federal Circuit Rule 29(a), the National Law School Veterans Clinic Consortium states:

a) No party's counsel has authored this brief in whole or part;

b) No party or party's counsel has contributed money intended to fund the preparation or submission of this brief;

c) No other person has contributed money intended to fund the preparation or submission of this brief.

This brief is filed pursuant to the Court's authorization. May 6 Order 2, ECF No. 50.

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IDENTITY OF AMICUS CURIAE AND ITS INTEREST IN THE CASE

The National Law School Veterans Clinic Consortium ("NLSVCC") submits this brief in support of the position of the Petitioner, National Organization of Veterans' Advocates, Inc ("NOVA"). The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.[1]

The NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. The Consortium's mission is, working with like-minded stakeholders, to gain support and advance common interests with the VA, U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

The NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. The NLSVCC is keenly interested in this case in light of the important jurisdictional issue presented and respectfully submits that pre-enforcement judicial review of substantive provisions in the VA's *Adjudication Procedures Manual, M21-1* (the "M21-1 Manual") is critical to protecting the interests of our nation's veterans.

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[1] NLSVCC appreciates the hard work of Jackson Tyler, J.D. 2020, the research assistant for the Veterans Clinic at The University of Missouri School of Law on this brief.

SUMMARY OF ARGUMENT

Congress provided for judicial review of the Secretary of Veterans' Affairs' (the "Secretary") actions and decisions in enumerated and distinct instances. The Veterans' Judicial Review Act, Pub. L. No. 100–687, 102 Stat. 4105 (1988) (the "VJRA") grants the United States Court of Appeals for the Federal Circuit ("Federal Circuit") jurisdiction to review "[a]n action of the Secretary to which section 552(a)(1) or 553 of Title 5 (or both) refers." 38 U.S.C. § 502. Section 552(a)(1) is a provision of the Freedom of Information Act ("FOIA") requiring publication in the Federal Register of various agency items including "substantive rules of general applicability" and "statements of general policy or interpretations of general applicability formulated and adopted by the agency." 5 U.S.C. § 552(a)(1)(D). Section 553 is the agency rulemaking provision of the Administrative Procedure Act ("APA"). It refers to both substantive rules, which need notice and comment, and interpretative rules and statements of policy, which do not. 5 U.S.C. § 553(d)(1)–(2). In addition, section 553 grants a right to the public to petition for the issuance, amendment, or repeal of a rule. *Id. at* § 553(e). The Federal Circuit also has jurisdiction to review individual VA claims decisions, after the veteran exhausts a notoriously arduous appeal process. 38 U.S.C. § 7292.

In this case, Petitioner NOVA seeks judicial review of two provisions in VA's internally-binding M21-1 Manual. This court previously held it lacked

jurisdiction under section 502 to review the M21-1 Manual provisions, holding that the provisions in the Manual are not section 552(a)(1) agency action. *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017) ("DAV").

The effect of this Court's decision in *DAV* is to allow the Secretary to evade judicial review. The Secretary disagrees, contending veterans have two other avenues of relief. *See* Respondent's En Banc Response, 4-5. According to the Secretary, veterans have the option of filing an individual benefits appeal under section 7292(b) and may seek judicial review after a section 553(e) rulemaking petition is denied. *Id*.

This reasoning is flawed because it treats separate and distinct options for judicial review as comparable and interchangeable. They are not. Denying veterans preemptive challenges under section 502 deprives them of prompt and efficient relief by an Article III court, and effectively insulates the Secretary from oversight. Neither an individual benefits appeal nor a petition for rulemaking provides complete or adequate relief because both actions involve unnecessary and harmful delay. While the Appeals Modernization Act ("AMA") seeks to streamline the review of veterans claims, its impact on future delays is, at best, too speculative to ensure meaningful review. Further, review of a denial of a petition for rulemaking is substantively narrow, deferential and takes a very long time.

There is no other equivalent mechanism to section 502 review available to a veteran to secure relief in the circumstances underlying this appeal. This Court's refusal to exercise jurisdiction wrongly burdens veterans by requiring "protracted agency adjudication in order to obtain pre-enforcement judicial review of a purely legal question that is already ripe for . . . review." *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1104, 1110 (Fed. Cir. 2017) (Dyk, J., dissenting in part and concurring in the judgment as compelled by *Disabled American Veterans v. Secretary of Veterans,* 859 F.3d 1072, 1077–78 (Fed. Cir. 2017))

Protracted and futile proceedings negatively affect all veterans and are especially detrimental for older, ailing and financial insecure veterans. As discussed below, time is of the essence. Judicial review under section 502 of substantive M21-1 Manual provisions is critical to protecting the interests of veterans.

ARGUMENT

The Secretary has argued that neither the holding in *Disabled American Veterans* ("DAV") nor Federal Circuit Rule 47.12(a) exist as roadblocks for veterans seeking review of their claims. Respondent's En Banc Response, 2. While technical avenues for review do exist under the holding of *DAV*, this brief describes the inadequacy of these avenues, leaving veterans without meaningful judicial relief.

Section 502 supplies broad discretion for judicial review of VA action, vesting in this Court jurisdiction to review any substantive rule, generally applicable interpretive rule, and general statement of policy. 38 U.S.C. § 502 (cross-referencing 5 U.S.C. 552(a)(1) and 553). This review is imperative because the alternatives identified by the Secretary are not workable. The Secretary asserts individual benefits appeals and rulemaking petitions exist as a means of viable judicial review. However, these alternatives are not adequate as described below.

I. JUDICIAL REVIEW OF AN M21-1 MANUAL PROVISION IN AN INDIVIDUAL BENEFITS APPEAL IS INADEQUATE

Individual benefits appeals are an inadequate vehicle for challenging unlawful VA rules because they take too long, are unduly burdensome and are rife with error. The new Appeals Modernization Act, designed to alleviate the legendary delays in the VA system, is not a panacea for the notorious problems.

A. An Individual Benefits Appeal Is a Long and Unduly Burdensome Route to Challenge an M21-1 Manual Provision

The Secretary asserts that veterans adversely affected by the Knee Replacement and Joint Stability provisions of the M21-1 Manual should not be able to obtain direct judicial review of such provisions because, "they can still challenge them by appealing the determination of their individual benefits claim."

Respondent's En Banc Resp. 8.[2] This assertion oversimplifies the increasingly complicated and arduous process of individual benefits appeals. While an avenue to challenge the M21-1 Manual may exist through individual benefits appeals, the exceedingly long delays render the process unfit for these types of challenges, in addition to the fact that lower level adjudicators are bound by the flawed M21-1 Manual provisions.

To be sure, reaching the Federal Circuit through an individual benefits appeal is possible, but just because something is possible does not make it practical or adequate. Processing an individual benefits claim and the subsequent appeal, in order to challenge a provision of the M21-1 Manual, takes considerably more time and resources than direct judicial review.

By way of brief overview, an individual benefits appeal will only reach the Federal Circuit after a decision of the United States Court of Appeals for Veterans Claims ("CAVC") is entered in a case. This CAVC decision only occurs after the VA Regional Office and Board of Veterans' Appeals (the "Board") proceedings have concluded. *See* U.S. Dep't of Veterans Affairs, *File a VA Disability Appeal,* https://www.va.gov /disability/file-an-appeal/.

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[2] *See also* VA Stay Resp. 5 n.3 ("NOVA presumably brings this facial challenge to the Manual provisions—rather than await the results of as-applied challenges brought by individual veterans—because NOVA believes that facial invalidation will effectuate prompt relief to all veterans affected by these provisions.").

Therein lies the problem. The process a veteran goes through in pursuing his claim within the Department of Veterans Affairs has been variously described as "a hamster wheel," and "a bureaucratic labyrinth." *See Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting); *Martin v. O'Rourke*, 891 F.3d 1338, 1350 (Fed. Cir. 2018) (Moore, J., concurring).

No one disputes that the process takes years to reach a conclusion. As Judge Moore observed in *Martin,* the appeals process "takes over five and a half years on average from the time a notice of disagreement is filed until the Board issues a decision, which often sets the stage for more proceedings on remand." *Martin*, at 1350. Noting that it takes approximately six and a half years for a veteran to challenge a VBA determination and receive a decision on remand, Judge Moore reminds us what is truly at issue in these cases:

> The men and women in these cases protected this country and the freedoms we hold dear; they were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival… God help this nation if it took that long for these brave men and women to answer the call to serve and protect. We owe them more.
>
> *Id*. at 1352.

Sadly, in *Martin*, three of the veterans in the nine cases before this court died while their appeal was pending. *Id*. at 1351.

During his tenure as Chief Judge of the Veterans Court, Judge Robert Davis acknowledged the issues presented by the backlog and delay, describing the VA

appeals system as "horribly flawed" with a backlog that "contributes to poor decision-making." Ben Kessling, *Hundreds of Thousands of Veterans' Appeals Dragged Out by Huge Backlog*, The Wall Street Journal (Aug. 22, 2018), https://www.wsj.com/articles/hundreds-of-thousands-of-veterans-appeals-dragged-out-by-huge-backlog-1534935600. The lengthy process increases the likelihood that veterans will drop claims or even die before a final disposition is reached in their cases. In the *Monk* case, which sought class certification for veterans who wait more than a year for a decision after filing a Notice of Disagreement, Judge Davis remarked that 5 to 7 years for claims processing is unreasonable. *Monk v. Wilkie*, 30 Vet. App. 181-182 (2018). He noted that "the claims processing system needs to be radically changed to provide more efficient claims resolution" and suggested various changes such as a closed record and alternative dispute resolution. Judge Davis predicted that without radical change or a new system implementing the features mentioned, backlog and delay will continue to be the norm." *Id*. at 182.

In *Monk*, Judge Allen of the CAVC compared the VA adjudication system to Charles Dickens' fictional *Jardyce v. Jardyce* case, described in his novel *Bleak House*. The *Jardyce* suit had been lingering so long, " [i]nnumerable children have been born into the cause; innumerable young people have married into it; innumerable old people have died out of it ... [and] a long procession of

Chancellors has come in and gone out." 1 WORKS OF CHARLES DICKENS 4-5 (1891)…." Judge Allen described it as an "apt analogy for what countless veterans face."

Just as *Bleak House* led to legal reform in England,[3] the indisputable and unacceptable delays in the VA benefit system were the subject of legislative reform, known as the Appeals Modernization Act ("AMA"), See, Dep't of Veterans Affairs, *VA's Appeals Modernization Act takes effect today*, 2019, https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5207 (acknowledging that under the "legacy process" appeals languished, *on average*, three to seven years before the Board rendered a decision). However, as discussed in the section below, there is no assurance the AMA will solve delay problems – or lead to correctly decided decisions.

B. It is Not Certain that The Appeals Modernization Act Will Alleviate the Burden of Undue Delay in Veterans' Appeals

In 2017, the Veterans Appeals Improvement and Modernization Act ("AMA") was passed in an effort to expedite veterans' appeals. *See* VA Claims and Appeals Modernization, 84 Fed. Reg. 138 (Jan. 18, 2019) (final rule) ("The AMA and these implementing regulations provide **much-needed** comprehensive

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[3] Thomas Simkiss, *Bleak House* and the Demise of Chancery: A Case Study in the Relationship Between Fictional Literature and Legal Reform, Victoria University of Wellington, 2015.

reform for the legacy administrative appeals process, to help ensure that claimants receive a timely decision on review . . .") [emphasis added]. All decisions relating to a veteran's claim after February 19, 2019 are subject to the AMA. AMA, Pub. L. No. 115-55, § 2(x), 131 Stat. 1105. Veterans with legacy claims may "opt in" to the AMA at specified times during the life of the claim or may remain in the legacy system. *Id*. The AMA does not implement several of the changes suggested by Judge Davis in *Monk* which would reduce backlog;[4] the AMA focuses on new forms and new processes in the extant bureaucracy.

Under the AMA, the veteran who appeals a Regional Office decision must choose one of three options: file a "Supplemental Claim"; request a "Higher-Level Review;" or, appeal directly to the Board of Veterans' Appeals. AMA, Pub. L. No. 115-55, § 2(h), 131 Stat. 1105 (codified as amended at 38 U.S.C. § 5104C(a)(1) (2017)); 38 C.F.R. § 3.2500 (2020). Each option requires the submission of a new and different form. *See generally* 38 C.F.R. § 3.2501 (2020); 38 C.F.R. § 3.2601 (2020); 38 C.F.R. § 20.202 (2020). Supplemental Claims and Requests for Higher Level Review are <u>not</u> heard by the Board; the claims remain at the Regional Office. If appealing to the Board, the veteran has three additional

[4] Judge Davis identified the following features to address delay, among others: "finality, a closed record, aggregate claims resolution, alternative dispute resolution, and claims waivers for immediate cash payments." *Monk v. Wilkie*, 30 Vet. App. At 182.

choices: (1) a review with no request for a hearing or additional evidence; (2) a review with a request for a hearing; or, (3) a review with no request for a hearing and with a request for additional evidence. AMA, Pub. L. No. 115-55, § 2(w)(1), 131 Stat. 1105 (codified as amended at 38 U.S.C. § 7113 (2017)).

While the AMA seemingly provides veterans with more choices, it is still unclear how those choices will actually affect the speed, or lack thereof, of their claim. Additionally, even with the AMA, the VA is still backlogged with "legacy claims" (claims that were initially denied before February 19, 2019.) *Annual Report Fiscal Year (FY) 2019*, DEPARTMENT OF VETERANS AFFAIRS BOARD OF VETERANS APPEALS, 36.

Importantly, for claims which do fall squarely within the purview of the AMA, there is no evidence that the AMA actually succeeds in decreasing delay in veterans appeals or leads to just results.

1. Recent Government Reports Identify Flaws In AMA Implementation That Present Risk Of Error And Delay

Prior to the implementation of the AMA, a report from the Government Accountability Office ("GAO") recommended that the VA articulate how it will monitor and assess the appeals process under the AMA compared to the legacy process, including specifying timeliness goals, as well as measures of accuracy. GAO, *VA Disability Benefits: Planning Gaps Could Impede Readiness for*

Successful Appeals Implementation, 7 (December 12, 2018), https://www.gao.gov/assets/700/695946.pdf. However, a GAO report after implementation found that VA "has not fully articulated detailed steps and time frames for assessing the relative performance of the new and legacy appeals processes." GAO, *Veterans Affairs: Sustained Leadership Needed to Address High-Risk Issues* 27 (May 22, 2019), https://www.gao.gov/assets/700/699254.pdf. Without these metrics, the report states, "VA cannot determine the extent to which the new process will achieve final resolution of veterans' appeals sooner than the legacy process." *Id.*

Further, as recently as April 2020, the GAO gave two priority recommendations to VA regarding its disability benefits appeals process, one of which was to "clearly articulate in its appeals plan how it will monitor and assess the new appeals process compared to the legacy process . . .". GAO, *Priority Open Recommendations: Department of Veterans Affairs* 4-5, 17 (Apr. 20, 2020), https://www.gao.gov/assets/710/706403.pdf. GAO said, "VA needs to establish a balanced set of performance goals and measures to assess how well the new appeals process is performing, such as overall timeliness, accuracy, and productivity." Id at p. 5. [emphasis added]

2. VA Has Not Developed Plans To Fully Address the Risk of Veterans Choosing More "Resource-Intensive" Options Under The AMA

As mentioned above, under the AMA, veterans must choose among different appeals processes through which to move their claim. AMA, Pub. L. No. 115-55, § 2(w)(1), 131 Stat. 1105 (codified as amended at 38 U.S.C. § 7113 (2017)). Some of the options involve the submission of additional evidence, or a request for an administrative hearing or both, and these options exist at both the Regional Office and the Board of Veterans' Appeals levels. *See generally* 38 C.F.R. § 3.2501 (2020) (explaining that VA will re-adjudicate the claim if new and relevant evidence is submitted with the supplemental claim); 38 C.F.R. § 3.103(d) (2020) (stating that veterans have the right to a hearing upon request prior to the issuance of a decision on the supplemental claim); 38 U.S.C. § 7113(b) (2020) (stating that veterans may request a hearing at the Board of Veterans' Appeals and may submit additional evidence at the Board hearing and for 90 days thereafter).

Notably, however, the VA has not addressed how it will handle this possible increase in workload, as these options are more "resource -intensive" than the previous process. In the April 2020 report described above, GAO—fearing that the VA was not prepared to handle the possible influx of resource-intensive claims without necessitating undue delay—reported that VA "needs to develop . . . strategies that address veterans . . . choosing the more resource-intensive options involving new evidence or hearings, which potentially subject veterans to longer wait times." GAO, *Priority Open Recommendations: Department of Veterans*

Affairs, 17. And, to the point at issue here, if a veteran files a Supplemental Claim or a Request for Higher Level Review, the veteran's claim remains at the Regional Office and the adjudicator is bound by the flawed M21-1 Manual through the process, however long it may be.

Without the fulfillment of these recent GAO recommendations, it is unlikely the AMA will solve the myriad of problems associated with legacy claims processing, more fully discussed in the next section below.

C. An Individual Benefits Appeal Is A Poor Substitute For This Court's Direct Review Of An Illegal M21-1 Manual Provision, Due To Delay And Error

VA itself recognizes that requests for review of new evidence or even hearings, will take more than one year for the Board to complete. *What are my Board Appeal options?*, BOARD APPEALS, https://www.va.gov/decision-reviews/board-appeal/. The submission of new evidence or the request for an administrative hearing necessarily adds time to the processing of any disability claim. GAO's findings regarding the lack of VA strategies to address the risks involved in veterans choosing the more resource-intensive options that are now available to them under the AMA show that delay is likely to occur in the new system, as it did in the legacy system. GAO, *Planning Gaps Could Impede Readiness for Successful Appeals Implementation*, at 6, 20. Irrespective of the system in which the veteran finds himself, an illegal M21-1 Manual provision will

erroneously drive the result for all original claims, Supplemental Claims and Higher Level Review Claims because the decision maker is bound by the flawed Manual.

VA's most current report shows that there are currently over 120,000 pending cases at the Board (120,638 in 2019). *Annual Report Fiscal Year (FY) 2019*, DEPARTMENT OF VETERANS AFFAIRS BOARD OF VETERANS APPEALS, 36. In contrast, the amount of decisions issued by the Board in 2019 totaled only 95,089, leaving a rolling surplus of cases each year. *Id*. For legacy appeals, the average time from the date an appeal is certified until the date a decision is dispatched (excluding the time the case is pending with a VSO representative for review) has increased nearly two-fold from an average of 253 days in 2016 to 440 days in 2019. *Id*.

According to the 2019 Report, the average time for a legacy appeal at the Board is 1,273 days. *Id*. a 25. The Board's Annual Report asserts that to render decisions in all of the cases pending at the Board as of 2019, it would take thirty-five months—just short of three years. *Annual Report Fiscal Year (FY) 2019*, 28. Although the AMA numbers are reportedly swifter in the recent report (the hearing option takes the longest at 265 days), the Annual Report does not indicate how long a case may have already been pending at the Regional Office before the appeal to the Board.

Before veterans even get to the Board, VA's most recent pronouncement on this time period is that the wait time averages 105 days. This is the estimate for the decision on the initial claim, with the caveat that complicated claims, or claims requiring more development take longer. U.S. Dep't of Veteran Affairs, *The VA Claim Process After You File Your Claim* (2020), https://www.va.gov/disability/after-you-file-claim/. Despite this relatively rosy estimate, an elephant in the room remains: the decision will likely be wrong.

In other words, even though a veteran may receive a relatively speedy decision out of the Regional Office on a simple claim, the overall error rate is high. The 2019 Annual Report shows that over 35% of appeals were granted and over 38% of appeals were remanded for some reason. VA Board of Veterans Appeals, *Annual Report Fiscal Year (FY) 2019, at* 32. This means that the Regional Office's decision was correct in less than one third of the cases. *Id.* And, continuing through the individual benefits appeal process to the CAVC level, the CAVC only affirmed 510 of the 7261 appeals it received—slightly above 7 percent. United States Court of Appeals for Veterans Claims, *Fiscal Year 2019 Report*, 3 (2020) http://www.uscourts.cavc.gov/documents/FY2019AnnualReport.pdf.[5]

[5] Further, although the impact of the AMA on CAVC appeals is not known, the CAVC indicated in its Annual Report that it may need more than 9 judges given the trajectory of appeals at the United States Court of Appeals for Veterans Claims, *Fiscal Year 2019 Report*, at 8.

These statistics establish one truth: an individual benefits appeal is not an efficient manner in which to secure a ruling on whether a M21-1 Manual provision is legal. As discussed above, the Appeals Modernization Act, though it gives veterans more options, does not solve problems of error and delay inherent in the system.

Cases adjudicated by this Court take only an average of nine months from filing to obtain a decision. U.S. Ct. of Appeals for the Fed. Cir., *Median Time to Disposition in Cases Terminated After Hearing or Submission* (2018), http://www.cafc.uscourts.gov/sites/default/files/Median%20Disposition%20Time%20for%20Cases%20Terminated%20after%20Hearing%20or%20Submission%20(Detailed%20table%20of%20data%202006-2015).pdf. Forcing veterans to submit challenges to the M21-1 Manual provisions through an individual benefits claims, which can (and likely will) take years, instead of allowing for direct judicial review, is unreasonable.

II. VETERANS CANNOT SECURE ADEQUATE REVIEW OF THE UNDERLYING DISPUTE BY FILING RULEMAKING PETITIONS UNDER SECTION 553 (e) OF THE ADMINISTRATIVE ACT

The Secretary argues in this case that even if NOVA is not able to seek direct judicial review of the Knee Replacement and Joint Stability Provisions at issue in this case, Petitioner is not foreclosed from filing a rulemaking petition under section 553(e). Respondent's En Banc Resp. 16 The Secretary is correct that

section 502 does not completely prevent petitioners from filing a petition for rulemaking under section 553(e) and that the grant or denial of the petition may still be subject to judicial review. These assertions, however, fail to account for (a) the fact that the section 553(e) petition process does not provide veterans the proper standard of review and (b) the delay involved in the, ultimately unnecessary, section 553(e) process. For these reasons, a section 553(e) petition is an inadequate and untenable replacement for direct judicial review of M21-1 Manual provisions.

A. A Section 553(e) Petition Does Not Provide Veterans With The Proper Standard of Review

The Secretary argues that this Court has no jurisdiction over interpretive rules set forth in the M21-1 Manual because judicial review is available via section 553(e) petitions for rulemaking. Respondent's En Banc Resp. 16.[6] Importantly, judicial review of the Secretary's response to a section 553(e) petition is limited only to whether the Secretary's denial was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with the law." *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1353 (Fed. Cir. 2011) (citing *Massachusetts v. Environmental Protection Agency*, 549 U.S. 497, 527-28 (2007)). The *Preminger*

[6] The Secretary made this same assertion in Gray at the Supreme Court. *Br. for Resp't in Opp'n, Gray v. Wilkie, Nos. 17-1679, 17-1693, 2018 WL 4298030, at *23-*24 (2018).*

court found that this form of differential review is extremely limited because “an agency's refusal to institute rulemaking proceedings is at the high end of the range” of levels of deference given to agency action under the “arbitrary and capricious” standard. *Id.* at 1353 (citing *American Horse Protection Association v. Lyng*, 812 F.2d 1, 4–5 (D.C. Cir. 1987)). The goal of this review is to ensure that the agency offered a public explanation for its refusal to engage in rulemaking. *Id.* at 1353 (citing *Lyng*, 812 F.2d at 4–5 (D.C. Cir. 1987)). And, in *Service Women's Action Network v. Secretary*, the Federal Circuit explained that “in only the ‘rarest and most compelling of circumstances’ is it appropriate to overturn an agency judgment not to institute a rulemaking.’” *Service Women's Action Network v. Secretary*, 815 F.3d 1369, 1375 (Fed. Cir. 2016) (citing *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 818 (D.C. Cir. 1981).

Determining whether the Secretary's response to a petition is arbitrary and capricious is not an adequate substitute for direct judicial review because Congress expressed a “preference for pre enforcement review of [the Secretary's] rules” through section 502. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 330 F.3d 1345, 1347 (Fed. Cir. 2003). M21-1 Manual rules qualify, under section 552(a)(1)(D), as “interpretations of general applicability formulated and adopted by the agency,” which the Federal Circuit has explicit jurisdiction to review under section 502. M21-1 Manual rules are of general applicability because

they apply to *all* veterans who initiate a benefits adjudication; the rules are not limited to specific or named individuals. Furthermore, adjudicators, who by the Secretary's own admission are bound by the M21-1 Manual, provide final resolution for 96% of all benefits cases. *Gray v. Secretary*, 875 F.3d 1102, 1114 (Fed. Cir. 2017) (Dyk. J., *dissenting in part*).

Because the M21-1 Manual should be subject to review under section 502, veterans should not be forced to accept the less deferential standard of review offered by courts reviewing the Secretary's denial of a section 553(e) petition. Veterans are best served by a review that examines the merits of the matter. The Secretary's assertion that veterans can seek meaningful judicial review of the M21-1 Manual through a 553(e) process—similar to that of direct review—is erroneous.

B. A Section 553(e) Petition Imposes An Additional Step And Unnecessary Delay

Even if veterans would obtain the same result from judicial review of a section 553(e) petition as they would under direct judicial review of the M21-1 Manual, the process imposes an unnecessary step which carries with it unnecessary delays. If, as the Secretary implies, the review of a denial would result in the same outcome as direct review, then there is no reason that veterans would need to pursue an intermediary procedure that would lengthen an already arduous process.

Furthermore, from an efficiency standpoint, direct review better allocates scarce judicial and agency resources by reducing time spent per case.

As stated above, veterans already face significant delays and errors in pursuing individual benefits adjudications. These delays and errors mean that obtaining judicial review of M21-1 Manual provisions will take years. The notion that the section 553(e) petition process could serve as a viable alternative ignores the significant delays associated with the section 553(e) process as well.

The Supreme Court previously counseled that a fundamental right of procedural due process is the opportunity to obtain judicial review "at a meaningful time and in a meaningful manner." *Armstrong v. Manzo*, 380 U.S. 545, 552 (1965). The delay in resolving section 553(e) petitions therefore threatens to implicate veterans' due process rights. *See Fusari v. Steinberg*, 419 U.S. 379, 388 (1975); *Telecommunications Research & Action Ctr. v. F.C.C.*, 750 F.2d 70, 80 (D.C. Cir. 1984) (*TRAC*) (holding that the tolerance for unreasonable delay lessens where human health and welfare are at stake); *see Cushman v. Shinseki*, 576 F.3d 1290, 1297-98 (concluding that both recipients of and applicants for entitlement to VA benefits retain a thoroughly protected property interest).

Should section 502 be interpreted to not confer jurisdiction over M21-1 Manual rules, there would be no effective means of constitutionally necessary judicial review. Courts warn that even if "the [the agency] 'grants' the petition for

rulemaking, it can then delay the actual rulemaking indefinitely, without any recourse to the Petitioners." *See In re A Community Voice*, 878 F.3d 779, 785–86 (9th Cir. 2017). Therefore, because veterans law clearly implicates the human health and welfare of sensitive claimants, section 553(e) is an inadequate and untimely method of judicial review. *See Erspamer v. Derwinski*, 1 Vet. App. 3, 10 (1990).

Generally, section 553(e) allows individuals to "petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e). Once a petition has been received, an agency must "fully and promptly consider it." *WWHT, Inc. v. F.C.C.*, 656 F.2d 807, 813 (D.C. Cir. 1981) (citing S. Rep. No. 752, 79th Cong., 1st Sess. (1945)) (internal citations omitted); *see* 5 U.S.C. § 555(e). Agencies must conclude a determination regarding a section 553(e) petition "within a reasonable time," and respond by either granting or denying the petition. *Nat'l Parks Conservation Ass'n v. U.S. Dept. of Interior*, 794 F.Supp.2d 39, 44 (D. D.C. 2011). The receipt of a petition does not create a duty to engage in rulemaking, but merely requires that the agency consider the petition and respond to it in a timely manner. *Id.*

The procedures in section 553(e), however, have proven to be an inadequate means of judicial review due in part to the tendency of agencies to delay in considering and responding to petitions. The hesitance of courts to find that an agency has unreasonably delayed its action only exacerbates this issue. A 2014

Administrative Conference of the United States Final Report indicated that "typically, it takes several years before a court will likely find a delay to be unreasonable, and about a decade or more before a finding of unreasonableness is a near certainty." Jason A. Schwartz & Richard L. Revesz, *Petitions for Rulemaking: Final Report to the Administrative Conference of the United States* 11 (Nov. 5, 2014),
http://www.acus.gov/sites/default/files/documents/Final%20Petitions%20for%20Rulemaking%20Report%20%5B11-5-14%5D.pdf. And, even if an agency is found to have delayed, the typical remedy is to "ask the agency for a timetable concerning when it can respond, thereby adding additional delay." Sidney A. Shapiro & Richard W. Murphy *Eight Things Americans Can't Figure out About Controlling Administrative Power*, 61 ADMIN. L. REV. 5, 27 (2009).

An example of such delay in the VA context can be seen in the handling of the 2015 Petition for Rulemaking regarding Character of Discharge determinations presented by Swords to Plowshares and Harvard Legal Services. *See,* National Veterans Legal Services Program, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper*, Legal Services Clinic of Harvard Law School, 31, https://law.yale.edu/sites/default/files/area/center/liman/document/underserved_liman_program.pdf. "Character of Discharge" determinations are a "make it or break it" moment for veterans in their relationship with VA. *Id*. at 39. The Character of

Discharge (i.e. honorable, other than honorable, dishonorable, etc.) is found on the veteran's DD214 – his separation document from the military. If the Character of Discharge is anything other than "honorable," an issue often arises regarding whether the veteran is entitled to healthcare and VA benefits, even though the law provides benefits for veterans with other than "honorable" discharges. *Id*. Approximately 125,000 post 9/11 veterans with "bad paper" discharges were wrongfully excluded from basic services provided by VA. *Id*. at 2. Three out of four of those 125,000 served in combat and suffer from Post-Traumatic Stress. *Id*.

The first formal request for regulatory changes in this area was made in June of 2015 and acknowledged by VA on July 14, 2015. At that time, VA stated it needed an additional 90 days to review the matter. On December 19, 2015, a formal Petition for Rulemaking, with comprehensive research and analysis was sent to VA. On May 27, 2016, VA agreed that regulations needed revamping. These regulations were not proposed until last week: on July 10, 2020 – over four and one half years *after* VA agreed revisions were necessary. 85 FR 41471, 41473; 38 CFR Part 3 [stating Petition received January 2016].

Other agencies work at a glacial pace, and the case law does not offer solace for these circumstances. For example, in *Ctr. for Environmental Health v. McCarthy*. 192 F.Supp.3d 1036 (N.D. Cal. 2016) it took three years before the petitions, filed in 2006, were considered and granted. *Id.* at 1039. And, after

granting the petitions, the EPA took no further action until 2014, when plaintiffs filed a lawsuit alleging delay at which time the agency concluded that it would not pursue finalization of the 2009 rulemaking. *Id.* Likewise, in *In re A Community Voice,* the EPA granted a section 553(e) petition in 2009 only two months after it was filed. *In re A Community Voice*, 878 F.3d at 783. After granting the petition and agreeing to engage in rulemaking, however, the EPA did little other than form an advisory panel and develop a survey. *Id.* Plaintiffs filed a mandamus petition in 2016, asking the court to find that the EPA unreasonably delayed the promulgation of a final rule. *Id.* The EPA, on the other hand, argued that it had been working diligently and estimated that a proposed rule would be issued in 2021, with the final rule following in 2023. *Id.* The court concluded that an eight-year delay with no concrete timetable was unreasonable. *Id.* at 787–88 (citing *TRAC*, 750 F.2d at 70 (D.C. Cir. 1984)).

Current literature and other available information are unclear as to the VA's exact timeline for handling section 553(e) petitions. This is due in part to the absence of a VA webpage listing petitions that have been filed with the agency. While *Ctr. for Environmental Health* and *In re A Community Voice* are not specific to veterans' disability benefits, they illustrate the lack of utility of a section 553(e) petition and prove that the section 553(e) process can be extraordinarily lengthy. VA's reputation as an agency plagued by (if not tolerant of) abnormally lengthy

delays does little to inspire confidence that it would act with uncharacteristic swiftness to resolve a section 553(e) petition. Given that the age of veterans is often elderly, the likelihood that a veteran lives to see the claim resolved is low. US Dep't of Veteran Affairs, *Profile of Vietnam War Veterans*, 2015, https://www.va.gov/vetdata/docs/SpecialReports/Vietnam_Vet_Profile_Final.pdf [noting 6.4 million veterans aged between 97 and 55, in 2015].

Section 502 should be interpreted to confer jurisdiction, thereby allowing veterans timely access to judicial review. To rule otherwise perverts the pro-veteran ethos and denies veterans adequate judicial review.

III. CONCLUSION

In sum, both an individual benefits claim and a section 553(e) petition leave veterans without a means to real relief when they face an illegal M21-1 Manual provision. With regard to the first avenue – an individual benefits claim, the process is woefully insufficient. History clearly demonstrates that, though possible, sending legal challenges to a VA rule through the individual benefits appeals process unnecessarily and significantly delays a decision. In turn, this delay—which is most certainly against the veteran's best interest and antithetical to the pro-veteran policy underlying veterans benefits law—renders any relief given inadequate. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) ["VA's adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant."].

Second, to suggest that section 553(e) and the lengthy petitioning process provides equal access to courts and equal justice to those who have been injured in the service of this country flies in the face of the government's interest that "all veterans so entitled receive the benefits due to them." *Barrett*, 466 F.3d at 1044.

Even if a veteran petitioner were to survive to see justice, it would have been denied to them for far too long. This nation owes a duty to those who have been injured while defending it and its interests. In a system where "the importance of systemic fairness and the appearance of fairness carries great weight," the two

avenues for relief described in this brief do not fairly provide an opportunity to challenge a VA rule. *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998). If "[t]he government's interest in veterans cases is *not* that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them," *DAV* should be revisited and over-ruled so that the M21-1 Manual is subject to direct judicial review. *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (emphasis added).

Therefore, amicus curiae NLSVCC respectfully ask this Court to overturn the Federal Circuit's holding in *DAV*.

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Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a) because it contains 6,249 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

I further certify that this brief complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5), (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font.

Dated: July 17, 2020.

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