2020-1321

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 Pursuant to 38 U.S.C. § 502

EN BANC BRIEF FOR RESPONDENT

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

MARTIN F. HOCKEY, JR.
Deputy Director

ERIC P. BRUSKIN
Assistant Director
Commercial Litigation Branch
Civil Division, Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-5958
Eric.Bruskin@usdoj.gov

Attorneys for Respondent

Of Counsel:

Y. KEN LEE
Deputy Chief Counsel

JULIE HONAN
Attorney
Benefits Law Group
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

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STATEMENT OF COUNSEL

Pursuant to Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is aware of the following cases that may directly affect or be affected by this Court's decision in this appeal:

Military-Veterans Advocacy, Inc. v. Secretary of Veterans Affairs, No. 20-1537 (Fed. Cir.)

National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs, No. 17-1839 (Fed. Cir.)

Veterans Law Group, Inc. v. Wilkie, No. 20-1899 (Fed. Cir.)

Veterans of Foreign Wars v. Secretary of Veterans Affairs, No. 20-1974 (Fed. Cir.)

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SECRETARY OF VETERANS AFFAIRS,
Respondent.

Petition for Review Pursuant to 38 U.S.C. § 502

EN BANC BRIEF FOR RESPONDENT

STATEMENT OF THE ISSUES

1. Whether this Court has jurisdiction under 38 U.S.C. § 502 to review provisions of the Department of Veterans Affairs' Adjudication Procedures Manual M21-1 that are binding on the agency's initial adjudicators but not on the Board of Veterans' Appeals (board), and whether this Court should overrule *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017).

2. Whether the time for filing a direct action for judicial review under 38 U.S.C. § 502 is governed by the 60-day deadline specified by Federal Circuit Rule 47.12(a) or only by the six-year statute of limitations in 28 U.S.C. § 2401(a).

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Providing Guidance To Claims Adjudicators Through The Manual Plays A Critical Role In VA's Claims Adjudication Process

VA's mission—to care for those "who shall have borne the battle" and for their families and survivors—is an immensely important responsibility. It is also an immense task; this year alone, VA expects to receive approximately 1.4 million disability benefits claims—a 20 percent increase over the last three years, and more claims than any time in our nation's history.[1]

VA adjudicates these claims through a well-known "two-step process." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011). First, Veterans Benefits Administration (VBA) employees in one of 56 regional offices around the country make "an initial decision on whether to grant or deny benefits." *Id.* Second, "if a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by the [board], a body within the VA that

[1] *See* Office of Budget, *FY2021 Budget Submission*, Vol. III at 171, *available at* https://www.va.gov/budget/docs/summary/fy2021VAbudget volumeIIIbenefitsBurialProgramsAndDeptmentalAdministration.pdf.

makes the agency's final decision in cases appealed to it."[2] *Id.*

When adjudicating disability benefits claims during the first step, VBA claims adjudicators rely on VA's *Adjudication Procedures Manual M21-1* (Manual), an online "resource" into which VA "consolidates its policy and procedures" for claims adjudication.[3] *Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 859 F.3d 1072, 1074 (Fed. Cir. 2017) (*DAV*).[4] The Manual contains nine parts, each of which includes multiple subparts, chapters, sections, topics, and blocks that prescribe in detail the steps that VBA personnel must undertake when processing and deciding claims.[5] Provisions that VA publishes in the Manual are

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[2] The Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (AMA), modified the two-step process by expanding veterans' options following receipt of an adverse regional office decision. *See* 38 U.S.C. §§ 5104B, 5104C. For present purposes, VA's modified claims process is still fairly described as two-step, with VBA-level adjudication at step one and board review at step two.

[3] The M21-1 Manual is one of several internal manuals that VBA personnel rely on to decide veterans' benefits claims. *See, e.g., Guaranteed Loan Processing Manual M26-1*, *available at* https://www.benefits.va.gov/WARMS/M26_1.asp; *Education Procedure M22-4*, *available at* https://www.benefits.va.gov/WARMS/M22_4.asp.

[4] The Manual can be accessed through the Table of Contents on VA's website, *available at* https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000073398/M21-1,%20Adjudication%20Procedures%20Manual,%20Table%20of%20Contents.

[5] For example, Part III, Subpart ii, Chapter 1, Section C, Topic 1, Block a explains how to record the date a claim was received. Manual III.ii.1.C.1.a.

binding on VBA personnel, Pet. Br. 42, and they evolve frequently. "Any VBA employee can request changes to the M21-1 Manual through submission of an online form," *DAV*, 859 F.3d at 1074, and the revision will be reflected in the Manual if a team at VA headquarters approves. Since January 1 of this year, VA has revised provisions in the Manual over 175 times.[6]

Accordingly, consolidating policies and procedures in the Manual facilitates the rapid dissemination of guidance from VBA leadership to the thousands of VBA adjudicators in VA's regional offices, ensuring that they "process benefits claims quicker and with higher accuracy." *DAV*, 859 F.3d at 1074. Much of the Manual's value lies, therefore, in its dynamic nature. But ensuring that dynamism comes at a price because, unlike rules published in the Federal Register, the Manual "is binding on neither the agency nor tribunals." *Id.* at 1077.

Veterans who receive adverse regional office decisions may appeal to the board, an appellate body within VA that is "not bound by [VA] manuals, circulars, or similar administrative issues." 38 C.F.R. § 20.105. The board must instead conduct "*de novo* review" before rendering the "agency's final decision" on a claim. *Henderson*, 562 U.S. at 431; *see* 38 U.S.C. § 7104. In doing so, the board

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[6] *Available at* https://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ssnew/help/customer/locale/en-US/portal/554400000001018/content/554400000136049/Changes%20by%20Date.

is bound only by "the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department"—VA's General Counsel. 38 U.S.C. § 7104(c). Further, the board may not rely on Manual provisions without "independently review[ing] the matter." *Overton v. Wilkie*, 30 Vet. App. 257, 259 (2018). And, if the board "chooses to rely on [a Manual provision] as a factor in its analysis or as the rule of decision, it must provide adequate reasons or bases for doing so" apart from the provision itself. *Id.* Failure to do so warrants remand. *Id.* ("The Board may not simply rely on the nonbinding [Manual] position without analysis.").

II. The VJRA Established A Tailored Judicial Review Scheme With Limited Pre-Enforcement Review Of Enumerated VA Actions

Starting in 1988, the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, Div. A, 102 Stat. 4105 (1988) (VJRA), authorized veterans dissatisfied with a board decision to appeal to a new Article I court—the United States Court of Appeals for Veterans Claims (Veterans Court), 38 U.S.C. § 7252(a)—which is authorized to "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary." 38 U.S.C. § 7261(a)(1). Within the scope of its jurisdiction, the Veterans Court may also "compel action of the Secretary unlawfully withheld or unreasonably delayed;" "hold unlawful and set aside [VA] decisions" that are "arbitrary, capricious, an abuse of discretion, or otherwise not in

accordance with law;" and set aside factual findings that are "clearly erroneous." *Id.* at § 7261(a)(2)-(4).

The VJRA further authorized veterans and VA to appeal Veterans Court decisions to this Court, 38 U.S.C. § 7292(d), which may decide "all relevant questions of law," including the lawfulness of "any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the" Veterans Court. *Id.* at § 7292(d)(1). This Court may also accept certification by a judge or panel of the Veterans Court of "a controlling question of law" as "to which there is a substantial ground for difference of opinion" and the resolution of which would "materially advance[]" the "ultimate termination of the case." *Id.* at § 7292(b)(1).

Finally, the VJRA authorized this Court to directly review certain VA actions outside the context of an individual benefits adjudication. 38 U.S.C. § 502. Such pre-enforcement review is available for "[a]n action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers." *Id.* The first of those cross-referenced provisions, 5 U.S.C. § 552(a)(1), is part of the Freedom of Information Act (FOIA) and provides, in pertinent part, that "[e]ach agency shall separately state and currently publish in the Federal Register for the guidance of the public— (D) substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated

and adopted by the agency[.]" 5 U.S.C. § 552(a)(1). It concludes with the proviso that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." *Id.*

The second of the cross-referenced provisions, 5 U.S.C. § 553, is part of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq.*, 701 *et seq.* Section 553 outlines the requirements for notice-and-comment rulemaking but states that those requirements do "not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice," 5 U.S.C. § 553(b)(3)(A). Section 553 also provides that each "agency shall give an interested person the right to petition for the issuance, amendment, or repeal of a rule." 5 U.S.C. § 553(e).

The VJRA directs that section 502 review "shall be in accordance with chapter 7 of title 5[,]" which contains the APA's judicial-review provisions. 38 U.S.C. § 502; *see* 5 U.S.C. §§ 701-706. These provisions authorize reviewing courts to "compel agency action unlawfully withheld or unreasonably delayed" and "hold unlawful and set aside agency action, findings, and conclusions found to be . . . arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(1), (2)(A). These provisions also make clear that a

"preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704.

Aside from the judicial review specified in the VJRA, VA decisions "under a law that affects the provisions of benefits" are "final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise." 38 U.S.C. § 511(a).

III. Federal Circuit Rule 47.12(a)

Following enactment of the VJRA, this Court established rules for processing petitions for pre-enforcement review under section 502. As relevant, Federal Circuit Rule 47.12(a), recently renumbered as Rule 15(f), provides that "[a]n action for judicial review under 38 U.S.C. § 502 of a rule and regulation of the Department of Veterans Affairs must be filed with a clerk of court within 60 days after issuance of the rule or regulation or denial of a request for amendment or waiver of the rule or regulation." The Court's 60-day deadline has been in place for nearly three decades, but the Court has rarely applied it to dismiss a petition as untimely. *See Samudio v. Sec'y, Dep't of Veterans Affairs*, 14 F.3d 612, 1993 WL 525463 (Fed. Cir. 1993) (unpublished); *Nuevas v. Sec'y of Dep't of Veterans Affairs*, 9 F.3d 977, 1993 WL 452676 (Fed. Cir. 1993) (unpublished).

IV. NOVA's Section 502 Petition

In November 2016, VA revised Part III, Chapter 4, Section A, Topic 6.a of the Manual, which concerns whether and how VBA adjudicators are to evaluate partial knee replacements for compensability. *See* Petition, ECF No. 1-2 at 40, 43-44, 127-128. In April 2018, VA revised Part III, Chapter 4, Section A, Topic 6.d of the Manual, which concerns how VBA adjudicators are to rate varying degrees of joint instability. *See id.* at 127, 129. These revisions were made immediately available to the public on VA's website. *See* VA, *Manual*, https://www.benefits.va.gov/warms/M21_1MR.asp. On January 3, 2020, NOVA filed a Petition For Review of the Manual provisions, and on May 6, 2020, the Court granted NOVA's request for hearing *en banc*.[7] ECF Nos. 1, 50.

SUMMARY OF THE ARGUMENT

Interpretive provisions that VA publishes in the Manual, like the knee provisions that NOVA challenges, are not subject to pre-enforcement review under 38 U.S.C. § 502 because they do not fall within the categories of agency action referred to in 5 U.S.C. §§ 552(a)(1) or 553. NOVA contends to the contrary that the knee provisions fall under section 552(a)(1)(D)'s reference to "interpretations of general applicability," but this contention conflicts with the text, structure,

[7] We address in this brief only the two questions in the Court's *en banc* order, and reserve all arguments concerning the merits of the provisions that NOVA seeks to challenge.

history, and purpose of FOIA. Under NOVA's theory, any agency interpretation that extends beyond a particular case or fact pattern is necessarily one of "general applicability" under section 552(a)(1)(D). But that same provision also refers to "statements of general policy," and the word "general" in that context would be superfluous under NOVA's reading since a "policy" necessarily extends to more than one person or case. NOVA's theory suggests, moreover, that a vast array of interpretations published in staff manuals or similar internal documents must be published in the Federal Register, but there is little support for this position.

Other provisions in section 552 confirm that section 552(a)(1)'s Federal Register publication requirement applies only to materials that bind either the agency or persons who deal with the agency. Section 552(a)(1) itself provides that, if an agency fails to publish in the Federal Register any material that must be so published, a person who lacks actual notice of the terms of the document "may not . . . be required to resort to, or be adversely affected by" the matter. 5 U.S.C. § 552(a)(1). Thus, interpretations that VA publishes in the Manual are not referred to in section 552(a)(1) because they do not bind VA or any benefits claimant. Although such provisions bind VA's frontline adjudicators, any veteran who receives an adverse decision from such an adjudicator may appeal to the board, which conducts *de novo* review and is not bound by interpretations published in the Manual when conducting its own independent analysis before reaching the

agency's final decision. By contrast, interpretations set forth in VA regulations or precedential General Counsel opinions are binding on frontline adjudicators *and* the board, and are consequently covered by section 552(a)(1)(D) and subject to section 502 review. Moreover, provisions in the Manual are far more similar to the agency materials that section 552(a)(2) designates for electronic access than to those that section 552(a)(1) designates for Federal Register publication.

NOVA argues in the alternative that 5 U.S.C. § 553 "refers" to interpretive provisions in the Manual by explicitly *excluding* "interpretative rules" from its notice-and-comment requirements. That theory is incompatible with the plain language of section 502 and would drastically expand this Court's pre-enforcement authority beyond the clear intent of Congress.

Even if the Court concludes that an interpretation published in the Manual could qualify as an action "to which section 552(a)(1) or section 553 of title 5 (or both) refers," and could therefore be "subject to judicial review" under section 502, the Court's review is still barred. The VJRA requires section 502 review to be conducted in accordance with the judicial-review provisions of the APA, which include a finality requirement. Because interpretations in the Manual do not bind the board, which "makes the agency's final decision in cases appealed to it," *Henderson*, 562 U.S. at 437, the interpretations are not "final agency action" subject to immediate review under the APA, 5 U.S.C. § 704. By contrast, binding

interpretations in VA regulations and precedential General Counsel opinions are "final agency action[s]" for APA purposes and are subject to pre-enforcement review under section 502.

Although interpretations in the Manual are not subject to pre-enforcement review, veterans are not without recourse. Most significantly, veterans may appeal adverse regional office decisions to the board, and can obtain judicial review of the legal standard the board applies to their claim. Accordingly, the critical question before the Court is not whether veterans can ever obtain review of a particular rule, but which court provides that review and at which stage in the process.

On the Court's second question, Rule 15(f)'s deadline to file petitions under section 502 governs in tandem with 28 U.S.C. § 2401(a). NOVA argues that section 2401(a) provides the only time limit for section 502 claims, but there is no indication in the VJRA or elsewhere that Congress intended section 2401(a) to bar courts from adopting claim-processing rules like Rule 15(f), which "promote the orderly progress of" litigation. *Henderson*, 562 U.S. at 435.

ARGUMENT

I. Interpretations In The Manual Are Not Subject To Section 502 Review

A. Section 552(a)(1) Does Not Refer To Interpretations In The Manual

The VJRA authorizes pre-enforcement review of a VA action "to which section 552(a)(1) . . . of title 5 . . . refers." 38 U.S.C. § 502. Section 552(a)(1),

which is part of FOIA, requires Federal agencies to "publish in the Federal Register for the guidance of the public" several categories of documents. Subsections (A) through (C) require each agency to publish "descriptions of its central and field organization," "statements of the general course and method by which its functions are channeled and determined," and "rules of procedure." 5 U.S.C. § 552(a)(1)(A)-(C). Section 552(a)(1)(D) requires agencies to publish "substantive rules of general applicability adopted as authorized by law, 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 552(a)(1)(E) requires agencies to publish "each amendment, revision, or repeal of" documents within the enumerated categories. 5 U.S.C. § 552(a)(1)(E). Finally, section 552(a)(1) states that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1).

Nonbinding interpretive rules in the Manual are not among the categories of documents that agencies must publish in the Federal Register. The Manual conveys guidance to VA's frontline adjudicators on the vast array of issues they encounter when adjudicating benefits claims, but that guidance binds only those adjudicators, not the entire agency or private parties. 38 C.F.R. § 20.105; *DAV*,

859 F.3d at 1077. Veterans dissatisfied with regional office decisions involving any particular Manual provision may appeal to the board, which must conduct "*de novo* review" of claims, *Henderson*, 562 U.S. at 431, and may not rely on any provision in the Manual without "independently reviewing the matter" and "provid[ing] a reasoned explanation" for its conclusion, *Overton*, 30 Vet. App. at 264.

NOVA argues (Pet. Br. 17-32) that section 502 permits pre-enforcement review of interpretive provisions in the Manual because they are "interpretations of general applicability[.]" 5 U.S.C. § 552(a)(1)(D). The text, structure, purpose, and history of FOIA and the VJRA all confirm, however, that pre-enforcement review of nonbinding guidance in an agency manual is unavailable under section 502's cross-reference to section 552(a)(1).

1. Section 552(a)(1)(D) Does Not Refer To Interpretations In The Manual

Section 552(a)(1)(D)'s directive that agencies publish in the Federal Register "interpretations of general applicability" must be read in conjunction with section 552(a)(2)(B), which requires agencies to "make available for public inspection in an electronic format . . . interpretations which have been adopted by the agency and are not published in the Federal Register." 5 U.S.C. § 552(a)(2)(B). Although both provisions address the handling of "interpretations," the interpretations they describe must be distinct because interpretations under section 552(a)(1)(D) must

be published in the Federal Register, whereas those under section 552(a)(2)(B), which are defined in part by reference to the *absence* of Federal Register publication, need only be made available to the public.

Courts have accordingly long read sections 552(a)(1)(D) and 552(a)(2)(B) in tandem, *e.g., Cathedral Candle Co. v. United States ITC*, 400 F.3d 1352, 1369 (Fed. Cir. 2005) (all interpretations need not be published); *Capuano v. Nat'l Transp. Safety Bd.*, 843 F.2d 56, 57-58 (1st Cir. 1988) (Breyer, J.) (publication not required for instructions to staff in manuals), and concluded that they "can only mean that interpretations of general applicability are to be published in the Federal Register while all other interpretations adopted by an agency" need not, *Anderson v. Butz*, 550 F.2d 459, 463 (9th Cir. 1977) (citation omitted); *see Stuart-James Co., Inc. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988) ("An interpretation is not of 'general applicability' if '(1) only a clarification or explanation of existing law or regulations is expressed; and (2) no significant impact upon any segment of the public results." (quoting *Anderson*, 550 F.2d at 463)); *see* Kenneth Culp Davis, *Administrative Law Treatise* § 3A.7, at 125 (Supp. 1970); 15 *Federal Procedure* § 38.26 (2011); 1 James T. O'Reilly, *Federal Information Disclosure* § 6.3 (2017). NOVA does not dispute that FOIA distinguishes between interpretations under section 552(a)(1)(D) and (a)(2)(B).

That distinction is critical here. Although the VJRA authorizes pre-

enforcement review of an action "to which section 552(a)(1) . . . refers," it does not mention section 552(a)(2). 38 U.S.C. § 502. Congress thus authorized pre-enforcement review of "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), but not of "interpretations . . . adopted by the agency" that "are not published in the Federal Register," *id.* at § 552(a)(2)(B). *See DAV*, 859 F.3d at 1077-1078; *see also Cyan, Inc. v. Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1070 (2018) ("[W]hen Congress wants to refer only to a particular subsection or paragraph, it says so.") (citation omitted).

Although determining whether an interpretation has "general applicability" can be "notoriously difficult," *Cathedral Candle*, 400 F.3d at 1369, at least two textual differences shed light on the matter. First, section 552(a)(1)(D) describes an interpretation "of general applicability," while section 552(a)(2)(B) does not. Second, section 552(a)(1)(D) is subject to the proviso that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1). Section 552(a)(2)(B) is not subject to that limitation.

NOVA ignores these textual differences, and instead relies on dictionary definitions of "'general'" and "'applicable'" to contend that "an interpretation of a legal provision is of 'general applicability' if it applies to an entire class of people

affected by the provision, and is not limited to specific factual circumstances." Pet. Br. 15; *see id.* at 21-22 (relying on other sources distinguishing between "'interpretations of general applicability'" and "case-specific" or "fact-specific" interpretations). NOVA's argument lacks merit.

As an initial matter, NOVA's construction of "general" in section 552(a)(1)(D) as simply the opposite of "specific" cannot be squared with other words in the same provision. Immediately before its reference to "interpretations of general applicability," section 552(a)(1)(D) describes "statements of general policy." 5 U.S.C. § 552(a)(1)(D). "[I]dentical words and phrases within the same statute should normally be given the same meaning," *Hall v. United States*, 566 U.S. 506, 519 (2012) (citation omitted), and that common-sense understanding applies with particular force to "the same word, *in the same statutory provision*," *United States v. Santos*, 553 U.S. 507, 522 (2008). But if "general" means simply broader than one person or case, the word would be superfluous in section 552(a)(1)(D)'s reference to "statements of general policy," because a "policy" necessarily extends to more than one person or case. 5 U.S.C. § 552(a)(1)(D); *see, e.g.*, *Webster's New International Dictionary of the English Language*, 2nd ed. (1960) (*Webster's*) at 1980 (defining "policy" as "[a] settled or definite course or method adopted and followed by a government, institution, body, or individual"); *see TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) ("It is a 'cardinal principle of

statutory construction' that 'a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant.'" (citation omitted)).

Beyond the dictionary, NOVA contends that its reading of FOIA is supported by *Nguyen v. United* States, 824 F.2d 697 (9th Cir. 1987). Pet. Br. 19. Ninth Circuit jurisprudence at best reflects an inconsistent approach to FOIA's Federal Register publication requirement. On one hand, the Ninth Circuit has considered whether a rule is binding to determine whether section 552(a)(1)(D)'s publication requirement attaches, *see Anderson*, 550 F.2d at 463, while, on the other hand, considering whether a rule is binding to determine only whether the rule adversely affects a member of the public, *see Nguyen*, 824 F.2d at 701-02. Even in *Nguyen*, however, the court recognized that "[t]he public's need to know of agency interpretations is greatest when the interpretation will be *conclusive* in the agency's ultimate decision." *Id.* at 701. Thus, "[w]hen an agency produces a 'field-level instructional guide' simply to assist its own employees in administering a regulation," and that guide does not determine the agency's final decision, "it has not made law affecting substantive rights" like a binding interpretation or regulation. *Id.* at 702 (citations omitted).

NOVA also cites *LeFevre v. Secretary, Department of Veterans Affairs*, 66 F.3d 1191 (Fed. Cir. 1995), for the notion that rules are of "'general applicability'"

when they "'prescribe[] the basis on which [VA] would adjudicate every claim' involving [an] issue[.]" Pet. Br. 19 (quoting *LeFevre*, 66 F.3d at 1196-97). But *LeFevre* held that a decision by the Secretary that bound the entire agency was a *substantive* rule because it was a "statement of general . . . applicability" that "prescribe[s] the basis on which the Department would adjudicate every claim[,] . . . reflects the result of a process that was 'legislative in nature[,]' was primarily concerned with policy considerations for the future[,] and looked to policy-making conclusions to be drawn from the facts." *LeFevre*, 66 F.3d at 1196-97. NOVA does not contend that the knee provisions it challenges are substantive rules.[8]

NOVA's conception of the "interpretations of general applicability" that agencies must publish in the Federal Register also contradicts decades of FOIA case law and administrative practice. 5 U.S.C. § 552(a)(1)(D). As then-Judge Breyer explained more than 30 years ago, courts that have considered nonbinding instructions in agency manuals of the kind at issue here have "unanimously held that publication in the Federal Register under § 552(a)(1) is not required."

[8] As a general matter, this Court has section 502 jurisdiction to initially consider a petition alleging that a Manual provision is a substantive rule requiring notice-and-comment procedures. If the Court determines that the provision is a substantive rule, the Court may invalidate it for not complying with notice-and-comment procedures. But if the Court determines that the provision is not substantive, the Court would not have jurisdiction to review it on the merits. NOVA concedes that the knee provisions are interpretive rules, Pet. Br. 10-13, which are exempt from section 553's requirements. 5 U.S.C. § 553(b)(3)(A).

Capuano, 843 F.2d at 58; *see*, *e.g.*, *Notaro v. Luther*, 800 F.2d 290, 291 (2d Cir. 1986) (per curiam) (holding the United States Parole Commission did not need to publish a nonbinding "training aid" considered in adjudicating a parole request).

The Supreme Court also has repeatedly considered interpretations contained in nonbinding agency manuals that were not published in the Federal Register. *See, e.g.*, *Washington State Dep't of Soc. & Health Servs. v. Guardianship Estate of Keffeler*, 537 U.S. 371, 385 (2003) (addressing "administrative interpretations" in the Social Security Administration's Program Operations Manual System); *Shalala v. Guernsey Mem'l Hosp.*, 514 U.S. 87, 90-91 (1995) (similar with respect to Medicare Provider Reimbursement Manual provision that was valid despite no notice-and-comment); *Schweiker v. Hansen*, 450 U.S. 785, 789 (1981) (per curiam) (similar with respect to a "13-volume handbook for internal use by thousands of SSA employees" that did "not bind the SSA"). Such agency manuals are filled with nonbinding interpretations that assist agency employees in processing claims brought by a broad swath of the public. "Clearly it is in the public interest for an agency with over 80,000 employees, making more than 1,250,000 disability determinations alone a year . . . to issue housekeeping instructions to its employees in the interest of uniform, fair and efficient administration." *Hansen v. Harris*, 619 F.2d 942, 956 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd*, 450 U.S. 785 (1981). Under NOVA's approach, however, all of those interpretations would appear to

constitute "interpretations of general applicability" that must be published in the Federal Register. 5 U.S.C. § 552(a)(1)(D). NOVA cannot seriously contend that section 552(a)(1)(D) requires Federal agencies to bloat the Federal Register, but its proposed reading would have just that effect.[9]

2. Section 552(a)(1)(D) Refers To Binding Interpretations

Contrary to NOVA's position, relevance to more than one person or fact pattern is a *necessary*, but not a *sufficient*, condition for an interpretation to be one "of general applicability." 5 U.S.C. § 552(a)(1)(D). To be of "general applicability," an interpretation must also materially impact the public's rights, duties, obligations, or conduct; stated another way, an interpretation must be "binding" on the agency and members of the public who interact with the agency.

i. The Text And History Of FOIA Support The Secretary's Reading Of FOIA

Interpretations under section 552(a)(1)(D) must be of "general applicability," whereas interpretations under section 552(a)(2)(B) need not. And only section 552(a)(1)(D) contains the proviso that, "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, *a person may not* in any manner *be required to resort to*, or *be adversely affected by*, a matter required to be

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[9] NOVA suggests that requiring Federal Register publication for nonbinding interpretive rules "faithfully serves Congress's goal of 'guidance of the public.'" Pet. Br. 20 (quoting 5 U.S.C. § 552(a)(1)). But that goal is equally, if not better, served by making nonbinding interpretations available online on VA's website.

published in the Federal Register and not so published." 5 U.S.C. § 552(a)(1) (emphasis added). Both of those distinctions shed light on the publication requirement in section 552(a)(1)(D), and both indicate that this requirement applies only to interpretations that have binding effect on the agency and the public.[10]

As initially enacted in 1946, section 3(a) of the APA required agencies to publish in the Federal Register "substantive rules adopted as authorized by law and statements of general policy or interpretations formulated and adopted by the agency for the guidance of the public, but not rules addressed to and served upon named persons in accordance with law." Administrative Procedure Act, Pub. L. No. 79-404, § 3(a), 60 Stat. 238 (1946). The APA further provided that "[n]o person shall in any manner be required to resort to organization or procedure not so published." *Id.* The Senate Report accompanying the APA explained that section 3(a) "forbids secrecy of rules binding or applicable to the public, or of delegations of authority." S. Rep. No. 79-752, 12 (1945); *see* H.R. Rep. No. 79-1980, 22 (1946) (similar). The understanding that only "binding" agency rules must be published in the Federal Register followed directly from the Federal Register Act,

[10] Section 552(a)(1)(D) also refers to interpretations which have been "formulated and adopted by the agency," whereas section 552(a)(2)(B) refers only to interpretations which have been "adopted by the agency[.]" The reference to "formulated" in section 552(a)(1)(D) is reasonably read as referring to interpretations adopted through more formal means, like precedential General Counsel opinions, and not informal guidance to field staff. *See Webster's* at 993 (defining "formulate" as "to put in a systemized statement or expression").

ch. 417, 49 Stat. 500 (1935), which required publication of documents that the President determined to "have general applicability and legal effect" subject to the proviso that "for purposes of this Act every document or order which shall prescribe a penalty shall be deemed to have general applicability and legal effect," *id.* at § 5(a)(2), 49 Stat. 501.

The *Attorney General's Manual on the Administrative Procedure Act* (1947) (*APA Manual*)—a resource the Supreme Court "ha[s] often found persuasive," *Norton v. Southern Utah Wilderness All.*, 542 U.S. 55, 63 (2004)—similarly indicates that section 3(a) of the APA applied paradigmatically to binding regulations. The *APA Manual* summarized section 3(a) as pertinent to "'substantive rules,'" adding that "[s]tatements of general policy and interpretations need be published only if they are formulated and adopted by the agency for the guidance of the public," a matter that the APA "leaves each agency free to determine for itself[.]" *APA Manual* 22. Courts interpreting the original APA accordingly described section 3(a) as applicable to rules "which the public is required to obey or with which it is to avoid conflict." *Airport Comm'n of Forsyth Cty. v. Civil Aeronautics Bd.*, 300 F.2d 185, 188 (4th Cir. 1962); *see, e.g., United States v. 449 Cases, Containing Tomato Paste*, 212 F.2d 567, 578 (2d Cir. 1954) (Frank, J., dissenting) (explaining that section 3(a) required publication of "binding standards").

Section 552(a) took its current form with the enactment of FOIA in 1966. Act of July 4, 1966, Pub. L. No. 89-487, 80 Stat. 250; *see* Act of June 5, 1967, Pub. L. No. 90-23, 81 Stat. 54 (codifying FOIA in 5 U.S.C. § 552). Among other changes, FOIA separated the "interpretations of general applicability formulated and adopted by the agency" that must be published in the Federal Register under section 552(a)(1)(D) from the "interpretations . . . adopted by the agency" that must only be made publicly available under section 552(a)(2)(B). FOIA also "imposed" a "new sanction . . . for failure to publish" the required materials in the Federal Register, S. Rep. No. 89-813, 6 (1965)—the proviso that "a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published," 5 U.S.C. § 552(a)(1); *see Morton v. Ruiz*, 415 U.S. 199, 233 & n.27 (1974). The *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* (1967) (*FOIA Memorandum*)—on which the Supreme Court has relied in construing section 552, *see*, *e.g.*, *National Archives & Records Admin. v. Favish*, 541 U.S. 157, 169 (2004)—explains that Congress enacted that new sanction to deprive noncompliant agency "rules, statements of policy, and interpretations" of general applicability of their "'force and effect,'" *FOIA Memorandum* 10-13. That reference to "force and effect" reflects the same understanding that underlies the Federal Register Act and the initial APA—that

only binding agency materials would constitute interpretations of general applicability subject to the Federal Register publication requirement.

The VJRA's legislative history reflects the same understanding. The House Report describes the VJRA as authorizing pre-enforcement "review [of] VA policy as expressed in VA regulations and interpretations by the General Counsel." H.R. Rep. No. 100-963, 26 (1988) (VJRA House Report). The Senate Report likewise characterizes the pre-enforcement review provision as a way to "submit the VA's institutional decisions—i.e., regulations—to court review." S. Rep. No. 100-418, 112 (1988) (VJRA Senate Report).

ii. Relevant Precedent Supports The Secretary's Reading Of FOIA

In the decades since FOIA's enactment, courts have consistently held that section 552(a)(1)(D)'s "requirement for publication attaches only to matters which if not published would adversely affect a member of the public." *New York v. Lyng*, 829 F.2d 346, 354 (2d Cir. 1987) (quoting *Hogg v. United States*, 428 F.2d 274, 280 (6th Cir. 1970), *cert. denied*, 401 U.S. 910 (1971)); *see id.* (collecting cases from other courts of appeals adopting the same rule); *see Cathedral Candle Co.*, 400 F.3d at 1370 (same); *Federal Procedure* § 38:26 (same); Colleen R. Courtade, Annotation, *What Rules, Statements, and Interpretations Adopted by Federal Agencies Must be Published*, 77 A.L.R. Fed. 572 (1986 & Supp. 2018-

2019) (same).[11] That will be true only of interpretations that are "binding on" the agency or on persons who interact with it. *See Concerned Residents of Buck Hill Falls v. Grant*, 537 F.2d 29, 38 (3d Cir. 1976) (holding that an agency's guide and handbook, "as merely internal operating procedures, rather than regulations officially promulgated under the APA or otherwise, . . . do not prescribe any rule of law binding on the agency").

The Supreme Court's decision in *Morton v. Ruiz* is instructive. Relying on section 552(a)(1)(D) and the "sanction" for an agency's failure to publish material that "'adversely affect[s]'" a member of the public, the Court concluded that the Bureau of Indian Affairs could not enforce a provision of a staff manual that had a "substantive" effect on Indians seeking benefits. *See Ruiz*, 415 U.S. at 233, 235. The Court explained that the agency's failure to treat the manual provision "as a legislative-type rule" that must be published under section 552(a)(1)(D) rendered it "ineffective" and deprived it of "binding effect." *Id.* at 236; *see id.* at 235 (noting the Government's argument that the provision would be "endowed with the force of law" only if it was "published in the Federal Register"); *cf. Schweiker*, 450 U.S.

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[11] To a lesser extent, so too has Congress. *See* 5 U.S.C. § 804(3)(A) (excluding from the Congressional Review Act of 1966 rules "of particular applicability" *and* rules "that do[] not substantially affect the rights or obligations of non-agency parties"); *cf.* 1 C.F.R. § 1.1 (identifying documents by reference to their "general applicability" *and* "legal effect").

at 789-91 (holding that an SSA agent's breach of an agency claims manual was not ground to estop the Government from denying benefits that would not otherwise have been available because the claims manual was "not a regulation," had "no legal force," and did "not bind the SSA"). The analysis in *Ruiz* underscores that section 552(a)(1)(D) is best read to require, at a minimum, that an "interpretation[] of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), have a "binding effect" on the agency or interested members of the public.

iii. The Broader Statutory Structure Supports The Secretary's Reading Of FOIA

In interpreting a statute, "a word is given more precise content by the neighboring words with which it is associated." *United States v. Williams*, 553 U.S. 285, 294 (2008). Provisions in the Manual are a far better fit with the neighboring words of section 552(a)(2) than with those of section 552(a)(1). As detailed above, section 552(a)(1) identifies various categories of materials that agencies must "publish in the Federal Register for the guidance of the public." 5 U.S.C. § 552(a)(1). In addition to "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), materials subject to section 552(a)(1)'s publication requirement include "descriptions of [the agency's] central and field organization;" "statements of the general course and method by which [the agency's] functions are channeled and determined, including

the nature and requirements of all formal and informal procedures available;" and "rules of procedure, descriptions of forms available or the places at which forms may be obtained, and instructions as to the scope and contents of all papers, reports, or examinations," *id.* at § 552(a)(1)(A)-(C). Those materials are characterized by their broad sweep and applicability to the agency as a whole. Section 552(a)(1)(D) requires publication of "substantive rules of general applicability adopted as authorized by law," 5 U.S.C. § 552(a)(1)(D), which likewise bind the agency and members of the public who interact with the agency.

By contrast, section 552(a)(2) lists materials that agencies must "make available for public inspection in an electronic format," and describes materials that are characterized by their narrower applicability and that have at most a limited binding effect. 5 U.S.C. § 552(a)(2). In addition to "interpretations which have been adopted by the agency and are not published in the Federal Register," 5 U.S.C. § 552(a)(2)(B), section 552(a)(2) requires electronic access to "final opinions, including concurring and dissenting opinions, as well as orders, made in the adjudication of cases," and "administrative staff manuals and instructions to staff that affect a member of the public," *id.* at § 552(a)(2)(A) and (C).[12] As a

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[12] NOVA's only reference to section 552(a)(2)(B) is to note that the IRS conceded that its "letter advice rulings and technical advice memoranda" must only be made publicly available. Pet. Br. 21 (citing *Tax Analysts and Advocates v. IRS*, 505 F.2d 350, 353 (D.C. Cir. 1974)). The IRS's position in *Tax Analysts* is not incompatible with our position. We agree that interpretations in materials directed

matter of VA practice, final opinions and orders in the adjudication of veterans' benefits cases are always nonprecedential and therefore have no binding effect beyond the individual veteran's case. 38 C.F.R. § 20.1303. And VA administrative staff manuals and staff instructions likewise do not bind the entire agency. 38 C.F.R. § 20.105.

Interpretations in the Manual are far more similar to the agency materials that section 552(a)(2) designates only for electronic access than to those that section 552(a)(1) designates for Federal Register publication. The structure of the statute thus underscores that Manual provisions fall comfortably into section 552(a)(2)(C) and that interpretations in the Manual are "interpretations which have been adopted by the agency," 5 U.S.C. § 552(a)(2)(B), rather than "interpretations of general applicability formulated and adopted by the agency" under section 552(a)(1)(D). *See NLRB v. Sears, Roebuck & Co.*, 421 U.S. 132, 153 (1975) (reading FOIA provision in light of "the other provisions of the Act").

Finally, VA's decision to make certain interpretive rules available online in the Manual rather than publishing them in the Federal Register reflects the agency's own judgment that such provisions are not generally applicable and

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to one person like those in *Tax Advocates* need only be made publicly available under section 552(a)(2). But that does not preclude other agency material—like interpretations in the Manual—from also falling under section 552(a)(2) because they do not bind the public or the agency as a whole.

subject to section 552(a)(1)(D). *See Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 362 (5th Cir. 1977) (noting that an agency's decision not to publish an internal handbook in the Federal Register indicates that the agency did not intend to be bound by its terms); *cf. Am. Mining Cong. v. Mine Safety & Health Admin.*, 995 F.2d 1106, 1109 (D.C. Cir. 1993) (explaining that a rule the agency chooses not to publish in the Code of Federal Regulations is less likely to be a legislative rule); *Brock v. Cathedral Bluffs Shale Oil Co.*, 796 F.2d 533, 539 (D.C. Cir. 1986) (similar). To be sure, VA cannot insulate a rule from pre-enforcement review simply by placing it in the Manual. But Congress's decision to include "administrative staff manuals and instructions to staff that affect a member of the public" in section 552(a)(2) rather than section 552(a)(1) must have interpretive significance. *See Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379, 1380 (Fed. Cir. 2018) (Taranto, J., concurring in the denial of the petitions for rehearing en banc) (noting that "[t]he differences in language between" sections 552(a)(1) and (a)(2) "may well inform how to read each provision").

3. Section 552(a)(1)(D) Does Not Refer To Interpretations In The Manual Because They Are Not Binding

Under our reading of FOIA, interpretations published in the Manual fall outside section 552(a)(1)(D) because they do not bind the whole of VA or any benefits claimant. The interpretations appear only in an internal agency manual that conveys guidance to VA's frontline adjudicators. Although interpretations in

the Manual bind those adjudicators, any veteran who is dissatisfied with an adjudicator's decision may appeal to the board and obtain *de novo* review. 38 U.S.C. § 7104(a); *see Henderson*, 562 U.S. at 431. In conducting that review, the board "is not bound by Department manuals, circulars, or similar administrative issues." 38 C.F.R. § 20.105. Rather, the board is "bound in its decisions" only "by the regulations of the Department, instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department," 38 U.S.C. § 7104(c); 38 C.F.R. § 20.105, all of which are referred to in section 552(a)(1) and are subject to pre-enforcement review under section 502.[13] And even when the board's position ultimately accords with an interpretation in the Manual, "[t]he Board may not simply rely on the nonbinding [Manual] provision without analysis," but instead "must provide adequate reasons or bases for" its decision. *Overton*, 30 Vet. App. at 259.

Accordingly, the board frequently rejects interpretations contained in the Manual. *See, e.g., Title Redacted,* Bd. Vet. App. No. 1427401, 2014 WL 3959707 (June 17, 2014) (rejecting Manual III.iv.8.A.4.a); *Title Redacted*, Bd. Vet. App.

[13] VA may reproduce a binding interpretation, such as a precedential General Counsel opinion, in the Manual, or may give interpretations published initially in the Manual "the force and effect" of law "as if published in the regulations" by subsequently using notice-and-comment rulemaking procedures. *See, e.g.,* 38 C.F.R. § 3.21 (giving an interpretation contained in the Manual the "force and effect" of law "as if published in the regulations").

No. 1633157, 2016 WL 5850298, at *7 (Aug. 22, 2016) (rejecting Manual IV.iii.2.A.1.B); *Title Redacted*, Bd. Vet. App. No. 18102879, 2018 BVA Lexis 83337 (May 16, 2018) (rejecting Manual III.i.3.B.4.a); *Title Redacted*, Bd. Vet. App. No. 1639810, 2016 BVA Lexis 46159 (Sept. 30, 2016) (rejecting multiple Manual provisions). The board's ability and willingness to reject interpretations in the Manual underscores that its provisions do not bind the board, either in theory or in practice. And because the board renders the "agency's final decision" on disability benefits claims, *Henderson*, 562 U.S. at 431; *see* 38 U.S.C. § 7104, its independent interpretation is the only one that can "adversely affect[]" a member of the public, 5 U.S.C. § 552(a)(1). As a result, interpretations in the Manual are not subject to section 552(a)(1)(D)'s Federal Register publication requirement or pre-enforcement review under section 502.

As the board decisions cited above demonstrate, VA's decision to provide guidance to its frontline adjudicators through interpretations in the Manual, rather than through a more formal mechanism such as a precedential General Counsel opinion or regulation, "comes at a price." *Perez v. Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015). When VA publishes an interpretation in the Manual, review of the interpretation must occur through an appeal from an individual determination, but the board in resolving that appeal will not be bound by the interpretation. *See also Christensen v. Harris Cty.*, 529 U.S. 576, 587 (2000)

(holding that an agency interpretations "contained in . . . agency manuals . . . do not warrant Chevron-style deference").

4. NOVA's Disagreement With The Secretary's Reading Of FOIA Is Unpersuasive

NOVA challenges our reading of FOIA first by arguing that limiting the term "interpretations of general applicability" to binding interpretations would nullify the inclusion of such interpretations in section 552(a)(1)(D) because "*[n]o* interpretive rule—whether generally applicable or not—legally binds an agency." Pet. Br. 39. This is incorrect. Although an interpretive rule is not legally binding "on regulated parties," *Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 251-253 (D.C. Cir. 2014); *see Mortg. Bankers*, 135 S. Ct. at 1206, an agency can direct its own personnel to follow particular interpretations, *see Splane v. West*, 216 F.3d 1058, 1064 (Fed. Cir. 2000) (recognizing that interpretive rules may be "binding on agency officials insofar as any directive by an agency head must be followed by agency employees").

Congress directed that the board "shall be bound" not only "by the regulations of the Department," but also by the "instructions of the Secretary, and the precedent opinions of the chief legal officer of the Department." 38 U.S.C. § 7104(c). A precedential General Counsel opinion is the prototypical example of an interpretation that binds the agency, falls within section 552(a)(1)(D), and therefore can be subject to pre-enforcement challenge under section 502. A

number of this Court's decisions exercising pre-enforcement review under section 502 have involved precedential General Counsel opinions. *See*, *e.g.*, *Snyder v. Sec'y of Veterans Affairs*, 858 F.3d 1410, 1412-1413 (Fed. Cir. 2017) (explaining that a precedential General Counsel opinion is reviewable under section 502 as "a formal agency action that is binding on the Board"); *Splane*, 216 F.3d at 1062, 1064 (explaining that a precedential General Counsel opinion "binding on the Board by statute" but not binding "outside the agency" is reviewable under section 502); *see also LeFevre*, 66 F.3d at 1196-98 (finding agency action reviewable because of its binding effect on parties other than VA adjudicators).

NOVA argues that the Supreme Court recently rejected the notion that "general applicability" is to be determined based on whether an interpretation "binds" the agency. Pet. Br. 38-39 (citing *Azar v. Allina Health Servs.*, 139 S. Ct. 1804, 1814 n.1 (2019)). Not so. In *Allina Health*, the Supreme Court held that a Department of Health and Human Services statement of policy should have undergone notice-and-comment procedures because it was "substantive" as that term is defined in "the notice-and-comment statute Congress drafted specially for Medicare." *Id.* at 1808-11. The observation in a footnote that "many manual instructions surely qualify as guidelines of general applicability," is dictum intended to suggest overlap in items in response to "the dissent's suggestion that each item in the list" under the Medicare Act—"'regulations, manual instructions,

interpretative rules, statements of policy, or guidelines of general applicability'"— "'refers to something different.'" *Id.* at 1814 n.1. *Allina Health* does not address VA's Manual or FOIA, and its analysis of the Medicare Act provides little useful guidance in answering the Court's first *en banc* question.

Likewise, nothing in the Government's brief in *Allina Health* supports NOVA's position. Pet. Br. 39, 40 (citing the Government's brief in *Azar v. Allina Health Services,* No. 17-1484 (S. Ct. Nov. 13, 2018)). The Government argued that the phrase "establishes or changes a substantive legal standard" in 42 U.S.C. § 1395hh(a)(2) should be interpreted like 5 U.S.C. § 553, which distinguishes between substantive rules, which "are binding and have the force and effect of law," and interpretive rules, "which merely reflect 'the agency's construction of the statutes and rules which it administers.'" *Allina Health*, Gov't Br. at 15-16 (quoting *Mortg. Bankers*, 135 S.Ct. at 1204 & n.1). In making that argument, the Government noted that, unlike substantive rules under section 553, which have the "force and effect of law," interpretive rules "have no binding legal effect." *Id.* at 35. It is true that interpretive rules do not have the "force and effect of law" to bind the public or outside tribunals like legislative rules, but they can nevertheless bind an agency or persons who interact with an agency. *See Splane*, 216 F.3d at 1064 (holding that the reference to a regulation having "the 'force and effect of law' is to the binding effect of that regulation on tribunals *outside* the agency, not

on the agency itself"). As noted above, VA General Counsel precedential opinions are interpretive rules to which section 553 does not apply but nevertheless bind the agency. *Id.* at 1065.

NOVA further contends that even if interpretive rules in the Manual are not initially binding on the agency as a whole, they become "every bit as binding as a substantive rule" once afforded deference. Pet. Br. 44 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2435 (2019) (Gorsuch, J., concurring in the judgment)). The majority in *Kisor* flatly rejected this position: "In *Mortgage Bankers*, we held that interpretive rules, even when given *Auer* deference, do *not* have the force of law." *Kisor*, 139 S. Ct. at 2420 (citing *Mortg. Bankers*, 135 S. Ct. at 1208 & n.4). To be sure, in seeking deference in an appropriate setting, a Manual provision could be offered as support when establishing the agency's considered position. But, when deference is given, it is the regulation as interpreted by the court that binds the board, not the Secretary's interpretation. *See Mortg. Bankers,* 135 S. Ct. at 1208 n.4 ("Even in cases where an agency's interpretation receives *Auer* deference, however, it is the court that ultimately decides whether a given regulation means what the agency says.").

Finally, NOVA argues as a matter of policy that interpretations in the Manual must be reviewable because they "constitute the last word for the vast majority of veterans." Pet. Br. 42-43 (quoting *Gray v. Sec'y of Veterans Affairs*,

875 F.3d 1102, 1114 (Fed. Cir. 2017) (Dyk, J., dissenting in part and concurring in the judgment)). NOVA points out that 94 percent of veterans' benefits claims decided in 2019 were not appealed to the board. Pet. Br. 42-43. Although there are many reasons veterans may not appeal to the board, VA does not control the rate of appeal via Manual provision or otherwise; by congressional design, that choice lies with veterans alone. And it is precisely this authority—the authority to obtain *de novo* review and the agency's final decision from the board—that renders interpretations in the Manual nonbinding. *See Batterton v. Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980) (nonbinding agency action is that which does not "foreclose alternate courses of action or conclusively affect rights of private parties").

To address this shortcoming in its position, NOVA contends that Manual provisions *effectively* bind the board because they "regularly dictate[] the Board's analysis." Pet. Br 43-44. The board's statutory task is to review regional office decisions that may have applied the Manual, 38 U.S.C. § 7104, and the Veterans Court has held that the board, if it relies on a Manual provision in its decision, must address and independently review the provision. *Overton*, 30 Vet. App. at 264. It is unsurprising, therefore, that the "Board's analysis" frequently reflects interpretations in the Manual. To the extent NOVA suggests that the Manual "regularly dictates" the *outcome* at the board, this contention is hard to fathom. In

addition to the board decisions we cite above showing the board's ready willingness to reject Manual provisions, in 2019 alone the board granted over 35 percent of legacy claims appeals and remanded another 39 percent of such appeals.[14] These are hardly the statistics of an appellate rubber stamp.

NOVA nevertheless argues to the contrary by plucking out a lone board decision that it characterizes as relying too heavily upon a Manual provision. Pet. Br. 44 (citing *Title Redacted*, Bd. Vet. App. 20000715, 2020 WL 1543152, at *13-14 (Jan. 7, 2020)). To the extent a single board decision can provide the Court with a helpful snapshot, this decision confirms the board's independence; the board agreed with the relevant Manual provision only after thoroughly analyzing its interpretation and concluding that it was persuasive. *Title Redacted*, Bd. Vet. App. 20000715, 2020 WL 1543152, at *13-14 (Jan. 7, 2020) (explaining that the interpretation mirrored a provision developed by VA in consultation with "a panel of non-VA specialists" who reviewed the relevant diagnostic code to ensure that, among other things, it "reflects medical advances"). The board did not "consider the [Manual] provision to be binding," but found its underlying reasoning "to be highly persuasive[.]" *Id.* NOVA's effort to impugn the board's independence, like its challenge to our reading of FOIA, thus lacks merit.

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[14] *See* VA, Board of Veterans' Appeals Annual Report FY 2019 at 33, *available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2019AR.pdf.

B. Section 553 Does Not Refer To Interpretations In The Manual

Having failed to establish that interpretations in the Manual are referred to in section 552(a)(1)(D), NOVA argues in the alternative that section 502's cross-reference to section 553 refers to these interpretations instead. Pet. Br. 45-49. Section 553(b) prescribes the contents that an agency must include in a notice of proposed rulemaking and states that those requirements "do[] not apply" to, among other things, "interpretative rules." 5 U.S.C. § 553(b)(A); *see Mortgage Bankers*, 135 S. Ct. at 1206 (describing section 553's "exemption of interpretive rules from the notice-and-comment process"). NOVA thus argues that interpretive rules VA publishes in the Manual are reviewable because section 553 "refers" to "interpretative rules" in the language that *excludes* them from notice-and-comment requirements. That argument is wrong.

"An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers," 38 U.S.C. § 502, is one that is *encompassed by* section 552(a)(1) or section 553, *i.e.*, an action to which one or both of those provisions apply. *See Conyers v. Sec'y of Veterans Affairs*, 750 F. App'x 993, 996 (Fed. Cir. 2018) (non-precedential) ("Section 553 refers to agency rulemaking that must comply with notice-and-comment procedures under the APA."). Adjacent language in section 553 reinforces that sensible conclusion. In addition to exempting interpretive rules from notice-and-comment rulemaking requirements, section 553 states that those

requirements do not apply to such matters as "a military or foreign affairs function of the United States." 5 U.S.C. § 553(a)(1). On NOVA's approach, a litigant could bring a pre-enforcement challenge to VA's action on "a military or foreign affairs function of the United States," on the theory that section 553 "refers" to such actions by excluding them from its coverage. *Id.* There is nothing in the VJRA or its history to suggest Congress intended to permit such actions.

Moreover, section 502 differentiates between interpretive rules that must be published in the Federal Register under section 552(a)(1)(D) and those that need only be made available to the public under section 552(a)(2)(B). 38 U.S.C. § 502. NOVA's reading of section 553—as "referring" to "interpretative rules" by way of excluding them, and thereby making *all* interpretive rules reviewable under section 502—is incompatible with section 502's distinction between section 552(a)(1)(D) and section 552(a)(2)(B).

Finally, NOVA invokes the principle "'that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" Pet. Br. 47-48 (quoting *Henderson*, 562 U.S. at 441). But that principle applies only when a statute is genuinely ambiguous, *see*, *e.g.*, *Nielson v. Shinseki*, 607 F.3d 802, 808 n.4 (Fed. Cir. 2010); *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003), *cert. denied*, 541 U.S. 960 (2004), and there is no genuine ambiguity here.

C. Interpretations In The Manual Are Not Subject To Pre-Enforcement Review Because They Are Not Final Agency Action

Even if an interpretation VA publishes in the Manual could be an "action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers," and therefore could be "subject to judicial review" under section 502, pre-enforcement review of the provision would be premature under the APA. The VJRA provides that section 502 review "shall be in accordance with chapter 7 of title 5"—the judicial-review provisions of the APA. *Id.*; *see* 5 U.S.C. §§ 701-706. Those provisions authorize judicial review of "final agency action," while stating that "[a] preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action." 5 U.S.C. § 704. Because interpretations in the Manual are not "final agency action" that would be subject to pre-enforcement review under the APA, the VJRA cannot and should not be interpreted to authorize this Court's pre-enforcement review of interpretations in the Manual. *See Ashford Univ., LLC v. Sec'y of Veterans Affairs*, 951 F.3d 1332, 1344 (Fed. Cir. 2020) (holding "that section 502, by incorporating 5 U.S.C. § 704, includes a finality requirement").

Under the APA, an agency determination is "final" if (1) the action "mark[s] the 'consummation' of the agency's decisionmaking process," and (2) the action is one from which "'rights or obligations have been determined'" or from which "'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997)

(citations omitted); *see*, *e.g.*, *U.S. Army Corps of Eng'rs v. Hawkes Co.*, *Inc.*, 136 S. Ct. 1807, 1813 (2016). Interpretations in the Manual do not satisfy either requirement. As explained above, such provisions are not binding on the board, which renders the "agency's final decision" on disability benefits claims, *Henderson*, 562 U.S. at 431, and which must conduct *de novo* review of any appeal without giving controlling weight to a provision in the Manual, *see Overton*, 30 Vet. App. at 259.

Accordingly, a regional office's reliance on or reference to a provision in the Manual does not mark the consummation of the agency's decision-making process, and no "rights," "obligations," or "legal consequences" result from the provisions themselves. *Bennett*, 520 U.S. at 178 (citation omitted); *see Joshi v. Nat'l Transp. Safety Bd.*, 791 F.3d 8, 11 (D.C. Cir. 2015) (rejecting the theory that "practical consequences" instead of "legal harms . . . can transform" agency action "into a final agency order"); *cf. Am. Paper Inst., Inc. v. U.S. Envtl. Prot. Agency*, 882 F.2d 287, 289 (7th Cir. 1989) ("[T]elegraphing your punches is not the same as delivering."). Legally binding consequences can flow only from the agency's final adjudication of an individual claim in a given case. *See*, *e.g.*, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 58 (1993) (explaining that a regulation related to the provision of Government benefits could be challenged only when applied to the

claimant); *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 894 (1990) (similarly requiring a "case-by-case approach").

Excluding interpretations in the Manual from this Court's pre-enforcement review still leaves room for litigants to challenge a significant category of binding agency actions under section 502. "[S]ubstantive rules of general applicability," 5 U.S.C. § 552(a)(1)(D), are generally final and subject to direct challenge. *See*, *e.g.*, *Abbott Labs. v. Gardner*, 387 U.S. 136, 150-51 (1967). And although many interpretations do not bind the board and therefore are not final, *see*, *e.g.*, *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 713 (D.C. Cir. 2015), that is not true of all such agency actions. As explained above, precedential opinions of the VA General Counsel bind the board, 38 U.S.C. § 7104(c), and are properly considered "interpretations of general applicability formulated and adopted by the agency" under section 552(a)(1)(D) and subject to pre-enforcement review. *See Snyder*, 858 F.3d at 1412-13; *Splane*, 216 F.3d at 1062; *see also*, *e.g., Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 478-79 (2001) (concluding that agency "interpretation" in a preamble to a rule was "final agency action" because it was "conclusive"); *Kennecott Utah Copper Corp. v. U.S. Dep't of Interior*, 88 F.3d 1191, 1222-23 (D.C. Cir. 1996) (explaining that whether a rule's preamble was a reviewable final action turns on "whether the preamble has independent legal

effect, which in turn is a function of the agency's intention to bind either itself or regulated parties").

Limiting section 502 review to final agency action also reflects the fundamental compromise underlying the VJRA. Contrary to NOVA's vision of "broad" pre-enforcement review (Pet. Br. 2), Congress in the VJRA created a tailored judicial-review scheme that channeled most challenges to VA decisions to the newly established Veterans Court through appeals of individual benefits determinations.[15] The VJRA scheme was "intended to afford the maximum possible deference to the [board's] expertise as an arbiter of the specialized types of factual issues that arise in the context of claims for VA benefits, while still

[15] Amici take NOVA's broad view of the VJRA further, arguing that section 502 authorizes pre-enforcement review of *non-final* agency action because 5 U.S.C. § 704 does not expressly require finality for agency actions "made reviewable by statute[.]" Brief Of Military-Veterans Advocacy, Inc. (MVA) As Amicus Curiae In Support Of Petition, ECF No. 56 at 21-23. This argument is incorrect for the reasons explained in *Ashford*, 951 F.3d at 1343-45 (citing *Carter/Mondale Presidential Comm., Inc. v. Fed. Election Comm'n*, 711 F.2d 279, 285 n.9 (D.C. Cir. 1993) (explaining that "[w]hile only the second category [in § 704] contains a reference to finality, . . . Congress also assumed that '[a]gency action made reviewable by statute' would be final action")); *see Bell v. New Jersey*, 461 U.S. 773, 778 (1983) ("The strong presumption is that judicial review will be available only when agency action becomes final[.]" (citations omitted)). MVA's theory, moreover, would permit freestanding challenges to VA "descriptions of its central and field organization," 5 U.S.C. § 552(a)(1)(A) and "statements of general course and method by which its functions are channeled and determined," *id.* at § 552(a)(1)(B), in the absence of any concrete effect on individual "rights or obligations" or other "legal consequences." *Bennett*, 520 U.S. at 178 (citation omitted). *Ashford*'s persuasive reading of section 502 avoids that unlikely result.

recognizing and providing for the possibility of error in [the board's] factual determinations[.]" VJRA Senate Report 60. As noted above, the VJRA House and Senate Reports mention the prospect of pre-enforcement review of "VA policy as expressed in VA regulations and interpretations by the General Counsel," VJRA House Report 26, and "VA's institutional decisions—i.e., regulations," VJRA Senate Report 112, but do not suggest anything resembling the "undeniably broad" judicial review NOVA envisions (Pet. Br. 4). Indeed, the House Report reiterates the "basic administrative principles that a reviewing court ought not to be put in a position where it has no idea of an agency's views on a particular legal question," and that "the law should encourage agencies to resolve disputes . . . without court intervention, since the agency is in the best position to understand the effect of a changed position and to make the most informed decision on the best means of implementing any change in its position." VJRA House Report 27.

Accordingly, although facial challenges to interpretations in the Manual are not judicially cognizable, veterans have alternative avenues established in the VJRA for contesting those provisions. *See Ashford*, 951 F.3d at 1340 (refusing to broadly interpret section 502 where petitioner had other avenues for "judicial review of the VA's adjudicatory decision"). Veterans and interested organizations may petition VA to conduct a rulemaking, *see* 5 U.S.C. § 553(e), and to adopt their preferred provision. If VA denies such a petition, the petitioner may seek direct

review of that denial in this court. *See Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1352 (Fed. Cir. 2011). When the board agrees with a provision in the Manual, a claimant can argue on appeal that the provision should be rejected. 38 U.S.C. §§ 7252, 7261, 7292. Litigants before the Veterans Court seeking faster review of a particular agency interpretation may petition that court to certify certain controlling legal questions to this Court. *See* 38 U.S.C. § 7292(b). And litigants who object to what they perceive as unreasonable delay may petition the Veterans Court for relief. *See Monk v. Shulkin*, 855 F.3d 1312 (Fed. Cir. 2017).[16]

NOVA's sweeping reading of section 502 would thus fundamentally alter the balance that has prevailed for the past three decades under the VJRA. Under its proposed construction, countless provisions in the Manual would constitute "interpretations of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), requiring VA to publish them in the Federal Register before providing them to frontline adjudicators, and subjecting them to pre-enforcement review. That destabilizing result would conflict with the history and purpose of the VJRA, and with the settled principle of administrative law that interpretive rules are generally not reviewable before their application in particular cases. *See*

[16] Veterans pursuing relief through these channels may benefit from the efforts of other veterans. *See Gray*, 884 F.3d at 1381 (Taranto, J.). Soon after *Gray* was dismissed, the Court decided *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019), a section 7292 appeal that mooted Mr. Gray's section 502 petition.

Huerta, 785 F.3d at 717. It would also disrupt and delay the pace of communication between VBA leadership and regional office personnel while interpretive rules and amendments thereto are published in the Federal Register and challenged in court, inevitably slowing VBA's pace of adjudication while increasing the possibility of inconsistent or erroneous decisions.

NOVA argues that the Court should read section 502 broadly "because VA gets it wrong so often." Pet. Br. 51; *see id.* at 50 (citing cases in which courts have ruled against VA). As an initial matter, every one of the cases NOVA cites was decided *after* enactment of the VJRA and thus could not have informed Congress's purpose. In enacting the VJRA, moreover, Congress lauded VA as "one of the most generous benefactor agencies in the world," VJRA House Report 25, and explained that the new legislation was "not based on a belief that the current preclusion of judicial review of [board] decisions results in wide-spread injustices; to the contrary, there is little evidence that most claimants are not satisfied with the resolution of their claims for VA benefits," VJRA Senate Report 30.

NOVA is of course correct that some VA actions have been invalidated. But many VA actions have also been upheld. *See*, *e.g.*, *Shinseki v. Sanders*, 556 U.S. 396, 399 (2009); *Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336 (Fed. Cir. 2016); *Service Women's Action Network v. Sec'y of Veterans Affairs*, 815 F.3d 1369 (Fed. Cir. 2016). NOVA also laments (Pet. Br. 2, 8, 16, 51-

52) the slow pace of the VA adjudication process. VA shares that dissatisfaction, but the agency has worked to improve its efficiency and recently worked with Congress and stakeholders, including NOVA, to craft a new appeals system reflected in the AMA. As a result of those reforms, VA maintained a 61-day average for completing its AMA workload (higher-level reviews and supplemental claims) in 2019[17], and, from February 2019 to the present, has reduced its overall legacy appeals inventory from over 400,000 to less than 200,000.[18]

Ultimately, the question the Court must decide is not whether veterans can ever obtain review of their disagreement with VA over interpretations in the Manual, as NOVA suggests, but which court provides that review at which stage in the process. Both the VJRA's creation of an appeals mechanism through the board and the Veterans Court with limited pre-enforcement review, and the well-established principle of administrative law that nonbinding and non-final agency interpretations are generally not reviewable before enforcement, strongly indicate that interpretations in the Manual are not reviewable under section 502.

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[17] VA, Periodic Progress Report on Appeals, February 2020 Update at 10, *available at* https://benefits.va.gov/benefits/docs/appeals-report-202002.pdf.

[18] VA, "VA hits major milestone in the resolution of legacy appeals" (July 6, 2020), *available at* https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5482.

D. The Court Should Not And Need Not Overturn *DAV*

The jurisdictional holding in *DAV* reflects the correct interpretation of section 502. The petitioner in *DAV* challenged VA revisions to Manual provisions designed to guide VBA adjudicators handling disability compensation claims from veterans suffering medically unexplained chronic multisymptom illnesses (MUCMI). *DAV*, 859 F.3d at 1074-75. The Court agreed with the Secretary that the MUCMI provisions fall under section 552(a)(2) because of where they are published and because they do not bind the board; by contrast, the Court held that petitioners failed to explain how the MUCMI provisions fall under section 552(a)(1). *Id.* ("Because DAV has not shown that the VA's revisions to the M21-1 Manual are actions of the Secretary subject to . . . § 552(a)(1) . . . we lack jurisdiction to review the M21-1 Manual revisions."). The Court also held that the MUCMI provisions "do not amount to § 553 rulemaking and do not carry the force of law." *Id.* at 1077 (citation omitted).

NOVA argues that *DAV* must be overturned because it incorrectly held that sections 552(a)(1) and (a)(2) are "mutually exclusive." Pet. Br. 32-38. But *DAV* did not hold that an interpretive rule is unreviewable simply because it is published in an administrative staff manual. *See Gray*, 884 F.3d at 1380 (Taranto, J.) (explaining that *DAV* did not treat sections 552(a)(1) and (a)(2) as "mutually exclusive in what they cover"). Rather, the *DAV* Court held that the petitioner

failed "to articulate why the [MUCMI provisions] amount to" interpretations referred to in section 552(a)(1)(D) "as compared to the interpretive rules subject to § 552(a)(2)(B)-(C)." *DAV*, 859 F.3d at 1078; *see also id.* at 1075 ("Section 502's express exclusion of agency actions subject to § 552(a)(2) renders the M21-1 Manual beyond our § 502 jurisdiction unless DAV can show the VA's revisions more readily fall under §§ 552(a)(1) or 553."); *see* NOVA Br. at 5-7, *NOVA v. Sec'y of Veterans Affairs*, No. 17-1839, 2019 WL 6837245 (2019) (similarly characterizing *DAV*). The Court's reference to section 552(a)(2)(B) reflects the VJRA's critical distinction between section 552(a)(1)(D) and section 552(a)(2)(B). And, because the petitioner in *DAV* failed to demonstrate why the MUCMI revisions necessarily fell under section 552(a)(1)(D) instead of section 552(a)(2)(B), the Court correctly dismissed the petition. *Id.* at 1078.

Nevertheless, because *DAV* did not expressly define "interpretations of general applicability" in section 552(a)(1)(D), we urge the Court to make clear that interpretations properly published in the Manual do not constitute "interpretations of general applicability" for the reasons explained above. This outcome is consistent with the most reasonable reading of FOIA and the APA, reflects the judicial review mechanisms provided in the VJRA, and would provide beneficial clarity to the veteran community.

II. Actions Seeking Pre-Enforcement Review Under Section 502 Are Governed By Section 2401(a) And Federal Circuit Rule 15(f)

Congress did not specify a time limit in the VJRA for actions seeking pre-enforcement review under 38 U.S.C. § 502. Several years after Congress enacted the VJRA, this Court established a 60-day deadline for such actions in Federal Circuit Rule 47.12(a), recently renumbered as Rule 15(f). As explained below, Rule 15(f) does not conflict with 28 U.S.C. § 2401(a), but governs section 502 actions in tandem with section 2401(a).

We agree with NOVA that section 2401(a) applies to section 502 claims, consistent with the Court's holding in *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1306-08 (Fed. Cir. 2008), and *Block v. Secretary of Veterans Affairs*, 641 F.3d 1313, 1318-19 (Fed. Cir. 2011). But NOVA's contention that section 2401(a) provides the *only* time limit applicable to section 502 claims is wrong. Pet. Br. 52-60. The statutory text—"every civil action commenced against the United States shall be barred unless the complaint is filed within six years after the right of action first accrues"— certainly commands dismissal of civil actions commenced more than six years after the right of action accrues. 28 U.S.C. § 2401(a). By its plain terms, however, it does not preclude this Court from adopting a shorter deadline in an authorized claim-processing rule like Rule 15(f).

NOVA identifies nothing aside from section 2401(a)'s text to suggest that Congress intended section 2401(a) to serve as the *only* time limit for claims under

statutes like section 502. Courts have rejected the contention that when section 2401(a) applies in the absence of a specific statutory time limit, it provides the only applicable time limit. *See Price v. Bernanke*, 470 F.3d 384, 388 (D.C. Cir. 2006) ("Though § 2401(a) sets an outside time limit on suits against the United States, there is nothing to suggest that Congress intended it to govern any time a court finds a cause of action without a specific limitations period."); *Edwards v. Shalala*, 64 F.3d 601, 605 (11th Cir. 1995) (same); *Lavery v. Marsh*, 918 F.2d 1022, 1026 (1st Cir. 1990) (same).

Instead, where Congress is silent as to the applicable time limit, courts are to "assume . . . that Congress intended to impose an appropriate period borrowed either from a state statute or from an analogous federal one." *Stevens v. Dep't of Treasury*, 500 U.S. 1, 7-8 (1991). This is true even where section 2401(a) applies to provide an outside time limit. *See, e.g., Price*, 470 F.3d at 388. The United States Code is replete with statutes that, analogous to section 502, authorize an appellate court's initial review of Federal agency rules and regulations and that require petitioners to act within 60 days. For example, the Hobbs Act, codified at 28 U.S.C. §§ 2341-2351, authorizes initial review in Federal courts of appeals of the rules, regulations, and orders of several Federal agencies, and requires that such actions be commenced within 60 days after the date of the challenged agency action. *Id.* at §§ 2342, 2344. And like section 502, many of these analogous

statutes direct the appellate court to review agency action "in accordance with" the APA's judicial review provisions. *See* 15 U.S.C. §§ 2060, 2618; 42 U.S.C. §§ 6306, 7607, 8412; *see also* 15 U.S.C. § 78y(b); 49 U.S.C. §§ 32909(b) (59 days), 30161(a).[19] The Court's rule giving petitioners 60 days to initiate actions under section 502, therefore, is consistent with analogous Federal statutes.

Even after 60 days, the Court possesses authority to hear challenges to the application of a VA rule or regulation—authority that undercuts NOVA's suggestion that Rule 15(f)'s deadline is unduly restrictive. *See Nat'l Labor Relations Bd. Union v. Fed. Labor Relations Auth.*, 834 F.2d 191, 195-97 (D.C. Cir. 1987). Veterans aggrieved by application of a VA action may obtain review of the validity of that action in an appeal to the Veterans Court, 38 U.S.C. § 7252; *see* 38 U.S.C. § 502 (cross-referencing 38 U.S.C. § 7292), and may seek further judicial review in this court under section 7292(a). In addition, veterans and interested organizations may petition VA for rulemaking under section 553(e) to adopt a new rule or regulation, or to amend an existing rule or regulation—regardless of when the rule or regulation was first published or amended—and seek review under section 502 if the petition is denied. *Preminger*, 632 F.3d at

[19] Likewise, Congress frequently provides parties 60 days within which to initiate review of agency actions or lower court decisions in this Court. *See, e.g.,* 5 U.S.C. §§ 7121, 7703(b)(1)(A)-(B), (d)(1)-(2); 7 U.S.C. § 2461; 19 U.S.C. § 1337(c); 28 U.S.C. §§ 2107 (if the United States is a party), 2522, 2645(c) (if the United States is a party); 38 U.S.C. § 7292; 42 U.S.C. § 300aa-12(f).

1352. The Court's adoption of Rule 15(f) does not, therefore, insulate VA actions from judicial review or deprive veterans of the opportunities to challenge VA rules and regulations permitted by Congress. Pet. Br. 55.

Moreover, even if the statutory text was insufficient to answer the Court's question, the limited indicia of congressional intent concerning section 502's time limit undermines NOVA's position. The VJRA's legislative history says nothing about Congress's alleged intent to allow petitioners to file section 502 claims years after the adoption or revision of a rule or regulation. Yet the Senate Report to the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, which authorized section 502 challenges to VA's schedule of ratings, reflects Congress's awareness and approval of the constraints imposed by Rule 15(f): "The committee notes that the . . . review of the ratings schedule would be circumscribed by . . . the Rules of the United States Court of Appeals for the Federal Circuit," which require that "an action seeking review of a rule or regulation must be filed within 60 days of the effective date of the rule or regulation." S. Rep. No. 110-449, at 14 (2008); *cf. Sears*, 349 F.3d at 1330. NOVA cannot establish, therefore, that Congress intended for section 2401(a) to serve as the sole time limit for section 502 claims. NOVA's challenge to Rule 15(a) must, consequently, fail.

NOVA's remaining arguments concerning Rule 15(f) similarly miss the

mark. NOVA argues that Rule 15(f) should be treated like laches, which the Supreme Court recently reiterated cannot defeat claims filed within a specific statutory time limit. Pet. Br. 53-54 (citing *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960-61 (2017)). But the statute of limitations in *SCA Hygiene*, 35 U.S.C. § 286, was enacted as part of the Patent Act itself, leaving no question that Congress intended the statute alone to govern claims under that act. *SCA Hygiene*, 137 S. Ct. at 959; *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 357 (2019) (addressing the Fair Debt Collection Practices Act's one-year statute of limitations, 15 U.S.C. § 1692k(d)); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014) (addressing the Copyright Act's three-year statute of limitations, 17 U.S.C. § 507(b)). Unlike the statutory time limits in *SCA Hygiene*, *Rotkiske*, and *Petrella,* section 2401(a) is not part of the VJRA and, therefore, does not "reflect[] a congressional decision" concerning section 502 claims authorized by the VJRA. Pet. Br. 54 (quoting *SCA Hygiene*, 137 S. Ct. at 960).

Further, unlike the equitable doctrine of laches, Rule 15(f) is a statutorily-authorized "claim-processing rule, serving 'to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times.'" *Hamer v. Neighborhood Hous. Servs. of Chi.*, 138 S. Ct. 13, 17-18 (2017) (quoting *Henderson*, 562 U.S. at 435)); *see Miner v. Atlass*, 363 U.S.

641, 648-49 (1960) (describing court-created time limits on "doing certain acts" as "the essence of orderly procedure"). NOVA rightly concedes that 28 U.S.C. § 2071(a) gives this Court "the power to 'prescribe rules for the conduct of [its] business[.]'" Pet. Br. 56 (quoting 28 U.S.C. § 2071(a)). Rule 15(f) does so in part by preventing veterans pursuing benefits through the statutorily-prescribed administrative claims process from jumping the line by directly challenging a rule or regulation that VA has already, initially applied to their claim. *Cf. Hilario v. Sec'y, Dep't of Veterans Affairs*, 937 F.2d 586, 588-89 (Fed. Cir. 1991) (finding no jurisdiction to consider a direct rule challenge where petitioner sought such review in lieu of challenging VA's application of the rule to his claim through the administrative appeals process). Far from overstepping the bounds of its "ken," Pet. Br. 54, therefore, Rule 15(f) falls squarely within the Court's statutory authority to control the conduct of its business.

NOVA next suggests that we conceded in past cases that section 2401(a) alone governs section 502 claims, but that is incorrect. Pet. Br. 53; *see Preminger*, 517 F.3d at 1306-08 (agreeing with the Government that section 2401(a) barred a 21-year old section 502 claim); *see also Block*, 641 F.3d at 1318-19. As noted, we agree with NOVA that section 2401(a) bars section 502 claims filed more than six-years after the accrual date, but that position is fully consistent with our long-held view, reiterated here, that section 2401(a) and Rule 15(f) govern in tandem. *See,*

e.g., Gov't Br. 13-14, *Brown v. Sec'y of Veterans Affairs*, No. 95-7067, 1996 WL 33453790 (1996) ("The absence of an express time limit in 38 U.S.C. § 502, however, does not reasonably support the conclusion that Congress intended . . . that only the general six-year time limit of 28 U.S.C. § 2401(a) would apply."); *Brown v. Sec'y of Veterans Affairs*, 124 F.3d 227, 1997 WL 488930, at *2 (Fed. Cir. 1997) (unpublished) (declining to "address the applicability or validity of [Rule 47.12(a)]" because the petition was filed "more than ten years after the regulations issued"). Section 2401(a) provides an "outside time limit on suits against the United States," *Price*, 470 F.3d at 388, but it does not mean that Congress intended for it to govern alone.

NOVA contends finally that Rule 15(f) is invalid because it conflicts with "jurisdiction conferred by statute," but this contention does not salvage NOVA's position. Pet. Br. 56 (quoting *Willy v. Coastal Corp*., 503 U.S. 131, 135 (1992)). Regardless of whether section 2401(a) is jurisdictional, claim-processing rules like Rule 15(f) are not jurisdictional because they do not "extend or restrict" the Court's pre-enforcement review jurisdiction. *See Henderson*, 562 U.S. at 435 ("Among the types of rules that should not be described as jurisdictional are what we have called 'claim-processing rules.' These are rules that seek to promote the orderly progress of litigation by requiring that the parties take certain procedural steps at certain specified times."); *see also Kontrick v. Ryan*, 540 U.S. 443, 444-45

(2004) (describing filing deadlines in the Bankruptcy Rules as "claim-processing rules that do not delineate what cases bankruptcy courts are competent to adjudicate"); *cf. Lance, Inc. v. Dewco Servs., Inc.*, 422 F.2d 778, 783-84 (9th Cir. 1970) (explaining that local rules "primarily . . . promote the efficiency of the Court"). Indeed, Rule 15(f) may be forfeited or waived in appropriate cases. *See Hamer*, 138 S. Ct. at 17-18. In all of the ways that NOVA contends, therefore, the conflicts between Rule 15(f) and section 2401(a) or the VJRA are illusory.

In the end, NOVA's failure to establish that Congress intended section 2401(a) to govern section 502 claims alone is fatal to its central contention that Rule 15(f) cannot "override" section 2401(a). Pet. Br. 54-58. Section 2401(a) erects an outside time limit on section 502 claims, while Rule 15(f) reflects this Court's considered view of the appropriate deadline for filing such claims. Thus, because Rule 15(f) does not "override" section 2401(a), but governs in tandem with it, the Court need not abandon the rule, which has served its intended purpose for nearly 30 years.

CONCLUSION

For these reasons, we respectfully request that the Court hold that it does not have jurisdiction pursuant to 38 U.S.C. § 502 to review nonbinding provisions in the Manual, and that Federal Circuit Rule 15(f) and 28 U.S.C. § 2401(a) govern petitions seeking pre-enforcement review under section 502.

Respectfully submitted,

ETHAN P. DAVIS
Acting Assistant Attorney General

ROBERT E. KIRSCHMAN, JR.
Director

/s/Martin F. Hockey, Jr.
MARTIN F. HOCKEY, JR.
Deputy Director

/s/Eric P. Bruskin
ERIC P. BRUSKIN
Assistant Director
Commercial Litigation Branch
Civil Division, Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044
Tel: (202) 307-5958
Fax: (202) 353-0461
Eric.Bruskin@usdoj.gov

Attorneys for Respondent

Of Counsel:

Y. KEN LEE
Deputy Chief Counsel

JULIE HONAN
Attorney
Benefits Law Group
Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 6th day of August, 2020, a copy of the foregoing "EN BANC BRIEF FOR RESPONDENT" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent's counsel certifies that this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 13,969 words.

/s/Eric P. Bruskin
Eric P. Bruskin
Counsel for Respondent