No. 20-1321

United States Court of Appeals for the Federal Circuit

NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITIONER'S UNOPPOSED MOTION FOR LEAVE TO FILE AMENDED PETITION FOR REVIEW

Roman Martinez
Blake E. Stafford
Shannon Grammel
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

October 16, 2020

Counsel for Petitioner

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Pursuant to Federal Rules of Appellate Procedure 27 and this Court's Order dated October 14, 2020 (ECF No. 99), Petitioner National Organization of Veterans' Advocates, Inc. (NOVA) respectfully requests leave to file the accompanying amended petition for review in this case (Am. Pet.). The amended petition makes two changes. *First*, it adds three individuals—Peter Cianchetta, Michael Regis, and Andrew Tangen—as petitioners in order to eliminate any concern about whether NOVA has Article III standing in this case. *Second*, the amended petition adds a challenge to *Agency Interpretation of Prosthetic Replacement of a Joint*, 80 Fed. Reg. 42,040 (July 16, 2015) (2015 Knee Replacement Guidance). Counsel for the Secretary of Veterans Affairs (VA) has indicated that VA has no objection to NOVA's motion to make these amendments.

BACKGROUND

1. NOVA's petition for review in this case, docketed on January 3, 2020, challenges the validity of two rules governing knee disability claims that VA promulgated in its Adjudication Procedures Manual M21-1 (Manual). ECF No. 1-2 (Pet.). The first rule is the Knee Replacement Rule, Manual § III.iv.4.A.6.a (promulgated November 21, 2016), which addresses the treatment of partial knee replacements under Diagnostic Code (DC) 5055 following this Court's decision in

Hudgens v. McDonald, 823 F.3d 630 (Fed. Cir. 2016). Pet. 1, 8-11.[1] The second rule is the Knee Joint Stability Rule, Manual § III.iv.4.A.6.d (promulgated April 13, 2018), which addresses the rating schedule for knee instability under DC 5257. Pet. 1, 11-15.

In the petition, NOVA explained that these challenges implicate two threshold questions worthy of initial en banc review: (1) whether this Court should overrule its decision in *Disabled American Veterans v. Secretary of Veterans Affairs* (*DAV*), 859 F.3d 1072, 1075-78 (Fed. Cir. 2017), and hold that it has jurisdiction under 38 U.S.C. § 502 to review interpretations of general applicability contained in the Manual, *see* Pet. 2-3 & n.2; and (2) whether this Court's local rule setting a 60-day deadline for filing Section 502 petitions impermissibly overrides the six-year limitations period contained in 28 U.S.C. § 2401(a), *see* Pet. 4-5. Moreover, NOVA explained that it has associational standing to raise these challenges under this Court's decision in *Disabled American Veterans v. Gober* (*Gober*), 234 F.3d 682, 689-90 (Fed. Cir. 2000). Pet. 5-7.

NOVA then filed a petition for initial hearing en banc on the two threshold questions identified above, ECF No. 11, as well as a motion to stay the briefing schedule during the pendency of the en banc petition, ECF No. 12. VA responded

[1] The current Section III.iv.4.A.6.a was added to the Manual as Section III.iv.4.A.3.e. It became Section III.iv.4.A.6.a on April 13, 2018.

to both filings, ECF Nos. 16, 45, and in neither response did VA question NOVA's standing to bring this action or challenge NOVA's characterization of the challenged Manual provisions as interpretations of VA statutes, regulations, and/or this Court's decision in *Hudgens*.

This Court granted NOVA's petition for initial hearing en banc and requested briefing on the same two questions raised in NOVA's en banc petition. ECF No. 50. The parties then filed their respective en banc briefs addressing those two questions along with a separate question, first raised in VA's en banc response brief, regarding APA finality. *See* ECF No. 53 (NOVA En Banc Br.); ECF No. 78 (VA En Banc Br.); ECF No. 84 (NOVA En Banc Reply Br.). Once again, VA did not challenge NOVA's standing, and neither party's briefing discussed NOVA's standing. And VA conceded that both challenged Manual provisions were interpretations of legal provisions and/or of *Hudgens*. *See* VA En Banc Br. 9, 19 n.8.

2. On September 15, 2020, this Court issued an order requesting supplemental briefing on NOVA's standing. ECF No. 87. In its order, the Court asked whether the allegations in NOVA's petition for review were sufficient to establish its associational standing, whether NOVA had evidence to support its associational standing, and whether NOVA had standing under any theory other than associational standing. *Id.* at 1-2. The Court did not invite briefing on whether to overrule its precedential decision in *Gober*, which was not mentioned in the order.

On September 22, 2020, NOVA filed its supplemental brief. ECF No. 89 (NOVA Supp. Br.). As NOVA asserted in its petition for review, NOVA explained in its supplemental brief that it has associational standing under this Court's decision in *Gober*. *Id.* at 2-7. But to dispel doubt, NOVA also submitted evidence demonstrating its associational standing. *Id.* at 7-13. Relevant here, NOVA submitted declarations by Mr. Cianchetta, Mr. Regis, and Mr. Tangen, three of its veteran members currently suffering from knee disabilities who have been receiving, or are currently seeking, disability benefits governed by the Knee Rules. *Id.* at 8-10. Finally, NOVA noted that, should the Court have concerns about NOVA's standing, it should allow the joinder of individual petitioners—including Mr. Cianchetta, Mr. Tangen, and Mr. Regis—who undeniably have standing in their own right. *Id.* at 15 (citing *Mentor H/S, Inc. v. Med. Device Alliance, Inc.*, 240 F.3d 1016, 1019 (Fed. Cir. 2001) (per curiam)). NOVA noted, moreover, that all three veterans have agreed to adopt the arguments set forth in NOVA's briefs and at oral argument, without any need for further briefing. *Id.*

VA filed its supplemental brief on September 29, 2020. ECF No. 91 (VA Supp. Br.). For the first time in this case—and for the first time in 20 years since the Court decided *Gober*—VA claimed that NOVA lacks standing. In making this argument, VA urged the Court to depart from *Gober*, *id.* at 3-4, 7, and then asserted that NOVA's evidence of individual members' standing is insufficient, *id.* at 8-10.

With respect to Mr. Cianchetta and Mr. Regis, VA did not dispute that they currently have standing; VA merely argued that they lacked standing in January 2020 (when NOVA's petition was filed) because they did not have a pending claim at a regional office. *Id.* And with respect to Mr. Tangen, VA claimed that his injury is "hypothetical" because he does not currently have a pending claim before VA. *Id.* at 9-10. VA did not object to NOVA's request that the Court allow NOVA to add new petitioners to eliminate any standing concerns.

On October 2, 2020, NOVA filed its supplemental reply brief. ECF No. 96 (NOVA Supp. Reply Br.). With respect to the three individual members, NOVA refuted VA's assertion that they would not have had standing at the time NOVA filed its petition. *Id.* at 1-3. But NOVA also explained that the Court need not reach this question because post-filing events can cure standing deficiencies if raised in a supplemental filing. *Id.* at 3-4 (citing *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008)).

3. On October 8, 2020, the Court held oral argument and dedicated the initial segment of the argument to the question of standing. *See* Oral Arg. 00:20-30:07 (ECF No. 98), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1321_10082020.mp3. During this segment, VA conceded that Mr. Cianchetta and Mr. Regis currently have standing because they have benefits claims pending at the regional-office level that will be affected by the challenged Knee Rules. *Id.* at 19:27-

20:09. VA found Mr. Tangen's standing to pose a "more difficult question" because he does not have a currently pending claim, but VA acknowledged Mr. Tangen's intent to file a claim should NOVA's challenge to the Knee Joint Stability Rule succeed. *Id.* at 20:02-20:29. And VA agreed that, under *Prasco*, allowing NOVA to amend the petition to add these three individuals as petitioners could solve any concerns about NOVA's standing. *Id.* at 20:30-21:14. At the conclusion of this segment, Judge Dyk recommended filing a petition on behalf Mr. Cianchetta, Mr. Regis, and Mr. Tangen to eliminate concerns about NOVA's standing. *Id.* at 29:18-29:53.[2]

4. On October 14, 2020, the Court issued an order inviting NOVA to move for leave to file an amended petition to include a challenge to the 2015 Knee Replacement Guidance. ECF No. 99 at 1-2. The validity of the 2015 Knee Replacement Guidance was challenged in *Hudgens*, where the Court rejected its impermissible interpretation of DC 5055. 823 F.3d at 637-39. Following *Hudgens*,

[2] Judge Dyk recommended filing a new petition on behalf of these three individuals and moving to consolidate that petition with NOVA's petition. We will be heeding that advice by filing a protective petition for review and motion to consolidate on behalf of Mr. Cianchetta, Mr. Regis, and Mr. Tangen, in the event the Court denies this motion to amend. But consolidating separate petitions may still require the Court to resolve NOVA's standing in order to dispose of NOVA's petition. *See Gober*, 234 F.3d at 688-89 (addressing NOVA's standing in a case consolidated with three other cases). Allowing an amended petition in this case that joins the individual petitioners would readily eliminate the need to address NOVA's standing. *See infra* at 10-11.

VA added the Knee Replacement Rule to the Manual. The Knee Replacement Rule interprets *Hudgens* to reject the 2015 Knee Replacement Guidance only with respect to claims pending before July 16, 2015, and instructs Regional Office staff to deny ratings under DC 5055 for partial knee replacement claims filed after that date. Appx108-09; *see* NOVA En Banc Br. 11-13; *see also* Appx160 (proposing this change to the Manual based on a misinterpretation of *Hudgens*).

ARGUMENT

The Court should grant this motion to amend the petition for review. NOVA seeks to add three additional petitioners in order to eliminate concerns about Article III standing and to add an independent challenge to the 2015 Knee Replacement Guidance alongside its existing challenge to the Knee Replacement Rule. Allowing these amendments will confirm that this Court can reach the merits of the interpretations challenged in this case and ensure that the Court can decide the extraordinarily important threshold issues that it granted en banc review to decide.

1. The Court should allow Mr. Cianchetta, Mr. Regis, and Mr. Tangen to join as petitioners in this case. Although NOVA adheres to its position that it has Article III standing for the reasons explained in its supplemental briefs, allowing these individual members to join as petitioners would eliminate the need to rely on NOVA's associational or direct standing.

The Supreme Court has long recognized that "appellate courts" have "inherent power" to "correct jurisdictional defects" when dismissal "would impose unnecessary and wasteful burdens on the parties, judges, and other litigants waiting for judicial attention." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 836 (1989) (citing *Mullaney v. Anderson*, 342 U.S. 415, 417 (1952)). This power includes the ability to allow new parties to enter a pending case to overcome unnecessary disputes about standing. *Mullaney*, 342 U.S. at 416-17; *see, e.g.*, *Mentor H/S, Inc. v. Med. Device All., Inc.*, 244 F.3d 1365, 1373 (Fed. Cir. 2001).

The Supreme Court's decision in *Mullaney* is squarely on point. There, the defendant-petitioner "questioned the [associational] standing" of the plaintiff-respondent, a union suing on behalf of its members, for the first time in the Supreme Court. 342 U.S. at 416. "At the time, it was not clear that unions had standing to sue on behalf of their members." *Newman-Green*, 490 U.S. at 834 n.8. Thus, "[t]o remove the matter from controversy," the Court granted the union's motion "for leave to add as parties plaintiff two of its members" who were "subject to" the rule being challenged. *Mullaney*, 342 U.S. at 416-17. In doing so, the Court cited Federal Rule of Civil Procedure 21, which "authorize[d] the addition of parties 'by order of the court on motion of any party or of its own initiative at any stage of the action and

on such terms as are just.'" *Id.* at 417.[3] The Court explained that adding the individual union members as plaintiffs would not "affect[] the course of the litigation" or otherwise "embarrass the defendant," and that "dismiss[ing] the present petition and requir[ing] the new plaintiffs to start over in the District Court would entail needless waste and runs counter to effective judicial administration." *Id.*

Similarly, in *Mentor*, this Court allowed the "appellate joinder" of a plaintiff patentee to "cure[] a technical jurisdictional defect" in a licensee's standing. 244 F.3d at 1373. The Court explained that "[a]ppellate joinder under [Rule] 21" is appropriate to cure a standing defect "when a change in the parties will not affect the litigation or embarrass the defendant." *Id.* (citing *Newman-Green*, 490 U.S. at 837). And in that case, the court found that "joinder would not prejudice the defendants" because the addition of the new plaintiff did not deprive defendants of any necessary "discovery" or otherwise alter the course of the litigation. *Id.* The Court also noted that "no party [had] raised the issue of standing in this case, even

[3] Rule 21 was amended in 2007, but the substance is the same. *See* Fed. R. Civ. P. 21 ("On motion or on its own, the court may at any time, on just terms, add or drop a party."). And although the Federal Rules of Civil Procedure technically apply only to district courts, *see* Fed. R. Civ. P. 1, the Supreme Court reaffirmed *Mullaney*'s reliance on Rule 21 at the appellate level in *Newman-Green*, explaining that "the policies informing Rule 21 may apply equally to the courts of appeals" because they "represent[] the exercise of an appellate power" to correct jurisdictional defects "that long predates the enactment of the Federal Rules." 490 U.S. at 832-34.

on appeal"; rather, the Court had *sua sponte* "invited and received briefs on the issue." *Id.* Thus, rather than unnecessarily "dismiss[ing] th[e] case for lack of jurisdiction," the court joined the new "plaintiff to retroactively cure a jurisdictional defect," allowing it to "proceed to the merits." *Id.*

Under *Mullaney* and *Mentor*, the Court should allow Mr. Cianchetta, Mr. Regis, and Mr. Tangen to join this case as petitioners. For starters, allowing them to join the case would "remove the [question of NOVA's standing] from controversy." *Mullaney*, 342 U.S. at 416. Article III is satisfied as long as "at least one petitioner" has standing. *Horne v. Flores*, 557 U.S. 433, 445 (2009). And as NOVA explained in its supplemental briefing, Mr. Cianchetta, Mr. Regis, and Mr. Tangen each has standing in his own right, as each is "subject to" one of the Knee Rules being challenged in this case. *Mullaney*, 342 U.S. at 416-17; *see* NOVA Supp. Br. 8-10; NOVA Supp. Reply Br. 1-4.[4] Specifically, Mr. Cianchetta, who recently underwent a partial knee replacement and filed a supplemental claim for disability

[4] Granting this motion to amend the petition would also formally alleviate any question about whether these individuals had standing at the time NOVA filed its petition in January 2020, because the operative pleading would become—and the time for assessing standing would be based on—the amended petition. *See Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008) ("[S]upplemental pleadings can be used to cure subject matter jurisdiction deficiencies."). Although NOVA continues to contend that these individuals had standing in January 2020, *see* NOVA Supp. Reply Br. 2-3, the parties agree that an amended petition would take that issue off the table under *Prasco*, *see id.* at 3-4; Oral Arg. 20:33-21:03.

benefits, has standing to challenge both the Knee Replacement Rule and the 2015 Knee Replacement Guidance. *See* NOVA Supp. Br. 8-9; NOVA Supp. Reply Br. 2-3; Cianchetta Decl. ¶¶ 4-9; *see also infra* at 18. And Mr. Regis and Mr. Tangen, who both suffer from knee joint instability and are accordingly entitled to knee disability benefits, have standing to challenge the Knee Joint Stability Rule. *See* NOVA Supp. Br. 9-10; NOVA Supp. Reply Br. 3; Regis Decl. ¶¶ 4-9; Tangen Decl. ¶¶ 4-6. Notably, VA itself conceded at oral argument that Mr. Ciancetta, Mr. Regis, and (possibly) Mr. Tangen have standing to challenge the respective rules bearing on each one's particular situation. Oral Arg. 19:27-20:23.

Allowing these individual NOVA members to join as petitioners would not prejudice or otherwise "embarrass" VA. *Mullaney*, 342 U.S. at 417. Unlike cases in which "joinder would have prejudiced [the opposing party] because it was unable to conduct discovery on the non-joined party," *Mentor*, 244 F.3d at 1373, the questions in this case are purely legal questions concerning the validity of the Knee Rules. So too for the questions submitted to the en banc Court: They are purely legal questions concerning the Court's Section 502 jurisdiction and the timing requirements for Section 502 petitions. There are no fact-bound issues in this case.[5]

[5] Granting this motion to amend will not affect the timeliness of the petition: The challenges to the Knee Replacement Rule, 2015 Knee Replacement Guidance, and Knee Joint Stability Rule remain timely under Section 2401(a)'s six-year limitations period. *See* Pet. 4-5; Am. Pet. 4-5.

And Mr. Cianchetta, Mr. Regis, and Mr. Tangen fully adopt NOVA's existing briefing and argument. *See* Cianchetta Decl. ¶ 10; Regis Decl. ¶ 10; Tangen Decl. ¶ 8; NOVA Supp. Br. 15; NOVA Supp. Reply Br. 3-5 & n.3. Thus, joining the three individual NOVA members as petitioners will neither "affect[] the course of the litigation," *Mullaney*, 342 U.S. at 417, nor "prejudice" VA in any way, *Mentor*, 244 F.3d at 1373. Indeed, VA has consented to their joinder in this case.

Furthermore, "no party here raised the issue of standing in this case," *Mentor*, 244 F.3d at 1373; rather, the issue first came up in the Court's *sua sponte* request for supplemental briefing. The parties had no reason to address NOVA's standing given the Court's existing precedent in *Gober*, and VA's late-breaking assertion that NOVA lacks standing would require the Court to revisit that precedent. These "rare[]" and "special circumstances" certainly counsel in favor of joining new petitioners. *Mullaney*, 342 U.S. at 417; *cf. Balgowan v. New Jersey*, 115 F.3d 214, 217 (3d Cir. 1997) (allowing joinder of new parties on appeal because of a "change in the law effected by [intervening precedent]").

Finally, dismissing this petition and requiring "the new [petitioners] to start over" would "entail needless waste and run[] counter to effective judicial administration." *Mullaney*, 342 U.S. at 417. As evidenced by the Court's grant of initial hearing en banc, the issues in this case—particularly the threshold issues pending before the en banc Court—are of considerable importance to our Nation's

veterans. Indeed, the Supreme Court agreed to resolve the question of this Court's jurisdiction under Section 502, but the case was ultimately dismissed as moot. *See Gray v. Wilkie*, 139 S. Ct. 2764 (2019). Now that this issue has been re-briefed and argued before this Court sitting en banc, there is no reason to delay its resolution yet again based on a readily solvable concern about NOVA's standing that exists only if this Court unexpectedly revisits its longstanding decision in *Gober*.

2. Pursuant to the Court's October 14, 2020 Order (ECF No. 99), NOVA also seeks leave to add a direct challenge to the 2015 Knee Replacement Guidance, 80 Fed. Reg. 42,040. In doing so, however, NOVA welcomes the opportunity to provide the Court with additional clarity as to why its challenge to the Knee Replacement Rule—and not merely to the 2015 Knee Replacement Guidance—is also appropriate.

a. NOVA's existing challenge to the Knee Replacement Rule that appears in the Manual § III.iv.4.A.6.a (Appx108-109) is subject to this Court's Section 502 jurisdiction. In *Hudgens v. McDonald*, 823 F.3d 630, 637-39 (Fed. Cir. 2016), this Court conclusively rejected VA's interpretation that DC 5055 applies only to total knee replacements, and not to partial knee replacements. In doing so, it directly considered—and rejected—the validity of the 2015 Knee Replacement Guidance, which VA had promulgated in the Federal Register as an explanatory note to be added to 38 C.F.R. § 4.71a. Although the Guidance amended Section 4.71a, VA had

made the express and deliberate choice to issue it as an "interpretive rule" that was accordingly not subject to "prior opportunity for public comment" under 5 U.S.C. § 553. 80 Fed. Reg. at 42,041. In *Hudgens*, this Court rejected the Guidance as a "*post hoc* rationalization" that was inconsistent with (1) DC 5055's text; (2) the pro-veteran canon of construction recognized in *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994); and (3) VA's longstanding interpretation of DC 5055 as applying to both total and partial knee replacements. 823 F.3d at 637-39.

By rejecting the 2015 Knee Replacement Guidance's interpretation of DC 5055, *Hudgens* established that the Guidance was invalid and no longer operative. Indeed, VA later acknowledged as much in a decision issued by the Board of Veterans' Appeals (Board). *See [Title Redacted]*, No. 10-47 269, 2017 WL 3921565, at *9-10 (Bd. Vet. App. July 26, 2017) (refusing to apply 2015 Knee Replacement Guidance in light of *Hudgens*). Nonetheless, after *Hudgens* VA headquarters misinterpreted *Hudgens* as somehow applying only to claims filed before July 16, 2015—the date the Guidance was published. Appx160. Based on that misinterpretation, VA added the Knee Replacement Rule to the Manual, instructing its adjudicators to apply the discredited interpretation contained in the 2015 Knee Replacement Guidance to claims filed after that date. Appx108-109.

Because *Hudgens* had already decisively rejected the 2015 Knee Replacement Guidance, NOVA did not originally challenge that Guidance in its petition. Instead,

NOVA challenged the Knee Replacement Rule that VA added to the Manual. That is a new and independent agency action reflecting VA's decision to continue applying the interpretation contained in the Guidance, even though this Court has already concluded that this interpretation is unlawful and should no longer be operative. As NOVA has argued, the Knee Replacement Rule qualifies as an "interpretation of general applicability" for purposes of Section 502's cross-reference to 5 U.S.C. § 552(a)(1)(D), insofar as it both (1) interprets *Hudgens* to apply only to claims pre-dating the 2015 Knee Replacement Guidance, and (2) re-asserts VA's endorsement of the (already invalidated) interpretation contained in that Guidance. Pet. 9-11; NOVA En Banc Br. 12-13.[6]

Although VA disputes NOVA's assertion that the Knee Replacement Rule is "of general applicability," it has conceded that the Rule qualifies as an interpretive

[6] A helpful analogy here is the "reopening" doctrine, which applies when an agency issues a rule and then, in a later promulgation, demonstrates that it has reexamined and reaffirmed its "original decision." *CTIA-Wireless Ass'n v. FCC*, 466 F.3d 105, 110 (D.C. Cir. 2006) (collecting cases). In that circumstance, "the matter has been reopened," the agency has issued a new agency action, and "the time period for seeking judicial review [of that action] begins anew." *Id.* (citation omitted). NOVA contends that *Hudgens* invalidated the 2015 Knee Replacement Guidance, such that the only operative interpretation is that contained in the Manual. But at a minimum, the Manual provision demonstrates that VA reexamined and reaffirmed its interpretation of DC 5055 in the wake of *Hudgens*, and constitutes an independent agency action. This is not a case, in other words, where the Manual provision being challenged simply parrots a fully-operative interpretive rule that VA has previously issued elsewhere and that has not already been rejected by this Court.

rule. VA En Banc Br. 9, 19 n.8.[7] Moreover, VA has not argued that the 2015 Knee Replacement Guidance has any independent ongoing force or validity after *Hudgens*—*except* to the extent that the Knee Replacement Rule requires regional adjudicators to apply that Guidance to claims filed after July 16, 2015. On the contrary, VA's arguments throughout this case strongly suggest that it believes the Guidance lacks any independent force apart from its reaffirmation in the Knee Replacement Rule. As we understand it, VA's position is that the Board is not bound to interpret DC 5055 in accordance with the Guidance—and has authority to reject that Guidance—because it is not bound by the Manual's Knee Replacement Rule. *See, e.g.*, VA En Banc Br. 31-33; *[Title Redacted]*, 2017 WL 3921565, at *9-10. Indeed, VA has repeatedly implied to the Court that veterans will be able to challenge VA's interpretation of the DC 5055 in when appealing any adverse regional-office decision to the Board. VA En Banc Br. 30-31.

That position only makes sense, however, if the 2015 Knee Replacement Guidance no longer has any independent force of its own after *Hudgens*. After all,

[7] Even if the Knee Replacement Rule were deemed not to be an "interpretation[]," NOVA has made clear that it would nonetheless trigger Section 502 as a "statement[] of general policy," also under Section 502's cross-reference to 5 U.S.C. § 552(a)(1)(D). NOVA En Banc Br. 22-23 n.5. At a very minimum, the Rule establishes VA's general policy of requiring all Regional Office adjudicators to apply the 2015 Interpretive Rule (instead of *Hudgens*) to claims filed after July 16, 2015.

if it *did* have such force, the Guidance would be binding on the Board under 38 U.S.C. § 7104(c), because that Guidance—even though it is merely an interpretive rule—would qualify as a "regulation[] of the Department." *See* 80 Fed. Reg. at 42,040-42 (describing 2015 Knee Replacement Guidance as an "amendment[]" to VA's "regulations" and explaining that it adds an "explanatory note" to 38 C.F.R.§ 4.71a indicating that partial knee replacements do not count as "prosthetic replacement[s]"). Surely if VA believed that the Guidance was binding on the Board, it would have said so at some point in this litigation.[8]

In short, NOVA's view is that *Hudgens* invalidated the 2015 Knee Replacement Guidance, and that the Knee Replacement Rule improperly seeks to bring that Guidance back to life by requiring regional adjudicators to apply it in certain case involving DC 5055 and partial knee replacements. The Rule's misinterpretation of *Hudgens*—and its renewed affirmation of the 2015 Knee

[8] It is theoretically possible that VA might argue that the 2015 Knee Replacement Guidance retains independent operative force (separate and apart from the Knee Replacement Rule) but is *not* a "regulation[]" and thus is *not* binding on the Board under 38 U.S.C. § 7104(c). If so, VA would then presumably also argue that the Guidance is not "of general applicability" for purposes of Section 502's cross reference to Section 552(a)(1)(D)—and thus is not reviewable by this Court. As NOVA has explained, however, Section 552(a)(1)(D) does not turn on whether an interpretation is binding on the Board. NOVA En Banc Br. 38-44; NOVA En Banc Reply Br. 6-17. If this Court concludes that the Knee Replacement Guidance has independent force but is not binding on the Board, it should hold that the Guidance is nonetheless reviewable under Section 502 and 552(a)(1)(D), for the same basic reasons argued in NOVA's en banc merits brief.

Replacement Guidance—make the Rule an "interpretation of general applicability" subject to this Court's review under Section 502's cross-reference to Section 552(a)(1)(D).

b. Although this Court has jurisdiction over NOVA's challenge to the Knee Replacement Rule, NOVA welcomes the Court's invitation to add, as an additional claim, a challenge to the 2015 Knee Replacement Guidance itself. Adding that challenge would allow this Court to apply *Hudgens* and reject the Guidance (for the second time), even if the Court concludes that it lacks jurisdiction to hear NOVA's challenge to the Knee Replacement Rule.

There is no question that—to the extent the 2015 Knee Replacement Guidance has ongoing force and effect, either independently or through its reaffirmation under the Knee Replacement Rule—this Court has jurisdiction to review it. NOVA and Mr. Cianchetta have standing to challenge the Guidance for the reasons discussed above and in NOVA's supplemental briefs addressing standing. NOVA Supp. Br. 8-10; NOVA Supp. Reply Br. 2-3. Section 502 authorizes judicial review of the Guidance because it is an "interpretation[] of general applicability formulated and adopted by the agency," 5 U.S.C. § 552(a)(1)(D), and because it purports to be an "amendment" of 38 C.F.R. § 4.71a, 5 U.S.C. § 552(a)(1)(E); *see* 80 Fed. Reg. at 42,040-41. The Guidance itself declares that it is a "final rule." 80 Fed. Reg. at

42,040. And it was promulgated in July 2015, *see id.*, within 28 U.S.C. § 2401(a)'s six-year statute of limitations.

Moreover, granting NOVA leave to add this challenge will not prejudice VA or change the course of this litigation. The merits of NOVA's challenges to the rules have not yet been briefed or argued, and the 2015 Knee Replacement Guidance was clearly discussed in NOVA's initial petition for review. *See* Pet. 8-11. Nor would adding this challenge to the 2015 Knee Replacement Guidance impede resolution of either of the threshold issues before the en banc Court. Indeed, it would not prevent the Court from reaching—and deciding—whether it has Section 502 jurisdiction over both the Knee Replacement Rule and the Knee Joint Stability Rule.[9]

[9] NOVA does not seek to amend its challenge to the Knee Joint Stability Rule. Although there was some discussion at oral argument about whether NOVA might wish to challenge the Rule as a legislative rule, *see* Oral Arg. 01:46:40-01:48:30, the Rule is not a legislative rule because, as a Manual provision, it lacks "the 'force and effect of law.'" *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 96 (2015); *see DAV*, 859 F.3d at 1077; *Splane v. West*, 216 F.3d 1058, 1064 (Fed. Cir. 2000). VA never consummated its initial effort to promulgate a version of the Knee Joint Stability Rule as a legislative rule. *See* 82 Fed. Reg. 35,719, 35,720-23 (proposed Aug. 1, 2017). Its dubious tactic of instead seeking a similar result by promulgating the Rule in the Manual does not make the Rule a legislative rule—but it does expose the Rule to judicial review as an "interpretation of general applicability" under Section 502 and Section 552(a)(1)(D).

CONCLUSION

For the foregoing reasons, NOVA respectfully requests leave to file an amended petition for review in this case.

Dated: October 16, 2020

Respectfully submitted,

/s/ Roman Martinez

Roman Martinez
Blake E. Stafford
Shannon Grammel
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200
roman.martinez@lw.com

Counsel for Petitioner

CERTIFICATE OF INTEREST

Case Number 20-1321

Short Case Caption *NOVA, Inc. v. Secretary of Veterans Affairs*

Filing Party/Entity National Organization of Veterans' Advocates, Inc., Petitioner

I certify the following information is accurate and complete to the best of my knowledge.

Date: October 16, 2020 Signature: */s/ Roman Martinez*
Name: Roman Martinez

1. **Represented Entities**. Provide the full names of all entities represented by undersigned counsel in this case.

National Organization of Veterans' Advocates, Inc.

2. **Real Party in Interest.** Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

3. **Parent Corporations and Stockholders.** Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.

None.

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

Not applicable.

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

NOVA v. Secretary of Veterans Affairs, No. 17-1839 (Fed. Cir.).

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

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

None/Not Applicable.

CERTIFICATE OF COMPLIANCE

I hereby certify that this motion complies with the type-volume limitations of Federal Rule of Appellate Procedure 27(d)(2)(A) because it contains 3,971 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 27(d).

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

Dated: October 16, 2020

/s/ Roman Martinez
Roman Martinez