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.

REPLY BRIEF OF PETITIONER ON HEARING EN BANC

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September 8, 2020

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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: September 8, 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.

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INTRODUCTION

VA's strategy in this case is to ignore the straightforward text of the relevant statutes and urge this Court to interpret them to make it as hard as possible for veterans to obtain preenforcement judicial review of VA interpretive rules. VA's arguments on both questions presented (along with the new finality issue raised in VA's brief) are contrary to the statutory text, find no support in the case law or elsewhere, and defy the clear intent of Congress.

First, VA largely ignores (or tries to re-write) the statutory text bearing on this Court's jurisdiction under 38 U.S.C. § 502. VA has no coherent answer to NOVA's point that—as a matter of plain meaning *and* in the special context of administrative law—"interpretations of general applicability" under 5 U.S.C. § 552(a)(1)(D) are legal interpretations governing entire classes of persons, rather than just specific individuals. Instead, VA insists that interpretations are "of general applicability" only if they are "binding"—a requirement it invents out of thin air. VA also urges this Court to reject jurisdiction based on Section 502's cross-reference to 5 U.S.C. § 553, which VA says does not "apply" to interpretive rules. But the text of the cross-reference grants jurisdiction over agency actions to which Section 553 "*refers*," and VA does not (and cannot) deny that Section 553 twice expressly refers to interpretive rules.

Second, VA argues that the challenged Manual provisions are not "final agency action" under the Administrative Procedure Act (APA), 5 U.S.C. § 704. But Section 704 itself makes clear that its finality requirement does not apply here. And even if it did, it would readily be satisfied, because the challenged interpretations reflect VA's formal determination of what the Diagnostic Codes mean and provide binding direction to Regional Office (RO) adjudicators empowered to issue final decisions on benefits claims.

Third, VA's defense of the 60-day deadline for filing Section 502 petitions is even less persuasive. After conceding that 28 U.S.C. § 2401(a)'s six-year limitations period governs Section 502 petitions, VA nonetheless contends that this limitations period somehow operates "in tandem" with the 60-day period created by this Court's local rules. But two different limitations periods cannot govern at the same time—the shorter period will necessarily override the longer one. Here, the court-created 60-day deadline cannot override the longer period set by Congress. The 60-day deadline is invalid, and NOVA's petition is timely.

All of VA's threshold procedural arguments therefore fail. This case should proceed to the merits.

ARGUMENT

I. SECTION 502 AUTHORIZES REVIEW OF THE CHALLENGED M21-1 MANUAL PROVISIONS

A. The Court Has Jurisdiction Under Section 502's Cross-Reference To Section 552(a)(1)

The challenged Manual provisions are reviewable under Section 502 because they are "interpretations of general applicability" under 5 U.S.C. § 552(a)(1)(D). VA concedes (at 9) they are interpretations, and they are "of general applicability" because they apply to an entire class of veterans rather than just specific individuals. That understanding of "general applicability" tracks both the ordinary meaning of the statutory text and the well-settled usage of that phrase—and its counterpart, "particular applicability"—throughout administrative law. NOVA Br. 18-32. VA's assorted arguments to the contrary lack merit.

1. VA Ignores The Ordinary And Settled Meaning Of "Interpretations Of General Applicability"

a. VA cannot deny that undefined statutory terms normally bear their ordinary meaning. VA prevailed under this fundamental principle just last week. *See Gumpenberger v. Wilkie*, — F.3d —, 2020 WL 5167354, at *2 (Fed. Cir. Sept. 1, 2020). Yet VA does not even pay lip-service to that principle here, much less explain how the ordinary meaning of "general applicability" supports its interpretation.

Nor does VA deny that NOVA's interpretation of "general applicability" comports with the phrase's ordinary meaning. As dictionaries confirm, an interpretation of "general applicability" is one that applies to an entire class of persons or situations, rather than just specific individuals or scenarios. NOVA Br. 18-20. The challenged Manual provisions plainly fall within that definition. *Id.* at 22. That resolves the issue in NOVA's favor.

b. VA also jettisons another interpretive principle the Government regularly advances to the Supreme Court: that statutory terms in administrative-law cases should reflect their "customary usage in administrative law." Gov't Br. 22, *Smith v. Berryhill*, 139 S. Ct. 1765 (2019) (No. 17-1606), 2018 WL 6706084. Here, as NOVA explained, the term "general applicability" has long been used to refer to legal provisions applicable to entire classes of persons or situations, including in the original APA, the Congressional Review Act, 1 C.F.R. § 1.1, and guidance issued by the Office of Management and Budget (OMB), the IRS, and the Navy. NOVA Br. 23-32.

VA ignores this line of NOVA's argument, merely noting in passing (at 17) NOVA's "rel[iance] on other sources." But VA offers no reason to conclude that Congress intended the "general applicability" phrase in Section 552(a)(1)(D) to bear some idiosyncratic meaning different from its standard administrative-law usage. VA cites nothing indicating that any agency has ever understood "general

applicability" to mean "binding," and it does not even try to square its theory with 1 C.F.R. § 1.1 and the IRS, Navy, and OMB documents cited in NOVA's brief.

c. The opposite of "general applicability" is not non-binding—it is *particular* applicability. The dichotomy between general and particular applicability has been written into the APA and FOIA from the start. NOVA Br. 24-25; *see* 5 U.S.C. § 551(4). That dichotomy underlies the distinction between "interpretations of general applicability" in Section 552(a)(1)(D), which must be published, and mere "interpretations" under Section 552(a)(2)(B), which need not. *See Nguyen v. United States*, 824 F.2d 697, 700 & n.5 (9th Cir. 1987). Indeed, FOIA's legislative history is clear that Congress used the "general applicability" language in Section 552(a)(1)(D) to exempt interpretations of *particular* applicability from the publication requirement. *See* NOVA Br. 26-27.

VA's brief ignores this legislative history and does not engage at all with the concept of particular applicability. That is because doing so proves the irrelevance of binding effect—for whether a rule is of particular applicability has nothing to do with whether it is binding. For instance, both "the prescription of future rates for a single named utility" (*Attorney General's Manual on the Administrative Procedure Act* 13 (1947) (*APA Manual*)) and an agency's "advisory interpretation relating to a specific set of facts" (*id.* at 22-23) are rules of particular applicability. The former is binding; the latter is not. *See also* 142 Cong. Rec. 8201 (1996) (listing binding

and non-binding rules of particular applicability). What makes a rule "of *particular* applicability" is its applicability to specified individuals or circumstances. *See* NOVA Br. 21, 23-32. And here, the challenged Manual provisions are plainly interpretations of general, not particular, applicability.

2. VA's "Binding" Requirement Is Unfounded

VA insists (at 27) that interpretations are "of general applicability" only if they "have a 'binding effect' on the agency or interested members of the public." This "binding" requirement has no statutory basis. In trying to justify it, VA misleadingly treats authorities saying that binding rules must be published (a point no one disputes) as if they said *only* binding rules must be published. Nothing in the statute supports VA's phantom "binding" requirement.

a. VA argues (at 17-18) that the word "general" in the phrase "interpretation of general applicability" cannot mean "broader than one person or case" because that would make it superfluous in the neighboring phrase "statements of general policy." According to VA (at 17), "a 'policy' necessarily extends to more than one person or case." VA is mistaken—in fact, the statute's reference to "statements of general policy" supports *NOVA's* interpretation.

Agency policy statements describe "the manner in which the agency proposes to exercise a discretionary power." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 n.31 (1979) (quoting *APA Manual* 30 n.3). VA is wrong to assume that policy statements

always apply to more than one person or case. Just as agencies can issue interpretations based on specific sets of facts, so too can they state how they would exercise policy discretion in particular scenarios. In response to a request for particularized guidance, an agency can state whether it would be likely to, say, grant a permit or bring an enforcement action under the specified circumstances. Such a case-specific guidance document is a "statement[] of policy" under Section 552(a)(2)(B), while an analogous document that broadly applies to entire classes of persons or facts is a "statement[] of general policy" under Section 552(a)(1)(D). NOVA's interpretation creates no superfluity problem.

If anything, Section 552(a)(1)(D)'s reference to "statements of general policy" undermines VA's argument that "general" means "binding." NOVA agrees with VA that "general" must mean the same thing in both "statements of general policy" and "interpretations of general applicability." But VA's view that "general" in the latter phrase means "binding" thus means that the former phrase refers to *binding* policy statements. That is a contradiction in terms. NOVA Br. 40 n.11; *see, e.g.*, *Syncor Int'l Corp. v. Shalala*, 127 F.3d 90, 94 (D.C. Cir. 1997) ("[P]olicy statements are binding on neither the public nor the agency." (citations omitted)).

Giving the word "general" a consistent meaning throughout Section 552(a)(1)(D) cuts squarely *against* VA's interpretation.[1]

b. VA also finds a "binding" requirement in Section 552(a)(1)'s 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" (absent other "actual and timely notice" of the matter). VA claims (at 24-25) that because this proviso can alter the "effect" of matters required to be published, it shows that "only binding agency materials would constitute interpretations of general applicability."

This leap is wholly illogical. For starters, even interpretations that are not "binding" on every sub-component of an agency can "adversely affect" people. The Manual provisions here are a perfect example. Take the Knee Replacement Rule—it ensures that, as a legal certainty, veterans will be denied benefits by VA's ROs for partial knee replacements. Appx108-09. That is manifestly an adverse effect: It results in a final adjudication of their claim that can be challenged only by embarking on a lengthy appeals process. *See* NOVA Br. 7-9. The same is true of other Manual interpretations, which likewise "bind" the "thousands" of "frontline adjudicators"

[1] In any event, even if VA were correct that policy statements are always applicable to more than one person (and therefore general), that would simply mean that the phrase "general policy" is itself mildly redundant. That proves nothing, because "'[s]ometimes the better overall reading of the statute contains some redundancy.'" *Atl. Richfield Co. v. Christian*, 140 S. Ct. 1335, 1350 n.5 (2020).

tasked with adjudicating some 1.4 million disability claims each year. VA Br. 2-4, 10-11; NOVA Br. 7. VA was thus correct to "concede[]" in *Gray v. Secretary of Veterans Affairs* that the Manual provisions have a "real and far reaching" "impact." 875 F.3d 1102, 1107-08 (Fed. Cir. 2017).[2]

Even assuming the proviso applies only to "binding" materials, there is no basis to think it covers every type of agency action that must be published under Section 552(a)(1). It clearly does not: If, for example, an agency repealed a legislative rule imposing a penalty, that repeal would have to be published per Section 552(a)(1)(E)—even though no one could possibly "be required to resort to, or be adversely affected by," such a repeal. Indeed, the proviso does not apply to *any* "matters which benefit" (rather than burden) "persons affected," even though such matters may still be subject to mandatory publication. *Attorney General's Memorandum on the Public Information Section of the Administrative Procedure Act* 11-12 (June 1967) (*FOIA Memorandum*). VA's premise that the proviso cabins the publication obligation is thus plainly wrong. And nothing in the Attorney General's *FOIA Memorandum* remotely indicates that "only binding" interpretations are of general applicability. VA Br. 24-25.

[2] VA notes (at 53-54) that veterans who wish to challenge an interpretation in the Manual may do so through other avenues, but those avenues are not an effective substitute for Section 502 review. *See* NOVA Br. 51-52; NLSVCC Amicus Br. 5-26.

c. VA's final textual argument suggests (at 22 n.10) that Section 552(a)(1)(D)'s reference to interpretations "formulated" by the agency should be "read as referring to interpretations adopted through more formal means" as opposed to "informal guidance." To the extent VA is implying that "formulated" means "binding," that argument fails because Section 552(a)(1)(D) applies the same "formulated" condition to *non*-binding policy statements. And VA offers nothing to support the weight it places on the word "formulated," nor any reason to conclude that VA did not "formulate" the interpretations it incorporated in the Manual. *See Webster's Second New International Dictionary* 993 (1943) ("formulate" means "to put in a systematized statement or expression"); VA Br. 3-4 (describing the Manual as a highly organized collection of "'policy and procedures,'" approved by "VA headquarters," that "prescribe [the decisional framework] in detail" (citation omitted)); *cf. Fed. Express Corp. v. Holowecki*, 552 U.S. 389, 399-400, 404 (2008) (describing an agency "formulating [a] rule" in its "compliance manual and internal directives").

d. VA also tries to rely (at 27-30) on Section 552(a)'s "structure" to support its "binding" requirement by comparing the materials listed in Section 552(a)(1) with those listed in Section 552(a)(2). But both (a)(1) and (a)(2) reference indisputably binding materials: Section 552(a)(1)(D) references "substantive rules," and Section 552(a)(2)(A) references "final" adjudicative "orders," both of which can

bind the agency. *See Pac. Gas & Elec. Co. v. Fed. Power Comm'n*, 506 F.2d 33, 38 (D.C. Cir. 1974). That cannot be the distinguishing factor. Stripped of that irrelevancy, VA's position (at 28) essentially mirrors NOVA's: Section 552(a)(1) materials are "characterized by their broad sweep" whereas Section 552(a)(2) materials are "characterized by their narrower applicability." Interpretations in the Manual—which will dictate the outcome of 1.4 million disability claims decided by ROs this year, *see* VA Br. 2-3—have a broad sweep. And while the entire Manual itself is not subject to publication, *see* 5 U.S.C. § 552(a)(2)(C), the "interpretations of general applicability" within it are, *id.* § 552(a)(1)(D).[3]

e. VA also tries to find a "binding" requirement in the legislative history of Section 3(a) of the original APA, Section 552(a)'s predecessor. But all VA can muster is a Senate Report stating that Section 3(a) "forbids secrecy of rules binding or applicable to the public." VA Br. 22 (quoting S. Rep. No. 79-752, at 12 (1945)). This generalized description does not help VA. If anything, the disjunctive "binding *or* applicable" helps *NOVA*, by confirming the intuitive conclusion that "applicable" is distinct from "binding."

Perhaps recognizing that the Senate Report's actual language is unhelpful, VA effectively rewrites it: Whereas the Senate Report refers to publication of "rules

[3] VA's suggestion (at 29-30) that its own "decision" not to publish somehow shows that it was not *required* to publish is utterly circular and unsupported.

binding *or* applicable to the public," VA's brief transforms it into a supposed "understanding" that "*only* 'binding' agency rules must be published in the Federal Register." VA Br. 22 (emphasis added). VA must distort even the legislative history to justify its interpretation.[4]

Nor does the Attorney General's *APA Manual* support VA's cramped reading. The most VA can bring itself to say is that the *APA Manual* "indicates that section 3(a) of the APA applied *paradigmatically* to binding regulations." *Id.* at 23 (emphasis added). But the passage that VA quotes—which simply states that "each agency [is] free to determine for itself" whether to issue interpretations and policy statements, *id.* (quoting *APA Manual* 22)—does not even support *that* theory. And it certainly does not suggest that "general applicability" somehow means "binding."

VA's attempt (at 25) to draw that conclusion from two sentences of "[t]he [Veterans' Judicial Review Act's (VJRA's)] legislative history" is even less persuasive. Neither snippet says anything about the meaning of Section 552(a)(1). And VA neglects to mention that the second quote comes from a description of a bill that did *not* become the VJRA and that had a meaningfully different preenforcement

[4] Similarly unavailing is VA's reference to the original Federal Register Act, which "required publication of all documents the President determined to 'have general applicability *and* legal effect.'" VA Br. 22-23 (emphasis added) (quoting Pub. L. No. 74-220, § 5(a)(2), 49 Stat. 500, 501 (1935)). This reference undermines VA's interpretation by making clear that "general applicability" does not mean "legal effect."

review provision. S. Rep. No. 100-418, at 112 (1988) (describing S. 2292, *not* S. 11); *see id.* at 117 (reproducing S. 2292's review provision).

f. VA's "binding" requirement is also incoherent as a matter of administrative law. It cannot be squared with Section 552(a)(1)(D)'s requirement to publish "statements of general policy," which are non-binding. *See supra* at 7-8. And as NOVA explained, interpretive rules are likewise quintessentially non-binding. NOVA Br. 39-42.

In response, VA insists (at 35) that while "interpretive rules do not . . . bind the public or outside tribunals" they "can nevertheless bind an agency." That is wrong. Interpretive rules cannot legally bind an agency as a whole because, unlike legislative rules, they lack the force of law. *See Vietnam Veterans of Am. v. Sec'y of the Navy*, 843 F.2d 528, 537-38 (D.C. Cir. 1988). The two characteristics—binding on the agency and force of law—are two sides of the same coin.[5] And contrary to VA's suggestion (at 35), that is precisely what the Government told the Supreme Court in *Allina Health*: "[I]nterpretive rules" lack "the force and effect of law" and are therefore not "binding *on the agency* or on the courts." Gov't Br. 17, *Azar v.*

[5] VA itself has recognized this. *See, e.g.*, VA Op. Gen. Couns. Prec. 4-2000, 2000 WL 35724225, at *4 (Apr. 13, 2000) (determining whether a "manual [provision] constitutes a substantive rule" by determining whether it is "binding *on VA*" (emphasis added)).

Allina Health Servs., 139 S. Ct. 1804 (2019) (No. 17-1484), 2018 WL 5962884 (emphasis added).

In attempting to show otherwise, VA observes (at 33) that "an agency can direct its own personnel to follow particular interpretations." But VA "confuses two senses in which a rule may bind": Even if an "'interpretative rule binds an agency's employees, . . . it does not bind the agency itself.'" *Warder v. Shalala*, 149 F.3d 73, 82 (1st Cir. 1998) (citation omitted). The number of interpretive rules that are "binding on [VA] as a whole," VA Br. 36, is zero.

This distinction is exemplified by precedential VA General Counsel opinions, which VA wrongly describes (at 33) as "interpretation[s] that bind[] the agency." As NOVA explained—and VA ignores—General Counsel opinions do *not* bind "the agency" because the agency can revoke or modify them at any time, even during an adjudication. NOVA Br. 41-42. At most, a General Counsel opinion binds the Board, a subordinate decisionmaking body within VA. But Manual interpretations have a similar effect—as VA admits (at 10), they bind all frontline adjudicators in VA's ROs. VA never explains why binding ROs is not enough to render an interpretation "of general applicability," but binding the Board is. This distinction among agency sub-entities has nothing to do with any commonsense understanding of "general applicability." It appears to be custom-designed to avoid Section 502 jurisdiction.

3. VA's Cited Precedent Is Inapposite And Unpersuasive

Without statutory or administrative-law support, VA is unsurprisingly unable to identify any cases supporting its interpretation. Indeed, VA concedes (at 34) that the Supreme Court characterized non-binding agency manual provisions as "guidelines of general applicability" in *Azar v. Allina Health Services*, 139 S. Ct. 1804, 1814 n.1 (2019). And not a single case VA cites remotely suggests that an "interpretation *must* be 'binding'" on an agency to be "of 'general applicability.'" VA Br. 21 (emphasis added).

Many of VA's cases merely hold that binding rules must be published in the Federal Register. For example, in *Morton v. Ruiz*, the Supreme Court held that a "substantive," "legislative-type rule" must be published under Section 552(a)(1)(D). 415 U.S. 199, 235-36 (1974). Nothing in *Ruiz*, however, suggests that *only* such binding rules fall within Section 552(a)(1)(D). The same is true of cases requiring publication of "'binding standards'" or "rules 'which the public is required to obey.'" VA Br. 23 (citations omitted).

Similarly unhelpful are *Capuano v. National Transportation Safety Board*, 843 F.2d 56 (1st Cir. 1988), and *Notaro v. Luther*, 800 F.2d 290 (2d Cir. 1986) (per curiam). These cases make no attempt to parse the distinction between interpretations that are "of general applicability" and those that are not. Contrary to VA's suggestion (at 19-20), they do not draw any distinction between "binding" and

"nonbinding" materials—indeed, neither case uses either word at all. And *Capuano*'s sweeping assertion that courts had not required publication of agency manuals has been challenged as "highly questionable" and inaccurate. Kenneth Culp Davis, *Administrative Law of the Eighties: 1989 Supplement to Administrative Law Treatise* § 5:11, at 125 (1989) (Davis Supp.).

Also unhelpful are cases VA cites for the proposition that Section 552(a)(1)'s publication requirement "'attaches only to matters which if not published would adversely affect a member of the public.'" VA Br. 25 (quoting *New York v. Lyng*, 829 F.2d 346, 354 (2d Cir. 1987)). Again, this limitation on Section 552(a)(1)'s publication requirement says nothing about "binding." Furthermore, as VA acknowledges (at 25), these cases all rely (uncritically) on *Hogg v. United States*, 428 F.2d 274 (6th Cir. 1970), which fabricated this limitation on 552(a)(1). *See* 1 Kenneth Culp Davis, *Administrative Law Treatise* § 5:10, at 339 (2d ed. 1978) (observing that "the statute contains no such limitation"); Victor H. Polk, Jr., *Publication Under the Freedom of Information Act of Statements of General Policy and Interpretations of General Applicability*, 47 U. Chi. L. Rev. 351, 353 n.11 (1980) (Polk) (same). *Hogg* did not even quote, let alone analyze, Section 552(a)(1)(D)'s text; the court simply announced its "adversely affect" rule and then cited bits of legislative history that do not support its announcement. 428 F.2d at 280. The Supreme Court recently rejected a similar judge-made test that "alter[ed]

FOIA's plain terms" based on misguided "arguments from legislative history." *Food Mktg. Inst. v. Argus Leader Media*, 139 S. Ct. 2356, 2364 (2019). This Court should not embrace *Hogg*'s blatant departure from the statutory text.

Finally, VA cites, in passing, decisions stating that an "interpretation is not of 'general applicability'" if it (1) expresses "'only a clarification or explanation of existing law or regulations,'" and (2) results in "'no significant impact upon any segment of the public.'" VA Br. 15 (quoting *Stuart-James Co. v. SEC*, 857 F.2d 796, 801 (D.C. Cir. 1988)). But nothing in this test supports VA's "binding" requirement. And it has rightly been criticized as lacking any grounding in the statutory text (which says nothing about "impact") and too vague to be applied consistently (what makes an impact "significant"?). *See, e.g.*, Davis Supp. § 5.11, at 125; Polk 356-64.

In any event, Manual interpretations are generally applicable even under this test because they undoubtedly have a significant and "far reaching" "impact" on veterans' disability claims. *Gray*, 875 F.3d at 1107-08; *see supra* at 8-9. Thus, even if the Court were to adopt this atextual and amorphous gloss on "interpretations of general applicability," the interpretations challenged here would still qualify.

4. Even If Some "Binding Effect" Were Necessary, The Challenged Manual Provisions Have It

Even if—contrary to all the authorities already discussed—the phrase "general applicability" requires some sort of "binding effect," VA Br. 27, the challenged Manual provisions have such effect.

All agree that interpretations contained in the Manual formally "bind VA's frontline adjudicators." *Id.* at 10. These adjudicators render the agency's "final" benefits decisions, save for the few cases—less than 6%—that are appealed to the Board. 38 U.S.C. § 7105(c) (stating that RO decision "shall become final" absent an appeal); *see also* 38 C.F.R. § 20.1103 (same); NOVA Br. 7. Thus, while the Board renders "the agency's final decision *in cases appealed to it*," *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (emphasis added), for the "vast majority of veterans," the RO's decision is final and will "constitute the [agency's] last word." *Gray*, 875 F.3d at 1114 (Dyk, J., dissenting in part and concurring in the judgment).

Even at the Board, Manual provisions can be outcome-determinative. VA finds this "hard to fathom" (at 37-38), but it is not that hard. For example, in addition to giving conclusive weight to the Knee Joint Stability Rule, *see* NOVA Br. 43-44, the Board has also given conclusive weight to the Knee Replacement Rule, declaring with no independent analysis that "VA has determined that for claims filed and decided on or after July 16, 2015 . . . provisions of DC 5055 are only applicable to veterans who have undergone total knee replacement." *[Title Redacted by Agency]*,

No. 17-43 250, 2019 WL 4552605, at *3 (Bd. Vet. App. May 10, 2019); *see* Appx108.

Finally, VA concedes (at 36) that it asks for judicial deference to interpretations contained in the Manual. That makes them binding as a practical matter. *See* NOVA Br. 44. VA cites (at 36) *Kisor v. Wilkie*, 139 S. Ct. 2400, 2420 (2019) (plurality opinion), for the proposition that interpretive rules "'do *not* have the force of law.'" That is correct (and is why NOVA is not arguing that the provisions are legislative rules). But it does not change the practical reality that when the conditions for *Auer* deference are satisfied, courts defer to interpretations in the Manual. In that real-world sense, such Manual provisions *are* effectively binding.

5. VA's Workability Concern Is Misplaced

Finally, VA retreats (at 10, 20-21) to a results-oriented argument: NOVA's interpretation would bring too many materials within Section 552(a)(1)'s publication requirement. But requiring publication of generally applicable interpretations promotes the transparency FOIA was designed to achieve.

Even if more publication were a bad thing, "it is not [this Court's] task" to adopt the interpretation "that produces the least mischief." *Lewis v. City of Chicago*, 560 U.S. 205, 217 (2010). It is "to give effect to the law Congress enacted." *Id.* And if adhering to the text of Section 552(a)(1)(D) requires publication of more

materials than VA would like, VA "must take its complaints" to "Congress." *Allina Health*, 139 S. Ct. at 1815-16 (rejecting "the government's policy arguments" that "providing notice and comment for [certain] manual provisions would prove excessively burdensome").

In any event, VA's policy concerns are overblown. Section 552(a)(1) expressly authorizes agencies to avoid publishing the full text of readily available materials in the Federal Register through "incorporat[ion] by reference." *See also* 1 C.F.R. §§ 51.1-51.11. This provision was designed "to help reduce the bulk of the Federal Register," precisely VA's purported concern here. H.R. Rep. No. 89-1497, at 7 (1966); *see FOIA Memorandum* 12-13.

VA is well acquainted with incorporation by reference, taking this approach for numerous materials covered by Section 552(a)(1). *See, e.g.*, 80 Fed. Reg. 14,308 (Mar. 19, 2015); 76 Fed. Reg. 14,282 (Mar. 16, 2011). Indeed, VA takes a similar approach with precedential General Counsel opinions, publishing short summaries in the Federal Register while directing readers to VA's website for the "full text of [the] opinions." *E.g.*, 85 Fed. Reg. 788 (Jan. 7, 2020); 84 Fed. Reg. 64,182 (Nov. 20, 2019); 84 Fed. Reg. 13,991 (Apr. 8, 2019). VA offers no reason why it could not use these same methods to satisfy its statutory obligation to publish Manual provisions containing generally applicable interpretive rules.

B. The Court Has Jurisdiction Under Section 502's Cross-Reference To Section 553

Section 502's cross-reference to 5 U.S.C. § 553 provides an independent—and even more straightforward—basis for this Court's jurisdiction. Section 553 unambiguously "refers" to "interpretative rules," and VA agrees with NOVA that the Manual provisions at issue here are "[i]nterpretive" rules. VA Br. 9, 19 n.8; *see* NOVA Br. 45-49. Section 502's cross-reference to Section 553 is thus the simplest way to resolve this case in NOVA's favor. That approach requires nothing more than applying the plain meaning of the statutory text, obviating any need for the Court to overrule *DAV*, interpret FOIA's publication requirement, or resolve the debate over VA's "binding" requirement.

VA spends just two pages (at 39-40) contesting this separate basis for jurisdiction, but its arguments are unavailing. VA contends that Section 553 does not "refer[]" to interpretive rules in the Manual because its "notice-and-comment requirements" do not "*apply*" to interpretive rules. VA Br. 39 (emphasis added). But Section 502 is not limited to actions "to which the notice-and-comment requirements of Section 553 *apply*"; it says actions "to which [S]ection . . . 553 . . . *refers*," 38 U.S.C. § 502 (emphasis added). And as NOVA explained, the word "refers" means to "point" or "allude" to. NOVA Br. 45 (citing dictionaries). Section 553 expressly "refers" to interpretive rules twice, in subsections (b)(A) and (d)(2).

No ordinary English speaker would understand "refers" as VA does. Imagine an airport security sign that reads: "All persons (except pilots and crew) must remove their shoes and jackets during screening." Of course this sign "refers" to pilots, even though it exempts them from its requirements. So too does Section 553 refer to interpretive rules. VA's attempt to substitute "applies" for "refers" "impermissibly seeks to displace the [statute's] plain meaning." *Bostock v. Clayton Cty.*, 140 S. Ct. 1731, 1750 (2020).

Even if VA were right that what matters is whether Section 553 "applies" to interpretive rules, NOVA would still prevail. After all, Section 553 does two things: It *both* imposes notice-and-comment requirements for legislative rules, 5 U.S.C. § 553(b)(1)-(3), (c), (d); *and* creates an exception to those requirements for interpretive rules, *id.* § 553(b)(A), (d)(2). The requirements do not apply to interpretive rules, but the exception undoubtedly does: As the D.C. Circuit has said, Section 553's exception to the APA's notice-and-comment requirements "*applies* to 'interpretive rules.'" *Aulenback, Inc. v. Fed. Highway Admin.*, 103 F.3d 156, 168 (D.C. Cir. 1997) (emphasis added). Thus, even if the word "refers" in Section 502 somehow means "applies," Sections 553(b)(A) and 553(d)(2) certainly "apply" to interpretive rules.

VA claims (at 40) that Section 553 cannot "refer[]" to interpretive rules because of "section 502's distinction" 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)." But Section 502 does not draw that distinction. Section 502 instead broadly cross-references actions "to which section 552(a)(1) or 553 of title 5 (or both) refers." 38 U.S.C. § 502. These are *independent* cross-references, and VA offers no reason (textual or otherwise) to suppose that one cross-reference cabins the other.

VA also argues that this Court should not apply the plain meaning of "refers" because that would mean Section 502 authorizes jurisdiction over challenges to "a military or foreign affairs function of the United States." VA Br. 39-40 (quoting 5 U.S.C. § 553(a)(1)). That is incorrect, because VA does not carry out "military or foreign affairs function[s]"; if it did, then *all* of VA's rules would be exempt from the APA's notice-and-comment requirements. Unsurprisingly, VA fails to offer even a single example to demonstrate this supposedly absurd result.

Finally, as NOVA explained, any doubt about the meaning of "refers" in Section 502 should be resolved in NOVA's favor under the pro-veteran canon. NOVA Br. 47-48. VA declares (at 40) the pro-veteran canon inapplicable because "there is no genuine ambiguity here." But given VA's inability to muster a single dictionary definition (or any other authority) supporting its counterintuitive interpretation of "refers," that assertion falls flat. Section 502's cross-reference to Section 553 provides an independent basis for this Court's jurisdiction.

II. VA'S FINALITY ARGUMENT IS UNAVAILING

VA contends (at 41-48) that "[e]ven if" interpretations in the Manual "could be 'subject to judicial review' under section 502," such interpretations "are not 'final agency action'" as purportedly required by 5 U.S.C. § 704. VA is mistaken. Section 502 is not subject to Section 704's "final agency action" requirement, and the challenged Manual provisions are sufficiently final to satisfy it regardless.

A. Section 502 Is Not Subject To Section 704's "Final Agency Action" Limitation

VA argues (at 41) that Section 704's "final agency action" requirement applies to Section 502 cases because Section 502 states that review "shall be in accordance with chapter 7 of title 5." But VA fails to quote Section 704's full text, which authorizes judicial review of two separate categories of agency action: "[1] Agency action made reviewable by statute and [2] final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704; *see Nebraska Pub. Power Dist. v. United States*, 590 F.3d 1357, 1369-71 (Fed. Cir. 2010) (en banc) (distinguishing between these "two categories"). By its terms, Section 704's "final agency action" requirement applies only to the *second* category, not the *first* category. As the Supreme Court has explained, Section 704 requires finality when "review is sought *not* pursuant to specific authorization in the substantive statute, but *only* under the general review provisions of the APA." *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 882 (1990) (emphasis added); *see Norton v. S. Utah Wilderness*

Alliance, 542 U.S. 55, 61-62 (2004) (Section 704 requires finality "[w]here no other statute provides a private right of action").

Here, petitions for review under Section 502 fall under the *first* category—review of "[a]gency action made reviewable by statute"—and are not subject to Section 704's finality requirement. *See Iowa League of Cities v. EPA*, 711 F.3d 844, 863 n.12 (8th Cir. 2013) ("[W]e decline to conjure up a finality requirement for '[a]gency actions made reviewable by statute' where none is located in the text of the APA, particularly where the Supreme Court has implied that the two phrases incorporate distinct requirements." (alteration in original)).

VA grounds its finality argument in *Ashford University, LLC v. Secretary of Veterans Affairs*, 951 F.3d 1332 (Fed. Cir. 2020). There, the Court reasoned that, while Section 702 uses the word "final" to describe "'only the second category'" of reviewable action, the APA's "legislative history" revealed that "Congress also assumed that '[a]gency action made reviewable by statute' would be final action." *Id.* at 1343-44. And because Section 502 "incorporat[es] 5 U.S.C. § 704," Section 502 "includes a finality requirement." *Id.* at 1344. The Court proceeded to apply the "final agency action" test set forth in *Bennett v. Spear*, 520 U.S. 154, 177 (1997), requiring that the action (1) "mark the 'consummation' of the agency's decisionmaking process"; and (2) be one "by which 'rights or obligations have been

determined,' or from which 'legal consequences will flow.'" *Ashford*, 951 F.3d at 1345-46.

NOVA respectfully submits that *Ashford* is mistaken to hold that Section 502 is subject to *Bennett*'s two-prong finality test, and that portion of the decision should be overruled.[6] *See* MVA Amicus Br. 20-24. *Ashford* conflicts with the Supreme Court's admonition that a statute's "plain terms" cannot be overridden based on "arguments from legislative history." *Food Mktg.*, 139 S. Ct. at 2364. And there is no need to create a separate finality requirement for agency actions specifically "'made reviewable by statute'": When a statute "expressly makes specified agency actions reviewable"—as Section 502 does—the question is simply "whether the asserted agency action falls within the statutory terms." *Iowa League of Cities*, 711 F.3d at 863 n.12.

Section 502's scope confirms that the APA's "final agency action" limitation does not apply. Section 502 authorizes review of actions to which Section 552(a)(1) refers, and several categories of items referred to in Section 552(a)(1) would *never* be "final" under VA's theory of APA finality. The most notable example is Section

[6] *Ashford*'s finality holding was not necessary to the disposition; the Court first concluded that the challenged action was not reviewable under Section 502 on other grounds. 951 F.3d at 1338-43. And as the Court acknowledged, its finality analysis deepened a circuit split. *See id.* at 1344 n.8 (citing *Iowa League of Cities*, 711 F.3d at 863 n.12); *see also Riverkeeper v. U.S. EPA*, 806 F.3d 1079, 1081 (11th Cir. 2015).

552(a)(1)(D)'s reference to statements of "general policy," which are not typically treated as final. *See Nat'l Mining Ass'n v. McCarthy*, 758 F.3d 243, 250-51 (D.C. Cir. 2014). Incorporating VA's understanding of the APA's finality limitation would sharply curtail the breadth of Section 502's cross-references. Indeed, the whole purpose of Section 502 is to implement Congress's "preference for preenforcement review" of VA actions and to relax the usual justiciability requirements. *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs* (*NOVA*), 330 F.3d 1345, 1347 (Fed. Cir. 2003).

Ashford also observed (and VA hints) that courts have imposed an "inherent" finality limitation onto "agency judicial review provisions generally," which "'Congress intended to codify'" in Section 704. 951 F.3d at 1343 (citation omitted); *see* VA Br. 44 n.15. But the cases *Ashford* and VA cite all involved review of "orders" or "decisions" in individual proceedings. The "inherent" finality limitation in those cases was necessary to avoid "constant delays" from judicial review of "mere preliminary or procedural orders" divorced from "the merits of [the] proceeding." *Fed. Power Comm'n v. Metro. Edison Co.*, 304 U.S. 375, 383-85 (1938); *see Bell v. New Jersey*, 461 U.S. 773, 778-79 (1983); *Carter/Mondale Presidential Comm., Inc. v. FEC*, 711 F.2d 279, 284-85 & n.9 (D.C. Cir. 1983). So the courts interpreted statutes authorizing review of agency "orders" to mean final and "definitive" orders. *Metro. Edison*, 304 U.S. at 384. Section 502, by contrast,

is singularly focused on providing "pre-enforcement review" of "prospective[]" agency actions like "substantive and interpretive rules, but not orders." *Coal. for Common Sense in Gov't Procurement v. Sec'y of Veterans Affairs*, 464 F.3d 1306, 1316-17 (Fed. Cir. 2006). The concerns about piecemeal review of orders are not present here.[7]

Accordingly, this Court should hold that Section 704's "final agency action" limitation does not apply to Section 502 cases. And to the extent the Court concludes that Section 502 contains some inherent finality requirement aside from Section 704, it must reflect that Section 502 is "one of those statutes that specifically provides for 'preenforcement' review," *Whitman v. Am. Trucking Ass'ns*, 531 U.S. 457, 479 (2001), and accordingly "permit[s] 'judicial review directly, even before the concrete effects normally required for APA review are felt,'" *id.* at 479-80 (quoting *Lujan*, 497 U.S. at 891); *see NOVA*, 330 F.3d at 1347. At a minimum, any finality requirement should accommodate challenges to VA "interpretations of general applicability" and "statements of general policy" that Congress unambiguously

[7] VA claims that without a finality limitation, Section 502 might authorize "freestanding challenges to VA 'descriptions of its central and field organization'" and "'statements of the general course and method by which its functions are channeled and determined.'" VA Br. 44 n.15 (quoting 5 U.S.C. § 552(a)(1)(A)-(B)). But avoiding this "unlikely result" (*id.*) does not require an atextual finality limitation, because no one would have Article III standing to bring such pointless challenges in the first place.

wanted this Court to review under Section 502's cross-references to Sections 552(a)(1)(D) and 553.

B. The Challenged Manual Provisions Satisfy Section 704's "Final Agency Action" Limitation

In any event, the challenged Manual provisions satisfy *Bennett*'s two-prong test for final agency action. That test does not turn on procedural formalisms; it instead requires a "'pragmatic'" assessment of the "practical" and "legal" realities of the agency action to determine whether it is sufficiently definite for review. *U.S. Army Corps of Eng'rs v. Hawkes Co.*, 136 S. Ct. 1807, 1814-15 (2016); *see POET Biorefining, LLC v. EPA*, — F.3d —, 2020 WL 4745274, at *7 (D.C. Cir. Aug. 14, 2020).

First, the challenged Manual provisions "mark the 'consummation' of the agency's decisionmaking process," *Bennett*, 520 U.S. at 177-78, because they set forth VA's considered "'interpretation' and 'guidance'" regarding DC 5055 and DC 5257 as well as VA's determination that all ROs must apply that guidance when issuing final adjudicatory decisions, *POET Biorefining*, 2020 WL 4745274, at *7; *see Hawkes*, 136 S. Ct. at 1815. Issued from "VA headquarters," these provisions were incorporated into the Manual for nationwide application by the "thousands" of RO adjudicators bound by them. VA Br. 3-4. The Knee Replacement Rule purports to implement "VA's . . . policy . . . that partial knee replacements" do not qualify

under DC 5055, Appx26, and the Knee Joint Stability Rule purports to "incorporate [VA's] guidance on handling joint stability findings" under DC 5257, Appx65.

VA does not seriously contest this point. Instead, VA confusingly claims (at 42) that "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." But NOVA is not challenging "a regional office's reliance on or reference to" a Manual provision; NOVA is bringing a *preenforcement* challenge to the provisions themselves. And, in any event, VA is mistaken: Under the applicable statute and regulation, an RO decision *is* final. The only thing that would render it non-final is if the veteran chooses to take a discretionary appeal. 38 U.S.C. § 7105(c); 38 C.F.R. § 20.1103.

Second, the Manual provisions purport to "alter the legal regime" governing veterans benefits, *Bennett*, 520 U.S. at 178, by providing "'notice of how [VA] interpret[s]'"—and how ROs will apply—"the relevant [regulations]," *Hawkes*, 136 S. Ct. at 1814-15 (citation omitted). They accordingly "'ha[ve] legal consequences'" for both veterans and the veterans benefits system. *Gray*, 875 F.3d at 1112 (Dyk, J., dissenting in part and concurring in the judgment) (quoting *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1022-23 (D.C. Cir. 2000)).

Because the Manual provisions are issued from VA headquarters and are formally binding on ROs, all veterans are legally certain to have their benefits claims

resolved according to the Manual's terms. *See, e.g.*, *Appalachian Power*, 208 F.3d at 1021 (agency action "issued at headquarters [and] controlling in the field" is final). Here, that means VA will necessarily deny the claim of any veteran who seeks compensation for a partial knee replacement or for knee instabilities outside the Manual's interpretation. These legal consequences are palpable, direct, and undeniable.[8]

VA makes much of the fact (at 42) that veterans have the right to appeal RO decisions, and that Manual provisions are not binding on the Board. But that does not detract from the legal consequences flowing directly from the challenged provisions. By statute, RO decisions reflect VA's final adjudication of a veteran's claim unless the veteran appeals, and veterans appeal in only a small fraction of cases. *See supra* at 18. Thus, as a *formal* matter, Manual provisions dictate how VA ROs will resolve claims—and as a *practical* matter, those RO decisions will be the final word. The mere possibility that the Manual's interpretations might not "conclusively determine" the outcome of some future discretionary appeal does not negate their finality. *Bennett*, 520 U.S. at 177; *see Hawkes*, 136 S. Ct. at 1814.

[8] The provisions also have practical consequences on veterans' applications in the first place. Their mandatory and "unequivocal language" only "'leads [veterans] to believe'" that, unless they fall within the Manual's terms, benefits will be denied and they need not even apply. *POET Biorefining*, 2020 WL 4745274, at *7-8.

At a minimum, the Manual's binding effect on the ROs creates a threshold legal obstacle that triggers the need for veterans to appeal to the Board. By creating that obstacle—and thereby requiring that appeal—the Manual necessarily inflicts "legal consequences" on affected veterans. No one would deny that an adverse, case-dispositive ruling from a federal district court would inflict legal consequences on the losing party, even though that party could appeal. The same is true about an RO ruling adverse to a veteran.

VA's brief ignores these consequences by pretending that RO decisions are essentially meaningless and that only the Board is empowered to render "'[VA]'s final decision'" on veterans benefits claims. VA Br. 42 (quoting *Henderson*, 562 U.S. at 431). But as noted above, that is simply not true. *See supra* at 18. And VA mischaracterizes *Henderson*, which emphasizes that the Board has the final say only "in cases appealed to it." 562 U.S. at 431. The Board is irrelevant in the vast majority of cases that are *not* appealed, and its legal interpretations do not bind either VA or the Board itself in later cases. 38 C.F.R. § 20.1303.

In any event, the Manual's legal and practical effects continue at the Board, and beyond. The Board is legally required to consider and analyze relevant Manual provisions, *Overton v. Wilkie*, 30 Vet. App. 257, 263-64 (2018), and it regularly treats Manual provisions as controlling. *See supra* at 18-19. Furthermore, VA concedes (at 36) that Manual provisions can "establish[] the agency's considered

position" when seeking *Auer* deference from federal courts. That itself demonstrates that they "have the requisite legal consequences for APA finality purposes." *Air Brake Sys., Inc. v. Mineta*, 357 F.3d 632, 644 (6th Cir. 2004).

Apart from emphasizing that Manual provisions are not binding, VA also declares that the requisite legal consequences "can flow *only* from the agency's final adjudication of an individual claim in a given case." VA Br. 42 (emphasis added). That radical position would eviscerate Section 502 review, which has nothing to do with individual adjudications but is instead focused on "preenforcement" review. *NOVA*, 330 F.3d at 1347; *see Ashford*, 951 F.3d at 1338 ("Adjudications are not subject to section 502 review."). Not even VA takes that position seriously, as it concedes on the very next page (at 43) that precedential General Counsel opinions are final, even though they are interpretive rules and originate outside an individual adjudication.[9]

In short, the challenged Manual provisions constitute "'final agency action, reflecting a settled agency position which has legal consequences'" for veterans and

[9] Equally mistaken is VA's suggestion that "interpretive rules are generally not reviewable before their application in particular cases." VA Br. 46-47 (citing *Ass'n of Flight Attendants-CWA v. Huerta*, 785 F.3d 710, 717 (D.C. Cir. 2015)). As the D.C. Circuit "reiterated" just last month, "an interpretive rule construing existing law can constitute final action." *POET Biorefining*, 2020 WL 4745274, at *8; *see Cal. Cmtys. Against Toxics v. EPA*, 934 F.3d 627, 634-35 (D.C. Cir. 2019) (repudiating *Huerta*'s "blurred" finality analysis and reaffirming that "interpretive rules can be final").

the benefits system. *Gray*, 875 F.3d at 1112 (Dyk, J., dissenting in part and concurring in the judgment) (citation omitted). This Court should reject VA's effort to curtail veterans' Section 502 rights with a misconceived finality requirement.

III. THE 60-DAY DEADLINE FOR FILING SECTION 502 PETITIONS IS INVALID

VA's defense (at 51-58) of Federal Circuit Rule 15(f)'s 60-day deadline for Section 502 petitions also lacks merit.[10] VA's concession that the six-year limitations period in 28 U.S.C. § 2401(a) applies to Section 502 petitions is fatal to its argument, and its suggestion that the 60-day deadline governs "in tandem" with Section 2401(a) lacks merit.

Critically, VA "agree[s] with NOVA that section 2401(a) applies to section 502 claims." VA Br. 51, 56. That concession resolves this issue. Because Congress has determined that veterans have six years to bring Section 502 challenges, that is the *only* time limit that can apply to this case. "[C]ourts are not at liberty to jettison Congress' judgment on the timeliness of suit." *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 960 (2017) (citation omitted).

VA nonetheless argues that this Court's 60-day deadline "governs section 502 actions *in tandem* with section 2401(a)." VA Br. 51 (emphasis added). But VA never explains how the deadline for such actions can be both 60 days and six years

[10] Since NOVA filed its opening brief, the 60-day deadline has been moved from Rule 47.12(a) to Rule 15(f). *See* VA Br. 8.

at the same time. It cannot: When a shorter limitations period applies, it necessarily overrides the longer limitations period. A petition filed after six years—when Section 2401(a) kicks in—has already been untimely under Rule 15(f) since day 61. VA's assertion (at 58) that there is no "conflict[] between Rule 15(f) and section 2401(a)" defies common sense. In the real world, Rule 15(f)'s 60-day deadline shrinks the time limit enacted by Congress by more than 97%.

VA's real argument is that a court may *eliminate* a statutory limitations period—like Section 2401(a)—and *replace it* with a dramatically shorter limitations period of its own design—like this Court's 60-day deadline. That argument fails many times over.

First, it is inconsistent with the statutory text. Congress's decision to subject Section 502 actions to Section 2401(a)'s six-year limitations period necessarily reflects its judgment that a shorter limitations period should not apply. Courts cannot "'overrid[e]'" a "limitations period specified by Congress." *SCA Hygiene*, 137 S. Ct. at 960; *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019); *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 685-86 (2014).

VA tries (at 55) to distinguish *SCA Hygiene*, *Rotkiske*, and *Petrella* by arguing that "section 2401(a) is not part of the VJRA" and therefore "does not 'reflect[] a congressional decision' concerning section 502 claims." But Congress speaks through the statutory text it enacts, and VA itself admits (at 51) that "section

2401(a)'s text" subjects Section 502 challenges to a six-year limitations period. As this Court has consistently held, "Congress did not intend to exempt actions under section 502 from the general six-year statute of limitations in 28 U.S.C. § 2401." *Block v. Sec'y of Veterans Affairs*, 641 F.3d 1313, 1319 (Fed. Cir. 2011); *see* NOVA Br. 53. As in *SCA Hygiene*, *Rotkiske*, and *Petrella*, that intent must be respected.[11]

Second, although this Court undoubtedly has authority to "prescribe rules for the conduct of their business," those rules must be "consistent with Acts of Congress." 28 U.S.C. § 2071(a). A filing deadline is not "consistent with Acts of Congress" when, as here, it supplants an act of Congress. Indeed, NOVA has provided multiple examples of cases in which a court-created filing deadline was held to violate the Rules Enabling Act. NOVA Br. 56-57 (citing cases). VA does not even try to rebut these cases.

Third, VA mischaracterizes case law. VA asserts (at 51-52) that courts have employed shorter limitations periods "even where section 2401(a) applies." Not so: In every case VA cites, the court expressly held that Section 2401(a) did *not* apply. *See, e.g.*, *Price v. Bernanke*, 470 F.3d 384, 387-88 (D.C. Cir. 2006) ("agree[ing]" that Section 2401(a)'s "six-year limit" was inapplicable to federal-sector ADEA

[11] VA's observation (at 55) that some of these cases involved the doctrine of laches rather than a local rule is irrelevant. The key principle is that courts cannot "'overrid[e]'" Congress's chosen limitations period, *SCA Hygiene*, 137 S. Ct. at 960—be it through laches, local rule, or otherwise.

claims); *Edwards v. Shalala*, 64 F.3d 601, 605 (11th Cir. 1995) (same); *Lavery v. Marsh*, 918 F.2d 1022, 1027 (1st Cir. 1990) (same). For that reason, those courts borrowed limitations periods from elsewhere. Here, however, borrowing a limitations period is entirely unnecessary and inappropriate because—as VA says—"section 2401(a) applies." VA Br. 51.

Similarly, VA cites (at 52) *Stevens v. Department of the Treasury*, 500 U.S. 1, 7-8 (1991), for the proposition that courts may "borrow[]" limitations periods "where Congress is silent as to the applicable time limit." But here—as everyone agrees—Congress was *not* silent; it deliberately chose to apply Section 2401(a). VA Br. 51; NOVA Br. 53. By its terms, Section 2401(a) governs "*every civil action* commenced against the United States." 28 U.S.C. § 2401(a) (emphasis added). That is presumably why VA and this Court agree that Section 2401(a) applies here.[12]

Fourth, VA's reliance on other statutes—and their legislative history—is misplaced. VA notes (at 52) that the "United States Code is replete with statutes" that require petitioners challenging agency actions "to act within 60 days." But those are *statutes*, not court-created rules. Congress was free to set the limitations period for Section 502 actions at 60 days, too. It didn't. These federal statutes thus actually

[12] In *Stevens*, the Court expressly declined to resolve which limitations period governs a federal-sector ADEA claim. 500 U.S. at 7-8. Since *Stevens*, multiple cases (including *Price*, *Edwards*, and *Lavery*) have held that Section 2401(a) does not apply to such claims.

cut against VA's argument. *See Rotkiske*, 140 S. Ct. at 361 ("Atextual judicial supplementation is particularly inappropriate when, as here, Congress has shown that it knows how to adopt the omitted language or provision.").

VA then turns (at 54) to "[t]he VJRA's legislative history," only to admit that it "says nothing" on this question. So VA instead unearths a stray statement in a Senate Report from 2008—20 years *after* the VJRA's enactment—acknowledging the existence of this Court's 60-day limit. VA Br. 54 (citing S. Rep. No. 110-449, at 14 (2008)). But as the Supreme Court recently made clear, "'[a]rguments based on subsequent legislative history . . . should not be taken seriously.'" *Bostock*, 140 S. Ct. at 1747 (citation omitted). And legislative history certainly cannot supplant a statute. Even if the Senate Committee was "aware[]" of this Court's 60-day rule, VA Br. 54, "'courts have no authority to enforce [a] principl[e] gleaned solely from legislative history'" that is not "anchored in the text of the statute," *Shannon v. United States*, 512 U.S. 573, 583-84 (1994).

Finally, VA's argument has no limiting principle and would lead to absurd results. If VA is right that federal courts can promulgate time limits shorter than the statutory time limits Congress imposed, nothing would stop courts that disfavor civil rights cases, or government contracts cases, or patent cases, from imposing the same 60-day limit Rule 15(f) imposes on Section 502 claims—in defiance of Congress's

clear intent.[13] That cannot be right. VA's theory violates the separation of powers and should be rejected.

CONCLUSION

The Court should hold that it has jurisdiction to consider NOVA's timely challenge to the Manual provisions.

Dated: September 8, 2020

Respectfully submitted,

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[13] *See, e.g.*, 28 U.S.C. § 2415 (six-year limitations period for government contract actions); 35 U.S.C. § 286 (six-year limitations period for patent infringement claims); 42 U.S.C. § 2000e-5(f)(1) (90-day limitations period for Title VII claims).

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a) and Federal Circuit Rule 32(b)(1), as extended by this Court's order dated August 28, 2020 (ECF No. 83), because it contains 8,998 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

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

Dated: September 8, 2020

/s/ Roman Martinez
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