

No. 20-1321

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**United States Court of Appeals  
for the Federal Circuit**

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NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.,

*Petitioner,*

v.

SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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

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**SUPPLEMENTAL REPLY BRIEF OF PETITIONER  
ON HEARING EN BANC**

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October 2, 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: October 2, 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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## SUPPLEMENTAL REPLY BRIEF

VA's belated challenge to NOVA's standing (ECF No. 91) should be rejected.

1. VA cannot seriously dispute that NOVA has Article III associational standing, based on its veteran members, under *Disabled American Veterans v. Gober*, 234 F.3d 682, 689-90 (Fed. Cir. 2000). Instead, VA claims (at 3-4, 7) that *Gober* is wrong and the Court should abandon both its injury-in-fact analysis and its reliance on unchallenged allegations. This is the first time in 20 years that VA has urged the Court to depart from *Gober*, and this request comes in a short supplemental brief responding to a Court order that does not even mention *Gober* or invite the parties to address its continuing validity. This Court can and should resolve the standing question based on its settled precedent. Indeed, as explained below, NOVA has standing under *any* reasonable interpretation of Article III's requirements.<sup>1</sup>

2. With or without *Gober*, NOVA most plainly has associational standing based on its veteran members with knee disabilities—Mr. Cianchetta, Mr. Tangen, and Mr. Regis. All three men are directly harmed by the Knee Rules and have

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<sup>1</sup> VA is wrong to suggest (at 2-5) that *Phigenix, Inc. v. Immunogen, Inc.*, 845 F.3d 1168 (Fed. Cir. 2017), is incompatible with *Gober* or necessarily requires a petitioner to submit affirmative proof of standing in every case. As NOVA explained, *Phigenix*'s summary-judgment standard means that VA admitted NOVA's factual allegations by failing to contest them. *See* Fed. R. Civ. P. 8(b)(6), 56(c)(1)(A). And although VA says (at 5) that a party cannot "admit jurisdictional facts," that is simply wrong: "The Supreme Court has long held that . . . 'parties may admit the existence of facts which show jurisdiction.'" *Aptive Env'tl., LLC v. Town of Castle Rock*, 959 F.3d 961, 973 n.5 (10th Cir. 2020) (collecting cases).

Article III standing to challenge them in their own right. NOVA Supp. Br. 8-10.

VA does not actually contest this. Instead, VA focuses (at 8-10) on whether these veterans had a “pending adjudication at [a] regional office” when NOVA filed its petition in January 2020. But a veteran’s standing to bring a preenforcement challenge to a VA rule does not hinge on whether the veteran already has a pending claim at a regional office; after all, the whole point of 38 U.S.C. § 502 is to allow preenforcement challenges outside the existing claims process. Rather, as VA admits (at 8), standing exists when there is a “‘substantial risk’ that the harm will occur” as a result of the challenged rule. *See also, e.g., Biotechnology Indus. Org. v. District of Columbia*, 496 F.3d 1362, 1370 (Fed. Cir. 2007) (“‘realistic danger’” of harm). There is no question that, under the Knee Rules, these NOVA members faced a realistic danger of harm when NOVA filed its petition in January 2020.

Mr. Cianchetta has been receiving knee disability benefits since he left the Air Force in 1991. Cianchetta Decl. ¶¶ 3-4. In November 2018, his doctor advised him that he needed a partial knee replacement. *Id.* ¶ 5. In October 2019, he was referred and scheduled to have that surgery in April 2020. *Id.* Thus, when NOVA filed its petition in January 2020, Mr. Cianchetta knew that he would have the surgery, that he would seek additional disability benefits, and that the VA regional office would reject his claim under the Knee Replacement Rule’s interpretation of DC 5055. He had standing at that point. It does not matter that Mr. Cianchetta did not file a

supplemental disability claim until last month, after his surgery finally took place.

Mr. Tangen's injury was also apparent in January 2020, because by that time he had received—in September 2018—an erroneous 10% knee disability rating based on the Knee Joint Stability Rule's flawed interpretation of DC 5257. Tangen Decl. ¶¶ 5-6. VA's assertion (at 9-10) that Mr. Tangen's injury is "hypothetical" makes no sense: He has suffered continuous harm attributable to the unlawful rule since September 2018, and his injury will be redressed if this Court invalidates that rule and thereby enables him to seek an increased disability rating.

Mr. Regis was actively seeking knee disability benefits as of January 2020, including for knee instability under DC 5257. Regis Decl. ¶¶ 6-7. At the time NOVA filed its petition, Mr. Regis's claim was under review by the Board, and it has now been remanded to the regional office, where he continues to seek increased benefits under DC 5257. *Id.* Unless NOVA prevails, Mr. Regis's claim will be assessed under the unlawful Knee Joint Stability Rule.

For all these reasons, NOVA's veteran members would have had standing in their own right when NOVA filed its petition in January 2020. But VA's focus on the January 2020 petition filing date is just a distraction in any event. As this Court has held, post-filing events can "cure" Article III standing deficiencies if reflected in a supplemental pleading. *Prasco, LLC v. Medicis Pharm. Corp.*, 537 F.3d 1329, 1337 (Fed. Cir. 2008). If necessary, this Court can and should construe NOVA's



standing brief and declarations as a supplement to its petition. *See* NOVA Supp. Br. 15. That would solve any arguable standing problem, as VA does not deny that Mr. Cianchetta, Mr. Tangen, and Mr. Regis all have standing right now.<sup>2</sup>

3. VA also argues (at 12-14) that challenging VA rules is not “germane” to NOVA’s purpose as stated in its by-laws. But this Court rejected that exact argument in *Gober*, 234 F.3d at 689-90, and the relevant language in NOVA’s by-laws has not changed, *see* Rauber Decl. ¶ 5. The by-laws also make clear that NOVA’s mission is not merely to assist veterans’ advocates, but also to “do all and everything related to” providing such assistance. *Id.* That broad language plainly covers promoting pro-veteran policies through advocacy and litigation. *See id.* ¶¶ 5-7. And VA does not—and cannot—suggest that later precedent from the Supreme Court or this Court has undermined *Gober*’s germaneness holding in any way.

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<sup>2</sup> NOVA also has standing based on its attorney members who are injured as a result of the Knee Rules. NOVA Supp. Br. 10-12 (citing cases). VA does not contest that those members would have *Article III* standing; instead, it challenges (at 11-12) their prudential standing under the statutory “zone of interests” test. But this Court’s supplemental briefing order asked only about Article III standing, and VA has waived its statutory zone-of-interests argument. *See* NOVA Supp. Br. 12 n.3. In any event, NOVA’s attorney members fall within Section 502’s zone of interests because of the crucial role such attorneys play in “the preparation, presentation, and prosecution of claims.” 38 U.S.C. § 5904(a); *see Match-E-Be-Nash-She-Wish Band of Pottawatomis Indians v. Patchak*, 567 U.S. 209, 225 (2012) (noting that zone-of-interests test “forecloses suit only when a plaintiff’s ‘interests are so marginally related to or inconsistent with the purposes implicit in the statute that it cannot reasonably be assumed that Congress intended to permit the suit’”); *see also E. Bay Sanctuary Covenant v. Trump*, 932 F.3d 742, 768-69 & n.9 (9th Cir. 2018).

In any event, NOVA's by-laws are not "talismanic"—and are certainly not the only way to ascertain NOVA's purpose. *Humane Soc. of the U.S. v. Hodel*, 840 F.2d 45, 59 (D.C. Cir. 1988). In addition to the by-laws, NOVA's Executive Director has submitted an uncontroverted declaration (which VA ignores) stressing that NOVA's purposes go beyond merely serving veterans' advocates and include "assist[ing] veterans . . . in seeking disability benefits from VA," "helping both *veterans* and their advocates," "promot[ing] *pro-veteran* policies," and "ensur[ing] that *veterans* are treated fairly and receive the benefits they are due under law." Rauber Decl. ¶¶ 5-7 (emphases added). VA also ignores NOVA's extensive track record of policy advocacy and litigation to promote veterans' rights. *Id.* ¶¶ 6-7; NOVA Supp. Br. 4 n.1. To say this petition is not germane to NOVA's purpose blinks reality.<sup>3</sup>

4. Finally, VA is wrong to assert (at 14-15) that NOVA lacks organizational standing. As just explained, the Knee Rules impede NOVA's purpose of helping veterans attain the disability benefits to which they are entitled. *See* Rauber Decl. ¶¶ 5-7. Furthermore, NOVA has expended resources as a result of the Knee Rules' frustration of its purpose. *Id.* ¶¶ 11-14. Thus, in addition to NOVA's associational standing, NOVA also has organizational standing here.

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<sup>3</sup> In the unlikely event the Court overturns *Gober*'s germaneness holding and concludes that this litigation is not germane to NOVA's purpose, it should grant NOVA's alternative request to allow one of its members with standing to join the case. *See* NOVA Supp. Br. 15. VA has not opposed that request.

Dated: October 2, 2020

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitations of this Court's order dated September 15, 2020 (ECF No. 87), because it does not exceed five pages, 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: October 2, 2020

/s/ Roman Martinez

Roman Martinez