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 IN SUPPORT OF PETITION FOR INITIAL HEARING EN BANC

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April 9, 2020

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CERTIFICATE OF INTEREST

Counsel for Petitioner certifies the following:

1. Full Name of Party represented by me:

   National Organization of Veterans' Advocates, Inc.

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

   None.

3. Parent corporations and publicly held companies that own 10 percent or more of stock in the party:

   None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   N/A.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

   NOVA v. Secretary of Veterans Affairs, No. 17-1839.

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

Dated: April 9, 2020

Respectfully submitted,

/s/ Roman Martinez

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INTRODUCTION

Petitioner National Organization of Veterans' Advocates, Inc. (NOVA) respectfully submits this short reply in support of its Petition for Initial Hearing En Banc, ECF No. 11 (Pet.). NOVA acknowledges that a party seeking en banc review is not entitled to a reply as a matter of right, and accordingly does not attempt a full, point-by-point rebuttal of the Secretary of Veterans Affairs' (VA's) Response to the Petition, ECF No. 45 (Resp.). But a brief reply is warranted here, most importantly to place VA's response in its proper context.

VA contends that the Court should decline en banc review on the two threshold issues presented in this case—the validity of this Court's decision in *Disabled American Veterans v. Secretary of Veterans Affairs* (*DAV*), 859 F.3d 1072 (Fed. Cir. 2017), and of this Court's Rule 47.12(a)—primarily because NOVA might be able to "argue its way around" these authorities and "convince[]" a three-judge panel to adopt such arguments. Resp. 8, 12-13. In speculating about what NOVA might be able to argue, VA refuses to acknowledge its own longstanding support for *DAV* and Rule 47.12(a). But if this Court denies en banc review, VA will undoubtedly raise both to the three-judge panel as threshold procedural bars blocking this case from being adjudicated on the merits. This Court should not countenance this sort of bait-and-switch, which is designed to shunt this case to a panel that is foreclosed by precedent from considering NOVA's primary

jurisdictional argument. In the unusual circumstances of this case, the fairest and most efficient way to proceed is for this Court to review both issues en banc now.

ARGUMENT

1. VA's primary objection to initial hearing en banc on the *DAV* issue rings disingenuous. Without actually conceding that the Court has jurisdiction, VA tries to create the impression that this Court "may still be able to" exercise jurisdiction in this case "without eroding *DAV*" and that en banc review is therefore not appropriate. Resp. 7; *see id*. at 12 (suggesting that *DAV* "may not actually preclude judicial review here"). If, however, the Court denies NOVA's en banc petition, VA will no doubt invoke *DAV* and argue the opposite to a three-judge panel.

This is not merely a guess. Less than two months ago, VA argued to a panel in a different case brought by NOVA that "this Court has held that the M21-1 Manual is [an] 'administrative staff manual' that 'affect[s] a member of the public' and, accordingly, is presumptively outside this Court's section 502 jurisdiction." Gov't Br. 23, *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, No. 17-1839 (Fed. Cir. Feb. 13, 2020), 2020 WL 763223 ("17-1839 *NOVA* Gov't Br.") (quoting *DAV*, 859 F.3d at 1075). Any effort by NOVA to distinguish *DAV* will be met with the same categorical response here: VA will say *DAV* forecloses review of any "interpretive rule" that "appears only in an internal manual that 'convey[s] guidance to VA adjudicators.'" *Id*. at 32 (alteration in original) (quoting *DAV*, 859

F.3d at 1077).[1] VA does not now concede that *DAV* is wrong but instead continues to believe that *DAV* was "correctly decided." Resp. 7. Nor does VA argue that *DAV* does not govern this case, which also involves an interpretive rule promulgated through the M21-1 Manual. *See* Pet. 6-7.

Moreover, VA does not dispute that *DAV* will be at center stage here. Although VA posits that "*DAV* did not categorically foreclose review of Manual provisions," Resp. 7, various judges of this Court have read *DAV* to say just the opposite. *See, e.g.*, *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102, 1110 (Fed. Cir. 2017) (Dyk, J., dissenting in part and concurring in the judgment) (understanding *DAV* to "categorically" foreclose Section 502 jurisdiction in any action challenging interpretive rules "'contained within an administrative staff manual'" that is "'not binding on the Board'" (quoting *DAV*, 859 F.3d at 1078)), *vacated and remanded sub nom. Gray v. Wilkie*, 139 S. Ct. 2764 (2019); *id.* at 1107-09 (majority opinion) (understanding *DAV* to "compel[]" dismissal of actions challenging "M21-1 Manual provisions," even "provisions [that] differ from those at issue in *DAV*"); *Conyers v. Sec'y of Veterans Affairs*, 750 F. App'x 993, 997 (Fed. Cir. 2018) ("[I]n [*DAV*], this Court found the M21-1 Manual unreviewable under

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[1] Although VA claims that "this Court's authority to review disputed [Manual] provisions turns on their 'particular features,'" Resp. 7 (citation omitted), VA ultimately acknowledges that, in its view, the only feature that matters is "the Manual's generally non-binding effect," *id.* at 11. That feature is presumably shared by *all* interpretive rules promulgated in the Manual.

§ 502 . . . ."); *Hudick v. Wilkie*, 755 F. App'x 998, 1006 (Fed. Cir. 2018) ("In *DAV* and *Gray*, we explained that, because the VA does not generally consider M21 Manual provisions binding, a veteran must challenge these provisions on an as applied basis.").

To be clear, NOVA has preserved the alternative argument that this Court has jurisdiction to review Manual-promulgated interpretive rules under Section 502's cross-reference to 5 U.S.C. § 553, which twice refers to "interpretative rules." Pet. 12 (quoting 5 U.S.C. § 553(b)(A), (d)(2)). *DAV* did not squarely address this argument and thus does not necessarily foreclose it. But VA seems to think that *DAV* controls the Section 553 issue as well, *see* Resp. 2-3—and if that is true, only the en banc Court can resolve whether that Section 553 holding is correct. Rather than force a three-judge panel to "test" NOVA's ability to "argue its way around *DAV*," *id*. at 8, 12, the more straightforward course is for the en banc Court to decide for itself whether *DAV* is correct. That is the primary threshold issue in this case. The Court should reject VA's effort to divert the case to a procedural forum—a three-judge panel—that will be powerless to actually consider the merits of NOVA's primary jurisdictional argument.

2. VA also denies that the Section 502 jurisdictional issue "involves a question of exceptional importance" under Federal Rule of Appellate Procedure 35(a)(2). Resp. 8-9. But the Supreme Court obviously thought otherwise: It granted

certiorari in *Gray* to consider precisely the same issue. And rightly so: As Judge Dyk explained in *Gray*, the Section 502 question has "exceptional importance" because it threatens to inflict "significant 'hardship'" on veterans and will have a "widespread impact on the efficient adjudication of veterans' claims [for benefits]." *Gray*, 875 F.3d at 1114 (Dyk, J., dissenting in part and concurring in the judgment) (citation omitted); *Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379, 1382 (Fed. Cir. 2018) (en banc) (Dyk, J., dissenting from the denial of rehearing en banc).

VA makes the strange assertion that there is no "'urgency' to revisit *DAV* now" because "facial challenges to provisions of the Manual have remained rare since the Court denied rehearing in *Gray*." Resp. 8 (citation omitted). But *of course* such "facial challenges" have been "rare": *DAV*'s holding purports to foreclose them. If anything, VA's circular argument simply proves the need to revisit *DAV*, which is successfully operating as a jurisdictional bar to pre-enforcement challenges of unlawful Manual provisions and thus "impos[ing] a substantial and unnecessary burden" on our Nation's veterans. *Gray*, 875 F.3d at 1110 (Dyk, J., dissenting in part and concurring in the judgment).

3. VA continues to talk out of both sides of its mouth on whether, under *DAV*, Sections 552(a)(1) and (a)(2) are mutually exclusive. *See* Pet. 4-5, 11, 14 n.4. Here, VA asserts that it has consistently maintained "since *DAV*" that this Court lacks Section 502 jurisdiction to consider challenges to Manual revisions because

the revisions are not binding, and *not* because Sections 552(a)(1) and (a)(2) are mutually exclusive. Resp. 11. But that is simply not true. In *Gray*, VA successfully advanced its mutual-exclusivity theory in its merits brief to this Court. Gov't Br. 26-27, 32-35, *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102 (Fed. Cir. 2017) (No. 16-1782), 2016 WL 6883023; *see also Gray*, 875 F.3d at 1114-15 (Dyk, J., dissenting in part and concurring in the judgment). And it has repeatedly advanced that argument in multiple cases since then, as well. *See, e.g.*, 17-1839 *NOVA* Gov't Br. 23, 33; Gov't Br. 20-22, *Procopio v. Sec'y of Veterans Affairs*, 943 F.3d 1376 (Fed. Cir. 2019) (No. 19-2184), ECF No. 30; Gov't Br. 24-26, *Krause v. Sec'y of Veterans Affairs*, No. 17-1303 (Fed. Cir. Mar. 19, 2018), 2018 WL 1905196. Moreover, this Court has *itself* interpreted *DAV* to embrace the mutual-exclusivity theory. *See Conyers*, 750 F. App'x at 997 (stating that *DAV* found "the M21-1 Manual unreviewable" under Section 502 because it was covered by Section 552(a)(2), and thus "expressly exempt[ed]" from Section 552(a)(1)).

To be sure, VA has regularly disclaimed its mutual-exclusivity theory when convenient—for example, when urging this Court to deny en banc review or the Supreme Court to deny certiorari. *See* Resp. 4, 9-11; Br. in Opp. 14, 22-23, *Gray v. Wilkie*, 139 S. Ct. 2764 (2019) (No. 17-1679); Gov't Reh'g Opp. 1, 5-14, *Gray v. Sec'y of Veterans Affairs*, 884 F.3d 1379 (Fed. Cir. 2018) (No. 16-1782), ECF No.

90. But that just confirms the problem: VA cannot be allowed to flip-flop its way around the need to fundamentally reconsider *DAV* and its underlying rationale.

4. Finally, VA's case against en banc review of the Rule 47.12(a) issue suffers from two of the same major flaws as its Section 502 argument.

First, VA seeks to create the impression that NOVA's petition "may" not be "untimely under Rule 47.12(a)," thereby rendering en banc review unnecessary. Resp. 13. But it is all but preordained that if this Court denies NOVA's petition for initial hearing en banc, VA will vigorously argue to a three-judge panel that NOVA's petition is untimely under Rule 47.12(a)—just as it regularly does in other cases.[2] Indeed, there is no question that NOVA's petition is untimely under Rule 47.12(a)'s plain text; the only question is whether that rule is invalid because it contradicts the statutory limitations period established by 28 U.S.C. § 2401(a). That question—implicating the basic validity of this Court's own rule—is best resolved by the en banc Court.

[2] Indeed, this is a favorite argument of VA's. *See, e.g.*, Gov't Br 13 n.4, *Fulcher v. Sec'y of Veterans Affairs*, No. 17-1460 (Fed. Cir. Nov. 28, 2017), 2017 WL 5957577; Gov't Br. 24, *Goodman v. Shulkin*, 870 F.3d 1383 (Fed. Cir. 2017) (No. 16-2142), 2016 WL 6871431; Gov't Br. 20, *Block v. Sec'y of Veterans Affairs*, 641 F.3d 1313 (Fed. Cir. 2011) (No. 10-7045), 2010 WL 4639159; Gov't Br. 7-10, *Disabled Am. Veterans v. Gober*, 234 F.3d 682 (Fed. Cir. 2000) (Nos. 99-7061, -7071, -7084, -7085), 1999 WL 33608503; Gov't Br. 10-18, *Brown v. Sec'y of Veterans Affairs*, 124 F.3d 227 (Fed. Cir. 1997) (No. 95-7067), 1996 WL 33453790.

Second, VA again talks out of both sides of its mouth. On the one hand, VA seems to suggest that Rule 47.12(a) may not bind a three-judge panel, *see* Resp. 13; on the other hand, VA asserts that even the full en banc Court lacks authority to invalidate Rule 47.12(a), *id*. at 15-16. Those two statements flatly contradict one another. And although VA misleadingly claims that NOVA should have "pursued the rule-change process prescribed by [Federal] Rule [of Appellate Procedure] 47(a)(1)," *id*. at 16, that rule does not create any "process" by which individual citizens or entities can petition for, or directly initiate, rule changes. In any event, there is no requirement that litigants engage in that administrative process instead of asserting their statutory rights in litigation. Once again, VA just seems to be throwing up yet another procedural roadblock to deny veterans their day in court.

CONCLUSION

The Court should grant initial hearing en banc to overrule *DAV* and to invalidate Rule 47.12(a).

Dated: April 9, 2020

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document contains 1,964 words, excluding the parts exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 35(c)(2).

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Dated: April 9, 2020

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