2022-1264

United States Court of Appeals for the Federal Circuit

JEREMY BEAUDETTE, MAYA BEAUDETTE,

Claimants-Appellees,

– v. –

DENIS MCDONOUGH, Secretary of Veterans Affairs,

Respondent-Appellant.

On Appeal from the United States Court of Appeals for Veterans Claims in No. 20-4961, Honorable Joseph L. Falvey Jr., Honorable Joseph L. Toth and Honorable Michael P. Allen

BRIEF FOR CLAIMANTS-APPELLEES

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NOVEMBER 21, 2022

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CERTIFICATE OF INTEREST

Counsel for Claimants-Appellees Jeremy Beaudette and Maya Beaudette certifies the following:

1. Full name of party represented by me	2. Name of real party in interest represented by me	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Jeremy Beaudette; Maya Beaudette	N/A	N/A

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

Amanda Pertusati, Public Counsel

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).

Sullivan v. Secretary of Veterans Affairs, No. 20-2193 (Fed. Cir.).

6. Information required by Federal Rule of Appellate Procedure 26.1(b) and (c) that identifies organizational victims in criminal cases and debtors and trustees in bankruptcy cases.

Not Applicable

Dated: November 21, 2022

/s/ Igor V. Timofeyev
Igor V. Timofeyev

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

STATEMENT OF RELATED CASES

This is an appeal from a precedential decision by the United States Court of Appeals for Veterans Claims ("the Veterans Court"), *Beaudette v. McDonough*, 34 Vet. App. 95 (2021). The Veterans Court entered an order granting the petition for a writ of mandamus filed by Claimants-Appellees Jeremy Beaudette and Maya Beaudette ("the Beaudettes"), and enjoining Respondent-Appellant, the Secretary of Veterans Affairs ("the Secretary"), from denying review by the Board of Veterans' Appeals ("the Board") of adverse benefits decisions rendered under the Program of Comprehensive Assistance for Family Caregivers ("the Caregiver Program" or "PCAFC"). The Veterans Court also certified a class consisting of all claimants who received an adverse benefits decision under the Caregiver Program, exhausted the then-existing administrative review process, but have not been afforded the right to request Board review. The class action proceedings before the Veterans Court are ongoing at *Beaudette v. McDonough*, No. 20-4961 (Vet. App.).

The question of whether Board review for benefits decisions under the Caregiver Program should be available is also present in another case pending before this Court, *Sullivan v. Secretary of Veterans Affairs*, No. 20-2193 (Fed. Cir.). On March 15, 2021, this Court stayed No. 20-2193 pending the entry of judgment by the Veterans Court in the underlying action here. On January 14, 2022, the Court extended the stay in No. 20-2193 pending the resolution of this appeal.

INTRODUCTION

The Veterans Court correctly concluded that section 1720G(c)(1)'s mere statement that a decision under the Caregiver Program shall be considered a "medical determination" did not amount to "clear and convincing evidence" that Congress intended to withdraw judicial review from *all* benefits decisions under the program. That conclusion stems from the plain language of the statute—which says nothing about judicial review, much less its foreclosure—and from section 1720G(c)(1)'s placement in the statutory scheme.

The Veterans Court confirmed its reading by examining the relevant canons of statutory construction, all of which weighed against the Secretary's interpretation. *First*, the strong presumption in favor of judicial review counseled against construing section 1720G(c)(1) as implicitly excluding an entire veterans benefits program from judicial review. As the Veterans Court observed, it could find no other instance of Congress doing so. *Second*, the presumption against implied repeal signaled that Congress would not withdraw—"without a word of comment"—an entire veterans benefits program from the comprehensive system of judicial review set forth by the Veterans' Judicial Review Act. *Finally*, the Veterans Court examined carefully, but found unpersuasive, the Secretary's reliance on the presumption that Congress is aware of existing agency regulations and the argument that Congress subsequently ratified the agency's interpretation.

The regulation in question, 38 C.F.R. § 20.104(b), does not provide the requisite clear and convincing evidence of intent to foreclose judicial review. And the court found no evidence of implied congressional ratification.

The Secretary offers no valid reason to set aside the Veterans Court's decision. The Secretary contends that Congress intended section 1720G(c)(1)'s statement that a decision under the Caregiver Program is to be considered a "medical determination" to refer to a Department of Veterans Affairs ("VA") regulation providing that medical determinations are not reviewable by the Board (or the Veterans Court). But the Secretary can point to *nothing* in the text, structure, or legislative history of the Caregiver Statute to support this argument. Moreover, the VA regulation the Secretary invokes is not the only legal authority that uses the phrase "medical determination." At the time Congress enacted the Caregiver Program, the term "medical determination" was used extensively by the Veterans Court to refer to the type of Board determination that must, as a matter of law, be supported by independent medical evidence—providing an important pro-veteran procedural safeguard. Congress was presumptively aware of those judicial decisions, and it made sense for Congress to use the term "medical determination" in section 1720G(c)(1) as instructing the Board on evidentiary standards to use in its review—as opposed to implicitly foreclosing review altogether.

The Secretary then invokes a handful of statements by VA representatives (*not* by Members of Congress) that *post-date* the Caregiver Statute's enactment. But material not available to lawmakers at the time of a statute's enactment is not legislative history, and after-the-fact statements are not a reliable indicator of congressional intent. The Secretary is left to invoke the presumption of congressional awareness of pre-existing agency regulations. But that presumption alone—in the absence of any other evidence—is not clear and convincing evidence that Congress intended to foreclose judicial review.

As a last resort, the Secretary argues that his interpretation is due deference, and that 38 U.S.C. § 502, which authorizes direct challenge to the Secretary's rulemaking in this Court, deprives the Veterans Court of jurisdiction. No deference is appropriate. Congress did not delegate to the Secretary the authority to determine when his decisions should be judicially reviewable, and the statute (interpreted in light of settled canons of statutory construction) is not ambiguous. The Secretary's section 502 argument (which is waived in any event) is foreclosed by the plain language of that provision and this Court's precedents, which expressly authorize the Veterans Court to consider the Secretary's statutory interpretations in the context of reviewing appeals (or mandamus petitions) from an individual benefits decision.

This Court should affirm.

JURISDICTION

On April 19, 2021, the Veterans Court issued an order granting the Beaudettes' petition for a writ of mandamus and requiring the Secretary to allow claimants to appeal adverse benefits decisions rendered under the Caregiver Program for review by the Board of Veterans' Appeals. Appx2-10. The Veterans Court denied the Secretary's motion for full-court review of the order on August 2, 2021, Appx1367, and entered judgment on October 6, 2021, Appx1. This Court has jurisdiction over this appeal under 38 U.S.C. § 7292(a), (c).

ISSUES PRESENTED

1. Whether the Veterans Court correctly held that mere use of the term "medical determination" in 38 U.S.C. § 1720G(c), a provision of the Caregivers and Veterans Omnibus Health Services Act of 2010, did not manifest the requisite "clear and convincing evidence" of congressional intent to foreclose judicial review authorized for veterans benefit decisions by the Veterans' Judicial Review Act, 38 U.S.C. § 511(a), for benefit decisions made under the Caregiver Program.

2. Whether the Veterans Court had authority to issue a writ of mandamus under the All Writs Act, 28 U.S.C. § 1651(a), after concluding that petitioners established a clear and indisputable right to the writ and lacked an adequate alternative means to attain relief, where the

mandamus petition did not challenge any rulemaking action by the Secretary.

STATEMENT OF THE CASE

I. BACKGROUND

A. Judicial Review of Veterans' Benefits Decisions

For most of the twentieth century, "judicial review of decisions of the Veterans' Administration was almost entirely foreclosed." *Forshey v. Principi*, 284 F.3d 1335, 1345 (Fed. Cir. 2002) (en banc). In 1988, Congress changed that approach by enacting the Veterans' Judicial Review Act ("the VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988). The VJRA "specifically provid[ed] for independent judicial review of the Board [of Veterans' Appeals]'s final decisions by a new Article I Court of Veterans Appeals (today known as the Court of Appeals for Veterans Claims)." *Bates v. Nicholson*, 398 F.3d 1355, 1364 (Fed. Cir. 2005).

"[T]he effect of the [VJRA] was to generally place judicial review of Secretarial decisions 'under a law that affects the provision of benefits' within the specialized review process" centered on the Veterans Court. *Id.* Under the VJRA, the Secretary decides "all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). The VJRA then provides that "[a]ll questions in a matter which under section 511(a) … are subject to a decision by the Secretary shall be subject to one review on appeal to the

Secretary," and that "[f]inal decisions on such appeals shall be made by the Board." *Id.* § 7104(a). Next, "[t]he Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," and "shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." *Id.* § 7252(a). Finally, this Court reviews the Veterans Court's decisions, subject to specific statutory limitations. *Id.* § 7292(a)-(c).

B. The Caregiver Program

After Operation Enduring Freedom and Operation Iraqi Freedom began, many service members who served in Afghanistan and Iraq returned home with injuries so severe that they required ongoing, sometimes permanent, care, often provided by young spouses or other family members. Recognizing that, as a nation, "we have a responsibility to take care of [our troops] when they come home," in 2010, President Barack Obama signed into law the Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, 124 Stat. 1130 (2010) (the "Caregiver Act"), following unanimous approval by both houses of Congress.[1]

The Caregiver Act, among other things, established a "program of comprehensive assistance for family caregivers of eligible veterans," 38 U.S.C.

[1] Remarks on Signing the Caregivers and Veterans Omnibus Health Services Act of 2010. https://www.govinfo.gov/content/pkg/DCPD-201000344/pdf/DCPD-201000344.pdf. As President Obama noted, "this legislation marks a major step forward in America's commitment to families and caregivers who tend to our wounded warriors every day." *Id.*

§ 1720G(a)(1)(A), *codified principally* at 38 U.S.C. § 1720G. The Caregiver Program provides benefits—including healthcare, and in some cases, a monthly stipend in addition to training, support, counseling, lodging, travel reimbursement, mental health services, and respite care—to caregivers of veterans who are found by the VA to have suffered a "serious injury" "in the line of duty." 38 U.S.C. § 1720G(a)(2).[2] To qualify for Caregiver Program benefits, the veteran must require "personal care services." *Id*. The "personal care services" element can be met by (1) "[a]n inability to perform an activity of daily living," or (2) "[a] need for supervision or protection" or extensive instruction due to certain injuries. *Id.*; *see also* 38 C.F.R. § 71.20(c).

The "Construction" section of the Caregiver Act, section 1720G(c)(1), states that "[a] decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination." The Caregiver Act does not define the term "medical determination," and the statute's legislative history provides no indication what Congress intended by including the term "medical determination" in section 1720G(c)(1).

[2] The program was originally limited to veterans who served on or after September 11, 2011. In 2018, Congress expanded the Caregiver Program through the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act of 2018 (the "VA MISSION Act"), Pub. L. No. 115-182, § 161, 32 Stat. 1393, 1438-40 (2018). As of October 1, 2022, the program includes eligible veterans of any service era. 38 C.F.R. § 71.20(a)(2).

In 2015, the VA promulgated a final rule implementing the Caregiver Program. *See* Appx83-104; Caregivers Program, 80 Fed. Reg. 1357 (Jan. 9, 2015). The text of the rule itself is silent about veterans' and caregivers' right to appeal PCAFC decisions—or lack thereof. *See* 38 C.F.R. ch. I, pt. 71 (§§ 71.10-71.60).[3] In the final rule's preamble published in the Federal Register, however, the VA responded to commenters who suggested that the rule "should address a veteran's, servicemember's, or caregiver's right to appeal decision made in connection with the [Caregiver] Program." Appx92; 80 Fed. Reg. at 1366. The VA did not amend its final rule to address this issue, as the commenters requested. Instead, it asserted in the preamble that "medical determinations are not subject to the jurisdiction of the Board of Veterans' Appeals under 38 U.S.C. 7104, or pursuant to our implementing regulation, which states that 'medical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment or an individual, are not adjudicative matters and are beyond the [Board of Veterans' Appeals'] jurisdiction.'" *Id.* (quoting 38 CFR § 20.101(b)) (alteration in original).[4] The VA's commentary did not address the fact that the term

[3] The VA's interim rule implementing the Caregiver Act, 76 Fed. Reg. 26,148 (May 5, 2011), was also silent on the matter.

[4] Section 20.104(b)'s predecessor was originally enacted in 1983, prior to the passage of the VJRA. *See* 38 C.F.R. § 19.3(b) (1983). The regulation was revised in 1992 and codified as 38 C.F.R. § 20.101(b); it was re-designated as 38 C.F.R. § 20.104(b) in 2019. *See* 84 Fed. Reg. 138 (Jan. 18, 2019).

"medical determination" also has long been used by the Veterans Court as a term of art that refers to a specific type of Board finding that triggers a judicially-created rule of law (commonly called the *Colvin* rule) that binds the Board's decision-making. *See, e.g.*, *Johnson v. Derwinski*, 3 Vet. App. 16, 18 (Ct. Vet. App. 1991).

Therefore, the VA stated that all PCAFC determinations under 38 U.S.C. § 1720G lie outside the VJRA adjudication framework. Instead, "review of Caregiver Program benefits decisions is limited to the clinical appeals process of the Veterans Health Administration ('VHA')." Appx92; 80 Fed. Reg. at 1366.

C. The Proceedings Below

1. The VA's Initial Determinations of the Beaudettes' Eligibility for the Caregiver Program

Appellee Jeremy Beaudette served in the Marine Corps from 2002 to 2012, including five combat tours in Iraq and Afghanistan. *See* Appx1217. Jeremy was exposed to improvised explosive device blasts, a vehicle rollover, and mortar, rocket, and small arms fire. *Id*. Multiple concussions during his combat tours caused Traumatic Brain Injury ("TBI") and rendered him legally blind. Appx1229-1231. Upon medical discharge, VA rated Jeremy 100% disabled and found him in need of 'aid and attendance' benefits, due to TBI, vision loss, post-traumatic stress disorder, depression, memory loss, degenerative back diseases, migraines, radiculopathy, and musculoskeletal disorders. Appx1067-1068.

Jeremy and his wife, Maya, (together, the "Beaudettes") applied for Caregiver Program benefits in March 2013. Appx66. The VA found them eligible for the program based on a finding of Jeremy's inability to perform activities of daily living and his substantial need for supervision and protection, including assistance with a variety of routine personal and household tasks. Appx1200-1240.

The Beaudettes remained on the Caregiver Program for over four years. VA repeatedly assessed Jeremy's needs and consistently found him eligible. Appx918; Appx862; Appx868; Appx786-803; Appx762-769; Appx761-763; Appx745-748; Appx729-732; Appx761-763.

2. The VA's Revocation of the Beaudettes' Eligibility and the VHA Appeal Process

In October 2017, VA contacted the Beaudettes to schedule the next assessment of Jeremy's condition. The Beaudettes requested a delay due to Jeremy's ongoing recovery from two major back surgeries relating to his service-connected disabilities. App41-42. VA, however, denied the request to reschedule and instead proceeded with the reassessment using Jeremy's medical records. *Id*.

In February 2018, VA informed the Beaudettes that they were no longer eligible for Caregiver Program benefits, Appx693—despite the fact that Jeremy's disabilities had not improved and his caregiving needs had not decreased. For instance, VA's own in-home and phone assessments conducted in April and August

2017 found that Jeremy still needed assistance with a variety of basic everyday tasks. *See* Appx1200-1240.

The Beaudettes challenged VA's determination under VHA's two-level internal appeals process. Appx36-43; Appx46-47. The first-level reviewer—the Caregiver Program manager at the VA Southern Nevada Healthcare System—denied the Beaudettes' appeal in July 2018. Appx44-45. The reviewer stated only that "discharge from the [Caregiver Program] was clinically and administratively appropriate." *Id.* The Beaudettes sought reconsideration of this decision by a second-level reviewer in September 2018. Appx46-47. That reviewer—the Director of the Sierra Pacific Veterans Integrated Service Network ("VISN")—denied the Beaudettes' appeal in November 2018. Appx48-49. The VISN Director based his decision on Jeremy's inability "to come to the program for a full evaluation at the time of [the October 2017] review." *Id.* The denial stated that "[t]his decision is final and cannot be appealed." *Id*.

The Beaudettes sought to appeal the VHA denial-of-benefits decision to the Board on August 12, 2019, Appx1267-1273, but did not receive a response, Appx3.[5]

[5] The Beaudettes also reapplied for Caregiver Program benefits on December 4, 2019, which VA denied. Appx67n.19.

3. The Veterans Court's Issuance of a Writ of Mandamus

On July 15, 2020, the Beaudettes filed a petition for a writ of mandamus with the Veterans Court seeking an order declaring the Secretary's prohibition of Board review of benefit decisions under the Caregiver Program to be contrary to law, ordering the Secretary to allow Board review of their claims, and enjoining the Secretary from denying Board review of future decisions under the Caregiver Program. Appx50-76. The Beaudettes also sought to certify a class of similarly situated veterans and caregivers. *Id.*

On April 19, 2021, the Veterans Court granted the Beaudettes' petition, issued "a writ of mandamus ordering the Secretary to begin notifying claimants of their right to appeal adverse Caregiver Program determinations to the Board of Veterans' Appeals," and certified a class. Appx2. The Veterans Court found that "[t]he Beaudettes have established an indisputable right to Board review, the lack of an adequate administrative means of securing that right, and the propriety of extraordinary relief in these circumstances," and also have "satisfied each of the prerequisites for class certification." Appx7; Appx10.

The Veterans Court found the "purported reference in section 1720G [of the Caregiver Act] to VA's longstanding rule that a 'medical determination' is not appealable" insufficient "to overcome broad reach of the Veterans' Judicial Review Act [VJRA] and the strong presumptions in favor of reviewability of

agency action and against implicit repeals of statutes." Appx2. The Veterans Court disagreed with VA's contention that Congress stripped the Board and the Veterans Court of jurisdiction through use of the term "medical determination" in 38 U.S.C. § 1720G. Appx5-6. The court found that "the plain language of section 1720G(c)(1) does not insulate the Caregiver Program from [Board review and subsequent] judicial review." Appx5. As the Veterans Court noted, Congress "certainly knew how to clearly limit the jurisdiction of this Court when it passed the Caregiver Program statute" and had done so in a similar context—the VA MISSION Act at 38 U.S.C. § 1703(f)—but not in section § 1720G. Appx6.

Finding that the plain language of the Caregiver Program statute does not support the Secretary's interpretation, the Veterans Court turned to applicable canons of statutory interpretation and found that they confirmed its construction of section 1720G. *Id*. The Veterans Court found that the Caregiver Program statute does not contain "clear and convincing evidence" of an intent to bar judicial review. The court also found no evidence to support the Secretary's argument that Congress silently ratified VA's construction of § 1720G, or "displace[d] the ordinary scope of the VJRA," especially given the strong presumption against repeals by implication. *Id*.

The Veterans Court noted that the term "medical determination" in § 1720G could be a reference to the *Colvin* rule, named for its first articulation in *Colvin v.*

Derwinski, 1 Vet. App. 171, 175 (Ct. Vet. App. 1991), that, when the Board makes a medical determination, it must base such determination on independent medical evidence instead of its own unsubstantiated medical opinion. Appx7. The Veterans Court did not, however, "settle on a definitive reading of section 1720G(c)(1)" because the question was unnecessary to its decision. But the court specifically (and "with confidence") rejected the Secretary's interpretation:

> Of the potentially correct readings of section 1720G(c)(1), the Secretary's is not one. It would take the extraordinary step of limiting the regular operation of the VJRA and foreclosing judicial review despite the absence of a clearly expressed congressional intent to do so. We can say with confidence that VA's interpretation does not meet the high standard for wholly stripping the Board, and thus this Court, of jurisdiction over Caregiver Program determinations.

Appx7-8.

Judge Falvey dissented, stating that he would "deny the petition for writ of mandamus … because Congress has excluded Caregiver Program decisions from Board jurisdiction, and consequently from [the Veterans Court's] jurisdiction." Appx11. In the dissent's view, "the term 'medical determination' in subsection (c)(1) refers to the longstanding regulatory rule that medical determinations are not appealable to the Board." Appx11 (citing 38 C.F.R. § 20.104(b)).

The Secretary requested review of the order by the entire Veterans Court. The Veterans Court denied the Secretary's motion for full-court review on August 2, 2021, Appx1367, and entered judgment on October 6, 2021, Appx1.

D. The VA's Implementation of the Veterans Court's Order

The Secretary appealed the Veterans Court's decision to this Court but did not request a stay. As part of a notice plan jointly devised by the parties, and according to the VA's most recent update under the notice plan, the VA has sent over 430,000 notices to veterans and caregivers who at any time applied to the Caregiver Program of their right to appeal to the Board of Veterans' Appeals. The VA has created a website describing the appeals process and providing links to the necessary forms, including forms it created specifically to implement the Veterans Court's decision.[6] As a result, veterans and caregivers have appealed PCAFC decisions to the Board, and as of September 30, 2022, the Board has issued over 250 dispositions of Caregiver Program appeals.[7]

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[6] *See* U.S. Dep't of Veterans Affairs, "VA Caregiver Support Program: PCAFC Decisions—Options for Further Review and Appeal," https://www.caregiver.va.gov/support/PCAFC_Appeals.asp.

[7] A search of Board decisions available on the BVA's website shows that the Board considered at least 250 appeals of Caregiver Program benefits decisions following the Veterans Court's ruling below through September 2022. *See* U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, "Search Decisions," https://search.usa.gov/search?affiliate=bvadecisions (search for "PCAFC & remand").

SUMMARY OF ARGUMENT

I.A. The Veterans Court's conclusion that section 1720G(c)(1) does not foreclose judicial review is fully supported by the statutory text. Nothing in the plain language of section 1720G(c)(1) purports to withdraw a veteran's ability to seek Board and Veterans Court review of benefit decisions made under the Caregiver Program. The Veterans Court correctly contrasted that statutory silence with the language in other statutory provisions, where Congress used explicit language to foreclose or limit judicial review of veterans benefits decisions. As the court correctly observed, "Congress certainly knew how to clearly limit the jurisdiction of th[e Veterans] Court when it passed the Caregiver Program statute." Appx5. In particular, the Veterans Court examined subsequent legislation (the VA MISSION Act) that amended section 1720G and also instituted a new program of veterans benefits. That legislation used language expressly foreclosing Board and Veterans Court appeals of benefits decisions under the new program. Appx5 (discussing 38 U.S.C. § 1703(f)). As the Veterans Court correctly concluded, the fact that Congress did not use the same clear language in section 1720(c)(1) indicates that Congress did not intend to foreclose Board and judicial review.

The placement of section 1720G(c)(1) within the statutory scheme further supports the Veterans Court's construction. Section 1720G(c)(1) is a part of the Caregiver Statute's section entitled "Construction." Unlike other provisions

withdrawing judicial review, section 1720(c)(1) is not placed within a section entitled "Review of Decisions" or "No Appeal." *Compare* 38 U.S.C. § 1720G(c)(1), *with* 38 U.S.C. § 1703(f); 35 U.S.C. § 314(d). This placement is another strong indication that section 1720G(c)(1) was not meant to foreclose judicial review.

I.B. The Veterans Court's reading of section 1720G(c)(1) is confirmed by settled canons of statutory construction. Congress legislates with the knowledge of a "strong presumption favoring judicial review of administrative action," *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015), which can be rebutted only by "clear and convincing evidence" of congressional intent to foreclose review, *Kucana v. Holder*, 558 U.S. 233, 252 (2010) (internal quotation marks and citation omitted). There is simply no requisite "clear and convincing evidence" of congressional intent to withhold judicial review for benefits decisions under the Caregiver Program. The Secretary's assertion that section 1720G(c)(1) implicitly references VA's regulatory carveout for medical determinations has no merit because section 1720G(c)(1) makes "no mention of the regulatory carveout," and "[a]n implied reference cannot constitute 'clear and convincing evidence of an intent to withhold' judicial review." Appx6 (citation omitted).

The Secretary does not challenge the Veterans Court's finding that the express language of section 1720G(c)(1) does not address judicial review. Instead,

the Secretary argues that section 1720G(c)(1)'s statement that PCAFC decisions are to be considered a "medical determination" must be read as referring to a VA regulation providing that medical determinations "are not board-reviewable." VA Br. 37. But the Secretary can point to *nothing* in the text, structure, or legislative history of the Caregiver Statute to support his claim that section 1720G(c)(1)'s reference to a "medical determination" was intended to foreclose judicial review. The Secretary invokes a handful of statements by VA representatives (*not* by Members of Congress) that *post-date* the Caregiver Statute's enactment. But material not available to lawmakers at the time of a statute's enactment is not legislative history, and "[a]fter-the-fact statements … are not a reliable indicator of what Congress intended when it passed the law." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 579 (1995). The Secretary is left to invoke the presumption of congressional awareness of pre-existing agency regulations. But that presumption alone—in the absence of any other evidence—falls far short of the requisite "clear and convincing" evidence standard that Congress intended to foreclose judicial review.

I.C. The Veterans Court's decision is further supported by the "strong presumption that repeals by implications are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624

(2018). The Veterans Court correctly concluded that Congress did not intend to withdraw the Caregiver Program in its entirety from the VJRA's default of judicial review—particularly without *any* mention of the VJRA in the Caregiver Statute or *any* indication that its reference to a "medical determination" was intended to foreclose this normal review process of the VA's benefits decisions. When Congress has decided to exclude an issue from any level of judicial review under the VJRA, it has consistently indicated its intent to do so *expressly* with *clear and unambiguous* language. While the Secretary contends that section 1720G(c)(1) and the VJRA could be "harmonized" through his interpretation of the term "medical determination," VA Br. 38, the Veterans Court was correct that the Secretary's reading of section 1720G(c)(1) would unavoidably disrupt the VJRA's comprehensive review process for veterans benefits decisions. As the Veterans Court observed, it found "no other instance … where Congress has, without a word of comment, wholly excluded a veterans program from judicial review." Appx6.

I.D. The mere fact that section 1720G(c)(1) contains a term ("medical determination") that also appears in a VA regulation that precludes Board review of certain matters, 38 C.F.R. § 20.104(b), does not provide the requisite clear and convincing evidence of intent to foreclose judicial review. The VA regulation the Secretary invokes is not the only legal authority that uses that same phrase. When it established the Caregiver Program, Congress was also presumptively aware that

the term "medical determination" was used extensively by the Veterans Court to refer to a type of Board finding that triggers procedural limitations on the Board's ability to render certain determinations. *See Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). This principle—the *Colvin* rule—established a groundbreaking due process safeguard for veterans by prohibiting the Board from relying on its own "medical conclusions" in place of medical evidence in the record in reaching decisions.

The Secretary argues that section 1720G(c)(1) could not refer to the *Colvin* rule because the exact term "medical determination" does not appear in the *Colvin* opinion itself. But this ignores the fact that after the *Colvin* opinion, the Veterans Court consistently used the term "medical determination" to describe the type of Board finding that must be supported by independent medical evidence pursuant to *Colvin*. Equally unpersuasive is the Secretary's argument that it "would serve no purpose" for section 1720G(c)(1) to refer to the *Colvin* rule because that rule already applies "to all board determinations of matters requiring medical evidence to decide." VA Br. 27. Absent reference to the *Colvin* rule in the Caregiver Program statute, the Board could substitute its own judgment to determine that a veteran does not need assistance with activities of daily living despite contrary medical evidence in the record, thereby eroding veterans' procedural rights. It

made sense for Congress to use the term "medical determination" in section 1720G(c)(1) to instruct the Board on evidentiary standards to use in its review—as opposed to implicitly foreclosing review altogether.

I.E. The Secretary contends that Congress implicitly ratified the VA's construction of section 1720G(c)(1) because it never amended the Caregiver Act to disavow VA's interpretation. For starters, legislative approval by silence is the "weakest" source of statutory construction. *Butterbaugh v. DOJ*, 336 F.3d 1332, 1342 (Fed. Cir. 2003). In any event, as the Veterans Court correctly found, the Secretary's meager evidence falls far short of showing congressional ratification of VA's interpretation. Appx7.

I.F. If there is any residual doubt, the principle that "interpretive doubt is to be resolved in the veteran's favor," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), must tilt the scales against the Secretary. The Veterans Court's construction, which permits judicial review of benefit decisions under the Caregiver Program, provides an important safeguard against VA's past widespread practice of wrongfully depriving veterans and their caregivers of benefits they deserve under the statute.

II. The Secretary urges that his interpretation be given deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). No such deference is appropriate. There is no indication that Congress intended to delegate to VA the authority to determine whether judicial review of

benefit decisions under the Caregiver Program should be available. Moreover, the settled canons of statutory construction—the strong presumption in favor of judicial review, the presumption against repeal by implication, and the pro-veteran canon—are "more than up to the job" of resolving section 1720G(c)(1)'s meaning. *Epic*, 138 S. Ct. at 1630. The VA wrongly believed that its interpretation was compelled by section 1720G(c)(1)'s plain language, and no deference is due where the agency has not exercised its interpretive authority.

III. The Veterans Court had statutory authority to issue mandamus. As an initial matter, the Secretary waived his argument that 38 U.S.C. § 502 provides an exclusive method for challenging the VA's construction of its governing statute by not challenging the Veterans Court's jurisdiction below. More importantly, section 502 expressly provides that the Veterans Court may review VA's statutory interpretations in the context of an individual benefits decision, *Wingard v. McDonald*, 779 F.3d 1354, 1358 (Fed. Cir. 2015), and there is no dispute that the underlying mandamus petition was in aid of the court being able to entertain such an appeal. While section 502 authorizes a direct challenge in this Court of the Secretary's *rulemaking* actions, the underlying petition does not challenge any VA rulemaking or regulation (as the Secretary concedes). Nor, under this Court's precedents, does availability of section 502 constitute an alternative to a "regular appeals process" that could preclude mandamus.

ARGUMENT

I. STANDARD OF REVIEW

This Court may "review and decide any challenge to the validity of any statute or regulation or any interpretation" that was relied upon by the Veterans Court in making its decision. 38 U.S.C. § 7292(c); *see also Albun v. Brown*, 9 F.3d 1528, 1530 (Fed. Cir. 1993). The Court reviews the Veterans Court's legal determinations *de novo*. *Prenzler v. Derwinski*, 928 F.2d 392, 393 (Fed. Cir. 1991). This Court has "jurisdiction to review the [Veteran Court's] decision whether to grant a mandamus petition that raises a non-frivolous legal question." *Beasley v. Shinseki*, 709 F.3d 1154, 1158 (Fed Cir. 2013).

II. THE STATUTORY TEXT, STRUCTURE, AND THE SETTLED CANONS OF STATUTORY CONSTRUCTION SUPPORT THE VETERANS COURT'S DECISION

A. The Statutory Text and Structure Contain No Indication that Congress Intended to Foreclose Board and Judicial Review of Benefits Decisions Under the Caregiver Program.

"'The starting point in discerning congressional intent is the existing statutory text.'" *Guillebeau v. Dep't of Navy*, 362 F.3d 1329, 1337 (Fed. Cir. 2004) (quoting *Lamie v. United States Tr.*, 540 U.S. 526, 534 (2004)). In examining whether section 1720G(c)(1) forecloses judicial review, the Veterans Court appropriately began "with the language of the statute." *Duncan v. Walker*, 533 U.S. 167, 172 (2001) (citations omitted). The court observed that "[t]he plain language of section 1720G(c)(1) does not insulate the Caregiver Program from judicial review." Appx5.

Indeed, as the court pointedly noted, the statutory provision "does not mention jurisdiction at all." *Id.*

That silence ought to be dispositive. Congress enacted section 1720G(c)(1) against the long-standing bedrock rule of the VJRA that the Board shall have the authority to review, and to issue "[f]inal decisions," in "[a]ll questions" where VA issued a decision "under a law that affects the provision of benefits … to veterans or the dependents or survivors of veterans," 38 U.S.C. §§ 511(a), 7104(a), with the Board's decisions subject to review by the Veterans Court, *id.* § 7252(a). The Caregiver Statute is unquestionably "a law that affects the provision of benefits … to veterans or the dependents or survivors of veterans," 38 U.S.C. § 511(a), and—as the Secretary acknowledged both below and in this Court, VA Br. 14 & n.6; Appx1393—decisions regarding assistance and support services provided under the Caregiver Program are "'benefits' decisions" within the meaning of the VJRA. *See also* 85 Fed. Reg. 46,226, 46,286 (July 31, 2020) ("38 U.S.C. § 1720G confers benefits, which would typically be subject to 38 U.S.C. §§ 7104(a) and 511(a) and confer BVA jurisdiction"). Nothing in the plain language of section 1720G(c)(1) purports to withdraw a veteran's ability to seek Board and Veterans Court review of benefit decisions under the Caregiver Program. Viewed "against th[e] venerable … backdrop" of the VJRA's provision of a specialized judicial review of adverse

veteran benefit decisions, "the congressional silence is audible." *United States v. Bestfoods*, 524 U.S. 51, 62 (1998) (citation omitted).

As the Veterans Court observed, this silence was particularly instructive because "Congress certainly knew how to clearly limit the jurisdiction of th[e Veterans] Court when it passed the Caregiver Program statute." Appx5. The court cited, as examples (*see* Appx5), the VJRA provisions explicitly limiting judicial review of VA's decisions. *See* 38 U.S.C. § 511(a) ("Subject to subsection (b), the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court, whether by an action in the nature of mandamus or otherwise."); *id.* § 7252(a) ("The Secretary may not seek review [by the Veterans Court] of any such decision [of the Board of Veterans' Appeals]."); *id.* § 7252(b) ("The [Veterans] Court may not review the schedule of ratings for disabilities adopted under section 1155 of this title or any action of the Secretary in adopting or revising that schedule."); *id.* § 7263(d) ("An order of the [Veterans] Court under this subsection is final and may not be reviewed in any other court.").

In addition, the Veterans Court noted recent congressional legislation that foreclosed Board appellate review of the VA's decisions "in a related context":

> In legislation establishing the Veterans Community Care Program—which incidentally amended portions of section 1720G—Congress instructed that "[t]he review of any decision under subsection (d) or (e) *shall be subject to the*

> *Department's clinical appeal process, and such decisions may not be appealed to the Board of Veterans' Appeals*."

Appx5 (quoting the VA MISSION Act, Pub. L. No. 115-182, § 101(a)(1), 132 Stat. 1393, 1399 (2018), *codified at* 38 U.S.C. § 1703(f)) (emphasis added). As the court observed, "[t]he contrast between the language of section 1703(f) and section 1720G(c)(1) could hardly be starker," fatally undermining "the Secretary's argument that section 1720G(c)(1) unambiguously strips the Board, and consequently th[e Veterans] Court, of jurisdiction." Appx5.

"[W]hen Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Collins v. Yellen*, 141 S. Ct. 1761, 1782 (2021) (internal quotation marks and citation omitted). Here, Congress used explicit language precluding review of specific veteran benefit decision by the Board and the Veterans Court in section 1703(f)—*precisely* the preclusion that the Secretary contends Congress accomplished *sub silentio* in section 1720G(c)(1). Settled principles of statutory construction foreclose the Secretary's anti-textual interpretation. A court has "no warrant to redline" Title 38, "importing … consequential language into provisions containing nothing like it." *Badgerow v. Walters*, 142 S. Ct. 1310, 1318 (2022).

The Secretary argues that the comparison between the express preclusion language in section 1703(f) and its absence in section 1720G(c)(1) is "less

persuasive" because the Caregiver Statute and the Community Care Program statute were enacted in different years. VA Br. 35. But although the presumption of meaningful variation operates with "particular[]" force when the statutory provisions are "enacted as part of a unified overhaul of judicial review procedures," *Nken v. Holder*, 556 U.S. 418, 430-31 (2009), it applies whenever Congress uses different language in provisions of the same title. *See, e.g.*, *Patel v. Garland*, 142 S. Ct. 1614, 1624 (2022) (a statutory provision barring review of "*any* judgment" was not limited to "discretionary judgments" because "[h]ad Congress intended … to limit jurisdictional bar to 'discretionary judgments,' it could have easily used that language—as it did elsewhere in the immigration code") (select internal quotation marks and citations omitted).

Moreover, "Congress is presumed to legislate" with the knowledge of "the 'strong presumption favoring judicial review of administrative action.'" *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021) (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 486 (2015)); *see also infra* at 30-36. For decades before it enacted either the Caregiver Act of the VA MISSION Act, Congress knew that, to foreclose judicial review, the statute "must upon its face give clear and convincing evidence of an intent to withhold [judicial review]." *Abbott Labs v. Gardner*, 387 U.S. 136, 140 n.2 (1967) (internal quotation marks and citation omitted); *see also* Appx5-6. The Secretary offers no logical explanation why, notwithstanding knowledge of this

"well-settled" interpretive rule," *Salinas*, 141 S. Ct. at 698 (internal quotation marks and citation omitted), Congress would choose to preclude judicial review with a cryptic reference to "medical determination" in 2010 (in section 1720G(c)(1)) and then use express preclusion language eight years later (in section 1703(f)). The Secretary's insistence that both provisions accomplish the same objective—foreclosure of judicial review—flies in the face of statutory text.

Here, moreover, the legislation establishing the VCCP also "amended portions of section 1720G." Appx5. The fact that Congress chose neither to replicate the term "medical determination" (which, under the Secretary's reading, is a shorthand for preclusion of judicial review) in section 1703(f), nor to conform section 1720G(c)(1) to section 1703(f) by adding the new express preclusion language to the statute, is a strong indication that Congress did not view the term "medical determination" as foreclosing judicial review. When Congress simultaneously drafts one provision and amends another, but keeps two different standards, "[t]he contrast between the language used in the two standards, and the fact that Congress used a new standard [in the new provision], certainly indicate that Congress intended the two standards to differ." *I.N.S. v. Cardoza-Fonseca*, 480 U.S. 421, 432 (1987).[8]

[8] The Secretary speculates that Congress needed to use "a more explicit statement" in section 1703(f) "to exempt those decisions from [B]oard review" because "VCCP decisions are *for the most part* not 'medical determinations' in the same matter as

The placement of section 1720G(c)(1) within the statutory scheme further supports the plain-language reading of that provision as not foreclosing Board or Veterans Court review. *See Barnhart v. Simon Coal Co.*, 534 U.S. 438, 450 (2002). Section 1720G(c)(1) is a part of the Caregiver Statute's section entitled "Construction." *See* 38 U.S.C. § 1720G(c). Notably, section 1720(c)(1) is not placed within a section entitled "Appeals," "Judicial Review," or—as with section 1703(f)—"Review of Decisions." *See* 38 U.S.C. § 1703(f). This placement—especially when contrasted with the express and clear title of section 1703(f)—is a strong indication that section 1720G(c)(1) was never meant to foreclose judicial review. *See Henderson v. Shinseki*, 562 U.S. 428, 438-40 (2011) (placement of a timing rule in a statutory section entitled "Procedure," rather than the section entitled "Organization and Jurisdiction," provided inference that the rule was not intended to be jurisdictional). This is a far cry from instances where courts have found the government to have met its "heavy burden" of demonstrating the requisite "clear and

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some PCAFC decisions." VA Br. 34-35 (emphasis added); *but see* 38 U.S.C. § 1703(d)(1)(E) (referring to decisions made by "the covered veteran *and the covered veteran's referring clinician*" that are "*in the best medical interest* of the covered veteran" (emphasis added); *id.* § 1703(d)((2)(B) (referring to decisions on "[t]he nature of the hospital care, medical services, or extended care services required"). The Secretary's conjecture about the degree to which VCCP and PCAFC decisions are medical determinations simply highlights that "medical determination" has a natural meaning unrelated to Board reviewability. Again, if the term "medical determination" were a term-of-art shorthand for preclusion of judicial review, Congress could have easily used the same term in section 1703(f). Yet it did not.

convincing" evidence of congressional intent to preclude judicial review. *See, e.g.*, *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 272-73 (2016) (finding judicial review precluded where the statutory provision (35 U.S.C. § 314(d)), entitled "No Appeal," expressly provided that a specific agency determination "shall be final and non-appealable").

B. The "Strong Presumption" in Favor of Judicial Review Supports the Veterans Court's Conclusion that Congress Did Not Intend to Foreclose Judicial Review of Caregiver Program Benefits.

The Veterans Court's plain-text reading of section 1720G(c)(1) is further confirmed by "the strong presumption favoring judicial review of administrative action." *Salinas*, 141 S. Ct. at 698 (internal quotation marks and citation omitted); *see also Abbott Labs.*, 387 U.S. at 141 ("only upon a showing of 'clear and convincing evidence' of a contrary legislative intent should the courts restrict access to judicial review") (citation omitted). "Because the presumption … is well-settled, the Court assumes that Congress legislates with knowledge of the presumption. It therefore takes "clear and convincing evidence" to dislodge the presumption." *Kucana v. Holder*, 558 U.S. 233, 251-52 (2010) (selected internal quotation marks and citations omitted). "To the extent there is ambiguity" regarding the meaning of a statutory provision, such ambiguity "must be resolved" in favor of judicial review. *Salinas*, 141 S. Ct. at 698.

Here, the Veterans Court correctly applied this presumption and found that "[t]he Secretary has not met his burden" of showing the requisite "clear and convincing evidence" of congressional intent to withhold judicial review. Appx5-6. The Veterans Court rejected as "conclusory" the Secretary's argument that "Congress intended to withhold judicial review from the Caregiver Program because section 1720G(c)(1) implicitly references VA's regulatory carveout for medical determinations." Appx6. As the court observed, "[s]ection 1720G(c)(1) makes no mention of the regulatory carveout 'upon its face,'" and "[a]n implied reference cannot constitute 'clear and convincing evidence of an intent to withhold' judicial review." Appx6 (quoting *Abbott Labs.*, 387 U.S. at 140 n.2).

The Secretary accuses the Veterans Court of "cherry-picking" the presumption in favor of judicial review because (he asserts) it would be "more favorable to its desired outcome." VA Br. 36. This accusation is unwarranted. The "presumption favoring interpretations of statutes that allow judicial review of administrative action" is a "well-settled" rule of statutory construction, *Reno v. Catholic Soc. Servs., Inc.*, 509 U.S. 43, 63-64 (1993) (internal quotation marks and citation omitted), and courts "have consistently applied that interpretive guide … to questions concerning the preservation of federal-court jurisdiction," *Kucana*, 558 U.S. at 251 (citing cases). The fact that the Veterans Court turned to this presumption as an interpretive tool is a virtue, not a vice.

The Secretary next chastises the Veterans Court for focusing on the "express language" of the statute at the expense of "the structure of the statute and its legislative history." VA Br. 36 (citing *Block v. Comm. Nutrition Inst.*, 467 U.S. 340, 350-51 (1984)). For starters, the text of the statute is the best guide—and "[t]he starting point"—for "discerning congressional intent." *Guillebeau*, 362 F.3d at 1337. It will be an exceedingly rare case—if any—where the requisite "clear and convincing evidence" of congressional intent to foreclose judicial review could be found *in the absence* of any such indication in the statutory text: "When Congress intends to effect a significant change, 'it ordinarily provides a relatively clear indication of its intent in the text' of the statute." *Gates v. VA*, No. 2020-2187, 2021 U.S. App. LEXIS 40129, at *4-5 (Fed. Cir. Feb. 2, 2021) (quoting *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1520 (2017)). Had Congress intended to "dislodge the presumption," *id.*, "it presumably would have made such intention clear from the face of the text," *Gates*, 2021 U.S. App. LEXIS 40129, at *5.

In any event, the Secretary points to *nothing* in the structure or legislative history of the Caregiver Act that would constitute the requisite "clear and convincing" evidence of congressional intent to foreclose judicial review of *all* benefits decision under the Caregiver Program. Instead, the Secretary simply rehashes his argument that section 1720G(c)(1) "states that PCAFC decisions are to be considered 'medical determinations,'" and that a VA regulation provides that

medical determinations "are not board-reviewable." VA Br. 37. The Secretary's argument boils down to an assertion that the presumption in favor of judicial review has been rebutted by the presumption of congressional awareness of a pre-existing agency regulation. This falls far short of the requisite "clear and convincing" evidence that Congress intended to foreclose judicial review. Nor is there any precedent (and the Secretary cites none) that an agency can discharge its "heavy burden" of showing that Congress "prohibit[ed] all judicial review of the agency's compliance with a legislative mandate," *Mach. Mining*, 575 U.S. at 486 (internal quotations and citation omitted), by merely invoking another interpretive presumption.

Block v. Community Nutrition Institute, 467 U.S. 340 (1984), does not support the Secretary's argument that the presumption in favor of judicial review controls "only" where there is "substantial doubt about congressional intent." VA Br. 37. The Supreme Court in *Block* held that Congress intended to preclude consumers of dairy products from obtaining judicial review of milk market orders issued by the Secretary of Agriculture because the statutory scheme provided a very specific, detailed mechanism for producers and handlers (but not consumers) to seek judicial review of the orders. *See* 467 U.S. at 341. The Supreme Court based its conclusion on the fact that the statute "provide[d] a detailed mechanism for judicial consideration of *particular issues at the behest of particular persons*," thereby

implying that "judicial review of those issues at the behest of other persons" was precluded. *Id.* at 349-51 (emphasis added).

Unlike the law at issue in *Block*, the Caregiver Statute does not set up a cooperative regulatory scheme that authorizes certain participants (but not others) to seek administrative remedies. *See* 467 U.S. at 347. Nor is there any basis for concluding that enabling veterans to seek Board and Veterans Court review of adverse benefit decisions "would severely disrupt [a] complex and delicate administrative scheme." *Id.* at 348. In the aftermath of the Veterans Court's decision below, the Secretary has instituted a process enabling veterans and their caregivers to appeal adverse decisions to the Board, and the Board has already considered a significant number of these appeals with no apparent "disrupt[ion]" to the Caregiver Program's operation. On the contrary, the Board's ability to consider appeals from the VA's denial or revocation of caregiver benefits has provided an important safeguard against wrongful benefits revocation. *See, e.g.*, *(Title Redacted by Agency)*, No. 220330-234303, 2022 BVA LEXIS 62822 (Aug. 11, 2022) (remanding the VA's denial decision as "conclusory and unexplained"; *(Title Redacted by Agency)*, No. 211105-197459, 2022 BVA LEXIS 26690 (Apr. 19, 2022) (same).

The Secretary's assertion that congressional intent to foreclose judicial review is "made clear by [the PCAFC's] legislative history," VA Br. 37, lacks merit. There is *nothing* in the legislative history of the Caregiver Statute to support the Secretary's

claim that section 1720G(c)(1)'s reference to "medical determination" was intended to foreclose judicial review. The Secretary points only to select statements by VA representatives (*not* by Members of Congress) that *post-date* the Caregiver Statute's enactment. *See* VA Br. 30-31 & n.10. But "[m]aterial not available to the lawmakers is not considered, in the normal course, to be legislative history." *Gustafson v. Alloyd Co.*, 513 U.S. 561, 579 (1995). And "[a]fter-the-fact statements … are not a reliable indicator of what Congress intended when it passed the law," *id.*, nor can they satisfy the high threshold of demonstrating that Congress wished to preclude judicial review.

The "'strong presumption' in favor of judicial review" may be overcome only "by 'clear and convincing' indications, drawn from '*specific* language,' '*specific* legislative history,' and 'inferences of intent drawn from the statutory scheme as a whole,' that Congress intended to bar review." *Cuozzo*, 579 U.S. at 273 (emphasis added). None of that exists here. The statutory language that the Secretary invokes does not mention judicial review (or appeals). The Caregiver Act's legislative history is entirely silent on the issue of judicial review. Nor is this a statutory scheme where Congress expressly and deliberately provided for judicial review of *other* types of veterans benefits decisions but *not* of the Caregiver Program benefits, or for appeals by certain people but not others. *See Block*, 467 U.S. at 348.

C. The Presumption Disfavoring Repeals by Implication Further Supports the Veterans Court's Conclusion that Congress Did Not Foreclose Judicial Review of Caregiver Program Benefits.

In reaching its conclusion that section 1720G(c)(1) did not foreclose judicial review, the Veterans Court relied on another settled statutory canon—"a 'strong presumption that repeals by implications are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute.'" Appx6 (quoting *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018)). As the court observed, "[t]he party claiming that 'one [law] displaces the other [] bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow.'" Appx6 (quoting *Epic*, 138 S. Ct. at 1624).

The Veterans Court found that the Secretary "offer[ed] insufficient proof [of] a clear congressional intention to displace the ordinary scope of the VJRA." Appx6. The court observed that "Congress did not mention the VJRA in the Caregiver Program statute, nor did it define the phrase 'medical determination' or indicate elsewhere what the term might mean." Appx6. The Veterans Court also found "no other instance … where Congress has, without a word of comment, wholly excluded a veterans program from judicial review." Appx6. Since "[i]t is well settled that Congress 'does not alter the fundamental details of a regulatory scheme in vague terms of ancillary provisions,'" the Veterans Court concluded that the Secretary's

reliance on the term "medical determination" in section 1720G(c)(1) "falls short of the 'clear and manifest' intention required by *Epic*." Appx6 (quoting *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001)).

The Secretary contends that the Veterans Court failed to consider whether the VJRA and section 1720G(c)(1) could be "harmonized" through VA's interpretation of the term medical determination." VA Br. 38. But the Veterans Court specifically acknowledged that a court "'is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both.'" Appx6 (quoting *Epic*, 138 S. Ct. at 1624). The Veterans Court found, however, that adopting the Secretary's reading of section 1720G(c)(1) would mean "wholly exclud[ing]" an entire veterans benefits program from judicial review. Appx6. This exclusion would unavoidably disrupt the VJRA's comprehensive review process for veterans benefits decisions, *see Bates*, 398 F.3d at 1364, effectively "suspend[ing]" the VJRA's "normal operations" with respect to the Caregiver Program, *Epic*, 138 S. Ct. at 1624.

It was entirely reasonable for the Veterans Court to conclude that Congress would not have withdrawn an entire newly-created benefits program from the default VJRA process of judicial review without *any* mention of the VJRA in the Caregiver Statute or *any* indication that its reference to "medical determination" was intended to foreclose the normal review process under the VJRA. Appx6. The Veterans Court's conclusion was especially reasonable given that when Congress has decided

to exclude an issue from any level of judicial review under the VJRA, it has consistently indicated its intent expressly on the face of the statute with clear and unambiguous language. *See supra* at 27; Appx5.

D. There is No "Clear and Convincing Evidence" that Congress Intended the Term "Medical Determination" to Refer to VA Regulation 20.104(b) Rather than to the *Colvin* Rule.

The Secretary relies heavily on the canon that when Congress legislates, it is presumed to be aware of existing agency regulations. VA Br. 23-24, 28-29. The Secretary contends that Congress intended to preclude Board and Veterans Court review of Caregiver Program benefit decisions merely because Congress used the same term as a VA regulation, 38 C.F.R. § 20.104(b), that precludes Board review of certain matters. *See* VA Br. 29, 32-33. As the Veterans Court correctly concluded, this slender reed cannot support the Secretary's construction. The lonely fact that section 1720G(c)(1) contains a term that also appears in VA regulation 20.104(b) does not provide the requisite clear and convincing evidence of intent to foreclose judicial review—certainly not absent *any* supporting indication in the statutory language, structure, or legislative history. Appx6-8.

As a preliminary matter, the Secretary's analytical leap fails to give sufficient credit to other important canons of statutory construction, including the "well-settled presumption favoring interpretations of statutes that allow judicial review of administrative action," *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496

(1991) (citation omitted), and the corollary principle that to "dislodge the presumption," the statutory language or structure must show "clear and convincing evidence" of legislative intent to prohibit judicial review. *Kucana*, 558 U.S. at 251-52 (citation omitted). The Secretary's failure to credit adequately these other interpretive canons dooms its analysis. *See supra* at 30-38.

Moreover, the VA regulation on which the Secretary hangs his hat is not the only legal authority that uses that same phrase. Courts also presume that Congress is aware of pre-existing judicial interpretations of the law, not just agency regulations. *See Cannon v Univ. of Chi.*, 441 U.S. 677, 696-98 (1979); *Mudge v. United States*, 308 F.3d 1220, 1232 (Fed. Cir. 2002). Thus, Congress was presumptively aware when it created the Caregiver Program that the term "medical determination" as used in section 1720G(c)(1) was extensively used by the Veterans Court to refer to a type of Board finding that triggers procedural limitations on the Board's ability to render medical determinations, as set forth in *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998).[9]

[9] This Court in *Hodge* overruled the so-called "*Colvin* test" for materiality with respect to when a hearing should be reopened on the basis of new and material evidence. 155 F.3d at 1359-60. The Court left undisturbed *Colvin*'s determination that Board panels "may consider only independent medical evidence to support their findings" and must "point to a medical basis other than the panel's own unsubstantiated opinion [] support[ing] the decision." 1 Vet. App. at 175.

In *Colvin*, the Veterans Court was presented with an appeal from a veteran seeking to reopen his claim to obtain service connection for multiple sclerosis. 1 Vet. App. at 173. Despite evidence from a VA neurologist who stated in a report of medical examination that "the [veteran]'s multiple sclerosis began in the infantry while he was in Vietnam," the Board in its review concluded that this medical evidence did not "provide a new factual basis so as to permit the grant of service connection for multiple sclerosis" and denied the veteran's request to reopen his claim. *Id*. at 173. The Veterans Court in *Colvin* found the Board's exercise of its independent judgment and disregard of medical evidence to be in error and held that the Board may not "refut[e] … medical conclusions in the record with its own unsubstantiated medical conclusions," and instead "may consider only independent medical evidence to support [its] findings." *Id*. at 175.

This principle—the *Colvin* rule—established a groundbreaking due process safeguard for veterans by prohibiting the Board from relying on its own "medical conclusions" in place of medical evidence in the record in reaching decisions. *See Fernandez v. Peake*, 299 Fed. Appx. 973, 976 (Fed. Cir. 2008) ("[t]he Board was not required to base its decision on independent medical evidence until the Veterans Court rendered its 1991 decision in *Colvin*").[10] *Colvin* and its progeny have affirmed

[10] Prior to the *Colvin* rule, the Board routinely rejected medical evidence in rendering medical determinations, citing only "sound medical principles" to support its decisions. *See* Veterans Benefits Manual 14.5.7 (2018).

the importance of medical evidence in the Board's adjudication of veterans' claims in the decades following the opinion.

The Secretary's argument that "medical determination" as used in section 1720G(c)(1) cannot refer to the *Colvin* rule because the exact term "medical determination" does not appear in the language of the original opinion (VA Br. 27) is baffling. The Veterans Court consistently describes the rule requiring the Board to refer to medical evidence in making "medical determinations" by referencing the *Colvin* decision. *See, e.g.*, *Johnson v. Derwinski*, 3 Vet. App. 16, 18 (1991) ("The Board cannot make a medical determination based on its own opinion.") (citing *Colvin*); *Santiago v. Brown*, 5 Vet. App. 288, 292 (1993) ("the issue presented in this case is whether the Board's opinion … is an unsubstantiated *medical* determination, which this Court has held the Board is unauthorized to render, or whether it is a *legal* determination, i.e., a finding of fact which the Board, as fact finder, has derived from a review of medical evidence which is sufficiently conclusive as to the underlying medical issues to enable the Board to render the legal determination") (citing *Colvin*); *Gutierrez v. Principi*, 19 Vet. App. 1, 5 (2004) ("[t]he Secretary … contends that the matter should be remanded because … the Board made a medical determination independent of the medical evidence, in violation of *Colvin*") (additional citation omitted); *Hepburn v. Peake*, No. 06-1686, 2008 U.S. App. Vet. Claims LEXIS 1058, at *15 (Ct. Vet. App. July 25, 2008) ("the

Board may not substitute its own unsubstantiated opinion for competent medical evidence or render a medical determination without credible supporting evidence") (citing *Colvin*). The Secretary's dismissal of *Colvin* as "a Veterans Court case that *happens to touch* on the concept of medical determinations" (VA Br. 27 (emphasis added)) ignores both the import of *Colvin* and the fact that the widely-used formulation of the *Colvin* rule consistently used the term "medical determination"—the same term as in section 1720G(c)(1).

Also unpersuasive is the Secretary's argument that it "would serve no purpose" for section 1720G(c)(1) to use the term "medical determination" to refer to the *Colvin* rule because "*Colvin* already applies to all board determinations of matters requiring medical evidence to decide." VA Br. 27. Absent reference to the *Colvin* rule in the Caregiver Program statute, the Board could decide, for example, that the question of whether a veteran needs "[a]ssistance with one or more activities of daily living," § 1720G(d)(4)(A), such as grooming or bathing, 38 C.F.R. § 71.15, is not medical in nature and could be evidenced by lay statements. The Board could then substitute its own judgment to determine that a veteran does not need assistance with activities of daily living despite contrary medical evidence in the record, thereby eroding veterans' procedural rights. It made sense for Congress to use the term "medical determination" in section 1720G(c)(1) as instructing the Board on

evidentiary standards to use in its review—as opposed to implicitly foreclosing review altogether.

Although the Veterans Court did not definitely hold "medical determination" in section 1720G(c)(1) to be a reference to the *Colvin* rule, that only reflects that the issue was not squarely before the court. There was, therefore, no need for the Veterans Court to provide a definitive interpretation of the statutory term "medical determination." While the Secretary chastises this exercise of judicial restraint as "cavalier[]," VA Br. 26, that approach is in line with this Court's own practice. *See Mudge*, 308 F.3d at 1232 (a court need not decide a question of statutory construction that "is not properly before [it] on appeal"). And the Veterans Court had no trouble concluding that "[o]f the potentially correct readings of 1720G(c)(1), the Secretary's is not one" because it would "take the extraordinary step of limiting the regular operation of the VJRA and foreclosing judicial review despite the absence of a clearly expressed congressional intent to do so." Appx7-8.

Lastly, the Secretary invokes (VA Br. 33) the Supreme Court's recent observation that "[w]here Congress employs a term of art 'obviously transplanted from another legal source,' it 'brings the old soil with it.'" *George v. McDonough*, 142 S. Ct. 1953, 1959 (2022) (quoting *Taggart v. Lorenzen*, 139 S. Ct. 1795, 1801 (2019)) (selected internal quotation marks omitted). But that interpretive maxim cuts against the Secretary's position. The "old soil" most often denotes *judicial*

interpretations of the terms of art that Congress uses in later-enacted statutes. *See, e.g.*, *Taggart*, 139 S. Ct. at 1801-02 (a bankruptcy provision authorizing a court to issue measures in aid of an injunction was presumed to incorporate "traditional standards in equity practice for determining when a party may be held in civil contempt for violating an injunction"); *Hall v. Hall*, 138 S. Ct. 1118, 1127-29 (2018) (use of the term "consolidate" in Federal Rule of Civil Procedure 42(a) carried the meaning ascribed to it by courts under the prior consolidation statute); *Field v. Mans*, 516 U.S. 59, 68-74 (1995) (a bankruptcy provision dealing with a debt resulting from fraud carried "a common-law understanding of the terms" such as "actual fraud"); *Cmty. For Creative Non-Violence v. Reid*, 490 U.S. 730, 739-40 (1989) (interpreting the term "employee" in the Copyright Act of 1976 in light of prior decisions regarding the conventional employer-employee relationship "as understood by common-law agency doctrine") (citing cases). Since the Caregiver Statute does not define the term "medical determination," the term "presumably carried forward the same meaning" the Veterans Court "had ascribed to it" in the numerous decisions articulating the *Colvin* rule. *Hall*, 138 S. Ct. at 1128.[11]

[11] In addition, although the Secretary touts that the VA's regulation existed since 1988, *see, e.g.*, VA Br. 2, 21, the *Colvin* rule is of similar vintage, having been first articulated in 1991. *Supra* at 39-40.

E. Congress Did Not Implicitly Ratify the VA's Construction of Section 1720G(c)(1).

The Secretary contends that Congress implicitly ratified the VA's construction of section 1720G(c)(1) because "Congress took no action in two later amendments to the Caregiver Act to disavow VA's interpretation." VA Br. 29-30. But the canon of congressional acquiescence, *see Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978), cannot bear the weight the Secretary places on it.

As an initial matter, legislative approval by silence is the "weakest" source of statutory construction. *Butterbaugh v. DOJ*, 336 F.3d 1332, 1342 (Fed. Cir. 2003). Thus, it is doubtful that it could outweigh the other "strong" interpretive presumptions and supply "clear and convincing" evidence that Congress intended to preclude judicial review. *See supra* at 32-33.

Here, the Secretary's meager evidence falls far short. The Secretary first invokes VA's single response to the House Subcommittee on Health's questions for the record in 2011 (a year after the Caregiver Statute's enactment) that "the PCAFC decisions are not within the [B]oard's jurisdiction and may not be appealed to the [B]oard." VA Br 30; *see also* Appx__[Resp_Ex._25_at 75]. But an isolated statement to a twelve-member subcommittee is not sufficient to "invoke a presumption of general congressional awareness." *Schism v. United States*, 316 F.3d 1259, 1294 (Fed. Cir. 2002) (en banc) (*citing SEC v. Sloan*, 436 U.S. 103, 121 (1978)). Moreover, the same VA representative testified earlier at the hearing that

there is some form of "board" review following a VHA clinical appeal. *See* Appx1439 ("If the family is still uncomfortable with that decision, we will bump it up to the VISN level and eventually to Central Office, *where we will convene a board to re-review*.") (emphasis added). Faced with this confusing (and seemingly contradictory) testimony, the Veterans Court properly concluded that "the single written statement is insufficient to invoke a presumption of 'general congressional awareness.'" Appx7 (quoting *Schism*, 316 F.3d at 1294).[12]

Finally, the Secretary invokes the 2018 VA MISSION Act, which amended certain parts of section 1720G but "made no clarifications or alterations to the statement in section 1720G(c)(1) that PCAFC decisions were to be construed as medical determinations." VA Br. 31-32. This argument likewise fails. The VA MISSION Act did not reenact or comment on section 1720G(c)(1), but only made amendments to separate subsections 1720G(a) and 1720G(d). As such, the Veterans Court correctly concluded that the VA MISSION Act cannot be construed as

[12] The Secretary also relies on a cryptic statement in a written testimony of a VA representative at a 2016 hearing that PCAFC benefit decisions are "'considered medical determinations' and that, when there are disagreements or disputes over those decisions, 'VHA follows the VHA Clinical Appeals policy and procedures that govern the appeals process for all VHA clinical programming.'" VA Br. 30-31 n.10 (citing prepared hearing statement). This statement does not even mention preclusion of Board review; it provides no basis to infer congressional awareness of—much less acquiescence in—the VA's interpretation of section 1720G(c)(1). The same applies to the VA's annual reports (*see* VA Br. 30 n.10 & Ex. A), which the VA did not even introduce into the record before the Veterans Court.

congressional ratification or approval of VA's interpretation of section 1720G(c)(1). Appx7. As the court trenchantly observed, "'[t]he canon of ratification [and the presumption under *Lorillard* have] little probative value where … what is re-enacted is a different subsection of the statute.'" *Id.* (quoting *Shalom Pentecostal Church v. Acting Sec'y, U.S. DHS*, 783 F.3d 156, 167 (3rd Cir. 2015)) (second alteration in original).

F. The Pro-Veteran Canon Further Supports a Construction of Section 1720G(c)(1) as Not Precluding Judicial Review.

The Veterans Court resolved this action through statutory analysis of the Caregiver Program statute, finding that the use of "medical determination" in section 1720G(c)(1)—particularly in view of the "strong presumption favoring judicial review of administrative action"—did not signify clear intent from Congress that the Program is insulated from the VJRA's mandate of judicial review. Appx5. The pro-veteran canon (to which the court below did not need to resort) provides additional support for the Veterans Court's conclusion. If the Court finds the section 1720G(c)(1) to be ambiguous, the pro-veteran canon that "interpretive doubt is to be resolved in the veteran's favor," *Brown v. Gardner*, 513 U.S. 115, 118 (1994), must tilt the inquiry toward the Veterans Court's construction. *See Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009). Only that construction permits judicial review of benefit decisions under the Caregiver Program. *See* VA Br. 7-8. And that review provides an important safeguard against VA's past widespread practice of

wrongfully terminating Caregiver Program benefits for eligible veterans and their caregivers. *See* Appx57.

Many well-documented examples, discussed in congressional hearing and media reports, showed benefit revocations that resulted not from sudden improvement of veterans' injuries, but rather from VA's arbitrary reassessment determinations, which could not be reconciled with the veterans' actual need for support. Appx57. The Veterans Court addressed these injustices by properly recognizing the right to judicial review, and certified a class of veterans and caregivers who had been denied a right to seek review of their benefits denials. Appx8-11. In fact, many of these veterans and caregivers have already exercised the important right of Board appeal in an effort to overturn Caregiver Program decisions terminating their benefits. *See infra* at 53.

III. *CHEVRON* DEFERENCE IS INAPPLICABLE

As a last resort, the Secretary urges that his interpretation of the term "medical determination" in section 1720G(c)(1) as precluding judicial review be accorded deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). VA Br. at 39-41. No such deference is appropriate. *Chevron* has never stood for the proposition that agencies may declare themselves immune from judicial review, and that courts must defer to them. Even if *Chevron* did apply,

the Secretary's interpretation of section 1720G(c)(1) as precluding judicial review is unreasonable.

The threshold *Chevron* inquiry is "whether Congress in fact meant to confer the power the agency has asserted." *W. Va. v. EPA*, 142 S. Ct. 2587, 2607-08 (2022) (citation omitted). Here, there is no indication that Congress intended to delegate to VA the authority to determine when judicial review of benefit decisions under the Caregiver Program should be available. The VJRA already sets forth a comprehensive and detailed system of which VA decisions (and issues) are appealable. *Supra* at 5-6. The Secretary may have general rulemaking authority to *implement* the statutory scheme, 38 U.S.C. § 501(a), but no VJRA provision authorizes the Secretary to insulate his decisions from judicial review.

"[O]ne of the principal justifications behind *Chevron* deference" is deference to "practical agency expertise." *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 651-52 (1990) (citing *Chevron*, 467 U.S. at 865). To receive deference, the agency must bring its specialized expertise to resolve a statutory ambiguity or fill a gap left by Congress. *Chevron*, 467 U.S. at 865-66; *Cuozzo*, 579 U.S. at 276-77. But the VA can claim no specialized expertise in matters of statutory construction or when judicial review is warranted. The question of whether the text or structure of section 1720G(c)(1) contains "clear and convincing evidence" of congressional intent to preclude judicial review of benefit decisions under the Caregiver Program

is a matter for this Court to decide—not the VA. *See Adams Fruit Co. v. Barrett*, 494 U.S. 638, 649-50 (1990).

Moreover, a court "owe[s] an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' [it] find[s itself] unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). Here, the settled canons of statutory construction—the strong presumption in favor of judicial review, the presumption against repeal by implication, and the pro-veteran canon—are "more than up to the job," *Epic*, 138 S. Ct. at 1630. "Where, as here, the canons supply an answer, *Chevron* leaves the stage." *Epic*, 138 S. Ct. at 1630 (internal quotation marks and citation omitted).

In addition, "'deference to an agency's interpretation of a statute is not appropriate when the agency wrongly believes that interpretation is compelled by Congress.'" *Peter Pan Bus Lines, Inc. v. Fed. Motor Carrier Safety Admin.*, 471 F.3d 1350, 1354 (D.C. Cir. 2006) (quoting *PDK Labs., Inc. v. DEA*, 362 F.3d 786, 798 (D.C. Cir. 2004)) (selected internal quotation marks and additional citations omitted); *cf. Negusie v. Holder*, 555 U.S. 511, 521-23 (2009) (*Chevron* deference is not appropriate where the agency "has not exercised its interpretive authority," but instead believed its interpretation was mandated by existing precedent). This is so because "*Chevron* step 2 deference is reserved for those instances when an agency

recognizes that the Congress's intent is not plain from the statute's face." *Peter Pan Bus Lines*, 471 F.3d at 1354.

Here, as the Secretary acknowledges (VA Br. 40), the VA believed that its interpretation was compelled by "[t]he plain language of section 1720G(c)(1)," which "removed any doubt that Congress intended to insulate even decisions of eligibility from appellate review under the Program of Comprehensive Assistance for Family Caregivers." 80 Fed. Reg. at 1366. Because the VA "wrongly believe[d] that interpretation [wa]s compelled by Congress," *Peter Pan Bus Lines*, 471 F.3d at 1354, deference to that interpretation is inappropriate.

Finally, the Secretary's invocation of policy considerations (VA Br. 41) is unavailing. For one thing, policy considerations cannot warrant deference to an agency where the basis for deference is otherwise lacking. For another, the Secretary's concerns are exaggerated. The Secretary contends that "[n]on-medical personnel and judges could be asked to second guess treatment decision and medical judgments of medical personnel.' VA Br. 41. But the *Colvin* rule, which requires the Board to base any medical determination on independent medical evidence, will guard against that supposed danger and prevent any impermissible "second-guessing."

The Secretary then intones that having the Board consider appeals under the Caregiver Program "could … draw limited medical resources away from patient

care." VA Br. 41. But Board appeals are either decided on the existing record or, in some cases, on additional evidence supplied by the veteran, 38 U.S.C. § 7104(a); VA's medical personnel simply have no role to play once an appeal to the Board is filed. In any event, "any increased burdens" imposed on VA are the result of "an appropriate balance" struck by Congress, so the Secretary's complaint "is properly addressed to Congress, not this Court." *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 123-24 (1980).

The Secretary frets that Board appeals "could overwhelm an already heavily-taxed adjudicatory system." VA Br. 41. But the VA did not seek a stay of the decision below either from the Veterans Court or from this Court. *Cf. Russell v. Todd*, 309 U.S. 280, 287 (1940) (a party claiming equitable relief must act with reasonable promptness); *U.S. v. Wylie*, 730 F.2d 1401, 1403 (11th Cir. 1984) (a government's "ability to stay an unfavorable ruling insures that no … interference [with its operations] will take place"). Instead, the VA agreed to develop and implement an appeal process that enables veterans and their caregivers to appeal adverse benefit decision to the Board. Appx1368-1385; Appx1386-1390. And the VA has already notified by mail veterans who have been rejected or removed from the Caregiver Program of their right to appeal that denial to the Board. *Id*. The VA's willingness to implement the Veterans Court's decision, and to provide a mechanism

for Board appeals under the Caregiver Program, belies its stated concerns that the agency's adjudicatory resources will be overwhelmed.

In fact, this appeal process has already enabled the Board to correct many erroneous VA decisions, demonstrating the importance of administrative and judicial review. A search of Board decisions in the BVA's database shows that the Board issued decisions in at least 250 appeals of Caregiver Program benefit decisions following the institution of the program through September 2022.[13] In remanding these decisions, the Board often chastised the VA for "not cit[ing] any medical findings or records underpinning the decision," leaving "the Board [] no way to know how or why" a decision was reached. *E.g.*, *(Title Redacted by Agency)*, No. 220330-234303, 2022 BVA LEXIS 62822 (Aug. 11, 2022). And the Board often found that the underlying VA decision was "conclusory and unexplained." *Id.*; *see also (Title Redacted by Agency)*, No. 211105-197459, 2022 BVA LEXIS 26690 (Apr. 19, 2022) (same). In devising a program to benefit veterans and their caregivers, Congress could not have intended an agency process that results in erroneous and arbitrary denials, with no recourse from "conclusory and unexplained" agency decisions.

[13] *See* U.S. Dep't of Veterans Affairs, Board of Veterans' Appeals, "Search Decisions," https://search.usa.gov/search?affiliate=bvadecisions (search for "PCAFC & remand").

IV. THE VETERANS COURT PROPERLY GRANTED A WRIT OF MANDAMUS

A. Section 502 Does Not Prevent the Veterans Court from Issuing a Writ of Mandamus.

The Secretary argues that the Veterans Court lacked statutory authority to issue mandamus because 38 U.S.C. § 502 provides an exclusive method for challenging the VA's construction of its governing statute. This argument lacks merit.

As an initial matter, the Secretary has waived this argument. As the Secretary admits, the VA did not challenge the Veterans Court's jurisdiction below. VA Br. 45 n.18. On the contrary, the VA acknowledged below that the Veterans Court "would have jurisdiction under the AWA [All Writs Act] where it would otherwise 'be prevented or frustrated from exercising its statutorily granted jurisdiction over a Board decision.'" Appx1392-1393 (quoting *Wick v. Brown (In re Wick)*, 40 F.3d 367, 373 (Fed. Cir. 1994)).

More importantly, however, Section 502 does not limit the Veterans Court's jurisdiction here. Section 502, entitled "Judicial Review of Rules and Regulations," provides, in full:

> An action of the Secretary to which section 552(a)(1) or 553 of title 5 (or both) refers is subject to judicial review. Such review shall be in accordance with chapter 7 of title 5 and may be sought only in the United States Court of Appeals for the Federal Circuit. However, if such review is sought in connection with an appeal brought under the

> provisions of chapter 72 of this title, the provisions of that chapter shall apply rather than the provisions of chapter 7 of title 5.

38 U.S.C. § 502.

All that means is that an action challenging the VA's rulemaking under the Administrative Procedure Act ("the APA"), chapter 7 of title 5, must be brought in this Court, not another court. Section 502 explicitly explains that it changes nothing about the Veterans Court's jurisdiction; if review of the VA's regulation is sought as part of an appeal under the VJRA (under chapter 72 of title 38), the provisions of that chapter, rather than those of the APA, shall apply. 38 U.S.C. § 502.

Thus, Section 502 "does not have the hallmarks of a jurisdictional decree." *Stern v. Marshall*, 564 U.S. 462, 480 (2011). Treating section 502 as such runs counter to the Supreme Court's admonition "to avoid characterizing rules as jurisdictional where Congress has not 'clearly stated that the rule is jurisdictional.'" *Mayne Pharma Int'l Pty. Ltd. v. Merck Sharp & Dohme Corp.*, 927 F.3d 1232, 1238 (Fed. Cir. 2019) (quoting *Sebelius v. Auburn Reg'l Med. Ctr.*, 568 U.S. 145, 153 (2013)).

Section 502 does not set forth an *exclusive* method for a challenge to the validity of a VA regulation. Rather, section 502 *authorizes* a direct challenge in this Court of the Secretary's *rulemaking* actions—namely, promulgation of rules or other rulemaking actions under 5 U.S.C. §§ 552(a)(1) and 553. "Having invoked the

APA" in Section 502, "Congress added for clarity that, when review of regulations takes place under chapter 72 (in the Veterans Court under § 7252 or in this court under § 7292), as is common, the standards of chapter 72 and not the APA govern the review. § 502 (third sentence; unchanged since 1988)." *Wingard v. McDonald*, 779 F.3d 1354, 1358 (Fed. Cir. 2015); *see also Wolfe v. McDonough*, 28 F.4th 1348, 1358 (Fed. Cir. 2022) ("In considering an individual case, the Veterans Court and this court can consider a regulation's validity.") (citing 38 U.S.C. §§ 7261(a)(3), 7292; *Gardner v. Brown*, 5 F.3d 1456 (Fed. Cir. 1993)).

The Beaudettes' petition for a writ of mandamus is not, as the Secretary posits (VA Br. 42), a "direct (or facial) challenge[]" to the Secretary's rulemaking under sections 552(a)(1) or 553 of the APA. The Beaudettes never challenged a VA rule, and the Secretary has not identified any VA rule challenged by the Beaudettes. In fact, the Secretary concedes that the Beaudettes' petition does *not* "challeng[e] the validity of 38 C.F.R. § 20.104(b)," and that the Veterans Court did *not* "directly address[] the validity of that regulation." VA Br. 43 n.15. The Secretary nevertheless contends that, because the Beaudettes challenge the VA's *interpretation* of section 1720G(c)(1), such a challenge can only be brought under 38 U.S.C. § 502. But that argument is belied by the very text of Section 502, which explains that the Veterans Court explicitly retains the jurisdiction to review VA's statutory interpretations in the context of an individual benefits decision. 38 U.S.C. § 502 (third sentence); *see*

also § 7261(a) (explaining that in appeals before the Veterans Court, the court shall interpret statutory and regulatory provisions, and set aside unlawful agency regulations). The Beaudettes' request for a writ of mandamus was "in aid of [the Veterans Court's] prospective jurisdiction under 28 U.S.C. § 7252," Appx4, as the Secretary acknowledged below, *see* Appx1404 n.3 (the Beaudettes' "petition for the right to *an appeal of the merits of the PCAFC decision to the Board*") (emphasis added).[14]

Moreover, the Secretary's interpretation is not embodied in any regulation. At best, it is a statement contained in the commentary section of the Federal Register. Under the Secretary's faulty logic, a veteran could bring a direct challenge in this Court under section 502 to the validity of any statement advanced by VA in the commentary section of the Federal Register. Section 502 was not intended to be used in that way.[15]

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[14] The fact that the Beaudettes sought to certify a class of similarly situated individuals does not render their challenge non-case-specific, nor does the Secretary contend otherwise. Indeed, the only class certification factor the VA contested below was the typicality factor. Appx8-9.

[15] The Secretary's effort (VA Br. 43-44) to conjure a conflict between this action and *Sullivan v. Sec'y of Veterans Affairs*, No. 20-2193 (Fed. Cir.), is misplaced. The VA acknowledged that the request was "a petition for rulemaking under 38 U.S.C. § 553(e)"—the APA's provision expressly referenced in section 502—and denied that request. Amended Petition for Review ¶¶ 11, 16 & Exs. D & G, *Sullivan v. Sec'y of Veterans Affairs*, No. 20-2193 (Fed. Cir. Jan. 27, 2021). Petitioners in *Sullivan* then sought this Court's direct review of the Secretary's "*refusal to act on their petition for rulemaking*" under 28 U.S.C. § 702. *Id*., ¶ 17 (emphasis added).

B. The Veterans Court Correctly Found the Mandamus Requirements Are Satisfied.

The Secretary argues that the Veterans Court lacked authority to issue a writ of mandamus to compel a Board appeal. VA Br. 46-49. This assertion is foreclosed by this Court's precedent. In *Bates v. Nicholson*, this Court confirmed the propriety of the Veterans Court's issuing of a writ under the All Writs Act to compel a Board appeal that was wrongfully withheld. *See* 398 F.3d 1355, 1359 (Fed. Cir. 2005) ("[t]he propriety of a writ of mandamus [under the All Writs Act] turns on the question of whether the [Veterans Court] would have jurisdiction to review the [VA's] decision"); *see also Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998) (the Veterans Court "has the power to issue writs of mandamus in aid of its jurisdiction under the AWA"). As already shown, the Veterans Court had jurisdiction. *Supra* at 4. This action arises in the same procedural posture as *Bates*: The VA denied the right to Board review and the Beaudettes petitioned the Veterans Court to compel the VA to provide the right to Board review.

The Secretary's attempt (VA Br. 47) to analogize this case to *Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022)—also falters. *Wolfe* did not involve a challenge to VA's denial of VJRA review rights, but rather to a VA regulation relating to reimbursement for medical costs. *See* 28 F.4th at 1353-57. Moreover, Wolfe was still litigating her Board appeal when she filed her mandamus petition in

the Veterans Court, and this Court determined there was no indication that the appeal was "unreasonably delayed." *Id.* at 1357.

The Secretary's argument that section 502 provides "an alternative … means of challenging the VA's interpretation," VA Br. 47-48, is likewise misplaced. The requirement that a mandamus petitioner demonstrate the lack of other adequate means is "designed to ensure that the writ will not be used as a substitute for *the regular appeals process*." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380-81 (2004) (emphasis added). The "regular appeals process" here was to appeal to the Board, and then to the Veterans Court. Because the VA cut off the entire VJRA appeal path—i.e., the "regular appeals process"—the Beaudettes were forced to seek mandamus. Initiating a rulemaking petition and subsequently filing a petition for review under section 502 in this Court can hardly be categorized as the "regular appeals process"; certainly, neither *Bates* nor *Cox* intimated that petitioners should have initiated a section 502 petition instead.

If the Secretary were correct that initiating a rulemaking petition and subsequently filing a 502 petition constitutes a "regular appeals process," the Veterans Court would effectively be deprived of any authority under the All Writs Act. The Secretary could argue in any case that the petitioner should instead submit a rulemaking petition to VA and a subsequent 502 petition to this Court. That

breathtaking claim cannot be reconciled with this Court's precedents regarding the Veterans Court's mandamus authority.

CONCLUSION

This Court should affirm the Veterans Court's decision.

Respectfully submitted,

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