No. 2022-1264

In the United States Court of Appeals for the Federal Circuit

JEREMY BEAUDETTE, MAYA BEAUDETTE,
Claimants – Appellees,
v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,
Respondent – Appellant.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 20-4961, Judge Allen, Judge Toth, and Judge Falvey

UNOPPOSED BRIEF OF AMICUS CURIAE VIETNAM VETERANS OF AMERICA IN SUPPORT OF APPELLEES AND IN FAVOR OF AFFIRMANCE

ALEC U. GHEZZI
Vietnam Veterans of America
8719 Colesville Road
Silver Spring, MD 20910
T: (202) 632-5783
F: (202) 495-5513
aghezzi@vva.org

Counsel for Amicus Curiae

CERTIFICATE OF INTEREST

Case Number 2022-1264

Short Case Caption *Beaudette v. United States*

Filing Party/Entity Vietnam Veterans of America, Inc., *Amicus Curiae*

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

Date: December 14, 2022 Signature: */s/ Alec U. Ghezzi*
Name: Alec U. Ghezzi

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

   Vietnam Veterans of America, Inc.

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

   None.

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

   None.

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

   None.

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

   None.

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

   None.

7. **Authority to File.** This brief is submitted with the consent of all parties pursuant to Federal Rule of Appellate Procedure 29(a)(2).

8. **Statement Regarding Authorship and Funding.** This amicus brief was authored in whole by undersigned counsel in the performance of his duties as an employee of Vietnam Veterans of America, a 501(c)(19) nonprofit organization. Neither counsel nor Vietnam Veterans of America received money or other compensation in exchange for the preparation or submission of this brief from parties to this case or persons external to this case.

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STATEMENT OF IDENTITY AND INTEREST

Vietnam Veterans of America (VVA) is a national nonprofit organization and is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. As the Vietnam war ended and years passed, it became clear established veterans service organizations had failed to make a priority of the issues of concern for Vietnam veterans. In response, in January 1978 VVA began its journey to put Vietnam veteran issues at the forefront.

In 1983, VVA took a significant step by founding Vietnam Veterans of America Legal Services (VVALS) to assist veterans seeking benefits and services from the government. By working under the theory that a veteran's representative should be an advocate rather than simply a facilitator, VVALS established itself as a highly competent and aggressive legal assistance program available to veterans. VVA also played a leading role in advocating for the creation of Judicial Review, championing the rights of veterans to challenge VA benefits decisions in court. In the 1990s, VVALS evolved into the current VVA Service Representative program that continues to represent and advocate for veterans today.

VVA offers a unique and important perspective on issues faced by Vietnam veterans, specifically on aging veterans' issues faced by this group. Appellee Jeremy Beaudette and other similarly situated veterans require the assistance of caregivers

in order to live productive, fulfilling lives, and as such they have a right to seek judicial review of adverse decisions made by the Department of Veterans Affairs (VA), including those under the Program of Comprehensive Assistance for Family Caregivers (PCAFC). As such, *amici* have a strong interest in seeking to have this Court affirm the United States Court of Appeals for Veterans Claims holding in the above-captioned matter and find that applicants and disqualified participants in the PCAFC have the right to appeal the corresponding decisions to the Board of Veterans Appeals (BVA).

ARGUMENT

The Beaudettes persuasively explain why they are entitled to affirmation of the lower court's decision. *Amici* respectfully submit this brief to explain the PCAFC more fully, the basis for affirming the right to seek judicial review, and the impact that denying the right of veterans to seek such review would have on aging veterans' populations such as those individuals who served in Vietnam.[1] *Amici* argue that the Court should conclude that the right to judicial review applies to the PCAFC,

[1] This brief is submitted with the consent of both parties pursuant to Federal Rule of Appellate Procedure 29(a)(2) and authored in part by undersigned counsel, in the performance of his duties as an employee of Vietnam Veterans of America (VVA), a 501(c)(19) nonprofit organization, and in part by another employee of VVA, as referenced on page 12). Neither counsel nor Vietnam Veterans of America received money or other compensation in exchange for the preparation or submission of this brief from parties to this case or persons external to this case.

ensuring consistency in the right to judicial review of federal agencies' decisions, and ask this Court to affirm the decision of the United States Court of Appeals for Veterans Claims.

Access to the Program of Comprehensive Assistance for Family Caregivers (PCAFC) particularly affects Vietnam-era veterans, who are in a more physically compromised position than younger generations of veterans.

The United States Census Bureau estimates that in 2020 there were over 6,000,000 remaining Vietnam veterans.[2] In 2015, 36% of Vietnam veterans received a disability rating of at least 70% from VA, with at least 77% of veterans suffering from service-connected disabilities.[3]

In fiscal year 2021, Vietnam Veterans of America (VVA) held 101,355 powers of attorney for claimants before VA, the majority of whom served during the Vietnam Era. 35,927 of those were on behalf of disabled veterans, with a combined disability rating of 70% or greater - the statutory minimum to qualify for PCAFC.[4] VVA's constituent base consists of elderly veterans, many of whom struggle with mobility, prosthetic adjustment, and other activities of daily living (ADL);

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[2] *See Veterans Data Tables, Table 13. Persons (aged 15 and over) who received Veteran's Benefits during year [< 1.0 MB*], CENSUS BUREAU (2020), (https://www.census.gov/topics/population/veterans/data/data-tables.html), last visited Oct. 11, 2022.

[3] *See* Natl. Ctr. For Vet. Analysis and Stats., *Profile of Vietnam War Veterans from the 2015 American Community Survey,* DEPT. OF VETS. AFFAIRS (Jul. 2017), 8 (https://www.va.gov/vetdata/docs/SpecialReports/Vietnam_Vet_Profile_Final.pdf) , last visited Oct. 11, 2022.

[4] This information was obtained by VVA from VA through a data request.

notwithstanding individuals of all service eras who suffer from catastrophic disabilities, Vietnam era veterans are currently the most likely candidates for participation in PCAFC.

Veterans, like all those seeking relief from a Federal Agency, are entitled to seek judicial review – this right also exists for claims under the PCAFC.

VVA played a critical role in ensuring the passage of the Veterans' Judicial Review Act of 1988 (VJRA) by mobilizing its member base for grassroots advocacy. Prior to passage of the VJRA, the Department of Veterans Affairs (DVA) was "the only administrative agency that operated virtually free of judicial oversight . . . whose major functions were insulated from judicial review."[5] In passing the Act, Congress recognized the unique nature of veterans' benefits, e.g. while debating the merits of the Act, Senator Murkowski observed that VA's duty to assist "is not how Social Security or any other program operates... This is a system which, in its scope and approach, is unique in our Government." Veterans' Admin. Adjudication Proc. and Jud. Rev. Act, 134 Cong. Rec. S9178-02 (statement of Sen. Frank H. Murkowski). Sen. Murkowski explained, "There is a reason for that kind of system, Mr. President, and the reason is this: Veterans are special. They are a special class of our citizens. These men and women have agreed to put themselves in harm's way in service to their country. There is … no other class of citizens like them. The

[5] *See History,* VET. APP. (http://www.uscourts.cavc.gov/history.php), last visited Oct. 11, 2022.

Congress has historically granted special benefits for these men and women." *Id.* Rep. Lane Evans introduced this legislation in January 1987, and in a letter to his House colleagues he wrote:

> We believe that veterans should be allowed their day in court. Social Security recipients, federal prisoners, even undocumented workers can challenge agency decisions. But veterans are stuck with the VA rulings and have no chance of outside review. This violates our constitutional system and its checks and balances. It leads to agency abuses and to a bureaucracy that's run amok.[6]

Congressional intent was made clear in 1988: veterans are entitled to appeal agency decisions using the courts; to seek redress of their grievances in a manner not dissimilar to appeals brought by ordinary civilians against other executive agencies. Denial of the right to appeal improper executive action in the courts is a denial of procedural due process.

Congressional intent behind the Program of Comprehensive Assistance for Family Caregivers (PCAFC) is clearly stated in 38 U.S.C. § 1720G: "The Secretary shall establish a program of comprehensive assistance for family caregivers of eligible veterans." As explained by Congressman Michael Michaud, "this bill creates a robust, supportive services program *for caregivers*" and "attempts to alleviate the financial difficulties facing eligible caregivers[.]" (emphasis added) CAREGIVERS

[6] *See* Mary Stout, *VVA and the War to Win Judicial Review,* VVA VETERAN ONLINE (Jul./Aug. 2018) (https://vvaveteran.org/38-4/38-4_judicialreview.html), last visited Oct. 11, 2022.

AND VETERANS OMNIBUS HEALTH SERVICES ACT, 156 Cong. Rec. 57, H2726 (Apr. 21, 2010) (statement of Rep. Michael Michaud). While these benefits are delivered directly to caregivers, PCAFC applications are joint applications ultimately intended to benefit veterans.

In its appeal, the VA erroneously asserts that PCAFC eligibility decisions are medical determinations in totem, and that review of eligibility denials by the Board of Veterans' Appeals is foreclosed under 38 U.S.C. §1720G(c)(1), which states that "[a] decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination." *Appellant's Opening Brief, at 5*. This position necessarily conflicts with the VJRA by foreclosing any right to seek redress, affording DVA a total shield against oversight; it also conflicts with the presumption that Congress drafts legislation in a manner favoring the right of individuals to seek judicial review of administrative action. *See Mach Mining LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015):

> Congress rarely intends to prevent courts from enforcing its directives to federal agencies. For that reason, this Court applies a "strong presumption" favoring judicial review of administrative action. *Bowen v. Michigan Academy of Family Physicians*, 476 U.S. 667, 670 (1986). That presumption is rebuttable: It fails when a statute's language or structure demonstrates that Congress wanted an agency to police its own conduct. *See Block v. Community Nutrition Institute*, 467 U.S. 340, 349, 351 (1984). But the agency bears a "heavy burden" in attempting to show that Congress "prohibit [ed] all judicial review" of the agency's compliance with a legislative mandate. *Dunlop v. Bachowski*, 421 U.S. 560, 567 (1975).

Moreover, this well-established presumption of the right to judicial review may only be defeated by clear and convincing evidence of Congressional intent to preclude review. *Reno v. Catholic Social Services, Inc.*¸509 U.S. 43, 63-64 (1993). Appellant VA fails to meet this burden because it has erred in its interpretation of what Congress intended in section 1720G(c)(1). VA's error is magnified by its misunderstanding of the eligibility process under PCAFC.

The PCAFC eligibility process is two-fold: first, VA must determine if a veteran is eligible; then, VA must determine who is eligible to provide this care. The first step is legal, as it addresses enumerated requirements under §1720(G), while the second step is a matter of provider suitability and is thus a medical determination. This position is supported by the explanatory statement submitted by Sen. Akaka for the Senate record on the Caregivers and Veterans Omnibus Health Services Act of 2010, P.L. 111-163 (2010), wherein the Senate version of the bill "would require VA to carry out oversight of the caregiver", designating a home health agency to conduct biannual visits and submit reports to VA, who would have "final authority to revoke a caregiver's designation as a primary personal care attendant." CAREGIVERS AND VETERANS OMNIBUS HEALTH SERVICES ACT, 156 Cong. Rec. 58, S2567 (Apr. 22, 2010) (statement by Sen. Kahikina Akaka); *see also* 38 U.S.C. §1720G(a)(9)(C) (where the VA Secretary is compelled to establish monitoring procedures for the provision of personal care services for PCAFC veterans); *see also*

38 C.F.R. §20.104(b) (Describing medical determinations as including "similar judgmental treatment decisions with which an attending physician may be faced."). Moreover, per 38 CFR §20.104(b), "The Board's appellate jurisdiction extends to questions of eligibility for hospitalization, outpatient treatment, and nursing home ***and domiciliary care . . . and for other benefits administered by the Veterans Health Administration.***" In relevant part, 38 C.F.R. §59.2 defines domiciliary care as:

> providing shelter, food, and necessary medical care on an ambulatory self-care basis (this is more than room and board). It assists eligible veterans who are suffering from a disability, disease, or defect of such a degree ***that incapacitates veterans from earning a living, but who are not in need of hospitalization or nursing care services.*** (Emphasis added).

Veterans are eligible to receive care via the PCAFC if they are in need of personal care services due to "an inability to perform one or more activities of daily living", "need for supervision or protection" due to neurological or other impairment, "need for regular or extensive instruction or supervision without which the ability of the veteran to function in daily life would be seriously impaired", or "such other matters as the Secretary considers appropriate." 38 U.S.C. §1720G(a)(2)(C); *see also Veteran Warriors, Inc. v. Secretary of Veterans Affairs*, 21-1378, at 18 (Fed. Cir. 2022) ("The VA, therefore, promulgated a definition of 'in need of personal care services' that limited the family caregivers program to veterans who require in-person care. It believed that definition 'would reduce clinical

subjectivity in [the family caregivers program's] eligibility determination[] and thereby improve consistency in the program.' Proposed Rule, 85 Fed. Reg. at 13,359; accord Final Rule, 85 Fed. Reg. at 46,228. It also noted how the definition of 'in need of personal care services' supports the VA's decision to focus the family caregivers program 'on eligible veterans with moderate [to] severe needs.' *See* Final Rule, 85 Fed. Reg. at 46,228; accord Proposed Rule, 85 Fed. Reg. at 13,356."). None of the aforementioned definitions necessarily constitute nursing care, but they exceed the threshold definition for domiciliary care. As such, the Board of Veterans' Appeals must have jurisdiction over PCAFC claims according to VA's own regulatory interpretation of 38 U.S.C. §7104, as this would be analogous to the VBA granting service-connected benefits and the VHA providing care for the service-connected condition (also a two-step process). To assert that VBA adjudications constituted clinical appeals would be equally absurd. VA's statutory interpretation is thus contrary to its own regulations, and cannot be upheld.

The Board of Veterans Appeals is better situated than the Veterans Health Administration (VHA) to make final determinations on PCAFC claims.

Since the PCAFC began, VHA has struggled with applying a consistent standard for program eligibility. For example, in its most recent final rule commentary pertaining to the program, VA acknowledged:

> Several commenters did not suggest specific changes to the proposed rule but rather expressed frustration with the current execution and management of PCAFC, to include inconsistent application of program

> requirements, problematic eligibility determinations, inappropriate discharges, and a general lack of knowledge and accountability by [Caregiver Support Clinics] CSCs. 85 F.R. 46226, 46288 (Jul. 31, 2020).

VA elaborated:

> Contrary to some of the comments, it was not our intent to narrow and restrict eligibility with this change, and we believe that these revisions will broaden the current criteria since it will no longer be limited to a predetermined list of impairments. *Id.* at 46239.

The commenters' concerns with execution and problematic eligibility determinations were well-founded, as the final rule change further complicated eligibility and led to a massive increase in PCAFC application rejections. As noted by the Executive Director of the Caregiver Support Program, VHA denied 76.38% of all applications nationwide in fiscal year 2021. Colleen Richardson, *Presentation For VA Prosthetics & Special Disabilities Program Federal Advisory*, VHA CAREGIVER SUPPORT PROGRAM, 11 (Oct. 18, 2021).

VHA consists of 18 independently operating Veterans Integrated Services Networks (VISNs), across which there is no uniform applied standard for program eligibility. VHA's primary mission is to provide and administer healthcare. Although making eligibility determinations is a necessary part of that process, unlike the Veterans Benefits Administration, VH is simply not equipped to manage large volumes of appeals. In a November 21, 2019, report the VA Office of Inspector General (OIG) found:

> significant deficiencies with POM's management of appeals of non-VA care claims prior to the implementation of the Appeals Modernization Act. First, OCC POM did not know the extent of unprocessed appeals that were unaccounted for and stored in file cabinets, boxes, and bins at POM facilities. Second, OCC leaders lacked effective oversight of the appeals function, and POM leaders had not clearly defined the roles and responsibilities of the appeals manager. Finally, VHA was not fully prepared for appeals modernization, including developing and implementing all the required procedures for the new appeals process.

This is consistent with VVA's anecdotal experience in the form of complaints received by veterans denied eligibility by VHA for a variety of services. For example, several claimants were verbally told they were denied but never received a letter. VVA advocates had to make several inquiries just so VHA would issue an initial denial letter.

According to its website, VHA will adjudicate the following appeal options for decisions issued on or after February 19, 2019:

> VHA Clinical Review Process, Supplemental Claim, Higher-Level Review, or appeal to the Board. Like the Clinical Review Process, a Supplemental Claim or request for Higher-Level Review is completed by VHA.[7]

This decision coincides with the full implementation date of the Veterans Appeals Improvement and Modernization Act (AMA), P. L. 115-55 (2017), therefore it can be reasonably inferred that the VA is admitting that judicial review is warranted for

[7] *See PCAFC Appeals,* DEPT. OF VETS. AFFAIRS (https://www.caregiver.va.gov/support/PCAFC_Appeals.asp), last accessed 10/05/2022.

Legacy cases, but not AMA. While AMA changed the process for seeking review, it did not change the substance of the law.

Given its track record, VVA is highly skeptical that VHA has the expertise and resources to successfully deliver justice to veterans through this appeal process. In contrast, the Board of Veterans Appeals consists of trained attorneys and experienced jurists who possess subject matter expertise in the law and in the field of veterans' benefits and, as noted above, these reviews are explicitly within their jurisdiction. Ergo, the Board of Veterans Appeals serves as an indispensable check on DVA benefits decisions, and is in the best position to serve as the final arbiter of denied PCAFC claims.

CONCLUSION

For the foregoing reasons, *Amici* respectfully request the Court **affirm** the decision of the United States Court of Appeals for Veterans Claims.

Dated: December 14, 2022

Respectfully submitted,

/s/ Alec U. Ghezzi
Alec U. Ghezzi
Vietnam Veterans of America[8]
8719 Colesville Road
Silver Spring, MD 20910
T: (202) 632-5783
F: (202) 495-5513
aghezzi@vva.org
Counsel for Amici Curiae

[8] Logan Lecates wrote the majority to this brief, but is unable to submit it in his own name as he does not meet the Court's criteria for admittance.

PROOF OF SERVICE

I hereby certify that on December 14, 2022, I electronically transmitted the foregoing Brief of Amici Curiae to the Clerk of the Court using the Court's CM/ECF document filing system. I further certify that all counsel of record are being served with a copy of this Brief by electronic means via the Court's CM/ECF system.

Dated: December 14, 2022 */s/ Alec U. Ghezzi*
Alec U. Ghezzi

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE, REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Federal Circuit Rules 29(a) and 32(b)(1). This brief contains 4,063 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Times New Roman 14-point font in Microsoft Word 2016.

Dated: December 14, 2022 */s/ Alec U. Ghezzi*
Alec U. Ghezzi