No. 12-_____

IN THE
SUPREME COURT OF THE UNITED STATES

VETERANS FOR COMMON SENSE AND VETERANS UNITED FOR TRUTH, INC., ON BEHALF OF THEMSELVES AND THEIR MEMBERS, PETITIONERS,

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress has provided that the Secretary of Veterans Affairs' "decision" as to an individual veteran's entitlement to benefits is not subject to judicial review by federal district courts. Title 38 U.S.C. § 511 provides that the Secretary of Veterans Affairs "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits." 38 U.S.C. § 511(a). Subject to certain exceptions that are not pertinent here, "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." *Ibid.* In conflict with the D.C. Circuit, Second Circuit, and Federal Circuit, the en banc Ninth Circuit held that petitioners' systemic constitutional and Administrative Procedure Act challenges to the Secretary's policies and procedures in handling veteran medical benefits and death and disability claims were barred by Section 511, even though petitioners challenge no benefit "decision" made by the Secretary.

The question presented is:

Whether the Ninth Circuit erred in holding that 38 U.S.C. § 511 precludes the district court's jurisdiction over systemic challenges to the United States Department of Veterans Affairs' failures to provide timely medical benefits and to timely resolve claims for service-connected death and disability benefits.

PARTIES TO THE PROCEEDING

Petitioners are Veterans for Common Sense and Veterans United for Truth, Inc., on behalf of themselves and their members.

Respondents are Eric K. Shinseki, Secretary of Veterans Affairs; the United States Department of Veterans Affairs; Steven L. Keller, Acting Chairman, Board of Veterans Appeals; Allison A. Hickey, Under Secretary, Veterans Benefits Administration; Bradley G. Mayes, Director, Compensation and Pension Service; Robert A. Petzel, Under Secretary, Veterans Health Administration; Ulrike Willimon, Veterans Service Center Manager, Oakland Regional Office, Department of Veterans Affairs; and the United States of America.

CORPORATE DISCLOSURE STATEMENT

Veterans for Common Sense and Veterans United for Truth, Inc. have no parent corporations, and no publicly held company owns 10% or more of their respective stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Veterans for Common Sense and Veterans United for Truth, Inc., on behalf of themselves and their members, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The en banc decision of the Ninth Circuit (App., *infra*, 1a-67a) is reported at 678 F.3d 1013. The order of the Ninth Circuit granting rehearing en banc (App., *infra*, 343a-344a) is reported at 663 F.3d 1033. The panel decision of the Ninth Circuit (App., *infra*, 68a-204a) is reported at 644 F.3d 845. The district court's memorandum of decision, findings of fact, and conclusions of law (App., *infra*, 205a-295a) is reported at 563 F. Supp. 2d 1049. The district court's order granting in part and denying in part respondents' motion to dismiss (App., *infra*, 296a-342a) is unreported.

JURISDICTION

The Ninth Circuit issued its panel decision on May 10, 2011. The petition for rehearing en banc was granted on November 16, 2011. The Ninth Circuit issued its en banc decision on May 7, 2012.

On July 24, 2012, Justice Kennedy granted an extension of time within which to file a petition for a writ of certiorari to and including September 5, 2012.

This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Title 38 U.S.C. §§ 511, 7104, 7252, 7261, and 7292 are set forth in the appendix to the petition. App., *infra*, 345a-353a.

INTRODUCTION

Our Nation has made a solemn commitment to those who serve in the Armed Forces in combat: to provide medical care and mental-health treatment on their return home and to provide monetary support to soldiers disabled during service or to their families in the event of death. Congress charged the United States Department of Veterans Affairs (VA) with providing these benefits. Tragically for many veterans, the VA has fallen far short of meeting these commitments.

An unprecedented number of veterans returning from war in Iraq and Afghanistan are suffering from mental-health disorders such as post-traumatic stress disorder (PTSD). Without timely treatment, these disorders too often lead to severe depression and suicide. Yet the VA is putting off critically time-sensitive mental-health evaluations for weeks or even months, even though the VA knows there is an epidemic of suicides among the Nation's veterans. This has resulted in over 75,000 veterans waiting for mental-health treatment to which they are lawfully entitled. Congress has taken notice of this epidemic and has directed the VA to implement a comprehensive fix, but the VA has failed to implement procedures necessary to ensure that our Nation's veterans receive the benefits to which they are entitled.

The VA's practices and policies are just as problematic with regard to the adjudication of claims

for death and disability benefits. These benefits, which provide basic sustenance for many veterans and their families, often take *years* to be awarded. Many veterans with valid claims never actually receive their benefits, because they die before they are awarded.

Petitioners, nonprofit veterans organizations, brought statutory and constitutional challenges to the VA's practices and procedures, or lack thereof, that cause these delays. After a divided three-judge panel held that the district court had jurisdiction to resolve petitioners' challenges, the Ninth Circuit en banc concluded that jurisdiction was lacking under the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a). Section 511(a) provides that the Secretary of the VA "shall decide 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." 38 U.S.C. § 511(a). The VJRA also states that, subject to certain exceptions, "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." *Ibid.* Under one exception, the Court of Appeals for Veterans Claims can review certain "decisions" by the Secretary. *Id.* § 511(b)(4); 38 U.S.C. § 7252.

The Ninth Circuit's construction departs from the plain language of the statute by reading the word "decision" out of Section 511(a). Nowhere do petitioners challenge any "decision" by the Secretary in any particular veteran's case; petitioners challenge the VA's deficient procedures and unjustifiable delays before making the decision, rather than the decision itself. Indeed, three other circuits disagree with the Ninth Circuit's

interpretation. Consistent with the text of Section 511(a), the D.C. Circuit, Second Circuit, and Federal Circuit have construed Section 511 to preclude judicial review only as to a *decision* actually made by the Secretary.

Moreover, the ruling below's reading of Section 511(a) ignores that this Court narrowly construes jurisdiction stripping statutes, particularly where such an application would entirely preclude judicial review. This Court requires a clear and unambiguous statement from Congress to preclude constitutional challenges. No such statement exists in this case.

The Nation's veterans are suffering due to intolerable delays by the VA. Having served the Nation and sacrificed during war, veterans should not be forced to wait any longer. This Court should grant certiorari to resolve the conflict in the courts of appeals and make clear that the federal district courts are open to hear systemic challenges by veterans.

STATEMENT OF THE CASE

A. Statutory Framework

1. Congress has provided veterans with certain benefits for their service to the Nation. Veterans have a statutory right to medical care by the Veterans Health Administration (VHA), including mental-health treatment, for any service-related injuries. 38 U.S.C. § 1710 et seq. And in the event of disability or death while on active duty, or death from a service-connected disability, compensation is paid to the veteran or the veteran's survivors. 38 U.S.C. §§ 1110, 1310, 1312. Veterans and their families can seek disability and death benefits by

filing a claim with the Veterans Benefits Administration (VBA). 38 U.S.C. § 5100 et seq.

When a veteran is denied death or disability benefits, a veteran can appeal the adverse "decision" within the VA to the Board of Veterans' Appeals. 38 U.S.C. §§ 7104, 7105. Medical decisions, such as the type and timing of care and treatment an individual veteran needs, are not subject to further review by the Board. 38 C.F.R. § 20.101(b) ("Medical determinations * * * are not adjudicative matters and are beyond the Board's jurisdiction.").

In the Veterans Judicial Review Act, Congress has provided veterans the right to appeal adverse benefits determinations from the Board to an Article I court. The VJRA further provides that that court—the Court of Appeals for Veterans Claims (Veterans Court)—"shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252. The Veterans Court "decide[s] all relevant questions of law" to the benefits decision and can only set aside administrative factual findings that are "clearly erroneous." 38 U.S.C. §§ 7261(a)(1), (a)(4).

The Federal Circuit has exclusive jurisdiction to review decisions from the Veterans Court. The Federal Circuit's review is limited to questions of law; it does not review factual findings with respect to a benefits determination. 38 U.S.C. §§ 7292(a), (d)(2).

2. The VJRA also makes certain benefits "decisions" by the Secretary of Veterans Affairs non-reviewable by any court.

Section 511(a) provides that "[t]he Secretary shall decide 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). Subject to certain exceptions, those decisions "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." *Ibid.* In particular, claims decisions that are subject to the jurisdiction of the Veterans Court are not subject to this judicial review prohibition. *Id.* § 511(b).

B. Factual Background

1. Delays and inadequate procedures in the provision of veterans' mental-health treatment

a. The consequences of war do not end when a soldier returns home. In addition to the over 6,000 dead and 40,000 wounded in the wars in Iraq and Afghanistan, hundreds of thousands of United States military personnel return home from combat with severe mental health disorders, including major depression and PTSD.

These mental health disorders are life altering, and, if untreated, can be life ending. PTSD is an extreme "psychological condition that occurs when people are exposed to extreme, life-threatening circumstances" or are placed in "immediate contact with death and/or gruesomeness, such as [what] occurs in combat." App., *infra*, 223a (alteration in original). Military personnel returning from the wars in Iraq and Afghanistan are experiencing PTSD at unprecedented rates due to unique circumstances in those wars. App., *infra*, 223a-224a. As of 2008, approximately 300,000 soldiers then

deployed in Iraq or Afghanistan suffered from PTSD or depression. About a third of all soldiers returning home from these wars have PTSD, traumatic brain injury, or severe depression. App., *infra*, 224a. If not properly treated, PTSD is a leading risk factor for suicide. App., *infra*, 227a-228a.

b. Although Congress has required the Secretary to provide free health care for five years to honorably discharged veterans who have served in combat, 38 U.S.C. § 1710(a)(1), (e)(1)(D), (e)(3)(A), the VHA systematically has failed to provide essential timely mental health care to veterans.

This is the case even though Congress has mandated that the "Secretary shall provide" a general mental and psychological assessment "as soon as practicable after receiving the request, but not later than 30 days after receiving the request." *Id.* § 1712A(a)(3). And while the VHA has mandated (consistent with Congress's directive) that any veteran who presents at a VHA facility with mental health issues receive an evaluation within 24 hours and a follow-up appointment within 14 days, App., *infra*, 82a-83a, only slightly more than half of veterans returning from Iraq and Afghanistan with symptoms of PTSD receive "minimally adequate care." App., *infra*, 224a (citing 2008 study by the RAND Corporation). Funds are not the problem; the VA has acknowledged that it possesses more than enough resources to meet veterans' needs.[1]

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[1] Before the district court, the VA conceded that it "has sufficient funding to carry out its mission of ensuring that veterans have the medical care they need." App., *infra*, 226a. The VHA's "current budget provides enough funding to cover a

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Rather than receiving an initial evaluation within 24 hours, veterans are often outright denied treatment for depression and PTSD—as the VA Office of the Inspector General (OIG) reported in May 2007. For patients that need treatment for symptoms of depression with moderate severity, 24.5% had to wait two to four weeks for an evaluation, and 4.5% waited four to eight weeks. App., *infra*, 233a. For PTSD, 26% of patients had to wait two to four weeks just to be evaluated, and 5.5% had a four-to-eight week wait time. *Ibid.* All told, 85,000 veterans languish on waiting lists to receive mental-health care; rather than remedy this problem, the VHA instead simply increased the time before a veteran can be placed on a waiting list. App., *infra*, 235a.[2]

There is no redress that a veteran can seek from the Board or Veterans Court when mental health treatment is systemically delayed, even though these delays often have catastrophic consequences.[3]

'worst-case scenario' of an influx of veterans returning from Iraq and Afghanistan with mental illness." *Ibid.*

[2] If anything, the length of the delays is understated. A subsequent OIG audit found that appointment schedulers were entering incorrect information, which "resulted in some 'gaming' of the scheduling process." App., *infra*, 234a. Actually 25% of patients had wait times over 30 days. App., *infra*, 233a. And a more recent audit found that the situation had only deteriorated. As of April 2012, just 49% of referred patients were receiving an evaluation within 14 days, and the remaining 51% had to wait 50 days on average. VA OIG, *Review of Veterans' Access to Mental Health Care*, at ii (2012), http://www.va.gov/oig/pubs/VAOIG-12-00368-161.pdf.

[3] Government regulations provide that "[m]edical determinations, such as determinations of the need for and

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Failure to treat PTSD timely can result in alcoholism, drug addiction, homelessness, and antisocial behavior. App., *infra*, 78a. And the longer PTSD goes untreated, the greater the risk of suicide. App., *infra*, 227a. Indeed, the confluence of the VA's delays and the sheer number of veterans returning from Iraq and Afghanistan suffering from PTSD has led to an epidemic of suicides. Each day, about 18 veterans take their own lives, including 4 to 5 suicides each day among veterans entitled to health care from the VHA. The suicide rate among veterans is 3.2 times higher than that of the general-population rate. App., *infra*, 224a-225a. Tragically, many veterans who commit suicide previously sought emergency mental health treatment from VA hospitals and were simply turned away. Pet. 9th Cir. E.R. 2007; 2010-2011; 2020-2021; 2025; 2027-2028.

None of this has to happen. Congress is aware of the problem and has taken action, enacting the Joshua Omvig Veterans Suicide Prevention Act, Pub. L. No. 110–110, 121 Stat. 1031 (2007). Congress concluded that "suicide among veterans suffering from post-traumatic stress disorder * * * is a serious problem." *Id.* § 2. It directed that the VA "should take into consideration the special needs of veterans suffering from PTSD * * * and [who] experience high rates of suicide in developing and implementing the comprehensive program under

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appropriateness of specific types of medical care and treatment for an individual, *are not adjudicative matters and are beyond the Board's jurisdiction*." 38 C.F.R. § 20.101(b) (emphasis added).

this Act." *Ibid.* Notwithstanding this directive, the VA has failed to implement emergency procedures that Congress and its own audits have deemed necessary.

Instead, the VA has tried to cover up the problem. The Deputy Chief of Patient Care Services in the VA's Office for Mental Health wrote in an internal e-mail: "Shh! Our suicide prevention coordinators are identifying about 1,000 suicide attempts per month among the veterans we see in our medical facilities. Is this something we should (carefully) address ourselves in some sort of release before someone stumbles on it?" App, *infra*, 225a-226a.

2. Delays in adjudication of claims for disability and death benefits

The VBA administers veterans' benefits programs, such as pension and disability benefits. Veterans with disabilities resulting from disease or injury sustained or aggravated during active military service are entitled to monetary benefits from VBA, 38 U.S.C. § 1110, and their families are entitled to benefits in the event of death, *id.* § 1121. Many veterans, or their families, are entirely dependent on these disability or death benefits for financial support. App., *infra*, 241a.

But for too many veterans, the VBA's benefits system is broken. As of April 2008, over 400,000 claims were pending, app., *infra*, 250a, and over a million claims are pending now.[4] For any claim that

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[4] As of August 27, 2012, 824,274 compensation claims are pending in Regional Offices and 255,946 compensation claims are pending on appeal. Dep't of Veterans Affairs, 2012 Monday

(Footnote continued on following page)

involves an appeal, it takes an average of 4.4 years for benefits to be awarded. App., *infra*, 252a. The delay is so long that thousands of veterans die before their appeals are resolved. App., *infra*, 255a.

The claims process begins with the veteran's filing of an application with one of the 57 VA Regional Offices, which makes the initial decision as to a veteran's entitlement to benefits. On average, it takes a Regional Office over half a year to issue an initial decision, with PTSD claims taking longer. App., *infra*, 242a-243a.

Veterans whose claims are denied by a Regional Office may appeal the adverse determinations to the Board of Veterans' Appeals, the internal appellate body of the VA. But before an appeal even can be heard by the Board, the Regional Office must prepare two straightforward documents: a Statement of the Case and a two-page Certification of Appeal. App., *infra*, 248a-249a; 38 C.F.R. § 19.35; Certification of Appeal, available at http://www.va.gov/vaforms/va/pdf/VA8.pdf. Veterans must wait 261 days and 573 days, respectively, for the VBA to complete these simple tasks, even though the VBA has acknowledged they take only 2.6 hours combined for someone to complete. Pls. Trial Ex. 1282. VBA does not know why some veterans must wait 1000 days or more for certification. App., *infra*, 250a-251a.

The appeal itself to the Board of Veterans' Appeals is even slower. Although veterans have the

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Morning Workload Reports (Aug. 27, 2012), available at http://www.vba.va.gov/REPORTS/mmwr/index.asp.

right to request a hearing before the Board (which makes the veteran more likely to prevail), most veterans do not request such a hearing, despite the high likelihood of success, because it takes on average 455 days to receive one. App., *infra*, 252a. All told, it takes an average of 3.9 years for the VA to resolve an appeal. *Ibid.*

The appeals process effectively places many veterans in a perpetual holding pattern. This is the case even though veterans prevail in 72.7% of all cases (winning outright in 28.5% of the time, and getting a remand in 44.2% more cases).[5] And even though Congress has mandated that remands receive "expeditious treatment" by the Regional Offices, 38 U.S.C. § 5109B, it takes Regional Offices almost 500 days to resolve remanded claims (and 564 days for remanded PTSD claims). Approximately 75% of remanded claims return to the Board of Veterans Appeals. It then takes another 149 days on average for the Board to render a second decision. App., *infra*, 255a. Of these second appeals, 27% are remanded to the Regional Office yet again, resulting in a constant "churning" of claims between the Regional Offices and the Board of Veterans' Appeals.[6]

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[5] *See* Board of Veterans' Appeals, Report of the Chairman at 21, (Feb. 1, 2012) http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2011AR.pdf.

[6] A May 2012 report of the VA OIG confirmed that "VBA's management of appeals was ineffective in providing timely resolution of veterans' appeals" and that the situation is deteriorating. VA OIG, *Veterans Benefits Administration: Audit of VA Regional Office's Appeals Management Processes*, at 2 (May 30, 2012), http://www.va.gov/oig/pubs/VAOIG-10-

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C. Proceedings Below

1. Petitioners brought suit alleging that the VA's practices and procedures resulting in severe, systemic delays in medical treatment and the adjudication of death and disability claims violated veterans' due process rights under the Constitution and the Administrative Procedure Act. Petitioners sought declaratory and injunctive relief, including an order compelling the VA to implement its own strategic plan for improving mental-health treatment and to afford veterans faced with administrative delays an opportunity to challenge them. Petitioners did not seek relief for the denial of any medical treatment or disability benefits on behalf of any particular veterans. App., *infra*, 95a-99a.

2. The district court initially denied respondents' motion to dismiss and held that "§ 511 does not preclude review of all of Plaintiffs' claims in this Court." App., *infra*, 328a. The court acknowledged that the circuits are divided as to the interpretation of Section 511, and that "the D.C. Circuit interpreted the preclusive effect of § 511 more narrowly" than the Sixth Circuit. App., *infra*, 325a.

After a seven-day bench trial, the district court denied relief in an 82-page decision, after making

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03166-75.pdf. The appeals backlog swelled by 30% from 2008 to 2010. The OIG found that VBA had not "allocat[ed] sufficient staff to work on appeals." *Ibid.* And it found that "[w]ithout change, the age of the appeals comprising the inventory will continue to increase and veterans will continue to face unacceptable delays in receiving their entitled monetary and health benefits." *Ibid.*

extensive findings of fact—none of which were contested by the government on appeal. The district court concluded that it lacked authority to order the requested remedies. App., *infra*, 264a-280a. With regard to benefits adjudications, the district court concluded that Section 511(a) barred its review. App., *infra*, 275a.

3. A divided three-judge panel of the court of appeals reversed as to the challenges at issue here.

a. The panel held that Section 511(a) does not preclude the district court from considering petitioners' constitutional and statutory challenges. The court of appeals explained that petitioners' due process challenge to the delays in mental health care services is not barred because petitioners "need not, and do not, seek to relitigate in federal court whether VA staff actually '*acted* properly in handling' individual veterans' requests for appointments." App., *infra*, 123a-124a.

The panel also concluded that petitioners' due process challenge to the process for adjudicating claims for disability benefits was not precluded by Section 511 because the conduct that petitioners "challenge is not a 'decision' within the meaning of § 511"; rather, "that their appeals languish *un*decided is the very basis for their claim." App., *infra*, 145a-146a.

In interpreting Section 511, the panel expressly agreed with the interpretations of the D.C. Circuit and the Federal Circuit. App., *infra*, 146a-148a. The panel, however, expressly disagreed with the Sixth Circuit, stating: "We fail to understand how the Sixth Circuit squared its reasoning with the plain text of the statute * * * ." App., *infra*, 149a.

b. Chief Judge Kozinski dissented. He concluded that the district court lacked jurisdiction under Section 511 to petitioners' challenges. App., *infra*, 170a-189a.

4. The Ninth Circuit granted rehearing en banc and affirmed the district court. The divided en banc panel held that "the district court lacks jurisdiction to reach" petitioners' due process challenges under Section 511. App., *infra*, 54a.

a. The majority acknowledged that there is a lack of clarity in the Circuits concerning the scope of Section 511(a)'s preclusion of judicial review. The court explained that "most other circuits have not articulated a comprehensive test to determine the preclusive contours of § 511." App., *infra*, 22a.

The majority concluded that the district court lacked jurisdiction over petitioners' delay-in-treatment challenges because "there is no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly." App., *infra*, 33a. Likewise, the majority concluded that the court lacked jurisdiction over petitioners' challenges relating to delays in adjudication of disability claims because the "district court cannot decide such claims without determining whether the VA acted properly in handling individual veterans' benefits requests at each point in the process." App., *infra*, 35a. The court of appeals reached these conclusions by relying on and citing to petitioners' complaint, rather than the findings of fact that the district court made after a week-long trial.

b. Judge Schroeder dissented. She explained that Section 511 precludes only a review of a "decision" granting or denying benefits, not "a decision to delay making a decision." App., *infra*, 57a. Judge Schroeder stated petitioners' "concern is not with the substance of any benefits decision. Their concern is with process." App., *infra*, 58a.

Judge Schroeder further explained that the majority's interpretation of Section 511 conflicted with the D.C. Circuit's "narrow interpretation of § 511's bar." App., *infra*, 65a.

REASONS FOR GRANTING THE PETITION

REVIEW IS WARRANTED BECAUSE THE COURTS OF APPEALS ARE SHARPLY DIVIDED OVER A QUESTION OF VITAL IMPORTANCE TO OUR NATION'S VETERANS

Three circuits have rejected the Ninth and Sixth Circuit's overbroad reading of Section 511(a). That irreconcilable division in the courts of appeals alone warrants this Court's immediate review.

Under the ruling below, veterans and their organizations have no recourse to challenge the systemic failures of the VA to provide expedient medical care. Nor can veterans or their families seek review of the VA's failures to make timely determinations regarding disability and death benefits requests—meanwhile, those systemic failures force veterans to navigate the Kafkaesque cycle of benefits denials, appeals, and remands. This is the case even though this Court consistently has construed jurisdiction stripping statutes narrowly, particularly where their application would foreclose all judicial review and bar constitutional challenges.

The question presented is far too important to await further percolation in the lower courts. The sacrifices our soldiers make while serving the United States are compounded by the struggles they face in dealing with the VA upon returning home. Under the ruling below, they have no redress. This Court should grant review and reverse the Ninth Circuit's erroneous conclusion that the federal district courts are powerless to entertain petitioners' systemic challenges.

A. The Circuits Are Divided Three-To-Two Regarding The Scope Of Section 511(a)

1. Three circuits construe Section 511(a) to preclude review only of "decisions" actually made by the Secretary

Contrary to the ruling below, the D.C. Circuit, the Second Circuit, and the Federal Circuit have held that 38 U.S.C. § 511(a) does not preclude systemic challenges that do not seek to overturn "decisions" by the Secretary.

a. The D.C. Circuit has construed Section 511(a) as granting the Secretary authority to make decisions about veterans' benefits, and as only precluding district court review of any decision actually made by the Secretary. *Broudy v. Mather*, 460 F.3d 106, 112 (D.C. Cir. 2006).

In *Broudy*, veterans were injured as a result of exposure to atomic radiation in Japan during World War II. *Id.* at 108-109. The veterans alleged that the government "intentionally covered * * * up" tests that "accurately describe[d] the levels of radiation to which each veteran was exposed" and instead used "flawed dose reconstructions" in deciding veterans' eligibility for benefits. *Id.* at 109-110. The veterans

explained that their challenges were "not about whether they should have received Government compensation for their sicknesses" but rather "about whether Government officials denied them a constitutional right of meaningful access to administrative proceedings before the" VA. *Id.* at 108.

The D.C. Circuit rejected the government's contention that Section 511(a) precluded district court jurisdiction over the veterans' challenges. The court of appeals held that the government's "argument misreads the statute." *Id.* at 112. "Section 511(a) does not give the VA *exclusive* jurisdiction to construe laws affecting the provision of veterans benefits or to consider all issues that might somehow touch upon whether someone receives veterans benefits." *Ibid.* "Rather, it simply gives the VA authority to consider such questions when making a decision about benefits * * * and, more importantly for the question of our jurisdiction, prevents district courts from 'review[ing]' the Secretary's decision once made." *Ibid.* (citations omitted; brackets in original). Thus, the D.C. Circuit explained:

> [W]hile the Secretary is the sole arbiter of benefits claims and issues of law and fact that arise during his disposition of those claims, district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding.

Id. at 114.

Nor did the D.C. Circuit agree (as the Ninth Circuit did below) "that if the District Court exercises jurisdiction here, it would need to determine whether the VA 'acted properly' in handling the claims of at least those plaintiffs who were denied full benefits." *Id.* at 115. The court explained that was "[n]ot so," because the veterans were "not asking the District Court to decide whether any of the veterans whose claims the Secretary rejected [we]re entitled to benefits. Nor are they asking the District Court to revisit any decision made by the Secretary in the course of making benefits determinations." *Ibid.*; *see also Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 (D.C. Cir. 2010) (*Broudy* "indicated that only questions '*explicitly* considered' by the Secretary would be barred by § 511, not questions he could be 'deemed to have decided' or, presumably, implicitly decided." (quoting *Broudy*, 460 F.3d at 114)).

b. The Second Circuit also has held that district courts have jurisdiction over challenges relating to veterans' benefits so long as the challenges do not seek review of the Secretary's decision to deny benefits in any particular case. *Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992).

In *Disabled American Veterans*, the Second Circuit interpreted the VJRA as not precluding district court jurisdiction over a facial constitutional challenge to a statute that denied benefits eligibility to any "incompetent" veteran without a spouse, child, or dependent parent until the veteran's estate is reduced to less than $10,000 in value. *Id.* at 137-

138, 141.[7] The court held that "since the Veterans neither make a claim for benefits nor challenge the denial of such a claim, but rather challenge the constitutionality of a statutory classification drawn by Congress, the district court had jurisdiction to consider their claim." *Id.* at 141.

c. The Federal Circuit is in accord with the D.C. Circuit and Second Circuit. The Federal Circuit has held that Section 511(a) does not preclude district court review of every suit that involves a law affecting the provision of veterans' benefits. *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000).

In *Hanlin*, a decision on which the D.C. Circuit relied, the Federal Circuit refused to "read the statute to require the Secretary, *and only the Secretary*, to make all decisions related to laws affecting the provision of benefits." 214 F.3d at 1321 (emphasis added). "Rather, once the Secretary has been asked to make a decision in a particular case (e.g., through the filing of a claim with the VA), 38 U.S.C. § 511(a) imposes a duty on the Secretary to decide all questions of fact and law necessary to a decision in that case." *Ibid.*

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[7] The Second Circuit applied the VJRA, when it referred to Section 211 rather than Section 511. As the Ninth Circuit noted, "Section 211 was recodified as § 511 by the Department of Veterans Affairs Codification Act, Pub. L. No. 102-83, 105 Stat. 378 (1991)." App., *infra*, 19a. That recodification did not change the statutory language, and for that reason the Ninth Circuit "refer[red] to the pre-VJRA provision as § 211 and the post-VJRA provision as § 511." *Ibid.*

The Federal Circuit subsequently has reaffirmed its holding in *Hanlin* that "Section 511(a) does not apply to every challenge to an action by the VA." *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005). The court of appeals reiterated that Section 511(a) "only applies where there has been a 'decision by the Secretary.'" *Ibid.*

d. There can be little doubt that had the reasoning of the D.C. Circuit, Second Circuit, and Federal Circuit been applied to the present case, the district court would have been permitted to exercise jurisdiction over petitioners' challenges. Nowhere do petitioners seek review of the Secretary's "decision" as to any veteran's entitlement to medical treatment or disability benefits. Indeed, the government has proffered no evidence that it actually has decided any of the issues in this case—i.e., made a "decision" that would be barred from review under Section 511(a). Rather, petitioners contend that the VA's practices and procedures—which lead to long delays in medical treatment and the adjudication of benefit claims—violate due process and the Administrative Procedure Act. Such suits are precisely the type that would survive in other Circuits under *Broudy*, *Disabled American Veterans*, and *Hanlin*.

2. Two circuits hold that Section 511(a) broadly precludes jurisdiction over systemic challenges to the VA's practices and policies

On the other side of the divide, both the Sixth Circuit and the ruling below have construed Section 511(a) to preclude systemic challenges so long as the challenge, in some attenuated way, might "affect[] to the provision of benefits"—even if

the suit seeks no redress for any "decision" by the Secretary. 38 U.S.C. § 511(a).

a. In *Beamon*, three individual veterans "asked the district court to review the legality and constitutionality of the procedures that the VA uses to decide benefits claims." *Beamon v. Brown*, 125 F.3d 965, 970 (6th Cir. 1997). The veterans alleged "that VA procedures cause unreasonable delays in benefits decisions." *Ibid.* Notwithstanding the fact that the veterans did not challenge any benefits decision, the Sixth Circuit held that "[d]etermining the proper procedures for claim adjudication is a necessary precursor to deciding veterans benefits claims" and thus the Secretary of the VA has exclusive jurisdiction over the challenge. *Ibid.* Moreover, contrary to the ruling of other courts, the Sixth Circuit reasoned that to adjudicate the veterans' challenges would require "review [of] individual claims for veterans benefits, the manner in which they were processed, and the decisions rendered by the regional office of the VA and the [Board]." *Id.* at 970-971.

b. The ruling below adopted the reasoning of the Sixth Circuit. App., *infra*, 35a ("[W]e find ourselves in accord with the Sixth Circuit, which resolved a similar question in *Beamon v. Brown*."). The en banc majority concluded that there was "no way for the district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of mental health care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those requests properly." App., *infra*, 33a. Accordingly, the Ninth Circuit concluded the

district court was without jurisdiction to decide petitioners' challenges.

While the en banc court purported to "[s]ynthesize" the various out-of-circuit precedents under Section 511, the court nevertheless acknowledged that not all circuits agreed with its approach. App., *infra*, 23a (citing the Second Circuit's decision in *Disabled American Veterans* as contrary to its statutory construction). Indeed, in dissenting from the ruling below, Judge Schroeder concluded that the D.C. Circuit and Second Circuit precedents could not be reconciled with the en banc majority's decision. App., *infra*, 61a-65a. The majority of the three-judge Ninth Circuit panel likewise had rejected the Sixth Circuit's approach. It had "agree[d] with the Federal Circuit's interpretation of" Section 511(a) that a "decision" immune from district court review means "a formal 'decision' by the Secretary or his delegate." App., *infra*, 146a-147a (quoting *Bates*, 398 F.3d at 1365).

This inter-circuit conflict is alone sufficient to warrant this Court's review.

B. The Ninth Circuit's Ruling Cannot Be Reconciled With This Court's Longstanding Precedent

Review also should be granted because the Ninth Circuit's ruling conflicts with this Court's well-settled rule requiring "'clear and convincing' evidence of congressional intent * * * before a statute will be construed to restrict access to judicial review." *Johnson v. Robison*, 415 U.S. 361, 373-374 (1974) (citing *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)); *see also Webster v.* Doe, 486 U.S. 592, 603 (1988) ("where Congress intends to preclude

judicial review of constitutional claims its intent to do so must be clear").

1. In *Robison*, this Court held that the predecessor statute to Section 511 contained "no explicit provision" that "bars judicial consideration of [the veterans'] constitutional claims." *Robison*, 415 U.S. at 367. The Court explained that "[s]uch a construction would, of course, raise serious questions concerning the constitutionality of" the provision. *Id.* at 366.

Congress provided no such "explicit provision" when it amended the statute by enacting Section 511. Section 511 contains no "clear and convincing evidence" that it intended to "restrict access to judicial review" where no benefits decision is being challenged. The plain language of Section 511 precludes district courts from reviewing only a "*decision* of the Secretary as to any such question"—i.e., as to "all questions of law and fact *necessary to a decision* by the Secretary under a law that affects the provision of benefits." 38 U.S.C. § 511(a) (emphasis added).

The statute does not preclude judicial review of anything else. In particular, the text of Section 511 makes no reference to any constitutional or other systemic challenges that might be prohibited. Indeed, the legislative history confirms that Congress did not intend to divest district courts of jurisdiction over such systemic challenges. H.R. Rep. No. 100–963, 1988 U.S.C.C.A.N. 5782, 5801-5804 ("*Robison* was correct in asserting judicial authority to decide whether statutes meet constitutional muster * * *."). Thus, as other courts have concluded when examining Section 511(a)'s near-identical predecessor statute, "the structure of

our constitutional form of government dictate[s] that [the court] not read § 211(a) to preclude all judicial review of a veteran's serious constitutional claims." *Marozsan v. United States*, 852 F.2d 1469, 1472 (7th Cir. 1988) (en banc).[8] To be constitutional, the statute must be construed "to allow substantial constitutional challenges to the veterans' benefits statutes and regulations, as well as to the procedures established by the V.A. to administer them." *Ibid.* This is particularly the case where "the statute itself contains no explicit language barring judicial consideration of a veteran's constitutional challenge to the benefits system." *Id.* at 1474.

Here, petitioners challenge no "decision" by the Secretary. Indeed, the government's own regulations concede that a question concerning medical treatment is not even a "decision" (and thus is outside of the Board of Veterans' Appeals' review). 38 C.F.R. § 20.101(b) ("Medical determinations * * * are not adjudicative matters and are beyond the Board's jurisdiction.").

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[8] Before the enactment of the VJRA, Section 211(a) provided:

> [T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise.

38 U.S.C. § 211(a) (1982).

2. The Ninth Circuit dismissively swept aside *Robison*, contending that this Court's "warning of 'serious questions' concerning statutes that preclude all judicial review is of limited application here." App., *infra*, 40a. Relying on review of benefits decisions by the Veterans Court (and ultimately the Federal Circuit), the Ninth Circuit held that, under its reading of Section 511, "Congress did not leave veterans without a forum for their constitutional claims." App., *infra*, 41a.

But that cannot be squared with this Court's recent decision in *Free Enterprise Fund*. There, the Court held that granting exclusive jurisdiction "to review any Board rule or sanction" does not "limit the jurisdiction that other statutes confer on district courts," where no "rule" or "sanction" is at issue. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150 (2010). In particular, this Court "presume[d] that Congress d[id] not intend to limit jurisdiction if 'a finding of preclusion could foreclose all meaningful judicial review'; if the suit is 'wholly collateral to a statute's review provisions'; and if the claims are 'outside the agency's expertise.'" *Ibid.* (quoting *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212-213 (1994)).

This Court in *Free Enterprise Fund* also rejected the government's argument that the constitutional challenge could be raised as part of a "sanction," because that would require the petitioner to unnecessarily suffer "before 'testing the validity of the law.'" *Id.* at 3151 (quoting *MedImmune, Inc. v. Genentech, Inc.*, 549 U.S. 118, 129 (2007)). Here, it would make little sense to require veterans to mount a systemic challenge to the Secretary's policies and procedures as they navigate through the benefits

process with their own individual claims for particular benefits. But that is what the Ninth Circuit did in this case.

C. This Case Is An Ideal Vehicle To Decide This Question Of National Importance

1. The petition presents a question of paramount national importance in need of prompt resolution.

Ensuring that combat veterans timely receive the care and support that the Nation has promised them in return for their service is one of the Nation's highest priorities. As the President has stated:

> For their service and sacrifice, warm words of thanks from a grateful nation are more than warranted, but they aren't nearly enough. We also owe our veterans the care they were promised and the benefits that they have earned. We have a sacred trust with those who wear the uniform of the United States of America. It's a commitment that begins at enlistment, and it must never end.

President Barack Obama, Remarks by the President on Improving Veterans' Health Care (Apr. 9, 2009) (transcript available at http://www.whitehouse.gov/the_press_office/Remarks-by-the-President-on-Improving-Veterans-Health-Care-4/9/2009/).

The government, however, is not backing up its words with action. Veterans returning from the wars in Afghanistan and Iraq are afflicted in unprecedented numbers with PTSD because of the unique challenges of waging those wars, such as multiple deployments, the inability to identify the enemy, the lack of real safe zones, and the inadvertent killing of innocent civilians. App., *infra*,

223a-224a. PTSD is one of the two "signature wounds of today's wars." App, *infra*, 78a n.5. Indeed, during the first two years of the Iraq War, from 2003 to 2005, there was a 232% increase in PTSD diagnoses among veterans born after 1972. App., *infra*, 224a. As of 2008, 18.5% of service members who returned from the wars had PTSD. *Ibid*.

Prompt treatment of veterans with PTSD symptoms is critical to prevent PTSD from causing severe depression, anti-social behavior, and suicide. App., *infra*, 78a-79a. The VA does not dispute this. App., *infra*, 82a. Yet veterans must wait weeks or months even to receive a mental health evaluation. App., *infra*, 233a. These delays are not aberrant circumstances; they are now the norm. And these delays have led to another tragic new norm: extraordinary rates of suicide among veterans.

The VA does no better with respect to providing disability and death benefits. Veterans and their families often are forced to wait years for the VA's Regional Offices to reach a decision and the appellate process to be completed. The average time to pursue a claim that involves an appeal is now 4.4 years. App., *infra*, 252a. Even though these benefits could help provide food and shelter, many veterans give up before completing the process. Indeed, during a single six-month period, 1,467 veterans died during the pendency of their appeals. App., *infra*, 255a.

Given the sheer number of veterans with PTSD returning home each day and the importance of treatment and benefits, the outcome of this case will affect the livelihoods of hundreds of thousands of veterans at a crucial time in their lives. Absent this

Court's review, veterans who are forced to wait for treatment or are locked in a years-long struggle to secure benefits will have no recourse.

To be sure, the Ninth Circuit en banc majority hypothesized that such a veteran could seek a writ of mandamus from the Veterans Court. App., *infra*, 33a-34a n.18. The bitter irony in this suggestion is that the majority ruled against petitioners on one of their challenges because it concluded that granting the "requested relief would transform the adjudication of veterans' benefits into a contentious, adversarial system." App., *infra*, 4a. It is difficult to imagine a more adversarial system than one in which thousands of veterans must seek mandamus relief from a court to receive the disability benefits to which they are entitled by statute.

Veterans should not be forced to depend on such illusory relief. As Judge Schroeder observed in dissent, "such an extraordinary writ is rarely granted." App., *infra*, 66a (citing *Erspamer v. Derwinski*, 1 Vet. App. 3, 9-11 (Vet. App. 1990) (declining to issue mandamus even after concluding that a delay of ten years for benefits was unreasonable)). And "[t]he writ is not binding in any case other than the case in question, and thus would have no [e]ffect on the procedures" that would continue to apply to countless other veterans facing the same obstacles to having their claims timely resolved. *Ibid.* (citation omitted).[9]

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[9] Under the VA's own policies, veterans with mental health issues should receive an evaluation within *24 hours*. App., *infra*, 82a-83a. The amount of time it would take to pursue

(Footnote continued on following page)

Congress has done its part by requiring that our veterans receive medical care and disability benefits when they return home and by providing the necessary funding. The executive branch, however, has fallen woefully short. This Court should not allow the government's systemic failures to be insulated from judicial review.

2. The Court should grant review now. Any delay is at the expense of our Nation's veterans. Indeed, this case likely presents the *only* opportunity for this Court to intervene in time for the veterans of the Iraq and Afghanistan wars. Combat veterans are entitled to free health care from the VA for only 5 years after their service ends. 38 U.S.C. § 1710(e)(3)(A). If left unreviewed, the Ninth Circuit's decision will condemn these "veterans to suffer intolerable delays inherent in the VA system." App., *infra*, 67a.

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mandamus relief would make that relief far too late for veterans with symptoms of PTSD.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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