No. 12-296

In the Supreme Court of the United States

VETERANS FOR COMMON SENSE, ET AL., 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

BRIEF FOR RESPONDENTS IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Principal Deputy Assistant Attorney General
CHARLES W. SCARBOROUGH
Attorney
Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Whether the Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105, permits a district court to exercise jurisdiction over claims that challenge the "average" delay of the Secretary of Veterans Affairs in administering certain benefits and seek systemic judicially-supervised reform of the Secretary's procedures.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1a-67a) is reported at 678 F.3d 1013. The court of appeals' vacated panel opinion (Pet. App. 68a-204a) is reported at 644 F.3d 845. The decision of the district court (Pet. App. 205a-295a) is reported at 563 F. Supp. 2d 1049.

JURISDICTION

The judgment of the court of appeals was entered on May 7, 2012. On July 24, 2012, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including September 5, 2012, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Secretary of Veterans Affairs is charged with the administration of benefits to persons who have served in the United States Armed Forces (as well as to their dependents and beneficiaries). 38 U.S.C. 301(b), 303. Among other things, the Secretary administers the provision of "hospital care and medical services which the Secretary determines to be needed" for certain disabled veterans, 38 U.S.C. 1710(a)(1), as well as the provision of certain disability and death benefits, see 38 U.S.C. 1110, 1310. In performing these functions, the Secretary "operates in the context of continuous Congressional oversight," H.R. Rep. No. 963, 100th Cong., 2d Sess. 25 (1988) (*1988 House Report*), and both Congress and the Secretary are actively engaged in attempting to improve the timeliness and accuracy of the benefits process, see Pet. App. 2a-3a.

Since shortly after the creation of the Veterans Administration in 1930, federal law has limited judicial review of its processing of veterans' claims. Pet. App. 13a-21a. A 1933 law stated that "[a]ll decisions rendered by the Administrator of Veterans' Affairs" (the predecessor to the Secretary) "under the provisions of this title, or the regulations issued pursuant thereto, shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review by mandamus or otherwise any such decision." Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9; see Pet. App. 13a-14a. In reaction to judicial decisions recognizing exceptions to that provision, Congress in 1970 amended the law to reemphasize its intent that the preclusion of judicial review "be all inclusive." H.R. Rep. No. 1116, 91st Cong., 2d Sess. 10 (1970); see 38 U.S.C. 211(a) (1970); Pet. App. 14a-15a; see also *Henderson ex*

rel. Henderson v. *Shinseki*, 131 S. Ct. 1197, 1201 (2011) ("Before 1988, a veteran whose [disability] claim was rejected by the VA was generally unable to obtain further review.").

In 1988, in response to a concern that more recent judicial decisions (including one by this Court) had again "taken the courts further into individual decision-making than Congress heretofore intended," Congress enacted the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, in which it "broaden[ed] the scope" of the prior law's limitations on judicial review. *1988 House Report* 22, 27; see Pet. App. 16a-17a (discussing *Traynor* v. *Turnage*, 485 U.S. 535 (1988)); see also *Traynor*, 485 U.S. at 544-545 (acknowledging the possibility of congressional action if the scope of judicial review were considered excessive). In a provision currently codified at 38 U.S.C. 511(a), the VJRA specifies that the 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." Section 511(a) further provides that "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," except as provided in subsection (b). One of the subsection (b) exceptions is for "matters covered by chapter 72 of this title," which describes the jurisdiction of the United States Court of Appeals for Veterans Claims (Veterans Court). 38 U.S.C. 511(b)(4).

The Veterans Court is an independent Article I tribunal, created by the VJRA, with "exclusive jurisdiction" to review certain administrative decisions and au-

thority to decide legal and factual issues, including constitutional claims. 38 U.S.C. 7251, 7252(a), 7261(a)(1). The Veterans Court's authority includes, *inter alia*, the power to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2); see *Henderson*, 131 S. Ct. at 1201 n.2 (equating review by the Veterans Court to review by a district court under the Administrative Procedure Act). The Veterans Court has concluded (as have multiple circuit courts) that a veteran who believes that action on his claim has been unreasonably delayed may seek mandamus relief from the Veterans Court under the All Writs Act, 28 U.S.C. 1651(a). *Erspamer* v. *Derwinski*, 1 Vet. App. 3, 4-5 (1990); see *Vietnam Veterans of America* v. *Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir.), cert. denied, 131 S. Ct. 195 (2010); Pet. App. 42a.

Veterans Court decisions are themselves subject to judicial review by the United States Court of Appeals for the Federal Circuit, an Article III court. 38 U.S.C. 7292; see *Henderson*, 131 S. Ct. at 1201. The Federal Circuit has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought [in such an appeal], and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. 7292(c); see 38 U.S.C. 7292(d)(1) (stating that the Federal Circuit "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions"). The Federal Circuit also has exclusive jurisdiction to review challenges to the Secretary's rules and regulations. 38 U.S.C. 502 (Supp. IV 2011), 511(b).

The House Report accompanying the VJRA explained that "it is strongly desirable to avoid the possi-

ble disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts." *1988 House Report* 28. It further explained that "the subject of veteran benefits rules and policies is one that is well suited to a court [such as the Federal Circuit] which has been vested with other specialized types of jurisdiction." *Ibid.*

2. Petitioners are two veterans' advocacy groups that filed a district-court suit raising, *inter alia*, constitutional challenges to perceived delays in the Secretary's provision of mental health care to veterans and its adjudication of claims for disability benefits. Pet. App. 6a. The complaint purports to disavow any challenge to any specific delay in any individual case and instead to challenge "average" delays system-wide. *E.g.*, *id.* at 30a & n.17.

Following a bench trial, the district court concluded that "[t]he remedies sought by [petitioners] are beyond the power of this Court and would call for a complete overhaul of the VA system, something clearly outside of this Court's jurisdiction." Pet. App. 295a; see *id.* at 205a-295a. With respect to the administration of mental-health benefits, the district court determined (among other things) that petitioners had failed to prove that "there are in fact system-wide delays in providing this care," noting that while the evidence had not proved "that every veteran always gets immediate mental health care," it did show that "the majority of veterans of Iraq and Afghanistan are being seen at clinics offering mental health services within 30 days." *Id.* at 269a.

With respect to the administration of disability benefits, the district court reasoned that determination of whether delays are unreasonable "may depend on the

facts of each particular [disability] claim" (*e.g.*, how many issues were raised), and that 38 U.S.C. 511 foreclosed such an examination of individual benefits decisions. Pet. App. 275a. The district court additionally reasoned that any order directing the Secretary to shorten processing times would necessarily require changes in the governing regulations, and would thus be foreclosed by 38 U.S.C. 502. Pet. App. 276a. The court also expressed the view that petitioners' suit, if successful, would inefficiently require the agency to "divert resources" from the initial resolution of claims (the point at which 88% of claims are finally resolved) for the benefit of the "4% to 11% of veterans" who pursue appeals (the stage at which many of the alleged delays occur). *Id.* at 279a.

3. A divided panel of the court of appeals affirmed in part and reversed in part. Pet. App. 68a-204a. The majority acknowledged that "in theory, the political branches of our government are better positioned than are the courts to design the procedures necessary to save veterans' lives," *id.* at 72a, but believed that the VJRA did not preclude the district court from exercising jurisdiction over petitioners' claims of systemic delay in the administration of veterans' benefits, *id.* at 121a-124a, 144a-153a. On the merits, the majority concluded that the challenged delays had violated due process, and remanded for the district court to determine what new administrative procedures would be necessary. *Id.* at 125a-140a, 153a-160a.

Chief Judge Kozinski dissented from the majority's opinion, which he described as "hijack[ing]" the Secretary's "mental health treatment and disability compensation programs and install[ing] a district judge as reluctant commandant-in-chief." Pet. App. 169a; see *id.* at

169a-204a. Chief Judge Kozinski warned that the majority's decision would "undoubtedly distract the VA from its ultimate mission: taking care of veterans who risked their lives for our nation." *Id.* at 170a. He observed that Section 511(a) bars district courts from adjudicating "any 'questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits,'" and reasoned that "[d]ecisions by administrative schedulers setting up mental health care appointments for veterans are fully covered by the VJRA's preclusive reach." *Id.* at 184a (brackets omitted). He further reasoned that Section 511 also bars adjudication of petitioners' claims of delay in disability-benefit determinations, because a court cannot determine the unreasonableness of delays without determining "how much time the VA *should* have taken," a determination that would require the court to inquire into individual benefits decisions. *Id.* at 186a. The majority's opinion, Chief Judge Kozinski concluded, "dramatically oversteps its authority, tearing huge gaps in the congressional scheme for judicial review of VA actions." *Id.* at 204a.

4. The court of appeals granted the government's petition for rehearing en banc, vacated the panel's opinion, and ordered entry of judgment in favor of the Secretary. Pet. App. 1a-67a. As relevant here, the court held that the VJRA divested the district court of jurisdiction to consider petitioners' delay-related claims. *Id.* at 11a-44a. The court explained that "the VJRA supplies two independent means by which we are disqualified from hearing veterans' suits concerning their benefits": (1) "Congress has expressly disqualified us from hearing cases related to VA benefits in § 511(a)," and (2) "Congress has conferred exclusive jurisdiction over such

claims to the Veterans Court and the Federal Circuit." *Id.* at 20a.

The court of appeals reviewed and "[s]ynthesiz[ed]" the decisions of various courts of appeals to conclude that Section 511(a) "precludes jurisdiction over a claim if it requires the district court to review VA decisions that relate to benefits decisions, including any decision made by the Secretary in the course of making benefits determinations." Pet. App. 27a (internal quotation marks and citations omitted); see *id.* at 21a-27a. The court explained that such "preclusion extends not only to cases where adjudicating veterans' claims requires the district court to determine whether the VA acted properly in handling a veteran's request for benefits, but also to those decisions that may affect such cases." *Id.* at 27a.

Applying those principles, the court reasoned that "Section 511 undoubtedly would deprive us of jurisdiction to consider an individual veteran's claim" of unreasonable delay. Pet. App. 29a; see *id.* at 35a. It then rejected petitioners' "attempt[] to circumvent this jurisdictional limitation by disavowing relief on behalf of any individual veteran, and instead proffering evidence of *average* delays." *Id.* at 29a-30a; see generally *id.* at 28a-44a. "The fact that [petitioner] couches its complaint in terms of *average* delays," the court reasoned, "cannot disguise the fact that it is, fundamentally, a challenge to thousands of individual mental health benefits decisions made by the VA." *Id.* at 32a. With respect to disability claims, for example, "[w]hether the average delays of which [petitioner] complains are reasonable depends on the facts of individual veterans' claims, such as the complexity of the claim ([Posttraumatic Stress Disorder] claims being some of the most difficult to resolve), the

severity of the disability, and the availability and quality of the evidence." *Id.* at 37a.

The court also rejected petitioners' suggestion that its jurisdictional conclusion would deprive veterans of meaningful relief for unconstitutionally lengthy delays. Pet. App. 38a-44a. The court recognized that in *Johnson* v. *Robison*, 415 U.S. 361 (1974), this Court had interpreted the predecessor of Section 511 not to apply to certain constitutional claims, in order to avoid the "serious questions" that a statute foreclosing all judicial review of a constitutional claim might present. Pet. App. 39a-40a. But the court reasoned that the concerns animating the statutory construction in *Robison* were "of limited application here," *id.* at 40a, because "nothing in the VJRA forecloses judicial review of constitutional questions," *id.* at 41a.

The court observed that a veteran who believes his claim has been unconstitutionally delayed can seek relief from the Veterans Court through a writ of mandamus; that a ruling of the Veterans Court would control the Secretary's handling not only of the claim at issue but of future claims as well; and that the Veterans Court's decision would itself be reviewable in an Article III court (the Federal Circuit). Pet. App. 41a-43a. "In tandem," the court concluded, "the availability of review by both the Veterans Court and the Federal Circuit evinces Congress's intent to protect the federal courts and the VA from time-consuming veterans' benefits litigation, while providing a specialized forum wherein complex decisions about such benefits can be made." *Id.* at 43a; see *ibid.* ("Congress may have foreclosed *our* review of the VA's decisions related to claims adjudication, but it has not foreclosed federal judicial review *in toto*.").

Judge Schroeder, writing only for herself, dissented in relevant part. Pet. App. 55a-67a. In her view, district-court adjudication of petitioners' systemic claims is not barred by Section 511(a), because such adjudication would not require "individualized examination of actual benefits determinations." *Id.* at 58a.

ARGUMENT

The court of appeals correctly concluded that the VJRA forecloses petitioners from seeking a structural injunction to address the "average" delay in the Secretary's processing of mental-health and disability claims. As the jurisdictional limitations of the VJRA reflect, the Legislative and Executive Branches, both of which have demonstrated a consistent commitment to caring for this Nation's veterans, are in a better position than the Judicial Branch to address day-to-day operational issues of the sort that petitioners' claims present. The decision below does not conflict with any decision of this Court or any other court of appeals, and no further review is warranted.

1. The VJRA's comprehensive scheme channels review of claims alleging unlawful delay in the provision of benefits to the Veterans Court and the Federal Circuit. The statute specifically assigns to the Veterans Court the authority to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2). The court of appeals here accordingly observed—as have other circuit courts, and the Veterans Court itself—that a veteran whose claim has been unreasonably delayed may obtain relief, via mandamus, from the Veterans Court. See Pet. App. 42a; *Vietnam Veterans of America* v. *Shinseki*, 599 F.3d 654, 659 n.6 (D.C. Cir.), cert. denied, 131 S. Ct. 195 (2010); *Beamon* v. *Brown*, 125 F.3d 965, 969 (6th Cir. 1997); *Erspamer* v.

Derwinski, 1 Vet. App. 3, 4-5 (1990); see also *In re Russell*, 155 F.3d 1012, 1013 (8th Cir. 1998) (per curiam). As the D.C. Circuit has noted, the standard for obtaining relief in such an action would be "essentially the same" as the standard applicable to unreasonable-delay claims that are brought in other contexts under the Administrative Procedure Act. *Vietnam Veterans of America*, 599 F.3d at 659 n.6. And the Federal Circuit would be able to review any decision of the Veterans Court in such a case. 38 U.S.C. 7292.

Although petitioners briefly characterize review of delay in the Veterans Court and Federal Circuit as "hypothesized" and "illusory," Pet. 32, they do not directly dispute its availability. They also do not contend that an individual veteran alleging unreasonable delay may opt out of review in the Veterans Court and bring his claim in district court instead—nor could they. In enacting the VJRA, Congress understood that "the subject of veteran benefits rules and policies" would benefit from specialized review, and it specifically wanted "to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts." *1988 House Report* 28. "Congress plainly preferred" to channel judicial review to the Federal Circuit "as a matter of policy, both because it avoided overburdening the district court system and because the district courts lacked the necessary expertise." *Bates* v. *Nicholson*, 398 F.3d 1355, 1364 (Fed. Cir. 2005). This Court's decisions recognize that when Congress exhibits a "fairly discernible" intent to channel certain claims through a particularized review scheme, that review scheme is exclusive. See, *e.g.*, *Elgin* v. *Department of the Treasury*, 132 S. Ct. 2126, 2133

(2012); *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994); *Block* v. *Community Nutrition Inst.*, 467 U.S. 340, 351 (1984).

Congress manifested its intent for such exclusivity in the VJRA not only through its creation of a specialized court that can hear unreasonable-delay claims, see, *e.g.*, *Elgin*, 132 S. Ct. at 1233, but also through the enactment of express provisions foreclosing district-court review, see, *e.g.*, *Shalala* v. *Illinois Council on Long Term Care, Inc.*, 529 U.S. 1, 10 (2000) (discussing a similarly exclusive scheme in the Medicare and Social Security contexts). Specifically, 38 U.S.C. 511 generally bars review (outside the scheme created by the VJRA itself) of "the decision of the Secretary as to any * * * question" of "law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits." And Section 502 provides that only the Federal Circuit may review certain rules. See 38 U.S.C. 502 ("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.").

Petitioners cannot avoid the VJRA's limitations on judicial review of unreasonable-delay issues simply by disavowing a challenge to any individual benefit claimant's delay and purporting to challenge only the "average" delay in the administration of claims. Pet. App. 29a-30a & n.17. As the court of appeals recognized, "couch[ing] [the] complaint in terms of *average* delays cannot disguise the fact that it is, fundamentally, a challenge to thousands of individual mental health benefits decisions made by the VA." *Id.* at 32a. The concept of an "average" delay becomes meaningless if it is severed

from the context of the actual claims that the Secretary is addressing; the reasonableness of delays cannot be adjudicated without some investigation into how actual claims play out in practice (*e.g.*, the number of issues they present and how long it should take to resolve those issues); and a court attempting to remedy delays through a comprehensive judicial order would necessarily have to insert itself into the processing of individual claims in order to impose time limits for consideration of individual claims and to police compliance with its order. *Id.* at 32a-33a. Congress could not have intended for plaintiffs to circumvent the VJRA's channeling provisions simply by aggregating multiple claims together and then asking the court to disregard the individual claims for purposes of adjudicating the issue of delay. Indeed, it is only the individual claims for benefits (and the individual complaints of delay in addressing those particular claims) that can support petitioners' standing to sue on their members' behalf. *Summers* v. *Earth Island Inst.*, 555 U.S. 488, 495, 498 (2009); see pp. 20-21, *infra*. Petitioners' omnibus "average" delay claim would "embroil the district court in the day-to-day operation of the VA," Pet. App. 33a, far more than an individual delay claim ever could.

Petitioners' contrary arguments lack merit. They primarily assert (*e.g.*, Pet. 27-29) that their claim falls outside the scope of Section 511 because, in their view, they are not challenging the sort of "decision" to which the statute pertains. That assertion—on which their question presented expressly depends (see Pet. i)—is flawed on several levels. As a textual matter, Section 511 broadly bars judicial review not simply of "decision[s] by the Secretary under a law that affects the provision of benefits," but any "decision[s]" on "ques-

tions of law and fact *necessary to*" that first class of decisions (emphasis added). That twice-broad language encompasses the issues raised in petitioners' complaint. Cf., *e.g.*, *Illinois Council*, 529 U.S. at 5-10 (concluding that statutory preclusion of actions "'to recover on any [Medicare] claim'" barred suit preemptively challenging "the lawfulness of a policy, regulation, or statute that *might* later bar recovery"). As a structural matter, petitioners' argument largely ignores the inference of exclusivity created by the VJRA's channeling of unreasonable-delay claims to more specialized bodies. See pp. 10-12, *supra*. And as a historical and practical matter, it is difficult to believe that Congress would have wanted the various district (and circuit) courts to have jurisdiction—let alone overlapping jurisdiction—over specialized questions of claims-processing procedure and resource allocation in the administration of benefits claims. The Veterans Court and Federal Circuit unquestionably have exclusive jurisdiction to review such benefits claims on the merits and therefore have the accumulated experience and expertise necessary to best consider any claims of undue delay. See pp. 10-11, *supra*.

Petitioners additionally urge a narrow scope of VJRA preclusion in light of the requirement that Congress speak clearly when it intends to preclude review of constitutional claims. See Pet. 26-27 (citing, *inter alia*, *Johnson* v. *Robison*, 415 U.S. 361 (1974), and *Webster* v. *Doe*, 486 U.S. 592 (1988)). But as this Court has recently made clear, no such clear-statement requirement applies "where Congress simply *channels* judicial review of a constitutional claim to a particular court" and does not try to "deny *any* judicial forum for a colorable constitutional claim." *Elgin*, 132 S. Ct. at 2132 (emphasis added;

internal quotation marks and citation omitted); see *Thunder Basin Coal*, 510 U.S. at 206, 215 n.20. That is all Congress has done here, and its intent to do so is clear from the text and structure of the VJRA.

An individual member of one of the petitioner associations, if aggrieved by unreasonable delay, would be free to raise in the Veterans Court all of the constitutional claims that petitioners present here. See *Vietnam Veterans of America*, 599 F.3d at 660 ("[A] claim that a plaintiff has been denied due process because of delayed agency action is essentially no different than an unreasonable delay claim; indeed, if there is any difference at all, it is that an unreasonable delay claim would likely be triggered *prior to* a delay becoming so prolonged that it qualifies as a constitutional deprivation of property.").

Although the procedure for review of constitutional claims in the Veterans Court is not identical in all respects to review in district court—it might not, for example, permit the aggregation of separate claims or the review of a claim by an organizational plaintiff on behalf of its members—it nevertheless provides a suitable avenue for any aggrieved person to raise any potential constitutional arguments about unreasonable delay. Cf. *Henderson*, 131 S. Ct. at 1201 (noting that veterans "have a remarkable record of success" before the Veterans Court, obtaining "some form of relief in around 79 percent of its 'merits decisions'"). The Veterans Court is expressly authorized to address constitutional questions, see 38 U.S.C. 7261(a)(1); its decisions not only control the case at bar but also "have a binding effect on the manner in which the VA processes subsequent veterans' claims," *Beamon*, 125 F. 3d at 970 (see, *e.g.*, *Tobler* v. *Derwinski*, 2 Vet. App. 8 (1991)); and its decisions are reviewable by the Federal Circuit, which has

full authority to issue binding decisions on constitutional issues (including any constitutional issues that the Veterans Court lacked authority to decide in the first instance, if any such issues exist), see *Elgin*, 132 S. Ct. 2136-2137.

Finally, petitioners suggest (Pet. 28-29)—relying on this Court's decision in *Free Enterprise Fund* v. *Public Company Accounting Oversight Board*, 130 S. Ct. 3138 (2010)—that their claims may proceed notwithstanding the statute's channeling provisions because their claims are ancillary to the review scheme those provisions create. Petitioners' reliance on *Free Enterprise Fund* is misplaced. Unlike the plaintiff in *Free Enterprise Fund*, petitioners here are not raising a structural constitutional challenge to the composition of a federal agency, see *id.* at 3150-3151, but are instead raising complaints challenging particular agency activity. In this context, application of the VJRA's particularized review provisions does not present any of the problems mentioned in *Free Enterprise Fund*. It would not "foreclose all meaningful judicial review" (but instead would merely channel it); it would not force truly "collateral" claims into a statutory review process designed solely to handle other matters (to the contrary, the VJRA specifically authorizes the Veterans Court to address claims of unreasonable delay in the determination of claims for benefits); and would not require administrative resolution of claims "outside the agency's expertise" (indeed, an agency is better positioned than a court to address fact-intensive issues of how claims can most efficiently be processed, and the Veterans Court is a specialized Article I tribunal with expertise in the subject matter). Pet. 29 (quoting *Free Enterprise Fund*, 130 S. Ct. at 3150); see *Elgin*, 132 S. Ct. at 2140.

2. Contrary to petitioners' contention (Pet. 19-23), the court of appeals' decision here is consistent with the decisions of other courts of appeals. Petitioners acknowledge (Pet. 24-26) that the decision below accords with the Sixth Circuit's decision in *Beamon* v. *Brown*, *supra*, which concluded that whether the Secretary's procedures "cause unlawful or unconstitutional delays in the administration of veterans benefits are questions within the exclusive jurisdiction of the [Board], the [Veterans Court], and the Court of Appeals for the Federal Circuit." 125 F.3d at 974. Other court of appeals have likewise rejected attempts to raise claims related to veterans' benefits outside the statutory framework Congress has prescribed for litigating such claims. See, *e.g.*, *Hall* v. *United States Dep't of Veterans' Affairs*, 85 F.3d 532, 532-535 (11th Cir. 1996) (per curiam) (constitutional challenge to statute and regulation relating to benefits), *Zuspann* v. *Brown*, 60 F.3d 1156, 1157-1160 (5th Cir. 1995) (statutory and constitutional challenge to adequacy of medical care), cert. denied, 516 U.S. 1111 (1996); *Hicks* v. *Veterans Admin.*, 961 F.2d 1367, 1368-1370 (8th Cir. 1992) (constitutional challenge to reduction of disability benefits).

Petitioners fail to identify any court that has allowed claims similar to the ones they raise here to proceed outside the special statutory review provisions of the VJRA. Petitioners first cite (Pet. 19-21) the D.C. Circuit's decision in *Broudy* v. *Mather*, 460 F.3d 106 (2006). That case, however, did not involve complaints of delay in the consideration of claims and evidence actually presented to the Secretary, but instead complaints that the government had concealed evidence about the plaintiffs' exposure to atomic radiation, thereby precluding them at the outset from demonstrating to the Secretary that

their illnesses were covered under the veterans-benefits scheme. *Id.* at 109-110. In considering whether the VJRA would preclude those claims, the court recognized that circuit precedent precluded district courts from inquiring whether the Secretary "acted properly" in handling a benefits request. *Id.* at 114-115 (citation omitted); see *Price* v. *United States*, 228 F.3d 420 (D.C. Cir. 2000), cert. denied, 534 U.S. 903 (2001); *Thomas* v. *Principi*, 394 F.3d 970 (D.C. Cir. 2005). It concluded, however, that the particular claims at issue would not require such an inquiry, since they concerned information and evidence that were never presented to the Secretary. 460 F.3d at 115.

Broudy does not demonstrate that the D.C. Circuit would permit claims like petitioners', which, unlike the claims at issue in *Broudy*, directly challenge the manner in which the Secretary makes benefits decisions. See Pet. App. 25a-26a (discussing *Broudy*). To the contrary, VJRA preclusion of such claims remains an open question in that circuit. A few years after *Broudy*, in *Vietnam Veterans of America* v. *Shinseki*, *supra,* the D.C. Circuit addressed claims essentially identical to petitioners'. See 599 F.3d at 656 ("Appellants are two veterans associations appealing the district court's dismissal of their suit alleging that the Department of Veterans Affairs violated the APA and the Constitution (due process clause) because of the average time it takes the VA to process veterans' claims."). The D.C. Circuit did not read *Broudy*, as petitioners would, to clearly hold that such claims escape VJRA preclusion. Rather, the court noted some "tension" between *Broudy* and the prior circuit decisions (*Price* and *Thomas*, *supra*) on which *Broudy* had purported to rely, *id.* at 659; declined to resolve that tension, *ibid.*; and went on to conclude

that the case should be dismissed on the alternative jurisdictional ground that the organizational plaintiffs lacked standing, see *id.* at 662.

Petitioners' reliance (Pet. 21-22) on the Second Circuit's decision in *Disabled American Veterans* v. *United States Department of Veterans Affairs*, 962 F.2d 136 (1992), is similarly misplaced. That decision held only that a district court has jurisdiction to consider "facial challenges" to the constitutionality of "legislation affecting veterans' benefits." *Id.* at 140. The Second Circuit has recognized that "other constitutional and statutory claims must be pursued within the appellate mill Congress established in the VJRA." *Larrabee* v. *Derwinski*, 968 F.2d 1497, 1501 (1992); *id.* at 1498 (concluding that the VJRA barred certain procedural due process claims relating to the Secretary's provision of medical care). Because petitioners' delay-related claims in this case do not present a facial challenge to a federal statute, the decision below does not conflict with *Disabled American Veterans*. See Pet. App. 47a (expressly declining to decide whether the VJRA would bar facial constitutional challenges to statutes).

Petitioners are also mistaken in asserting (Pet. 22-23) that the decision below conflicts with *Hanlin* v. *United States*, 214 F.3d 1319 (Fed. Cir. 2000). In that case, an attorney brought a damages action against the United States, alleging a right, under an implied-in-fact contract, to certain attorney's fees for representing a veteran in the claims process. *Id.* at 1320. Finding "no language" in Section 511 that would require the attorney to file his claim administratively, the court concluded that Section 511 did not bar the Court of Federal Claims from adjudicating that claim. *Id.* at 1321. That decision does not suggest, however, that the VJRA would permit

a district court to adjudicate unreasonable-delay claims like petitioners', which *are* subject to the administrative process. Indeed, the Federal Circuit could never directly authorize a district court to hear such claims, since its limited appellate jurisdiction does not extend to a case like this one. 28 U.S.C. 1295.

As the foregoing discussion reflects, petitioners fundamentally err in trying to extrapolate hard-and-fast rules from decisions that addressed unavoidably context-specific questions. Issues of VJRA preclusion necessarily depend on precisely what a particular plaintiff is asking the district court to decide, and results accordingly vary from claim to claim. The decision below illustrates the point. Although the court of appeals concluded that the VJRA bars petitioners' delay-related claims, it also concluded (in a portion of its opinion that petitioners do not challenge) that another of petitioners' claims—which the complaint "framed * * * as a challenge to the constitutionality of the VJRA" itself—could proceed (but was flawed on the merits). Pet. App. 44a-53a. The court of appeals accordingly concluded, as did all of the other courts of appeals that address the issue in the decisions petitioners cite, that the VJRA precludes many, but not all, claims relating to veterans' benefits. No further review of the application of the VJRA to petitioners' particular claims is warranted.

3. Even assuming the scope of VJRA preclusion otherwise warranted this Court's review, this case would be an unsuitable vehicle for addressing it.

First, as the D.C. Circuit recognized in *Vietnam Veterans of America*, organizational plaintiffs like petitioners lack standing to challenge "average" delays in the administrative process. An organization only has a right to bring suit on behalf of its members when, *inter alia*,

"its members would otherwise have standing to sue in their own right." *Hunt* v. *Washington State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977). Petitioners' individual members would have no standing to challenge "average" delay. To the extent they are injured by delay, "the average processing time does not cause [their] injury; it is only *their* processing time that is relevant." *Vietnam Veterans of America*, 599 F.3d at 662; see *ibid.* ("If, for example, [they] fell at the quick-processing end of a bell-shaped curve, a high average processing time would be irrelevant to them, and to reverse the analysis, a low average would not avoid injury if [they] were at the other end of the curve."). Petitioners' failure to satisfy the causation prerequisite for standing, *ibid.*, would accordingly provide an alternate ground for affirmance. See Pet. App. 31a-32a (acknowledging the possibility that petitioners might lack standing, but deciding the case on the alternative jurisdictional ground of VJRA preclusion).

Second, petitioners lack a cause of action for their claims. The Administrative Procedure Act (on which petitioners' own complaint relies) authorizes judicial review only when "other statutory procedures for review are inadequate." *FCC* v. *ITT World Commc'ns, Inc.*, 466 U.S. 463, 469 (1984); see 5 U.S.C. 703-704. As multiple courts of appeals have recognized, the VJRA provides an adequate statutory procedure (Veterans Court review) for addressing claims of unreasonable delay. See *Vietnam Veterans of America*, 599 F.3d at 659 (concluding that the argument against Administrative Procedure Act review "appears to be unassailable," but dismissing case on threshold jurisdictional grounds instead); *Beamon*, 125 F.3d at 967-970; see also *In re Russell*, 155 F.3d at 1013 (per curiam). To the extent petitioners

might contend that the Court should recognize an implicit cause of action directly under the Constitution, such an implied remedy would be inappropriate where Congress has provided an adequate statutory remedy. Cf. *Bush* v. *Lucas*, 462 U.S. 367, 368 (1983) (declining to authorize a damages remedy for First Amendment violations in the context of federal employment, "[b]ecause such claims arise out of an employment relationship that is governed by comprehensive procedural and substantive provisions giving meaningful remedies against the United States"). This further defect in petitioners' suit provides an additional reason to deny the petition.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Principal Deputy Assistant Attorney General
CHARLES W. SCARBOROUGH
Attorney

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