No. 12-296

# 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*

## REPLY BRIEF FOR PETITIONERS


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## INTRODUCTION

On Veterans Day, the President acknowledged that there are veterans "struggling with the wounds of war—such as Post-Traumatic Stress Disorder or Traumatic Brain Injuries." Remarks by the President on Veterans Day (Nov. 11, 2012).[1] The President promised, as did his predecessors, to eliminate the "claims backlog" because "[n]o veteran should have to wait months or years for the benefits that [they]'ve earned." *Ibid.*

Two years ago, the President made this same commitment on Veterans Day—that the government is "working to eliminate the backlog at the VA." Remarks by the President Honoring Veterans Day in Seoul, South Korea (Nov. 10, 2010).[2] But in the years between these speeches, nothing has improved. Instead, 21% more veterans are waiting for their claims to be resolved (an increase from 740,948 to 897,406), and 18% more claims are languishing on appeal (an increase from 215,726 to 254,159).[3] Despite the VA's contention that it is diligently working to fix the problem, the government's efforts simply have failed.

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[1] Transcript available at http://www.whitehouse.gov/the-press-office/2012/11/11/remarks-president-veterans-day.

[2] Transcript available at http://www.whitehouse.gov/the-press-office/2010/11/10/remarks-president-honoring-veterans-day-seoul-south-korea.

[3] Dep't of Veterans Affairs, Monday Morning Workload Reports (Nov. 8, 2010 & Nov. 13, 2012), available at http://www.vba.va.gov/REPORTS/mmwr/index.asp.

Our Nation's veterans no longer can afford to wait. The VA is ignoring directives from the President and is failing to implement acts of Congress aimed to reduce suicides. Pet. 11. The record in this systemic challenge to the VA's delays demonstrates that too many veterans die before the VA resolves their benefits claims. And many are returning home from war with severe depression, PTSD, and traumatic brain injuries only to be turned away at VA hospital doors. Treatment delayed is treatment denied. Veterans from the Iraq and Afghanistan wars are promised just five years of post-war medical care. The VA should not be permitted to run out the clock on those who have just come home.

The VA bureaucracy now seeks to shield itself from scrutiny behind Section 511. But that provision affords no protection from petitioners' systemic challenge. The government ignores that Section 511, by its plain language, precludes judicial review only of a "decision" by the Secretary. *No* decision is challenged in this case. Yet the government's reading of Section 511 apparently would preclude any systemic challenge, as the government acknowledges that the Veterans Court "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." Opp. 15.

Instead, the VA suggests that a veteran about to commit suicide because he or she has not received mental-health treatment within 24 hours, or a veteran waiting for benefits to put food on the table,

should petition for mandamus—a remedy that (if even available) at best simply moves one veteran to the front of the queue at the expense of all others waiting. This Court has never held that the potential availability of such extraordinary relief can deprive courts of jurisdiction to hear systemic challenges. That is not what Congress intended when it enacted the VJRA, and it is not how other courts of appeals have construed that statute.

This Court's immediate review is warranted.

## ARGUMENT

### A. Review Is Warranted Because The Circuits Are Divided

Respondents cannot reconcile the ruling below with the decisions of the D.C. Circuit, the Second Circuit, and the Federal Circuit. Those courts construed Section 511(a) to preclude only claims that seek to overturn actual "decisions" by the Secretary. Had their construction of Section 511(a) been applied to this case, the Ninth Circuit would not (and could not) have held that jurisdiction was wanting.

1. As the petition demonstrates, the D.C. Circuit has held that "§ 511(a) prevents district courts from hearing a particular question only when the Secretary has 'actually decided' the question. Where there has been no such decision, § 511(a) is no bar." *Broudy v. Mather*, 460 F.3d 106, 114 (D.C. Cir. 2006) (brackets and citation omitted). Respondents attempt to distinguish *Broudy* on the ground that it "did not involve

complaints of delay" in adjudication "but instead complaints that the government had concealed evidence" during adjudication. Opp. 17. But respondents fail to explain how that makes any legal difference. If anything, a challenge to the adjudication processes in individual veterans' claims (as in *Broudy*) comes far closer to Section 511(a)'s jurisdictional bar of "decisions" than petitioners' systemic claims.

Respondents also assert that the claims at issue in *Broudy* did not require an inquiry into whether the Secretary "acted properly"—an inquiry respondents say must be made in this case. But that ignores *Broudy*'s express holding, which explains that no "decision" is being challenged as long as the veterans "are not asking the District Court to decide whether any of the veterans * * * are entitled to benefits" or "to revisit any decision made by the Secretary in the course of making benefits determinations." 460 F.3d at 115. Thus, Section 511(a) bars judicial review only where a plaintiff seeks collateral review of a benefits decision. Here, no decision has even been made by the Secretary, and petitioners seek to have no benefits determination overturned.

Respondents point to the D.C. Circuit's subsequent decision in *Vietnam Veterans*, which presented a challenge to adjudicatory delays. Opp. 18-19. But as respondents acknowledge, *Vietnam Veterans* expressly did not address the scope of Section 511(a). Rather, the D.C. Circuit confirmed that *Broudy* held "that only questions '*explicitly* considered' by the Secretary would be barred by § 511"—a ruling that cannot be

reconciled with the Ninth Circuit's decision. *Vietnam Veterans of Am. v. Shinseki*, 599 F.3d 654, 659 (D.C. Cir. 2010) (quoting *Broudy*, 460 F.3d at 114). To be sure, the D.C. Circuit noted, without addressing, some "tension" between *Broudy* and two earlier decisions. But those two *prior* D.C. Circuit decisions—*Price v. United States*, 228 F.3d 420 (D.C. Cir. 2000), and *Thomas v. Principi*, 394 F.3d 970 (D.C. Cir. 2005)—are inapplicable here because they involved attempts by individual, pro se veterans to collaterally attack (and thus second-guess) the VA's actual "decisions" through tort actions. As Judge Schroeder recognized in dissent, those decisions simply have no bearing on this case. Pet. App. 63a-64a.

2. Respondents argue that the Second Circuit decision is not inconsistent because the claim asserted in *Disabled American Veterans* was different—a facial challenge to a statute. But that ignores the *holding* of the Second Circuit's decision: Section 511(a) does not bar judicial review where "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." *Disabled Am. Veterans v. United States Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992). Indeed, as even the Ninth Circuit majority recognized (a recognition respondents do not address), *Disabled American Veterans* cannot be reconciled with the ruling below. Pet. App. 23a ("*But see Disabled Am. Veterans*"). Applied here, that rule would permit review of petitioners' claims, which challenge only systemic delays,

not benefits determinations. Moreover, because *Disabled American Veterans* allowed a facial constitutional challenge to adjudication procedures, that decision is incompatible with respondents' view that all legal questions, including constitutional ones, are channeled to the Veterans Court.

Respondents also contend that the Second Circuit's decision in *Larrabee v. Derwinski* is consistent with the ruling below. But that case is inapposite. It involved a challenge to the VA's actual decision to deny benefits, which petitioners agree is precluded by Section 511(a). 968 F.2d 1497, 1498 (2d Cir. 1992).

3. Respondents assert that because the precise facts of the Federal Circuit's decision in *Hanlin* are not squarely the same as those here, there can be no conflict. Opp. 19. But *Hanlin* held that, while Section 511(a) requires the Secretary to decide all questions of law and fact, Section 511(a) does not provide exclusivity where the Secretary has made no actual decision. *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000). That rationale would allow petitioners' claims here to proceed. Respondents further argue that *Hanlin* is different because petitioners' claims are "subject to the administrative process." Opp. 20. But that argument assumes that respondents are correct in their understanding of Section 511(a), which they are not.

4. The decisions from the Fifth, Eighth, and Eleventh Circuits to which respondents point (Opp. 17) are not germane to the question presented.

In those cases, the Secretary made a decision to deny benefits, and the veteran challenged that same benefits determination in a collateral district court action. Here, no decision of the Secretary is being challenged; petitioners challenge the systemic delay and absence of procedures in the VA's claim handling process and provision of mental-health care.

### B. Section 511(a) Does Not Preclude Systemic Challenges

Respondents also contend that review is not warranted because the VJRA channels all claims alleging unlawful delay in the provision of benefits—including petitioners' claims—exclusively to the Veterans Court and the Federal Circuit. Opp. 10-13. But that merits-based argument is wrong, and should be addressed only after briefing and argument.

#### *1. Section 511 does not preclude judicial review of challenges to delays in adjudicating benefits*

As respondents acknowledge (Opp. 14-15), this Court requires "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) (internal quotation marks omitted). Respondents assert that this rule is inapplicable because unreasonable-delay claims are merely channeled to the Veterans Court through an alleged "comprehensive scheme." Opp. 10. Respondents are incorrect. The scheme established in the VJRA provides for review only of

actual "decisions" of the VA in the adjudication of individual veterans' benefits claims. The VJRA does not speak to, and thus cannot preclude, challenges to the VA's procedures (or lack thereof) that cause systemic delays in that adjudication. *Cf. Bowen v. Michigan Acad. of Family Physicians*, 476 U.S. 667, 675 (1986) ("The reticulated statutory scheme * * * simply does not speak to challenges mounted against the *method* by which such amounts are to be determined rather than the *determinations* themselves.").

Rather than identify a comprehensive scheme to which all delay claims might be channeled, respondents point to the Veterans Court's mandamus authority in individual cases. Respondents assert that mandamus creates an "inference of exclusivity." Opp. 14. But the "mere fact that some acts are made reviewable" through mandamus "should not suffice to support an implication of exclusion" of judicial review. *Bowen*, 476 U.S. at 674 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 141 (1967)).

Mandamus for claims of unreasonable delay bears no relation to the "particularized review scheme" present in the cases on which respondents rely. Opp. 11-12; *see Elgin v. Department of Treasury*, 132 S. Ct. 2126, 2134 (2012) (discussing the "painstaking detail" in the administrative review scheme); *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 207 (1994) (discussing "detailed structure" for review of claims). Rather, mandamus is a "drastic" remedy "to be invoked only in extraordinary situations," and is unavailable in the run of cases that have been unreasonably delayed.

*Erspamer v. Derwinski*, 1 Vet. App. 3, 9 (1990) (quoting *Kerr v. United States Dist. Court for N. Dist. of California*, 426 U.S. 394, 402 (1976)). Indeed, respondents have not identified a single case in which mandamus actually was granted to remedy a delay.

Absent clear congressional intent, the VJRA should not be read to strip courts of jurisdiction over petitioners' systemic claims. To do so would "foreclose all meaningful judicial review" of those claims. *Free Enter. Fund v. Public Co. Accounting Oversight Bd.*, 130 S. Ct. 3138, 3150 (2010); *see Marozsan v. United States*, 852 F.2d 1469, 1472 (7th Cir. 1988) (en banc). Mandamus in any individual case would not remedy the overall practices and procedures—or the absence of such procedures—that cause systemic delays. Pet. App. 66a. At best, mandamus provides relief for one veteran at the expense of all others waiting for their claims to be decided. But moving one veteran to the front of the line does nothing to address the systemic issues that veterans face at the hands of the VA's bureaucracy. Moreover, as respondents essentially acknowledge, their view would preclude petitioners' systemic challenges, because the Veterans Court "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." Opp. 15.

Nothing in Section 511(a) provides clear congressional intent to preclude judicial review of petitioners' systemic challenges to the VA's procedures. The plain language of Section 511(a) precludes judicial review only of "questions of law and fact necessary to a

decision by the Secretary." 38 U.S.C. § 511(a). By its very terms, it simply has no effect where no question of law or fact actually has been decided by the Secretary. Respondents suggest, without explanation, that the VA's failures to make decisions also fall within the scope of Section 511. Opp. 14. But such an unsupported assertion should provide no basis to deny review. As this Court has held, where Congress precludes judicial review of agency "determinations," that does not bar review of the practices and procedures used to make determinations. *Bowen*, 476 U.S. at 675-678.

Nor can respondents recast petitioners' claims as an aggregation of challenges to individual benefits determinations. Opp. 12-13; Pet. App. 32a. Petitioners do not allege that the Secretary made an incorrect determination of any individual veteran's entitlement to benefits. Petitioners also do not challenge "average" delays. Average delay statistics, among many other figures presented in the district court, are simply some of the compelling evidence of systemic deprivations of veterans' due process rights.

### *2. The VJRA does not apply to challenges concerning provision of mental-health care*

Absent this Court's review, the ruling below will "foreclose all meaningful judicial review" of veterans' claims that congressionally mandated, timely mental-health care is not being provided. *Free Enter. Fund*, 130 S. Ct. at 3150.

Respondents are incorrect that veterans can have delayed mental-health care claims adjudicated by the Veterans Court. As the petition explained (Pet. 9, 28) and respondents ignore, the Board of Veterans Appeals ("Board") does not hear claims concerning specific treatment, including claims for delays in treatment or evaluations: "Medical determinations, such as determinations of the need for an 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). Because such claims are not within the Board's jurisdiction, they cannot be appealed to the Veterans Court or reviewed by the Federal Circuit. 38 U.S.C. §§ 7252(a), 7292(a).

Respondents are also wrong concerning the Veterans Court's mandamus authority to remedy unlawful delays in treatment. Opp. 10. The Veterans Court's mandamus authority extends only to "any action brought under this chapter," i.e., an action appealed to the Board. 38 U.S.C. § 7261(a). Because the Board lacks jurisdiction to review the timeliness of mental-health treatment, the Veterans Court cannot use mandamus to order timely treatment. None of the cases cited by respondents is to the contrary; each involved claims for death or disability benefits that are within the Board's jurisdiction.

### C. For Our Veterans Of The Iraq And Afghanistan Wars, This Case May Be The Only Vehicle To Address Meaningfully The Question Presented

1. Absent this Court's review, tens of thousands of veterans of the Iraq and Afghanistan Wars will continue to be told they must wait weeks or months for suicide-preventing mental-health care that they are supposed to receive within 24 hours. And hundreds of thousands of veterans entitled to death or disability benefits will have their claims languish in the appeals process with no end in sight. As the leading, experienced veterans organizations explain in their amici brief, "[t]here is no case that can be expected to present a better vehicle to address the issue." Nat'l Veterans Legal Services Program Amici Br. at 21. Indeed, this petition presents perhaps the only opportunity for this Court to rule in time to give relief to the millions of veterans returning from Iraq and Afghanistan.

2. In the face of these exigent circumstances, respondents' manufactured vehicle concerns should not defeat review. Opp. 20-22.

a. Contrary to respondents' suggestion, petitioners have standing. The district court rejected respondents' standing arguments, and the court of appeals found them unnecessary to address. As the district court concluded, petitioners' "members have suffered injuries in fact" because they "have faced significant delays in receiving disability benefits and

medical care from the VA." Pet. App. 258a-259a. Petitioners "have also demonstrated a causal connection" because the delays "lead to exactly the type of injuries complained of." *Id.* at 259a. And petitioners' members' injuries can be redressed by ordering the VA to "adjudicate a veteran's appeal of a denial of benefits within a certain time period." *Ibid.*

Respondents' arguments about "average" delays are misplaced. Opp. 20-21. The delay statistics are *evidence* of a systemic crisis.

b. Respondents assert that petitioners have no Administrative Procedure Act ("APA") cause of action because the VJRA provides an adequate remedy. Opp. 21. The district court disagreed with that argument, and the Ninth Circuit did not even reach it. As the district court explained, the Veterans Court lacks the "power to provide a remedy for the systemic, constitutional challenges to the VA health system." Pet. App. 312a; *see* pp. 10-11, *supra*. And respondents essentially concede that, under their view, the Veterans Court could not hear petitioners' challenge to delays in benefits adjudication. Opp. 15.

In any event, petitioners also brought due process claims. Pet. App. 115a-160a (considering claims separately). To the extent respondents contend that petitioners lack a separate cause of action to assert that constitutional claim, that is a new argument and is waived. *Glover v. United States*, 531 U.S. 198, 205 (2001) (refusing to consider alternative arguments for affirmance that were not raised below).

## CONCLUSION

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

Respectfully submitted,

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