

No. 12-296

IN THE
Supreme Court of the United States

VETERANS FOR COMMON SENSE AND VETERANS
UNITED FOR TRUTH, INC.,
Petitioners,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Ninth Circuit**

**BRIEF OF *AMICI CURIAE* NATIONAL
VETERANS LEGAL SERVICES PROGRAM,
THE AMERICAN LEGION, PARALYZED
VETERANS OF AMERICA, THE MILITARY
ORDER OF THE PURPLE HEART, AND
VIETNAM VETERANS OF AMERICA
SUPPORTING PETITIONERS**

RONALD B. ABRAMS
JOINT EXECUTIVE DIRECTOR
NATIONAL VETERANS LEGAL
SERVICES PROGRAM
1600 K Street, N.W.
Suite 500
Washington, DC 20006
(202) 265-8305

*Counsel for Amicus Curiae
National Veterans Legal
Services Program*

October 10, 2012

RICHARD KLINGLER*
JAMES A. HIGH, JR.
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
rklingler@sidley.com

*Counsel for
Amici Curiae*

* Counsel of Record

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	iii
BRIEF OF THE <i>AMICI CURIAE</i>	1
INTEREST OF THE <i>AMICI CURIAE</i>	1
SUMMARY OF THE ARGUMENT	5
ARGUMENT	6
I. THE PETITION PRESENTS AN IMPORTANT ISSUE OF STATUTORY CONSTRUCTION AFFECTING THE SCOPE OF JUDICIAL CHALLENGE AVAILABLE TO ENSURE THE LAWFUL AND ADEQUATE PROVISION OF VETERANS' BENEFITS	6
A. The Ninth Circuit's Rule Incorrectly Bars Legal Challenges To The Department Of Veterans Affairs' Systemic Practices And Failures.....	6
B. Challenges In Article III Courts To The VA's Systemic Failures Are Essential To Ending The Unlawful Delays In The Provision Of Medical Care And Statutory Benefits For Veterans	10
1. Tremendous Case Backlogs And Agency Mismanagement Cause Unconscionable And Unlawful Delays In The Provision Of Medical Care And Benefits To Veterans	11
2. Judicial Review In Article III Courts Of Claims Of Systemic Denial Of Veterans' Legal Rights Is Necessary To Compel The VA To Act Lawfully And Appropriately	16

TABLE OF CONTENTS – continued

	Page
II. THE CIRCUIT SPLIT REGARDING THE SCOPE OF SECTION 511 AND JURISDICTION TO REVIEW SYSTEMIC CLAIMS SHOULD BE ADDRESSED NOW TO PROTECT VETERANS' LEGAL ENTITLEMENT TO MEDICAL CARE AND BENEFITS	19
CONCLUSION	22

TABLE OF AUTHORITIES

CASES	Page
<i>Bates v. Nicholson</i> , 398 F.3d 1355 (Fed. Cir. 2005).....	20
<i>Bounds v. Smith</i> , 430 U.S. 817 (1977).....	17
<i>Broudy v. Mather</i> , 460 F.3d 106 (D.C. Cir. 2006).....	19, 20, 21
<i>Brown v. Plata</i> , 131 S. Ct. 1910 (2011).....	18
<i>Califano v. Yamasaki</i> , 442 U.S. 682 (1979).....	16
<i>Cnty. of Riverside v. McLaughlin</i> , 500 U.S. 44 (1991).....	17
<i>Davis v. Principi</i> , 276 F.3d 1341 (Fed. Cir. 2002).....	9
<i>Hicks v. Veterans Admin.</i> , 961 F.2d 1367 (8th Cir. 1992).....	20
<i>Johnson v. Robison</i> , 415 U.S. 361 (1974).....	19
<i>Kerr v. U.S. Dist. Court</i> , 426 U.S. 394 (1976).....	18
<i>Nehmer v. U.S. Dep't of Veterans Affairs</i> , 284 F.3d 1158 (9th Cir. 2002).....	11
<i>Perdue v. Kenny A. ex rel. Winn</i> , 130 S. Ct. 1662 (2010).....	16
<i>Reno v. Flores</i> , 507 U.S. 292 (1993).....	16
<i>Walters v. Nat'l Ass'n of Radiation Survivors</i> , 473 U.S. 305 (1985).....	18
<i>Wash. State Dep't of Social & Health Servs. v. Keffeler</i> , 537 U.S. 371 (2003).....	16
<i>Watt v. Energy Action Educ. Found.</i> , 454 U.S. 151 (1981).....	16
<i>Weaver v. United States</i> , 98 F.3d 518 (10th Cir. 1996).....	20
STATUTES AND REGULATION	
18 U.S.C. § 3626.....	18
36 U.S.C. §§ 230501-230513.....	4

TABLE OF AUTHORITIES – continued

	Page
38 U.S.C. § 502	8
§ 511	7, 9
§ 1710(e)	13
§ 1712A(a)(3)	13
§ 5103(a)	18
§ 5107(b)	18
§ 5902	2
§ 7292(d)(2)	9
38 C.F.R. § 20.1303	9

ADMINISTRATIVE DECISIONS

<i>Am. Legion v. Nicholson</i> , 21 Vet. App. 1 (2007)	17
<i>Lefkowitz v. Derwinski</i> , 1 Vet. App. 439 (1991)	9

OTHER AUTHORITIES

Steve Almasy, <i>The Toll of War Now Includes More Amputees</i> , CNN, May 27, 2012, available at http://www.cnn.com/ 2012/05/27/us/amputee-veterans-come- home/index.html	11
Erin Bagalman, <i>Suicide Prevention Efforts of the Veterans Health Administration</i> , Cong. Res. Serv. (Feb. 3, 2012), available at http://www.fas.org/sgp/crs/misc/ R42340.pdf	13
James Dao, <i>Veterans Wait for Benefits as Claims Pile Up</i> , N.Y. Times, Sept. 28, 2012, available at http://www.nytimes. com/2012/09/28/us/veterans-wait-for-us- aid-amid-growing-backlog-of-claims. html	11, 12, 14, 16

TABLE OF AUTHORITIES – continued

	Page
Margaret C. Harrell & Nancy Berglass, Ctr. for a New Am. Sec., <i>Losing the Battle: The Challenge of Military Suicide</i> (Oct. 2011), available at http://www.cnas.org/files/documents/publications/CNAS_LosingTheBattle_HarrellBerglass.pdf	12
Randi Kaye & Scott Bronstein, <i>Hundreds of Thousands of War Vets Still Waiting for Health Benefits</i> , CNN, Oct. 4, 2012, available at http://www.cnn.com/2012/09/29/health/delayed-veterans-benefits/index.html?iref=allsearch	14
Veterans Benefits Admin., Office of Inspector Gen., <i>Audit of VA Regional Offices' Appeals Management Process</i> (May 30, 2012), available at http://www.va.gov/oig/pubs/VAOIG-10-03166-75.pdf	15
Timothy Williams, <i>Suicides Outpacing War Deaths for Troops</i> , N.Y. Times, June 8, 2012, available at http://www.nytimes.com/2012/06/09/us/suicides-eclipse-war-deaths-for-us-troops.html	12
Gregg Zoroya, <i>Gauges Worn by Troops Offer Clues on Impact from Blasts</i> , USA Today, Sept. 5, 2012, available at http://www.usatoday.com/news/military/story/2012-09-01/troops-explosion-gauges-neurology-PTSD/57484580/1	12

BRIEF OF THE *AMICI CURIAE*

National Veterans Legal Services Program (“NVLSP”), the American Legion, Paralyzed Veterans of America (“PVA”), the Military Order of the Purple Heart (“MOPH”), and Vietnam Veterans of America (“VVA”) respectfully submit this brief, pursuant to Supreme Court Rule 37.2(a), as *amici curiae* in support of petitioner seeking a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.¹

INTEREST OF THE *AMICI CURIAE*

Because the issue presented in this petition will significantly affect the speed, quality, and scope of medical services and statutory benefits afforded to this nation’s veterans, and because the issue presented will affect the scope of legal challenges that organizations that represent veterans may assert on behalf of their members, the issue presented significantly affects *amici’s* interests and those of their members.

National Veterans Legal Services Program is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our nation’s 25 million veterans and active duty personnel with the federal benefits

¹ Consistent with Supreme Court Rule 37.2(a), counsel of record for both petitioners and respondents both received timely notice and granted consent to *amici* to file this brief. Letters from the parties consenting to the filing of this brief are on file with the Court. Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and no person or entity other than *amici* and their counsel made a monetary contribution to the preparation or submission of the brief.

they have earned through their service to the country. NVLSP has been instrumental in the passage of landmark veterans' rights legislation, and it has successfully challenged unfair practices by the Department of Veterans Affairs (VA) that deprived veterans and their families of hundreds of millions of dollars in benefits. It also serves as a national support center that recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates. NVLSP publications provide veterans, their families and their advocates with the information necessary to obtain the benefits to which they are entitled under the law. For the last ten years NVLSP has published the Veterans Benefits Manual, which has become the leading guide for advocates and attorneys who help veterans and their families obtain benefits from the VA.

In addition, and of particular relevance here, NVLSP is a veterans' service organization recognized by the Secretary under 38 U.S.C. § 5902 to assist veterans in the preparation, presentation, and prosecution of claims for benefits before the VA. In this capacity, NVLSP has directly represented thousands of veterans in proceedings before the VA, the Board of Veterans' Appeals ("BVA"), and the Court of Appeals for Veterans Claims ("CAVC"). Given the experience and expertise, NVLSP is well positioned to describe the current population of veterans presenting claims to the VA and the extreme delays those veterans encounter in doing so.

The American Legion was chartered by Congress in 1919 as a patriotic, mutual-help, war-time veterans' organization. It now is a community-service organization with nearly 2.5 million members. The American Legion serves military veterans in a myriad of ways. Among the many services it provides

are assistance and representation of veterans in matters involving the VA, including help with appeals for veterans' benefits, reporting on the impact on veterans of VA health care policies, and assisting severely injured servicemembers with help in transitioning from the military.

Paralyzed Veterans of America is a national, Congressionally-chartered veterans' service organization headquartered in Washington, D.C. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of armed forces veterans who have experienced spinal cord injury or dysfunction. PVA seeks to improve the quality of life for veterans and all people with spinal cord injury and dysfunction through its medical services, benefits, legal, sports and recreation, architecture, and other programs. PVA advocates for quality health care, for research and education addressing spinal cord injury and dysfunction, for benefits based on its members' military service, and for civil rights, accessibility and opportunities that maximize independence for its members and all veterans and non-veterans with disabilities. Through its nationwide network of national service officers, PVA provides its members and other veterans, dependents, and survivors with direct representation before the VA and in the federal courts. PVA has almost 20,000 members, all of whom are military veterans. These veterans and others whom PVA represents are among those who most heavily depend upon prompt and efficient VA medical care and timely and accurate benefits claims decisions.

The Military Order of the Purple Heart has a mission to foster an environment of goodwill and camaraderie among combat wounded veterans, promote patriotism, support necessary legislative

initiatives, and, most importantly, provide service to all veterans and their families. MOPH assists veterans with claims and is familiar with the systemic delays in the VA process. In fiscal 2012, MOPH assisted veterans in the submission of over 26,500 claims to the VA and the prosecution of 272 appeals.

Vietnam Veterans of America is a Congressionally-chartered national veterans' service organization that is expressly dedicated to ensuring the rights of Vietnam War-era veterans. See 36 U.S.C. §§ 230501-230513. VVA assists veterans and their families, both members and non-members, in the prosecution of claims for benefits by providing them with *pro bono* legal representation before the VA, the BVA, and on appeal to the CAVC. In addition, VVA's advocacy concerning issues of importance to individual veterans, as well as veterans as a group, extends to the legislative arena and broad-impact litigation.

Amici have repeatedly witnessed how medical care is provided and how the claim adjudication process works before the VA. The decision below, if not reviewed, will profoundly affect whether the VA discharges its statutory duties promptly enough to be meaningful to the veterans and their families who urgently need such services and the benefits that Congress has determined they should receive.

Amici submit this brief in support of petitioners Veterans for Common Sense and Veterans United for Truth, Inc. because the rule adopted by the Ninth Circuit diverges from that of the majority of circuits to consider the scope of challenges allowed in Article III courts by Section 511, and is also at odds with the plain meaning of the statute. If not reviewed, the decision below will preclude legal

challenge in Article III courts seeking systemic relief from intolerable and unlawful delays by the VA in considering claims by some of our veterans most in need of government assistance, while also leaving veterans without any means to secure effective relief from these delays through piecemeal appeal of individual VA decisions.

SUMMARY OF THE ARGUMENT

The petition presents an important issue of statutory construction likely to affect the provision of medical services and statutory benefits to millions of U.S. veterans. Legal challenges to the Department of Veterans Affairs' handling of veterans' claims and medical needs can take two forms. They can arise in the narrow context of challenges to the VA's determination of an individual veteran's particular claims and requirements, with limited appellate review and precedential effect thereafter. Or, challenges may be presented in federal district court to the government's systemic denials of veterans' statutory or constitutional rights – just as other classes of plaintiffs may press such claims in contexts involving, for example, prisons, child welfare systems, public hospitals, or police practices. The Ninth Circuit's decision subject to the petition construed a statute that determines when veterans' claims may be presented to Article III courts and when they must be presented upon review of the VA's determinations. The Ninth Circuit incorrectly precluded Article III courts from considering challenges to the VA's systemic failures and denials of statutory and constitutional rights – and thus precluded veterans from presenting such claims in any forum because they cannot be presented effectively upon appeal from individual claim decisions.

The Ninth Circuit's artificial and incorrect limitation on veterans' challenges to the VA's systemic failures is especially significant in light of the enormous scope of veterans' needs and the egregious failures of the VA in meeting those needs. Veterans' medical needs and unaddressed benefit claims have long swamped the VA's capabilities, and those needs are increasing with the return of veterans from the wars in Iraq and Afghanistan. The resulting delays in providing medical care and processing claims have especially unconscionable effects upon veterans' mental health needs and risk of suicide.

No basis exists to delay review of the Ninth Circuit's statutory construction. A clear circuit split exists. No better vehicle for consideration of the statutory issue is apparent or likely to emerge. And, delay in providing judicial oversight and redress for the VA's failure to provide care and benefits required by statute and the Constitution have daily, tragic effects on veterans and their families.

ARGUMENT

I. THE PETITION PRESENTS AN IMPORTANT ISSUE OF STATUTORY CONSTRUCTION AFFECTING THE SCOPE OF JUDICIAL CHALLENGE AVAILABLE TO ENSURE THE LAWFUL AND ADEQUATE PROVISION OF VETERANS' BENEFITS.

A. The Ninth Circuit's Rule Incorrectly Bars Legal Challenges To The Department Of Veterans Affairs' Systemic Practices And Failures.

At issue is whether veterans can use the legal processes and assert the type of claims in Article III

courts that are available to all other classes of plaintiffs – or are instead confined to a second-class legal status where their challenges are limited to piecemeal legal claims, with limited precedential effect, upon review of individual benefit or medical determinations. The statute construed by the Ninth Circuit, 38 U.S.C. § 511, determines which disputes are heard in the constrained, specialized system for veterans’ individual benefits claims and which legal disputes and claims may be heard in the district courts. The Ninth Circuit’s construction of Section 511 improperly limited veterans’ access to Article III courts and, in doing so, limited the type of legal claims they can bring and relief they can secure in any forum.

Section 511 limits district courts’ review of only particular decisions of the Secretary of Veterans Affairs. Under the statute, “[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.” 38 U.S.C. § 511(a). Subject to four enumerated exceptions – which are inapplicable here – “the decision of the Secretary . . . shall be final and conclusive and may not be reviewed by any other official or by any court.” *Id.*

Section 511, and in particular the scope of a “decision” as used in Section 511, determines what actions (or inaction) of the VA may be challenged in the first instance before an Article III court. While Section 511 forecloses district court review of the Secretary’s decision to award benefits in an individual case, the dispute here is what else, if anything, constitutes a “decision” of the Secretary under Section 511. A broad reading of “decision” will necessarily shield a range of VA activity from

challenge and review in district court, withholding from veterans access to judicial relief in a wide variety of situations.

The Ninth Circuit's construction of Section 511 excludes nearly all systematic legal challenges from Article III courts and confines veterans to the system of review established for decisions of the Secretary regarding an award of benefits – *i.e.*, the Board of Veterans' Appeals ("BVA"), the Court of Appeals for Veterans Claims ("CAVC"), and, under a narrow standard of review, the Federal Circuit.² Where adopted, that construction limits the ability of veterans and organizations that represent veterans to protect fundamental rights through challenges to systemic practices of the VA and its components. If barred from Article III courts and restricted to the individual claims review process, veterans would be unable to assert an adequate scope of claims (*e.g.*, system-wide violations of due process or statutory requirements), pursue multi-plaintiff and class action suits and related procedural mechanisms, and secure the related, broad remedies available in district court. Article III courts would be unable to consider claims that, for example, the VA had declined to consider entire classes of medical or benefit claims, or incorrectly addressed particular categories of medical issues or benefit claims that may affect tens of

² The Federal Circuit's jurisdiction to hear petitions challenging rules promulgated by the VA and subject to the publication or notice-and-comment requirements of the Administrative Procedure Act, see 38 U.S.C. § 502, provides no mechanism for meaningful relief from the relevant VA practices and violations of law. The legal challenges at issue here and most important to veterans are addressed to the VA's operational practices and its compliance with relevant statutes and the Constitution – not to the content or procedures leading to its formal rules.

thousands of veterans. Given the vast scope of veterans' needs and claims, judicial challenges to such systemic failures may well provide the only effective mechanism for ensuring that the VA fulfills its legal obligations.

In addition, decisions of the BVA have no precedential value. 38 C.F.R. § 20.1303. Thus, even if one veteran succeeded in having the BVA declare the delays facing him amounted to a violation of his due process rights, that decision would not apply to other veterans. Nor can veterans join together as a class to resolve these issues, because the CAVC has ruled that it does not have authority to entertain a class action. *Lefkowitz v. Derwinski*, 1 Vet. App. 439, 440 (1991) (per curiam). Aside from constitutional claims and challenges to formal rules, the Federal Circuit is without jurisdiction to review factual issues or even the application of law "to the facts of a particular case." 38 U.S.C. § 7292(d)(2); see also *Davis v. Principi*, 276 F.3d 1341, 1344 (Fed. Cir. 2002). The mechanisms established to review individual benefits determinations are simply not designed to address or capable of addressing legal challenges alleging systemic deficiencies.

The Ninth Circuit interpreted Section 511's limitation of district court jurisdiction far too broadly, and as a result wrongly held that Section 511 bars suits which challenge VA actions other than a "decision" by the Secretary in addressing a particular benefit claim. Section 511 withholds district court jurisdiction to review "questions of law and fact *necessary to a decision* by the Secretary under a law that affects" benefits. 38 U.S.C. § 511(a) (emphasis added). The Ninth Circuit, however, held that "§ 511 precludes jurisdiction over a claim" involving review of "VA decisions that *relate* to

benefits decisions.” Pet. App. 27a (emphasis added). This substitution of “relate to” for “necessary to,” and the extension of “decision” to include broad patterns and practices or omissions, are the central flaws in the Ninth Circuit’s decision. Together with the limited scope of relief available through direct review of individual veterans’ determinations by the VA, the Ninth Circuit’s construction expands Section 511 beyond its plain meaning and limits the practical legal rights and remedies available to veterans in a manner Congress could not have intended. The Ninth Circuit’s reading of Section 511 erroneously shields the most important, wide-ranging practices of the VA from effective judicial review.

B. Challenges In Article III Courts To The VA’s Systemic Failures Are Essential To Ending The Unlawful Delays In The Provision Of Medical Care And Statutory Benefits For Veterans.

The Ninth Circuit’s determination to bar Article III courts from considering claims by groups of veterans directed against VA practices, omissions, and failures – and in practice to bar such claims in any legal forum – is particularly inappropriate and important in light of the scope of difficulties confronting our nation’s veterans. Judicial redress for systemic failures of the VA to satisfy statutory and constitutional requirements is an immensely important mechanism for correcting the VA’s failures and meeting our nation’s commitments to its veterans.

1. Tremendous Case Backlogs And Agency Mismanagement Cause Unconscionable And Unlawful Delays In The Provision Of Medical Care And Benefits To Veterans.

The VA faces a tremendous backlog in veterans' claims, leading to enormously lengthy delays in claims processing, claim appeals resolution, and the provision of benefits and medical care guaranteed to veterans by statute.

1. *Scope of Veterans' Needs.* In 2011, veterans filed 1.3 million claims with the VA. James Dao, *Veterans Wait for Benefits as Claims Pile Up*, N.Y. *Times*, Sept. 28, 2012, at A1.³ Veterans of the Vietnam War are aging, and claims by Vietnam War-era veterans comprise almost a third of new claims at the VA. *Id.* Vietnam veterans have distinct health issues, such as illnesses presumptively arising from exposure to Agent Orange, see, e.g., *Nehmer v. Veterans Admin.*, 284 F.3d 1158 (9th Cir. 2002), or simply advancing age.

This claims backlog is increasing as the veterans of the wars in Iraq and Afghanistan return and seek medical care and other veterans' benefits. More than 800,000 Americans have served in combat roles in these two conflicts. See Pet. App. 222a. Advances in armor and medicine have allowed these veterans to survive more severe injuries than did veterans of prior conflicts,⁴ and almost half of veterans of the

³ Available online at <http://www.nytimes.com/2012/09/28/us/veterans-wait-for-us-aid-amid-growing-backlog-of-claims.html>.

⁴ See, e.g., Steve Almasy, *The Toll of War Now Includes More Amputees*, CNN, May 27, 2012, available at <http://www.cnn.com/2012/05/27/us/amputee-veterans-come-home/index.html>.

Iraq and Afghanistan Wars file a claim for disability. See, e.g., Dao, *supra*.

The particular and substantial mental health issues facing veterans of recent wars make the VA's task especially challenging.⁵ The district court noted in the proceedings below that approximately one-third of Iraq War veterans seek mental health care during the first year following discharge, and 18.5% of veterans of the War in Afghanistan have post-traumatic stress disorder ("PTSD"). Pet. App. 223a-224a. PTSD is among the risk factors for suicide.⁶ Since 2005, the suicide rate for combat veterans has "risen sharply."⁷ One estimate places the number of servicemembers with traumatic brain injury, "considered one of the signature wounds of wars in Iraq and Afghanistan," at 300,000.⁸

⁵ The Ninth Circuit and the VA have acknowledged that the VA's task of handling its obligations to these returning troops is "daunting." Pet. App. 2a-3a (citing *Review of Veterans' Claims Processing: Are Current Efforts Working? Hearing Before the S. Comm. on Veterans' Affairs*, 111th Cong. 9 (2010) (statement of Michael Walcoff, Acting Under Sec'y for Benefits, U.S. Dep't of Veterans Affairs)).

⁶ Margaret C. Harrell & Nancy Berglass, Ctr. for a New Am. Sec., *Losing the Battle: The Challenge of Military Suicide* 2 (Oct. 2011), available at http://www.cnas.org/files/documents/publications/CNAS_LosingTheBattle_HarrellBerglass.pdf.

⁷ Timothy Williams, *Suicides Outpacing War Deaths for Troops*, N.Y. Times, June 8, 2012, available at <http://www.nytimes.com/2012/06/09/us/suicides-eclipse-war-deaths-for-us-troops.html>.

⁸ Gregg Zoroya, *Gauges Worn by Troops Offer Clues on Impact from Blasts*, USA Today, Sept. 5, 2012, available at <http://www.usatoday.com/news/military/story/2012-09-01/troops-explosion-gauges-neurology-PTSD/57484580/1>.

Veterans returning from Iraq and Afghanistan also face substantial hurdles and intolerable delays when attempting to obtain needed care. The VA is required to provide free medical care to all veterans who served in any conflict after November 1, 1998, for five years after discharge. 38 U.S.C. § 1710(e)(1)(D). However, the VA's administration of such benefits has become dysfunctional, dramatically delaying the provision of mental health evaluations for veterans and determinations on applications for benefits.

2. *Delay in Securing Mental Health Care.* Veterans face unconscionable and unlawful delays in securing medical evaluations and treatment, especially for mental health issues. A veteran requesting a "general mental health assessment" is entitled to receive one from the VA "as soon as practical after receiving the request, but not later than 30 days after receiving the request." 38 U.S.C. § 1712A(a)(3). The Deputy Under Secretary for Health Operations and Management of the Veterans Health Administration in 2007 directed that veterans who sought assistance for mental health issues for the first time be evaluated within 24 hours, but, in connection with the litigation below, stated that he had "no way of knowing whether" this instruction was being followed. Pet. App. 230a-231a. A recent Congressional report summarized how "[t]he extent to which these policies are implemented in practice has been questioned in Congressional testimony, news media, and survey responses from both providers and patients." Erin Bagalman, Cong. Res. Serv., *Suicide Prevention Efforts of the Veterans Health Administration* 10 (Feb. 3, 2012).⁹

⁹ Available online at <http://www.fas.org/sgp/crs/misc/R42340.pdf>.

The VA's suicide prevention efforts are especially flawed. A Congressional report concluded that "[a] recurring theme in the area of suicide prevention interventions is the apparent gap between policy and practice" and noted as one example "the timeliness of mental health appointments." Bagalman, *supra* at 16. Too common is the experience of one veteran who reported that he called a "VA suicide prevention hotline," was told he would be called back, and never was. Randi Kaye & Scott Bronstein, *Hundreds of Thousands of War Vets Still Waiting for Health Benefits*, CNN, Oct. 4, 2012.¹⁰ Delays in providing adequate mental health treatment put undue strain on both veterans and their families. As noted by the courts below, an average of 18 veterans die by their own hands each day, five of whom are under the care of the VA. Pet. App. 70a, 79a, 125a, 225a. In such settings, even short delays can have grave, irreversible consequences.

3. *Delayed Claims and Appeals Processing.* The claims and appeals processes for addressing veterans' benefits claims are also plagued by extreme delays. Pet. App. 248a-256a; see also Dao, *supra*.¹¹ The district court below found that in 2008, VA regional offices took an average of 261 days to issue a simple Statement of the Case after a veteran challenged an initial determination. Pet. App. 250a. More recent data from the VA's Office of the Inspector General

¹⁰ Available online at <http://www.cnn.com/2012/09/29/health/delayed-veterans-benefits/index.html?iref=allsearch>.

¹¹ For example, the district court found that in the first three months of 2008, between 19% and 44% of cases remanded by the BVA were "avoidable remands" where the rating office had made a mistake, and almost half of these avoidable remands "were the result of [VA] employees violating their duty to assist veterans." Pet. App. 254a.

confirmed that this situation is not improving: of eight regional offices examined, the VA Inspector General found that the average time for the regional offices to issue a Statement of the Case ranged from 120 days to 448 days. Veterans Benefits Admin., Office of Inspector Gen., *Audit of VA Regional Offices' Appeals Management Process* 14, fig. 1 (May 30, 2012).¹²

The VA is not meeting even its own goals for processing appeals. *Id.* at 3. The VA Inspector General found that the backlog of undecided appeals was growing and that “VBA contributed to this growing inventory and time delays by not allocating sufficient staff to work on appeals and, in some cases, not using its appeals staff effectively.” *Id.* The VA Inspector General concluded that:

The critical starting point to reducing the appeals inventory would be to identify and request the staffing needed to meet goals for processing appeals in a timely manner. The regional offices also have opportunities to improve appeals management processing timeliness through better use of designated appeal staff and revised procedures. Until VBA implements these changes, the appeals inventory will continue to grow and untimely appeal decisions will further delay the delivery of potential monetary and health benefits for veterans.

Id. at 8.

A recent *New York Times* article illustrated the human cost behind these statistics. For example, an

¹² Available online at <http://www.va.gov/oig/pubs/VAOIG-10-03166-75.pdf>.

army veteran with PTSD suddenly had his disability benefits cut because the VA erred in determining which years he received drill pay. *Dao, supra*. By the time the VA corrected the error, he had filed for bankruptcy. *Id.* In another case, the VA took almost two years to process the pension claim of the 89-year-old widow of a World War II veteran, resulting in her daughter's using significant savings to pay nursing home bills. *Id.* This "routine pension claim" was resolved only after the intervention of a member of Congress. *Id.* In many instances, the VA's delays in deciding claims hit hardest the veterans most in need of the speedy adjudication Congress has mandated for veterans' claims. In short, the VA's system for resolving claims is broken and cannot meet basic legal requirements.

2. Judicial Review In Article III Courts Of Claims Of Systemic Denial Of Veterans' Legal Rights Is Necessary To Compel The VA To Act Lawfully And Appropriately.

Remedying this kind of widespread and systemic government failure is a traditional function of the federal courts. For example, the Court has allowed systemic challenges to the federal government's method of recouping erroneous overpayments, *Califano v. Yamasaki*, 442 U.S. 682 (1979), the federal government's bidding system for awarding leases for oil and gas exploration, *Watt v. Energy Action Educ. Found.*, 454 U.S. 151 (1981), conditions of release from Immigration and Naturalization Service custody of minors, *Reno v. Flores*, 507 U.S. 292 (1993), as well as the conditions of state-sponsored foster care, *Perdue v. Kenny A. ex rel. Winn*, 130 S. Ct. 1662 (2010), state use of Social Security benefits of foster children, *Wash. State Dep't*

of Soc. & Health Servs. v. Keffeler, 537 U.S. 371 (2003), prisoners' access to legal information, *Bounds v. Smith*, 430 U.S. 817 (1977), and the timeliness of judicial determinations of probable cause, *Cnty. of Riverside v. McLaughlin*, 500 U.S. 44 (1991).

The widespread problems at the VA are not amenable to case-by-case remedies and require commensurate relief. There is no reason to squander the VA's limited resources by serially adjudicating the same issue time and again, and no reason to prevent generations of veterans from benefiting from judicial determinations made in a single federal proceeding.

Furthermore, under the decision below, the Secretary's failure to act or decide cannot effectively be challenged. Veterans with complaints of mental or psychological issues are to be evaluated by the VA within 24 hours. As noted in the petition, this one-day limit is usually missed, often by 50 days or more. Pet. 9 & n.2. In the decision below, the Ninth Circuit suggested that a writ of mandamus was the appropriate remedy for delays. Pet. App. 33a n.18. This notion is naïve and wrong. It is impossible to force the VA to meet the required 24-hour deadline, once it passes, by mandamus or otherwise. More generally, the Ninth Circuit's proposed solution would require each veteran to file a petition for mandamus along with his or her initial application for benefits.¹³ That result would frustrate the

¹³ The Court of Appeals for Veterans Claims has held that organizations such as *amici* may not seek writs of mandamus for their members from the CAVC. *Am. Legion v. Nicholson*, 21 Vet. App. 1, 8-9 (2007). Thus, if veterans collectively are to be afforded relief from the VA's systemic failures, that relief must be provided by federal district courts.

Congressional purpose of providing a “non-adversarial, pro-veteran” system at the VA.¹⁴

The decision of the Ninth Circuit below accomplishes exactly what Congress could never have intended: depriving veterans of remedies available to other classes of plaintiffs who allege broad violations of their statutory and constitutional rights.¹⁵ Indeed, Congress clearly intended just the opposite in seeking, through statute, to provide for adequate and prompt medical care and provision of statutorily-defined benefits.

“Congress has, in the words of Abraham Lincoln, ‘provided for him who has borne the battle, and his widow and his orphan.’” *Walters v. Nat’l Ass’n of Radiation Survivors*, 473 U.S. 305, 309 (1985). The VA’s adjudicatory “process is designed to function throughout with a high degree of informality and solicitude for the claimant.” *Id.* at 311. The VA must assist veterans in developing evidence for their claims, 38 U.S.C. § 5103(a), and must give veterans the “benefit of the doubt” when evidence is in equipoise, *id.* § 5107(b). Yet it cannot be that Congress’s attempt, in certain circumstances, to allow veterans to avoid the sort of adversarial proceedings typical in the U.S. legal system can be taken as evidence to deny veterans the ability to use

¹⁴ The decision below also reveals a gross misunderstanding about the proper role of mandamus as “an extraordinary remedy.” *Kerr v. U.S. Dist. Court*, 426 U.S. 394, 402 (1976). Indeed, the Ninth Circuit’s suggestion is to do exactly the opposite, and make routine, continuing use of mandamus.

¹⁵ For example, Congress has provided that state prisoners may bring systemic challenges to prison conditions, including the provision of medical care, in district court. 18 U.S.C. § 3626; *Brown v. Plata*, 131 S. Ct. 1910 (2011).

adversarial legal proceedings for other types of claims.

Congress especially cannot have intended to insulate from judicial review the *failure* of the Secretary to act regarding veterans' benefits. And, this Court has indicated that limits to such due process challenges would in any event be impermissible. *Johnson v. Robison*, 415 U.S. 361, 373 (1974).

The Ninth Circuit's decision below is simply not in accord with Congress's treatment of veterans, and there is no reason to deny veterans the protections of law, and the processes and forms of legal redress, available to other classes of persons before federal district courts.

II. THE CIRCUIT SPLIT REGARDING THE SCOPE OF SECTION 511 AND JURISDICTION TO REVIEW SYSTEMIC CLAIMS SHOULD BE ADDRESSED NOW TO PROTECT VETERANS' LEGAL ENTITLEMENT TO MEDICAL CARE AND BENEFITS.

As petitioners describe, Pet. 18-26, a clear circuit split exists regarding whether Section 511 bars district court review of actions simply *related* to benefits determinations, including challenges to the VA's pervasive failures, or only those findings *necessary* to a particular decision of the Secretary.

The D.C. Circuit has interpreted Section 511 in a straightforward manner, holding that "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." *Broudy v. Mather*,

460 F.3d 106, 114 (D.C. Cir. 2006).¹⁶ The Ninth Circuit below claimed to be in agreement with the D.C. Circuit. See Pet. App. 25a-27a. However, what the D.C. Circuit considered to be the boundary of Section 511, namely, a “decision made by the Secretary in the course of making benefits determinations,” *Broudy*, 460 F.3d at 115, the Ninth Circuit considered to be only an example of VA actions within the ambit of Section 511. The Ninth Circuit stated that “§ 511 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 (quoting *Broudy*, 460 F.3d at 115) (emphases added; some quotation marks and citations omitted). But *Broudy* itself rejects this construction, making clear that “§ 511(a) prevents district courts from hearing a particular question *only when* the Secretary has actually decided the question.” 460 F.3d at 114 (emphasis added; brackets and quotation marks omitted).

As organizations that have extensive experience litigating veterans’ claims in both federal courts in the first instance and on appeal of VA decisions, *amici* can confirm that a real difference exists

¹⁶ Other circuits, such as the Federal Circuit, the Eighth Circuit, and the Tenth Circuit, have interpreted “decision” in a manner consistent with the D.C. Circuit. See *Bates v. Nicholson*, 398 F.3d 1355, 1365 (Fed. Cir. 2005) (“Section 511(a) does not apply to every challenge to an action by the VA. As we have held, it only applies where there has been a ‘decision by the Secretary.’”); *Hicks v. Veterans Admin.*, 961 F.2d 1367, 1370 (8th Cir. 1992) (§ 511 prevents district court review of issues “necessary to a decision which affects benefits”); *Weaver v. United States*, 98 F.3d 518, 520 (10th Cir. 1996) (§ 511 precludes “challeng[e] to the underlying benefits determination”).

between the rules adopted by the Ninth Circuit and those applicable in the D.C. Circuit (as well as circuits aligned with the D.C. Circuit). They can also confirm that the split between the circuits has very tangible and extensive practical implications. Petitioners' challenge is one of many legal challenges to systemic practices that would be permitted in the D.C. Circuit but barred by the Ninth Circuit's construction of Section 511. It is not a challenge to a decision of the Secretary in an individual case, but rather a challenge to procedures and practices affecting in practical terms how those decisions are to be made or delayed. *Cf. Broudy*, 460 F.3d at 108-10 (D.C. Circuit allowing challenge by veterans to the VA's allegedly depriving them of "meaningful access to administrative proceedings before the" VA by denying them access to information). In this case, intolerable systemic delays also constitute a lack of meaningful access to proceedings and medical care, and veterans should be able to challenge these delays in district court and would be able to do so in the district courts within the D.C. Circuit.

No basis exists to defer addressing the circuit split regarding Section 511's meaning and scope. There is no case that can be expected to present a better vehicle to address the issue. And, any delay in resolving the circuit split has tremendous human consequences. The VA's egregious delays in processing veterans' benefits and providing medical care to veterans will continue in the absence of the appropriate judicial oversight that would, absent the Ninth Circuit's rule, otherwise be available to veterans as it is to other classes of plaintiffs. The Ninth Circuit's rule deprives veterans of access to courts, their ability to assert statutory and constitutional claims related to the VA's systemic

failures, and their ability to secure appropriate redress on a scale that addresses those failures.

CONCLUSION

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

Respectfully submitted,

RONALD B. ABRAMS
JOINT EXECUTIVE DIRECTOR
NATIONAL VETERANS LEGAL
SERVICES PROGRAM
1600 K Street, N.W.
Suite 500
Washington, DC 20006
(202) 265-8305

*Counsel for Amicus Curiae
National Veterans Legal
Services Program*

October 10, 2012

RICHARD KLINGLER*
JAMES A. HIGH, JR.
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
(202) 736-8000
rklingler@sidley.com

*Counsel for
Amici Curiae*

* Counsel of Record