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BULLETIN

THE NEWSLETTER OF VETERANS UNITED FOR TRUTH, INC.

#60

“VETERANS STANDING UP FOR EACH OTHER”

5 SEPTEMBER 2012

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## APPEAL TO THE SUPREME COURT

Today our counsel filed with the Supreme Court of the United States for a writ of certiorari, which is the instruction for the lower court (in this case the Ninth Circuit of the US Court of Appeals) to forward a case to the Supreme Court.

The Supreme Court has discretion over which cases it hears. The petition explains why the Supreme Court should hear our case. The VA will have an opportunity to file an opposition brief to this petition, though it may elect not to do so. We will most likely have a ruling on our petition by the end of December or early January.

The petition is 37 pages long so we will not forward the entire document to you. Below you will find extracted portions of that petition, specifically the sections titled: “Question Presented”, “Introduction”, and part C of “Reasons for Granting the Petition”. When the full petition is available on the internet we will post a link to it on our website.

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## QUESTION PRESENTED

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

The question presented is:

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

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## INTRODUCTION

Our Nation has made a solemn commitment to those who serve in the Armed Forces in combat: to provide medical care and mental-health treatment on their return

home and to provide monetary support to soldiers disabled during service or to their families in the event of death. Congress charged the United States Department of Veterans Affairs (VA) with providing these benefits. Tragically for many veterans, the VA has fallen far short of meeting these commitments.

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

The VA's practices and policies are just as problematic with regard to the adjudication of claims for death and disability benefits. These benefits, which provide basic sustenance for many veterans and their families, often take years to be awarded. Many veterans with valid claims never actually receive their benefits, because they die before they are awarded.

Petitioners, nonprofit veterans organizations, brought statutory and constitutional challenges to the VA's practices and procedures, or lack thereof, that cause these delays. After a divided three-judge panel held that the district court had jurisdiction to resolve petitioners' challenges, the Ninth Circuit en banc concluded that jurisdiction was lacking under the Veterans Judicial Review Act (VJRA), 38 U.S.C. § 511(a). Section 511(a) provides that the Secretary of the VA "shall decide all questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. § 511(a). The VJRA also states that, subject to certain exceptions, "the decision of the Secretary as to any such question shall be final and conclusive and may not be reviewed by any other official or by any court." *Ibid.* Under one exception, the Court of Appeals for Veterans Claims can review certain "decisions" by the Secretary. *Id.* § 511(b)(4); 38 U.S.C. § 7252.

The Ninth Circuit's construction departs from the plain language of the statute by reading the word "decision" out of Section 511(a). Nowhere do petitioners challenge any "decision" by the Secretary in any particular veteran's case; petitioners challenge the VA's deficient procedures and unjustifiable delays before making the decision, rather than the decision itself. Indeed, three other circuits disagree with the Ninth Circuit's interpretation. Consistent with the text of Section 511(a), the D.C. Circuit, Second Circuit, and Federal Circuit have construed Section 511 to preclude judicial review only as to a decision actually made by the Secretary.

Moreover, the ruling below's reading of Section 511(a) ignores that this Court narrowly construes jurisdiction stripping statutes, particularly where such an

application would entirely preclude judicial review. This Court requires a clear and unambiguous statement from Congress to preclude constitutional challenges. No such statement exists in this case.

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

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## **REASONS FOR GRANTING THE PETITION**

### **C. THIS CASE IS AN IDEAL VEHICLE TO DECIDE THIS QUESTION OF NATIONAL IMPORTANCE**

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

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

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

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

The government, however, is not backing up its words with action. Veterans returning from the wars in Afghanistan and Iraq are afflicted in unprecedented numbers with PTSD because of the unique challenges of waging those wars, such as multiple deployments, the inability to identify the enemy, the lack of real safe zones, and the inadvertent killing of innocent civilians. App., *infra*, 223a-224a. PTSD is one of the two "signature wounds of today's wars." App., *infra*, 78a n.5. Indeed, during the first two years of the Iraq War, from 2003 to 2005, there was a 232% increase in PTSD diagnoses among veterans born after 1972. App., *infra*, 224a. As of 2008, 18.5% of service members who returned from the wars had PTSD. *Ibid*.

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

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

Given the sheer number of veterans with PTSD returning home each day and the importance of treatment and benefits, the outcome of this case will affect the livelihoods of hundreds of thousands of veterans at a crucial time in their lives. Absent this Court's review, veterans who are forced to wait for treatment or are locked in a years-long struggle to secure benefits will have no recourse.

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

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

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

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