25-71

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

National Organization for Women–New York City,

Plaintiff-Appellant,

— v. —

United States Department of Defense, and United States Department of Veterans Affairs,

Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of New York
No. 1:23-cv-06750-VEC
Hon. Valerie Caproni

BRIEF OF *AMICI CURIAE* ERWIN CHEMERINSKY, MEGHAN E. BROOKS, DAVID D. COLE, YELENA DUTERTE, JOHN H. GIAMMATTEO, HELEN HERSHKOFF, CATHERINE POWELL, JUDITH RESNIK, LAURENCE H. TRIBE, AND ADAM ZIMMERMAN IN SUPPORT OF PLAINTIFF–APPELLANT SEEKING REVERSAL

Bridget Lavender*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
blavender@aclu.org
**Admission pending*

Michelle Fraling
Counsel of Record
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, 6th Floor
Washington, DC 20005
Tel: (917) 710-3245
michelle.fraling@aclu.org

Counsel for Amici Curiae

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page(s)**

Statutes **Page(s)**

IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

Amici are law professors whose scholarship focuses on constitutional law, federal civil rights law, the jurisdiction of the federal courts, alternative adjudicatory schemes, and the law of administrative agencies. They have published on these topics in a variety of venues, including law reviews, books, and popular media outlets. Among the *amici* are law professors who have also litigated major cases on structural constitutional law, the federal civil rights statutes, agency adjudication processes, and the power of the Article III courts, including as lead counsel delivering oral argument before the United States Supreme Court. Given the importance of proper interpretation of statutes affecting the federal courts' jurisdiction, and that issue's centrality to their teaching and scholarship, *amici* believe they can be of assistance to this Court. *Amici*[2] are:

Erwin Chemerinsky
Dean
Jesse H. Choper Distinguished Professor of Law
University of California Berkeley School of Law

Helen Hershkoff
Herbert M. and Svetlana Wachtell Professor of Constitutional Law and Civil Liberties
New York University School of Law

---

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(2), *amici* submit this brief without an accompanying motion for leave to file because all parties before this Court have consented to its filing. *Amici* state that: (i) neither party's counsel authored the brief in whole or in part; (ii) neither party, nor their counsel, contributed money that was intended to fund preparing or submitting the brief; and (iii) no person other than *amici*, their members, or their counsel contributed money that was intended to fund preparing or submitting the brief.

[2] *Amici* speak in their personal capacities, and not on behalf of the institutions they are affiliated with. University affiliations are listed for informational purposes only.

Meghan E. Brooks
Assistant Professor of Law
Director, Veterans Legal Clinic
Joseph F. Rice School of Law
University of South Carolina

David D. Cole
The Honorable George J Mitchell
Professor in Law and Public Policy
Georgetown University Law Center
Former National Legal Director, ACLU

Yelena Duterte
Assistant Professor
Director of the Veterans Legal Clinic
School of Law
University of Illinois at Chicago

John Harland Giammatteo
Associate Professor
University at Buffalo School of Law

Catherine Powell
Eunice Carter Distinguished Research
Scholar Professor of Law
Fordham University School of Law

Judith Resnik
Arthur Liman Professor of Law
Yale Law School

Laurence H. Tribe
Carl M. Loeb University Professor
Emeritus
Harvard University

Adam Zimmerman
The Robert Kingsley Professor of Law
USC Gould School of Law

INTRODUCTION

The Veterans' Judicial Review Act ("VJRA") does not withdraw district court jurisdiction over Plaintiff-Appellant NOW-NYC's Fifth Amendment and Affordable Care Act ("ACA") claims against Defendant-Appellee U.S. Department of Veterans Affairs ("VA"). The jurisdiction-stripping language in the VJRA prohibits federal district courts from second-guessing the VA Secretary's previous judgments in individualized benefit determinations. 38 U.S.C. § 511; *see, e.g.*, *Disabled Am. Veterans v. U.S. Dep't of Veterans Affairs*, 962 F.2d 136 (2d Cir. 1992) [hereinafter "DAV"]; *cf. Larrabee ex rel. Jones v. Derwinski*, 968 F.2d 1497 (2d Cir. 1992). But, consistent with Section 511's plain text and sister circuits' longstanding principle that even indisputable jurisdiction-stripping language must be narrowly construed, its scope is limited: rather than cover the waterfront of any possible benefits-related challenge brought under all manner of laws affecting the provisions of veterans benefits, its overarching aim is to prevent district courts from improperly usurping VA's exclusive authority to adjudicate "claim[s] for benefits." *DAV*, 962 F.2d at 141. Thus, as this Court has already held, Section 511 does not deprive district courts of jurisdiction over "*facial* [constitutional] challenges of legislation affecting veterans' benefits." *Larrabee*, 968 F.2d at 1501 (quoting *DAV*, 962 F.2d at 140) (emphasis in original).

Here, the Veterans brought exactly such a claim: a facial challenge to "a statutory classification drawn by Congress" in an appropriations law affecting veterans' benefits. *DAV*, 962 F.2d at 141. The Veterans thus neither sought "review" of prior benefits determinations, nor did they challenge a "decision" made by the VA Secretary. Rather, they took the VA Secretary's prior benefits determinations as a given and brought a facial challenge to the statutory classification under the Fifth Amendment and ACA.

Strengthening the case for jurisdiction, the Government's position would deprive the Veterans of a meaningful forum to air their claims. As neither the VJRA nor its implementing regulations authorize VA to review the Veterans' claims, applying Section 511 would leave the Veterans in a jurisdictional no man's land—preventing them from pursuing such claims in federal district court and the VJRA adjudication process.

For these reasons, this Court should decline to apply Section 511 and reverse the district court's decision.

ARGUMENT

I. The District Court erred in declining to exercise jurisdiction over the Veterans' claims.

A. Jurisdiction-stripping language must be construed narrowly.

Congress drafts legislation against the backdrop of a "strong presumption" in favor of "judicial review of administrative action." *Smith v. Berryhill*, 587 U.S. 471,

483 (2019). To rebut that "heavy" presumption, *id*., a statute must contain "compelling" language to the contrary, *Dismuke v. United States*, 297 U.S. 167, 172 (1936). Thus, access to Article III courts typically "will not be cut off" unless the statutory text supplies "a persuasive reason to believe that such specifically was the purpose of Congress." *Or. Nat. Res. Council v. U.S. Forest Serv*., 834 F.2d 842, 851 (9th Cir. 1987). Put differently, courts need not "guess" whether a statute was designed to "divest district courts of jurisdiction." *Axon Enter., Inc. v. Fed. Trade Comm'n*, 598 U.S. 175, 207–08 (2023) (Gorsuch, J., concurring). Where Congress "holds that view," it "simply tells us." *Id.* at 208. And where Congress gives no such unequivocal textual command, Article III courts retain their "virtually unflagging" duty to hear cases that fall within their jurisdiction, be it through the federal-question statute, 28 U.S.C. § 1331, or any other grant of authority. *Sprint Commc'ns, Inc. v. Jacobs*, 571 U.S. 69, 77 (2013).

This presumption against jurisdiction-stripping applies with equal force for statutes that inarguably limit some aspects of federal courts' reach. The "general rule" is "to resolve any ambiguities in a jurisdiction-stripping statute in favor of the narrower interpretation." *Acre v. United States*, 899 F.3d 796, 801 (9th Cir. 2018). Accordingly, even ostensibly "capacious" jurisdiction-stripping language should not be read to its literal outer bounds. *Jennings v. Rodriguez*, 583 U.S. 281, 293 (2018) (plurality); *see also, e.g.*, *Reno v. Am.-Arab Anti-Discrimination Comm*., 525 U.S.

471, 482 (1999); *United States v. Dohou*, 948 F.3d 621, 625 (3d Cir. 2020); *Acre*, 899 F.3d at 801; *Obioha v. Gonzales*, 431 F.3d 400, 405 (4th Cir. 2005).

Consider, for example, this Court's decision in *Disabled American Veterans*. There, this Court held that veteran plaintiffs could proceed in district court with facial constitutional claims challenging a federal law that provided different inheritance rules on the basis of disability. The Second Circuit declined to read Section 511 to preclude district court review of "the constitutionality of a statutory classification drawn by Congress" in a federal statute affecting veterans' benefits, *id.* at 141, because such a hyper-literal reading would conflict with the general principle that "Article III district courts have power to rule on the constitutionality of acts of Congress," *id.* at 140. Determining that the veterans' facial constitutional challenge "neither make[s] a claim for benefits nor challenge[s] the denial of such a claim," it concluded that district court jurisdiction had been proper. *Id.* at 141.

Reflecting particular reluctance to cede Article III courts' adjudicative authority to Executive Branch agencies, additional limiting principles govern the scope of "special statutory review scheme[s]" that prohibit district courts from "exercising jurisdiction over challenges to federal agency action" in favor of frontline agency review. *Axon*, 598 U.S. at 185; *cf. SEC v. Jarkesy*, 603 U.S. 109, 127–32 (2024) (emphasizing the limits of Congress's power to delegate adjudicative authority to federal agencies). First, those kinds of jurisdictional directives must be

read against the presumption that "the point of special review provisions" is "to give the agency a heightened role in the matters it customarily handles, and can apply distinctive knowledge to." *Axon*, 598 U.S. at 186. Where a claim falls outside the agency's bailiwick, "courts are at no disadvantage" to evaluate it, obviating Congress's underlying rationale for exclusive agency review. *Free Enter. Fund v. Pub. Co. Acct. Oversight Bd.*, 561 U.S. 477, 491 (2010); *see also Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 212 (1994).

Second is the understanding that "Congress rarely allows claims about agency action to escape effective judicial review," even where it modifies the standard Article III review process through a special statutory review scheme. *Axon*, 598 U.S. at 186. Although effective judicial review in this context does not always "demand a district court's involvement," certain claims would essentially be lost if they began in front of an administrative agency rather than a district court. *Id.* at 190.

B. The text of Section 511 precludes only district court "review" of previous benefit determinations—which the Veterans did not seek.

These interpretive principles make plain that the district court erred in refusing to exercise jurisdiction over the Veterans' claims. Section 511 contains two commands. First, it directs that the Secretary "shall decide" any "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). Second, outside of a special review scheme set forth elsewhere in the VJRA that funnels

claims through the Court of Appeals for Veterans Claims and then the Federal Circuit, Section 511 makes those decisions "final and conclusive," prohibiting "any court" from "review[ing]" them through "action[s] in the nature of mandamus or otherwise." *Id.*

Read together—and against the background presumption that jurisdiction-stripping language is to be narrowly construed—these two portions of Section 511 withdraw jurisdiction only over a specific subset of claims. Its text targets efforts to collaterally seek "review in the district court of decisions that the Secretary has actually made," *Blue Water Navy Viet. Veterans Ass'n v. McDonald*, 830 F.3d 570, 575 (D.C. Cir. 2016), in "the context of an individual veteran's VA benefits proceedings," *Veterans for Common Sense v. Shinseki*, 678 F.3d 1013, 1023 (9th Cir. 2012) [hereinafter "*VCS*"]; *see also, e.g.*, *Monk v. United States*, No. 22-CV-1503, 2025 WL 473590, at *8 (D. Conn. Feb. 12, 2025) ("Section 511(a) bars district courts from hearing many cases that seek collateral review of individual benefits applications. . . .").[3]

[3] For the avoidance of doubt: Although many appellate authorities, including *VCS* and *Blue Water*, have recognized collateral challenges to the Secretary's individual benefits determinations as falling within the undisputed heartland of Section 511, both of those cases recognized that claims styled in other manners can also be swept into its jurisdictional bar. That makes good sense. Although the plain text of Section 511 contemplates preserving the Secretary's exclusive decision-making authority over benefits determinations, reading the statute to prohibit only claims formally styled as benefits do-overs and brought by solo plaintiffs would make it all too easy

By choosing to describe Section 511's jurisdictional limitation in these terms, Congress made plain that its aim was to prevent veterans from second-guessing the benefits determinations addressed in the first portion of Section 511 (which are to be "final") through Article III courts (which are prohibited from "review[ing]" those "decisions"). 38 U.S.C. § 511(a). In other words, Congress withdrew jurisdiction only for a narrow class of claims: challenges to benefits determinations that the first portion of Section 511 vests the Secretary with authority to decide in the first instance.

Section 511's textual emphasis on ensuring finality for VA-specific benefits determinations is also consistent with the statute's context. Through the VJRA, Congress constructed a scheme by which "[t]he agency effectively fills in for the district court" with respect to covered claims. *Axon*, 598 U.S. at 185. That legislative design would become toothless if the district court could re-open decisions already rendered by the agency itself. But the same is not true where the veteran is challenging a statutory classification unrelated to individual benefits determinations.

---

for veterans to circumvent the statute by, say, opting out of the VA claims adjudication process altogether, styling their complaint as a class action, and so forth. *Cf. VCS*, 678 F.3d at 1026–27 (no jurisdiction over challenge to VA's "*average*" mental healthcare delays where "Section 511 undoubtedly would deprive us of jurisdiction to consider an individual veteran's claim" over the same practices). For the purpose of Section 511, what matters is the substance of what a claim challenges—i.e., whether it seeks to collaterally challenge the VA's specialized benefits decision-making process—not its labeling or formal elements.

DAV, 962 F.2d at 140. Those claims, which fall outside of the text of Section 511 in any event, would not undermine the broader adjudicative scheme Congress designed through the VJRA if they were resolved in the district court.

True, the text of Section 511 also addresses decisions made pursuant to laws that "*affect*[] the provision of benefits." 38 U.S.C. § 511 (emphasis added). But this lone word should not be read so expansively as to swallow up the whole universe of benefits-related claims. When it comes to determining the scope of an administrative agency's delegated decision-making authority, open-ended clauses of this sort should be given "a non-hyperliteral reading" to "prevent the statute from assuming near-infinite breadth." *FERC v. Elec. Power Supply Ass'n*, 577 U.S. 260, 278 (2016). For example, in *FERC*, the Supreme Court considered the scope of a statute granting the Federal Energy Regulatory Commission oversight over "rules and practices affecting" wholesale energy rates. *Id.* at 277. The Court acknowledged the statute could potentially be read to grant the agency oversight authority over "just about everything—the whole economy," given the wide range of factors that "affect" energy prices. *Id.* at 278. But the Court could not "imagine that was what Congress had in mind," because under such a reading, the statute would essentially "never run its course." *Id.* Thus, it adopted a more tempered and "common-sense" interpretation. *Id.*

A "common-sense" interpretation of Section 511 is likewise appropriate here. Taken literally, all manner of laws "affect[] the provision of benefits," 38 U.S.C. § 511, to veterans: the United States Constitution, federal nondiscrimination protections, service eligibility and discharge criteria, the laws of war. But no one would seriously suggest that Section 511 vests the VA Secretary and veteran courts with exclusive interpretive authority for those laws—much less authority that is "final" and precludes "review[] by any other official." *Id.* The word "affects" must have some limiting principle.

Fortunately, the statutory text itself supplies exactly that limiting principle. Congress, after all, typically does not "introduce a general term that renders meaningless the specific text that accompanies it." *Fischer v. United States*, 603 U.S. 480, 481 (2024). If Congress had meant to give the VA Secretary exclusive decision-making authority over all possible statutes that affect VA benefits, it could have said so without qualification. It did not. The companion text instead clarifies that Section 511 deals only with the actual "provision of benefits" by the agency and questions that are "necessary" to "decisions" conferring those benefits.

In short, Section 511 emphatically does not grant the agency "*exclusive* jurisdiction to construe" any and all "laws affecting the provision of veterans benefits," nor does it vest the agency with the *exclusive* right to "consider all issues that might somehow touch upon whether someone receives veterans benefits."

Broudy v. Mather, 460 F.3d 106, 112 (D.C. Cir. 2006) (emphasis in original). Otherwise, Section 511 would "require the Secretary, and only the Secretary, to make all decisions related to laws affecting the provision of benefits," sweeping well beyond the targeted displacement of jurisdiction that Congress intended. *Hanlin v. United States*, 214 F.3d 1319, 1321 (Fed. Cir. 2000). Under the plain text of the statute, claims that do not effectively function to second-guess VA's individualized determinations with respect to benefits programs it administers remain subject to district court review, *id.*, regardless of whether they turn on laws that "affect" benefits in some theoretical sense.

Here, the Veterans' claims fail to satisfy Section 511's plain-text requirements. First, the Veterans did not ask the district court to "review[]" benefits decisions. Far from seeking to dislodge, undermine, or otherwise revise them, they took the Secretary's prior determinations of "law and fact" about their eligibility for benefits as a given.[4] Put simply: like the plaintiffs in *DAV*, the Veterans challenged a statutory classification—not their individual benefits determinations. 962 F.2d at 141. They sought to invoke their rights under the U.S. Constitution and the ACA to challenge the underlying VA appropriations statute. And this Court has already expressly

[4] While it is true that some Veteran members applied for IVF benefits, that alone does not foreclose judicial review. As this suit neither touches the Veterans' prior benefits determination nor requires it to re-open individual benefits decisions, this Court may resolve the Veterans claims without relitigating any individual's prior benefits determinations. *Cf. Broudy,* 460 F.3d at 122.

rejected the charge that Section 511 precludes Article III courts from hearing cases, like this one, where plaintiffs challenge the facial constitutionality of a federal statute. *Id.*

Finally, the Veterans do not challenge a "*decision* by the Secretary." 38 U.S.C. § 511 (emphasis added). An unambiguous statutory classification is not a "decision by the Secretary," *id.* It is a decision by Congress. Here, the VA Secretary merely implemented a cut-and-dry, statutorily required decision when determining eligibility for veterans' benefits. *Accord Traynor v. Turnage*, 485 U.S. 535, 538 & n.2 (1988), *superseded by statute*, Veterans' Judicial Review Act, Pub. L. No. 100-687, § 101, 102 Stat. 4105, 4105 (1988) (addressing judicial review of a regulation the Secretary had promulgated to implement an open-ended, ambiguous benefits statute). The Secretary therefore did not "apply distinctive knowledge" housed within the agency to the challenged classification, *Axon*, 598 U.S. at 186, further undercutting the case for exclusive agency review.

District courts are, therefore, not precluded from hearing the Veterans' claims.

II. The Government's position would deprive veterans of any meaningful opportunity to enforce their rights.

Practical considerations likewise strongly counsel in favor of district court review. Because Congress "rarely allows claims about agency action to escape effective judicial review," even an otherwise-exclusive statutory review scheme may not displace Article III jurisdiction where doing so would "'foreclose all meaningful

judicial review' of the claim." *Axon*, 598 U.S. at 186 (quoting *Thunder Basin*, 510 U.S. at 212–13); *see also Jennings*, 583 U.S. at 293 (plurality) (refusing to interpret jurisdiction-stripping provision so broadly as to make certain claims "effectively unreviewable").

Neither the VJRA nor its implementing regulations authorize VA to review the Veterans' constitutional or ACA claims. Those authorities establish only a limited framework for adjudicating veterans' benefits claims. *See generally* 38 U.S.C. §§ 7104, 7251, 7261, 7292(a), 7292(c), 7292(d)(1). Under the statute, veterans must first file individual "claims" for "benefits" through VA itself; they then may challenge those determinations through the VJRA's special statutory review scheme. The agency's regulations, in turn, define a "claim" as a request for the "determination of entitlement or evidencing a belief in entitlement, to a specific benefit under the laws administered by [VA] submitted on an application form prescribed by the Secretary." 38 C.F.R. § 3.1(p). Benefits encompass the "payment, service, commodity, function, or status, entitlement to which is determined under laws administered by [VA] pertaining to veterans and their dependents and survivors." *Id.* § 20.3(e).

VA regulations permit the agency's frontline processing offices to consider veterans' claims for benefits only "under the laws administered" by VA. *Id.* § 3.1(p). But the ACA and U.S Constitution are not laws administered by VA. VA forms do

not even allow veterans to present ACA or constitutional "claims" or seek relief under those authorities. The VJRA thus provides them with no mechanism by which to make these claims.

Finally, even if the Veterans could have pursued their claims through the VJRA adjudication scheme (they could not), that process cannot grant them the injunctive relief they sought in this litigation. For example, ACA claimants may recover the full range of rights and remedies provided under Title VI of the Civil Rights Act of 1964. 29 U.S.C. § 794a(2); 42 U.S.C. § 18116(a). This includes both "damages" and equitable remedies like "injunctive relief." *Alexander v. Sandoval*, 532 U.S. 275, 279 (2001). Likewise, plaintiffs may obtain declaratory or injunctive relief pursuant to a constitutional violation. 28 U.S.C. §§ 2201–02. The VJRA's review system, by contrast, is trained at resolving individual veterans' "claims" for benefits under the VA's laws. *See generally* 38 U.S.C. §§ 5100–26. Refereeing the claims administration process is a far cry from awarding the full equitable remedies available under the ACA and the U.S. Constitution. And pursuit of equitable relief—not individualized claim adjudication—is at the heart of these Veterans' claims.

In short, by dismissing these claims, the district court left the Veterans in a jurisdictional no man's land—preventing them from meaningful pursuing relief in federal district court *and* the VJRA adjudication process. Surely Congress did not intend for this unusual result.

CONCLUSION

The district court erred in refusing to exercise jurisdiction over the Veterans' claims. By its terms, Section 511 withdraws district court jurisdiction only over claims that would require collateral judicial review of prior VA benefits awards. The Veterans neither sought "review" of prior benefits determinations nor did they challenge a "decision" made by the VA Secretary. Instead, they challenged a statutory classification contained in a VA appropriations statute, invoking their rights under the U.S. Constitution and a separate federal statutory guarantee. This Court should not read Section 511 so expansively as to cover claims that fall well outside its plain text, particularly since doing so would deprive the Veterans of any meaningful alternative forum.

Dated: April 11, 2025

Respectfully submitted,

/s/ Michelle Fraling

Bridget Lavender*
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004
Tel: (212) 549-2500
blavender@aclu.org
**Admission pending*

Michelle Fraling
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th Street NW, 6th Floor
Washington, DC 20005
Tel: (917) 710-3245
michelle.fraling@aclu.org

Counsel for Amici Curiae Legal Scholars

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and 32(a)(7)(B) because, excluding parts of the brief exempted by Fed. R. App. P. 32(f), this brief contains 3,624 words. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionately spaced typeface using Times New Roman 14-point type.

Dated: April 11, 2024

Respectfully submitted,

/s/ Michelle Fraling
MICHELLE FRALING

Counsel of Record for Amici Curiae

CERTIFICATE OF SERVICE

I hereby certify that on April 11, 2025, I caused this Brief of *Amici Curiae* to be filed with the Clerk for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF System. Notice of this filing will be sent by email to all parties by operation of the Court's electronic filing system.

Dated: April 11, 2024

Respectfully submitted,

/s/ Michelle Fraling
MICHELLE FRALING

Counsel of Record for Amici Curiae