

**United States Court of Appeals
for the Federal Circuit**

**NATIONAL ORGANIZATION OF VETERANS'
ADVOCATES, INC.,**
Petitioner

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent

2020-1321

Petition for review pursuant to 38 U.S.C. Section 502.

ON PETITION FOR HEARING EN BANC

ROMAN MARTINEZ, Latham & Watkins LLP, Washington, DC, filed a petition for hearing en banc for petitioner. Also represented by SHANNON MARIE GRAMMEL, BLAKE STAFFORD.

ISAAC B. ROSENBERG, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response to the petition for respondent. Also represented by JOSEPH H. HUNT, ROBERT EDWARD KIRSCHMAN, JR., MARTIN F. HOCKEY, JR.; CHRISTOPHER O. ADELOYE, JULIE HONAN, Y. KEN LEE, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

MELANIE L. BOSTWICK, Orrick, Herrington & Sutcliffe LLP, Washington, DC, for amicus curiae Military-Veterans Advocacy Inc. Also represented by JEFFREY T. QUILICI, Austin, TX; JOHN B. WELLS, Law Office of John B. Wells, Slidell, LA.

STEPHEN BLAKE KINNAIRD, Paul Hastings LLP, Washington, DC, for amici curiae National Veterans Legal Services Program, Paralyzed Veterans of America, Veterans of Foreign Wars. Amicus curiae National Veterans Legal Services Program also represented by BARTON F. STICHMAN, National Veterans Legal Services Program, Washington, DC.

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*. *

PER CURIAM.

ORDER

The National Organization of Veterans' Advocates, Inc. ("NOVA") filed a petition for initial hearing en banc. A response thereto was invited by the court and filed by the Secretary of Veterans Affairs. NOVA was granted leave to file a reply in support of the petition. Military-Veterans Advocacy Inc. and the National Veterans Legal Services Program, Paralyzed Veterans of America, and the Veterans of Foreign Wars were granted leave to file briefs as amici curiae in support of the petition.

The petition was referred to the circuit judges who are in regular active service. A poll was requested and taken,

* Circuit Judge Moore did not participate.

and the court has decided that the petition warrants en banc attention.

Upon consideration thereof,

IT IS ORDERED THAT:

- (1) The petition for hearing en banc is granted.
- (2) The parties are requested to file briefs addressing the following two issues:
 - A. Whether this court has jurisdiction under 38 U.S.C. § 502 to review provisions of the Department of Veterans Affairs' Adjudication Procedures Manual M21-1 that are binding on the agency's initial adjudicators but not on the Board of Veterans' Appeals, and whether this court should overrule *Disabled American Veterans v. Secretary of Veterans Affairs*, 859 F.3d 1072 (Fed. Cir. 2017).
 - B. Whether the time for filing a direct action for judicial review under 38 U.S.C. § 502 is governed by the 60-day deadline specified by Federal Circuit Rule 47.12(a) or only by the six-year statute of limitations in 28 U.S.C. § 2401(a).
- (3) NOVA's opening brief must be filed within 45 days from the date of this order. The Secretary's brief is due within 45 days after service of NOVA's opening brief. NOVA's reply brief must be filed within 30 days after service of the Secretary's brief.
- (4) The court invites the views of amici curiae. Any such brief may be filed without consent and leave of court. Any amicus brief supporting NOVA's position or supporting neither position must be filed within 20 days after service of NOVA's opening brief. Any amicus brief supporting the Secretary's

position must be filed within 20 days after service of the Secretary's brief.

- (5) The court requires 24 paper copies of all briefs and appendices provided by the filer within 5 business days from the date of electronic filing of the document. Administrative Order No. 20-01 does not exempt the filing of these paper copies.
- (6) This case will be heard en banc on the basis of the briefing ordered herein and oral argument.
- (7) Oral argument will be scheduled at a later date.

FOR THE COURT

May 6, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court