IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

JEREMY BEAUDETTE AND MAYA BEAUDETTE, individually and on behalf of others similarly situated, **Petitioners,** v. **ROBERT WILKIE,** in his capacity as Secretary of Veterans Affairs, **Respondent.**	)	Vet. App. No. _____

PETITION FOR CLASS RELIEF IN THE NATURE OF
A WRIT OF MANDAMUS

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I. INTRODUCTION

Petitioners Jeremy and Maya Beaudette, a disabled combat veteran and his caregiver, ask the Court to compel the Secretary of Veterans Affairs ("VA") to allow Petitioners to seek review at the Board of Veterans' Appeals ("Board") of VA's decision to revoke their benefits under the Program of Comprehensive Assistance for Family Caregivers ("Caregiver Program" or "Program"). VA's prohibition of Board review—and, consequently, review by this Court—is contrary to the Veterans' Judicial Review Act ("VJRA"), which expressly mandates Board review of all benefits decisions. VA's rationale for prohibiting Board review is based on a single vague and cryptic provision of the Caregiver Program statute which states that such decisions are "considered a medical determination." There is no support Congress intended by this language to preclude Board review, let alone support sufficient to override the VJRA's clear mandate.

The Caregiver Program is a critical component of the care our country owes and provides to our veterans who have been wounded and disabled in the line of duty. As VA acknowledges, the Caregiver Program fits within the statutory definition of "benefits" under the VJRA. As a result, determinations regarding Caregiver benefits—in particular, the improper revocation of such benefits—are, by statute, subject to review under the VJRA. VA's argument, that the designation of decisions regarding such benefits as a "medical determination" is an implied repeal of the express statutory right to Board and judicial review under the VJRA, is unfounded and does not come close to satisfying the high standard of "clearly expressed congressional intention" necessary to abrogate the VJRA's express mandate. VA is improperly foreclosing on a wholesale basis all

reasonable protections such review provides. As a result, potentially thousands of veterans are being wrongly denied Caregiver benefits with no effective appeal rights.

The Caregiver Program is in need of judicial review. Congress, the media, and a separate nationwide class action have highlighted VA's widespread practice of wrongfully revoking Caregiver benefits from eligible veterans. Such revocations have been based on arbitrary and inconsistent application of eligibility criteria, due in part to VA's underestimating the number of veterans that would be eligible for the Program. This underestimation resulted in a ten-fold increase in Program costs. Rather than preparing the Program for a larger-than-expected pool of claimants, VA began arbitrarily revoking benefits in large numbers—nearly 20,000 recipients since the Program's inception in 2011. In many instances, revocations resulted not from sudden improvement of veterans' injuries, but rather from arbitrary reassessment determinations of the veterans, which cannot be reconciled with the veterans' actual need for support.

Petitioners' revocation from the Program followed this formula. Jeremy is legally blind, and suffers from Traumatic Brain Injury and chronic back pain caused by his combat service in Iraq and Afghanistan. In 2013, VA found Jeremy eligible for the Program, with his wife, Maya, serving as his caregiver. Maya subsequently quit her job to care for Jeremy full time. For years, VA repeatedly reassessed Jeremy and consistently upheld his eligibility. However, in 2018, despite no improvement to Jeremy's injuries and no change in his need for caregiving, VA decided he was no longer eligible and revoked him from the Program. The available Veterans Health Administration ("VHA") appeal process, which is non-judicial and performed by VHA staff, did not correct the error.

Because VA has wrongly determined there is no review under the VJRA, and the Board is legally bound to follow that instruction, Petitioners seek this Court's intervention.

Petitioners request the Court (1) declare that the Secretary's prohibition of Board review of decisions under the Caregiver Program is contrary to law; (2) order the Secretary to allow Board review of Petitioners' claim; (3) enjoin the Secretary from denying Board review of future decisions under the Program; (4) set a briefing schedule for certifying a class of similarly situated veterans and caregivers; and (5) order other relief as may be just and appropriate, including an award attorneys' fees for Petitioners.

II. STATEMENT OF THE CASE

A. Background of Judicial Review of Veterans' Benefits

Prior to 1988, veterans were not entitled to judicial review of benefits decisions. This changed with the VJRA of 1988,[1] which clarified the Board's jurisdiction and created a comprehensive judicial review process. Two sections codified in Title 38 govern the Board's jurisdiction.[2] First, § 511(a) provides: "The 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 or the dependents or survivors of veterans." Second, § 7104(a), titled "Jurisdiction of the Board," provides that issues under § 511(a) are "subject to one review on appeal to the Secretary" and "[f]inal decisions on such appeals shall be made by the Board." From the Board, a veteran may appeal to this Court, and thereafter to the Federal Circuit. §§ 7252, 7292. The driving

[1] Pub. L. No. 100-687, Tit. III, 102 Stat. 4105, 4113–22 (codified throughout 38 U.S.C.).
[2] All statutory citations in this Petition are to Title 38 unless stated otherwise.

principle of the VJRA was to ensure fairness in the adjudication of veterans benefits. *Freeman v. Shinseki*, 24 Vet. App. 404, 415 (2011).

B. The Secretary's Unsupported Determination that Congress Intended to Insulate the Caregiver Program from Board and Judicial Review

Congress created the Caregiver Program in 2010[3] to provide benefits to caregivers of seriously injured combat veterans, including healthcare and, in some cases, a monthly stipend. § 1720G(a)(3); 38 C.F.R. § 71.40. To receive Caregiver benefits, VA must find, *inter alia*, that the veteran has a "serious injury" "incurred or aggravated in the line of duty" and requires "personal care services." § 1720G(a)(2). The "personal care services" element can be met by, *inter alia*, (1) "[a]n inability to perform an activity of daily living," (2) "[a] need for supervision or protection" due to certain injuries, or (3) if the veteran is 100% disabled and "has been awarded special monthly compensation that includes an aid and attendance allowance." 38 C.F.R. § 71.20(c); § 1720G(a)(2)(C).

Under the "Construction" section of the statute, § 1720G(c)(1) states, "[a] decision by the Secretary under this section affecting the furnishing of assistance or support shall be considered a medical determination." Congress did not provide any clarity as to what it intended by this provision—for example, what is a "medical determination," and what is the effect of a decision being "considered" a medical determination. There is no clarity on the face on the statute, and the legislative history is similarly silent.

Nevertheless, VA determined during rulemaking that the reference to "medical

[3] Caregivers and Veterans Omnibus Health Services Act of 2010, Pub. L. No. 111-163, Tit. I, 124 Stat. 1171, 1132–1139. VA implemented the Program at 38 C.F.R. § 71.10 *et seq*. 76 Fed. Reg. 26148 (May 5, 2011), *as amended* 80 Fed. Reg. 1357 (Jan. 9, 2015).

determination" was an implied reference to a VA regulation—38 C.F.R. § 20.104(b)—which states "[m]edical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond the Board's jurisdiction." **A0010**.[4] From this inference alone, VA concluded that Caregiver Program decisions "may not be adjudicated in the standard manner as claims associated with veterans' benefits." *Id*.[5] VA did not consider whether the "medical determination" language in the statute could have been a reference to other VA rules that use that same phrase, *e.g.*, the *Colvin* rule, which places procedural limitations on the Board's ability to render a "medical determination."[6]

C. VA's Administration of the Caregiver Program Without VJRA Review Has Resulted in Inconsistencies and Widespread Wrongful Denial of Benefits

Since its inception, VA has failed to administer the Program consistent with basic due process requirements, including ensuring against the arbitrary and inconsistent deprivation of benefits. As an initial matter, the Government Accountability Office ("GAO") reported in 2014 that VA "significantly underestimated the demand" for the Program—originally estimating that 4,000 applications would be approved by the September 2014, yet in reality 15,600 applications were approved by May 2014. **A0042–**

[4] This regulation was codified at 38 C.F.R. § 20.101(b), but has since been redesignated at § 20.104(b). 84 Fed. Reg. 138, 177 (Jan. 18, 2019) (final rule).
[5] Under VA's construction, even *non-medical* issues—such as whether the veteran served in the "line of duty"—are deemed "medical determinations" and are thus excluded from VJRA review. **A0010**. The only review available is two levels of appeals to VHA staff within the VHA system. *See* VHA Directive 1041.
[6] *See Johnson v. Derwinski*, 3 Vet. App. 16, 18 (1991) (emphasis added) (citing *Colvin v. Derwinski*, 1 Vet. App. 171, 175 (1991)).

43, 56. Given this oversight, GAO reported that the Program's obligations of $30.8 million in 2011 would increase ten-fold to an estimated $305.7 million by 2015. **A0038**.

Between the remainder of 2014 through 2015, VA approved several thousand more applications. **A0110** (table B.2). However, during this same period, VA began revoking veterans from the Program in substantial numbers: 2011 (15 revocations), 2012 (367), 2013 (1,090), 2014 (1,811), 2015 (3,078), 2016 (4,310), and 2017 (3,934). *Id*. Between 2015 and 2017, the media began reporting on widespread wrongful revocations. *See* **A0123–136**. VA denies "any cuts to the size or funding," **A0132**, or that "rising costs and staff needs had pressured medical centers to review caregivers' eligibility," **A0126**. However, VA's own revocation data—showing a *ten-fold increase* in revocations from 2012 to 2015, **A0110**—suggests VA altered its implementation of the eligibility criteria to increase revocations in light of the unexpected *ten-fold increase* in costs, **A0038**.

In response to the reports, VA issued a memorandum in April 2017 suspending revocations while the Program "undergo[es] an internal review to evaluate consistency in revocations." **A0137–138**. In May 2017, VA issued a press release noting the "concerns about inconsistent application of eligibility requirements for the program" and announced an extension of the suspension "to make sure everyone…has clear guidance on enrollment criteria." **A0139**. And in July 2017, VA announced that the review revealed "inconsistent practices in implementing [appeals] across medical centers," which were identified as "areas of significant concern." **A0140–143**. VA issued new directives and subsequently resumed "full operations," including revocations. **A0143**.

Despite these new directives, however, VA's revocation data reveals that it

revoked 4,290 veterans from the Program the following year (2018)—nearly the highest revocation rate since the Program's inception. **A0110** (table B.2). Congress and the media took note and continued to report on the problems. In April 2018, Senators wrote to the Secretary about the "inadequate, unclear, and inconsistent explanations" for revocations, and requested "a retrospective review of the eligibility determinations." **A0144–145**. Thereafter, the media again began reporting on widespread arbitrary revocations, **A0146–156**, including double and triple amputees being arbitrarily revoked and downgraded, *see* **A0157–177**. In August 2018, the VA OIG issued an audit report further detailing VA's mismanagement of the Program, including lack of clear guidance on revocation procedure, failure to consistently monitor/document health conditions, failure to establish effective governance/accountability, and significant delays in processing applications.[7]

In December 2018, the Secretary was called to answer questions before a joint session of the House and Senate Veterans' Affairs Committees. The Secretary was asked about the reports of arbitrary revocations, including the NPR story regarding the double and triple amputees, and he was asked to "immediately reinstate a ban on downgrades and terminations until VA can demonstrate to [Congress] that the serious management problems have been corrected and these types of outrageous errors will not occur again."[8]

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[7] **A0189** ("[R]egulations and the directive do not specify the steps…to determine if a veteran is no longer eligible for the program."); **A0192–201** (recommending "steps to ensure caregiver support coordinators are properly applying eligibility criteria"); **A0203** (recommending "steps to ensure the accuracy of all veteran eligibility determinations"). GAO reported that VA had only implemented two of the six recommendations. **A0240**.

[8] Senator Patty Murray, *Senator Murray Grills VA Secretary Wilkie on Caregivers Program During Senate Hearing*, YouTube (published Dec. 21, 2018), *available at* https://www.youtube.com/watch?v=t4SnLss28po&feature=youtu.be.

The Secretary responded that the "[NPR] story[,]…that problem was corrected within 24 to 48 hours," and in response to further pressing that these arbitrary revocations and downgrades are not "isolated incidents," he responded: "those cases[,]…my understanding[,] have been corrected because of directives from [VA] that people were not reading the regulations properly." Sen. Murray, YouTube, *supra* note 8.

Despite the Secretary's claim that the cases reported by NPR were fixed and the widespread revocations were ostensibly "corrected," the Secretary nevertheless agreed that "no one else would be downgraded or kicked out of the program until [VA] look[s] and make[s] sure that the regulations are being implemented at every level correctly."[9] Thus, VA issued a memorandum again suspending revocations and downgrades "until further notice," **A0263**, citing "continued concerns…about inconsistent application of eligibility requirements by VA medical centers." **A0264**. In February 2019, Senators again wrote to the Secretary citing "documented evidence of wide-ranging inconsistency and clear, inexcusable errors in VA's eligibility decisions." **A0265**.[10]

Given the confidential nature of VA's Caregiver determinations and the lack of any meaningful and transparent appeal process, it is difficult to ascertain what is causing these widespread revocation, downgrades, and other adverse findings. The media reports

[9] Sen. Murray, YouTube, *supra* note 8. It is unclear which "directives" the Secretary was referring to that ostensibly corrected the revocation problems. The Senator was asking about *recent* reports of widespread revocations (late 2018), but the directives VA issued in response to the pre-2017 revocation reports were issued in July 2017.

[10] The Senators further implored the Secretary to "reverse [his] trend of previous years" of "request[ing] insufficient funding as compared to [VA's] own prior estimates" to "ensure the program is fully funded." **A0265**.

provide some details in individual cases, and while in those cases the errors are blatant (*e.g.*, downgrading a triple amputee), the reports lack detail on the claims processes.

In January 2019, however, seven caregivers filed a class action in the Court of Federal Claims. **A0279–323**. They detailed rampant legal errors committed by various VA facilities across the country.[11] In response, the U.S. moved to dismiss for lack of jurisdiction, arguing Caregiver benefits are "benefits" under § 511(a), and therefore "any benefits-related claims…are categorically outside the scope of [the court's] jurisdiction and would ordinarily be appealed through the VJRA."[12] The court dismissed the case on jurisdictional grounds, concluding that § 511(a) governs Caregiver benefits, and therefore § 511(a) "precludes [the] court from reviewing decisions of the Secretary" relating to Caregiver benefits. *Tapia v. United States*, 146 Fed. Cl. 114, 135 (2019).[13]

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[11] These errors include VA's (1) refusing to allow the veterans' primary care team to be involved in the eligibility determination and refusing to consider private treatment records, **A0295–296, 302–303, 306, 310–311**; (2) failing to provide adequate notice of the basis for revocations, **A0305–306, 311, 314**; (3) revoking eligibility or requiring a full reassessment if the veteran moves from one region to another, **A0309, 313–314**; and (4) placing arbitrary time restrictions on when a veteran can reapply after being denied or revoked, **A0311** (one year); *see also* **A0176** (six months).

[12] **A0328–331** (also arguing that the "medical determination" provision precludes jurisdiction); *see also* **A0337–339** (also arguing that any jurisdictional questions should be resolved by appealing to the Veterans Court and ultimately to the Federal Circuit).

[13] The *Tapia* court did not analyze the conflict between VA's construction of the "medical determination" provision and the express provisions of the VJRA because the issue was not in dispute, as both parties asserted that Caregiver decisions are "medical determinations." Indeed, this assertion was the premise for the plaintiffs' asserting jurisdiction in the Court of Federal Claims. *See* 146 Fed. Cl. at 129 ("[P]laintiffs argue that, because determinations by the Secretary under the [Caregiver Program] are considered medical determinations, their claims are precluded from the standard review path enjoyed by other types of veterans' benefits, and, therefore, jurisdiction should be available [Court of Federal Claims], in addition to the VHA's clinical appeals process.").

D. VA's Wrongful Revocation of Petitioners' Caregiver Benefits

Petitioner Jeremy Beaudette served in the Marine Corps for 10 years—from 2002 to 2012—including five combat tours in Iraq and Afghanistan. **A1135**. He was exposed to IED blasts, a vehicle rollover, and mortar, rocket, and small arms fire. *Id*. He suffered multiple concussions during his combat tours, causing Traumatic Brain Injury ("TBI") and rendering him legally blind. **A1147, 1149**. Upon medical discharge, VA rated him 100% disabled and found him in need of "aid and attendance" benefits. **A1142**. His rating accounts for TBI, vision loss, PTSD, depression, memory loss, degenerative back diseases, migraines, radiculopathy, and musculoskeletal disorders. **A0985–86**.

Jeremy and his wife, Maya, applied for Caregiver benefits in March 2013. They were found eligible due to (1) Jeremy's inability to perform activities of daily living, (2) his substantial need for supervision/protection, and (3) because Jeremy was rated 100% disabled with special monthly compensation that includes an aid-and-attendance allowance. **A1118–58**; *see* 38 C.F.R. § 71.20(c). VA further found that, due to Jeremy's chronic back pain and blindness (caused by TBI), he needs assistance with personal hygiene, dressing, toileting, preparing meals, housework, shopping, transportation, using the telephone, and managing medications and finances. **A1118–19, 1122**.

After over a year of caring for Jeremy and working full-time, Maya was forced to quit her job in 2014 in order to provide full-time care for Jeremy.[14] Petitioners remained

[14] **A1118–19** (April 2013: "Maya recently started working for TSA, she has had difficulty with getting time off for pt's appts, is now contemplating reducing hours"), **A0912** (Nov. 2013: "when she is working she is very worried about him being home alone"), **A0872** (June 2014: "She has not been able to work in eight months and the TSA stated she must

on the Program for over four years, during which VA repeatedly assessed Jeremy's needs and consistently found him eligible, including as recently as August 2017.[15]

In October 2017, VA contacted Petitioners to schedule an in-person assessment at a VA facility, which was expected to last three hours. At the time, Jeremy was recovering from two major back surgeries relating to his service-connected back disabilities.[16] Petitioners requested that VA delay the in-person assessment while Jeremy recovered.[17] VA declined this request and proceeded with the assessment based on the written record. **A1175–76**. Despite the fact that Jeremy's disabilities had not improved—nor had his need for caregiving decreased—VA decided he was no longer eligible. **A0611**. These findings were unsupported by the record, particularly in light of the most recent "in home assessment" (April 2017) and the most recent "phone assessment" (Aug. 2017)—both of which demonstrated Petitioners' eligibility.[18] VA also apparently ignored the fact that Jeremy also remained eligible for the Program in light of his special monthly

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report to work next week or risk losing her job"), **A0837** (Nov. 2014: "[Maya] shared that she quit her job with TSA because of the Caregiving needs").

[15] **A0836** (Nov. 2014); **A0780, 786** (May 2015); **A0704–21** (May 2016); **A0687–80** (Aug. 2016); **A0679–81** (Nov. 2016); **A0663–66** (Feb. 2017); **A0647–50** (April 2017); **A0615–19** (Aug. 2017).

[16] **A0616** ("Vet had surgery in August to patch leak in spinal fluid after two months of IV antibiotics from remainder of [implant] that was infected next to [] spine").

[17] **A1175–76** ("we asked for a reasonable accommodation to push us a few weeks [until] he fully recover[ed] to be able to attend a three hour appointment").

[18] **A0647–50** (**April 2017**: "[n]eeds assistance" with "[b]athing and personal hygiene," "[d]ressing," "[p]reparing meals," "[h]ousework," "[s]hopping," "[t]ransportation," and "[m]anaging medications [and] finances"); **A0615–18** (**Aug. 2017**: "Vet has not been able to walk since prior to surgery," "Vet requires skilled transfers, help[] with bathing, dressing, toileting," and "veteran has had two major back [surgeries] in the past three weeks"); **A0616** ("Vet has required increased help with ALDs and IADLs since the surgeries, and has residual headaches that are debilitating").

compensation/aid-and-attendance award. *See* 38 C.F.R. § 71.20(c)(4). VA informed Petitioners of the denial with boilerplate language in a February 2018 letter. **A1169–70**.

Petitioners appealed under the VHA process. **A1171–78**. VHA denied the appeal in July 2018 with another boilerplate letter. **A1179–80**. Petitioners appealed to the VISN director. **A1181–82**. The appeal was denied, citing Jeremy's inability to attend the October 2017 in-person evaluation. **A1183–84**. Petitioners wish to appeal the revocation to the Board based on: (1) VA's unsupported and inconsistent findings regarding Jeremy's need for support, (2) VA's legal error in ignoring Jeremy's eligibility in light of his special monthly compensation/aid-and-attendance award, 38 C.F.R. § 71.20(c)(4), and (3) VA's violation of Petitioners' due process rights by declining their reasonable request for a delay of the in-person assessment while Jeremy recovered from surgery.[19]

III. JURISDICTION AND STANDARD OF REVIEW

This Court has the power to issue a writ of mandamus pursuant to 28 U.S.C. § 1651(a) in aid of its prospective jurisdiction under 38 U.S.C. § 7252. *See Monk v. Wilkie*, 30 Vet. App. 167, 170 (2018). VA's policy of refusing Board review results in depriving this Court of its proper jurisdiction, and thus, this Court has jurisdiction to intervene. The

[19] Petitioners filed a notice of disagreement (NOD) on August 12, 2019, for Board review, **A1185–91**, but have received no response. Thereafter, on October 30, 2019, relating to Jeremy's disability benefits, VA increased Jeremy's "aid and attendance" rating, finding he "need[s] assistance with individual daily care with bathing, clothing, food prep, planning, organizing, cleaning, medication administration, emotional support, and driving to specialist appointments." **A1244–46**. VA also awarded Jeremy the highest level of special monthly compensation in relation to his aid-and-attendance allowance. *Id*. In light of this, Petitioners reapplied for the Program on December 4, 2019. However, VA again denied benefits, again ignoring Jeremy's eligibility under 38 C.F.R. § 71.20(c)(4). Petitioners are currently appealing that decision in the VHA review process.

Court has authority to "hold unlawful and set aside" VA regulations found to be "not in accordance with the law," "contrary to constitutional right," or "in violation of a statutory right[.]" § 7261(a)(3). The Court may grant a writ of mandamus compelling VA officials to act when the petitioner has demonstrated (1) a lack of adequate alternative means to attain the desired relief and (2) a clear and indisputable right to the writ. *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004); U.S. Ct. Vet. App. R. 21(a)(3). The Court also must be convinced the writ is warranted under the circumstances. 542 U.S. at 381.

IV. LEGAL ARGUMENT[20]

A. VA Cannot Show a "Clearly Expressed Congressional Intention" to Abrogate the VJRA's Review Process for Caregiver Claims

As VA concedes, the Caregiver Program provides "benefits" within the scope of § 511(a).[21] Therefore, by default under § 7104(a), final Caregiver decisions (like other "benefits") are permitted to be appealed to the Board. VA's construction of the "medical determination" provision, § 1720G(c)(1), as an implicit reference to 38 C.F.R. § 20.104(b) designed to preclude Board review thus conflicts with § 7104(a)'s express Board-review mandate. As a result, VA's construction requires a conflict analysis to determine whether Congress impliedly abrogated VJRA rights for Caregiver benefits.

[20] Petitioners have no alternative to relief apart from seeking a writ from this Court. Though Petitioners sought Board review nearly a year ago (and to date have received no response), **A1185–91**, the Board cannot disobey the Secretary's instructions, § 7104(c), and thus seeking Board review to invalidate the Secretary's policy is a "'useless act' and would be futile." *See Wolfe v. Wilkie*, 32 Vet. App. 1, 39 (2019). Indeed, the Board has already followed the Secretary's no-Board-review instruction in a separate case. **A0025**.

[21] *See* **A0328–30, 337–340, 1249–50, 1257, 1261–62**; *see also Tapia*, 146 Fed. Cl. at 135 ("the Family Caregivers Program is a 'law that affects the provision of benefits by the Secretary to veterans.'") (quoting § 511(a)).

"When confronted with two Acts of Congress allegedly touching on the same topic, [a court] is not at liberty to pick and choose among congressional enactments and must instead strive to give effect to both." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1624 (2018) ("*Epic*") (quotations omitted). "A party seeking to suggest that…one displaces the other, bears the heavy burden of showing a clearly expressed congressional intention that such a result should follow. The intention must be clear and manifest." *Id*. (quotations omitted). In analyzing the claimed conflict, courts "come armed with the stron[g] presum[ption] that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id*. (quotations omitted). Courts presume that "Congress had given serious thought to the earlier statute," and, as a result, "[b]efore holding that the result of the earlier consideration has been repealed or qualified, it is reasonable for a court to insist on the legislature's using language showing that it has made a considered determination to that end." *Reg'l Rail Reorg. Act Cases*, 419 U.S. 102, 134 (1974) (quotations omitted).

Here, there is no "clearly expressed congressional intention" to abrogate § 7104(a)'s Board-review mandate for Caregiver benefits or other "language showing that [Congress] made a considered determination to that end." Congress did not "specifically address[]" the VJRA in the Caregiver statute; nor did Congress express any intention to alter "or suspend [the VJRA's] normal operations" for processing benefits appeals. To support its position, VA merely points to its own regulation that bars Board review for medical treatment decisions and (without any support) asserts that Congress's use of the term "medical determination" is an implicit reference to that regulation. This is a far cry

from the "clearly expressed congressional intention" the law requires.

The "medical determination" provision is vague and cryptic at best. It is tucked away in the "Construction" section, as opposed to a section titled "Appeals" or "Judicial Review."[22] Congress did not define the term "medical determination" or otherwise provide context to its use of that term. Congress expressed no intention that its use of that term was incorporating a VA regulatory effect of the term. And Congress expressed no intention—much less a "clear and manifest" one—to alter the VJRA's application to Caregiver benefits. Section 7104(a), on the other hand, is clear and explicit: appeals to the Board must be made available for "all benefits decisions."[23] VA cannot abrogate these well-established rights based on indefinite congressional expression.[24]

To nullify the VJRA's clear mandate, VA must produce more than a supposed implied reference to a VA regulation and infer from that reference that Congress intended to revoke a right created by a *separate* statute, without so much as acknowledging the separate statute or explaining what effect that implied reference should have.[25] Had

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[22] *See Henderson v. Shinseki*, 562 U.S. 428, 438–40 (2011) (placement of timing rule in a statutory section titled "Procedure," rather than the section titled "Organization and Jurisdiction," provided inference that the rule was not intended to be jurisdictional).
[23] *Wages v. McDonald*, 27 Vet. App. 233, 236 (2015) (noting "clear congressional intent" under §§ 511(a) and 7104(a) that the Board has jurisdiction "on all benefits decisions").
[24] *See St. Martin Evangelical Lutheran Church v. South Dakota*, 451 U.S. 772, 787–88 (1981) ("indefinite congressional expressions cannot negate plain statutory language and cannot work a repeal or amendment by implication").
[25] Even if VA shows § 1720G(c)(1) is an implied reference to the VA regulation, Congress cannot alter a statute by impliedly approving a regulation. *Commissioner v. Acker*, 361 U.S. 87, 93 (1959) ("Congress could not add to or expand this statute by impliedly approving the regulation"); *Louisville & N. R. Co. v. US*, 282 U.S. 740, 759 (1931) ("approval of administrative authorities may be persuasive in the interpretation of doubtful provisions of a statute, [it] cannot alter provisions that are clear and explicit").

Congress intended to alter the standard review framework for veterans' benefits for the newly-created Caregiver Program, it would have done so explicitly.[26] Congress could have, for example, stated, "The Board may not review any decision under this Section," or by expressly amending the VJRA to exempt the Caregiver Program. Congress could have achieved this result by any numbers of methods that would not include implied and vague language purportedly requiring the reader to "connect the dots" to an unidentified VA regulation and requiring the reader to make a further inference as to what affect that implicit reference should have on review rights created by a separate, unidentified statute. Veterans, particularly those injured in the line of duty, are entitled to more clarity from their lawmakers when their benefits are at stake, particularly if the purported intention is to alter fundamentally the default claims process that has stood in place for decades.

Notably, eligibility determinations under the Program are no different from determinations made under other VA benefits programs that *are* entitled to VJRA review. Specifically, "aid and attendance" benefits under § 1114 and 38 C.F.R. § 3.352 require establishing a "need for regular aid and attendance." The determinations are nearly identical under both benefits programs and the standards use nearly identical language.[27]

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[26] *See Freeman*, 24 Vet. App. at 415 ("[H]ad Congress wished to bar this Court's jurisdiction, it could have easily done so.") (citing § 7252(b) as an example of when Congress has explicitly precluded VJRA review: "The Court may not review the schedule of ratings for disabilities…or any action of the Secretary in adopting or revising that schedule."); *see Epic*, at 1626 ("[W]hen Congress wants to mandate particular dispute resolution procedures it knows exactly how to do so.").

[27] *Compare* 38 C.F.R. § 3.352(a) ("aid and attendance" determinations consider, *e.g.*, the veterans' inability to "dress or undress" or to keep "clean and presentable," inability to "feed," inability to attend to the "wants of nature," need of assistance with prosthetics, or incapacity requiring care on a regular basis for protection), *with* 38 C.F.R. § 71.15

Yet claimants for "aid and attendance" benefits are entitled to VJRA review. Thus, when Congress created Caregiver benefits using similar eligibility criteria as "aid and attendance" benefits, it is fair to assume Congress intended for both benefits to be adjudicated through the same standard claims process created for VA benefits: the VJRA.

The Court's duty is to "strive to give effect to both" the VJRA and the Caregiver statute so as to avoid the otherwise ensuing statutory conflict. *Epic*, at 1624. One solution is to construe the "medical determination" provision not as a deprivation of VJRA review, but rather as an evidentiary and procedural safeguard *during* such review, as articulated in *Colvin*, 1 Vet. App. at 175. The *Colvin* rule holds that "[t]he Board cannot make a **medical determination** based on its own opinion," *Johnson*, 3 Vet. App. at 18 (emphasis added), and "when a Board inference results in a 'medical determination,' the basis for that inference must be independent and it must be cited," *Kahana v. Shinseki*, 24 Vet. App. 428, 434–35 (2011).[28] Thus, the "medical determination" language would not be interpreted as an unprecedented step of *implicitly* excluding certain benefits from

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(Caregiver decisions consider, *e.g.*, inability to "dress or undress," inability to bathe, inability to groom in order to keep oneself "clean and presentable," inability to "toilet or attend to toileting without assistance," inability to "feed," need of assistance with prosthetics, or "difficulty with mobility"). The standards are so similar that eligibility for special monthly compensation for aid-and-attendance benefits automatically establishes the primary requirements for the Caregiver Program. *See* 38 C.F.R. § 71.20(c)(4).

[28] This Court first articulated this rule in *Murphy v. Derwinski*, 1 Vet. App. 78, 81 (1990), in response to the Board's improper practice of rendering medical determinations based on the physician Board members' knowledge—or based on "generally established" medical principles—without creating a record sufficient for judicial review. Veterans Benefits Manual 14.5.7 (2018); James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later*, 66 N.Y.U. Ann. Surv. Am. L. 251, 272–73 (2010). The Court then reinforced its holding in *Colvin*, and it has continuously enforced the *Colvin* rule as a due process safeguard ever since. *See Kahana*, 24 Vet. App. at 434–435.

VJRA review, but rather as an incorporation of the *Colvin* rule to ensure the Board does not render improper medical determinations when reviewing Caregiver eligibility findings. In sum, it is VA's burden to show a "*clearly expressed* congressional intention" to exclude Caregiver decisions from VJRA's review, and "[t]he intention must be *clear and manifest*." *Epic*, at 1624 (emphasis added). VA cannot meet this high burden.

B. Other Applicable Canons Foreclose VA's Construction

"[O]nly upon a showing of clear and convincing evidence of a contrary legislative intent should the courts restrict access to judicial review."[29] Further, the pro-veteran canon mandates that interpretive doubt should be resolved in the veterans' favor.[30] VA's construction results in wholesale preclusion of Board and judicial review, leaving veterans without rights to effective review of adverse decisions and thereby risking arbitrary and inconsistent revocations. These canons counsel that the Court should instead favor an interpretation that would preserve VJRA review, for example, by interpreting the "medical determination" provision as an incorporation of the *Colvin* rule.[31]

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[29] *Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 671–72, n.3 (1986); *Freeman*, 24 Vet. App. at 414–16 ("unless Congress *explicitly* prohibits it, there is a strong presumption in favor of judicial review"); *id*. (finding no congressional intent to exclude fiduciary appointment determinations from VJRA review; noting the fiduciary statute "does not contain an explicit bar to judicial review"); *c.f. Isom v. West*, 12 Vet. App. 287, 287 (1999) (ordering briefing on whether VA's regulatory exclusion of Board review for "medical determinations" "violate[s] the statutory provisions defining the jurisdiction of the Board," including in light of the "presumption of judicial review").

[30] *Henderson*, 562 U.S. at 441; *Trafter v. Shinseki*, 26 Vet. App. 267, 272 (2013) (pro-veteran canon overrides *Chevron* step two if VA's interpretation "conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions").

[31] To the extent VA can show a congressional intention to preclude VJRA review, that preclusion should be narrowly construed to the express language of the statute: "A

Finally, under the constitutional-avoidance canon, if one interpretation raises serious constitutional doubts, the court may adopt an alternate interpretation that avoids the constitutional problems. *Jennings v. Rodriguez*, 138 S. Ct. 830, 836 (2018). In determining whether VA's operation of the Program raises due process concerns,[32] the Court applies the *Mathews v. Eldridge* test.[33] First, wrongful revocation of Caregiver benefits results in a significant hardship to the veteran, caregiver, and their family. Veterans rely on these benefits for health care and financial support, particularly where the caregiver has given up his or her career in reliance on the provision of benefits (including a stipend) in order to care for the veteran. Second, the current framework invariably results in inconsistent application of eligibility criteria, legal errors, and an unreasonably high risk of erroneous revocations—despite VA's many unsuccessful attempts to fix the problems. *See supra* § II.C. Board review would have the impact of correcting these errors.[34] Third, permitting Board review would not cause significant

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decision [] under this section *affecting the furnishing of assistance or support* shall be considered a medical determination." § 1720G(c)(1) (emphasis added). Thus, questions of law or constitutional claims should be subject to the VJRA. For example, at the very least, Petitioners should be allowed to seek Board review of (1) VA's legal error in failing to consider Jeremy's aid-and-attendance award under 38 C.F.R. § 71.20(c)(4) as supporting eligibility for the Caregiver Program, and (2) whether VA violated Petitioners' due process rights by declining their reasonable request for a delay of the in-person assessment while Jeremy recovered from surgery.

[32] Veterans have a property interest in their benefits, *see Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009), and therefore they are entitled to protection from "arbitrary" revocation, *Fuentes v. Shevin*, 407 U.S. 67, 80–81 (1972).

[33] 424 U.S. 319, 335 (1976) (courts balance (1) the private interest; (2) the risk of erroneous deprivation and value of extra safeguards; and (3) the government's interest).

[34] *See Cook v. Snyder*, 28 Vet. App. 330, 336 (2017) ("Congress's decision to statutorily codify that right reflected the important procedural nature and the critical role of Board hearings in the VA benefits system."); *id*. at 337 (noting correlation between Board

burden to VA, as the Board already reviews similar issues for disability benefits, particularly in the context of aid-and-attendance benefits, § 1114.

Finally, VA's construction results in arbitrary disparate treatment of veterans in violation of substantive due process.[35] First, due to the lack of meaningful review, whether a veteran and caregiver are revoked from the Program depends heavily on where they reside.[36] Second, disabled veterans applying for aid-and-attendance receive VJRA review, but disabled combat veterans applying for Caregiver benefits do not—yet determinations under these benefits are nearly identical. There is no rational basis for this disparate treatment. Thus, the current operation of the Program creates serious constitutional doubts. The constitutional avoidance canon therefore cautions against VA's construction and favors a construction that preserves VJRA review.

V. CONCLUSION

The Court should grant the Petition and correct VA's unlawful practice. VJRA's express provisions require Board review, and VA cannot violate this clear mandate.

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hearings and successful claims); *see also* **A1295** (35.75% success rate for Board appeals in 2019). In fact, VA has successfully defended against due process challenges by citing to the review rights accorded by the VJRA. *See* **A1319–23**; *E. Paralyzed Veterans Ass'n v. Sec'y of Veterans Affairs*, 257 F.3d 1352, 1358–59 (Fed. Cir. 2001).

[35] *See Strott v. Derwinski*, 1 Vet. App. 114, 117 (1991) (citing *Flemming v. Nestor*, 363 U.S. 603, 611 (1960) (benefits statute violates due process "if the statute manifests a patently arbitrary classification, utterly lacking in rational justification.")).

[36] Certain VA health care centers saw decreases of over 80% in the number of approved caregivers between 2014 and 2018: Ralph H. Johnson VAMC (Charleston, SC): 93% decrease; South Texas Veterans HCS (Kerrville and San Antonio, TX): 88% decrease; Charlie Norwood VAMS (Augusta, GA): 85% decrease; Northern Arizona VA HSC (Prescott, AZ): 84% decrease. **A0151**. Other VA health care centers saw increases of over 200% in the number of approved caregivers between 2014 and 2017: VA Greater Los Angeles HCS (217% increase); Phoenix VA HCS (208% increase). **A0133**.

Respectfully submitted,

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