UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
625 Indiana Avenue N.W., Suite 900
Washington, D.C. 20004

KATHLEEN EGBERT; PATRICIA DARLENE HOWELL CORNEILSON; SCOTT STEARNS; AQUARIAN TABERNACLE CHURCH; and CORRELLIAN NATIVIST CHURCH INTERNATIONAL, INC., Petitioners, v. R. JAMES NICHOLSON, SECRETARY OF VETERANS AFFAIRS, in his official capacity; WILLIAM F. TUERK, UNDER SECRETARY FOR MEMORIAL AFFAIRS, in his official capacity; and LINDEE LENOX, ACTING DIRECTOR, NATIONAL CEMETERY ADMINISTRATION'S MEMORIAL PROGRAMS SERVICE, in her official capacity, Respondents.	Vet. App. No. 06-2773

REPLY IN SUPPORT OF PETITION FOR MANDAMUS

INTRODUCTION

After over nine years of agency inaction, Petitioners filed this case to vindicate their fundamental right to religious liberty. All veterans, regardless of faith, deserve to have their individual religious expression recognized in military cemeteries on an equal basis.

But rather than addressing the almost decade-long delay in processing Petitioners' applications for burial-related benefits, Respondents (collectively, "the Agency" or "VA") seek to prolong that delay by arguing that this Court lacks jurisdiction to hear this case. The Agency's jurisdictional theory is inconsistent with prevailing case law and with Congress's intent to create a streamlined system to adjudicate veterans' benefits

claims in a consistent, timely fashion. As discussed more fully below, this Court plainly has both the mandamus authority and subject matter jurisdiction to remedy the VA's unlawful inaction. No other conclusion is possible under cases such as *Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005), and *Beamon v. Brown*, 125 F.3d 965 (6th Cir. 1997), which clearly recognize this Court's ability to compel Agency action on unreasonably delayed benefits decisions.

On the merits, the VA offers no justification for its extended inaction, other than a plea for leniency based on promises to act at some unspecified point in the future. The Agency does not – and, indeed, could not – argue that that over nine years of delay is somehow legally "reasonable." Nor does the VA even attempt to reconcile its history of bureaucratic delay with the fact that, during the pendency of Petitioners' applications over the past decade, the Agency approved at least six other emblems of belief for use on military headstones and grave markers. Significantly, the Agency does not address the clearly established law that demands that federal agencies accord equal treatment to all religions.

This is an easy case, fully warranting resolution with a prompt writ of mandamus. This Court should order the Agency to fulfill its obligations and stop its improper religious favoritism.

ARGUMENT

I. THIS COURT IS THE PROPER FORUM FOR PETITIONERS' ACTION.

The VA does not dispute this Court's general statutory authority to issue a writ of mandamus to "compel action of the Secretary . . . unreasonably delayed," 38 U.S.C. § 7261(a)(2). *See* Answer at 5-6. Nor does the Agency deny that this Court has jurisdiction to issue such extraordinary relief if the Board of Veterans Affairs ("BVA") would have jurisdiction to hear an appeal of an approval or denial of Petitioners' pending applications. *See id.* at 7-14. As the VA acknowledges, that issue turns on the broader question whether this case arises "under a law that affects the provision of benefits." 38

U.S.C. § 511(a). Yet while recognizing, as it must, that the prevailing case law interprets that statutory provision quite broadly, the Agency nonetheless argues for an "exception in this case." Answer at 13. Such an exception, however, is unwarranted here. As the Agency concedes, the BVA undoubtedly would have jurisdiction to hear a case involving the inscription of certain information inscribed on a decedent's grave marker (specifically, the person's name and the number of the grave). *See* Answer at 8. Committing those claims to the exclusive jurisdiction of the veterans court system, while simultaneously forcing the federal district courts to address related claims about other information on the same decedent's headstone (namely, the emblem of belief), would produce the precisely the inefficient, inconsistent results Congress and the courts have prohibited.

A. This Court Has Mandamus Authority Over Agency Action that Threatens to Defeat Its Appellate Jurisdiction.

Congress passed the Veterans Judicial Review Act ("VJRA") to provide a streamlined method of review for decisions made in the course of administering veterans benefits statutes. The legislation was "intended to produce timely, consistent, and fair decisions for veterans in a truly independent court which will not be burdened by other cases having nothing to do with veterans." *Bates*, 398 F.3d at 1364 (internal quotation marks and citation omitted). The appellate provisions of the VJRA "amply evince Congress's intent to include all issues, even constitutional ones, necessary to a decision which affects benefits." *Hicks v. Veterans Administration*, 961 F.2d 1367, 1370 (8th Cir. 1992). The VJRA gives this Court authority to hear all constitutional and statutory claims associated with a benefits-related decision by the Agency. *See, e.g.*, *Beamon*, 125 F.3d at 969; *Larrabee by Jones v. Derwinski*, 968 F.2d 1497, 1501 (2nd Cir. 1992).

Petitioners filed this action because the Secretary has consistently refused either to grant or deny their longstanding applications, and hence has deprived the applicants of any opportunity to appeal. Agency delays of this sort are threats to this Court's potential

jurisdiction and thus subject to mandamus orders. *See, e.g.*, *Bates*, 398 F.3d at 1359; *Cox v. West*, 149 F.3d 1360, 1363 (Fed. Cir. 1998). Mandamus authority "extends to the potential jurisdiction of the appellate court where an appeal is not then pending but may be later perfected." *FTC v. Dean Foods Co.*, 384 U.S. 597, 603 (1966).

In *Bates*, the Secretary had avoided submitting a Statement of the Case that would have allowed for appellate review. The Federal Circuit ordered this Court to grant a writ of mandamus ordering the Secretary to take the necessary ministerial action to allow review to proceed. *Bates*, 398 F.3d at 1357. Along similar lines, the plaintiffs in *Beamon* challenged a system of rampant delays in processing benefit requests that led to years of systemic delays that frustrated appellate review. The Sixth Circuit held that the case should be initiated in the Court of Appeals for Veterans Claims:

> Contrary to plaintiffs' arguments, there is no reason to believe that this system cannot provide for the adequate adjudication of their constitutional challenges to the process by which the VA decides its benefits decisions. The CVA has the power of mandamus with which it can remedy individuals' claims alleging delay, and there is no reason why the CVA could not consider challenges to VA procedures during the adjudication of individual claims contesting delayed benefits decisions.

Beamon, 125 F.3d at 969. The court in *Beamon* noted how this Court has repeatedly used its authority under both the All Writs Act, 28 U.S.C. § 1651, and the VJRA, 38 U.S.C. § 7261(a)(2), "to issue extraordinary writs when it appears that agency inaction would frustrate its appellate jurisdiction." *Id.* at 968-69 (citing *Friscia v. Brown*, 8 Vet. App. 90, 91 (1995); *Ebert v. Brown*, 4 Vet. App. 434, 437 (1993); and *Erspamer v. Derwinski*, 1 Vet. App. 3, 7-8 (1990)).

For over nine years, the Agency's inaction on Petitioners' headstone applications has frustrated Petitioners' ability to seek redress through the standard appellate process in this Court. Accordingly, the Court undoubtedly has mandamus authority under the All Writs Act and the VJRA to preserve its ultimate jurisdiction, assuming jurisdiction would

lie to address a grant or denial of Petitioners' applications. As discussed below, that is undoubtedly the case here.

B. The BVA, and Hence This Court, Would Have Jurisdiction Over the Secretary's Decision Once It Is Rendered.

As recognized in *Bates*, this Court has jurisdiction over decisions that could feed into the VJRA pipeline. Thus, as Respondents acknowledge, the jurisdictional question ultimately turns on whether the Petitioners could have appealed to the BVA (and then to this Court, *see* 38 U.S.C. § 7252) a decision from the Secretary refusing to allow Wiccan Pentacles to be engraved on veterans' headstones. As the relevant statutory language, case law, and Congressional intent make clear, such an appeal would clearly be permitted.

The VJRA appellate pipeline is open to decisions made "under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. § 511(a). It is irrelevant whether the Secretary's actual decision directly affects veterans' benefits – although in this case it surely will. "The relevant issue under section 511(a) is whether the decision necessarily interpreted *a law* that affects veterans' benefits." *Cox*, 149 F.3d at 1365 (emphasis in original). For that reason, there was CAVC jurisdiction in *Cox* even though the dispute involved a payment to an attorney rather than to a veteran. The statute at issue affected the provision of benefits, and that was enough. *Bates* elaborated on *Cox*, explaining that a law falls within § 511(a) if it is "legislation relating *in whole or in part* to benefits." *Bates*, 398 F.3d at 1365 (emphasis added).

The National Cemeteries Act plainly "affects the provision of benefits" to veterans, either in whole or in part. In that Act – pursuant to which the VA must mark each grave in a national cemetery with "the name of the person buried, the number of the grave, and such other information as the Secretary shall by regulation prescribe," 38 U.S.C. § 2404(c)(1) – Congress directed as follows: "The Secretary shall furnish, when

requested, appropriate Government headstones or markers at the expense of the United States" for the graves of eligible veterans. *Id.* § 2306(a). A statute directing that the Secretary "shall furnish" something "when requested" by a veteran or survivor is unquestionably a law that affects the provision of veterans benefits. It cannot sensibly be said to be anything else.

The Agency argues that this statute, which undoubtedly and on its face affects the provision of benefits, nonetheless falls outside § 511 because the public law containing that provision also included sections that arguably do not affect the provision of benefits. This approach cannot be squared with *Bates*, which clearly held that the proper jurisdictional test simply asks whether the public law at issue deals "in whole or in part" with benefits. *Bates*, 398 F.3d at 1365. The Agency's strained reading turns *Bates* on its head. *Bates* involved an order disqualifying an attorney from representing claimants before the VA. The Federal Circuit recognized that the precise statutory subsection relied upon by the attorney did not affect the provision of benefits, *id.* at 1359-60, but nonetheless held that § 511 applied because the statute as a whole affected the provision of benefits, *id.* at 1362. The essence of *Bates* is that a statute falls within § 511 if any portion of it does. Nothing in *Bates* suggests that a statute that on its face affects the provision of benefits falls outside § 511 if it was enacted as part of a public law that contained other provisions that do not affect the provision of benefits.

In any event, the Agency concedes that some decisions involving headstones would be properly appealable through the VJRA process. *See* Answer at 8. If the Secretary provided a headstone that misspelled the name of the deceased, an item covered by 38 U.S.C. § 2404(c)(1), a survivor undoubtedly could appeal to the BVA and then this Court if the Agency refused to correct the error. It would be an utter waste of judicial resources if that same veteran's family were simultaneously forced to challenge another engraving error – for example, if the VA mistakenly engraved a Serbian Orthodox Cross on the headstone instead of the deceased's preferred Russian Orthodox Cross – in federal

district court. This is essentially the situation Petitioners face: Because of the Agency's policies and inactions, Wiccan veterans may be laid to rest under blank headstones instead of ones engraved with the emblem that correctly reflects their beliefs. Nonetheless, the Agency proposes parsing decisions under one portion of § 2404(c)(1) for appeal to the this Court – "the name of the person buried" – while leaving decisions under another portion of the same sentence for appeal elsewhere. As the Federal Circuit concluded, such "piecemeal adjudication of closely related issues" would "undermine the congressional purpose" of maintaining a unified system of veterans benefits appeals. *Bates*, 398 F.3d at 1365.

The statutory language, legislative intent, and binding case law plainly vest this Court with jurisdiction to hear Petitioners' action, and there is no sound reason to grant the Agency's request for an "exception in this case." Answer at 13.

II. PETITIONERS ARE ENTITLED TO THE REQUESTED RELIEF.

Petitioners are clearly entitled to relief on the merits. They have made valid applications for benefits that the Agency is statutorily authorized to provide. The VA admits that it has received the applications, and admits that for over nine years it has refused – and, in fact, will continue to refuse – to rule on them. The arguments offered in the VA's Answer do not justify the Agency's continued stalling tactics.

A. Petitioners Are Entitled to Relief from the Agency's Arbitrary Refusal to Act for Over Nine Years.

Mandamus relief is warranted here, as Petitioners have amply demonstrated that the VA's inaction "is so extraordinary, given the demands and resources of the Secretary, that the delay amounts to an arbitrary refusal to act, and not the product of a burdened system." *Costanza v. West*, 12 Vet. App. 133, 134 (1999). Indeed, the Agency has not even attempted to rebut Petitioners' allegations and documentary evidence, which indicate that the VA's extended delay has resulted not from an overburdened system, but from the Agency's conscious neglect of its statutory and regulatory duties.

Even if it tried, the VA could not possibly justify its almost decade-long inaction, in light of two simple, undisputed facts. First, in the years since 1997, when the first of Petitioners' applications was filed, the Agency adopted two successive directives governing the adoption of emblems of belief – one in 2001, *see* NCA Directive 3310 (May 9, 2001) (filed with Petition at Attachment 14), and another in 2005, *see* NCA Directive 3310 (Oct. 5, 2005) (filed with Petition at Attachment 22).[1] Without any meaningful explanation, however, the Agency refused to apply either directive to any of Petitioners' long-pending applications. Second, during that same period, the VA demonstrated that it did, in fact, have sufficient time and resources to rule on *other* applications for emblem recognition. Indeed, while Petitioners' applications were pending, the VA approved at least six other emblems of belief, often within months of the applications. *See* Petition ¶¶ 29-30 and Attachments cited therein. In light of these facts, the Agency's refusal even to address Petitioners' applications is surely an "arbitrary refusal to act, and not the product of a burdened system." *Costanza*, 12 Vet. App. at 134.

In *Bates*, the petitioner sought mandamus relief in this Court only two months after the Secretary refused to act on his request for a Statement of the Case, *Bates*, 398 F.3d at 1358, yet the Federal Circuit still found such extraordinary relief appropriate, *id.* at 1366. An unjustified, inexplicable delay of over nine years undoubtedly deserves the same attention.

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[1] The Agency asserts that Petitioners' applications ask the Secretary to make a discretionary policy decision. This is not so. The VA long ago made the policy decision that emblems of belief would be among the "other information" that would be engraved on a military headstone under 38 U.S.C. § 2404(c)(1). It has already decided that an emblem of belief is part of an "appropriate" Government headstone under 38 U.S.C. § 2306(a). Petitioners are not asking for a new category of information to be included on headstones. They ask only that the Secretary obey the statutory command in § 2306 that he "shall furnish" a headstone that is identical in all relevant respects to those provided to other veterans. An order of mandamus from this Court would not invade any of the Secretary's policy-making authority.

In addition to the illegality of the delay itself, the Agency's selective inaction on Petitioners' applications, while the VA simultaneously approved numerous other emblems of belief, is blatant, unlawful religious discrimination. The VA cannot seriously suggest that the Agency has the authority or discretion to grant some veterans' requests to include their emblems of belief on government-provided headstones, while denying the same right to Wiccan veterans and their families. Accordingly, the VA has not even responded to Petitioners' claims that a seemingly perpetual, arbitrary refusal to act on their applications – effectively amounting to an unappealable denial of those applications – violates Petitioners' rights under the First Amendment and the Religious Freedom Restoration Act, 42 U.S.C. § 2000bb ("RFRA"). *See* Petition ¶¶ 38-44.

Because the Agency has no discretion to violate the Constitution or RFRA, denial of Petitioners' applications would be an abuse of discretion. The remedy of mandamus "is available to correct a clear abuse of discretion." *In re Continental General Tire, Inc.*, 81 F.3d 1089, 1090 (Fed. Cir. 1996). This Court is well-equipped to decide the constitutional and statutory issues involved in the case, *see, e.g.*, *Beamon*, 125 F.3d at 969; *Larrabee*, 968 F.2d at 1501, and should grant the requested relief on those grounds, as well.

B. Intent to Promulgate New Rules Is Not a Defense.

Rather than offer any explanation for its years of inaction, the Agency seeks this Court's approval for *even further delay*, asserting – without putting anything into the record – that it is in the process of revising its regulations. *See* Answer at 15-18. At some unspecified time in the future, says the Agency, Petitioners will be able to comment on proposed regulations, and then perhaps, depending on the outcome of the rulemaking process, the VA might adopt a rule under which Petitioners might obtain relief. With all due respect, Petitioners have heard this before.

As documented in the exhibits to the Petition, Petitioners were told in November 2001 that new regulations were on their way. *See* Petition ¶ 20 and Attachment 13. They

were told this again in Spring 2005. *See* Petition ¶¶ 23-25 and Attachments 17, 19, and 21. Meanwhile, the Agency was approving the symbols of numerous other religions, none of whom were told that they needed to wait for new regulations. *See* Petition ¶¶ 29-31 and Attachments cited therein. Petitioners patiently waited while Wiccan veterans were laid to rest without emblems of belief.

Finally, in October 2005 the Agency promulgated revised NCA 3310. Respondent Lenox sent letters to Petitioners announcing that the new regulations were finally in place and inviting them to file yet more applications. *See* Petition Attachment 20. The Agency, however, has reneged once again.

For the first time, the VA now claims in its Answer that it "prepared" a notice of proposed rulemaking in June 2006 (although neither a copy of the notice nor evidence of its preparation was placed in the record). *See* Answer at 15-18. But even if we credit this undocumented assertion about intent to promulgate new rules, *see, e.g., Peeler v. Miller*, 535 F.2d 647, 654 (Cust. & Pat. App. 1976) ("We will not accept statements in briefs as substitutes for evidence."), the VA's Answer in this Court bears an uncanny resemblance to the Agency's past conduct. In November 2001, the Agency offered its first response to Petitioner Aquarian Tabernacle Church's application from 1997. After apologizing for the four-year delay, the VA said:

> We are currently in the process of preparing a regulation that will provide guidance to organizations interested in having their emblems placed on Government-furnished headstones and markers. When our proposed regulation has been drafted, it will undergo a comprehensive internal examination by the Department of Veterans Affairs (VA). Once approved within VA, the regulation will be sent to the Office of Management and Budget for coordination. The approved regulation will then be published in the *Federal Register* to allow organizations and individuals to submit comments. We will notify you when the regulation is published in the *Federal Register*, and forward to any suggestions or comments you may have at that time.

Petition Attachment 13. The Agency's Answer in this Court shows exactly the same pattern: an apology (of sorts) for the past delay, *see* Answer at 17 ("the Secretary is

sympathetic"); unsupported assertions about new rulemaking with no timelines promised or even predicted, *see id.* at 16; and vague assurances that Petitioners will be near the top of the list for consideration when the new regulations are finally promulgated, *see id.* at 17.

The VA asserts that the possibility of future rules changes provides Petitioners with an "adequate alternative means to obtain the desired relief" sufficient to deny mandamus. Under that theory, however, an agency could continually claim to be in the process of future rulemaking, and effectively avoid its statutory responsibilities in perpetuity. This fear is hardly speculative, as shown by the VA's conduct over the past nine-plus years.

In any case, even if it were true that the Agency is thinking about promulgating new regulations, that would make no legal difference here. Intent to enact a different rule sometime in the future does not give an agency permission to disregard existing rules, even if the agency believes that the existing rules are invalid. "Prior regulations remain valid until replaced by a valid regulation or invalidated by a court." *Menorah Medical Center v. Heckler*, 768 F.2d 292, 297 (8th Cir. 1985); *see also, e.g., Abington Memorial Hospital v. Heckler*, 750 F.2d 242, 244 (3d Cir. 1985); *Fertilizer Institute v. EPA*, 935 F.2d 1303, 1312 (D.C. Cir. 1991). The Agency cannot justify continued inaction on Petitioners' applications simply by invoking its institutional authority to promulgate future regulations. *See Abington Memorial Hospital*, 750 F.2d at 244 ("The Secretary contends that the appropriate remedy is to remand to her for further rule-making procedures, because any other remedy would unlawfully deprive the Secretary of her exclusive authority to choose reimbursement methods. We find the Secretary's arguments unpersuasive. . . . [U]ntil rendered invalid by a court decision or replaced by a valid new regulation, the prior method of reimbursement remains operative.").

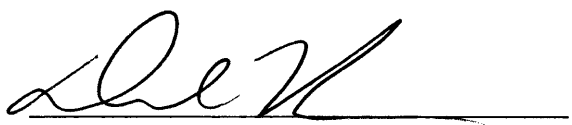
Previously existing regulations provided a sufficient basis for the Secretary to approve applications for the Christian and Missionary Alliance, Humanist, Presbyterian

Church, Izumo Taishakyo, Soka Gakkai, and Sikh emblems of belief. *See* Petition ¶¶ 29-31 and Attachments cited therein. Those regulations offer a similarly sufficient basis to approve Petitioners' applications.

CONCLUSION

Some legal remedy for the Agency's years of discriminatory delay is long overdue. Through its inaction, the VA has deprived Petitioners of the opportunity to seek relief in the BVA and this Court for nearly a decade. The Court, therefore, should exercise its jurisdiction and statutory authority to issue the requested writ of mandamus. Petitioners respectfully seek an order of this Court requiring the Agency to comply with the Constitution, laws, and regulations of the United States and to process their applications expeditiously. In the alternative, Petitioners request that this Court rule as a matter of law that Petitioners are entitled to the benefit sought and issue an order directing Respondents to adopt the Wiccan Pentacle as one of the accepted emblems of belief to appear on government-issued headstones and markers.

RESPECTFULLY submitted this 1st day of December 2006.



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Certificate of Service

I, Daniel Mach, certify under penalty of perjury under the laws of the United States that on the 1st day of December, 2006, I served a copy of the Reply in Support of Petition for Mandamus on the representative of record for Respondents R. James Nicholson, Secretary of Veterans Affairs; William F. Tuerk, Under Secretary for Memorial Affairs; and Lindee Lenox, Acting Director, National Cemetery Administration's Memorial Programs Service, at the address listed below, by first-class mail with postage pre-paid:

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