IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

GERALD A. LECHLITER, Petitioner,	)	
v.	)	Vet. App. No. 23-2587
DENIS MCDONOUGH, Secretary of Veterans Affairs, Respondent.	)	

RESPONDENT'S SUPPLEMENTAL MEMORANDUM OF LAW PURSUANT TO SEPTEMBER 19, 2023 COURT ORDER

On September 19, 2023, the Court ordered each party to file a supplemental memorandum of law addressing several issues. Respondent, Denis McDonough, Secretary of Veterans Affairs, hereby responds to the Court's inquiries.

RESPONDENT'S ARGUMENT

Pursuant to the All Writs Act (AWA), the Court has the authority to issue extraordinary writs in aid of its prospective jurisdiction. 28 U.S.C. § 1651(a). "[J]urisdiction to issue a writ of mandamus pursuant to the AWA relies upon not actual jurisdiction but potential jurisdiction." *In re Fee Agreement of Cox (Cox I)*, 10 Vet.App. 361, 370 (1997), *vacated on other grounds sub nom., Cox v. West (Cox II)*, 149 F.3d 1360 (Fed. Cir. 1998).

This Court's appellate jurisdiction derives exclusively from statutory grants of authority provided by Congress and may not be extended beyond that permitted by law. *See Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988).

Hence, it is well established that the AWA does not extend this Court's jurisdiction. *See Cox II*, 149 F.3d at 1363; *see also Heath v. West*, 11 Vet.App. 400, 402-03 (1998). Because the AWA "is not an independent basis of jurisdiction, . . . the petitioner must initially show that the action sought to be corrected by mandamus is within [the] court's statutorily defined subject matter jurisdiction." *Baker Perkins, Inc. v. Werner & Pfleiderer Corp*., 710 F.2d 1561, 1565 (Fed. Cir. 1983); *see Pennsylvania Bureau of Correction v. United States Marshals Service*, 474 U.S. 34, 43, (1985) (noting that the AWA "is a residual source of authority").

The Court's appellate jurisdiction is governed by section 7252 of title 38, U.S.C., which provides that the Court "shall have exclusive jurisdiction to review decisions of the Board." 38 U.S.C. § 7252(a). The Board, in turn, has jurisdiction to consider "[a]ll questions in a matter which under section 511(a) of . . . title [38] is subject to decision by the Secretary." 38 U.S.C. § 7104(a). And pursuant to section 511(a), "[t]he 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." 38 U.S.C. § 511(a). Therefore, the Court's jurisdiction to issue the order sought by petitioner pursuant to the AWA depends on whether the grant of the petition could lead to a Board decision over which the Court would have jurisdiction. *See Cox I*, 10 Vet.App. at 371.

Answering that question requires the Court to consider, and petitioner to show, that this case "arises 'under a law that affects the provision of benefits.'"

Bates v. Nicholson, 398 F.3d 1355, 1359 (Fed. Cir. 2005) (quoting 38 U.S.C. § 511(a)); *see McNutt v. Gen. Motors Acceptance Corp. of Ind.*, 298 U.S. 178, 188-89 (1936) (The ultimate burden of establishing jurisdiction rests with the party seeking the exercise of jurisdiction in his favor.); *Bethea v. Derwinski*, 2 Vet.App. 252, 255 (1992). Petitioner must also show that VA's action in question, *i.e.,* precluding self-represented claimants from accessing VA Information Technology (IT) systems, could be the subject of a Board decision, *Yi v. Principi*, 15 Vet.App. 265, 267 (2001) (per curiam order) (holding that the Court "lacks appellate jurisdiction over any issue that cannot be the subject of a Board decision"), and that this Court would have subject matter jurisdiction to consider a Board decision on that matter, *see, e.g., Wanner v. Principi*, 370 F.3d 1124, 1129-31 (Fed. Cir. 2004) (discussing a matter that had been removed by statute from the Court's jurisdiction).

Petitioner fails to meet these criteria. Accordingly, his petition should be dismissed.

1. **Although the Court has previously reviewed VA's policies as to *who* is afforded VBMS access, is VA's policy regarding the *manner* in which VA provides access to records an unreviewable Privacy Act matter solely within VA's discretion.**

VA's policy regarding the manner in which VA provides access to records is an unreviewable Privacy Act matter solely within VA's discretion.

The Privacy Act "regulate[s] the collection, maintenance, use, and dissemination of information by [federal] agencies" and provides a private cause

of action against federal agencies for violating its provisions. *Doe v. Chao*, 540 U.S. 614, 618 (2004) (quotation marks omitted); *see* 5 U.S.C. § 552a(g)(1). The Privacy Act allows an individual or his authorized representative to access records pertaining to the individual. *See* 5 U.S.C. § 552a(d)(1). However, it does not dictate the *manner* of access.

Congress expressly vested jurisdiction over civil actions arising from the Privacy Act in the United States district courts. *See* 5 U.S.C. § 552(a)(4)(B) (providing that "the *district court* of the United States in the district in which the complainant resides, or has his principal place of business, or in which the agency records are situated, or in the District of Columbia, has jurisdiction to enjoin the agency from withholding agency records and to order the production of any agency records improperly withheld from the complainant") (emphasis added); 5 U.S.C. § 552a(g)(1) (providing that an "individual may bring a civil action against the agency, and the *district courts* of the United States shall have jurisdiction in the matters under the provisions of this subsection") (emphasis added).

As relevant here, VA processes "[r]equests for records about an individual[] protected under the Privacy Act . . . including one's own records . . . under the . . . Privacy Act." 38 C.F.R. § 1.550(b). VA's regulations implementing the Privacy Act instruct that, if the Agency fails to respond to a request for access to records, "the individual must pursue the request with the Privacy Officer of the administration office . . . or staff office . . . that has custody over the records," and that denials of records requests may be appealed to the Office of General Counsel, who will

render the final agency decision in such appeals. 38 C.F.R. § 1.580(b), (c); *see* 38 C.F.R. §§ 1.550(b), 1.577.

It is undisputed that the petitioner bears the burden of establishing that the Court has jurisdiction to act. That requires a showing that: (1) petitioner's request for remote, electronic access to his records through VA IT systems was made pursuant to a law affecting the provision of VA benefits, (2) that VA's decision on the matter could be the subject of a Board decision, and (3) that the Court would have subject matter jurisdiction to review the Board's decision. Petitioner fails to carry his burden on all points.

The Privacy Act is not "a law that affects the provision of benefits by the Secretary," such that it would fall within the Board's jurisdiction. 38 U.S.C. § 511(a); *see* 38 U.S.C. § 7104(a); *Bates*, 398 F.3d at 1359. VA regulations unambiguously delegate the authority to make final determinations regarding the Privacy Act to the VA Office of General Counsel, not the Board. *See* 38 C.F.R. §§ 1.527, 1.559, 1.580. Petitioner has not demonstrated how the grant of a writ in these circumstances would lead to a final Board decision, a necessary predicate for this Court's jurisdiction. *Yi*, 15 Vet.App. at 267.

Because the Privacy Act is not "a law that affects the provision of benefits by the Secretary," the relief petitioner seeks from the Court is outside the scope of the Court's jurisdiction. "Although general access to inspect or receive a copy of a claimant's record is governed by privacy laws and regulations applicable to VA and to the Federal government more generally, there is no statute or regulation

creating a right to electronically access VA's internal IT systems or mandating that individuals who may view a record must be allowed to do so via any particular IT system." 85 Fed. Reg. 9435, 9439 (Feb. 19, 2020) (Individuals Accredited by VA using VBA IT Systems to Access VBA Records Relevant to a Claim While Representing a Claimant Before the Agency – Proposed Rule); *see also* 38 C.F.R. § 1.600(d) (sections 1.600 through 1.603 are not intended to, and do not create or establish a right to electronic access).

The privilege of accessing VA IT systems, including the Veterans Benefits Management System (VBMS), is not a benefit under title 38, U.S.C. Moreover, the manner in which the Secretary administers access to VA IT systems does not present a question of fact or law necessary to a decision over which the Court has jurisdiction. *See* 85 Fed. Reg. 9435, 9438 (Feb. 19, 2020) ("Electronic access to claimant records is not a right and any request for such access is not a benefit claim that is subject to appeal.").

These are unreviewable Privacy Act matters that are solely within the Secretary's discretion. Where a decision is committed to the discretion of the Secretary and no manageable standards exist to evaluate that decision, the decision is committed to the Secretary's discretion absolutely, and the Court lacks jurisdiction to review such a determination. *See Werden v. West*, 13 Vet.App. 463, 467 (2000). As this Court has previously held, "it is not the role of the Court to dictate to the Secretary how most effectively to administer the VA benefits system." *Ramsey v. Nicholson*, 20 Vet.App. 16, 36 (2006); *see also* 38 U.S.C. § 303 (noting

that the Secretary is responsible for the "control, direction, and management of the Department").

2. Assuming the Court has jurisdiction generally over the issue of VBMS access, does the Court have authority to do the following:

a. Direct VA to issue an appealable decision either generally justifying its policy of withholding access from self-represented claimants or specifically acting on the petitioner's request for access.

The Court does not have authority to direct VA to issue an appealable decision either generally justifying its policy regarding who is permitted, and under what circumstances, to access VA IT systems or specifically acting on the petitioner's request for access.

1. Appealable decision generally

The Secretary turns first to the question of whether the Court can direct VA to issue an appealable decision generally justifying its policy of precluding self-represented claimants from remotely accessing VA IT systems, including VBMS. The answer to this inquiry is no.

VA's policy regarding "who is permitted, and under what circumstances," to access VA IT systems is codified in a series of regulations that were amended in 2022. *See* 87 Fed. Reg. 37744 (June 24, 2022) (Individuals Using VA IT Systems to Access Records Relevant to a Benefit Claim – Final Rule, effective July 25, 2022); *see also* 38 C.F.R. §§ 1.600-1.603 (2022). These regulations provide access to specific VA IT systems, including VBMS, on a read-only basis, but do not extend that access to self-represented claimants. *See* 85 Fed. Reg. 9435,

9436 (Feb. 19, 2020) (noting that . . . that "a VA- accredited attorney [had] petitioned VA to initiate a rulemaking for purposes of clarifying whether attorney support staff could gain access to VBMS in the same manner as the attorney of record in the claim."). Access is permitted *only* to attorneys, agents, representatives of a VA-recognized service organization, affiliated support-staff person, or individuals authorized by the General Counsel to represent more than one claimant under 38 C.F.R. § 14.630 who have been approved to access VA IT systems under §§ 1.600 through 1.603. *See* 38 C.F.R. § 1.600(b)(1).

This Court does not have the authority to provide non-case-specific review of these recently amended regulations regarding read-only access to VA IT systems. *See* 38 U.S.C. §§ 7252(a); 7261. Rather, the Court can only consider a regulation's validity in an individual case through appellate review of a final Board decision. 38 U.S.C. § 7261(a)(3). The power to directly review VA actions in adopting, revising, or refusing to adopt or revise regulations lies solely with the U.S. Court of Appeals for the Federal Circuit. *See* 38 U.S.C. §§ 502, 7292; *Wingard v. McDonald*, 779 F.3d 1354, 1357 (Fed. Cir. 2015).

In *Rosinski v. Shulkin*, 29 Vet.App. 183 (2018), this Court considered whether it had subject matter jurisdiction to consider the validity of a different VA policy and determined that it did. However, *Rosinski* differs significantly from the instant case and is not instructive. In *Rosinski,* the issue before the Court involved the validity of VA's policy of allowing Veterans Service Organizations (VSOs) – but not attorneys – to review newly completed rating decisions before they were

promulgated. The *Rosinski* Court determined that it had jurisdiction to consider the validity of VA's policy, which was contained in the agency's M21-1 Adjudication Procedures Manual, because the policy arose under a law that affects the provision of benefits by the Secretary. *See Rosinski*, 29 Vet.App. at 188 (*citing* 38 U.S.C. § 511(a)); *Bates*, 398 F.3d at 1359; *see also Ledford v. West*, 136 F.3d 776, 779 (Fed. Cir. 1998) (holding that this Court's "jurisdiction is premised on and defined by the Board's decision concerning the matter being appealed").

This case differs because the "policy" at issue here regarding who is granted privileges to access VA IT systems is codified in newly amended VA regulations – not the M2-1 Adjudication Procedures Manual. *See* 38 C.F.R. §§ 1.600-1.603; 87 Fed. Reg. 37744 (June 24, 2022) (Individuals Using VA IT Systems to Access Records Relevant to a Benefit Claim – Final Rule, effective July 25, 2022). Therefore, if the *manner* in which VA provides access to records is reviewable at all, it is not reviewable in this Court.

To the extent the instant petition can be construed as a challenge to VA's newly amended access regulations, *i.e.,* 38 C.F.R. § 1.600-1.603, petitioner's avenue for relief is vested exclusively with the Federal Circuit under 38 U.S.C. § 502. *See Wolfe v. McDonough*, 28 F.4th 1348, 1358 (Fed. Cir. 2022). The same is true if his petition is construed as a petition for rulemaking under 38 U.S.C. § 553(e). *Preminger v. Sec'y of Veterans Affs.*, 632 F.3d 1345, 1352 (Fed. Cir. 2011).

This Court has no authority to direct VA to issue an appealable decision generally justifying its policy with respect to who is permitted, and under what circumstances, to access VA IT systems, including VBMS, because the policy itself, to the extent it is reviewable, is codified in recently promulgated regulations that are not subject to direct review in this Court.

2. Specifically act on petitioner's request for access

Turning now to the question of whether the Court has the authority to direct VA to issue an appealable decision specifically acting on the petitioner's request for remote access to VBMS. The answer to this inquiry is also no.

A historical review of the case law, statutes, and regulations pertaining to accreditation of agents and attorneys and providing access to VA IT systems is in order.

Section 5904 of 38 U.S.C. addresses the criteria and procedures under which VA will recognize an individual as an agent or attorney for the purposes of preparation, presentation, and prosecution of claims under laws administered by the Secretary. This statute first came to the Court's attention in *Bates v. Principi*, 17 Vet.App. 443 (2004), when the Court dismissed a petition for a writ of mandamus after concluding that matters arising under section 5904 were not within this Court's jurisdiction. On appeal, in *Bates v. Nicholson*, 398 F.3d 1355 (Fed. Cir. 2005), the Federal Circuit reversed, holding that matters arising under 38 U.S.C. § 5904 are subject to judicial review in this Court because section 5904 is a law that affects the provision of benefits under 38 U.S.C. § 511.

Section 5904 directs the Secretary to prescribe regulations implementing the statute. The Court has had the occasion to address those regulations on several occasions prior to their amendment in June 2022.

In *Chisholm v. McDonald*, the Court considered an attorney's petition for a writ of mandamus asking the Court to order VA to grant remote, read-only access to VA IT systems for paralegals under the attorney's supervision. 28 Vet.App. 240 (2016). The *Chisholm* court held that the action of authorizing or denying access to electronic records for *counsel* seeking benefits on behalf of clients, and for staff assisting such counsel, is taken pursuant to 38 C.F.R. § 14.629, and that this regulation was promulgated pursuant to 38 U.S.C. §§ 501(a) and 5904. *Chisholm*, 28 Vet.App. at 242 (emphasis added). On that basis, the Court concluded that the denial of access would be subject to review by the Board and was within the Court's prospective jurisdiction. It granted the writ and directed VA to issue a decision on petitioner's request for access. *Id.*

Shortly after its order in *Chisholm*, the Court issued an opinion in *Green v. McDonald*, where it considered a motion seeking to compel the Secretary to grant an *attorney* read-only access to a veteran's VBMS file. 28 Vet.App. 281 (2016) (emphasis added). The *Green* court addressed the pre-amendment versions of 38 C.F.R. §§ 1.600-1.603, which were enacted prior to the implementation of VBMS, and held that these regulations did not provide *attorneys* representing claimants with a right to remote read-only access to VBMS. *Green*, 28 Vet.App. at 289 (emphasis added).

Most recently, the Court addressed access to VA IT systems, including VBMS, in *Carpenter v. McDonough* 34 Vet.App. 261 (2021). In *Carpenter*, the Court reviewed a Board decision that denied remote, read-only access to VA IT systems for paralegals and other support staff working under the supervision of an attorney. 34 Vet.App. 261 (2021). The *Carpenter* court, noting that the regulations at issue, i.e., 38 C.F.R. § 1.600-1.603, had not changed since *Green*, concluded that it must follow *Green* and hold that these regulations did not pertain to VBMS access. *Id.*

The aforementioned caselaw provides background on the evolution of the reviewability of VA's determinations regarding access to its IT systems. While not dispositive of the issue presented in this case, these precedents, and the regulatory and statutory history related to accreditation and access, support the Secretary's position that the Court does not have authority to direct VA to specifically act on petitioner's request for access.

Significantly, petitioner, as a self-represented claimant, is not now, and has never been, encompassed by VA statutes or regulations governing recognition of agents or attorneys or providing access to VA IT systems. *See* 38 U.S.C. § 5904; 38 C.F.R. §§ 1.600-1.603; 14.629. Accordingly, even if these regulations were reviewable in this Court, which they are not, petitioner lacks standing to challenge their validity.

Separate and apart from the jurisdictional limits set by section 7252, this Court has "adopt[ed] as a matter of policy the jurisdictional restrictions of the Article

III case or controversy rubric." *See, e.g., Mokal v. Derwinski*, 1 Vet.App. 12, 15 (1990). In *Swan v. Derwinski*, the Court recognized that the "case or controversy" requirement included a "requirement that a litigant have standing, which 'is perhaps the most important of [the "case or controversy"] doctrines.'" 1 Vet.App. 20, 22 (1990) (*quoting Allen v. Wright*, 468 U.S. 737, 750, (1984)); *see also Matter of Stanley*, 9 Vet. App. 203, 209 (1996) ("This standing requirement emerges from the case-or-controversy requirement in Article III, Section 2, of the U.S. Constitution, a jurisdictional restraint to which this Court has held it will adhere.").

"[T]he irreducible constitutional minimum of standing contains three elements." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). "First, the plaintiff must have suffered an 'injury in fact' – an invasion of a legally protected interest which is (a) concrete and particularized, . . . and (b) 'actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Id.* (*quoting Whitmore v. Arkansas*, 495 U.S. 149, 155 (1990). "Second, there must be a causal connection between the injury and the conduct complained of . . . ." *Id.* "Third, it must be 'likely,' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision.'" *Id.* at 561 (*quoting Simon v. E. Ky. Welfare Rights Org.*, 426 U.S. 26, 38 (1976)).

"'The party invoking federal jurisdiction bears the burden of establishing' standing . . . ." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398 (2013) (*quoting Defs. of Wildlife*, 504 U.S. at 561). "A federal court is powerless to create its own jurisdiction by embellishing otherwise deficient allegations of standing." *Whitmore*, 495 U.S. at 155-56.

In *Chisholm*, the Court directed VA to issue a decision on petitioner's request for access to VA IT systems for paralegals under the attorney's supervision, 28 Vet.App. 240 (2016), however, there was no dispute in that case that the moving party, and the staff under his supervision, were encompassed by VA's accreditation regulations. The same is true of the moving parties in *Green* and *Carpenter.* The instant case is different because petitioner, as a self-represented claimant, is not covered by the VA statutes and regulations regarding accreditation and access to VA IT systems and never has been. *See* 38 U.S.C. § 5904; 38 C.F.R. §§ 1.600-1.603; 14.629. He is not entitled to a decision on his specific request for access because he is beyond the scope of the VA access regulations and lacks standing to challenge their validity.

Moreover, this Court's decisions in *Chisholm, Green,* and *Carpenter*, were all issued under the pre-amended versions of 38 C.F.R. §§ 1.600-1.603 and 14.629. In those cases, the Court interpreted the pre-amended versions of VA's access regulations and determined that it had jurisdiction over the matter in accordance with *Cox II*, 149 F.3d at 1365 and *Bates*, 398 F.3d 1359-61 because the pre-amended versions of the access regulations were implemented pursuant to 38 U.S.C. § 5904. However, that underlying premise changed when the regulations were amended in June 2022. *See* 87 Fed. Reg. 37744 (June 24, 2022).

In the proposed rulemaking amending VA's access regulations, VA premised the statutory authority for providing access to VA IT systems on 38

U.S.C. 5721 through 5728 – not section 5904. *See* 85 Fed. Reg. 9435, 9435 (Feb. 19, 2020) ("The statutory authority for 38 C.F.R. §§ 1.600 through 1.603 is 38 U.S.C. 5721 through 5728. Because the 'security of Department information and information systems is vital to the success of the mission of the Department,' it is statutorily mandated that VA 'establish and maintain a comprehensive Department-wide information security program to provide for the development and maintenance of cost-effective security controls needed to protect Department information, in any media or format, and Department information systems.' 38 U.S.C. 5722(a). In establishing its Department-wide information security program, Congress has entrusted to the VA information owners that oversee the system or systems to 'determin[e] who has access to the system or systems containing sensitive personal information, including types of privileges and access rights.' 38 U.S.C. 5723(d)(2)."). The Court cannot direct VA to issue an appealable decision specifically acting on the petitioner's request for remote access to VA IT systems because it cannot compel VA to act on a matter over which it would not have subject matter jurisdiction to review. *See Cox I*, 10 Vet.App. at 371.

To be clear, this does not mean that petitioner has no avenue to seek relief. However, the relief sought cannot be provided by this Court. The crux of the issue presented in this case falls under the Privacy Act – not VA regulations related to accreditation and access. Congress explicitly provided that U.S. district courts shall have jurisdiction over civil actions arising from an agency's refusal to comply with the Privacy Act. 5 U.S.C. §§ 552(a)(4)(B), 552a(g)(1); *see Cofield v. United*

States, 64 F. Supp. 3d 206, 214 (D.D.C. 2014) ("The federal courts . . . have exclusive jurisdiction over any claim . . . under . . . the Privacy Act."); *Treece v. United States*, 96 Fed. Cl. 226, 232 (2010) (dismissing the "plaintiff's claims under the Privacy Act . . . because the federal district courts have exclusive jurisdiction over such matters"). Indeed, district courts have regularly addressed such matters, including cases seeking enforcement of VA's obligation to provide records. *See, e.g.*, *Conyers v. United States Dep't of Veterans Affairs*, No. 16-CV-00013, 2017 U.S. Dist. LEXIS 4315, 2017 WL 722107, at *8-11 (E.D.N.Y. Jan. 10, 2017); *Demoruelle v. Dep't of Veterans Affairs*, No. 16-00562, 2017 U.S. Dist. LEXIS 102062, 2017 WL 2836989, at *2-4 (D. Haw. June 30, 2017); *Wadhwa v. Dep't of Veterans Affairs*, 342 F. Appx. 860, 862-63 (3d Cir. 2009) (per curiam); *Kinman v. United States*, No. 16-cv-00329, 2016 U.S. Dist. LEXIS 169447, 2016 WL 7165986, at *5 (S.D. Ohio Dec. 7, 2016).

If petitioner believes that by denying him remote read-only access to VA IT systems, VA is refusing to comply with the Privacy Act, his remedy is to file a civil action in U.S. district court.

b. Determine for itself whether VA's policy violates due process or is otherwise invalid.

This Court also does not have the authority to determine for itself whether VA's policy violates due process or is otherwise invalid.

As explained above, the *manner* in which VA provides access to records is an unreviewable Privacy Act matter that is solely within VA's discretion. Although

the Privacy Act requires the agency to provide access to records, it does not dictate the manner of such access. *See* 5 U.S.C. § 552a(d)(1).

To the extent petitioner is asserting that VA is not compliant with the Privacy Act because withholding remote read-only access to VA IT systems is akin to denying access to his own records, that challenge cannot be raised in this Court. The Privacy Act is not "a law that affects the provision of benefits by the Secretary," such that it would fall within the Board's jurisdiction. 38 U.S.C. § 511(a); *see* 38 U.S.C. § 7104(a); *Bates*, 398 F.3d at 1359. Petitioner can seek relief by filing a civil action in U.S. district court, however, this Court has no authority to take any action other than to dismiss the petition.

The result is the same if petitioner is challenging VA's policy with respect to when, and under what circumstances, it will grant the ability to remotely access VA IT systems in 38 C.F.R. §§ 1.600-1.603. These regulations were amended, effective June 25, 2022, to address "who is permitted, and under what circumstances, to directly access VA records and other claims-related information through specific VA IT systems." *See* 87 Fed. Reg. 37744 (June 24, 2022). These new regulations provide remote access to specific VA IT systems, including VBMS, on a read-only basis, but do not extend that access to self-represented claimants. *Id.*

This Court has no authority to determine for itself whether VA's policy violates due process or is otherwise invalid because the established policy and procedures with respect to when, and under what circumstances, VA will grant the

ability to access VA IT systems is codified in regulations that are not subject to direct review in this Court. *See* 87 Fed. Reg. 37744 (June 24, 2022). The Court is prohibited from addressing the validity of these regulations in this mandamus action because doing so would constitute the very kind of non-specific review of the regulations that is vested exclusively in the Federal Circuit under 38 U.S.C. § 502. *Wolfe*, 28 F.4th at 1358.

3. Does the Court have the authority to issue a show cause order pursuant to 28 U.S.C. § 1651(b).

This Court has authority to issue a show cause order pursuant to 28 U.S.C. § 1651(b), however, there is no basis to do so in the instant case.

In addition to the power to issue writs necessary or appropriate in aid of their respective jurisdictions, subsection (b) of the AWA allows courts to issue an alternative writ or rule nisi within their jurisdiction. *See* 28 U.S.C. § 1651(b). However, rules nisi are not a creature of federal law. *See* 5 Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 1195 (3d ed. 2004) ("Rules nisi are not provided for in the Federal Rules of Civil Procedure.").

The current version of *Black's Law Dictionary* does not define the term "rule nisi." Rather, *Black's* defines "*rule nisi*" as "*decree nisi*," and specifies that that it is "[a] court's decree that will become absolute unless the adversely affected party shows the court, within a specified time, why it should be set aside." *Black's Law Dictionary*, (11th ed. 2019); *see also United States v. Kimsey*, 668 F.3d 691 (9th Cir. 2012). Previous versions of *Black's* defined the term "*rule nisi*" in a similar

manner as "[a] rule which will become imperative and final *unless* cause be shown against it. This rule commands the party to show cause why he should not be compelled to do the act required, or why the object of the rule should not be enforced." *Black's Law Dictionary* 1047 (2d ed. 1910).

This historical review supports the view that this Court has general authority to issue show cause orders, otherwise known as rule nisi or decree nisi, pursuant to 28 U.S.C. § 1651(b). In practice, the Court routinely issues show cause orders for a variety of reasons, although it has not cited 28 U.S.C. §1651(b) as the authority to do so. Those reasons include failing to pay the Court's filing fee or to file a declaration of financial hardship; failing to file a timely Notice of Appeal; failing to file an appeal of a final, adverse Board decision; failing to demonstrate standing; failing to file a timely brief; and/or failing to otherwise comply with this Court's Rules of Practice and Procedure.

The Court, however, does not have authority to issue a show cause order directing the Secretary to justify the manner in which VA provides access to records because that is a discretionary, unreviewable Privacy Act matter that is solely within VA's discretion. It also does not have authority to issue a show cause order directing the Secretary to justify the policy of precluding self-represented claimants from remotely accessing VA IT systems because that policy is enacted through the amended versions of 38 C.F.R. § 1.600-1.603, which are not subject to direct review in this Court. The Secretary could find no precedent in any Court for using a show cause order to require the government to defend an amendment

to a federal regulation that was promulgated in compliance with 5 U.S.C. § 553's notice-and-comment rulemaking procedures.

Moreover, a show cause order is inapposite in the instant case because the Court was correct to construe petitioner's informal petition as a motion for extraordinary relief in the nature of a writ of mandamus under 28 U.S.C. § 1651(a). Petitioner has not directed the Court to any legal basis for his petition that would make his request for relief distinct from a petition for a writ of mandamus. *See e.g., Winsett v. Nicholson*, 174 Fed. Appx. 567, 568 (Fed. Cir. 2006).[1]

This matter should be dismissed, or alternatively denied, as explained above and in the Secretary's June 1, 2023, response to the petition and the Court's May 3, 2023, order, which is incorporated herein by reference.

WHEREFORE, Respondent respectfully responds to the Court's Order of September 19, 2023.

Respectfully submitted,

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[1] This nonprecedential authority is being cited because there is no clear precedent addressing an "alternate writ" or a "rule nisi." It is relevant to the case before the Court because, like the instant case, it involved this Court construing a petition for a rule nisi under 28 U.S.C. § 1651(b) as a petition for extraordinary relief in the nature of a writ of mandamus under 28 U.S.C. § 1651(a).

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