*In The*
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

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| Kathy Gardner-Dickson,<br>Petitioner,<br><br>v.<br><br>Robert L. Wilkie,<br>Secretary of Veterans Affairs,<br>Respondent. | )<br>)<br>)<br>)<br>)<br>)<br>)<br>) | No. 19-4765<br><br>**Opposition to Secretary's Motion to Dismiss** |

Petitioner Kathy Gardner-Dickson hereby opposes the Secretary's Motion to Dismiss this important case. Seven months after this petition was filed and three months after it was assigned to a panel and scheduled for oral argument, the Secretary now belatedly asserts that Petitioner cannot challenge the Court's current interpretation of its jurisdictional statute because a challenge to the Court's interpretation of its jurisdictional statute lies outside the Court's jurisdiction, as the Court currently interprets its jurisdictional statute. Such circular argument lacks substance[1] and is properly dismissed out-of-hand.

Should the Court press on, the Secretary's motion also fails to support its other assertions. First, the Secretary concedes, and

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[1] It is also in conflict with the Supreme Court's recent reiteration of the "basic presumption of judicial review [for] one 'suffering a legal wrong because of agency action.'" *Dep't of Homeland Security v. Regents of the Univ. of California*, 591 U.S. ___ (2020) at *9 (quoting *Abbott Labs v. Gardner*, 387 U.S. 136, 140 (1967)).

Petitioner agrees, that the Court has an "independent obligation to police its own jurisdiction." Sec'y Mot. at 1 (citing *Sellers v. Shinseki*, 25 Vet. App. 265, 274-75 (2012)). But, that obligation cuts both ways as it is a "well-established judicial doctrine that any statutory tribunal must ensure that it has jurisdictional over each case." *Sellers*, 25 Vet. App. at 275 (quoting *Barnett v. Brown*, 83 F.3d 1380, 1383 (Fed. Cir. 1996)). And so, the "Court is therefore compelled to resolve *all* jurisdictional questions." *Id.* (emphasis added). Thus, the Court is obligated to determine when it *does* have jurisdiction as much as when it does not. Petitioner here is asking the Court to do nothing more than determine whether it has jurisdiction over the matter under the facts presented.

The Secretary also surprisingly misrepresents a fundamental legal standard for jurisdiction under the All Writs Act (AWA). *Compare* Sec'y Mot. at 6 ("AWA allows the Court to issue only those writs that are in aid of its jurisdiction"), *with In re Fee Agreement of Cox*, 10 Vet. App. 361, 370 (1997) (vacated on other grounds sub nom. *Cox v. W.*, 149 F.3d 1360) ("jurisdiction to issue a writ of mandamus pursuant to the AWA relies upon not actual jurisdiction but *potential* jurisdiction."

(emphasis added)). Thus, the law – properly stated – establishes that the Court's jurisdiction depends on whether the grant of the petition *would lead to* a Board decision over which the Court *would have* jurisdiction. Such is the case at bar.

This Court has the "power to issue a writ compelling agency action." *See* 149 F.3d at 1363, 1364. Petitioner has raised the issue of whether the Court's current "no exceptions" interpretation of 38 U.S.C. section 7252 under *Breeden v. Principi*, 17 Vet. App. 475 (2004), coupled with its view that 38 U.S.C. section 7261 does not independently convey jurisdiction, which in combination creates an "appellant limbo," should remain good law. If Petitioner's view is adopted by the Court, it *would allow* (i.e., lead to) the Court's *immediate* review of the underlying Board "remand" decision without suffering further spins of the Secretary's hamster wheel. Thus, this Court has authority and jurisdiction under the AWA to adjudicate the issues raised by Petitioner.

Moreover, this conclusion is unaffected by the Secretary's assertions that Petitioner "mistakenly contends that section 7261 provides an independent source of jurisdiction," or that "it is well settled that the

Court does not have jurisdiction to review the Board's non-final remand orders." Sec'y Mot. at 5. First, these are the exact issues that Petitioner challenges on the merits and the Secretary cites no law resting jurisdiction on whether a party is or is not deemed likely to prevail on the merits at the outset of a case. Further, as the Secretary would have it, once a Court's statutory interpretation becomes "well-settled" the Court lacks jurisdiction over *any* challenge to that interpretation. There is, of course, no basis for such a position and it ignores the results of some of the most significant cases in the country's history. *See e.g., Brown v. Bd. of Educ.*, 347 U.S. 483 (*overturning Plessy v. Ferguson*, 163 U.S. 537 (1896)).

Finally, resolving this matter on the Secretary's motion would deprive the Court of the benefit of a full ventilation of the important issues presented by Petitioner – issues already deemed important enough for a panel (i.e., precedential) decision and oral argument. Further, because the jurisdictional issues raised by the Petition and the Secretary's Motion are indistinguishable, a panel decision would still be

required[2] and the Court's analysis would properly have the same scope as a fully argued case – but without benefit of argument. In short, granting the pending motion would result only in the Court prematurely deciding the important issues before it – and without hearing the Secretary's justification for defending a unequivocally erroneous Board decision. *See Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) ("The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.).

Wherefore, Petitioner opposes the Secretary's Motion to Dismiss and respectfully requests the Court to deny it and proceed with the scheduled argument.

Respectfully submitted,

/s/ Douglas J. Rosinski

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[2] *See* Oct. 18, 2019, Motion for Panel Decision.