In The
UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS

Kathy Gardner-Dickson, Petitioner, v. Robert L. Wilkie, Secretary of Veterans Affairs, Respondent.	))))))))	No. 19-4765 **Citation of Supplemental Authority**

Petitioner Kathy Gardner-Dickson hereby identifies supplemental authority relevant to the issues raised at oral argument pursuant to the Court's Rule of Practice and Procedure 30(b).

First, in *Henderson v. Shinseki* the Supreme Court stated that this Court's scope of review is "similar to that of an Article III court reviewing agency action under the Administrative Procedure Act, 5 U.S.C. § 706 ["APA"]." 562 U.S. 428, 432 n.2 (2011). Next, in *Department of Homeland Security v. Regents* (the "DACA" decision), the Court stated that the APA establishes a "basic presumption of judicial review [for] one 'suffering legal wrong because of agency action.'" 140 S.Ct. 1891, 2020 U.S. LEXIS 3254 (2020) at *21 (citing *Abbott Laboratories v. Gardner*, 387 U.S. 136, 140 (1967)). These cases raise further questions of whether the *Breeden* Court properly considered this legal presumption in its jurisdictional analysis, as there is no discussion of it in the opinion. 17 Vet App. 475 (2004).

Petitioner also identifies the recently reported case of *Allegheny Def. Project, et. al., v. Fed. Energy Regulatory Comm'n*, 2020 U.S. App. LEXIS 20363, __ F.3d __, 2020 WL 3525547 (Jun. 30. 2020), in which the U.S. Court of Appeals for the District of Columbia, *en banc,* rejected the "Commission's use of tolling orders that do nothing more that buy itself more time to act . . . and stall judicial review." 2020 U.S. App. LEXIS 20363 at *19. Particularly relevant, the Court rejected tolling orders because:

> They *not final enough* for aggrieved parties to seek relief in court, but they are *final enough* for private pipeline companies to go to court and take private property by eminent domain. And they are final enough for the Commission to greenlight construction and even operation of the pipelines. Tolling orders, in other words, render Commission decisions akin to Schrödinger's cat: *both final and not final* at the same time.

Id. at *21 (emphasis supplied). Further,

> the Tolling Order is emphatic that it is doing one thing, and one thing only: It is preventing "timely-filed rehearing requests" from being "deemed denied by operation of law," and in that way *foreclosing judicial review of the underlying order for as much time as the Commission chooses to take*.

Id. at *29 (emphasis supplied). Although the underlying statutes are different from those under review by this Court, the Circuit Court's analysis prohibits a reading of any statute that allows the Secretary to "foreclose[e] judicial review of the underlying order for as much time as the [Secretary] chooses to take."

Thus, each of these cases are relevant to whether the *Breeden* Court's analyses adequately considered all of the legal issues relevant to and resulting from its conclusion that it could not allow any exception(s) to the "final decision" requirement of 38 U.S.C. § 7252. Thus a proper interpretation of this Court's jurisdiction properly must include a consideration of whether the Secretary is left free to "foreclose judicial review . . . for a much time as [he] chooses to take" (i.e., creates "appellant limbo"). Petitioner, therefore, prays that this Court will accept and consider these supplemental authorities in adjudicating the issues raised in this case.

Respectfully submitted,

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