

**IN THE UNITED STATES COURT OF APPEALS
FOR VETERANS CLAIMS**

KENNETH M. CARPENTER
and
ROBERT V. CHISHOLM,
Appellants,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,
Respondent.

**BRIEF OF AMICUS CURIAE
NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM**

YELENA DUTERTE
Assistant Professor of Law and Director,
Veterans Legal Clinic
UIC John Marshall Law School

MATT WILCUT
Attorney
Deuterman Law Group

**On Behalf of Amicus Curiae
National Law School Veterans Clinic
Consortium (NLSVCC)**

TABLE OF CONTENTS

Page

STATEMENT PURSUANT TO RULE 29.....	1
ARGUMENT.....	1
I. No Stay Should Issue in These Cases Pending Uncertain Regulatory Action.	2
II. Even with Promulgation of a Final Rule, Appellants’ Arguments Will Not Be Rendered Moot	4
CONCLUSION.....	5

STATEMENT PURSUANT TO RULE 29

The National Law School Veterans Clinic Consortium (“NLSVCC”) submits this brief in support of the position of the Appellant.¹ NLSVCC is a collaborative effort of the nation’s law school legal clinics dedicated to pro bono efforts that address the unique legal needs of U.S. military veterans. A significant number of NLSVCC member clinics provide valuable experiential training for law students interested in representing claimants before the Department of Veterans Affairs (“VA”), under the supervision of a VA-accredited attorney. Such clinics also routinely employ full-time paralegals and other non-lawyer staff in order to better model the practice of law in a functioning firm environment. Therefore, NLSVCC is interested in a case that will determine whether law students, paralegals, and clinic staff will be able to *fully* participate in the representation of their clients, as Congress intended.

ARGUMENT

On July 16, the Court ordered both of the named parties to respond to three related topics in light of the VA’s publication on February 19, 2020, of proposed rules regarding access to electronic claims file, including a proposal to delete language that is at the heart of the current case at 38 C.F.R. § 14.629. 85 Fed. Reg. 9438-39.

NLSVCC supports the position of Appellants that the Court should not stay these cases due only to the release of the Proposed Rule and also that no future final rule can possibly moot the statutory and constitutional conflicts at issue in these cases.

¹ The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization. Each writer is a member of NLSVCC.

I. No Stay Should Issue in These Cases Pending Uncertain Regulatory Action

The Court should not issue any stay in these cases, especially not one tied to future publication of any final rule. The hypothetical, future publication of a final rule is not a certainty but only a mere possibility at this time. The Secretary's Response ("Sec'y Resp.") appears to assume throughout its first and third set of arguments that a final rule will issue, though it falls well short of claiming with any level of confidence that the determination to move forward with promulgation has been made. *See* Sec'y Resp. at 2-4. To the contrary, in the introduction and the second set of arguments, the Secretary uses language conceding that the relevant portions, if not the entirety, of the Proposed Rule may never become part of a final rule. *Id.* at 1, 3. Under such uncertain circumstances, and with the Secretary's failure to provide clarity or obligate themselves to ever provide such clarity, a stay would allow serious harm to continue to effect a significant portion of the advocate community, nearly the entire veterans clinics community, while the VA remains free to act or not act at its full discretion.

The practical result of the lack of enforceable action related to proposed rules in all but the rarest of circumstances, as detailed in the Appellants' Response ("Apps. Resp."), is that the Secretary must have alleged some *need* for a stay in his response, but only a *preference* to have the Appellants await uncertain and alternative "opportunity" has been argued. *See* Apps. Resp. at 9-10; *see also* Sec'y Resp. at 2. Relatedly, the Secretary has not even alleged a *need* to promulgate a final rule. Nothing in the Secretary's concession of a lack of a deadline is specific to these cases, these issues, or the Proposed Rule. *See* Sec'y Resp. at 3-4. Rather, it is true of all proposed rules. *Id.*

NLSVCC represents the interests of various Veterans Law clinics at law schools across the nation, including those who employ a VA-accredited attorney, who then trains and supervises some combination of law students, paralegals, and other clinical staff as their *primary* responsibility. Teaching best practices and professional conduct standards through competent legal representation is not only a common law school clinic model but one expressly recognized by the VA as “prevalent” since 38 C.F.R. § 14.629 was first proposed thirty-three years ago. *See* Cmts. of NLSVCC to Proposed Rule, at 2 (Apr. 20, 2020) (citing 52 FR 8472 (March 18, 1987); 53 FR 52416 (December 28, 1988)). The harm to veteran clients, clinic operations, and the education of students in the context of VA claims representation was grave enough as an ongoing election by VA not to develop necessary electronic file access for non-lawyers despite VA’s longstanding recognition of their role in competent representation and adequate controls over their supervision. *Id.* (noting “adequate controls” which already exist that permit “rel[iance] upon the integrity of the attorneys involved”). That harm is greatly compounded by the fact that, just after the previous round of briefings concluded in these appeals, VA now labels these same persons throughout the Proposed Rule as a security risk to the VA’s IT systems and a privacy risk to their own clients. *See* 85 FR 9435. Implicit in such action is a massive degradation of the reliance on the integrity of attorneys to provide adequate controls - despite no cited incidences of veterans alleging privacy violations, no attorneys alleging inadequate controls over non-lawyers or the ability to implement adequate controls, and no specified risks to the VA’s IT systems (that isn’t already expressly considered in representation and third party authorization agreements). The Proposed Rule relabels non-attorneys, absent any bases in reality.

In summation, even the Proposed Rule demonstrates the lack of any *need* to promulgate changes, but merely represents the election of the VA to continue to not implement access controls that it must (without acknowledgment) while engaging in harmful security theater. Nowhere in the Proposed Rule does the VA cite to its statutory authority to responsibly implement controls over accredited attorneys, which necessarily includes supervision of non-attorney assistance. Generalized security concerns for the general population do not trump the specific Congressional mandate to appropriately regulate the conduct of legal professionals, *in accordance to* their pre-existing professional standards.

II. Even with Promulgation of a Final Rule, Appellants' Arguments Will Not Be Rendered Moot

The Secretary misstates the Appellants' reliance on current regulatory language, and therefore mistakes changes to that regulatory language as having preclusive effect upon these appeals. *See* Sec'y Resp. at 3. Unlike a future-but-purely-hypothetical challenge to the language of the Proposed Rule, these appeals see the Appellants' invoking favorable statutory authority *primarily* and favorable regulatory language only to the extent that it exemplifies the only plausible position in conformity with Congressional intent (codifying favorable pre-existing administrative practice) that non-lawyer access to electronic claims files is foundational, not a discretionary use of VA's authority. *See supra* at 3. In other words, the proposed removal of regulatory language does not remove the pre-existing and live controversy over whether the statute requires some version of the same language at all. A challenge to the Proposed Rule would amount to "the VA is not free to say *that*," as a facial challenge while the current appeals

should determine what the VA must promulgate *at a minimum* and only seeks to disprove the Secretary's current application as it has been presented in these cases.

CONCLUSION

NLSVCC respectfully asks the Court not to implement any stay of these appeals and submits that no final rule can moot such appeals. NLSVCC asks the Court to grant long-needed relief to the profession to include mechanisms that will ensure the expeditious development of implementation-in-fact through necessary software changes.

/s/ Yelena Duterte

Yelena Duterte
Assistant Professor of Law and
Director Veterans Legal Clinic
UIC John Marshall Law School
315 South Plymouth Ct.
Chicago, Illinois 60604
Telephone: 312-427-2737 x843
Email: ydutert@jmls.edu

/s/ Matthew Wilcut

Attorney
Deuterman Law Group
317 S. Greene St.
Greensboro, NC 27401
Telephone: 336-373-1130 x334
Email: matt@deutermanlaw.com

Certificate of Service

I hereby certify that on August 6, 2020, the foregoing Amicus Curiae Brief was e-filed and served by electronic means on the following parties or counsel:

John D. Niles
(202) 621-5780
National Veterans Legal Services Program
1600 K Street, N.W., Suite 500
Washington, D.C. 20006
Lead Counsel for Appellants

Nathan Paul Kirschner
(202) 632-6959
Senior Appellate Attorney
Office of General Counsel (027D/E)
U.S. Dept. of Veterans Affairs
810 Vermont Avenue, N.W.
Washington, D.C. 20420
Lead Counsel for the Secretary

/s/ Matthew Wilcut

Matthew Wilcut
Deuterman Law Group
317 S. Greene St.
Greensboro, NC 27401
(336) 373-1130
matt@deutermanlaw.com

Board Member of National Law School Veterans Clinic Consortium