IN THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

RICHARD C. BAREFORD, Appellant, v. **DENIS McDONOUGH**, Secretary of Veterans Affairs, Appellee.	)))))))))	Vet. App. No. 19-4633

BRIEF FOR RICHARD C. BAREFORD IN OPPOSITION TO THE SECRETARY'S MOTION FOR FULL COURT REVIEW

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Congress requires that the Secretary of Veterans Affairs "shall furnish, when requested, an appropriate memorial headstone or marker *for the purpose of commemorating* an eligible individual whose remains are unavailable." 38 U.S.C § 2306(b)(1) (emphasis added). The panel properly set aside 38 C.F.R. § 38.631(c)(1), which limits the commemoration of veterans to those whose family members request it, as arbitrary and capricious and inconsistent with statutory purpose.

Until VA instituted its current (misguided) policy in 2009 and 2016 rulemakings, it had been the nearly unbroken practice of the government since the Civil War to furnish burial and memorial markers for veterans upon request, no matter the identity of the requestor. This case illustrates the wisdom of this historical practice. On September 2, 1935—Labor Day Monday—259 veterans died when a hurricane struck the Florida Keys. Of the dead, 254 were federal employees, selected by the Veterans Administration for service in the Veterans Work Program, a New Deal project created to assist the thousands of jobless veterans, mostly from World War I, who had gathered in Washington, DC during the Great Depression. Vilified in life as bums, drunks and psychopaths, they were promptly forgotten in death. The cremated remains in the Keys were abandoned in situ, and exposed to the elements for two years. In 1937 the Administrator opposed construction of the Florida Keys Memorial in Islamorada because it would "serve as a constant reminder of the unfortunate catastrophe which occurred."[1] In the 87 years since the hurricane, 91 of

[1] Letter, Frank T. Hines to Aubrey Williams, Deputy Administrator, Works Progress Administration, June 24, 1937; Investigative Files Regarding the Labor Day Hurricane of 1935, ca. 1935-1965; Records Group 15: Records of the Dept. of Veterans Affairs; National Archives Building, Washington, DC.

the 259 dead received proper burials, grave, and memorial markers through the efforts of family members and third parties; four unmarked graves at Woodlawn Cemetery, Miami, are pending action. Richard Bareford (Major, U.S. Army, Ret.) requested memorial markers for the 164 forgotten veterans, after years of researching service and VA records to establish their eligibility, only to be denied by VA's arbitrary family-applicant-only regulation.

There are no "good reasons" for VA to restrict applicants for memorial markers or headstones to family member, *Encino Motorcars, LLC v. Navarro*, 579 U.S. 211, 221 (2016), and VA did not "examine the relevant data" before taking action. *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 513 (2009) (internal citation omitted). The panel correctly made this determination in a reasoned opinion. *See Bareford v. McDonough*, 35 Vet.App. 171, 188–190 (2022) (finding 38 C.F.R. § 38.631(c) "arbitrary and capricious"). But even if members of the Court disagree with the panel's ruling, the Secretary's motion for full court review should be denied. "Motions for full Court review are not favored. Ordinarily they will not be granted unless such action is necessary to . . . resolve a question of exceptional importance." U.S. VET. APP. R. 35(c). Whether section 38.631(c)(1) is "reasonable and reasonably explained" is not such a question. Mot. at 10. If it were, full court review would be necessary every time a panel sets aside a VA regulation. The Secretary's motion should be denied.

I. THIS CASE DOES NOT INVOLVE A QUESTION OF "EXCEPTIONAL IMPORTANCE"

Under U.S. VET. APP. R. 35, full court review is not favored and ordinarily will not be granted unless it is necessary to (1) secure or maintain uniformity of the Court's decisions or (2) resolve a question of exceptional importance. The Secretary's request does not meet that demanding standard.

A. The Secretary Did Not Demonstrate That This Case Involves a Question of Exceptional Importance

Granting full court review is rare, and for good reason.[2] Empaneling a full court requires that the parties expend additional resources, and consumes "an inordinate amount of time and judicial resources." *Lawrence v. McDonough*, No. 20-5697, 2021 WL 2134120, at *4 (Vet. App. May 26, 2021) (Greenberg, J., concurring in denial of full court review)*, vacated as moot in Lawrence v. McDonough*, No. 21-2118, 2021 WL 6331586 (Fed. Cir. Oct. 5, 2021). It is for this reason that the Court requires a movant to "demonstrate" why a particular question meets the "exceptional importance" standard. The Secretary's motion fails to do so.

At most, the Secretary's motion merely ***alleges*** that the panel's decision raises a question of "exceptional importance." Mot. at 2, 10 ("[T]his case involves a question of exceptional importance; namely, whether the Secretary's regulation is reasonable and

[2] This Court's Rule 35 mirrors Rule 35 of the Federal Rules of Appellate Procedure. Between 2018–2020, en banc opinions constituted less than 1% of all federal appellate decisions. *See* Neal Devins et al., *Weaponizing En Banc*, 96 N.Y.U. L. REV. 1373, 1409, Fig. 1 (2021), http://ssrn.com/abstract=3782576. The infrequency of full court review is equally pronounced for this Court. *See, e.g.*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, FISCAL YEAR 2021 ANNUAL REPORT at 2 (2022).

reasonably explained and appropriately fills the gap left by Congress as to who may apply for a memorial marker."). This is not enough. "It is not sufficient merely to allege that one of the two foregoing criteria are met; it must be ***demonstrated***." *Holliday v. Principi*, 15 Vet.App. 21, 22 (2001) (emphasis added). Simply stating that this case involves a question of exceptional importance does not make it so.

The Secretary's failure to "demonstrate" why setting aside section 38.631(c)(1) raises a question of "exceptional importance" constitutes a *prima facie* reason to deny full court review. This is not a case where full court review is important to avoid conflicts with decisions of other courts. *Cf.* FED. R. APP. P. 35(b)(1)(B) ("a petition may assert that a proceeding presents a question of exceptional importance if it involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue"); *see* Note, *The Politics of En Banc Review*, 102 HARV. L. REV. 864, 876 & n.61 (1989) (citing Legislative History to show that "[t]he exceptional importance test anticipates future conflict with a particular panel decision"). Nor is it a case that relates to constitutional rights or this Court's jurisdiction. *See Rosinski v. Wilkie*, No. 17-3293, 2020 WL 2777154, at *1 (Vet. App. May 29, 2020) (Meredith, J., dissenting) (question implicating the Appropriations Clause); *Lawrence v. McDonough*, 2021 WL 2134120, at *5 (Allen, J., dissenting) ("[T]he panel decision goes to the heart of our jurisdiction"). Nor did the panel interpret the statutory text to curtail the Secretary's powers on matters of significance. The Secretary simply does not agree with the panel's determination that the 2016 rule is not "reasonable or reasonably explained," and now needs to be revisited by the Secretary.

The Secretary has also not "demonstrated" that section 38.631(c)(1) is itself a regulation of exceptional importance. The regulation at issue is relatively obscure and does not impact the lives of veterans as frequently as other VA regulations. *Compare* 38. C.F.R. § 38.631 (123 administrative decisions & guidance) *with* 38 C.F.R. § 4.3 (122,555 administrative decisions and guidance). It is unsurprising that the questions surrounding third-party applicants for memorial markers arise infrequently; few are willing to do the considerable legwork of unearthing service records to establish eligibility for long-dead veterans and arranging cemetery placement, or to pay installation fees for markers VA does furnish. *See* 38 C.F.R. § 38.631(b)(4) ("VA will not pay the cost of installing a memorial headstone or marker provided under this section for placement in any cemetery that is not a national cemetery"). Not once has the Secretary provided evidence of the total number of requests, or pending requests, for memorial markers or headstones by third-party applicants; indeed, the Secretary has not demonstrated that there are *any* pending third-party requests for memorial markers other than Mr. Bareford's.

Instead, the Secretary trots out a parade of horribles surrounding hypothetical requests for memorial markers because "anyone may now apply." Mot. at 9–10. Conjuring implausible scenarios of an "estranged sibling" or "battlefield adversary" requesting memorial markers, Appellee Br. at 25, is a weak attempt to make this case something it's not. The Secretary voices concerns that a memorial request may conflict with the decedent's family preferences, Mot. at 10, but has not shown that any such conflict has *ever* occurred (much less frequently). And even if such conflicts are possible, they can be addressed by drafting a lawful regulation that prioritizes family applications while still

effectuating fully the statute's purpose. *See infra* Section II.A. Rule 35's "exceptional importance" standard requires more than speculation. Simply put, the Secretary "has not carried his burden to demonstrate why the Court should favor his motion in this case." Brief for Respondent at 3, *Randolph v. McDonough*, Vet.App. No. 20-3333 (May 3, 2021). The Court should deny the Secretary's motion on this basis alone.

B. Whether a VA Regulation Is "Reasonable and Reasonably Explained" Is Not a Question of Exceptional Importance

The Secretary asks the Court to adopt a policy that effectively grants full court review under the "exceptional importance" standard ***every time*** a panel sets aside one of VA's regulations. *See* Mot. at 2, 10 ("[T]his case involves a question of exceptional importance; namely, whether the Secretary's regulation is reasonable and reasonably explained"). The Court should reject this invitation. Whether the Secretary's regulation "is reasonable and reasonably explained" does not satisfy Rule 35's requirements.

The question posed by the Secretary, *i.e.*, whether VA's regulation is "reasonable and reasonably explained," is the ordinary fare of judicial review and does not come near the legal questions a full court is meant to tackle. If it did, then the Secretary would have grounds to petition for full court review every time a panel sets aside one of VA's regulations. This is not the law, of course. *See Wolfe v. Wilkie*, 32 Vet.App. 1, 11 (2019) ("We have a court correcting an incorrect agency interpretation of a statute. This happens all the time in our system of government."), *rev'd on other grounds by Wolfe v. McDonough*, 28 F.4th 1348 (Fed. Cir. 2022). The "exceptional importance" standard requires more than merely invalidating an agency regulation, as is evidenced by the many

instances where this Court—and other federal appellate courts—invalidate agency regulations without empaneling a full court thereafter.[3] The Secretary holds the keys to re-write section 38.631(c)(1), and requiring him to rewrite this regulation to comport with the law should not stand out against other instances where VA regulations were set aside. Whether a VA regulation is "reasonable and reasonably explained" does not warrant full court review under the "exceptional importance" standard. The Court should deny the Secretary's motion.

II. THE PANEL'S DECISION SHOULD NOT BE DISTURBED

Because this is not a case of exceptional importance, the Secretary's petition should be denied without regard to the merits of the controversy, which are "irrelevant" to the decision to grant full court review. *See Igartua v. United States*, 654 F.3d 99, 103 (1st Cir. 2011) (Torruella, J., concerning the denial of en banc consideration). But even the merits of the panel's decision further supports denial of the Secretary's motion.

An agency regulation is

> arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to

[3] *See, e.g.*, *Crumlich v. Wilkie*, 31 Vet.App. 194 (2019) (setting aside part of 38 C.F.R. § 20.302(b)(1)); *Staab v. McDonald*, 28 Vet.App. 50 (2016) (setting aside 38 C.F.R. § 17.1002(f)). The cases in which federal appellate courts set aside agency regulations, without en banc review being requested or (if requested) granted, are legion. *See, e.g.*, *Military-Veterans Advocacy v. Sec'y of VA*, 7 F.4th 1110, 1148 (Fed. Cir. 2021) (setting aside 38 C.F.R. §§ 14.636(c)(1)(i), 3.155, 3.2500(b)); *Nat'l Ass'n of Mfrs. v. Dep't of Treasury*, 10 F.4th 1279, 1288 (Fed. Cir. 2021); *Consumer Fin. Prot. Bureau v. Consumer First Legal Grp.*, 6 F.4th 694, 705-06 (7th Cir. 2021); *Texas Ass'n of Mfrs. v. United States Consumer Product Safety Comm'n*, 989 F.3d 368, 389-90 (5th Cir. 2021); *Citizens for Responsibility and Ethics in Washington v. Fed. Election Comm'n*, 971 F.3d 340, 354-56 (D.C. Cir. 2020); *New York v. U.S. Dep't of Homeland Sec.*, 969 F.3d 42 (2d Cir. 2020).

> the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.

Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983). A regulation that runs contrary to the "clear purpose" of the statute cannot stand. *Commc'ns Satellite Corp. v. FCC*, 836 F.2d 623, 632 (D.C. Cir. 1988). The panel's decision finding that VA's memorial-marker regulation is arbitrary and capricious is unassailable, and should not be disturbed.[4]

A. The Secretary's Regulation Is Unreasonable and Contravenes Statutory Purpose

Congress has expressly declared the purpose of furnishing memorial headstones or markers:

> The Secretary shall furnish, when requested, an appropriate memorial headstone or marker *for the purpose of commemorating* an eligible individual whose remains are unavailable.

38 U.S.C. § 2306(b)(1) (emphasis added). This purpose, to commemorate veterans who have served their country, aligns with congressional intent to set aside "suitable areas in national cemeteries *to honor the memory* of members of the Armed Forces and veterans" whose remains are unavailable, where "appropriate memorial headstones and markers may be placed *to honor the memory* of individuals referred to in subsection (a) and section 2306(b) of this title." *Id.* §§ 2403(a), (b) (emphasis added). Indeed, "[a]ll national and other veterans' cemeteries under the control of the National Cemetery Administration,"

[4] Mr. Bareford has argued, and continues to maintain, that 38 U.S.C. § 2306 is not ambiguous and does not permit any applicant eligibility restrictions. Appellant Br. at 17–22.

where memorial markers are authorized to be placed, "shall be considered national shrines as a tribute to our gallant dead." *Id.* § 2403(c).

VA has previously recognized this statutory purpose. In the preamble to its 2009 rule, VA cited section 2403(c) to declare that "[G]overnment-furnished headstones and markers serve a particular, congressionally mandated purpose, namely, *to commemorate the gallant dead in a manner commensurate with the dignity of their sacrifice.*" Headstone and Marker Application Process, 74 Fed. Reg. 26,092-01, 26,094 (June 1, 2009) (emphasis added). Regardless of VA's reasons for changing course, Congress made clear that the dignity of a veteran's sacrifice does not depend on his family circumstances—whether a family member is available or interested in requesting a memorial—or whether the veteran's remains were available for burial or not. The panel correctly set aside VA's regulation as contravening the statutory purpose of section 2306(b)(1).[5]

Furthermore, nothing in the plain text of section 2306(b)(1) ties commemoration of an individual to that individual's family. "[C]ommemorating an eligible individual whose remains are unavailable" is a national honor memorializing the individual's service to the country, and (as VA acknowledged at oral argument) an entitlement that belongs to the veteran. 35 Vet.App. at 181, 187 (citing OA at 38:1–15). This is likely why, up until 2009, VA did not limit section 2306(b)(1) to requests by family members. But VA began to chip

[5] The Secretary now attempts to run from its prior acknowledgement that the purpose of government-furnished markers and headstones is "to commemorate the gallant dead in a manner commensurate with the dignity of their sacrifice." *See* Mot. at 3–5. The Secretary's attempt to parse VA's prior statements is unpersuasive; regardless, the statute itself clearly defines its purpose.

away at the express purpose of section 2306(b)(1) when it adopted a rule change in 2009, limiting the right to request *both burial and memorial headstones or markers* to "the decedent's next-of-kin (NOK), a person authorized in writing by the NOK, or a personal representative authorized in writing by the decedent." 38 C.F.R. § 38.632(b)(1) (2009). For the 2009 rule change, VA did not explain why it proposed a new, limiting definition of applicants. 35 Vet.App. at 185 ("VA did not address its novel limitation on eligible applicants"). That dramatic and unexplained rule change caused public and congressional outcry, prompting VA's decision in 2016 to differentiate between burial and memorial headstones and markers, and to impose the family-member application restriction only on the latter. Before 2009, "anyone having knowledge of the deceased" could request a memorial headstone or marker. *See* R. at 36. After 2016, any "eligible individual" ***without*** family members could not be commemorated under section 2306(b)(1).

The panel majority properly faulted VA's adoption of the 2016 rule as lacking a rational explanation consistent with statutory purpose. 35 Vet.App. at 187–88. VA had acknowledged that both burial and memorial markers are meant to honor the veteran's service and provide a place for family mourning. *Id.* Moreover, since the inception of the National Cemeteries Act in 1973, VA had always applied the same applicant criteria to the two types of markers (prior to the 2016 regulation). *Id.* Yet the Secretary drew separate criteria for eligible applicants, without explaining (for example) why personal representatives or other individuals should be excluded from applying for memorial headstones or markers based on the happenstance that the veteran's remains are unavailable for burial. *Id.* And VA never explained how its "restrictive definition satisfies VA's stated

policy of 'strik[ing] an appropriate balance between protecting the interests of a decedent's family and ensuring the appropriate memorialization of veterans.'" *Id.* at 189 (quoting Applicants for VA Memorialization Benefits, 81 Fed. Reg. 10,765-01, 10,769 (Mar. 2, 2016)). Further, VA never justified the differential restrictions for the two types of markers, when both serve the same statutory policy. *Id.* at 189–190 (pointing out "VA's acknowledgement that the two types of headstones and markers serve the same congressionally mandated purpose"). Accordingly, "the absurd result of the current policy … is that when no surviving family member is available, the deceased service member and his or her contributions to our country remain unmemorialized, simply because that service member's remains are not available for burial." *Id.* at 190. The 2016 rule is simply not a policy "that Congress would have sanctioned" when drafting section 2603(b)(1), and the panel correctly set it aside. *Id.; See also Crumlich*, 31 Vet.App. at 197 (holding portion of regulation invalid that "conflicts with a statutory mandate").

B. The Secretary Did Not Provide "Facts" or "Good Reasons" for Changing VA Policy

For over four decades, anyone with "knowledge of the deceased" could request a memorial marker. VA changed this longstanding policy in 2009 and again in 2016 without any factual basis to do so. And still today, VA cannot provide any facts or "good reasons" for this change in policy, thus rendering the current regulation "arbitrary and capacious." *See Encino Motorcars*, 579 U.S. at 221 (requiring that an agency provide "a rational connection between ***the facts*** found and the choice made") (internal citation omitted;

emphasis added). *See also id.* ("[T]he agency must at least . . . show that there are ***good reasons*** for the new policy") (internal citation omitted).

VA still has not established "the facts" upon which its policy change was made. Although it justifies the applicant restriction on the need to favor family members, VA has not shared how many requests (*if any*) from non-family members conflicted with requests from family members. Or, how many requests there are per year from third-party requestors, requiring VA to limit the total number of requests for administrative reasons. Without "the facts," VA's change in policy cannot warrant deference. *See FCC v. Prometheus Radio Project*, 141 S. Ct. 1150, 1159 (2021) (discussing the "two data sets on which the FCC relied"); *Mayo Found. for Med. Educ. & Research*, 562 U.S. 44, 49–50 (2011) (adopting an amended rule after receiving a "flood of claims").

In addition to not providing any "facts" to support its change in policy, VA did not provide any "good reasons" for the shift (and could not muster any in its motion for full-court review). In justifying the 2016 rule, VA articulated that its "intent, as much as possible, is to reserve to the family of the decedent decisions regarding memorialization." 81 Fed. Reg. at 10,768; *id.* at 10,769. To be clear, Mr. Bareford recognizes that VA's regulation can consider the primacy of family members when requesting memorial headstones or markers. For example, VA could devise a rule that establishes a reasonable waiting period after death before third-party requests are fulfilled; it could require that applicants attempt to locate and contact family members; and, in the event of competing applications, it could give priority to family-member applications. *See* Appellant Br. at 24–25, 30. But the absence of a family applicant cannot be a reason for denying altogether

the commemoration to which the veteran is entitled. There is no "good reason" why a veteran's commanding officer, members of his unit, a local veteran's organization, a personal representative, or a patriot like Mr. Bareford should be categorically excluded from applying to commemorate the veteran if his family is unavailable or estranged. Ensuring that family members can find "solace" when commemorating their loved ones does not exclude effectuating Congress's intent to commemorate all other "eligible individuals." Appellee Br. at 10, 18–19. No veteran should be forgotten.

The Secretary relies on *FCC v. Prometheus* to argue that agency rule changes are entitled to deference. Mot. at 6. But the panel acknowledged that its review was deferential, 35 Vet.App. at 183, and simply found the Secretary's reasoning lacking. In any event, in *Prometheus*, the FCC changed its broadcast-ownership rules because its old policy "no longer serve[d] the public interest," which was the purpose of the statute in question. *See* 141 S. Ct. at 1154, 1160. Here, the statutory purpose of the National Cemeteries Act, and specifically section 2306(b)(1), is to commemorate "eligible individual[s] whose remains are unavailable." Unlike the agency in *Prometheus*, VA has not provided any "good reason" why its old policy no longer served the statute's purpose.

The Secretary's reliance on *FCC v. Fox Television* is similarly unavailing. *See* Mot. at 6. To be sure, like the FCC in *Fox Television*, VA did indeed "display awareness that it [was] changing position." 556 U.S. at 515. Like the FCC, it did not "depart from a prior policy *sub silentio*." *Id*. The similarities end there. Unlike the FCC, VA did not "explicitly disavow[]" the pre-2009 or 2016 rules as "no longer good law." *Id.* at 517. And unlike the FCC, VA did not "decide it needed to step away from its old regime" that was "at odds"

with its overall policy. *Id.* at 518. To the contrary, VA's "old regime" was more in-line with the department's overall policy; it is the ***new regime*** that is "at odds" with VA policy. *Cf.* Mot. at 6–7 (citing 79 Fed. Reg. 59176–01 to articulate "VA's 'desire to expand the types of individuals who may request headstones and markers on behalf of decedents'").

In addition to not providing "good reasons" for changing its policy, the Secretary has not provided "good reasons" for distinguishing between burial requests and memorial requests. Confusingly, VA stated that memorial headstones and markers are "***distinguished***" from burial headstones and markers because they are intended to "provide a family with a physical site to gather to mourn and remember their loved one, ***similar*** to that provided by a burial headstone or marker." 81 Fed. Reg. at 10,768–69 (emphasis added). This reasoning is nonsensical. Memorial headstones and markers cannot be "distinguished" from burial headstones and markers because they provide something "similar" to what burial headstones and markers provide. *See* 35 Vet.App. at 189 (noting that VA's stated purpose "*applies to both types of headstones and markers*").

Thus, not only has the Secretary failed to show the exceptional importance of this case, but he has not even demonstrated error. VA has not articulated "an acceptable policy choice, premised on the special purpose held by memorial markers." Mot. at 8. If anything, VA's reasoning shows that memorial markers and headstone *do not* hold a "special purpose" different than burial markers and headstones. Section 38.631(c)(1) is arbitrary and capricious, and the panel's decision should remain undisturbed.[6]

[6] Although relevant only to panel review, the Secretary is incorrect that "the Court misunderstood critical facts and the relevant law, including the fact that the Veteran's

III. CONCLUSION

For the foregoing reasons, the Secretary's motion for full court review should be denied. This case does not raise a question of exceptional importance, and the panel correctly set aside 38 C.F.R § 38.631(c)(1).

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remains are not unavailable in this case as defined by 38 U.S.C. § 2306(b)." Mot. at 1. The Secretary never raised that argument, and instead argued wrongly that Mr. Bareford submitted only a burial-marker application (whereas Mr. Bareford clearly applied for memorial markers, R. 18, R.79). Appellee Br. at 9 n.2, 14 n.5; 35 Vet.App. at 194 n.9 (Falvey, J., concurring in part and dissenting in part) ("[O]ther statutory considerations and limitations concerning headstones or markers …, such as where the individual is buried, who is an eligible deceased individual, and what constitutes unavailable remains of a deceased individual" are "not at issue"). The Secretary cannot raise a new argument for the first time on rehearing. *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008).

The Secretary's contention is also factually unsupported. Unlike other veterans, R. at 62, Roy H. Anderson was not cremated upon discovery; rather his body was reported found on October 10, 1936, after 13 months of exposure to the elements. R., at 63. There is no record of what became of his remains, and they can no longer be identified or recovered. Exhumations were conducted in late 1937 to place the remains of hurricane victims in the Islamadora crypt, R. at 62, but there is no known record of which individual veterans' remains were exhumed or actually interred there. Mr. Bareford has regarded the Islamadora crypt as the resting place of all the veterans killed in the Labor Day hurricane, and has loosely characterized the crypt as the place holding the cremated and commingled remains of 166 veterans, including Mr. Anderson. *See, e.g.*, R., at 63. But to the extent VA is insisting on a precise factual accounting of the disposition of Mr. Anderson's individual remains, that is impossible. A memorial marker is appropriate if the remains "are unavailable" (present tense) at the time the marker is to be furnished, 38 U.S.C. § 2306(b)(1), including circumstances where the individual's remains "have not been recovered or identified," *id.* § 2306(b)(3)(A). Because Mr. Anderson's remains had not been recovered or identified at the time of the application, Mr. Bareford properly applied for a memorial marker for him (and for other hurricane victims), and the panel properly determined that 38 C.F.R. § 38.631(c) is at issue in this case. There is no advisory opinion. *See* Order denying motion for reconsideration, at 2 (Pietsch, J., concurring).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 30, 2022, I will electronically file the foregoing with the Clerk of Court at efiling@uscourts.cavc.gov, and will then send an electronic copy to the following:

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