No. 24-1230

IN THE

United States Court of Appeals for the Federal Circuit

SEAN A. KENDALL,

Claimant-Appellant,

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS,

Respondent-Appellee,

DORIS LAUGHTON-SMITH,

Respondent.

On Appeal from the United States Court of Appeals for Veterans Claims
No. 21-5563, Judge William S. Greenberg

MOTION OF THE FEDERAL CIRCUIT BAR ASSOCIATION FOR LEAVE TO FILE BRIEF AS AMICUS CURIAE IN SUPPORT OF THE PETITION FOR REHEARING EN BANC

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Counsel for Amicus Curiae

Pursuant to Federal Rule of Appellate Procedure 29(b) and Federal Circuit Rule 40(i), the Federal Circuit Bar Association respectfully moves for leave to file the accompanying amicus curiae brief in support of Appellant Sean A. Kendall's petition for rehearing en banc. Both Appellant and Appellee consent to the filing of this brief.

STATEMENT OF INTEREST

The Federal Circuit Bar Association ("FCBA") is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. Organized in 1985, the FCBA seeks to strengthen and serve the Federal Circuit bar by uniting the various groups who practice before this Court. As the principal bar association of the Federal Circuit, the FCBA is uniquely positioned to provide the perspective of practitioners who regularly appear before this Court. Of particular relevance to this case, FCBA members frequently represent veterans before both the United States Court of Appeals for Veterans Claims and this Court.

The legal issue in this case concerns the proper construction of 38 U.S.C. § 7263(d), a jurisdictional provision that defines this Court's authority to review the validity of VA regulations governing the

reasonableness of attorneys' fees. The FCBA has a direct institutional interest in the proper construction of statutes that define this Court's appellate jurisdiction. This interest is particularly strong where, as here, the statute at issue impacts FCBA members' ability to obtain Article III review of regulations governing the reasonableness of their fees.

FCBA's proposed amicus brief will assist this Court in interpreting § 7263(d) by describing the legislative history of the Veterans' Judicial Review Act ("VJRA"), the statute that first introduced § 7263(d), and the statutory framework the VJRA created for judicial review of veterans' benefits decisions. The brief also addresses the broader implications of the panel majority's decision, and how those implications conflict with the underlying goals of the VJRA. FCBA believes this perspective, which the parties' briefing does not address, will aid this Court in its review.

FCBA notified both Appellant and Appellee of this motion. Both parties consent to the filing of the accompanying amicus brief. This motion and the accompanying brief are timely under Federal Circuit Rule 40(i)(2) because FCBA is filing them within 14 days of the filing of the petition for rehearing en banc, which was filed on June 15, 2026.

CONCLUSION

For the foregoing reasons, the FCBA respectfully requests that the Court grant leave to file the enclosed brief.

June 29, 2026

Respectfully submitted,

/s/ Kevin P. Martin

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 24-1230

Short Case Caption Kendall v. Collins

Filing Party/Entity Federal Circuit Bar Association

Instructions:

1. Complete each section of the form and select none or N/A if appropriate.
2. Please enter only one item per box; attach additional pages as needed, and check the box to indicate such pages are attached.
3. In answering Sections 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance.
4. Please do not duplicate entries within Section 5.
5. Counsel must file an amended Certificate of Interest within seven days after any information on this form changes. Fed. Cir. R. 47.4(c).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 06/29/2026

Signature: /s/ Kevin P. Martin

Name: Kevin P. Martin

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Federal Circuit Bar Association		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

☐ Yes (file separate notice; see below) ☐ No ☑ N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). **Please do not duplicate information.** This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

CERTIFICATE OF COMPLIANCE

This motion complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A). The motion is printed in Century Schoolbook 14-point font and contains 402 words, excluding the parts exempted by Fed. R. App. P. 27(a)(2)(B).

/s/ Kevin P. Martin
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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

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Name: Kevin P. Martin

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STATEMENT OF INTEREST

The Federal Circuit Bar Association ("FCBA") submits this brief in support of the petition for rehearing en banc of Appellant Sean A. Kendall.[1] The FCBA is a national organization for the bar of the United States Court of Appeals for the Federal Circuit. One of the FCBA's primary purposes is to serve as a forum for dialogue between members of the Federal Circuit bar and this Court. The FCBA submits this brief as the principal bar association of this Court, with a direct interest in the proper construction of the jurisdictional provisions that define this Court's authority to review legal questions affecting the rights and interests of FCBA members.

Members of the FCBA regularly represent veterans in proceedings adverse to the Secretary of the Department of Veterans Affairs ("VA") before the Court of Appeals for Veterans Claims ("Veterans Court") and this Court. The FCBA therefore has a direct and substantial

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amicus curiae certifies that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than amicus curiae or his counsel contributed money that was intended to fund preparing or submitting the brief.

institutional interest in the specific question presented in this case: whether FCBA members and other members of the Veterans bar may seek Article III review of the validity of VA regulations governing the reasonableness of their fees.

That question is of profound significance to FCBA members and, ultimately, the veterans they serve. Under the panel majority's interpretation of 38 U.S.C. § 7263(d), the Secretary's authority to promulgate and apply regulations permitting reduction of his adversaries' attorneys' fees is substantially insulated from direct Article III review in individual cases. This unchecked authority is at odds with the strong presumption of judicial review of agency action. It disincentivizes the Veterans bar from taking on complex benefits matters, undermining the fairness of the veterans benefits adjudication system. The FCBA respectfully urges this Court to grant rehearing en banc to avoid these outcomes.

Counsel for Appellant and Counsel for the Secretary of Veterans Affairs consented to the filing of this brief.

INTRODUCTION

Since 1988, Congress has provided veterans and their representatives within the VA system with access to Article III judicial review. The passage of the Veterans' Judicial Review Act ("VJRA") reflected a fundamental shift in the relationship between the VA and the judiciary, ending the VA's longstanding exemption from judicial review and subjecting its legal determinations to review by both the Veterans Court and this Court. In recognition of the barriers veterans faced in obtaining adequate legal representation before these courts, the VJRA also lifted the longstanding limitation on attorneys' fees for VA benefits disputes.

The statutory framework governing attorneys' fees for VA cases has evolved significantly since the VJRA's enactment. Before 2006, initial fee-reasonableness determinations were made by the Board of Veterans' Appeals ("Board") and reviewed by the Veterans Court. That court's determinations of reasonableness in specific cases were not subject to further review, 38 U.S.C. § 7263(d), even as its decisions on legal and constitutional issues were, *id.*, § 7292(c). In 2006, Congress restructured the relevant statute to grant the VA Secretary authority to promulgate

regulations imposing "reasonable restrictions" on attorneys' fees and to make reasonableness determinations in specific cases. 38 U.S.C. § 5904. In doing so, Congress left § 7263(d), the provision that bars further review of Veterans Court fee orders, alone. The panel majority read this Congressional inaction to mean that even the Secretary's underlying regulations are immune from judicial review.

The panel majority's decision failed to account for the statutory history and the strong presumption of judicial review for agency action. Under the panel majority's decision, even if the Secretary's fee-reduction regulations directly contradict a statutory mandate or exceed the Secretary's statutory authority, no Article III court can remedy the situation. That outcome cannot be reconciled with the VJRA's text, structure, or legislative history, or with the strong presumption favoring judicial review of agency action. The panel majority's reading discourages attorneys from zealously representing veteran clients by creating uncertainty over whether attorneys will receive the compensation to which their client agreed. This chilling effect harms the very veterans the system was designed to protect.

The Court should grant rehearing *en banc* to correct the panel majority's misinterpretation and provide Article III review of legal questions arising out of the Secretary's fee-reasonableness regulations.

ARGUMENT

I. Congress Enacted the VJRA to Provide for Judicial Review of VA Determinations and Ensure Veterans' Access to Competent Counsel.

Before enactment of the VJRA, the VA operated in "splendid isolation" from judicial review; its decisions were effectively unreviewable by any independent court. *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (citing H.R. Rep. No. 100–963, pt. 1, at 10 (1988)). The VJRA ended this period of agency insulation. The result of decades of Congressional hearings and reports documenting the need for judicial review of VA determinations, the VJRA reflected Congress's considered judgment that the VA's actions required independent judicial oversight. *See, e.g., Judicial Review Legislation: Hearing Before the S. Comm. on Veterans' Affs. on S. 11 & S. 2292*, 100th Cong. 114 (1988) (opening statement of Sen. Alan Cranston, Chairman, S. Comm. on Veterans' Affs.) (emphasizing need for "outside review by the independent branch of government established in our constitutional framework with the

special responsibility of determining whether governmental action is legal and whether it is fundamentally fair.").

Congress pursued this objective through two complementary mechanisms: the creation of a specialized tribunal for veterans claims and the guarantee of Article III review of legal questions. First, the VJRA created the Veterans Court, a specialized Article I tribunal with jurisdiction to review decisions of the Board. 38 U.S.C. § 7253. Second, and of particular relevance here, the VJRA guaranteed Article III review by this Court of legal and constitutional questions decided by the Veterans Court, including challenges to the validity of VA regulations. 38 U.S.C. § 7292(c); *e.g., Jensen v. Brown*, 19 F.3d 1413, 1415 (Fed. Cir. 1994) (explaining "[t]his court has authority to review the Court of Veterans Appeals interpretation of a statutory provision or regulation" under § 7292, and reversing decision of Veterans Court finding regulation invalid as inconsistent with statute). This structure ensured that interpretations of statutes by the VA and Veterans Court would be subject to independent judicial scrutiny.

Congress also recognized that meaningful judicial review requires that veterans have access to competent legal representation. Prior to the

VJRA, attorneys and agents representing veterans were statutorily barred from charging more than ten dollars for their work on any given VA benefits claim. *See* Veterans' Benefits Consolidation Act, Pub. L. No. 85-857, § 3404(c)(2), 72 Stat. 1105, 1239 (1958); *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) (upholding ten-dollar fee limitation for VA benefits claims). During Congressional hearings, stakeholders expressed concerns that this cap made it nearly impossible for veterans to obtain adequate representation before the VA. *See* H.R. Rep. No. 100–963, pt. 1, at 17 (1988); *see generally Hearings on Jud. Rev. of Veterans' Claims, Subcomm. on Oversight and Investigations, H. Comm. on Veterans' Affs.*, 98th Cong., 1st Sess. (1983). In response, the VJRA authorized reasonable contingency fees for attorneys representing veterans before the Board and the Veterans Court. *See* Veterans' Benefits Improvement Act of 1988, Pub. L. No. 100-687, div. A, title I, § 104(a), 102 Stat. 4105, 4108 (1988) (originally codified at 38 U.S.C. § 3404 (1988); current version at 38 U.S.C. § 5904).

These two pillars of the VJRA—judicial review and access to adequate representation—were mutually reinforcing. Congress understood that judicial oversight of the VA was only meaningful if

veterans could access adequate counsel to bring their benefits claims and frame the relevant legal issues for review.

II. The Statutory Framework Surrounding Fee Arrangements Has Evolved Since Enactment Of The VJRA.

A. As Originally Enacted, § 7263(d) Barred Review Of Fee Determinations Made By The *Board*.

As enacted in 1988, the VJRA established a system for reviewing attorneys' fee agreements in VA benefits cases. Section 3404, now § 5904, authorized the Board to review fee agreements between veterans and their counsel and to order fee reductions where it found a fee was excessive or unreasonable. That same provision specified that "[a] finding or order of the Board under the preceding sentence may be reviewed by the [Veterans Court] under section 4063(d) of this title." 38 U.S.C. § 3404(c)(2) (1988).

Section 4063, now § 7263, in turn granted the Veterans Court authority to (1) review fee agreements on its own motion or the motion of any party, and (2) affirm a finding or order of the Board under § 3404(c)(2) and order a fee reduction as appropriate. The provision specified that "[a]n order of the [Veterans] Court under this subsection is final and may not be reviewed in any other court." Pub. L. No. 100–687, div. A, title III,

§ 301(a), 102 Stat. 4105, 4116 (1988) (originally codified at 38 U.S.C. § 4063(d), current version at 38 U.S.C. § 7263). Within the original statutory framework, this finality clause served to prevent Article III courts from second-guessing fact-intensive, case-specific fee-reasonableness determinations by the Board and Veterans Court.

Since its enactment in 1988, § 7263(d) has remained substantively identical. Congress updated the cross-reference to the Board's fee-review provision from "section 3404(c)(2)" to "section 5904(c)(2)" when § 3404 was renumbered, but it never amended the operative language of the finality clause.

B. Congress's 2006 Restructuring of § 5904 Fundamentally Changed the Nature of the Decisions Underlying Veterans Court Fee Orders.

In contrast, the provision that § 7263(d) cross-references, § 5904, has changed significantly. In 2006, Congress restructured § 5904 to authorize the VA Secretary, rather than the Board, to assess fee reasonableness in the first instance and order appropriate fee reductions. The Secretary's orders to reduce fees may then be reviewed by the Board. *See* 38 U.S.C. § 5904 (current). As a result, the Board no longer reviews and orders reductions of attorneys' fees in the first instance; it instead

reviews the Secretary's decisions in an appellate capacity. The 2006 amendment made another significant change by permitting the Secretary to "prescribe in regulations reasonable restrictions" on attorneys' fees for benefits claims before the VA. 38 U.S.C. § 5904(a)(5).

The practical consequence is that the subsection § 7263(d) cross-references, § 5904(c)(2), no longer contains any reference to a *Board* decision regarding fee agreements: it provides only for the filing of fee agreements with the Secretary. The subsection of § 5904 that does address Board review of fee decisions—the operative successor to the original § 3404(c)(2)—is located at § 5904(c)(3) and provides for Board review of the *Secretary*'s initial fee determination. In short, § 7263(d)'s cross-reference now points to a provision distinct from the one Congress initially targeted.

The fact that Congress altered § 5904 significantly without revising § 7263 is significant to assessing the scope of the jurisdictional bar in § 7263(d). When Congress enacted § 7263(d), the finality clause applied to a specific type of decision: fact-intensive fee-reduction orders issued by the Board based on its own assessment of the record. The current fee-review process involves a qualitatively different decision. Because the

Secretary now makes initial fee determinations and also has the authority to promulgate regulations imposing "reasonable restrictions" on attorneys' fees, the Board's role has shifted from independent factfinder to appellate reviewer of, *e.g.*, whether the Secretary's fee-related regulations are consistent with statutory law. That is precisely the kind of *legal* determination as to which § 7292 assigns jurisdiction to this Court. It is far removed from the fact-specific reasonableness determination that Congress sought to insulate from further appellate review when it enacted § 7263(d).

Legislative history confirms that Congress's purpose in enacting the finality clause in § 7263(d) was narrow: to prevent appellate courts from engaging in fact-intensive fee-reasonableness determinations. *Judicial Review Legislation: Hearing on S. 11 Before the Comm. on Veterans' Affs.*, 100th Cong. 43-44 (1988) (testimony of then-Judge Stephen Breyer) ("[i]t is difficult for Courts of Appeals to resolve any contested issues involved in matters of this sort, as those courts lack factfinding procedures"). The legislative history does not suggest that Congress intended to foreclose Article III review of the legality of VA

regulations. Such an outcome is directly at odds with the VJRA's central objective of ensuring judicial review over legal questions.

III. The Presumption of Judicial Review Requires a Narrower Reading of § 7263(d).

For all the reasons Appellant identifies, proper application of the presumption of judicial review requires recognizing this Court's jurisdiction to review the challenged VA regulation. It is well established that a statute will not be read to preclude judicial review absent "clear and convincing" evidence of congressional intent to do so. *Lindahl v. Off. of Pers. Mgmt.*, 470 U.S. 768, 778 (1985); *see also Mach Mining, LLC v. E.E.O.C.*, 575 U.S. 480, 486 (2015) (agency bears a "heavy burden" in attempting to show that Congress "prohibit[ed] all judicial review" of the agency's compliance with a legislative mandate). That inquiry turns "not only [on the statute's] express language, but also [on] the structure of the statutory scheme, its objectives, its legislative history, and the nature of the administrative action involved." *Lindahl*, 470 U.S. at 779. None of these factors supports reading § 7263(d) to bar Article III review of the validity of a VA regulation, a pure question of law, just because it concerns the reasonableness of attorneys' fees.

As Appellant details, Supreme Court precedent confirms that jurisdiction-stripping language in the veterans context is to be construed narrowly to avoid precluding review of legal issues. Petition of Appellant at 10-11 (citing *Johnson v. Robison*, 415 U.S. 361 (1974); *Traynor v. Turnage*, 485 U.S. 535 (1988)). The same reasoning applies here with equal force: Article III review of the validity of the Secretary's fee regulations involves review of a purely legal question that will not enmesh this Court in the fact-intensive, case-specific determinations that § 7263(d) was designed to place beyond Article III review.

The Supreme Court has reaffirmed that the judiciary, not the executive branch, ultimately bears responsibility for resolving questions of statutory interpretation and regulatory validity. *See Loper Bright Enters. v. Raimondo*, 603 U.S. 369, 392-93 (2024). If the Secretary's fee-determination regulations are insulated from the Federal Circuit's review, no Article III court will be able to assess whether the Secretary has correctly interpreted the scope of his own regulatory authority under § 5904(a)(5)—precisely the kind of unchecked agency power that the VJRA aimed to prevent by subjecting the VA to judicial review. This Court should not infer that Congress intended to restore the VA's

"splendid isolation" from judicial review with respect to the Secretary's fee regulations. Such a reading of § 7263(d) would deter qualified attorneys from representing veterans zealously, thereby undermining the very system of meaningful judicial review that the VJRA was enacted to promote.

CONCLUSION

For the foregoing reasons, the FCBA respectfully urges this Court to grant rehearing en banc.

June 29, 2026

Respectfully submitted,

/s/ Kevin P. Martin

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Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 40(i)(3), because this brief contains 2,519 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Microsoft 365 in Century Schoolbook 14-point font.

/s/ Kevin P. Martin
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