NO. 2015-3086

In the United States Court of Appeals
for the Federal Circuit

SHARON M. HELMAN,

Petitioner,

v.

DEPARTMENT OF VETERANS AFFAIRS,

Respondent.

On Petition for Review of the Merit Systems Protection Board
Case No. DC-0707-15-0091-J-1

MOTION OF PUTATIVE INTERVENOR-RESPONDENTS/*AMICI* VETERANS OF FOREIGN WARS, AMVETS, IRAQ AND AFGHANISTAN VETERANS OF AMERICA, NATIONAL ASSOCIATION FOR UNIFORMED SERVICES, RESERVE OFFICERS ASSOCIATION, NON-COMMISSIONED OFFICERS ASSOCIATION, MARINE CORPS LEAGUE, ARMY RESERVE ASSOCIATION, MARINE CORPS RESERVE ASSOCIATION, U.S. ARMY WARRANT OFFICERS ASSOCIATION, SPECIAL FORCES ASSOCIATION, AND JEWISH WAR VETERANS OF THE UNITED STATES FOR PERMISSIVE INTERVENTION, OR IN THE ALTERNATIVE TO FILE AN OVERSIZED *AMICUS* BRIEF IN SUPPORT OF NEITHER SIDE AND BE HEARD AT ARGUMENT

A coalition of 12 military and veterans organizations, collectively representing millions of veterans and members of the military, respectfully moves this Court for permission to intervene in this appeal for the purpose of defending the constitutionality of the Veterans Access, Choice, and Accountability Act ("VACAA").

Pursuant to Fed. Cir. R. 27(a)(5), undersigned counsel has discussed this motion with counsel for both parties. Petitioners' counsel have not yet adopted a position, and will file a response. Although the Government has declined to defend the VACAA's constitutionality in this case, it opposes this motion and will be filing an opposition brief to block the military and veterans groups from intervening as respondents to defend the law's validity. The Government also has declined to take a position on the groups' participation as *amici*.

The moving groups include many of this nation's premier veterans and military organizations:

- Veterans of Foreign Wars, http://www.vfw.org
- AMVETS, http://www.amvets.org
- Iraq and Afghanistan Veterans of America, http://www.iava.org
- National Association for Uniformed Services, http://www.naus.org
- Reserve Officers Association, http://www.roa.org
- Non-Commissioned Officers Association, http://www.ncoausa.org
- Marine Corps League, http://www.mclnationa.org
- Army Reserve Association, http://www.armyreserve.org
- U.S. Army Warrant Officers Association, http://www.usawoa.org
- Special Forces Association, http://www.specialforcesassociation.org
- Jewish War Veterans of the United States, http://www.jwv.org

These groups collectively represent millions of active duty, reserve, separated, and retired military personnel from all branches of the Armed Forces. Many of their members rely on the Department of Veterans Affairs' ("VA") hospitals, such as the Phoenix VA Health Care System, for medical treatment. These groups have a compelling interest in ensuring that our nation's 25 million veterans—including their members—receive the highest quality healthcare through the VA health system. They have equally compelling interests in ensuring that veterans do not face inordinate delays in obtaining necessary medical care at VA facilities, the VA properly maintains veterans' records and accurate waiting lists for appointments, and no veteran is improperly denied timely care.

To help achieve these critical goals, these groups seek to ensure that statutory mechanisms such as the VACAA, 38 U.S.C. § 713—which Congress enacted specifically to protect veterans in the wake of nationwide scandals throughout the VA health system—remain in place. The VACAA allows the Secretary of Veterans Affairs to expeditiously and efficiently remove career senior executives who engage in misconduct, malfeasance, or gross incompetence, potentially endangering veterans' health or lives, without months or even years of administrative and judicial wrangling. Members of these military and veterans groups depend on the structural protections that statutes such as the VACAA provide when they turn to VA facilities for care.

The Government has notified this Court that it does not intend to defend the VACAA's constitutionality, despite the fact that no court has yet addressed the issue. *See* Motion to Notify the Court of the Solicitor General's Decision Not to Defend Constitutional Challenge to Act of Congress, D.E. #66 (June 1, 2016). Both Petitioner Sharon Helman and the Government invite this Court to invalidate 38 U.S.C. § 713's grant of final appellate authority to Administrative Judges under the Appointments Clause, U.S. Const. art. II, § 2, cl. 2. They seek to have this provision struck down without any adversarial presentation of the issues, analysis of the substantial arguments and authorities supporting the statute's constitutionality, or even consideration of less extreme remedies for any possible constitutional defects.

Under these circumstances, the military and veterans groups easily overcome the presumption that the Government will adequately represent their interests in this matter. There are critical "aspects of this case"—substantial defenses of VACAA's constitutionality and more narrowly tailored remedies for any constitutional violations—that the Government has already acknowledged it will not "pursue to their fullest." *Wolfsen Land & Cattle Co. v. Pac. Coast Fed'n of Fisherman's Ass'ns*, 695 F.3d 1310, 1316 (Fed. Cir. 2012). This Court should grant permissive intervention because the military and veterans groups seek to

litigate the very questions of law already at issue in this suit. *See Dep't of Energy v. Louisiana*, 690 F.2d 180, 188 (Fed. Cir. 1982).

The Article III judicial process presupposes "a collision of actively asserted and differing claims," *Poe v. Ullman*, 367 U.S. 497, 505 (1911), and "the honest and actual antagonistic assertion of rights," *United States v. Johnson*, 319 U.S. 302, 305 (1943); *accord Chi. & Grand Trunk R. Co. v. Wellman*, 143 U.S. 339, 344-45 (1892). The Supreme Court has explained, "The adjudicatory process is most securely founded when it is exercised under the impact of a lively conflict between antagonistic demands, actively pressed," to facilitate "resolution of a controverted issue." *Poe v. Ullman*, 367 U.S. 497, 503 (1961).

Invalidating an act of Congress on the grounds that it violates the U.S. Constitution is among this Court's most solemn responsibilities. This Court should be reluctant to do so in the context of what has become, in relevant part, "a friendly, non-adversary proceeding" between Helman and the United States "as to the constitutionality of [a] legislative act." *Ashwander v. TVA*, 297 U.S. 288, 346 (1936) (Brandeis, J., concurring). Allowing the Executive Branch to use the courts to invalidate federal statutes by consent facilitates "circumvention of the traditional legislative and regulatory processes, and can lead to entrenchment of incumbents' policy preferences." Michael T. Morley, *Consent of the Governed or Consent of*

the Government? The Problems with Consent Decrees in Government-Defendant Cases, 16 U. Pa. J. Const. L. 637, 680 (2014).

The fact that Congress has not chosen to take affirmative action to intervene in this case neither constitutes an implicit repeal or abandonment of the VACAA, *see INS v. Chadha*, 462 U.S. 919, 953, 957 (1983) (holding that Congress may act in a legislative capacity only by passing a bill through the Article I, § 7 process), nor reduces this Court's responsibility to adjudicate the statute's validity accurately, based on all pertinent authorities and sources.

In their proposed brief, attached as an Exhibit to this motion, the military and veterans groups present substantial arguments that the Appointments Clause does not apply to the VA's Administrative Judges. The Clause applies to government personnel exercising the nation's sovereign authority, but the VA's Administrative Judges exercise power only in the government's capacity as an employer. *See* Brief of Intervenor-Respondents/*Amici*, at 23-31 (Exh. 1). And, in any event, Administrative Judges do not exercise "substantial authority" pursuant to the laws of the United States. *Id*. at 31-33.

The military and veterans groups further show that, if the Appointments Clause applies to Administrative Judges, they must be deemed "inferior officers" who may be appointed by department heads, such as the MSPB itself. *Id*. at 34-37. Administrative Judge Mish's appointment satisfied the constitutional requirements

for inferior officers because the MSPB properly delegated its appointment powers, *id*. at 37-43, and in any event has validly ratified his appointment, *id*. at 43-44. The proposed brief also demonstrates that restrictions on the MSPB's ability to remove administrative judges are constitutional, despite the VACAA's enactment. *Id*. at 44-49.

Finally, and perhaps most importantly, the military and veterans groups seek to demonstrate to this Court that, even if Administrative Judge Mish's method of appointment was unconstitutional under the Appointments Clause, the proper remedy is ***not*** to invalidate the VACAA. *Id*. at 49-53. Rather, a narrower and more appropriate remedy would be to hold unconstitutional the MSPB's delegation of its authority to hire Administrative Judges, *see* MSPB, *Organization, Functions & Delegations of Authority* ¶ 2.5.2.2 (Apr. 2011); give the MSPB an opportunity to approve or ratify Administrative Judge Mish's appointment itself; and, if necessary, remand this case so that Administrative Judge Mish may reconsider or ratify his previous ruling pursuant to a constitutionally valid appointment. *Id*. Invalidating an internal administrative delegation is a far less extreme remedy than striking down parts of a federal statute—particularly a law that Congress enacted only two years ago.

This Court also has a duty to confirm that it has subject-matter jurisdiction over this case. *See Cromer v. Nicholson*, 455 F.3d 1346, 1348 (Fed. Cir. 2006)

("Neither party disputes this court's subject matter jurisdiction . . . but we are obligated to consider the issue sua sponte if reason exists to doubt that jurisdiction applies."). The military and veterans groups further seek to demonstrate that the VACAA, as well as this Court's precedents, precludes this Court from hearing this appeal due to lack of subject-matter jurisdiction. *See* Brief of Intervenor-Respondents/*Amici*, at 15-22 (Exh. 1).

The reasonableness of the timing of an intervention motion depends on the circumstances of each case. *NAACP v. New York*, 413 U.S. 345, 365-66 (1973). Although this motion comes after the deadlines for intervention, Fed. Cir. R. 15(d), and amicus briefs, Fed. R. App. P. 29(e), "[t]his Court . . . has authority to accept an untimely motion to intervene," *King v. OPM*, No. 2012-3061, 2012 U.S. App. LEXIS 8845 (Apr. 30, 2012), and "may grant leave for later filing" of amicus briefs, Fed. R. App. P. 29(e). *Cf. id*. R. 2 (noting that the court may suspend its rules for "good cause").

The Department of Justice rarely abrogates its duty to defend the validity of statutes in federal court; that is an extraordinary contingency that the rules of this Court neither contemplate nor expressly address. The Department notified this Court that it would not be defending the VACAA on June 1, 2016. The military and veterans groups are filing this motion to intervene approximately seven weeks later, well before any oral argument and before this Court has begun to consider

the merits of the issue. Moreover, because the military and veterans groups have completed their brief and included it as an attachment to this motion, permitting intervention will not substantially delay these proceedings. The only potential "prejudice" Helman and the Government face is the need to respond to the substantial arguments the military and veterans groups seek to advance concerning this Court's jurisdiction, the VACAA's constitutionality, and the proper remedy in this case. Such adversarial testing is the least this Court should demand before considering invalidating a federal law. The timing of this intervention motion therefore should be deemed reasonable.

Because a justiciable controversy exists between Helman and the Government, the military and veterans groups need not demonstrate independent Article III standing to intervene in this case. *See, e.g.*, *Chiles v. Thornburgh*, 865 F.2d 1197, 1212-13 (11th Cir. 1989) ("[A] party seeking to intervene need not demonstrate that he has standing in addition to meeting the requirements of Rule 24 as long as there exists a justiciable case and controversy between the parties already in the lawsuit."); *see also Ruiz v. Estelle*, 161 F.3d 814, 832 (5th Cir. 1998).

At a minimum, if this Court denies permissive intervention, it should allow the military and veterans groups to participate as *amicus curiae* in support of neither party—true friends of the Court, defending the constitutionality of VACAA

and providing alternate remedies for any constitutional violations that may exist. It should accept their oversized brief (12,837 words) out of time for filing, and permit them to fully participate in any oral argument this Court may schedule in this case. *Cf. Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) ("This court denied the Coalition's motion to intervene but granted leave to file a brief amicus curiae."); *see also United States v. Windsor*, 133 S. Ct. 2675, 2685-89 (2013).

CONCLUSION

Congress enacted the VACAA barely two years ago to protect the health and welfare of the millions of veterans who rely on VA hospitals for healthcare. Although the federal judiciary has yet to consider its constitutionality, the Department of Justice has announced that it will refuse to defend the statute's constitutionality in this case against Helman's Appointments Clause challenge.

The putative intervenors represent millions of veterans, many of whom entrust their lives to VA hospitals. They seek to participate as full parties in this case to defend the validity of a law that was enacted specifically to protect their interests by giving the Secretary of Veterans Affairs the ability to quickly, decisively, and permanently remove any career senior executives at the VA who may jeopardize veterans' care; falsify appointment logs and waiting lists; unnecessarily make veterans wait months for care; accept bribes, kickbacks, or

gifts from contractors; persecute whistleblowers for bringing public attention to possible health risks; or otherwise act contrary to veterans' interests.

This Court should not entertain the possibility of invaliding the VACAA without a full and thorough airing of arguments and authorities on both sides of the issue by party litigants who are actually adverse to each other on that point. Granting intervention will allow these military and veterans groups to defend their members' vital interests, while providing the adversarial testing needed for meaningful adjudication of the critical constitutional questions this case presents.

For these reasons, this Court should grant the military and veterans groups' motion to intervene as respondents to defend the VACAA's constitutionality on jurisdictional and substantive grounds and propose narrower remedies for any constitutional defects. In the alternative, this Court should accept the military and veterans groups' brief as an oversized, out-of-time *amicus* filing, and allow them to participate in any oral argument concerning this Court's jurisdiction, VACAA's constitutionality, or the appropriate remedy for any constitutional violations.

Respectfully submitted,

July 20, 2016

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Helman v. Department of Veterans Affairs
Case No. 15-3086

CERTIFICATE OF INTEREST

Counsel for the Intervenor-Respondents/*Amici* certifies the following:

1. The full name of every party or amicus represented by me is:

Veterans of Foreign Wars
National Association for Uniformed Services
Marine Corps Reserve Association
Jewish War Veterans of the United States
U.S. Army Warrant Officers Association
Non-Commissioned Officers Association of the United States
Iraq and Afghanistan Veterans of America
Marine Corps League
Special Forces Association
Army Reserve Association
Reserve Officers Association
AMVETS

2. The name of the real party in interest (Please only include any real party in interest NOT identified in Question 3, below) represented by me is:

Not applicable; the entities identified above are the real parties in interest.

3. All parent corporations and any publicly held companies that own 10 percent of the stock of the party or amicus curiae represented by me are listed below. (Please list each party or amicus curiae represented with the parent or publicly held company that owns 10 percent or more so they are distinguished separately.)

Not applicable. No entity identified above has a parent corporation; no publicly held company owns 10% or more of stock in any of those entities.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Not applicable; no entity identified above appeared before the agency.

7/19/2016
Date

/s/ Michael T. Morley
Signature of counsel

Please note: All questions must be answered

Michael T. Morley
Printed name of counsel

cc: All counsel via ECF

CERTIFICATE OF SERVICE

I certify that today, July 20, 2016, I electronically filed the foregoing motion with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Michael T. Morley