No. 09-225

In the Supreme Court of the United States

WINTHROP P. BLOCK, ET AL., PETITIONERS

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENTS IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly dismissed petitioners' claims under the Administrative Procedure Act, 5 U.S.C. 553, and the Freedom of Information Act, 5 U.S.C. 552, on the ground that 38 U.S.C. 502, which was enacted while petitioners' claims were pending, vests the Federal Circuit with exclusive jurisdiction over such claims.

2. Whether the court of appeals erred in declining to transfer this case to the Federal Circuit.

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OPINIONS BELOW

The memorandum and amended judgment of the court of appeals granting the petition for rehearing (Pet. App. 1a-4a) is not published in the *Federal Reporter* but is reprinted in 329 Fed. Appx. 285. An earlier memorandum and judgment of the court of appeals (Pet. App. 5a-8a) is unreported. The opinion of the district court (Pet. App. 9a-23a) is reported at 541 F. Supp. 2d 87.

JURISDICTION

The judgment of the court of appeals on rehearing was entered on May 22, 2009. The petition for a writ of certiorari was filed on August 20, 2009. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1978, the Veterans Administration (VA)[1] issued a one-page amendment to its Compensation and Pension Program Guide, a "non-directive and non-policymaking" manual for use by agency adjudicators. Pet. App. 11a (citation omitted). The amendment, the Agent Orange Program Guide (AOPG), addressed claims by Vietnam veterans who sought service-connected disability compensation based on their exposure to the defoliant Agent Orange. See *ibid.* As relevant here, the AOPG stated that "there are presently no firm data to incriminate the herbicides as causative agents of any * * * disease or chronic symptom" other than "a skin condition known as chloracne." *Ibid.* The AOPG further stated that "[n]o special procedures will be initiated for these claims. Instead, each case will receive a thorough development of all available evidence." *Ibid.*[2]

2. In 1979, petitioners, who are veterans of the Vietnam War, filed suit challenging the AOPG in the United States District Court for the District of Columbia. Pet. App. 9a, 13a. Petitioners contended that the VA had

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[1] During the pendency of this suit, the VA was replaced by the Department of Veterans Affairs. Unless otherwise indicated, this brief uses the term "VA" to refer to both the Veterans Administration and the Department of Veterans Affairs.

[2] The AOPG remained in effect until 1985, when the VA promulgated a regulation that established a presumptive service connection only for chloracne. *Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation*, 50 Fed. Reg. 34,452, 34,458 (1985) (38 C.F.R. 3.311a (1986)); see Pet. App. 12a-13a. That regulation was later invalidated. See *id.* at 13a. After several years and multiple reviews of new research, the VA promulgated new regulations that created a presumption of service-connection for certain diseases alleged to have been caused by exposure to Agent Orange in Vietnam. See 38 C.F.R. 3.309(e); Pet. App. 13a.

failed to subject the AOPG to public notice and comment under the Administrative Procedure Act (APA), 5 U.S.C. 553, and to publication under the Freedom of Information Act (FOIA), 5 U.S.C. 552. Pet. App. 9a, 14a. They sought to compel the VA to undertake a public rulemaking on Agent Orange-related disability and to void denials of Agent Orange-related disability claims issued by the VA while the AOPG was still in effect. *Id.* at 14a.

Petitioners filed a motion for class certification in August 1979, and a motion for summary judgment in December 1979. Pet. App. 13a. The government shortly thereafter moved for judgment on the pleadings. *Ibid.* Oral argument on those motions was heard in February 1980. *Ibid*. Over the next few years, both sides submitted additional briefs and filings. See *id*. at 13a, 14a. Following various protracted periods of inactivity, the case was reassigned to a different district judge in 2007. *Id.* at 14a.

In 2008, the district court denied petitioners' motions for summary judgment and for class certification, and granted the government's motion for judgment on the pleadings, which it treated as a motion for summary judgment pursuant to Federal Rule of Civil Procedure 12(d). Pet. App. 9a-23a. As the district court noted, both parties acknowledged that the 1985 withdrawal of the AOPG "mooted plaintiffs' primary request that the Court order the VA to conduct a public rulemaking on Agent Orange-related disability." *Id.* at 14a. Petitioners continued, however, to seek an order invalidating all denials of Agent Orange-related claims while the AOPG was in effect. The district court observed that "[v]eterans whose claims were denied while the AOPG was in effect have been free to refile their claims, and to receive forward-looking compensation under liberalizing

regulations promulgated since then," and it concluded that the court could not "grant plaintiffs further relief pursuant to either the APA or to FOIA." *Id.* at 23a.

The district court explained that the VA's issuance of the AOPG did not violate the APA because the AOPG "did not announce a binding, substantive rule," Pet. App. 9a, but was instead a "general statement of policy" not subject to the APA's notice-and-comment requirements, *id*. at 16a (quoting *Pacific Gas & Elec. Co.* v. *FPC*, 506 F.2d 33, 38 (D.C. Cir. 1974)). The court further explained that the VA had satisfied its FOIA publication duty by making the AOPG available for public inspection and copying during the time the policy statement was in effect. *Id*. at 15a n.2.

3. Petitioners appealed. After the completion of briefing on the merits, the court of appeals *sua sponte* issued an Order to Show Cause why the appeal should not be dismissed for lack of jurisdiction. The court cited provisions of the Veterans' Judicial Review Act, enacted in 1988, that vest the Federal Circuit with exclusive jurisdiction over certain claims against the VA. See 38 U.S.C. 502, 511.

After further briefing, the court ruled that it lacked jurisdiction, since Section 502 "vests exclusive jurisdiction for review of claims relating to FOIA publication requirements and APA notice and comment rulemaking in the Federal Circuit." Pet. App. 7a. The court concluded that Section 502 applies to this case, even though the case was pending when the statute took effect in 1989. The court explained that, "[u]nder normal circumstances, application of a new jurisdictional statute 'takes away no substantive right, but simply changes the tribunal that is to hear the case.'" *Id.* at 7a-8a (quoting *Landgraf* v. *USI Film Prods.*, 511 U.S. 244, 274 (1994),

and *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916)). The court acknowledged that "dismissal of [petitioners'] case on jurisdictional grounds may risk the time-barring of their claim via the independent operation of the applicable statute of limitations," but it noted that petitioners "are likely to have a strong argument for equitable tolling of the statute." *Id.* at 8a. Finally, to "resolve any time-bar concerns," the court remanded the case to the district court with instructions to transfer the case to the Federal Circuit pursuant to 28 U.S.C. 1631. Pet. App. 8a.

The government filed a petition for panel rehearing. In its petition, the government explained that Section 1631 permits transfer only "to any other such court in which the action or appeal could have been brought at the time it was filed or noticed," 28 U.S.C. 1631, and that Federal Circuit was not created until 1982 and did not acquire jurisdiction to review VA regulatory challenges until 1989. The court of appeals granted the rehearing petition and issued a memorandum and amended judgment remanding the case with instructions to dismiss. Pet. App. 1a-4a. The court again observed, however, that petitioners "are likely to have a strong argument for equitable tolling of the statute [of limitations] should they choose to re-file in the Federal Circuit." *Id.* at 4a n.2.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioners contend (Pet. 11-14) that the court of appeals erred in concluding that, under 38 U.S.C. 502, the Federal Circuit has exclusive jurisdiction over peti-

tioners' APA and FOIA challenges to the AOPG. Petitioners argue that, because this case was pending when Section 502 was enacted, the retroactivity principles articulated in *Landgraf* v. *USI Film Products*, 511 U.S. 244 (1994), counsel against applying Section 502 to require dismissal of the present action. Petitioners' contention lacks merit and does not warrant this Court's review.

a. In *Landgraf*, this Court recognized that "the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic." 511 U.S. at 265. The Court also observed, however, that "[a] statute does not operate 'retrospectively' merely because it is applied in a case arising from conduct antedating the statute's enactment." *Id.* at 269. The Court noted, in particular, that it had "regularly applied intervening statutes conferring or ousting jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." *Id.* at 274. The Court explained that "[a]pplication of a new jurisdictional rule usually 'takes away no substantive right but simply changes the tribunal that is to hear the case.'" *Ibid.* (quoting *Hallowell* v. *Commons*, 239 U.S. 506, 508 (1916)). The Court stated that "[p]resent law normally governs in such situations because jurisdictional statutes speak to the power of the court rather than to the rights or obligations of the parties." *Ibid.* (internal quotation marks omitted); see *id.* at 292 (Scalia, J., concurring in the judgments) (noting the Court's "consistent practice of giving immediate effect to statutes that alter a court's jurisdiction").

Section 502 vests the Federal Circuit with exclusive jurisdiction over APA and FOIA claims against the VA. 38 U.S.C. 502. As the court of appeals correctly held,

Section 502 is a jurisdictional rule that governs the power of the tribunal to hear the case, rather than affecting the substantive rights or obligations of the parties. Pet. App. 4a. The presumption against retroactivity therefore does not apply. See *ibid.*; *Landgraf*, 511 U.S. at 274.

Petitioners contend (Pet. 13-14) that the decision below is inconsistent with *Landgraf* because it takes insufficient account of "the risk that the plaintiffs' claims might be time-barred." As this Court noted in *Landgraf*, however, the Court has "regularly applied intervening statutes conferring *or ousting* jurisdiction, whether or not jurisdiction lay when the underlying conduct occurred or when the suit was filed." 511 U.S. at 274 (emphasis added); see, *e.g.*, *Hallowell*, 239 U.S. at 508 (upholding a statute that effectively precluded judicial review of certain administrative decisions concerning Indian probate disputes). Nothing in *Landgraf* suggests that "the risk that the plaintiffs' claims might be time-barred," Pet. 13, warrants a different analysis.

b. Petitioners contend that the court of appeals' unpublished disposition is in "tension" with the decisions of other courts of appeals in "analogous cases." Pet. 13-14 (citing cases). But petitioners identify no decision in which a court of appeals has declined to apply a new jurisdictional statute to a pending case because of concern that another court might find a new suit to be time-barred. Petitioners, in short, identify no developed circuit conflict that warrants this Court's review.[3]

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[3] Further review is unwarranted for an additional reason: It is not clear that the district court had jurisdiction over this case even before the enactment of 38 U.S.C. 502. See 38 U.S.C. 211(a) (1976) ("[T]he decisions of the Administrator on any question of law or fact under any law administered by the Veterans' Administration providing benefits

2. Petitioners contend (Pet. 14-18) that, even if the court of appeals' jurisdictional ruling was correct, the court erred in ordering their suit to be dismissed rather than transferred to the Federal Circuit. Petitioners appear to recognize (see Pet. 16) that 28 U.S.C. 1631 does not authorize transfer of the case because their suit could not have been filed in the Federal Circuit at the time it was originally brought. Petitioners argue (Pet. 15-18), however, that the court of appeals possessed inherent authority to transfer the case. They further contend (Pet. 16) that the court of appeals' "ultimate decision" to order dismissal rather than transfer of the suit "necessarily rests on the premise that it lacked inherent authority," and they assert (Pet. 15-16) that a circuit conflict exists on the inherent-authority question. Petitioners' arguments lack merit and do not warrant this Court's review.

As petitioners acknowledge, the court of appeals did not address the issue of inherent authority. Pet. 16; see Pet. App. 3a-4a. Petitioners contend that the court of appeals' decision on rehearing to order dismissal of the suit, after the court had originally directed the district court to transfer the case to the Federal Circuit pursuant to 28 U.S.C. 1631, "can mean only that [the court] considered both statutory and inherent authority to be lacking." Pet. 17; see Pet. App. 3a-4a, 8a. It is equally

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for veterans and their dependents or survivors shall be final and conclusive and no other official or any court of the United States shall have power or jurisdiction to review any such decision by an action in the nature of mandamus or otherwise."), superseded by 38 U.S.C. 511; see also, *e.g.*, *Carter* v. *Cleland*, 643 F.2d 1, 9 (D.C. Cir. 1980) (holding that Section 211(a) precluded judicial review of an administrative guideline alleged to have improperly constrained VA adjudicators' discretion to make case-by-case factual determinations in claims for benefits).

plausible, however, that the court of appeals simply declined as a matter of discretion to exercise whatever inherent authority it might possess. In order to obtain reversal of the court of appeals' judgment, petitioners must demonstrate not simply that the court was *authorized* to order a transfer, but that it was *required* to do so. Petitioners make no attempt to show that such a duty existed.

Petitioners are also wrong in asserting that the decision below implicates a current division of authority on the question whether the courts of appeals possess inherent authority to transfer cases over which they lack jurisdiction. Section 1631 was enacted as part of the Federal Courts Improvement Act of 1982, Pub. L. No. 97-164, § 301(a), 96 Stat. 55. The decision on which petitioners rely for the proposition that courts possess such authority, *Pearce* v. *Director, Office of Workers' Compensation Programs, Dep't of Labor*, 603 F.2d 763 (9th Cir. 1979), was issued before the statute's enactment. The court in *Pearce* therefore had no occasion to address the question whether courts retain inherent transfer authority now that Congress has addressed the issue and has specified the circumstances under which transfer is appropriate.

Unlike in the present case, moreover, the Ninth Circuit in *Pearce* was not asked to transfer a suit to a court that would have lacked jurisdiction at the time the suit was brought. And while the court in *Pearce* ultimately decided that transfer was appropriate, it did not suggest that any principle of law *required* it to choose that course. See 603 F.2d at 771. For all those reasons, the court of appeals' disposition of this case does not conflict with the decision in *Pearce*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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