No. 16-236

In the Supreme Court of the United States

RICHARD S. MILBAUER, PETITIONER

v.

UNITED STATES OF AMERICA

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105, channels claims involving veterans' benefits into a specialized framework of administrative and judicial review and, with exceptions not relevant here, prohibits courts outside of that framework from reviewing any "questions of law and fact necessary to a decision by the Secretary [of Veterans Affairs] under a law that affects the provision of benefits." 38 U.S.C. 511(a).

The question presented is whether the court of appeals correctly concluded that the VJRA precludes review of petitioner's claim that a Department of Veterans Affairs hospital was required to offer him certain procedures for diagnosing a shoulder injury while it decided whether to approve him for a fee-for-service diagnostic procedure at an outside facility.

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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-11) is not published in the *Federal Reporter* but is reprinted at 636 Fed. Appx. 556. A prior opinion of the court of appeals is not published in the *Federal Reporter* but is reprinted at 587 Fed. Appx. 587. The opinion of the district court (Pet. App. 12-25) is unreported. A prior opinion of the district court is not published in the *Federal Supplement* but is available at 2013 WL 3815625.

JURISDICTION

The judgment of the court of appeals was entered on January 29, 2016. A petition for rehearing was denied on April 19, 2016 (Pet. App. 26-27). On July 14, 2016, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 17, 2016, and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Department of Veterans Affairs (VA) administers federal laws that furnish benefits to persons who have served in the U.S. Armed Forces (as well as to their dependents and beneficiaries). 38 U.S.C. 301(b). VA regulations define a "benefit" to include "any payment, service, commodity, function, or status, entitlement to which is determined under the laws administered by the [VA] pertaining to veterans." 38 C.F.R. 20.3(e) (emphasis omitted). Among other benefits, the Secretary of Veterans Affairs (Secretary) administers the provision of "hospital care and medical services which the Secretary determines to be needed" for certain disabled veterans. 38 U.S.C. 1710(a)(1).

Congress has charged the VA with determining when veterans are entitled to benefits and has limited judicial review of the VA's processing of veterans' claims. Until 1988, "the Congressional philosophy was that benefits decisions by the executive should not be subject to judicial review." *Bates* v. *Nicholson*, 398 F.3d 1355, 1362 (Fed. Cir. 2005). Thus, Congress entirely "preclude[d] review of any decision of the Administrator on any question of law or fact under any law administered by the Veterans' Administration." *Id.* at 1363 (citation and internal quotation marks omitted). As this Court explained, the bar on judicial review was intended "to insure that veterans' benefits claims will not burden the courts and the Veterans' Administration with expensive and time-consuming litigation" and to avoid judicial second-guessing of "the technical and complex determinations

and applications of Veterans' Administration policy connected with veterans' benefits decisions." *Johnson* v. *Robison*, 415 U.S. 361, 370 (1974).

In 1988, in response to a concern that recent judicial decisions (including one by this Court) had erroneously recognized exceptions to the bar to judicial review of veterans' benefits, Congress enacted the Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105. H.R. Rep. No. 963, 100th Cong., 2d Sess. 20-22 (1988); see *id.* at 21 (discussing the decision in *Traynor* v. *Turnage*, 485 U.S. 535 (1988), which Congress viewed as wrongly "endors[ing] judicial scrutiny of individual benefit determinations whenever an allegation is made that a decision implicates a constitutional principle or construction of a statute not codified in title 38 of the United States Code"); see also *Traynor*, 485 U.S. at 544-545 (acknowledging the possibility of congressional action if the scope of judicial review recognized by the Court were considered excessive).

The VJRA "continued to broadly bar judicial review of benefits decisions," but it "provided veterans with their day in court" by establishing a "specialized review process" that channels claims first to the United States Court of Appeals for Veterans Claims (Veterans Court), an Article I court, and then to the United States Court of Appeals for the Federal Circuit, an Article III court. *Bates*, 398 F.3d at 1363, 1364. The VJRA thus avoids "overburdening the district court[s]," which "lack[] the necessary expertise" to adjudicate claims involving veterans' benefits while providing for judicial review of such claims "in a truly independent court which will not be burdened by other cases having nothing to do with veterans." *Id.* at 1364 (quoting

134 Cong. Rec. H9258 (daily ed. Oct. 3, 1988) (statement of Rep. Solomon)).

Under the specialized review process established by the VJRA, a veteran who wishes to challenge a determination regarding VA benefits, including medical benefits, generally must first file a "Notice of Disagreement" with the facility that made the determination. 38 C.F.R. 20.201; see 38 C.F.R. 17.133. A veteran dissatisfied with the VA's response may appeal the decision to the Board of Veterans' Appeals (the Board), a VA administrative body with authority to review claims involving veterans' benefits. 38 U.S.C. 7104(a). The Board's decisions in turn are subject to judicial review in the Veterans Court, which has authority to review legal and factual issues decided by the VA. 38 U.S.C. 7252, 7261(a). The Veterans Court's authority includes, *inter alia*, the power to "compel action of the Secretary unlawfully withheld or unreasonably delayed." 38 U.S.C. 7261(a)(2). Veterans Court decisions are subject to judicial review in the Federal Circuit, which has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof brought" in such an appeal, "and to interpret constitutional and statutory provisions, to the extent presented and necessary to a decision." 38 U.S.C. 7292(c); see 38 U.S.C. 7292(d)(1) (providing that the Federal Circuit "shall decide all relevant questions of law, including interpreting constitutional and statutory provisions"). Finally, a veteran may seek further review of the Federal Circuit's decision in this Court. 38 U.S.C. 7292(c).

The VJRA also authorizes veterans to challenge VA rules and regulations that bear on benefits deter-

minations directly in federal court. See 38 U.S.C. 502, 511 (cross-referencing 5 U.S.C. 553). But Congress specified that such review "may be sought *only* in the United States Court of Appeals for the Federal Circuit," and not in a district court. 38 U.S.C. 502 (emphasis added).

Congress chose to make this specialized review process the exclusive avenue to obtain review of VA action involving veterans' benefits. In a provision currently codified at 38 U.S.C. 511(a), the VJRA prohibits any court—outside of the framework described above—from reviewing any "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans." 38 U.S.C. 511(a). With exceptions not relevant here, the VJRA renders the decision of the Secretary as to any such question "final and conclusive" and unreviewable "by any other official or by any court, whether by an action in the nature of mandamus or otherwise." *Ibid.*; see 38 U.S.C. 511(b)(4) (creating exception to bar to review for "matters covered by chapter 72 of this title," which describes the jurisdiction of the Veterans Court).

Although the VJRA bars judicial review of claims that implicate veterans' benefits decisions, it permits veterans to pursue other claims against the VA in district court. For example, veterans may file non-benefits-related claims against the VA under the Federal Tort Claims Act (FTCA), 28 U.S.C. 1346(b)(1), which renders the United States liable for money damages for injuries caused by certain tortious conduct of "any employee of the Government while acting within the scope of his office or employment." *Ibid.* This Court has recognized, for example,

that veterans may seek damages under the FTCA if VA employees negligently perform a medical procedure, see *United States* v. *Brown*, 348 U.S. 110, 113 (1954), and Congress has endorsed that understanding, see 38 U.S.C. 1151(b) (providing that VA disability payments based on negligence by a VA employee in furnishing medical treatment will be offset against any recovery under the FTCA). But Congress has made clear that such claims may proceed only if they would not require the court to review decisions by the VA with respect to veterans' benefits. 38 U.S.C. 511(a).

2. Petitioner is a veteran who has worked in the construction industry for many years. Pet. 15. In 2005, petitioner sought treatment at a VA medical center in Brooklyn, New York (Brooklyn VA), for injuries he sustained to his right shoulder in two work-related accidents at a construction site. Pet. App. 13. Within one week after each accident, the VA medical staff recommended that petitioner receive a magnetic resonance imaging (MRI) examination. *Ibid.* Although the Brooklyn VA facility had an MRI machine available for petitioner's use, petitioner was claustrophobic and wished to receive an "open" MRI that would allow him to undergo the procedure without being placed in a confined space. *Id.* at 2. Petitioner therefore requested that the VA agree to pay for him to obtain the open MRI at a non-VA facility. *Ibid.*

Federal law dictates the manner in which the VA provides medical services to veterans. The Secretary is authorized to "furnish hospital care and medical services" for eligible veterans pursuant to priorities established by Congress. 38 U.S.C. 1710(a); see 38

U.S.C. 1705. Congress has also authorized the VA to "contract with non-[VA] facilities" when VA facilities "are not capable of furnishing economical hospital care or medical services." 38 U.S.C. 1703(a). At the Brooklyn VA, requests by veterans for authorization to obtain fee-for-service medical procedures at a non-VA facility at the VA's expense are governed by a policy specifying that such treatment may be authorized if it is clinically necessary and cannot be provided at the VA facility where treatment was sought or at a different VA facility nearby. See Gov't C.A. Br. 16-17. The policy further provides that fee-for-service treatment at a non-VA facility should not be authorized when "alternative procedures of equal effectiveness" are available at the Brooklyn VA. *Id.* at 17 (citation omitted); Pet. App. 24 (citation omitted).

Pursuant to that policy, the VA ultimately approved petitioner to receive the open MRI at a non-VA facility. See Pet. App. 14. In July 2006, petitioner received the open MRI, which revealed that he had a torn rotator cuff. *Id.* at 2. In March 2007, the VA performed surgery on petitioner's shoulder, but petitioner alleges that the surgery was not successful. *Ibid.*

3. a. In 2008, petitioner filed an administrative claim with the VA under the FTCA. Pet. App. 2-3. Petitioner alleged that the VA medical staff had failed to approve "an outside MRI of [his] right shoulder in a timely manner." *Id.* at 15 (citation omitted). Petitioner asserted that, between September 2005 and June 2006, he had tried repeatedly to get the outside MRI scheduled but had encountered difficulty getting the VA to approve the procedure at a fee-for-service facility. See D. Ct. Doc. 60-1, at 2, 6-9 (Apr. 23, 2013).

Petitioner alleged that his shoulder could have been repaired had he received an open MRI within 30 days, and he contended that the delay in receiving the examination was "[d]ue to the staff not knowing how to arrange an outside MRI, the placing of the burden of paperwork on [petitioner] and [petitioner] finally having to file a complaint." Pet. App. 15 (citation omitted). The VA denied petitioner's administrative claim. *Id.* at 3.

b. Petitioner then filed this FTCA suit in federal court alleging a negligence claim against the United States on the ground that the VA had delayed approving him for an open MRI at an outside facility. Pet. App. 3.

The district court dismissed petitioner's complaint without prejudice. See 2013 WL 3815625, at *1-*6. The court held that the VJRA barred review of petitioner's claim because his allegations, "though couched in the language of tort law, essentially present a claim relating to veterans' benefits." *Id.* at *5. The court reasoned that petitioner sought to challenge "the process of obtaining authorization for the VA to pay for the MRI" and that his grievance is therefore "with the VA's benefits procedure, not with the medical treatment he received." *Ibid.*; see *ibid.* (observing that "the crux of the [c]omplaint lies in [petitioner's] allegations that he did not receive the outside MRI in a reasonable time because the process of obtaining pre-authorization for the VA's payment for the MRI was prolonged and deficient"). Because petitioner's challenge would require the court to review the VA's process for granting a medical benefit, the court concluded that the claim was barred by the VJRA.

The district court also ruled that it lacked jurisdiction over petitioner's claim that VA staff had acted negligently by failing to consider "alternative diagnostic procedures when they learned of [petitioner's] difficulty in obtaining pre-authorization for an outside MRI." 2013 WL 3815625, at *3. The court observed that petitioner had raised that argument for the first time in his opposition to the government's motion to dismiss. *Ibid.* Because petitioner had "mentioned nowhere in his administrative claim that [the VA] failed to provide alternative diagnostic procedures," the court concluded that it could not consider the claim due to petitioner's failure to exhaust his administrative remedies. *Id.* at *4.

c. In an unpublished per curiam decision, the court of appeals affirmed the dismissal of petitioner's claim based on the delay in receiving authorization for an open MRI at an outside facility, but remanded for the district court to reconsider "whether [petitioner] exhausted his alternative-diagnostic-procedures claim, and if so, whether the VJRA precludes review of that claim." 587 Fed. Appx. at 592.

The court of appeals agreed with the district court that the VJRA precluded review of petitioner's claim that the VA unreasonably delayed approving him for an open MRI because those allegations "raised a benefits issue." 587 Fed. Appx. at 592. The court of appeals observed that petitioner "sought a particular benefit—to have the VA pay for an open MRI performed at a non-VA facility—and he complained [that] the process of obtaining that benefit caused the delay in his diagnosis." *Id.* at 591. As the court explained, "[t]he district judge could not adjudicate [petitioner's] claim 'without determining first whether [he] was

entitled to a certain level of benefits,' namely, whether he was entitled to an outside MRI, paid for by the VA." *Id.* at 591-592 (quoting *Thomas* v. *Principi*, 394 F.3d 970, 974 (D.C. Cir. 2005)). Moreover, "in order to adjudicate this claim, the judge would have to determine whether the Brooklyn VA properly handled and processed [petitioner's] request to have the VA pay for an open MRI at a non-VA facility." *Id.* at 592. Observing "that 'there is no meaningful legal difference between a *delay* of benefits and an outright *denial* of benefits' for purposes of the VJRA," the court concluded that the statute "barred judicial review." *Id.* at 591 (quoting *Mehrkens* v. *Blank*, 556 F.3d 865, 870 (8th Cir. 2009)).

The court of appeals vacated the dismissal of petitioner's claim that the VA should have considered alternative diagnostic procedures, concluding that the district court had failed to conduct a proper exhaustion analysis. 587 Fed. Appx. at 592. The court of appeals instructed the district court on remand to reconsider the exhaustion issue and to further determine whether the VJRA barred review of the claim. *Ibid.*

d. On remand, the district court determined that petitioner had adequately exhausted his administrative remedies regarding his claim that the VA should have considered alternative diagnostic procedures. Pet. App. 21-22. The court reasoned that, although it was "undisputed that [petitioner] never formally alleged in his administrative claim that [the VA] failed to provide alternative diagnostic procedures," that claim was "so closely related to [petitioner's] claim that the VA[] failed to authorize the MRI at a non-VA facility in a timely manner" that the exhaustion re-

quirement was satisfied. *Id.* at 22 (citation and internal quotation marks omitted).

Given the substantial overlap between petitioner's two theories of liability, however, the district court concluded that the VJRA precluded review of the alternative-diagnostic-procedures claim. Pet. App. 23-24. The court reasoned that "[t]he gravamen" of petitioner's claim is that "he should have received alternative diagnostic procedures because the process for him to obtain authorization for the VA to pay for an open MRI at a non-VA facility was prolonged and deficient." *Id.* at 23. "At bottom," the court concluded, petitioner's "grievance is with the VA's benefits procedure" and "not with the medical treatment he received." *Ibid.* Accordingly, the court concluded that "[f]or the same reasons that [petitioner's] delay in authorizing the MRI claim was a veterans' benefit issue, his alternative diagnostic procedure claim is a veterans' benefits issue, and thus barred from judicial review under the VJRA." *Ibid.*

e. The court of appeals affirmed in an unpublished decision. Pet. App. 1-11. The court reiterated that the VJRA bars claims that the VA "failed to render appropriate medical services" when such claims would require a court to assess the VA's process for providing a benefit or to determine whether the VA acted properly in denying a benefit. *Id.* at 9. The court agreed with the district court that petitioner's claim regarding the provision of alternative diagnostic procedures flowed from his claim regarding the delayed MRI. *Id.* at 10. Although petitioner had "attempt[ed] to recast his claim on appeal as relating solely to the failure of the VA to inform him [that] alternative procedures were available," the court of appeals conclud-

ed that "his claim relates to the VA's failure to perform such procedures." *Ibid.* The court noted that "[i]n district court, [petitioner] argued [that] doctors at the Brooklyn VA could and should have performed alternative procedures to diagnose his shoulder injury, when it became clear he was experiencing difficulty obtaining an outside MRI." *Ibid.* Because resolution of that claim would require the court "to determine whether [petitioner] was entitled to a certain level of benefits" and "whether the Brooklyn VA properly followed its own policy in authorizing [petitioner's] outside MRI," the court of appeals concluded that the alternative-diagnostic-procedures claim, "[l]ike [petitioner's] delayed MRI claim," is "a benefits issue" that cannot be reviewed outside the VJRA's specialized scheme. *Id.* at 10-11.

ARGUMENT

The court of appeals correctly concluded that the VJRA forecloses petitioner's invocation of the FTCA to challenge the VA's failure to offer alternative diagnostic procedures while it processed his request for an open MRI at a non-VA facility. The unpublished, fact-bound decision below does not conflict with any decision of this Court or any other court of appeals. No further review is warranted.

1. a. Section 511(a) bars a court, outside the specialized review process established by the VJRA, from reviewing any "questions of law and fact necessary to a decision by the Secretary under a law that affects the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. 511(a). A "benefit" includes "any * * * service, * * * entitlement to which is determined under laws administered by the [VA] pertaining to veter-

ans." 38 C.F.R. 20.3(e) (emphasis omitted). The VA's provision of medical care to veterans who are eligible to receive it qualifies as a veterans' benefit. See 38 U.S.C. 1710(a) (authorizing VA Secretary to furnish "hospital care and medical services" for eligible veterans); see also 38 U.S.C. 1703 (authorizing VA Secretary to "contract with non-[VA] facilities" when VA facilities "are not capable of furnishing economical hospital care or medical services").

The court of appeals correctly concluded that Section 511(a) of the VJRA precludes jurisdiction over petitioner's claim that the VA negligently failed to provide him with alternative diagnostic procedures while it determined whether he was eligible to receive a fee-for-service open MRI at a non-VA facility at taxpayer expense. Both the court of appeals and the district court determined that petitioner's claim regarding alternative diagnostic procedures was inextricably linked to his challenge to the VA's delay in the process for approving him for an open MRI. See Pet. App. 10 (understanding petitioner to argue that "doctors at the Brooklyn VA could and should have performed alternative procedures to diagnose his shoulder injury, when it became clear he was experiencing difficulty obtaining an outside MRI"); *id.* at 23 (explaining that "[t]he gravamen" of petitioner's claim was that "he should have received alternative diagnostic procedures because the process for him to obtain authorization for the VA to pay for an open MRI at a non-VA facility was prolonged and deficient"). Review of petitioner's claim would therefore require a court to evaluate the process by which the VA authorizes fee-for-service procedures at outside facilities and to consider whether petitioner should have received

alternative diagnostic procedures in light of the alleged complexity and length of that process. In these circumstances, the court of appeals correctly concluded that petitioner's claim raised "a benefits issue" that courts outside of the VJRA's specialized review scheme lack jurisdiction to consider. *Id.* at 10.

Notably, if petitioner's alternative-diagnostic-procedures claim rested on facts unrelated to the VA's process for approving him for an open MRI at an outside facility, the claim would be unexhausted and forfeited. It "is undisputed" that petitioner did not challenge the VA's failure to provide alternative diagnostic procedures in his administrative complaint. Pet. App. 21. The district court deemed that claim exhausted only because it was "so closely related" to petitioner's allegation "that the VA[] failed to authorize the MRI at a non-VA facility in a timely manner." *Id.* at 22. In his district court complaint, petitioner (who was at that point represented by counsel) likewise focused on the delay in receiving authorization for the open MRI at a non-VA facility, alleging that the VA had "[f]ail[ed] to take reasonable steps to diagnose his rotator cuff injury within a reasonable time frame through an outside MRI," "[f]ail[ed] to have the appropriate paperwork prepared to authorize the outside MRI for a period of ten months," and "[c]ommitt[ed] other negligent acts or omissions in violation of the applicable standards of medical care." Complaint ¶ 25.

On this record, then, petitioner's alternative-diagnostic-procedures claim is reasonably understood to hinge on his argument that the VA's process for approving him for an open MRI at a non-VA facility was deficient. Petitioner, however, apparently does

not seek review of the court of appeals' determination on the prior appeal that his FTCA claim based on that delay in receiving the open MRI was barred by the VJRA. See 587 Fed. Appx. at 592.[1] The decision below therefore simply rejects petitioner's attempt to evade the jurisdictional bar to his claim based on delay in the process for approving him for an open MRI at a non-VA facility by repackaging it as a challenge to the VA's failure to offer alternative diagnostic procedures while it processed his request for an open MRI.[2]

b. Petitioner's arguments to the contrary lack merit. Petitioner contends (Pet. 28) that the court of appeals'

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[1] Petitioner did not reproduce the court of appeals' prior unpublished decision finding that claim barred in the appendix to the petition for a writ of certiorari, which would have been required by Rule 14.1(i) of this Court if petitioner had sought review now of a ruling in that earlier opinion.

[2] In *Heckler* v. *Ringer*, 466 U.S. 602 (1984), this Court rejected similar efforts to evade jurisdictional limits on judicial review of benefits decisions outside the administrative scheme prescribed by Congress. *Heckler* involved a challenge to a decision of the Department of Health and Human Services declining to pay for a particular type of surgery under Medicare. As here, federal law required that a "claim for benefits" under the Medicare Act proceed through a comprehensive scheme of administrative and judicial review. *Id.* at 614. This Court held that the statute barred jurisdiction over the claim of a plaintiff who had not yet obtained the surgery when he brought suit because he allegedly could not afford the procedure unless it were reimbursable under Medicare. *Id.* at 620-626. Although that claim did not "seek[] the immediate payment of benefits," it "clearly s[ought] to establish a right to future payments," and therefore was a benefits claim subject to the administrative scheme. *Id.* at 621. Petitioner's claim here challenging the delay in receiving approval for a particular medical benefit at a non-VA facility must similarly proceed through the specialized scheme of review created by Congress.

factbound decision in this case "divorces the VJRA's review process from its jurisdictional bar." Petitioner relies (Pet. 12-13, 28-29) on a VA regulation that provides that "[m]edical determinations, such as determinations of the need for and appropriateness of specific types of medical care and treatment for an individual, are not adjudicative matters and are beyond the [Board of Veterans' Appeals'] jurisdiction." 38 C.F.R. 20.101(b). But there is no dispute in this case regarding whether there was a medical need for a diagnostic examination of petitioner's shoulder; rather, petitioner's claim rests on alleged deficiencies and delays in the VA's process of approving him to receive an open MRI examination at an outside facility at VA expense and the VA's failure to provide alternative diagnostic procedures while it processed his request for an outside MRI. Nor does petitioner assert that alternative diagnostic procedures were medically superior to an open MRI. "At bottom," his grievance is "not with the medical treatment he received" but "with the VA's benefits procedure" and the length of time it took to receive the MRI. Pet. App. 23.[3]

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[3] Nor does it matter that petitioner has couched his challenge to the VA's process for providing benefits in terms of medical negligence. Indeed, VA regulations specifically provide that "issues over which the Board has jurisdiction include * * * [b]enefits for persons disabled by medical treatment" furnished by the VA, 38 C.F.R. 20.101(a)(17), and the statute authorizing those benefits requires a determination that "the disability or death was caused by hospital care, medical or surgical treatment, or examination furnished the veteran under any law administered by the Secretary * * * and the proximate cause of the disability or death was * * * carelessness, negligence, lack of proper skill, error in judgment, or similar instance of fault on the part of the [VA] in

Petitioner could have pursued that claim through the specialized review channel established by the VJRA. See, *e.g.*, *Veterans for Common Sense* v. *Shinseki*, 678 F.3d 1013, 1028 n.18 (9th Cir. 2012) (en banc) (observing that "to the extent that any individual veteran claims unreasonable delay in the provision of his benefits, he may file a claim in the Veterans Court, which has the power to 'compel action of the Secretary unlawfully withheld or unreasonably delayed'") (quoting 38 U.S.C. 7261(a)(2)), cert. denied, 133 S. Ct. 840 (2013); *Beamon* v. *Brown*, 125 F.3d 965, 968, 970 (6th Cir. 1997) (concluding that Section 511(a) bars review of "the legality and constitutionality of the procedures that the VA uses to decide benefits claims," and emphasizing that the Veterans Court "has the power to provide adequate relief for the plaintiffs," who sought to challenge the VA's "unreasonably delayed benefits decisions"). But Congress precluded petitioner from challenging the VA's process for providing benefits in a tort action in district court. See 38 U.S.C. 511(a).

Petitioner is also wrong to suggest (Pet. 23) that the court of appeals' decision renders the FTCA "a nullity for most veterans injured by the VA's failure to provide adequate medical care." As petitioner notes (Pet. 8), Congress contemplated that a veteran who is disabled by medical treatment that is performed negligently at a VA facility may seek money damages under the FTCA. See 38 U.S.C. 1151(b) (providing that VA disability payments must be offset against any FTCA recovery in that situation). Thus, claims alleging medical negligence by the VA are actionable under the FTCA as long as those claims would not require

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furnishing the hospital care, medical or surgical treatment, or examination," 38 U.S.C. 1151(a)(1)(A).

review of a veterans' benefits decision. See *Thomas* v. *Principi*, 394 F.3d 970, 975 (D.C. Cir. 2005) (recognizing that "if a VA doctor left a sponge inside a patient during surgery, section 511 would permit an FTCA malpractice suit in district court").

Nor is petitioner correct to assert (Pet. 30-31) that all forms of medical negligence may be characterized as veterans' benefits issues. Petitioner contends (*Ibid.*) that a district court could conclude that it lacks jurisdiction over a claim that a VA doctor left a sponge inside of a patient because adjudication of that dispute would require assessment of "whether the veteran was 'entitled to a certain level of benefits'—i.e., the performance of surgical procedures that would have avoided this mishap (e.g., sponge-counting by nurses)." But courts have recognized that negligence by the VA in the course of *providing* medical treatment—as opposed to the process for determining a veteran's entitlement to such treatment in the first place—is actionable under the FTCA. See, *e.g.*, *United States* v. *Brown*, 348 U.S. 110, 110-113 (1954) (recognizing that veteran could pursue an FTCA suit based on the use of an allegedly defective tourniquet during an operation). Petitioner's claim is different because he did not allege that the open MRI he received was performed negligently, but rather that the VA's process for approving that benefit was prolonged and deficient. See Pet. App. 10, 23. In the particular circumstances of this case, the court of appeals did not err in concluding that petitioner's alternative-diagnostic-procedures claim was bound up with his alleged "difficulty in obtaining an outside MRI," *id.* at 10, and so would require review of benefits issues concerning the VA's decision to authorize him to re-

ceive the open MRI at an outside facility and the VA's process for granting that authorization. Further review of the factbound determination regarding the nature of petitioner's claim is not warranted.[4]

2. Petitioner is incorrect to contend (Pet. 20-21) that the courts of appeals have adopted conflicting interpretations of the VJRA's jurisdictional bar.

The courts of appeals have uniformly recognized that Section 511(a) "expressly disqualifie[s] [courts] from hearing cases related to VA benefits." *Veterans for Common Sense*, 678 F.3d at 1023. The courts thus agree that veterans may not seek review of VA benefits decisions in suits brought outside of the VA's specialized review process, including suits brought under the FTCA. See *Evans* v. *Greenfield Banking Co.*, 774 F.3d 1117, 1122-1123 (7th Cir. 2014); *King* v.

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[4] Petitioner's contention (Pet. 17) that the injury to his shoulder became irreparable during the period of delay in receiving the open MRI does not alter the analysis. The VJRA's jurisdictional bar turns on the type of action challenged rather than the harm that action produces, and a plaintiff cannot avoid the bar by alleging that "he is suing for other damages—not for the benefits themselves." *Jones* v. *United States*, 727 F.3d 844, 848 (8th Cir. 2013); see, *e.g.*, *Zuspann* v. *Brown*, 60 F.3d 1156, 1159 (5th Cir. 1995) (holding that the VJRA precluded review of the plaintiff's claim that he was entitled to "a chemical free living area," warranting "compensation for his medical bills" and "damages for his pain and suffering," because his complaint was "[b]ased on the VA's allegedly erroneous decision to deny him benefits"), cert. denied, 516 U.S. 1111 (1996); see also *Lewis* v. *Norton*, 355 Fed. Appx. 69, 70 (7th Cir. 2009) (citing decisions holding that "[t]he VJRA's jurisdictional scheme precludes district courts from reviewing challenges to individual benefits decisions such as denials or delays of benefits," and finding that "despite [the plaintiff's] attempts to couch his complaint in constitutional terms, his actual injury arises from the VA's decision to reduce his benefits").

United States Dep't of Veterans Affairs, 728 F.3d 410, 414 (5th Cir. 2013); *Jones* v. *United States*, 727 F.3d 844, 847 (8th Cir. 2013); *Butler* v. *United States*, 702 F.3d 749, 753 (4th Cir. 2012), cert. denied, 133 S. Ct. 2398 (2013); *Veterans for Common Sense*, 678 F.3d at 1023 (9th Cir.); *Johnson* v. *Department of Veterans Affairs*, 351 Fed. Appx. 288, 290 (10th Cir. 2009), cert. dismissed, 560 U.S. 922 (2010); *Dambach* v. *United States*, 211 Fed. Appx. 105, 108-109 (3d Cir. 2006) (per curiam); *Bates* v. *Nicholson*, 398 F.3d 1355, 1364 (Fed. Cir. 2005); *Price* v. *United States*, 228 F.3d 420, 421 (D.C. Cir. 2000) (per curiam), cert. denied, 534 U.S. 903 (2001); *Beamon*, 125 F.3d at 970 (6th Cir.); *Hall* v. *United States Dep't of Veterans' Affairs*, 85 F.3d 532, 534-535 (11th Cir. 1996) (per curiam); *Disabled Am. Veterans* v. *United States Dep't of Veterans Affairs*, 962 F.2d 136, 141 (2d Cir. 1992).

The courts of appeals further agree that determinations by the VA regarding a veteran's entitlement to medical services and the process by which a veteran obtains those services qualify as benefits issues that may be reviewed only in accordance with the VJRA's specialized framework of review. See, *e.g.*, *Veterans for Common Sense,* 678 F.3d at 1026-1028; *Thomas*, 394 F.3d at 975; *Irvin* v. *United States*, 335 Fed. Appx. 821, 823-824 & n.1 (11th Cir. 2009) (per curiam); *Larrabee ex rel. Jones* v. *Derwinski*, 968 F.2d 1497, 1498-1501 (2d Cir. 1992). Such claims involve benefits determinations because "there is no way for [a] district court to resolve whether the VA acted in a timely and effective manner in regard to the provision of [medical] care without evaluating the circumstances of individual veterans and their requests for treatment, and determining whether the VA handled those re-

quests properly." *Veterans for Common Sense*, 678 F.3d at 1028.

Contrary to petitioner's assertion (Pet. 21), the Sixth Circuit's decision in *Anestis* v. *United States*, 749 F.3d 520 (2014), is not to the contrary. In *Anestis*, the widow of a veteran who committed suicide after he was turned away from two VA clinics sued under the FTCA. *Id.* at 522. The plaintiff alleged a "violation of medical standards of care" based on the VA's policy of "requir[ing] its facilities to provide medical care to anyone in urgent need of assistance, even if the individual was ineligible for benefits * * * or was not even a veteran." *Id.* at 525, 527. The Sixth Circuit concluded that Section 511(a) did not preclude jurisdiction over the plaintiff's claim because "it rest[ed] on the VA's duty to provide emergency care, regardless of [the decedent's] status as an enrollee, or even a veteran." *Id.* at 527. The court distinguished cases in which courts found that Section 511(a) barred review of "challeng[es] [to] the manner in which the [VA] processes claims for veterans' benefits" or "claims of failure to render appropriate medical services and denial of necessary medical care" that would require a "determin[ation] [of] whether the VA provided the proper level of benefits." *Id.* at 526. The court further recognized that "simply characterizing a claim as a 'failure to treat' claim does not preclude a benefits determination from also being at issue." *Id.* at 527. As the Sixth Circuit explained, the plaintiff's claim in *Anestis* existed "irrespective of [the decedent's] status as a veteran" and was therefore "clearly distinguishable." *Id.* at 526. *Anestis* does not conflict with the decision in this case because petitioner's alternative-diagnostic-procedures claim plainly de-

pends on his status as a veteran and requires assessment of the VA's procedures for authorizing him to receive an open MRI at a non-VA facility.[5]

Petitioner is also mistaken in contending (Pet. 22-23) that the decision below conflicts with the D.C. Circuit's decision in *Broudy* v. *Mather*, 460 F.3d 106 (2006). The court in *Broudy* concluded that "while the Secretary is the sole arbiter of benefits claims and issues of law and fact that arise during his disposition of those claims, district courts have jurisdiction to consider questions arising under laws that affect the provision of benefits as long as the Secretary has not actually decided them in the course of a benefits proceeding." *Id.* at 178. Petitioner erroneously states that the court of appeals below applied the VJRA to bar review of "matters the VA has not decided." Pet. 22 (emphasis omitted). In fact, the court ruled that petitioner's challenge would require review of the VA's decision to authorize petitioner to obtain an open MRI at an outside facility and its process for determining petitioner's entitlement to that fee-for-service examination. Pet. App. 10-11. Because petitioner's suit implicates the VA's procedure for providing benefits and its ultimate benefits decision, the analysis in *Broudy* is inapplicable.

Finally, because the court of appeals' decision in this case is factbound and unpublished, it would not in

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[5] For the same reason, petitioner is incorrect to assert (Pet. 20-21) that *Anestis* conflicts with the D.C. Circuit's decision in *Thomas*, 394 F.3d 970. Indeed, *Anestis* cited *Thomas* with approval and followed its analysis for identifying benefits claims. See *Anestis*, 749 F.3d at 526-527. The court of appeals below likewise "applied [the] test established" in *Thomas*, Pet. App. 9, demonstrating that courts have interpreted the VJRA consistently.

any event give rise to the sort of circuit conflict that might warrant review by this Court in other contexts or be an appropriate vehicle for any such review.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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