No. 16-677

In The

# Supreme Court of the United States

FREDDIE H. MATHIS,

*Petitioner*,

v.

ROBERT MCDONALD,

Secretary of Veterans Affairs,

*Respondent*.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

## BRIEF OF AMICUS CURIAE DISABLED AMERICAN VETERANS IN SUPPORT OF PETITIONER

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Disabled American Veterans (DAV) respectfully submits this amicus curiae brief in support of Petitioner.[1]

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## INTEREST OF THE AMICUS CURIAE

Founded 96 years ago, DAV is a federally chartered veterans service organization, serving the interests of this nation's disabled veterans. 36 U.S.C. §§ 50301 *et seq.* DAV has more than a million members, all of whom are service-connected disabled veterans. DAV's marquee program is the "National Service Program" through which, from approximately one hundred locations around the United States and Puerto Rico, its National Appeals Officers (NAOs), National Service Officers (NSOs), and Transition Service Officers (TSOs) assist veterans with their claims for benefits from the United States Department of Veterans Affairs (VA). A great number of these claims include medical examinations by personnel appointed by VA. The presumption of competence created by the United States Court of Appeals for the Federal Circuit

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[1] Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days before the due date of amicus curiae's intention to file this brief. All parties have consented. Consent of the Secretary is being lodged herewith and consent of Petitioner has been lodged with the Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae made a monetary contribution to its preparation or submission.

(Federal Circuit) and adopted by the VA thus directly impacts DAV's work on behalf of veterans.

In the most recent year for which statistics are available, DAV representatives, all accredited by VA, handled more than 300,000 benefits claims for disabled veterans. In addition, DAV has developed, in conjunction with two outside law firms, what is doubtless the largest program for pro bono representation at the United States Court of Appeals for Veterans Claims (Veterans Court) and the Federal Circuit. The program represents well over 1,000 veterans each year at those courts. DAV thus takes care of veterans "cradle to grave" in the claims process.

In what is supposed to be a uniquely informal, nonadversarial, and veteran-friendly system, the Federal Circuit has granted VA a "presumption of competence" to VA's selection of medical personnel to evaluate veteran disabilities. The presumption, however, was created by the Federal Circuit out of whole cloth. No statute or regulation mandates, suggests, or endorses it, and it is contradicted by the unique nonadversarial structure of the veterans benefits system, the statutory duty to assist, and the regulation mandating competent medical evidence.

The presumption of competence harms veterans because it effectively insulates from any type of meaningful review VA's selection of medical personnel. That selection is critically important to veterans receiving the high-quality medical care to which they are entitled. DAV and its members,

therefore, have a significant stake in the outcome of this case.

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## SUMMARY OF ARGUMENT

As distinct from any other administrative proceeding, Congress and the courts have recognized the "special solicitude" that is to be afforded to veterans, those among us who have "performed an especially important service for the Nation, often at the risk of his or her own life." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); *see also Henderson v. Shinseki*, 562 U.S. 428, 440 (2011); *United States v. Oregon*, 366 U.S. 643, 647 (1961). That special solicitude is reflected in the nonadversarial and inquisitorial procedures for affording veterans disability benefits. The VA has a statutory duty to assist veterans and the regulations require VA to provide competent medical evidence. The proceedings are ex parte and traditional adversarial procedures are not allowed. In this system, it has been recognized that veterans have a reduced ability to mount legal challenges before the VA or Board.

Notwithstanding its unique structure, the Federal Circuit held that it was "bound by clear precedent" to presume that Mr. Mathis's medical examiner "was competent to render the opinion he did." App. 15. The court recognized, however, that there was a "fair basis" to criticize that precedent and that there were "some legitimate concerns" because the cases supporting the presumption of competence do not provide "a solid foundation for the

broad application of the presumption of regularity to medical examiners." App. 11, 15. That criticism and concern are warranted. The cases relied on by the Federal Circuit in creating the presumption of competence do not support it. Instead, they distinguish procedural matters, such as the receipt of a properly mailed notice, in which a presumption may be appropriate, from an evidentiary matter going to the merits of a benefit claim, in which a presumption is not appropriate. The selection of a competent medical examiner and that examiner's conclusion are at the heart of a benefits claim; they are evidentiary and should not be assumed by a judicially created presumption. In addition, because it is VA's duty to select competent medical personnel, it cannot be the veteran's duty to challenge competence in the first instance.

## ARGUMENT

### I. THE VA CLAIMS PROCESS AND DAV'S ROLE IN THAT PROCESS

More than 225 years ago, Congress began providing pensions to veterans. The VA was created by Congress in 1930 and since then has been responsible for administering the program for veterans' benefits. In 1978, "approximately 800,000 claims for service-connected disability or death and pensions were decided by the 58 regional offices of the VA." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). The number of initial veterans claims and requests for reevaluation peaked at about 1.3 million in 2011. Since then, such claims have dropped but remain substantial, numbering about one million per year.

DAV, a congressionally chartered veterans service organization, provides nonattorney service officers to guide veterans through the claims process. In 2015, the last full year for which data is available, DAV represented veterans in more than 300,000 benefits claims. That year, the Board of Veterans' Appeals (Board) disposed of more than 55 thousand cases. DAV represented veterans in close to 30% of those cases, totaling 15,600 individual matters, the largest number handled by any veterans service organization.

As this Court recognized in *Walters*, "the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country." *Id.* Instead, the VA claims system has been designed to be "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998).

The nonadversarial nature of the VA system does not stem from just the volume of veterans claims and appeals. For more than 120 years, Congress prevented veterans from paying more than $10 for legal representation in the VA claims process, effectively prohibiting attorney representation. Congress did so to "protect claimants' benefits from being diverted to lawyers and to avoid making the claims process adversarial in nature, particularly in light of the highly effective representation provided for free by veterans' service organizations," such as the amicus here. *Carpenter, Chartered v. Sec'y of Veterans Affairs*, 343 F.3d 1347, 1350 (Fed. Cir. 2003). In rejecting a challenge

to the statutory fee cap, the Supreme Court noted that a "necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible." *Walters*, 473 U.S. at 323.

Even after Congress's elimination of the fee cap with the enactment of the Veterans' Judicial Review Act, Congress maintained the prohibition against paid attorney representation before a notice of disagreement (NOD) is filed with the Board. Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988) Congress has thus quite intentionally retained the informal and nonadversarial VA claims process. 38 U.S.C. § 5904(c)(1); *see Henderson*, 562 U.S. at 440. The system in which DAV assists veterans with their claims thus remains today one that is supposed to be paternalistic and nonadversarial, and with a special solicitude to the unique constituency it serves. *Henderson*, 562 U.S. at 440. It is through this prism that the presumption of competence adopted by the Federal Circuit must be viewed.

## II. THE PRESUMPTION OF COMPETENCE IS NOT SUPPORTED BY THE CASES RELIED ON BY THE FEDERAL CIRCUIT TO CREATE IT

The presumption of competence was created by the Federal Circuit in *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009). There, the Federal Circuit considered whether "the Board could assume the qualifications of VA's medical expert." *Id.* at 1290. In holding that "VA need not affirmatively establish the

expert's competency," the Federal Circuit said it was adopting the reasoning of the Veterans Court in *Cox v. Nicholson*, 20 Vet. App. 563 (2007). *Rizzo*, 580 F.3d at 1290-91.

The Veterans Court in *Cox* stated that the "Board is entitled to assume the competence of a VA examiner." 20 Vet. App. at 569. Such an assumption was appropriate, according to the Veterans Court, even though the "level of training, education, and experience of the person conducting the examination is a factor that, if the Board affords more or less weight to the report because of that reason, must be thoroughly explained in its decision." *Id.*

In support its statement that the Board was entitled to assume the competence of the VA examiner, the Veterans Court relied on the Federal Circuit's decision in *Butler v. Principi*, 244 F.3d 1337 (Fed. Cir. 2001), which stated that "the [presumption of regularity] doctrine thus allows courts to presume that what appears regular is regular, the burden shifting to the attacker to show the contrary." *Cox*, 20 Vet. App. at 569 (alteration in original) (quoting *Butler*, 244 F.3d at 1340).

*Butler*, however, does not address the competence of a medical examiner at all. Instead, in *Butler*, the Federal Circuit considered whether there was proof that VA had attached a notice of appeal rights to a letter sent to Mr. Butler. 244 F.3d at 1339. The Federal Circuit concluded that the presumption of regularity was appropriate in that circumstance.

Mr. Butler argued that the presumption conflicted with "the paternalistic aspects of the veterans benefits adjudication system, including 38 U.S.C. § 5107," which provides that "[a] claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary," and gives the benefit of the doubt to the veteran. *Id.* at 1340 (quoting Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 4, 114 Stat. 2096, 2098 (amending 38 U.S.C. § 5107(a) (1994)). In response, the Federal Circuit noted that "the veterans benefits adjudication system is nonadversarial and paternalistic," but that "the veteran still has certain legal procedural requirements to move forward with a claim." *Id.* Examples of such legal procedural requirements were the burden of showing jurisdiction and filing a timely notice of appeal. *Id.*

The Federal Circuit also specifically distinguished evidentiary matters "going to the merits of a benefit claim" from "a procedural matter, such as the mailing of a notice relating to an appeal." *Id.* The Federal Circuit was clear that the presumption of regularity applied "to the mailing of a copy of a notice of appeal rights to Mr. Butler" and, by distinguishing them, not to evidentiary matters going to the merits of a benefit claim. *Id.*

The *Butler* decision, which formed the basis for the Veterans Court's decision in *Cox*, which was then adopted by the Federal Circuit in *Rizzo*, thus recognized the fundamental distinction between a procedural issue, such as sending a letter relating to appeal rights and "evidentiary matters going to the merits of a benefit claim." That distinction means

that a "presumption of regularity" could apply to a procedural issue but not to an evidentiary issue.

The selection of a competent medical examiner is not akin to mailing a letter. It is not a procedural issue. The medical examiner considers the medical evidence and, based on his education and experience, recommends whether and to what extent a veteran is entitled to disability benefits. The competence of the medical examiner to perform that task is the predicate for a decision on a claim. Selection of a medical examiner thus goes to the heart of whether VA has provided competent medical evidence. It is the epitome of an evidentiary issue. *Butler*, which supports a presumption as to procedural issues and distinguishes procedural issues from evidentiary issues does not support the presumption of competence.

Nor does a later case addressing the presumption of regularity. *Kyhn v. Shinseki*, 716 F.3d 572 (Fed. Cir. 2013). In *Kyhn,* the appeals court determined that it was inappropriate for the Veterans Court to have applied a presumption of regularity to a finding in the first instance regarding VA's practice of notifying a veteran of a medical examination. The court distinguished the situation in *Kyhn* from the presumption of regularity applied with respect to mailing other notifications to a veteran. *Id.* at 577 (citing *Miley v. Principi*, 366 F.3d 1343 (Fed. Cir. 2004) (presumption of regularity as to mailing notification of rating decision); *Butler*, 244 F.3d 1337 (presumption of regularity as to mailing notice of appeal rights)). The court explained that the presumption of regularity as to mailing is a rule

of law whose application is triggered by preliminary fact findings. *Id.* at 577 n.9. Those preliminary fact findings are whether the letter was properly addressed and mailed. *Id.* Thus, when the preliminary facts are established, namely, the letter is addressed and mailed, through the presumption of regularity, it can be assumed that the letter arrived. The presumption can be rebutted but it is put in place based on the predicate facts.

In contrast, there are no predicate facts supporting the presumption of competence. Instead, and in contrast with *Kyhn*, the presumption of competence was put in place and remains in place not because VA can assure veterans that VA medical examiners will be competent to address the medical issues raised by their claims but because of the volume of claims handled by VA. App. 16. VA case volume, however, should not be permitted to excuse VA's obligations to assist veterans with their claims and to provide competent medical evidence.

## III. THE BURDEN OF CHALLENGING COMPETENCE SHOULD NOT BE PLACED ON VETERANS

This Court has recognized that the VA disability benefits system "is 'unusually protective' of claimants." *Henderson*, 562 U.S. at 437 (citing *Heckler v. Day*, 467 U.S. 104, 106-07 (1984)). Indeed, "[t]he contrast between ordinary civil litigation" and the system for adjudicating veterans benefits claims "could hardly be more dramatic." *Id.* at 440; *Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (the Court and the Federal Circuit "have long recognized that the character of

the veterans' benefits statutes is strongly and uniquely pro-claimant" (quoting *Hodge*, 155 F.3d at 1362).

The Federal Circuit has underscored VA's affirmative duty "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Comer*, 552 F.3d at 1368, 1369 (citation omitted); *see Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001) (citing *Hodge*, 155 F.3d 1362); H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794-95. The Veterans Court has long echoed this sentiment. *Brokowski v. Shinseki*, 23 Vet. App. 79, 85 (2009) (VA "must fully and sympathetically develop a veteran's claim to its optimum before reaching the claim on its merits."); *Norris v. West*, 12 Vet. App. 413, 420 (1999); *Douglas v. Derwinski*, 2 Vet. App. 435, 439 (1992) (It is a "basic principle of the VA claims process that claims will be processed and adjudicated in an informal, nonadversarial atmosphere, and . . . VA will assist claimants in many ways."); *see also* H.R. Rep. No. 105-52, at 4 (1997) (noting "the pro-claimant bias intended by Congress throughout the VA system").

The VA's affirmative duties are spelled out in the applicable statutes and regulations. For instance, VA has a statutory duty to assist veterans in developing their claims. 38 U.S.C. § 5103A; *see also* 38 C.F.R. § 3.103(a). The Secretary has a duty to assist claimants in obtaining evidence necessary to substantiate benefits claims. 38 U.S.C. § 5103A(a). The Secretary also has a duty to obtain private medical records, *id.* § 5103A(b), as well as service

medical records, records from VA medical facilities, and records from other federal departments and agencies, *id.* § 5103A(c). The Secretary must request private medical records at least twice in order to discharge his obligation to help a veteran claimant. *Id.* § 5103A(b)(2)(B).

In a claim for disability compensation, the Secretary must provide a medical examination or obtain a medical opinion when such an examination or opinion is necessary to make a decision on the claim. As recognized by the Federal Circuit, in developing claims, "the VA is required in some circumstances . . . to rely only on 'competent medical evidence,'" as defined by 38 C.F.R. § 3.159(a)(1). *Parks v. Shinseki*, 716 F.3d 581, 584 (Fed. Cir. 2013). "Competent medical evidence" is "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." *Id.* (quoting 38 C.F.R. § 3.159(a)(1)). The Federal Circuit has explained that the plain language of that regulation and common sense mean that "competency requires some nexus between qualification and opinion." *Id.* at 585.

The statute and regulations thus place on VA an affirmative duty to assist veterans and in particular to provide competent medical evidence. That competence requires "some nexus between qualification and opinion." *Id.* That nexus must be provided by VA as part of its duty to provide competent medical evidence. It should not be left for veterans to challenge. This is particularly so given that "[r]ealistic considerations may reduce the

ability of a veteran to mount legal challenges in the regional office or at the Board," *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000), and because claimants in VA proceedings typically appear pro se, even when assisted by a nonattorney, service-organization representative. *Comer*, 552 F.3d at 1369.

## IV. VETERANS ARE ENTITLED TO MORE THAN A HOPE THAT MEDICAL EXAMINATIONS ARE CONDUCTED PURSUANT TO CONGRESSIONAL MANDATE

In affirming the Veterans Court, the Federal Circuit evidenced considerable discomfort, the majority stating that there were "legitimate concerns" with the presumption of competence but that there was "a practical need for an administrable rule, given the volume of claims the VA is charged with processing." App. 11, 16. The volume of VA claims, however, cannot be an excuse for VA to effectively shield from challenge the competence of medical examiners or allow VA to not provide the credentials of the examiners it selects. Those actions are inconsistent with the statutory duty to assist and cannot be excused no matter how high the volume of veterans claims.

In denying en banc rehearing, the Federal Circuit essentially threw up its hands, noting that its "review is limited" and seeing "no legal impediment to a rebuttable presumption of competency." App. 82-83. But there is a legal impediment: In the nonadversarial veterans benefits

system, veterans are statutorily entitled to assistance in developing their claims. This includes an actually competent medical examiner, not one who is presumptively competent.

Federal Circuit Judge Hughes, joined by five other members of the court, stated that he was "certainly sympathetic to the concerns raised by the presumption of competency, and its potential for misuse by the VA." App. 82. But instead of being told to address those concerns, the Secretary was told to be "mindful of its obligations and not reflexively rely" on the presumption. *Id.* Veterans are entitled to more than sympathy and to more than a hope that the Secretary will be mindful of his obligations. They are entitled to a transparent system that requires that they receive competent medical examiners, not a system that can obfuscate that selection in a presumption of competence.

## V. THE *MATHIS* DECISION AND ITS PREDECESSORS HAVE SUBSTANTIAL NEGATIVE IMPLICATIONS FOR VETERANS

The veterans benefits system is one of mass and—ideally—accelerated justice. The process was designed to permit a veteran to navigate it without the assistance of an advocate. It is VA that has the statutory duty to assist veterans by informing them of the benefits available to them and assisting them in developing and substantiating claims to receive their entitlements. *See Jaquay*, 304 F.3d at 1280; 38 U.S.C. § 5103A. This includes providing medical examinations when necessary. 38 C.F.R. § 3.159(a)(1).

In this system, Veterans are entitled to competent medical examiners to assess their disabilities. The judicially created presumption of competence flies in the face of the VA's duty to assist generally, and specifically with the VA's duty to provide competent medical care to veterans. With no safeguards on the competence of medical examiners, veterans are left to suffer the consequences of being denied benefits to which they are entitled, and the already labyrinthine veterans benefits system is made even more opaque and difficult to navigate.

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## CONCLUSION

Amicus DAV thus supports the Petitioner and requests that the Court grant the petition for a writ of certiorari to consider and eliminate the presumption of competence.

Respectfully submitted,

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