No. 15-1054

In the Supreme Court of the United States

CURTIS SCOTT,

Petitioner,

v.

ROBERT MCDONALD, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF OF THE FEDERAL CIRCUIT BAR ASSOCIATION *AS AMICUS CURIAE* IN SUPPORT OF PETITIONER

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March 21, 2016

QUESTION PRESENTED

Amicus curiae, the Federal Circuit Bar Association, will address the following question:

Should the Federal Circuit impose an issue exhaustion requirement in non-adversarial proceedings before the Department of Veterans Affairs in the absence of statutory instruction to do so?

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INTEREST OF THE *AMICUS CURIAE*[1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit. It unites the groups that practice before that court and seeks to strengthen and serve the court. Among other activities, the FCBA facilitates *pro bono* representation for veterans with potential or actual litigation within the Federal Circuit's jurisdiction, with a view to improving fundamental fairness to all litigants. The FCBA launched its Veterans Pro Bono Initiative in 2007 to address "the number of *pro se* appeals by Veterans from the U.S. Court of Appeals for Veterans Claims ("Veterans Court") to the . . . Federal Circuit."[2]

The Federal Circuit's issue exhaustion rule now fashioned impacts the fair and efficient adjudication of veterans' benefits claims and the goals of the

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[1] No counsel for a party authored this brief in whole or part, and no counsel or party made a monetary contribution to fund the preparation or submission of this brief. No person other than the *amicus curiae*, its members, and its counsel made any monetary contribution to this brief's preparation and submission. Further, within the Federal Circuit Bar Association, no government board or association members participated in the decision to file the amicus brief or in shaping the contents of the brief. The parties have received timely notice of and have consented to this filing.

[2] *Veterans Pro Bono Initiative, Overview & FAQ*, FCBA, https://fedcirbar.org/Pro-Bono-Scholarships/Veterans-Pro-Bono/Overview-FAQ (last visited Mar. 16, 2016).

FCBA's Veterans Pro Bono Initiative. Most veterans proceed *pro se* before the Department of Veterans Affairs ("VA") and are not typically matched with *pro bono* attorneys, if at all, until their claims reach the Veterans Court. See *infra* Section I. The Federal Circuit's issue exhaustion rule prevents these *pro bono* attorneys from presenting on review sophisticated legal and technical arguments that previously unrepresented veterans cannot, and should not, be expected to identify or articulate on their own.

SUMMARY OF ARGUMENT

This Court should grant the petition for certiorari because the issue exhaustion rule imposed by the panel below upon Petitioner Curtis Scott (1) unfairly inhibits *pro se* and *pro bono* participation in the VA claims and appeals process, (2) disproportionally serves the VA's institutional interests, which are heavily outweighed by the interests of the individual veteran, and (3) conflicts with *Sims v. Apfel*, 530 U.S. 103 (2000) and the non-adversarial, claimant-friendly process that Congress established for the determination of claims for veterans benefits.

This case illustrates the challenges unrepresented veterans face in navigating the appeals process from the VA Regional Office ("RO") to the Board of Veterans' Appeals (the "Board"), to the Veterans Court, and on to the Federal Circuit. After serving in the United States Marine Corps Reserve, Petitioner Curtis Scott applied for disability benefits, alleging that he contracted hepatitis C in service. The VA RO

denied Scott's claim, and he appealed to the Board, requesting an evidentiary hearing. Because Scott was incarcerated at that time, the RO requested information about the date of his expected release in order to schedule the hearing. Scott provided this information, but the RO nonetheless scheduled the hearing during the pendency of his incarceration. He could not obtain transportation from the prison and missed the hearing.

Scott timely made a request to reschedule his evidentiary hearing, but the Board denied the request, finding that he had not shown good cause for failing to appear at the previously scheduled hearing. The Board then denied his claim.

Scott appealed to the Veterans Court, which vacated and remanded his case to the Board due to an inadequate medical examination. The Board remanded to the RO for a new medical examination. The RO again denied Scott's claim, and the Board affirmed in 2012. On appeal to the Veterans Court, Scott argued that the Board had failed to fulfill its duty to assist by denying his requested hearing. The Veterans Court refused to address the argument, writing that Scott "did not raise this [hearing] issue in [his prior appeal to the Veterans Court or his current appeal before the Board]." *Scott v. Shinseki*, No. 12-1972, slip op. at 2 (Vet. App. Mar. 20, 2014). The Federal Circuit affirmed, holding that the Veterans Court could impose a strict issue exhaustion requirement. *Scott v. McDonald*, No. 14-7095, slip op. at 9-10 (Fed. Cir. June 18, 2015) ("Op.").

Although many of the facts of his case are unique, Scott's experience is similar to that of thousands of veterans who apply for benefits through the VA's informal, non-adversarial agency-level proceedings *pro se*. The issue exhaustion requirement imposed by the Federal Circuit upon Scott works to prevent deserving veterans from accessing needed disability benefits simply because those veterans, who are largely unrepresented by counsel, do not consistently and repeatedly take issue with procedural defects at each and every of the multiple levels of review available to veterans. The institutional interests served by this rule—namely the culling of possibly irrelevant procedural arguments—are significantly outweighed by the individual veteran's interest in pursuing his or her disability benefits.

Indeed, imposing an issue exhaustion requirement on a claimant in non-adversarial proceedings runs contrary to this Court's precedent. *Sims*, 530 U.S. at 112. In *Sims*, the Court explained that "there are wide differences between administrative agencies and courts," and explicitly "warned against reflexively 'assimilat[ing] the relation of . . . administrative bodies and the courts to the relationship between lower and upper courts.'" *Id.* at 110 (citations omitted). "Where the parties are expected to develop the issues in an adversarial administrative proceeding, it seems . . . that the rationale for requiring issue exhaustion is at its greatest," but "[w]here . . . an administrative proceeding is not adversarial, . . . the reasons for a court to require issue exhaustion are much weaker." *Id.* The VA

claims process is a non-adversarial administrative proceeding upon which the issue exhaustion rule should not be foisted.

As this Court, Congress, and the President have long recognized, the non-adversarial, claimant-friendly nature of the VA's system for deciding benefits claims is unlike any other adjudicative process. See *infra* Section III. The typical veteran's inability to articulate specific legal arguments to advance his or her claim is the reality that motivated the promulgation of many of the pro-claimant features of this process, such as the VA's duty to assist veterans in the development of their claims and the VA's obligation to sympathetically read veterans' filings. See *id.* An issue exhaustion rule that results in veterans "waiving" arguments that they cannot, and are not expected to, identify and articulate has no place in the statutory scheme established by Congress.

ARGUMENT

I. The Issue Exhaustion Rule Places An Undue Burden On Veterans, The Majority Of Whom Proceed *Pro Se* Through The Adjudication Of Their Benefits Claims

This Court has recognized that "the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S.

305, 309 (1985). Instead, "Congress desired that the proceedings be as informal and nonadversarial as possible," *id*. at 323-24, and "to function throughout with a high degree of informality and solicitude for the claimant," *id*. at 311. Congress's special solicitude for the veterans' cause recognizes that "a veteran . . . has 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).

Congress desired that the multiple layers of review—beginning at the RO and moving up—would provide veterans with multiple opportunities to pursue their disability benefits, rather than with multiple opportunities to fail by waiving viable arguments. Under this informal and non-adversarial review scheme, Congress even established that a veteran can challenge an adverse decision by the Board in the Veterans Court, but the Secretary cannot. 38 U.S.C. § 7252(a).

Consistent with the non-adversarial nature of the veterans' benefits process, veterans are "often unrepresented during the claims proceedings." *Sanders*, 556 U.S. at 412; *Kelly v. Nicholson*, 463 F.3d 1349, 1353 (Fed. Cir. 2006) (observing that "veterans generally are not represented by counsel before the RO and the board"). In 2014, nearly 50,000 cases were formally appealed to the Board from the VA RO, and

about 90% of the veterans in those cases were unrepresented by counsel.[3]

Like Scott, most veterans who are able to obtain counsel do so for the first time when they appeal to the Veterans Court or during the pendency of that appeal. However, a significant number of veterans remain unrepresented even at that stage. In 2014, 3,745 appeals were filed with the Veterans Court, and 33% of those veterans proceeded without an attorney.[4]

Not surprisingly, the assistance of counsel often permits a veteran to identify legal arguments that the veteran was unable to identify on his or her own. Veterans law is often too complex even for the adjudicators tasked with applying the rules. See *DeLisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring) ("There is an unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex for the thousands of regional office adjudicators that must apply the rules on the front lines in over a million cases per year."). If veterans law is too complex for VA adjudicators to apply, *pro se* veterans with no legal training should not be expected to raise all issues at every stage of their appeal in order to avoid waiver of those issues.

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[3] See U.S. Dep't of Veterans Affairs, *Bd. of Veterans' Appeals Annual Report Fiscal Year 2014* at 18, 27 (2015), http://www.bva.va.gov/docs/Chairmans_ Annual_Rpts/BVA2014AR.pdf.

[4] U.S. Court of Appeals for Veterans Claims, *Annual Reports* (2015), https://www.uscourts.cavc.gov/documents/FY2014AnnualReport06MAR15FINAL.pdf.

The reality is that (1) the vast majority of veterans participate in the claims and appeal process without the benefit of legal representation, and (2) legal assistance does not usually arrive for these *pro se* veterans, if at all, until the case is before the Veterans Court. Therefore, by the time a retained or *pro bono* attorney is typically matched with a *pro se* veteran, many viable arguments could have already been "waived" by operation of the issue exhaustion rule.

With viable arguments waived, *pro bono* representation in many cases will be significantly hampered, if not rendered altogether futile. Indeed, even skilled and experienced lawyers will find it difficult to resuscitate claims deemed waived under the issue exhaustion rule. Recognizing this futility, *pro bono* attorneys may avoid providing representation to unrepresented veterans who have made it far into the appellate process, even though—absent an issue exhaustion rule—these veterans would benefit tremendously from representation. Many viable arguments could go unheard simply because they were not previously articulated.

The Federal Circuit itself expressed this very concern in *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000), when it declined to impose an "an across-the-board presumption for or against invocation of the exhaustion doctrine." *Maggitt* cautioned against applying the exhaustion of remedies doctrine against a party such "that the party's arguments go unheard," *id.* at 1377, because, at that time, "[r]ealistic considerations . . . reduce[d] the ability of . . .

veteran[s] to mount legal challenges in the regional office or at the Board," *id*. at 1378.

By transforming the VA claims and appeal process into one more akin to an adversarial proceeding, the Federal Circuit's issue exhaustion rule would require veterans to seek legal representation earlier on in the process in order to avoid waiver of possible issues. But because many veterans cannot afford to retain counsel, and *pro bono* groups serving veterans find it difficult to fill the gap, the likely result will be that (1) an even greater need for representation before the VA will go unmet, and (2) the Veterans Court will deem as waived an even larger number of unarticulated issues.

This outcome runs directly contrary to "Congress['s] desire[] that the proceedings be as informal and non-adversarial as possible," *Walters*, 473 U.S. at 323-24. Congress envisioned that the non-adversarial proceedings would be managed "in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Id*. at 321; see 38 C.F.R. § 3.103(e) (*permitting* veterans to be represented by counsel at every stage in the prosecution of a veteran's benefits claim). Attorney representation before the VA, while permissible, should not be made a *de facto* requirement by judicial imposition of an issue exhaustion requirement.

II. The Interest Of The Veteran In Pursuing Disability Benefits Weighs Heavily Against The Institutional Interest In Requiring Issue Exhaustion

The Federal Circuit's issue exhaustion rule disproportionally serves the VA's institutional interests, which are heavily outweighed by the interests of the individual veteran. The Panel below reiterated its case-by-case balancing test for issue exhaustion in the VA system: "The test is whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." Op. at 5 (quoting *Maggitt*, 202 F.3d at 1377). Citing to no authority, the Panel explained that, with regard to exhaustion of procedural issues, "[a] veteran's interest may be better served by prompt resolution of his [or her] claims rather than by further remands to cure procedural errors that, at the end of the day, may be irrelevant to final resolution and may indeed merely delay resolution." Op. at 12. The Panel did not provide an example, and indeed it is difficult to imagine a scenario in which a veteran would opt for the finality of a benefits denial over the possibility of an award.

The mere possibility that a procedural defect "may be irrelevant" does not outweigh the veteran's right to raise that procedural defect. The procedural defect at issue in this case, namely the denial of an evidentiary hearing, is particularly important to protecting a veteran's interest in pursuing his or her disability benefits. A VA Board hearing can have a direct effect on the Board's view of the merits of a veteran's claim. At a hearing in this case, Scott could have developed

written evidence and oral testimony related to his disability and its connection to his service.

The VA recognizes the importance of hearings as they pertain to the benefits application and appeals process. In its 2014 fiscal year, the Board reported that it held 10,879 hearings, an accomplishment that the VA lauded as a "success" and a "service to Veterans."[5] In fact, the Board made "efforts to conduct as many hearings as possible" in an effort "to better serve Veterans and their families."[6] Despite its recognition of the importance of hearings to "serve Veterans and their families," the VA now seeks to deny Scott his opportunity to be heard because, although he timely requested a hearing during his first appeal to the Board and again after the Board scheduled his hearing during his incarceration, he did not continue to do so throughout the course of his multi-year, multi-level appeal process.

Denial of disability benefits based on procedural issue exhaustion, rather than on the merits of the claim, can significantly impact the lives and well-being of deserving veterans. "Considering overall health, existing studies have consistently reported that 'denied' [veteran] applicants are often burdened by poor health and disability that can hamper

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[5] U.S. Dep't of Veterans Affairs, *Bd. of Veterans' Appeals Annual Report Fiscal Year 2014* at 4-5, 18 (2015), http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf.

[6] *Id*. at 8.

multiple aspects of functioning."[7] Those same studies "suggest that those [veterans] 'denied' [benefits] . . . may be as impaired as those 'awarded' [benefits] . . . and likely have critical, albeit unmet health care needs."[8]

Frequently, VA disability benefits are the only barrier standing between a veteran and the poverty threshold. A May 2015 VA study on veteran poverty trends found that "[v]eterans receiving a Service-Connected Disability (SCD) benefit have a significantly lower poverty rate when compared with [n]on-[v]eteran disabled."[9] The study concluded that "[t]his appears to show the importance of SCD benefits in helping Veterans avoid poverty."[10]

For these reasons, the interest of the individual veteran to raise previously unarticulated procedural defects in the pursuit of disability benefits weighs heavily against the VA's institutional interests in exhaustion of procedural issues that "*may* be irrelevant." Op. at 12 (emphasis added). The stakes in the VA benefits claims and appeals process are simply

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[7] Dennis A. Fried et al., *Health and Health Care Service Utilization Among U.S. Veterans Denied VA Service-Connected Disability Compensation: A Review of the Literature*, 180 Military Medicine 1034 (2015).

[8] *Id.*

[9] Nat'l Center for Veterans Analysis & Statistics, *Report on Veteran Poverty Trends* at 7, May 2015, http://www.va.gov/vetdata/docs/SpecialReports/Veteran_Poverty_Trends.pdf.

[10] *Id.*

too high to allow an issue exhaustion rule that unfairly prejudices veterans.

III. The Federal Circuit's Issue Exhaustion Rule Conflicts With This Court's Precedent And The Non-Adversarial, Veteran-Friendly Statutory Scheme

In addition to the negative practical and equitable consequences of the Federal Circuit's issue exhaustion rule, the rule also conflicts with this Court's precedent and with the non-adversarial statutory scheme. In *Sims v. Apfel*, this Court held that Social Security claimants who properly exhaust administrative remedies prior to judicial review do not waive any issues that the claimants failed to present to the agency. 530 U.S. at 105. *Sims* explained that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. The Court further explained that, "[w]here, by contrast, an administrative proceeding is not adversarial, we think the reasons for a court to require issue exhaustion are much weaker." *Id.* at 10.

The differences between adversarial judicial proceedings and agency proceedings are nowhere more pronounced than in veterans' benefits claims. Congress has long provided "special solicitude for the veterans' cause." *Sanders*, 556 U.S. at 412. As stated, this Court has recognized that "the process prescribed by Congress for obtaining disability benefits does not

contemplate the adversary mode of dispute resolution utilized by courts in this country." *Walters*, 473 U.S. at 309.

More recently, in *Henderson v. Shinseki*, 131 S. Ct. 1197, 1205-06 (2011), this Court emphasized: "The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson* specifically contrasted the "adversarial" nature of civil litigation with the "nonadversarial" nature of claims for veterans' benefits, in which the laws "place a thumb on the scale in the veteran's favor." *Id.* at 1205; accord S. Rep. No. 100-418, at 29 (1988).

Among the many non-adversarial elements of the veterans' benefits claims adjudication process, the Secretary of Veterans Affairs must make all "reasonable efforts to assist" a veteran in developing a claim. 38 U.S.C. § 5103A(a)(1). Congress required the Secretary to err on the side of providing too many benefits: whenever "there is an approximate balance of positive and negative evidence," the Secretary "shall give the benefit of the doubt to the claimant." *Id.* § 5107(b). And Congress established a lopsided scheme for obtaining court review: A veteran can challenge an adverse decision by the Board in the Veterans Court, but the Secretary cannot. *Id.* § 7252(a).

In tailoring this statutory scheme to make it as claimant-friendly as possible, both Congress and the

President repeatedly have emphasized the non-adversarial nature of the veterans' benefits system as a "means by which the Nation expresses its profound gratitude for the many sacrifices our veterans have made to protect and defend our freedom." Statement by President Clinton upon Signing H.R. 4864 (Nov. 9, 2000), *reprinted in* 2000 U.S.C.C.A.N. 2017; H.R. Rep. No. 106-781, at 5 (2000) ("[T]he Department of Veterans Affairs' system for deciding benefits claims 'is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial; therefore, the VA must provide a substantial amount of assistance to a veteran seeking benefits.'" (citation omitted)). In fact, Congress made a point of preserving the non-adversarial, pro-claimant character of the veterans' benefits system when it added judicial review to the system in 1988:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects the VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, [the] VA is expected to resolve

> all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross-examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.

H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795; accord *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (discussing the 1988 legislation and noting that "Congress emphasized the historically non-adversarial system of awarding benefits to veterans and discussed its intent to maintain the system's unique character").

Federal Circuit precedent similarly recognizes the non-adversarial nature of proceedings before the Board. See, e.g., *Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) ("Viewed in its entirety, the veterans' system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus." (quoting *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (en banc) (Mayer, C. J., dissenting)); *Hodge*, 155 F.3d at 1362 ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant."). The Federal Circuit has further emphasized that "[t]he VA disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009); see also *Percy v. Shinseki*, 23 Vet. App. 37, 47 (2009) ("It is

inconsistent with that congressional intent for VA to treat its procedures as a minefield that the veteran must successfully negotiate in order to obtain the benefits that Congress intended to bestow on behalf of a grateful nation.").

The Panel below departed from *Sims*, *Maggitt*, and from the non-adversarial, claimant-friendly scheme established by Congress when it ruled that Scott "waived" his right to challenge the denial of his hearing when he timely requested a hearing on two occasions but did not continue to repeat the request when he subsequently appeared before the Board. This is precisely the type of "trap for the unwary" against which Congress warned.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition for Writ of Certiorari.

Respectfully submitted,

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