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 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

CHRISTOPHER J. CLAY
DISABLED AMERICAN VETERANS NATIONAL HEADQUARTERS
3725 Alexandria Pike
Cold Spring, KY 41076
(859) 442-2043
cclay@dav.org

DORIS JOHNSON HINES
Counsel of Record
FINNEGAN, HENDERSON, FARABOW, GARRETT & DUNNER, LLP
901 New York Avenue, NW
Washington, DC 20001
(202) 408-4250
dori.hines@finnegan.com

Counsel for Amicus Curiae Disabled American Veterans

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

INTEREST OF THE AMICUS CURIAE

DAV is a federally-chartered veterans service organization, founded to serve 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. Although DAV operates a number of charitable programs serving the interests of its constituency, its marquee program, and the one for which it is best known, is the "National Service Program." Through that program, and from approximately one hundred locations around the United States and Puerto Rico, DAV's 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). In the most recent year for which statistics are available, DAV representatives, all accredited by VA, handled more than 340,000 benefits claims for disabled veterans. In addition,

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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 prior to the due date of the amicus curiae's intention to file this brief. All parties have consented to the filing of this brief. Those consents are being lodged herewith. 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.

DAV has developed, in conjunction with two outside law firms, what is doubtless the largest program now existing for *pro bono* representation at the United States Court of Appeals for Veterans Claims (CAVC) and at the United States Court of Appeals for the Federal Circuit (Federal Circuit). The program now represents well over 1,000 veterans each year at the CAVC and Federal Circuit. DAV thus takes care of veterans "cradle to grave" in the claims process.

The Federal Circuit's misreading of the relevant statutes and regulations and failure to consider the realities of the appellate process before the Board of Veteran Appeals (BVA) and CAVC in what is supposed to be the uniquely informal, ex parte, and veteran-friendly system, has led it to impose issue exhaustion as to all arguments and to preclude so-called "procedural arguments" except in "extraordinary circumstances." The nebulous nature and contradictory character of the Federal Circuit's pronouncements in *Scott v. McDonald,* 789 F.3d 1375 (Fed. Cir. 2015) on issue exhaustion cement great uncertainty and unfairness into the important task of representing veterans and undermine efficiency to the detriment of veterans. DAV has a significant stake in the outcome of this case.

SUMMARY OF ARGUMENT

The Federal Circuit held that Mr. Scott waived his right to challenge the failure of VA to grant him a hearing permitted by statute because he

did not ask for a hearing enough times. The Federal Circuit endorsed a "case-by-case" approach to questions of issue exhaustion before this Court's *Sims* decision. In the *Scott* case, however, the Federal Circuit held that despite the nonadversarial nature of the veterans claims process, which it says mandates a "less strict requirement of issue exhaustion," now, "absent extraordinary circumstances," so-called "procedural arguments" must be raised by veterans largely proceeding *pro se* because "VA's institutional interests" "outweigh [the veteran's] interests in the Veterans' Court's adjudication of the issue." 789 F.3d at 1381.

In the face of the both nebulous and contradictory rigidity now mandated by the Federal Circuit, it is important to understand that the VA adjudication system is an effort at mass justice, requiring high-volume advocates like DAV to process an enormous number of claims in a limited time and with limited resources. This has been possible for many years, in part, because of the claimant-friendly nature of the system.

In this case, however, the Federal Circuit imposed a rigidity that undermines not only the friendliness of the system, but its own precedent. In short, the *Scott* decision imposes a strict issue-exhaustion rule as to "procedural arguments" and thus eviscerates the "sympathetic reading" rule announced in *Comer v. Peake,* 552 F.3d 1362 (Fed. Cir. 2009). The boundaries of "procedural arguments," now singled out for even harsher application of issue exhaustion, are unclear. The *Scott* decision also signals to all advocates, lawyers

and non-lawyers alike, that it may be time to change the way they do business at VA. Specifically, the Federal Circuit's decision in *Scott* will require veterans and advocates before VA not only to identify every single argument in a case at a point at which an appeal may be taken by checking a box on a form. In addition, those appealing a BVA decision will need to state every such argument with meticulous precision. It takes little imagination to envision the consequences of such a development. For that reason, the Court should agree to hear this case and grant the relief urged by Petitioner.

ARGUMENT

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

More than 225 years ago, Congress began providing veterans pensions. The VA was created by Congress in 1930 and since then has been responsible for administering the program for veterans' benefits. This Court noted that 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). In 2011, the number of initial veterans claims and requests for reevaluation peaked at about 1.3 million. Since then, new claims have dropped but remain substantial, numbering about one million per year.

DAV, a congressionally-chartered veterans service organization, provides non-attorney service officers to guide veterans through the claims process. In 2014, DAV represented veterans in more than 340,000 claims to obtain earned benefits from the VA. That year, the BVA disposed of more than 55 thousand cases, the types of cases addressed by the Federal Circuit in *Scott*. DAV represented veterans in 29.2% of those 55 thousand appeals, totaling 16,224 individual cases. DAV was successful in having the claim allowed or remanded for further consideration in 76% of those cases.

The VA estimates that there will be more than 52 thousand substantive appeals filed with the BVA in fiscal year 2015 and nearly 60 thousand such appeals filed in fiscal year 2016. DAV expects that it will continue to represent veterans in approximately 30% of those appeals or between 15 to 16 thousand appeals each year.

As this Court recognized in *Walters*, as "might be expected in a system which processes such a large number of claims each year, the process prescribed by Congress for obtaining disability benefits does not contemplate the adversary mode of dispute resolution utilized by courts in this country." 473 U.S. at 309. Instead, given its high volume of claims processing, 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 just from 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 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 eventual elimination of the fee cap with the enactment of the Veterans' Judicial Review Act and the introduction of CAVC and Federal Circuit appellate review, Congress maintained the prohibition against paid attorney representation before a notice of disagreement (NOD) is filed with the BVA. Congress intentionally retained the informal and nonadversarial VA claims process. 38 U.S.C. § 5904(c)(1); *see Henderson v. Shinseki*, 562 U.S. 428 (2011). The system remains today one that is supposed to be paternalistic and nonadversarial, and with a special solicitude to the unique constituency it serves. *Id.* Understanding and appreciating the backdrop to the VA claims process puts in perspective the dramatically negative impact the Federal Circuit's *Scott* decision will have.

II. THE FEDERAL CIRCUIT'S DECISION IN *SCOTT* IS UNTETHERED FROM ANY STATUTORY OR REGULATORY MOORING

The system that Congress put in place was designed to handle a high volume of veterans disability compensation claims without attorneys in an informal and nonadversarial way.

In particular, a veteran who disagrees with a regional office decision on his claim can appeal to the BVA. The veteran first indicates a desire to appeal by filing a notice of disagreement (NOD). The VA is then required to prepare a statement of the case, which is then followed by the veteran submitting a substantive appeal. 38 U.S.C. § 7105. The requirements of a substantive appeal are set out in VA regulation, 38 C.F.R. § 20.202. The Federal Circuit in *Scott* characterized that regulation as "requir[ing] that the errors by the RO be identified either by stating that all issues in the statements of the case are being appealed or by specifically identifying the issues being appealed." *Scott*, 789 F.3d at 1378. But what the regulation completely states is:

> A Substantive Appeal consists of a properly completed VA Form 9, "Appeal to Board of Veterans' Appeals," or correspondence containing the necessary information. If the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify

the issues appealed.

An important distinction between what the VA regulation actually states and how the Federal Circuit characterized it is the regulation's introductory and specific reference to VA Form 9. That form allows the veteran to simply check a box, stating that he would like to "appeal all of the issues listed on the statement of the case." [JA830][2] Checking a box cannot impose an obligation to identify all "procedural arguments," as the Federal Circuit has now held. Instead, consistent with *Sims v. Apfel*, the VA form "strongly suggests that the [VA] does not depend much, if at all, on claimants to identify issues for review" and at the very least suggests that issue exhaustion does not apply. 530 U.S. 103, 112 (2000).

Further, and not substantively discussed by the Federal Circuit in its *Scott* decision, 38 C.F.R. § 20.202 goes on to state that the veteran *should*, not *must*, "set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination, or determinations, being appealed." In addition, "[t]o the extent feasible," the argument *should*, not *must*, "be related to specific items in the Statement of the Case and any prior Supplemental Statements of the Case." *Id. Further*, while not mandating that the veteran articulate specific arguments, the regulation explains that to the extent arguments are provided, "[t]he Board will construe such arguments in a liberal manner for purposes of determining whether

[2] "JA" refers to the court of appeals appendix.

they raise issues on appeal." *Id.* The Board also warns that it *may,* not *will*, "dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed." *Id.* Considered in full, therefore, the regulatory requirements are inconsistent with the Federal Circuit's imposition of issue exhaustion, particularly with respect to the undefined "procedural arguments" it specifically calls out for even more heightened scrutiny.

III. THE FEDERAL CIRCUIT'S DECISION IN *SCOTT* CONTRADICTS ITS OWN ISSUE-EXHAUSTION PRECEDENT

The Federal Circuit held that Mr. Scott waived his right to object to not being afforded the hearing he requested and to which he was statutorily entitled under 38 U.S.C. § 7105. *Scott,* 789 F.3d at 1376-77. The court's rationale was that Mr. Scott, and his service representative, had failed to raise that argument in his BVA appeal. *Id.* The Federal Circuit thus imposed strict issue exhaustion on Mr. Scott.

This decision represents a dramatic stiffening of the Federal Circuit's position on the exhaustion issue. For example, in *Maggitt v. West,* 202 F.3d 1370, 1377 (Fed. Cir. 2000), decided before this Court's decision in *Sims*, the Federal Circuit stated:

> Nothing in the statutory scheme providing benefits for veterans mandates a jurisdictional requirement of exhaustion of remedies which would require the Veterans Court to disregard

> every legal argument not previously made before the Board of Veterans' Appeals. In fact, **such an absolute rule would be inconsistent with the nonadversarial *ex parte* system that supplies veterans benefits**. (emphasis added)

The strict issue-exhaustion requirement now imposed in *Scott* is not only inconsistent with the Federal Circuit's *Maggitt* decision but with this Court's later decision in *Sims*. It also undermines the foundations of a system that was designed to express gratitude and appreciation to those who have served their country. It is difficult to reconcile a national policy of honoring veterans with denying them an advantage this Court has recognized is available to Social Security applicants. For that reason, DAV believes that this court should review the *Scott* decision and extend to veterans the same issue-exhaustion rights granted to other benefit applicants in *Sims*.

IV. THE NEW FEDERAL CIRCUIT ISSUE-EXHAUSTION RULE IS ACCOMPLISHED THROUGH A DE FACTO OVERRULING OF *COMER*

Despite Mr. Scott having asked for a hearing multiple times, the Federal Circuit concluded that he had not sufficiently raised this "procedural argument." The undercurrent of the court's decision, and its separation of "procedural arguments" from other types of arguments a veteran may raise, signals the nub of the court's analysis: no harm, no foul. That cynical view fails to appreciate the

"labyrinthine corridors of the veterans' adjudicatory system" that must be navigated while the veteran is most likely proceeding *pro se*. *Comer*, 552 F.3d at 1369.

The Federal Circuit reasoned that its precedent, including *Comer*, requires the Veterans Court to "look at all of the evidence in the record to determine whether it supports related claims for service-connected disability even though the specific claim was not raised by the veteran." 789 F.3d at 1381. Nonetheless, for undefined "procedural issues," "absent extraordinary circumstances," "it is appropriate for the Board and Veterans Court to address only those procedural arguments specifically raised by the veteran." *Id.*

This severe restriction on a veteran's ability to challenge the process before the VA, however, neglects the realities of the VA claims adjudication process, requiring only that a box be checked if all issues are to be appealed and stating that arguments *should,* but not *must*, be made. 38 C.F.R. § 20.201. It also ignores the reality that organizations like DAV assist huge volumes of real-world veterans. Dramatically reducing the ability of veterans to make "procedural arguments" is curiously out of place in a benefits system expressly designed to be as "informal and nonadversarial as possible." *Walters,* 473 U.S. at 323.

More than that, despite giving lip service to its admonition in *Comer v. Peake,* 552 F.3d at 1368 that a veteran's claim submissions are to be read "sympathetically," thereby echoing VA's own rule

that such filings are entitled to interpretation in a "liberal manner," 38 C.F.R § 20.202, the *Scott* court's reading of the record can in no way be viewed as "liberal" or "sympathetic" unless one ignores the common and accepted meanings of those words or accepts the premise that veterans are not actually entitled to the process that the statutes and regulations elaborate. For all intents and purposes, therefore, the *Scott* decision means that for "procedural arguments," *Comer* is dead.

V. THE *SCOTT* DECISION HAS FAR-REACHING NEGATIVE IMPLICATIONS FOR THE FUTURE OF VA ADVOCACY

The Veteran 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 v. Principi,* 304 F.3d 1276, 1280 (Fed. Cir. 2002); 38 U.S.C. §§ 5201, 5301, 5301A, *et seq*.

Despite the utopian design of VA, most veterans need assistance in navigating the complex adjudication process. To that end, Congress provided VA with discretion to grant free office space to veterans service organizations in federal buildings, 38 U.S.C. § 5902(a)(2) and to recognize certain organizations as qualified to assist veterans through the maze of the process, 38 U.S.C. § 5902(a)(1). Such organizations play a major role in keeping the benefit adjudication system running as smoothly as

it does. Without the guidance that these knowledgeable advocates bring to the table, VA would certainly suffer from a chaotic situation with hundreds of thousands of veterans filing *pro se* claims and having no knowledge of the "in's and out's" of the system.

Veteran advocates at the agency level, nonlawyers and even some lawyers, serve not just as advocates, but also as facilitators. In many cases, DAV NSOs (and presumably similar officers of other recognized organizations) make use of their "inside" knowledge of VA processes and their personal relationships with VA adjudicators to expedite benefits for qualifying veterans.

DAV's workload at the BVA is staggering. In 2014, nearly 30% of all the cases decided at the BVA listed DAV as the representative. DAV NAOs carried a caseload of more than 1,000 cases per year, an extraordinary portfolio. Carrying that kind of caseload means that cases must be handled rapidly. NAOs triage files for key issues and prepare submissions with care, but with an eye on the ever-mounting stack of cases still requiring attention. That review is consistent with the regulatory scheme, requiring only that a box be checked on the VA Form 9 to initiate a substantive appeal. This is not to say that quality is sacrificed. Quite the contrary. In 2014, DAV's rate of allowance (i.e., victories on claims) at BVA was 29.6%, while its rate of remand was 46.4%.

In light of the *Scott* decision, however, DAV and other advocates will need to change their

approach to representation at the BVA. The all-takers approach, which has provided quantity and quality representation, will need to give way to a more selective and academic-style process. Case files will need to be combed rather than examined, for fear of missing an argument. Submissions will need to be edited, possibly by multiple reviewers, to ensure that arguments have been stated with absolute precision, since the "sympathetic" or "liberal" reading promised by *Comer* can no longer be relied on by advocates, particularly for so-called "procedural arguments." The upshot of all this? The one thing that neither veterans, nor VA, needs. More delay.

VI. THE MOST EFFECTIVE REMEDY FOR THE DANGER CREATED BY *SCOTT* IS ADOPTION OF THE ISSUE-EXHAUSTION RULE URGED BY PETITIONER

This Court holds the key to providing veterans with the key to safe passage between the Scylla of "issue exhaustion" and the Charybdis of detailed expression of every possible argument. This Court should extend to veterans the advantages afforded to Social Security claimants in the *Sims* case and permit our nation's heroes to exhaust their administrative remedies without requiring, at the same time, that they raise every single possible argument to preserve it for judicial appeal. In this way, veterans advocates will not have to worry about the occasional missed argument and the system can proceed in the nonadversarial way that it was intended.

CONCLUSION

For these reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

DORIS JOHNSON HINES
Counsel of Record
FINNEGAN HENDERSON
FARABOW GARRETT &
DUNNER, LLP
901 New York Ave., NW
Washington, DC 20001
202-408-4250
dori.hines@finnegan.com

CHRISTOPHER J. CLAY
DISABLED AMERICAN
VETERANS NATIONAL
HEADQUARTERS
3725 Alexandria Pike
Cold Spring, KY 41076
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cclay@dav.org

Counsel for Amicus Curiae
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