

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 FOR THE NEW YORK STATE BAR
ASSOCIATION AS *AMICUS CURIAE* IN
SUPPORT OF PETITIONER**

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QUESTION PRESENTED

Whether the Federal Circuit's mandate that veterans – including homeless, elderly, and incarcerated veterans – raise and exhaust all procedural issues at the Department of Veterans Affairs agency level, denies these veterans access to justice.

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INTEREST OF *AMICUS CURIAE*

Pursuant to Supreme Court Rule 37, the New York State Bar Association (NYSBA) respectfully submits this brief *amicus curiae* in support of Petitioner, Curtis Scott.¹

Amicus curiae, NYSBA, is a Not-For-Profit Corporation organized under the laws of the State of New York, that is chartered to “promote the public good,” and “to uphold and defend the Constitution of the United States,”² on behalf of all citizens of the State of New York, including the approximately 892,221³ veterans who reside in the State of New York.

Amicus curiae is the largest voluntary state bar association in the United States with approximately 74,000 members.⁴ The NYSBA develops forward-looking policies, including those designed to protect the rights

1. This brief is submitted with the consent of both parties. Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amicus* and its counsel made such a monetary contribution.

2. N.Y. State Bar Ass’n, By-Laws § II (2016), *available at* <http://www.nysba.org/Bylaws/>.

3. U.S. Dep’t of Veterans Affairs, Nat’l Ctr. For Veterans Analysis and Statistics, Veteran Population (2014), http://www.va.gov/vetdata/Veteran_Population.asp (last visited Mar. 1, 2016); *see also* U.S. Dep’t of Veterans Affairs, State Summary: New York (2014), *available at* http://www.va.gov/vetdata/docs/SpecialReports/State_Summaries_New_York.pdf.

4. Telephone conversation Thomas J. Kniffen and NYSBA General Counsel Kathy Baxter, March 3, 2016.

of veterans and their dependents, that are relevant to the legal profession; and asserts positions in litigation (either as party or *amicus*) concerning matters of interest to its members and the legal profession as a whole.⁵ *Amicus curiae*'s Committee on Veterans, which initiated consideration and facilitated the ultimate decision of *amicus curiae* to participate in this action, was established by *amicus curiae* to focus upon the interests of veterans in the State of New York. *Amicus curiae* is, therefore, uniquely positioned to file this brief.

Amicus curiae considers this case to be of critical importance to unfettered access to justice for veterans and their dependents, specifically to disability compensation benefits that are administered and provided by the Department of Veterans Affairs (VA), Respondent.

The NYSBA has previously submitted *amicus* briefs in the Supreme Court of the United States; this *amicus* brief is designed to preserve and maintain the VA, non-adversarial, pro veteran adjudication system.

SUMMARY OF ARGUMENT

The Federal Circuit's decision in *Scott v. McDonald*, 789 F.3d 1375 (2015) will prejudice the rights and privileges of the New York State's veterans' population.⁶ *Scott* will particularly prejudice New York's most vulnerable

5. David P. Miranda, the President of the NYSBA, has prioritized NYSBA focus upon supporting litigation that enhances veterans' access to justice and the benefits programs administered by Respondent.

6. Data are discussed in detail, below.

veterans – over 100,000 elderly World War II and Korean War veterans, approximately 2,400 homeless veterans, over 1,500 of whom live in New York City, and like Scott, the 2272 veterans incarcerated in the State of New York.

Application of *Scott*'s issue-exhaustion rule to procedural issues that are first raised at the United States Court of Appeals for Veterans Claims (CAVC), creates an impediment to VA benefits that violates *Sims v. Apfel*, 530 U.S. 103 (2000); particularly, the decision in *Scott* requires our homeless, elderly and incarcerated veterans to discern procedural from substantive issues. The non-adversarial pro-veteran cornerstone of the VA adjudication process does not authorize or contemplate this impediment to access to justice and VA benefits, for our most vulnerable veterans – the homeless, the elderly and incarcerated.

ARGUMENT

I. The Federal Circuit's Mandate that Veterans – including Homeless, Elderly, and Incarcerated Veterans – Exhaust all Procedural Issues before the Department of Veterans Affairs, Adversely Impacts our most Vulnerable Veterans

As a result of the Federal Circuit's decision in *Scott*, veterans seeking benefits from VA must overcome a new hurdle to access VA benefits. Aside from being disabled, veterans who seek benefits are often particularly vulnerable – they are elderly, homeless, poor, or incarcerated, or some combination thereof. For these vulnerable veterans, who already have difficulty navigating the VA benefits system and who typically appear without an attorney at the administrative level, *Scott* is a prejudicial and unwelcome barrier to their access to benefits and justice.

a. Vulnerable Veterans – Those Who Are Homeless, Elderly, or Incarcerated – Make Up a Substantial Portion of Veterans Who Seek VA Benefits.

VA, through the Veterans Benefits Administration (VBA), administers a number of benefits programs for disabled veterans including pension and compensation benefits.⁷ In addition to being physically or mentally disabled, e.g., posttraumatic stress disorder, many disabled veterans find themselves significantly vulnerable, that is – homeless, elderly, or incarcerated.

Nationwide, there are a significant number of elderly and homeless veterans. There are approximately 1.2 million living World War Two (WWII) veterans,⁸ and 2 million living Korean War veterans.⁹ Regarding ages: approximately 10 million veterans are over the age of 65; 2.8 million veterans are between the ages of 65 and 69; 2.5 million are between 70 and 74; 1.6 million are between 75 and 79; 1.4 million are between 80 and 84, and 1.5 million are 85 and older.¹⁰ Over 47,000 veterans nationwide are homeless - 34% exist without shelter.¹¹

7. U.S. Dep't of Veterans Affairs, VA History in Brief, *available at* http://www.va.gov/opa/publications/archives/docs/history_in_brief.pdf (last visited Feb. 18, 2016).

8. Veteran Population, *supra* note 3.

9. Veteran Population, *supra* note 3.

10. *Id.* at tbl.1L.

11. U.S. Dep't of Housing and Urban Dev., The 2015 Annual Homeless Assessment Report to Congress, Part 1: Point-in-Time Estimates of Homelessness 50 (2015) [hereinafter

A significant number of vulnerable elderly and homeless veterans live in New York State. Approximately 57,475 elderly WWII veterans,¹² and 88,848 elderly Korean War veterans live in New York.¹³ Approximately 2,399 homeless veterans, reside in New York¹⁴ including an estimated 1,558 homeless veterans living in New York City.¹⁵ That is, 5% of the nation's homeless-veteran population lives in New York State.¹⁶

In addition to being elderly or homeless (or some combination of the two), many vulnerable veterans live in poverty. Indeed, the veteran poverty rate is rising.¹⁷ As compared to the non-veteran population, there is a higher poverty rate among disabled and vulnerable veterans in

AHAR], *available at* <https://www.hudexchange.info/resources/documents/2015-AHAR-Part-1.pdf>.

12. State Summary: New York, *supra* note 3.

13. *See id.*

14. AHAR, *supra* note 11, at 52.

15. *Id.* at 56. The exact number of veterans homeless in the New York City has not been conclusively resolved. *See, e.g.,* Nikita Stewart, *Decrease in Homeless Veterans in New York Far Outpaces National Drop*, N.Y. Times, Jan. 1, 2016, at A1; *see also* Office of Mayor of N.Y.C., Federal Government Announces New York City Has Ended Chronic Veteran Homelessness, <http://www1.nyc.gov/office-of-the-mayor/news/984-15/federal-government-new-york-city-has-ended-chronic-veteran-homelessness> (Dec. 30, 2015).

16. AHAR, *supra* note 11, at 52.

17. U.S. Dep't of Veterans Affairs, Nat'l Ctr. for Veterans Analysis and Statistics, *Veteran Poverty Trends 3* (2015), *available at* http://www.va.gov/vetdata/docs/SpecialReports/Veteran_Poverty_Trends.pdf.

almost every age classification.¹⁸ Further, for disabled veterans who are age 65 or older, the poverty rate is 48%.¹⁹

Vulnerable veterans also routinely end up, like Curtis Scott, incarcerated. Veterans comprise approximately 181,500 or 8% of the incarcerated population nationally.²⁰ As of January 16, 2016, the New York State Department of Veterans Affairs and the Department of Corrections and Community Supervision verified that 2,272 veterans were incarcerated in New York State at that time.²¹ Of the national estimates, 77% of incarcerated veterans received military discharges that were honorable or under honorable conditions, which would render them eligible

18. *Id.* at 5–6 (using U.S. Census Bureau definition of “disabled”: “anyone who identifies [on the American Community Survey] as having hearing, vision, cognitive, ambulatory, self-care or independent living difficulty”).

19. *Id.* at 6.

20. U.S. Dep’t of Justice, Veterans in Prison and Jail, 2011–12 tbl.1 (2015) [hereinafter *Veterans in Prison and Jail*], *available at* <http://www.bjs.gov/content/pub/pdf/vpj1112.pdf>. These numbers are the product of a static, point-in-time study. Thus, the study cannot provide a comprehensive number of living veterans who have ever been incarcerated, or a number of veterans who were incarcerated for the amount of time it normally takes the VA to adjudicate a claim from beginning to end, including the appeal process. It therefore underestimates the number of incarcerated Veterans who would be harmed by *Scott’s* procedural issue-exhaustion rule, and who would be denied access to justice and benefits on that basis.

21. United States Department of Veterans Affairs, Veterans Re-entry Search Service, *Incarceration Data*, confirmed by Pomerance, Benjamin, Deputy Director for Program Development of the New York State Division of Veterans’ Affairs via interview, (January 16, 2016).

for VA benefits.²² Also, “[a]bout half of all veterans in prison (48%) and jail (55%) had been told by a mental health professional they had a mental disorder,” and 18% reported a cognitive disability.²³

These elderly, homeless, poor, and incarcerated people constitute our vulnerable veteran population. Congress and VA designed the VBA to help, protect, and support precisely these individuals. And yet they are the persons who the Federal Circuit now compels to accept another barrier while navigating the procedural complexities of the VA claims-processing system.

b. VA’s Complicated Benefits Claims Adjudication Procedures and Systemic Delays Increasingly Have Impeded Access to Justice for Vulnerable Veterans

Access-to-justice limitations in connection with complex VBA claims adjudication procedures are further limiting because most veterans are not represented by attorneys during the VBA claim adjudication process.²⁴

Claims adjudication delays by VA effectively equate to a silent denial of benefits by the VA. Or, at least it feels that way to the homeless veteran who has no income, month after month, for several years, forced to remain

22. Veterans in Prison and Jail, *supra* note 20, at 7 tbl.6, 8; *see* 38 U.S.C. § 5303; 38 C.F.R. § 3.12.

23. Veterans in Prison and Jail, *supra* note 20, at 10.

24. *See* U.S. Dep’t of Veterans Affairs, Board of Veterans’ Appeals, Annual Report 27 (2014) [hereinafter BVA Annual Report 2014], *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf.

in volatility until the VA adjudicates the claim. As VA admits, there remains a considerable backlog of veterans' cases in the VBA system waiting for final adjudication.²⁵ A total of 348,466 claims are awaiting both evidentiary development, and decision at the VA Regional Office (VARO) level.²⁶ There is an additional backlog of 81,451 claims, for which development is completed, that await decision at the VARO level.²⁷

Veterans filed over 100,000 appeals of VA denied claims with the Board of Veterans Appeals (BVA) in 2014 alone, resulting in expansion of the already substantial backlog of appeals awaiting adjudication by the BVA.²⁸ 96% of those cases were appeals for pension and compensation benefits.²⁹ On average, BVA takes 1718 days—4.7 years—to issue a remand decision, meaning that the VARO upon remand, is required to re-adjudicate some part of the error driven, remanded claim.³⁰ This VA

25. U.S. Dep't of Veterans Affairs, Veterans Benefits Administration Reports, Claims Backlog, [hereinafter VA Claims Backlog] http://benefits.va.gov/reports/mmwr_va_claims_backlog.asp (last updated Feb. 27, 2016); U.S. Dep't of Veterans Affairs, Veterans Benefits Administration Reports, Claims Inventory, [hereinafter VA Claims Inventory] http://benefits.va.gov/reports/mmwr_va_claims_inventory.asp (last updated Feb. 27, 2016).

26. VA Claims Inventory, *supra* note 25. These numbers reflect new claims only, and do not account for the decisions on appeal.

27. VA Claims Backlog, *supra* note 25.

28. BVA Annual Report 2014, *supra* note 24, at 18.

29. *Id.* at 26.

30. *Id.* at 22. This time does not include the time it takes from the date the Veteran files a claim until the VA issues the

self-imposed bureaucratic time lag, adversely impacts a veteran's understanding of where her or his case sits in the adjudication process—all the veteran will know about the case for almost 5 years is that the case is pending. During such a tenuous time,³¹ Veterans express concern that the VA is not assisting them, but simply waiting for them to die.³² Such extreme delays in the pro-veteran, non-adversarial system should heighten the VA's duty to

Rating Decision, or the up to one year the Veteran may take to file a Notice of Disagreement. It also does not address the post remand period, if the Veteran appeals the Regional Office's post remand decision.

31. In addition to the wait times for VA claims processing, there have been a number of scandals including inappropriate shredding practices and issues with scheduling and wait times for necessary VA health care services. *See, e.g.*, VA Office of Inspector General, Office of Audits and Evaluations, Interim Report, Dep't of Veterans Affairs, Review of Alleged Shredding of Claims-Related Evidence at the VA Regional Office Los Angeles, California (2015), *available at* <http://www.va.gov/oig/pubs/VAOIG-15-04652-448.pdf> (last visited March 2, 2016); VA Office of Inspector General, Veterans Health Administration, Review of Alleged Patient Deaths, Patient Wait Times, and Scheduling Practices at the Phoenix VA Health Care System (2014) *available at* <http://www.va.gov/oig/pubs/VAOIG-14-02603-267.pdf> (last visited March 2, 2016).

32. *See, e.g.*, Pete Hegseth, Concerned Veterans for America, "Delay, Deny, Wait Till I Die:" Growing Number of Vets Die Awaiting VA Benefits (Jan. 2013) *available at* <http://cv4a.org/delay-deny-wait-till-i-die-growing-number-of-vets-die-awaiting-va-benefits/> (last visited March 2, 2016); Aaron Glantz, Reveal from the Center for Investigative Reporting, "Number of Veterans Who Die Waiting for Benefits Claims Skyrockets," (Dec. 2012) *available at* <https://www.revealnews.org/article-legacy/number-of-veterans-who-die-waiting-for-benefits-claims-skyrockets/> (last visited March 2, 2016).

assist and provide meaningful opportunity for vulnerable veterans, like Mr. Scott, to access the process. Instead, in this protracted climate, *Scott* erects further access to justice barriers for veterans.

Further complicating the VBA process, vulnerable veterans often proceed without the counsel of an attorney for seemingly perpetual stretches of the claims process. Only 10.9% of veterans are represented by lawyers in appeals before BVA.³³

That veterans often lack counsel from an attorney during important parts or even the entire VBA process is significant when assessing the impact of the procedural complexities added by the Court in *Scott*. Those who are represented by attorneys arguably fare much better at BVA when attempting to distinguish a procedural issue from a substantive issue.³⁴ This result is more acute for veterans who are elderly, homeless or at risk of homelessness, or incarcerated at some point during the adjudication process.

33. BVA Annual Report 2014, *supra* note 24, at 27. This report also accounts for Veterans who are represented by non-attorney advocates and Veterans service organizations. However, Veterans who are represented by attorneys have the best overall outcomes.

34. *Id.* (indicating that veterans represented by attorneys have a success rate of 35.3% and failure rate only 13.7%, whereas unrepresented veterans succeed just 22% of the time and fail in 32.8% of cases).

II. The Federal Circuit’s Issue-Exhaustion Mandate Erroneously Imposes Additional Obstacles to Access to Justice for Vulnerable Homeless, Elderly, and Incarcerated Veterans.

The Federal Circuit’s issue-exhaustion mandate presents a procedural barrier to justice and benefits for vulnerable veterans that an attorney cannot remedy at the Court. Under the *Scott* mandate, vulnerable veterans (often appearing *pro se*) are required to identify and raise procedural issues at *every stage* of agency review, or face preclusion from raising such issues to the BVA, CAVC, or Federal Circuit. *Scott* mandates that even the nearly 90% of veterans who appear without an attorney identify and raise all procedural issues.³⁵ And where a vulnerable veteran fails to adhere to that issue-exhaustion mandate on a meritorious procedural issue during any stage of the VBA proceeding, an attorney who appears later to assist the veteran on appeal to the CAVC is rendered powerless to resuscitate the veteran’s procedural rights, e.g., a hearing.

Scott’s issue-exhaustion mandate is not consistent with the non-adversarial and pro-veteran benefits system that Congress and VA created. The *Scott* mandate creates an unworkable rule that calls upon vulnerable veterans to make legal distinctions between substantive and procedural issues – the Petition should be granted.

35. *Scott v. McDonald*, 789 F.3d 1375 (2015).

a. The Federal Circuit Erred by Requiring Vulnerable Veterans to Distinguish Between Procedural and Substantive Issues, Contrary to the VA's Non-Adversarial and Pro-Claimant System.

For all veterans, particularly homeless, elderly and other vulnerable veterans, such as incarcerated veterans, Congress “created a paternalistic veterans’ benefits system to care for those who served their country in uniform.” *Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002); see *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2001) (“The VA’s adjudicatory process is designed to function throughout with a high degree of informality and solicitude for the claimant.” (internal quotation marks omitted)). It is well established 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, but who may be unaware of the various forms of compensation available to him.” *Comer v. Peake* 552 F.3d 1362, 1369 (Fed. Cir. 2009). “The government’s interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them.” *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). To this end, the VA system recognizes and accords veterans certain rights during the adjudication of their claims, including procedural due process, which creates a non-adversarial, pro-veteran system. *Henderson*, 562 U.S. at 431–32 (citing 38 C.F.R. §§ 3.103(a), 20.700(c)) (outlining various ways in which the VA system is non-adversarial).

The *Scott* issue-exhaustion mandate is contrary to the non-adversarial and pro-claimant VA statutory scheme. The court in *Scott* built an insurmountable barrier to

veterans' access to justice by imposing the requirement that veterans, including vulnerable homeless, elderly, and incarcerated veterans, distinguish between procedural and substantive issues.

The *Scott* rule relies upon an ephemeral distinction between procedural and substantive issues that are difficult to recognize and apply.³⁶ *Scott* shifts the burden of VA's mandate - to offer timely and quality driven delivery of benefits - to veterans, particularly prejudicing homeless, elderly and incarcerated veterans. Which issues are procedural, and which substantive, a complex and equivocal analysis, falls squarely upon the backs of veterans.

As the *Scott* court discussed, its issue-exhaustion mandate cannot be reconciled with the statutory charge to liberally construe veterans' pleadings, at least with regard to "substantive" issues. But the *Scott* court distinguished "procedural" issues from that statutory charge because procedural issues, it reasoned, are "collateral to the merits." *Scott* at 1381. As a result, the *Scott* court constrained its issue-exhaustion rule to procedural issues, which the *Scott* court viewed as frequently "irrelevant."³⁷ *Id.*

36. See Thurman Arnold, *The Role of Substantive Law and Procedure In The Legal Process*, 45 Harv. L. Rev. 618, 643 (1932). The author discusses the fundamental difficulty in distinguishing between substantive legal issues and procedural legal issues.

37. This notion is particularly jarring. Perhaps some procedural issues will not affect the outcome of a veteran's claim, but that does not render all procedural issues "irrelevant." Take, for example, the procedural concern at issue here—whether

The *Scott* mandate, although not specifically mentioned by the court, relies upon a common but faulty premise, i.e., it is possible to distinguish substantive from procedural issues.

Yet that premise is as often challenged for its definitional difficulty as it is used. *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 727 (1988) (“[T]he words ‘substantive’ and ‘procedural’ themselves . . . do not have a precise content . . .”). This Court has recognized “the impossibility of laying down a precise rule to distinguish ‘substance’ from ‘procedure,’ ” *St. Louis Sw. Ry. Co. v. Dickerson*, 470 U.S. 409, 411 (1985) (per curiam) (quoting *Brown v. W. Ry. of Ala.*, 338 U.S. 294, 296 (1949); internal quotation marks omitted), and “muddle[d] through” hard case after hard case to give effect to those imprecise words where applicable. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 414–15 (2010) [hereinafter *Shady Grove*].

The confusion inherent in *Scott*’s substance-procedure distinction is compounded by the fact that the VA system often leaves it to vulnerable veterans appearing without an attorney to unravel that confusion. Our vulnerable veterans now find themselves navigating a complex delineation, trying to separate substantive issues from the procedures and the practical rules by which we enforce that law. The elderly, homeless, poor, or incarcerated veteran should not face, as a new barrier to justice, a

Scott was entitled to a hearing before the Board. *See* 38 U.S.C. § 7107(b). That procedural concern is not only relevant—it is also a “fundamental requirement of due process.” *Matthews v. Eldridge*, 424 U.S. 319, 333 (1976). The *Scott* court’s summary dismissal of procedural issues ignores the great importance this Court places on procedural rights in administrative processes. *See id.*

complex legal problem that even this Court acknowledges is no easy task. *Shady Grove*, 559 U.S. at 414–15 & n.15. Not only does that yield an unpalatable result, it is also inconsistent with the intended simplicity and pro-veteran nature of the VBA claims process that the VA statutes and regulations envision,³⁸ and with the long-applied “canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries’ favor.” *Henderson*, 562 U.S. at 441 (internal quotation marks omitted).

CONCLUSION

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

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38. See, e.g., 38 C.F.R. § 20.700(a).