No. 15-1054

In the Supreme Court of the United States

CURTIS SCOTT, PETITIONER

v.

ROBERT MCDONALD,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR AMICUS CURIAE PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER

PAUL M. SCHOENHARD
Counsel of Record
SHARON LEE
ROPES & GRAY LLP
2099 Pennsylvania Avenue N.W.
Washington, D.C. 20006
(202) 508-4600
Paul.Schoenhard@ropesgray.com

TABLE OF CONTENTS

Page

Interest of amicus 1
Summary of the argument 2
Argument:
I. Veterans and their survivors are focused on their claims, not legal limitations like waiver 3
II. The veterans benefits system is designed and intended to be non-adversarial and pro-claimant 5
III. The Federal Circuit's decision is inconsistent with Congress' intent to design and maintain a uniquely pro-claimant, non-adversarial system 10
Conclusion 12

TABLE OF AUTHORITIES

Page(s)

Cases:

Barrett v. *Nicholson*, 466 F.3d 1038 (Fed. Cir. 2006) 5

Comer v. *Peake*, 552 F.3d 1362 (Fed. Cir. 2009) 4, 12

Gambill v. *Shinseki*, 576 F.3d 1307 (Fed. Cir. 2009) 11

Henderson v. *Shinseki*, 131 S. Ct. 1197 (2011) 5

Maggitt v. *West*,202 F.3d 1370 (Fed. Cir. 2000) 4, 10

Morton v. *West*, 12 Vet.App. 477 (1999) 8

National Org. of Veterans Advocates, Inc. v. *Sec'y of Veterans Affairs*, 710 F.3d 1328 (Fed. Cir. 2013) 5

Shinseki v. *Sanders*, 556 U.S. 396 (2009) 3, 5

Sims v. *Apfel*, 530 U.S. 103 (2000) 11

Walters v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305 (1985) 5

Statutes and Regulations:

38 C.F.R. 3.103(a) 10

36 U.S.C. 170101-170111 (2006) 1, 2

38 U.S.C. 5902 3

Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403 6

Statutes—Continued: Page(s)

Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 .... 6, 8

Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 6

Miscellaneous:

Benefits Legislative Initiatives Currently Pending Before the U.S. S. Comm. on Veterans' Affairs Hearing Before the Comm. on Veterans' Affairs, 109th Cong., 2d Sess. 69 (2006) 9

H.R. Rep. No. 963, 100th Cong., 2d Sess. 13 (1988) 7

H.R. Rep. No. 781, 106th Cong., 2d Sess. 5 (2000) 8

Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 Conn. L. Rev. 155 (1992) 7

Judicial Review Legislation Hearing Before the Comm. on Veterans' Affairs, 100th Cong. 3 (1988) 7

Judicial Review of Veterans' Claims Hearing before the Subcomm. on Special Investigations of the Comm. on Veterans' Affairs, 96th Cong. 245 (1980) 8

Miscellaneous —Continued: Page

Sherri Lavela et al., *Disease Prevalence and Use of Preventative Services: Comparison of Female Veterans in General and Those with Spinal Cord Injuries and Disorders*, 15 J. Women's Health 301 (2006) 4

S. Rep. No. 297, 109th Cong., 2d Sess. 19 (2006) 9

S. Rep. No. 397, 106th Cong., 2d Sess. 22 (2000) 8

Well-Grounded Claims and H.R. 3193, The Duty to Assist Veterans Act of 1999, Hearing Before the Subcomm. on Benefits of the Comm. on Veterans' Affairs, 106th Cong., 2d Sess. 12 (2000) 8

In the Supreme Court of the United States

CURTIS SCOTT, PETITIONER

v.

ROBERT MCDONALD,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR AMICUS CURIAE PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER

INTEREST OF AMICUS[1]

Paralyzed Veterans of America (PVA) is a non-profit veterans service organization founded in 1946 and chartered by Congress. See 36 U.S.C. 170101-170111 (2006). PVA has more than 19,000 members, who are veterans of the Armed Forces of the United States suffering from injuries or diseases of the spinal cord. PVA's statutory purposes include the following: acquainting the public with the needs and problems of

[1] No counsel for any party authored this brief in whole or in part, and no person or entity, other than amici curiae or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. The parties have granted blanket consent to the filing of amicus curiae briefs.

paraplegics; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering effective reconditioning programs for paraplegics. *Ibid.*

PVA fulfills its statutory purposes by operating various beneficial programs, such as providing free representation before the Department of Veterans Affairs (VA) to its members and other veterans, dependents, and survivors who have filed claims with the agency seeking benefits authorized by Congress. PVA also provides free legal services to members and other veterans, dependents, and survivors seeking judicial review of agency benefit decisions. Because the Court of Appeals for the Federal Circuit's holding, Pet. App. 14a, that claimants waive any procedural argument not expressly raised before the Board of Veteran Appeals (Board) threatens to deprive veterans of the benefits Congress intended, PVA has a strong interest in supporting review of that decision.

SUMMARY OF THE ARGUMENT

Many veterans and their survivors file and pursue their claims at the VA without legal representation. The veterans benefits system is, therefore, designed and intended to be uniquely pro-claimant and non-adversarial. The VA, both at the regional office and at the Board, operates with a single, salutary purpose: to ensure that veterans and their survivors receive the benefits they earned during their years of service. The pro-claimant, non-adversarial nature of the Board is extremely important to the many disabled veterans who rely on the VA.

Even as the system through which veterans' claims are adjudicated has evolved to include judicial review and attorney participation, Congress has held firm to these principles. PVA has consistently supported Congress' goal to maintain the non-adversarial nature of this system.

The Federal Circuit's holding that veterans waive procedural arguments not expressly raised before the Board is incompatible both with the needs of our Nation's veterans and the claimant-friendly system Congress intended.

ARGUMENT

I. VETERANS AND THEIR SURVIVORS ARE FOCUSED ON THEIR CLAIMS, NOT LEGAL LIMITATIONS LIKE WAIVER

Veterans and their survivors who file claims with the VA are focused on pursuing their claims, not on legalisms or procedural technicalities. Many veterans and their survivors file and pursue their claims at the VA without legal representation, appearing either *pro se* or with the benefit of non-lawyer veterans' service organization (VSO) representatives, such as those employed nationwide by PVA. See 38 U.S.C. 5902; *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009) ("[T]he veteran is often unrepresented during the claims proceedings."). Such claimants are frequently unfamiliar with the claims adjudication process, including the procedural requirements imposed on the VA, often suffer from physical, emotional and/or mental disabilities, and rely heavily on the VA to ensure they receive the benefits they earned. Each year, the VA assists between 9,000 and 15,000 veterans with spinal cord injuries, dis-

ease and disorders. See Sherri Lavela et al., *Disease Prevalence and Use of Preventative Services: Comparison of Female Veterans in General and Those with Spinal Cord Injuries and Disorders*, 15 J. Women's Health 301, 302 (2006). But these veterans, who already face challenges, are often unfamiliar with the statutes and regulations that govern benefits and the benefits process. Paralyzed veterans, in particular, often have a complex disability profile and depend heavily on the VA for help. While VSO representatives ably help claimants navigate through the benefits process, their focus is on pursuing the benefits claims. They are not legal experts and may therefore be unaware of the legal consequences, such as waiver, of activities earlier in the process.

The Federal Circuit has recognized these special circumstances:

> Realistic considerations may reduce the ability of a veteran to mount legal challenges in the regional office or at the Board. * * * Although the veterans' benefit system is intended to be "user friendly" to the veteran, these considerations suggest that the system may not be particularly "user friendly" for the presentation by a veteran of a legal challenge to the Secretary's position, either in a regional office or before the Board.

Maggitt v. *West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000). See also *Comer* v. *Peake*, 552 F.3d 1362, 1368-1369 (Fed. Cir. 2009) ("A liberal and sympathetic reading of appeal submissions is necessary because a pro se veteran may lack a complete understanding of the subtle dif-

ferences in various forms of VA disability benefits and of the sometimes arcane terminology used to describe those benefits.").

II. THE VETERANS BENEFITS SYSTEM IS DESIGNED AND INTENDED TO BE NON-ADVERSARIAL AND PRO-CLAIMANT

Mindful of the many challenges disabled veterans and their survivors face, Congress has designed a veterans benefits system that is uniquely non-adversarial and pro-claimant. See, *e.g.*, *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1205-1206 (2011). Among other duties, Congress has charged the VA with "the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence." *Ibid.* In view of this statutory obligation to assist veterans, the "VA is not an ordinary agency." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). Unlike other agencies, the VA is a reflection of "congressional policy to favor the veteran[s]," *id.* at 415 (Souter, J., dissenting), and its processes are intended to demonstrate a high degree of "solicitude for the claimant," *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). The benefits adjudication system was created in this manner, because Congress wanted all veterans to "receive the benefits due to them." *Barrett* v. *Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). "Consistent with these proclaimant principles, and pursuant to statute, the VA regulations * * * provide for certain procedural due process and appellate rights for veterans involved in VA adjudications." *Nat'l Org. of Veterans Advocates, Inc.* v. *Sec'y of Veterans Affairs*, 710 F.3d 1328, 1330 (Fed. Cir. 2013).

Congress only reinforced these fundamental premises when it altered the benefits adjudication system to be more favorable to claimants. As discussed *infra*, Congress created the U.S. Court of Veterans Appeals (now the U.S. Court of Appeals for Veterans Claims), thereby offering judicial review of all adverse benefits decisions.[2] Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105.

More recently, Congress codified the VA's duty to assist claimants, Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096, and enabled claimants to engage paid legal representation after a notice of disagreement has been filed with a VA regional office, Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, 120 Stat. 3403. These additions to the benefits system demonstrate Congress' continued commitment to the long-standing policy of maintaining a claimant-friendly process.

The legislative history of the Veterans Judicial Review Act (VJRA) confirms Congress' intention to re-

---

[2] Prior to the passage of the VJRA, veterans benefits adjudication consisted solely of a two-step process. First, a claimant would file a claim at a VA regional office where a panel would evaluate the claim and the extent of the disability. If the claim was denied, the veteran could then appeal to the Board to have the panel's decision reviewed on the merits. No substantive judicial review was available.

The VJRA added a third layer of review—the Court of Appeals for Veterans Claims—an Article I court with exclusive jurisdiction to review final decisions of the Board. Parties can then appeal CAVC decisions to the Court of Appeals for the Federal Circuit, as occurred in this case.

tain the non-adversarial elements of the benefits system even as it provided veterans with the option to appeal adverse decisions of the VA to the CAVC. Senator Murkowski, who sponsored a similar bill, articulated this position well when he explained that the goal of judicial review legislation is "to maintain the nonadversarial system while still providing meaningful review of the VA decisionmaking process." *Judicial Review Legislation Hearing Before the Comm. on Veterans' Affairs*, 100th Cong. 3, 4 (1988) (opening statement of Senator Murkowski). Similarly, the official House Report accompanying the VJRA states that Congress "[intended] to maintain a beneficial non-adversarial system of veterans benefits." H.R. Rep. No. 963, 100th Cong., 2d Sess. 13 (1988). The Report continues: "Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. * * * In such a beneficial structure, there is no room for * * * adversarial concepts." *Ibid.* Even as Congress created an avenue for judicial review, it rejected an adversarial model for VA proceedings in favor of a system designed to be "sympathetic to the veteran's claim." *Id.* at 15.

Though initially wary of altering the system that benefitted many veterans, VSOs came to favor judicial review, provided that the pro-claimant, non-adversarial nature of the then-existing VA proceedings were maintained or improved. See Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 Conn. L. Rev. 155, 156 (1992) (discussing the political history of the VJRA). For example, Jack Powell, PVA's then-Executive Director, testified before Congress: "PVA's position is

that the current VA adjudication process—no formal rules of evidence and no cross-examination of witnesses—both at the regional office and the BVA levels generally works well for veteran claimants." *Judicial Review of Veterans' Claims Hearing before the Subcomm. on Special Investigations of the Comm. on Veterans' Affairs*, 96th Cong. 245, 247 (1980) (statement of Jack Powell, Paralyzed Veterans of America).

More recent enactments and their legislative histories reconfirm Congress' intent to maintain the pro-claimant nature of the VA benefits adjudication process. For example, the Veterans Claims Assistance Act of 2000 (VCAA) expressly rejected *Morton* v. *West*, a decision holding that the VA was prohibited from assisting claimants until the claimant demonstrated that his claim was "well-grounded." 12 Vet.App. 477 (1999). The Senate Report accompanying the VCAA states the following: "The Committee bill, in summary, modifies the pertinent statutes to reinstate VA's traditional practice of assisting veterans at the beginning of the claims process." S. Rep. No. 397, 106th Cong., 2d Sess. 22 (2000). The House Report likewise stressed that the VA adjudication process was "specifically designed to be claimant friendly." H.R. Rep. No. 781, 106th Cong., 2d Sess. 5 (2000).

Voicing support for the VCAA, PVA offered sound policy rationales for a more claimant-friendly system: "First, veterans programs exist to assist veterans. Second, the public policy purpose underlying veterans programs is to ensure that veterans receive all benefits to which they are entitled. Third, there is no competing or opposing interest in veterans' claims." *Well-Grounded Claims and H.R. 3193, The Duty to Assist*

Veterans Act of 1999, Hearing Before the Subcomm. on Benefits of the Comm. on Veterans' Affairs, 106th Cong., 2d Sess. 12 (2000) (statement of Geoff Hopkins, Associate Legislative Director, Paralyzed Veterans of America). In passing the VCAA, Congress again acknowledged that adversarial concepts are counterproductive in a pro-claimant framework and merely work to confuse the nature of the system.

Similarly, in passing the Veterans Benefits, Health Care and Information Technology Act of 2006 (the 2006 Act), Congress insisted on maintaining a non-adversarial process even while giving veterans the option to hire an attorney. To accomplish that goal, the 2006 Act *inter alia* removed the prohibition that the VJRA placed on attorney representation, namely that fee-seeking attorneys could not represent claimants until *after* an adverse BVA decision was rendered. In removing this restriction, the Senate stated that "after the enactment of this bill, VA will continue to serve all claimants in a non-adversarial, claimant friendly manner, regardless of the presence of an attorney or any other representative in any case before VA." S. Rep. No. 297, 109th Cong., 2d Sess. 19 (2006). PVA supported the 2006 Act, knowing that Congress fully intended to preserve "the pro-claimant aspects of the system." See *Benefits Legislative Initiatives Currently Pending Before the U.S. S. Comm. on Veterans' Affairs Hearing Before the Comm. on Veterans' Affairs*, 109th Cong., 2d Sess. 69 (2006) (statement of Paralyzed Veterans of America).

Ultimately, because of Congress' enactments, veterans are able to seek judicial review of adverse decisions, receive VA assistance without first proving their

claim, and hire attorneys to advocate on their behalf. This statutory framework represents an ongoing commitment to ensuring that veterans and their survivors receive the benefits that veterans earned. This commitment is served by a pro-claimant, non-adversarial system.

III. THE FEDERAL CIRCUIT'S DECISION IS INCONSISTENT WITH CONGRESS' INTENT TO DESIGN AND MAINTAIN A UNIQUELY PRO-CLAIMANT, NON-ADVERSARIAL SYSTEM

The Federal Circuit's holding that claimants waive procedural arguments that are not expressly raised before the Board is inconsistent with sound policy and the unambiguous intent of the statutory scheme discussed above. A system in which a claimant waives procedural arguments that are not expressly raised is not a system that ensures the claimant "every benefit that can be supported in law." 38 C.F.R. 3.103(a). Rather than a system that ensures the VA properly fulfills its procedural obligations, waiver would create a system that denies benefits to deserving claimants and holds claimants—rather than the VA—accountable for the VA's procedural mistakes. Waiver is thus out of place in the non-adversarial system that Congress created. See *Maggitt*, 202 F.3d at 1377 ("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.").[3]

If the Federal Circuit's decision is affirmed, the current cooperative relationship between claimants and the VA will be eroded. Contrary to Congress' intent, VA proceedings will necessarily become more adversarial and fewer claimants will receive the benefits they may otherwise be due based on the VA's violation of procedural safeguards that were put into place to protect the rights of claimants. Claimants, who often proceed *pro se* or with the help of non-lawyer VSO representatives, will be obligated to raise and pursue all possible procedural arguments, and the VA will need to respond to those arguments. Disregarding these likely results and despite acknowledging that the non-adversarial nature of VA proceedings requires a liberal construction of substantive arguments, the Federal Circuit refused to extend this obligation to procedural issues. Pet. App. 11a-14a. By doing so, the Federal Circuit arbitrarily decided that procedural arguments are less important to the benefits process than substantive arguments. But neither the relevant statutes and regulations nor the Court's opinion in *Sims* v. *Apfel*, 530 U.S. 103 (2000)[4] makes such a distinction. There is no reason why procedural arguments should be treated differently.

---

[3] *Maggitt* was decided prior to the Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000).

[4] The Federal Circuit has acknowledged that the adjudicative process in the veterans' disability compensation system is intended to be less formal than in the social security system. See *Gambill* v. *Shinseki*, 576 F.3d 1307, 1323 (Fed. Cir. 2009).

To establish an adversarial process at the Board—in which procedural arguments are deemed waived—is incompatible with the clear intent of Congress. The common refrain throughout two decades of legislative history is Congress' intent to maintain a pro-claimant, non-adversarial system. Congress has consistently reiterated this intention even when passing the legislation that allowed for judicial review and attorney involvement at the agency level. A finding that veterans waive procedural arguments not expressly raised at the Board directly contravenes congressional intent and denigrates the pro-claimant nature of the adjudication system. "The 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*, 552 F.3d at 1369.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

PAUL M. SCHOENHARD
SHARON LEE
ROPES & GRAY LLP

MARCH 2016