No. 15-1054

In The Supreme Court of the United States

CURTIS SCOTT,

Petitioner,

v.

ROBERT A. McDONALD,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF FOR AMICUS CURIAE NATIONAL ORGANIZATION OF VETERANS ADVOCATES, INC. IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Organization of Veterans Advocates, Inc. (NOVA) is a not-for-profit educational membership organization incorporated in the District of Columbia in 1993. NOVA is a national organization of attorneys and other qualified members who act as advocates for disabled veterans.

NOVA hosts two conferences a year, one in the spring and one in the fall, which are the gold standard of veterans law education, in addition to occasional training webinars throughout the year. NOVA has a strong presence in Washington, DC, and it keeps its members informed each week with the latest and most important news in the industry. Members also benefit from the networking opportunities provided by NOVA.

The recent decision from the U.S. Court of Appeals for the Federal Circuit in *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015), adversely impacts veterans seeking judicial review of decisions denying disability benefits from the Department of Veterans Affairs (VA) based upon its imposition of an issue

[1] 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 amici curiae or its counsel made a monetary contribution to its preparation or submission. Counsel of record for the parties received timely notice of the intent to file this brief, and letters reflecting the consent of the parties have been filed with the Clerk

exhaustion requirement. As such, NOVA has a strong interest in seeking to have this Court review, and reverse, the *Scott* decision.

SUMMARY OF ARGUMENT

The Federal Circuit's decision in *Scott v. McDonald*, misapprehends the process for appealing an adverse decision of the Department of Veterans Affairs (VA), in particular an appellant's ability to raise procedural issues such as the denial of a request for a hearing before the Board of Veterans' Appeals. It is also based upon a misreading of the provisions of 38 C.F.R. § 202 as well as a misunderstanding of the function of a veteran's substantive appeal. Most importantly this decision is at odds with this Court's decision in *Sims v. Apfel*, 530 U.S. 103 (2000).

The decision of the Federal Circuit creates a dangerous precedent for veterans who work through the VA disability claims system without the assistance of counsel. By applying an issue exhaustion requirement in the context of an appeal of a decision denying veterans' benefits, the Federal Circuit has placed an unreasonable burden on appellants to possess the sophistication of understanding to present procedural arguments to the Board of Veterans' Appeals (Board) or lose the right to raise those arguments on an appeal to the U.S. Court of Appeals for Veterans Claims (Veterans Court). Veterans have been led to believe that the VA is their advocate and that they may rely upon the VA to act in their best

interests. Meanwhile, veterans may see incentive to proceed either *pro se* or with the assistance of a non-lawyer claims agent, making it less likely that legal arguments will be presented to the Board.

Issue exhaustion is inconsistent with the pro-claimant scheme that Congress envisioned when it created the veterans' benefits system. The goal of the process is to ensure that deserving veterans receive benefits, not to preclude consideration of issues because they were not raised during the nonadversarial appeal process. Issue exhaustion is not a necessary protection to be employed in a nonadversarial process.

It is also inconsistent with *Henderson v. Shinseki*, where this Court discouraged a rigid interpretation of a statute that resulted in limiting a veteran's right to judicial review. 131 S. Ct. 1197, 1205-1206 (2011). This Court relied primarily on a finding that Congress intended for a high level of solicitude for veterans throughout the adjudicatory process.

By requiring lay veterans to present procedural arguments to the Board at the risk of waiver, the Federal Circuit has disposed of the intent of Congress in creating the VA benefits system and ignored this Court's ruling in *Henderson*. For that reason, the Court should grant certiorari to review, and reverse, the decision in *Scott*.

ARGUMENT

I. THE UNIQUE VA APPEAL PROCESS.

The decision of the Federal Circuit incorrectly relied on the absence of Mr. Scott's pleadings. In the unique nonadversarial system created by Congress there are no pleadings required by an appealing claimant in the designed appeal process. In accordance with the provisions of 38 U.S.C. § 7105, appellate review of a decision of the VA is initiated by an appealing claimant with the submission of a notice of disagreement, and completed by the submission of a substantive appeal. *See* 38 U.S.C. § 7105(a). These are not pleadings, as that term is generally understood by litigants in an adversarial proceeding. Pleading is the beginning stage of a lawsuit in which parties formally submit their claims and defenses. https://www.law.cornell.edu/wex/pleading (last visited February 19, 2016). According to Black's Law Dictionary a pleading is "A formal document in which a party to a legal proceeding (esp. a civil lawsuit) sets forth or responds to allegations, claims, denials, or defenses. In federal civil procedure, the main pleadings are the plaintiff's complaint and the defendant's answer." BLACK'S LAW DICTIONARY 1191 (8th ed. 2004).

Congress purposefully created an informal setting devoid of adversarial "pleadings" by appealing claimants. The appeal process is initiated by the filing of a notice of disagreement which merely expresses an appealing claimant's disagreement with a

decision of the VA. *See* 38 C.F.R. § 20.201[2] (A written communication from a claimant or his or her representative expressing dissatisfaction or disagreement with an adjudicative determination by the agency of original jurisdiction and a desire to contest the result will constitute a Notice of Disagreement.). Nothing about a notice of disagreement equates to a "pleading" as used in an adversarial proceeding.

An appeal under the provisions of 38 U.S.C. § 7105(a) is completed by the submission of a substantive appeal. The VA provides a standardized form called a VA Form 9. This VA form is titled Appeal to Board of Veterans' Appeals. http://www.va.gov/vaforms/va/pdf/VA9.pdf. Block 10 of the VA's form allows an appealing claimant to request a hearing before the Board. Nothing more is required. Hearings before the Board of Veterans' Appeals at Department of Veterans Affairs Field Facilities, which is what was requested by Mr. Scott, are covered by the provisions of 38 C.F.R. § 19.75 and § 19.76. There is no "pleading" requirement; an appealing claimant simply marks a box.

There are three problems with the "pleading" expectation relied on by the Federal Circuit. First, there is no statute or regulation that actually requires the veteran to submit specific arguments in

[2] In September 2014, the VA for the first time required veterans to use a standardized form to submit a notice of disagreement. *See* 79 Fed. Reg. 57660-57698 (September 25, 2014). *See also* VA Form 21-0958 http://www.vba.va.gov/pubs/forms/VBA-21-0958-ARE.pdf.

support of his case. Second, there is no notice given on any form (notice of disagreement, VA Form 9, or supplemental statement of the case) that indicates or even signals to a veteran that he or she must raise a specific legal argument (procedural or otherwise), or that he or she will lose that argument forever. And third, attorney representation is not widespread and arguably is discouraged based on the availability of free help from veterans service organization, thereby making it very unlikely that meaningful legal arguments will actually be raised (as a practical matter, service organizations rarely make legal arguments beyond a generic reference to the benefit of the doubt regulation). The end result is that legal arguments will often not be raised until the veteran gets to court and has an attorney.

In Mr. Scott's case the pertinent rule related to an appealing claimant's failure to appear at a requested hearing is 38 C.F.R. § 20.704(d). Mr. Scott's requested hearing before the Board was set by the regional office which was unquestionably aware that Mr. Scott was incarcerated and would not be able to attend. After his unsurprising failure to attend, Mr. Scott complied with all of the requirements of § 20.704(d) by explaining the reason for his failure to attend. Nothing more was required.

The VA appeal process does not afford an appealing claimant a means for "pleading" or to otherwise put the Board and the Veterans Court on notice of his desire to raise the issue of his entitlement to a hearing as part of the pending appeal. There exists no VA

statute or regulation which allowed Mr. Scott or any other appealing claimant to raise the issue of the Board's refusal to reschedule a hearing before a decision on an appeal.

The notion mistakenly relied upon by the Federal Circuit in its decision – that there was some "pleading" which Mr. Scott could have filed but failed to which would have put the Board and/or the Veterans Court on notice of his desire to raise the issue of the Board's refusal to allow him a hearing before a decision on his appeal – does not exist. There is no "pleading" or regulatory or statutory procedure for such notice. It was not until the Veterans Court precluded his counsel from arguing this issue was Mr. Scott informed of his need to have "raised" this issue to the Board in order to be heard on that issue before the Veterans Court.

Overlooked or misunderstood by the Federal Circuit was the inability of an appealing claimant to "raise" issues before the Board concerning procedural errors which may be made by the Board. Congress does provide that: "The Board of Veterans' Appeals may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed." *See* 38 U.S.C. § 7105(d)(5). This authority delegated to the Board is of no moment concerning an appealing claimant's ability to "raise" a procedural issue to the Board regarding the proceedings before the Board.

This is confirmed by the content of the VA's Form 9. Block 8 on that form is titled "THESE ARE THE ISSUES I WANT TO APPEAL TO THE BOARD," and

it provides two options to an appealing claimant. Option A asks that the appealing claimant list the "issues" which are being appealed. The VA's form does not ask the appealing claimant to "allege specific error of fact or law in the determination being appealed," even though § 7105(d)(5) allows the Board to dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed. Notwithstanding this authority, an appealing claimant is not required by any statute or regulation to "plead" or allege any specific error of fact or law in the determination being appealed.

Further, option B, which was the option chosen by Mr. Scott, allows the appealing claimant to indicate that all issues listed on the VA's statement of case are being appealed. It is also noteworthy that there was only one issue listed in the statement of the case prepared by the VA in Mr. Scott's appeal which was entitlement to service connection for Hepatitis C. Again, there is a requirement on the VA Form 9 to "plead" or allege any specific error of fact or law in the determination being appealed.

Thus, the VA's Form 9 merely directs an appealing claimant to list the issues wanting to be appealed. No other "pleading" opportunity is afforded an appealing claimant in this unique appeal process designed by Congress. More importantly to the matter at issue in Mr. Scott's case, there is no opportunity, or for that matter, ability for an appealing claimant to foresee procedural issues which might occur when the Board considers the appeal, such as request for a hearing.

It is clear that the unique nonadversarial appeal process created by Congress does not contemplate "pleadings" from an appeal claimant. Therefore, the adversarial preclusion of issues on appeal is inapposite to the VA appeal process. The Veterans Court's as well as the Federal Circuit's misuse of the adversarial rule of "issue exhaustion" to refuse to consider Mr. Scott's "argument" that the Board had failed to provide an adequate statement of reasons or bases for its failure to provide Mr. Scott his requested hearing.

II. SECTION 202 OF TITLE 38 OF THE CODE OF FEDERAL REGULATIONS DOES NOT REQUIRE ISSUE EXHAUSTION IN THE VETERANS' BENEFITS CONTEXT.

The mandate of 38 C.F.R. § 202 that an appealing claimant in his or her substantive appeal should 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 is undermined by the VA's Form 9. As explained above, the VA's Form does not provide or even direct an appealing claimant to set out specific arguments relating to errors of fact or law made by the agency of original jurisdiction. As such, this regulation cannot be a regulatory "issue exhaustion" requirement.

At best, § 202 serves a limited function which is to identify arguments relating to errors of fact or law made by the agency of original jurisdiction in reaching the determination. The determination made in

this case by the agency of original jurisdiction was to deny service connected compensation for hepatitis C. The error which Mr. Scott sought to present to the Veterans Court was his denial of a hearing by the Board. This was not an argument related to an error of fact or law made by the agency of original jurisdiction in reaching the determination that he was not entitled to service connected compensation for hepatitis C. The issue of his entitlement to a hearing before the Board was not an issue which Mr. Scott could possibly have noted at the time of his submission of his substantive appeal, because the error had yet to happen. The Federal Circuit read more into § 202 than is supportable by the language of the regulation.

The Federal Circuit misread the limited purpose of § 202 which concerns only the function and requirements of a substantive appeal which completes an administrative appeal and implicates the jurisdiction of the Board of Veterans' Appeals. This is confirmed by the language of § 202 which provides: "A Substantive Appeal consists of a properly completed VA Form 9, "Appeal to Board of Veterans' Appeals," or correspondence containing the necessary information." The purpose of a substantive appeal is to: " . . . indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed." In Mr. Scott's case, there was only one issue on appeal, which was entitlement to service connected compensation for hepatitis C. See Issue identified on Board decision. Mr. Scott's substantive appeal complied with the requirements of § 202.

The Federal Circuit mistakenly reasoned that a veteran's interest may be better served by prompt resolution of his 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. This reasoning does not support the imposition of an "issue exhaustion" requirement based on the language of § 202.

Mr. Scott did not fail to raise the issue of his denial of a hearing before the Board because he had no opportunity or ability to raise that issue. The issue was "raised" by the actions of the Board in denying Mr. Scott a hearing. Mr. Scott made no deliberate decision to forego raising the issue because he had no opportunity to have "pled" such an issue. Mr. Scott did not initially fail to raise the procedural issue of his denial of a Board hearing. Mr. Scott's first opportunity to raise the issue was before the Veterans Court.

The thought below that it is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran is not appropriate. Section 202 does not require issue exhaustion because that regulation is not a means by which an appealing claimant is able to raise a procedural argument concerning an error which has yet to be made by the Board in its consideration of the appeal. The VA denied Mr. Scott service connected compensation for hepatitis C and he appealed that decision as required. It was the Board and not the VA which denied Mr. Scott a hearing.

Thereafter, Mr. Scott did everything that was required under the provisions of 38 C.F.R. § 20.704(d).

Mr. Scott did not fail to raise the procedural issue of his denial of a hearing before the Board based on the provisions of 38 C.F.R. § 20.202. There was nothing more for Mr. Scott or any other appealing claimant who did not appear at the designated for a Board hearing to have done, other than to comply with the provisions of 38 C.F.R. § 20.704(d). The decision of the Federal Circuit focused on the procedural issue of the Board's denial of a hearing but failed to either mention or discuss § 20.704(d).

There is no provision of law or regulation, to include § 20.202, which required Mr. Scott or any other appealing claimant to "plead" to the Board beyond what was required by § 20.704(d) to "raise" the hearing issue. Proceedings before the VA and the Board are explicitly nonadversarial. In such a system the adversarial rule of issue exhaustion has no place. The singular characteristics of the appeal process scheme for the administrative review of a decision denying VA benefits does not include issue exhaustion.

III. THIS COURT HAS DISCOURAGED JUDICIALLY-CREATED IMPEDIMENTS THAT SERVE TO TRAP UNWARY VETERAN-CLAIMANTS.

In *Henderson*, this Court examined 38 U.S.C. § 7266(a), which requires veterans seeking judicial review of an adverse Board decision to file a Notice of

Appeal to the Veterans Court within 120 days of the Board's decision. The veteran in *Henderson* failed to timely file his notice of appeal, and the Veterans Court dismissed. *Henderson*, 131 S. Ct. 1201-1202. On appeal to the Federal Circuit, the court determined that § 7266(a) was jurisdictional, effectively precluding judicial review to any veteran who missed the 120-day appeal period regardless of the reason why a timely appeal was not made. *Henderson v. Shinseki*, 589 F.3d 1201, 1220 (Fed. Cir. 2009). This Court reversed, holding that § 7266(a) was not jurisdictional and that the Veterans Court could consider a veteran's appeal that was filed outside of the 120-day appeal window. *Henderson*, 131 S. Ct. at 1206.

The Court reached this result after considering several factors. The Court observed that Congress, in enacting § 7266, did not use language consistent with that typically found in jurisdictional statutes. *Id*. at 1204-1205. Additionally, the Court observed that the statute appeared in a subchapter entitled "Procedure." *Id*. at 1205. It did not appear under a subchapter entitled "Organization and Jurisdiction." *Id*.

Ultimately, however, the Court stated that the "most telling" factor was the "singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims." *Id*. The Court stressed the solicitude of Congress for veterans and recognized that VA proceedings are "informal and nonadversarial." *Id*. The Court stated that the statutory scheme places "a thumb on the scale in the veteran's favor in the course of administrative and

judicial review of VA decisions." *Id*. (quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)). The Court found an untenable dichotomy to exist between the paternalistic, non-adversarial nature of the VA benefits system and a rigid rule that outright denied judicial review to veterans who did not meet a filing requirement. *Id*. at 1206.

Notably, the *Henderson* Court recognized similarities between the veterans' benefits system and the Social Security disability benefits program. *Id*. at 1204. Both federal programs, the Court explained, are "unusually protective" of claimants. *Id*. (citing *Heckler v. Day*, 467 U.S. 104, 106-107 (1984)). On this point, the Court cited to *Sims v. Apfel*, 530 U.S. 103 (2000). In that case, the Court addressed the issue-exhaustion doctrine and found it to be inconsistent with the protective nature of the Social Security benefits system. *Id*. at 112.

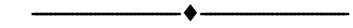
IV. APPLICATION OF THE ISSUE EXHAUSTION DOCTRINE IN VETERANS' CASES IS INCONSISTENT WITH BOTH THE SCHEME OF THE VETERANS' BENEFITS PROGRAM AND THIS COURT'S DECISION IN *HENDERSON*.

In *Scott*, the Federal Circuit held that "[A] review of Scott's pleadings to the Board confirms that Scott did not raise the hearing issue in his current appeal to the Board. The regulations do not require that the Board or the Veterans Court address the veteran's argument that the Board erred in not providing him

with a hearing." *Scott v. McDonald*, 789 F.3d 1375 (Fed. Cir. 2015). In effect, the Federal Circuit imposed a strict issue-exhaustion requirement on veterans.

In the context of the appeal of the denial of a veteran's claim, issue-exhaustion would require an appealing claimant, often acting without the assistance of legal counsel, to parse through an administrative decision that is replete with technical jargon and explain, with some level of precision, why the decision is legally unsound. The doctrine is inherently inconsistent with the scheme set into place by Congress, which unquestionably favors ensuring that justice is ultimately done for the veteran. Moreover, the application of the issue-exhaustion doctrine in this context is inconsistent with this Court's decision in *Henderson*, which discourages a rigid application of legal principles in the adjudication of veterans' benefits, at least where Congress has not made clear that a more formalized procedure is necessary. The Federal Circuit's decision in *Scott* does not address *Henderson*, nor does it analyze the paternalistic nature of the VA claims system.

The Federal Circuit's decision in *Scott* creates a dangerous precedent for any appealing claimant who has chosen to proceed through the claims system without the assistance of legal counsel. It cannot stand in light of both the pro-claimant scheme that Congress has established and this Court's caselaw. Therefore, the Court should review, and reverse, the *Scott* decision.



CONCLUSION

For the foregoing reasons, in addition to those stated in the petition, the Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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