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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The Secretary treats the question presented as a simple issue rightly resolved below—but only by failing to grapple with the uniquely pro-veteran context of veterans-benefits adjudication. Emblematic of this problem is that, throughout the Government's brief, the procedural pathway of *this* case is repeatedly contrasted with what is expected of ordinary civil litigants—a matter entirely irrelevant to what a *veteran* must do to pursue *veteran's benefits*. Conspicuously unaddressed by the Secretary is the question that actually matters—whether the actual language of the

relevant statutes and regulations requires veterans to exhaust all procedural issues. The Government's silence is revealing, for the text requires no such thing. The Federal Circuit's imposition of an exhaustion requirement without textual authority contravenes *Sims* v. *Apfel*, 530 U.S. 103 (2000), which prohibits judicially created issue-exhaustion requirements in non-adversarial agency contexts.

The brief in opposition, therefore, does nothing to dispute that the judgment below has created a veterans-benefits procedure that is the exact opposite of what Congress intended. Nor has the Government disputed the rule's devastating consequences for veterans, as illustrated by multiple *amicus* briefs (each of which the Government ignores). Veterans must now assume that all Board actions are essentially adversarial with respect to procedural problems—and act otherwise at their peril. Veterans (including those unrepresented) are now on their own at the Board to examine the record for procedural arguments that have deprived them of fair consideration of their appeals. This offense against both Congress's clearly expressed intent and the Nation's veterans merits this Court's attention.

I. No Relevant Statutes Or Regulations Require Issue Exhaustion

A. The root of the Secretary's erroneous statutory and regulatory analysis is that it assumes the answer to the question presented and gallops on from there. Indeed, the Secretary ignores the petition's detailed explanation of how the Federal Circuit's holding con-

flicts with other circuits' (and this Court's) construction of materially comparable language from structurally similar statutes. See Pet. 19-24. The Government does not even cite (much less analyze) any of those cases. It instead simply asserts that petitioner's argument "rests on the erroneous premise that the statutes and regulations governing VA benefits do not require issue exhaustion before the Board." BIO 18. But that, of course, is the very question petitioner raises. The circuits are now divided on whether comparable statutes require issue exhaustion. For the Secretary to argue that there is no conflict because *these* statutes and regulations *do* require issue exhaustion is worse than conclusory—it is circular.

Neither the Secretary nor the Federal Circuit have provided any justification for the vastly different result reached below. This Court should resolve the conflict.

B. With respect to the only statute or regulation that the brief in opposition actually analyzes, the Secretary presents the novel theory that 38 C.F.R. § 20.202 creates a rule whereby a procedural "issue" must be explicitly listed in either a Statement of the Case or in a veteran's VA Form 9 to be preserved.[1] *See*

[1] Petitioner addresses only § 20.202 in this reply. Though the Secretary states that the Federal Circuit held that 38 U.S.C. § 7252 requires issue exhaustion, the Secretary does not appear to disagree with petitioner's explanation (Pet. 15-17) as to why that statute does not require issue exhaustion. And the parties appear in agreement that petitioner complied with § 7292. See Pet. 11 n.2; BIO 12 n.3 (admitting that petitioner "did raise" this issue in the second Veterans

BIO 15-17 & n.5. This interpretation cannot withstand scrutiny.

1. As the Secretary notes, § 20.202 states: "If the Statement 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."[2] Pet. App. 7a n.2. The Secretary, however, perhaps simply assuming that principles of ordinary civil litigation apply, reads more into § 20.202 than is there. In the Secretary's view, complying with § 20.202 "only preserves for appeal" issues listed in the statement of the case or supplemental statement of the case, and "[a]n issue not listed on the statement of the case prepared by the VA is not preserved unless the claimant specifically identifies that issue on VA Form 9 or actually raises the issue in a pleading before the Board." BIO 15-16 n.5. But as petitioner and *amici* have demonstrated, § 20.202 says nothing of issues left unaddressed by a

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Court appeal, and not arguing that petitioner failed to comply with § 7292.).

[2] The Secretary faults petitioner for quoting "only a truncated portion" of Form 9. BIO 15 n.5. But the additional language is irrelevant to whether petitioner fully complied with § 20.202's actual requirements, as it is undisputed that he checked the box appealing all issues on Form 9. By selecting the option to appeal all issues, petitioner did all that was required by § 20.202.

Statement of the Case.[3] The Secretary attempts to pack more demands into § 20.202 than actually exist.

By its plain language, completing Form 9 wholly satisfies § 20.202's limited scope. Moreover, that regulation only governs appeals *from the Regional Office* to the Board, and it does not even govern all appeals to the Board. See 38 U.S.C. § 7105 (statute governing appealing a Regional Office decision). It says nothing about appeals of errors that are made by the Board, which must always occur ***after*** the veteran has completed Form 9. And it says nothing about appeals to the Board after remand, where re-appeal is automatic. See 38 C.F.R. § 19.38.[4] Both situations apply here. As the National Organization of Veterans Advocates noted in its *amicus* brief (at 10), *the Board* did not make the error petitioner attempted to appeal until it issued its decision in this matter, well after petitioner had properly completed Form 9. And nothing required him to specifically raise any issues after remand from the Veterans Court. Petitioner surely could not anticipate when he filed his VA Form 9 that the Board would subsequently refuse to grant him a hearing.

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[3] Pet. 14-15; National Veterans Legal Services Program Br. 15-16.

[4] The Secretary states that petitioner forfeited the argument that "no regulation requires a claimant to undertake any specific action in order to preserve an issue for appeal following a remand." BIO 16. But, in fact, petitioner argued below that he fully complied with all applicable statutes and regulations. Appellant's Br. 33-35, *Scott* v. *McDonald*, 789 F.3d 1375 (Fed. Cir. 2015); *Id.* at Appellant's Reply 8.

2. Fundamentally, the Secretary misconceives how veterans-benefits adjudication actually works.[5] The Secretary makes it sound like Statements of the Case are elaborate legal documents that disaggregate a claim into distinct legal questions, as if a veteran-claimant will then present a nuanced response distinguishing among legal arguments he wishes to pursue—something one might expect of civil litigants facing cross-motions for summary judgment. In reality, the only "issue" listed in his Statement of the Case was whether petitioner's hepatitis C was connected to service, entitling him to benefits. C.A. App. A-758; see also *id.* at A-203. Petitioner did all that the VA regulations required of him: He checked the box on his VA Form 9 indicating that he wanted to appeal all issues listed. C.A. App. A-830. *Nothing more* was required to wholly comply with § 20.202.

Indeed, quite unlike what is expected or even permitted of any court in ordinary civil litigation—it is the duty of the Board, under the intentionally paternalistic VA system, to review the record and address "all issues raised * * * by the evidence of record." *Robinson* v. *Peake*, 21 Vet. App. 545, 552 (2008), *aff'd sub nom. Rob-*

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[5] Indeed, as every *amicus* has demonstrated to this Court, all without response by the Government, issue exhaustion is a fundamental misfit in the paternalistic VA system. See Disabled American Veterans Br. 4-6; National Organization of Veterans Advocates, Inc. Br. 4-9; National Veterans Legal Services Program Br. 9-17; New York State Bar Association Br. 3-11; Federal Circuit Bar Association Br. 13-17; Paralyzed Veterans of America Br. 5-12.

inson v. *Shinseki*, 557 F.3d 1355 (Fed. Cir. 2009); 38 U.S.C. § 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record * * * ."). This remains true on remand, as VA Form 9 is not even *provided* to veterans on post-remand appeals, because that form plays no role in post-remand appeals. See C.A. App. 201-205.[6] In fact, no appeal form is provided to veterans who are, instead, instructed that "a response at this time is optional and is not required to continue your appeal." See C.A. App. A-201.

II. This Case Is An Ideal Vehicle For Deciding The Issue Presented

The Secretary argues that the case is an unsuitable vehicle for clarifying issue-exhaustion principles in veterans-benefits cases for two primary reasons: (1) the Federal Circuit's holding was a case-specific holding with limited applicability, and (2) the case is complicated by a prior remand from the Veterans Court. BIO 11, 18-19. Neither argument has merit.

A. The Secretary characterizes the decision below as a narrow decision that merely balances the interests revealed in the facts of the case and thus is unworthy of

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[6] See also National Organization of Veterans Advocates Br. 6 ("[T]here 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.").

the Court's review. BIO 19. To the contrary, however, the Federal Circuit's holding is categorical in its creation of a broad issue-exhaustion rule:

> [I]t is appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran * * * . [T]he Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board.

Pet. App. 14a. That holding directly contravenes *Sims*, and it expressly transcends any specific circumstances of this case. It affects every procedural argument that could arise in every veterans-benefits adjudication. The Veterans Court and the Federal Circuit have already invoked the opinion below for that very purpose—to defeat veterans' procedural arguments on exhaustion grounds. See, e.g., *Dickens* v. *McDonald*, 814 F.3d 1359, 1361 (Fed. Cir. 2016); *McMullen* v. *McDonald*, Case No. 15-1445, 2016 WL 2968044, *7-8 (Vet. App. May 23, 2016).

B. Continuing the fundamental error of treating the veterans-benefits system like civil litigation, the Government argues that petitioner forfeited any argument that the Board erred by denying him a hearing when he did not raise the argument in his first appeal to the Veterans Court.[7] But unlike remands in civil litigation,

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[7] The Secretary also implies that petitioner forfeited any

when the Veterans Court remands a case the *entire case* is adjudicated anew. *Best* v. *Principi*, 15 Vet. App. 18, 19 (2001) *(per curiam)* (on remand, "the Board is required to readjudicate the matter anew"); see also *Fletcher* v. *Derwinski*, 1 Vet. App. 394, 397 (1991) (on remand, "[t]he Court expects that the [Board] will reexamine the evidence of record [and] seek any other evidence the Board feels is necessary"). Furthermore, on remand, the Board continues to have "a statutory

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argument that the Board failed to provide him a hearing because his *pro se* request to reschedule his hearing did not explain "why a timely request for a new hearing date could not have been submitted." See BIO 5 n.2 (quoting 38 C.F.R. § 20.704(d)). Putting aside that the Board did not deny petitioner's request on this ground, the Secretary is yet again attempting to treat veterans like ordinary civil litigants. Veterans law requires that the VA give petitioner's pleadings a liberal construction. See Pet. App. 11a ("the Board and the Veterans Court give a liberal construction to argument made by the veteran before the Board"). Petitioner explained his failure to appear: "I don't have the access for transportation and availability for my convenience at the facility here" (C.A. App. A-826 (capitalization altered)). He then explained that this is the same reason why the request could not have been filed earlier: "I am filing this Answer, *as to why a* ***timely*** *Request could not be submitted* * * * ." *Ibid* (emphasis added). Giving petitioner's request a liberal construction, his letter fairly explained why he did not earlier request rescheduling. In any event, it makes little sense *in a case about whether veterans are freed from ordinary civil-litigation burdens* to suggest denial of the petition on the ground that the veteran has not complied with ordinary civil-litigation burdens.

duty to assist veterans in developing the evidence necessary to substantiate their claims. And when evaluating claims, the VA must give veterans the 'benefit of the doubt' * * * ." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 431-432 (2011) (citations omitted); see also 38 C.F.R. § 3.103(a). Because the Veterans Court's remand to the Board triggered the Board's duty to decide the matter anew, petitioner could not have forfeited any issues by failing to raise them to the Veterans Court.[8]

On remand, the Board therefore had a duty to reexamine the need for a hearing and explain its reasons for denying petitioner any chance to speak. See 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include * * * a written statement of the Board's findings and conclusions, and the reasons or bases for those findings and conclusions, on all material issues of

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[8] Elsewhere, the Secretary suggests that Mr. Scott is somehow *less* deserving of a hearing than other veterans: "At the time of his appeal, petitioner was incarcerated. ***Nevertheless***, he sought an evidentiary hearing * * * ." BIO 4 (emphasis added). The implication that Mr. Scott's incarceration lessened his right to a hearing is at odds with the acknowledged need to assist incarcerated veterans *more*, not less. *Bolton* v. *Brown*, 8 Vet. App. 185, 191 (1995) ("[T]hose who adjudicate claims of incarcerated veterans [must] be certain that they tailor their assistance to the peculiar circumstances of confinement. Such individuals are entitled to the same care and consideration given to their fellow veterans.") (quoting *Wood* v. *Derwinski*, 1 Vet. App. 190, 193 (1991).

fact and law presented on the record."). Yet it did not do so. As petitioner argued in his appeal to the Veterans Court, the 2012 Board decision lacks an adequate statement of reasons and bases for denying petitioner's request to reschedule his hearing.[9] C.A. App. A-79–83. It is that argument—that the 2012 Board decision lacked an adequate statement of reasons and bases—that the Veterans Court refused to adjudicate based on a judicially created issue-exhaustion requirement.[10]

C. Still continuing in its fundamental misunderstanding of the veterans-benefits system, the brief in opposition urges the Court to await "the simpler (and presumably more typical) case where a VA benefits

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[9] The Secretary misstates petitioner's argument to the Veterans Court, stating that the appeal was about the Board's failure to "afford him a rescheduled in-person hearing." BIO 10. Instead, as explained above, the issue on appeal is whether the 2012 Board decision had an adequate statement of reasons and bases for denying the petitioner's request to reschedule his hearing. The Secretary's misunderstanding of the underlying issue that petitioner attempted to appeal infects the rest of Secretary's analysis.

[10] To the extent the Secretary implies that § 7292 supports a requirement that petitioner have raised whether the Board provided an adequate statement of reasons and bases in his *first* appeal to the Veterans Court (BIO 12 n.3), that provision contains no such requirement. In any event, as explained above, the issue on appeal is the adequacy of the Board's 2012 decision, which could not have been raised earlier, and it is undisputed that petitioner fully complied with § 7292 by raising this issue before the Veterans Court in the decision now on appeal.

claimant raises a particular issue before the regional office, does not pursue it before the Board, and then asserts the issue as a ground of error in his initial Veterans Courts appeal." BIO 19. However, not only are remands from the Veterans Court common, they are the norm.[11] Thus, this case *already* is the "more typical" case the Secretary urges the Court to await.

Indeed, this case presents this Court with a rare opportunity to decide the contours of issue-exhaustion in veterans-benefits cases. In the sixteen years since *Sims*, this case is the first time the Federal Circuit has issued a substantive opinion directly addressing whether a veteran must have exhausted issues reasonably raised by the record when appealing from the Board. Cf. *Robinson*, 557 F.3d at 1361-1362 (noting that, unlike in this case, the Veterans Court had found "as a factual matter" that an issue was not raised by the record, and thus finding no error when the Board did not address it).

D. Finally, the Secretary urges the Court to deny this petition because it already denied *Parks* v. *Shinseki*, 134 S. Ct. 2661 (2014) (No. 13-837) (mem.). But unlike in *Parks*, this case squarely presents the issue. As the Secretary aptly pointed out in opposition to certiorari in *Parks*, issue exhaustion was not sub-

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[11] See, *e.g.*, Court of Appeals for Veterans Claims, *Annual Reports* at 2 (2016), https://www.uscourts.cavc.gov/documents/FY2015AnnualReport.pdf (of 4030 total appeals, 1106 were remanded and another 1971 were reversed or remanded in part).

stantively addressed by the Federal Circuit or preserved by *Parks*. See *Parks* v. *Shinseki*, No. 13-837, Brief for the Respondent in Opposition 7, 14 (April 16, 2014) ("Petitioner sought rehearing and rehearing en banc. For the first time, petitioner argued that this Court's decision in *Sims* v. *Apfel* excused his failure * * * . Petitioner forfeited any argument based on *Sims* by failing to raise it below * * * .") (citations omitted)). By contrast, that issue was thoroughly briefed below, resulted in a lengthy opinion from the court of appeals that addressed *only* issue exhaustion, and is squarely presented here.

CONCLUSION

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

Respectfully submitted.

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