No. 16-677

IN THE
Supreme Court of the United States

FREDDIE H. MATHIS,
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. AND NATIONAL ORGANIZATION OF SOCIAL SECURITY CLAIMANTS' REPRESENTATIVES IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

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.

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 *Mathis v. McDonald*, 845 F.3d 1347 (Fed. Cir. 2015) adversely impacts veterans seeking judicial review of decisions denying disability benefits from the Department of Veterans Affairs (VA) based upon its approval of judicially created presumptions in favor of the VA. As such, NOVA has a strong interest in seeking to have this Court review, and reverse, the *Mathis* decision.

The National Organization of Social Security Claimants' Representatives (NOSSCR) is a voluntary membership association comprised of more than 3,300 professionals, mostly attorneys, who represent individuals seeking disability and other benefits under the Social Security Act (Act). Many clients of NOSSCR members are veterans. (In 2015, over 9.3 million veterans received Social Security benefits, accounting for nineteen percent of all adult beneficiaries.[1]) Mathis v. McDonald adversely impacts NOSSCR's clients who are veterans in three main ways.

First, Mathis governs how the Veterans Administration (VA) weighs some evidence from its own sources when determining eligibility for VA disability benefits, and the Social Security Administration (SSA) considers VA disability ratings non-binding evidence when determining whether claimants for benefits under the Act are disabled. A legal defect in the VA's disability determination may thus adversely impact the SSA's adjudication of disability.

Second, Mathis concerns the general reliability of VA medical and non-medical evidence, and the SSA uses VA medical and non-medical evidence to adjudicate claims irrespective of any VA disability determination. Under SSA regulations, a claimant must either submit to the SSA or inform the SSA about all evidence that relates to his or her disability claim, including evidence from any VA source. Any unreliability in evidence from the VA may thus adversely impact the SSA's adjudication of disability.

Third, the SSA's and the VA's disability programs, while separate, are increasingly coordinated.[2] The

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[1]Office of Retirement Policy, Soc. Sec. Admin., "Population Profiles, Veteran Beneficiaries 2015" (June 2016), https://www.ssa.gov/retirementpolicy/fact-sheets/veteran-beneficiaries.html (visited Dec. 14, 2016).

[2]L. Scott Muller, Nancy Early, and Justin Ronca, "Veterans Who Apply for Social Security Disabled-Worker Benefits After Receiving a Department of Veterans Affairs Rating of `Total Disability' for Service-Connected Impairments: Characteristics and

increasing coordination of the SSA’s and the VA’s disability programs and the reliance by veterans on Social Security disability (and retirement) benefits show the importance of the SSA’s programs for our nation’s veterans. The adverse impact of the precedent in Mathis looms large for the nation’s veterans who may be entitled to benefits under the SSA's and the VA's programs. That impact is very important for the individuals whom NOSSCR members represent.

Outcomes,” Soc. Sec. Bulletin, Vol. 74, No. 3 (2014), https://www.ssa.gov/policy/docs/ssb/v74n3/v74n3p1.html.

SUMMARY OF ARGUMENT

The Federal Circuit's decision in *Mathis v. McDonald*, relies upon a judicially created presumption which favors the Department of Veterans Affairs (VA), specifically a presumption of competence for any VA medical examiner. Such a presumption is in direct conflict with the non-adversarial statutory scheme created by Congress.

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 using a presumption of competence for VA examiners in the context of an appeal of a decision denying veterans's benefits, the Federal Circuit has placed an unreasonable burden on veteran appellants to understand the credentials and qualifications of the VA employee who provides an opinion used to adjudicate the veterans's claim. Likely the vast majority of veterans do not have a basic, let alone a sophisticated, understanding of a VA employee's credentials and qualifications.

It is the obligation of the VA to fully investigate claims made by veterans. This obligation is not fulfilled if the individuals giving expert opinions are not qualified. A judicially created presumption of competence in inconsistent with the VA's obligation to fully develop claims. More importantly, such a presumption assumes that veterans are likely to know an examiner is not competent. Veterans 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 about the competence of a VA examiner will be presented to the Board.

A presumption of competence is inconsistent with the pro-veteran scheme that Congress envisioned when it created the veterans's 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 non-adversarial appeal process. A presumption of competence undermines the protection to be afforded veterans in a non adversarial 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.

The judicial creation of a presumption of competence for VA examiners by the Federal Circuit is contrary to 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 *Mathis*.

ARGUMENT

I. CONGRESS CREATED A UNIQUE PROCESS.

Prior to the enactment of the Veterans Judicial Review Act (VJRA) this Court recognized that the VA's adjudicatory "process is designed to function throughout with a high degree of informality and solicitude for the claimant." *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311, 105 S. Ct. 3180, 87 L. Ed.2d 220 (1985).

This Court's first decision after the passage of the VJRA was *Brown v. Gardner*, 115 S. Ct. 552 (1994). In *Gardner*, this Court observed that Congress had not established judicial review for VA decisions until 1988, only then removing the VA from what one congressional Report spoke of as the agency's "splendid isolation." H.R. Rep. No. 100-963, pt. 1, p. 10 (1988). *Gardner*, 115 S. Ct. 557.

In *Shinseki v. Sanders*, 556 U.S. 396, 129 S. Ct. 1696 (2009), this Court noted that Congress has made clear that the VA is not an ordinary agency. *Sanders*, 129 S. Ct. 1707. Justice Souter recognized:

> The VA differs from virtually every other agency in being itself obliged to help the claimant develop his claim, *see*, *e.g.*, 38 U.S.C. § 5103A, and a number of other provisions and practices of the VA's administrative and judicial review process reflect a congressional policy to favor the veteran, *see*, e.g., § 5107(b) ("[T]he Secretary shall give the benefit of the doubt to the claimant" whenever "there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter"); § 7252(a) (allowing the veteran, but not the Secretary, to appeal an adverse decision to the Veterans Court). Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions, I would not remove a comparable benefit in the Veteran's Court based on the ambiguous directive of § 7261(b)(2). And even if there were a question in my mind, I would come out the same way under our longstanding "rule that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 130 L. Ed.2d 462

(1994).

Sanders, 129 S. Ct. 1709. Justice Souter also recognized:

> . . . the added virtue of giving the VA a strong incentive to comply with its notice obligations, obligations "that g[o] to the very essence of the non-adversarial, pro-claimant nature of the VA adjudication system . . . by affording a claimant a meaningful opportunity to participate effectively in the processing of his or her claim." *Mayfield v. Nicholson*, 19 Vet.App. 103, 120-121 (2005).

Sanders, 129 S. Ct. 1710. The adoption of a presumption of competency for VA examiners is antithetical to the non-adversarial, pro-veteran nature of the VA adjudication system created by Congress. Moreover, it does not afford veterans a meaningful opportunity to participate effectively in the processing of his or her claim.

Most recently this Court in a unanimous decision in *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) referenced Congress's longstanding solicitude for veterans, *United States v. Oregon*, 366 U.S. 643, 647, 81 S. Ct. 1278, 6 L. Ed.2d 575, as plainly reflected in the VJRA and in subsequent laws that place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions. *Henderson*, 131 S. Ct. 1199.

This court observed:

> When a claim is filed, proceedings before the VA are informal and non-adversarial. The VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, *the VA must give the veteran the benefit of any doubt.*

Henderson, 131 S. Ct. 1206. (emphasis added).

II. CONGRESS MANDATES THAT VETERANS BE AFFORDED THE BENEFIT OF THE DOUBT REGARDING ANY ISSUE MATERIAL TO THE DETERMINATION OF A MATTER.

The general standard of proof in veterans benefits cases-the "benefit of the doubt" rule-provides that, "[w]hen there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b).

This "unique" standard of proof is lower than any other in contemporary American jurisprudence and reflects "the high esteem in which our nation holds those who have served in the Armed Services." *Gilbert v. Derwinski*, 1 Vet. App. 49 (1990); *see also Henderson v. Shinseki*, 131 S. Ct. 1197, 1205-06 (noting that "[t]he contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic"). By requiring only an "approximate balance of positive and negative evidence" to prove any issue material to a claim for veterans benefits, 38 U.S.C. § 5107(b), the nation, "in recognition of our debt to our veterans," has "taken upon itself the risk of error" in awarding such benefits. *Id.* (*citing Santosky v. Kramer*, 455 U.S. 745, 755, 102 S. Ct. 1388, 71 L. Ed. 2d 599 (1982) ("[I]n any given proceeding, the minimum standard of proof tolerated by the due process requirement reflects not only the weight of the private and public interests affected, but also a societal judgment about how the risk of error should be distributed between the litigants."). Thus, "[b]y tradition and by statute, the benefit of the doubt belongs to

the veteran." *Gilbert*, 1 Vet. App. at 54.

Congress, through the enactment of section 5107(b)'s low standard of proof for all issues material to a claim for veterans benefits, has authorized VA to resolve a scientific or medical question in the veteran's favor so long as the evidence for and against that question is in "approximate balance." Imposing a higher standard of proof would be counter to the benefit-of-the-doubt-rule. Section 5107(b) requires that the VA give the veteran the benefit of the doubt when the evidence regarding any issue material to his claim is in relative equipoise. *See Skoczen v. Shinseki*, 564 F.3d 1319, 1324 (Fed. Cir. 2009)(interpreting section 5107 and stating that the duty to assist requires VA to bear the "primary responsibility of obtaining the evidence it reasonably can to substantiate a veteran's claim for benefits").

The statutorily-mandated benefit-of-the-doubt rule assists the VA in deciding a veteran's claim on the merits after the claim has been fully developed by the VA which would include the obtaining of VA medical examinations and opinions. *See Harris v. Shinseki*, 704 F. 3d. 946 (Fed. Cir. 2013). The VA differs from every other federal benefits agency in being statutorily obliged to help the veteran develop his claim, *see*, *e.g.*, 38 U.S.C. § 5103A, and a number of other provisions and practices of the VA's administrative process reflects a congressional policy to favor the veteran, *see*, e.g., § 5107(b). Given Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of VA decisionmaking.

The "benefit of the doubt" statute, 38 U.S.C. § 5107(b), and the analogous "reasonable doubt" regulation, 38 C.F.R. § 3.102, apply to all material issues relating to a claim, including the competency as well as the credentials of a VA examiner. *See Kelly v. Nicholson*, 463 F.3d 1349,

1354 (Fed. Cir. 2006) (stating that 38 U.S.C. § 5107(b) "applies not only to decisions relating to the overall merits of a claim, but by its plain language it applies to all decisions determining any material issue relating to a claim").

III. ANY JUDICIALLY CREATED PRESUMPTION FAVORING THE VA UNDERMINES THE BENEFIT-OF-THE-DOUBT-RULE.

Congress has never enacted presumptions that make it easier for the VA to deny veteran's benefits. All judicially created presumptions are creatures of adversarial proceedings. A "presumption" is a procedural tool that shifts the burden of proof on a substantive issue: if a basic fact is established, a court accepts a conclusion on the issue unless the presumption is rebutted with evidence that meets the presumption's associated standard of proof. 1–301 Weinstein's Federal Evidence § 301.02 (2015).

In *Butler v. Principi*, 244 F.3d 1337 (Fed. Cir. 2001), the Federal Circuit imported the judicially created presumption of regularity on the basis that the "'presumption of regularity' supports official acts of public officers" and holds that, "[i]n the absence of clear evidence to the contrary, the doctrine presumes that public officers have properly discharged their official duties." *Butler*, 244 F.3d at 1340. By adopting a judicially created presumption the Federal Circuit incorrectly assumed that the adjudication of claims for veterans benefits were equivalent to any other public officer discharge of their public duty. The Federal Circuit was wrong.

In *Miley v. Principi*, 366 F.3d 1343 (Fed. Cir. 2004), the Federal Circuit extended the presumption of regularity to the issue of timely mailing of a notice of its decision,

thus triggering the veteran's time to file an appeal. That Court concluded that the presumption of regularity could be employed "in the absence of evidence to the contrary, [to establish] that certain ministerial steps were taken in accordance with the requirements of law." *Miley*, 366 F.3d at 1347 (emphasis added). The adjudication of a veteran's claim is not a ministerial act.

Pertinent to this petition the Federal Circuit expanded the presumption of regularity to a newly created judicial presumption of competence. In *Rizzo v. Shinseki*, 580 F.3d 1288 (Fed. Cir. 2009), the Federal Circuit adopted the reasoning of the lower court in *Cox v. Nicholson*, 20 Vet. App. 563, 568 (2007), which held that "the Board is entitled to assume the competence of a VA examiner" based on the presumption of regularity. *Rizzo*, 580 F.3d at 1290.

A year later, the Federal Circuit expanded on *Rizzo* in *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), finding that case "controlling" on the issue of whether the Board improperly relied on the department's medical witness without establishing his qualifications. *Id.* 1306. The Federal Circuit went further and required that, in order to challenge a VA medical examiner's qualifications, a veteran must do more than merely request them. *Id.* That Court noted that "[a] request for information about an expert's qualifications . . . is not the same as a challenge to those qualifications" Also, that Court concluded: "Indeed, one may assume that litigants who are told an expert witness' qualifications frequently may conclude that there is no reasonable basis for challenging those qualifications." *Id.* at 1306. Finally, the panel in *Bastien* stated, that in order to give the trier of fact the ability to determine the validity of a challenge to the expertise of a VA expert, a challenge "must set forth the specific reasons why the litigant concludes that the expert is not qualified to give an

opinion." *Id.* at 1307. This analysis is entirely premised on the mistaken assumption that the VA adjudication process operates like an adversarial process in which veterans are provided a process in order to challenge the expertise of VA experts. No such process exists because the adjudication process designed by Congress never contemplated such challenges.

Next, in *Sickels v. Shinseki*, 643 F.3d 1362 (Fed. Cir. 2011) the Federal Circuit addressed the provisions of 38 U.S.C. § 7104(d)(1) which require the Board's decisions to include a written statement of the reasons or bases for its findings and conclusions. In *Sickels*, the veteran argued that the Board violated § 7104(d)(1) by not providing a written explanation for its implicit conclusion that a VA medical opinion was sufficiently informed. That Court held that, "[w]hile we did not explicitly state so in *Rizzo*, it should be clear from our logic that the Board is similarly not mandated by section 7104(d) to give reasons and bases for concluding that a medical examiner is competent unless the issue is raised by the veteran. To hold otherwise would fault the Board for failing to explain its reasoning on unraised issues." *Sickels*, 643 F.3d at 1366.

Also the Federal Circuit applied the presumption of competency in *Parks v. Shinseki*, 716 F.3d 581, 584 (Fed. Cir. 2013). In *Parks*, the VA selected an advanced registered nurse practitioner (ARNP) to determine whether there was a relationship between a veteran's service and several health conditions, including diabetes. That Court found that the VA was required to rely only on "competent medical evidence," which is defined by VA regulations as "evidence provided by a person who is qualified through education, training, or experience to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1). The panel indicated, however, that, "[i]n the case of competent medical evidence, the VA benefits from

a presumption that it has properly chosen a person who is qualified to provide a medical opinion in a particular case." *Parks*, 716 F.3d at 585 (*citing Sickels*, 643 F.3d at 1366). The Court justified the expansion of the judicially created presumption because it furthered the policy of preventing "[r]epeated unnecessary remands for additional evidence [that may] complicate many cases and lead to system-wide backlogs and delays." *Id.*

In *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998), the Federal Circuit correctly observed:

> . . . in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight.

Id. 1363. The use of any judicially created presumption favoring the VA, in particular a presumption of competence for VA examiners, fails to consider the importance of systemic fairness and the appearance of fairness. As noted by Judge Reyna in his concurring opinion: "The presumption of competence has delegitimized the process of adjudicating veterans' entitlement to disability benefits." Slip opinion, concurring opinion. page 1. The use of such a presumption impairs systemic fairness as well as an appearance of fairness. What it does is to places the thumb on the scale in favor of the VA and not in favor of the veteran.

The "system is constructed as the antithesis of an adversarial, formalistic dispute resolving apparatus." *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (Mayer, C.J., dissenting) "The purpose is to ensure that the veteran receives whatever benefits he is entitled to, not to litigate as though it were a tort case." *Id.* Statutorily created presumptions especially a competence of VA examiners

meant for use in adversarial and formalistic proceedings for dispute resolution but not for a system premised on "informality and solicitude for the claimant."

An adversarial system permits discovery allows for the taking of depositions and for the submission of interrogatories. No such mechanisms exist in the VA's adjudicatory process. Yet, when the veteran asserts he or she did not receive a notice from the VA or questions the probativeness of the evidence developed by the VA by questioning the qualification of a VA examiner, the adversarial presumptions of regularity and competence are imposed, allowing VA to defeat the assertion without evidence.

Those adversarial presumptions, furthermore, are imposed not by Congress but by the Federal Circuit and the Veterans Court. Thus veterans are given a contradictory message. On the one hand the veteran is told he or she may rely on systemic fairness as well as an appearance of fairness. However, veterans are told that all VA examiners are presumed competent. Veteran are told the must affirmatively question the qualifications of the persons who provide expert opinions without any afore knowledge or basis for inquiry about such qualifications.

The unique non-adversarial process created by Congress did not contemplate "pleadings" or "challenges" from veterans. The use of judicially created presumptions favoring the VA is apposite to the process provided by Congress. The Veterans Court's as well as the Federal Circuit's erroneously rely on judicially created presumptions because such presumptions impose an evidentiary burden on veterans not contemplated by Congress.

IV. THE PRESUMPTION OF COMPETENCE IN PARTICULAR HAS NO ROLE IN THE NON-ADVERSARIAL PROCESS CREATED BY CONGRESS.

In *Sanders*, this Court noted that it has previously warned against courts' determining whether an error is harmless through the use of mandatory presumptions and rigid rules rather than case-specific application of judgment, based upon examination of the record. *See Kotteakos v. United States*, 328 U.S. 750, 760, 66 S. Ct. 1239, 90 L. Ed. 1557 (1946). *Sanders*, 129 S. Ct. 1704-1705. The presumption of competence created by the Veterans Court and expanded by the Federal Circuit is a mandatory presumption imposing an absolute rule that all VA examiners must be presumed to be competent. This presumption does not permit a case specific examination of the record because there is no record of the examiner's credentials. Worse it imposes an obligation on the veteran to challenge an examiner's credentials.

This Court concluded that the Federal Circuit's presumptions exhibit the very characteristics that Congress sought to discourage. *Sanders*, 129 S. Ct. 1705. This Court also concluded that the Federal Circuit's framework imposes an unreasonable evidentiary burden upon the VA. *Id*. In this matter, the judicially created presumption imposes an inconsistent evidentiary burden on veterans seeking to question the credentials of a VA examiner.

The VA's duty to assist imposed by Congress requires the VA to provide a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim. *See* 38 U.S.C. § 5013A(d)(1). The judicially created presumption of competence creates an evidentiary burden on veterans in a system where veterans have no access to

the qualifications of VA examiners. If this were an adversarial system where veterans had the tools of discovery then such a presumption might be warranted. However, no such tools are available to veterans or their representatives.

The VA process is more than just non-adversarial. It is inquisitory. Congress has imposed upon the VA the duty to make reasonable efforts to assist veterans in obtaining evidence necessary to substantiate the veteran's claim. *See* 38 U.S.C. § 5103A(a)(1). This duty includes obtaining medical examinations necessary to make a decision on the claim under 38 U.S.C. § 5103A(d). Thus, the VA pursuant to its duty to assist is developing a record of all of the evidence which would assist the veteran in substantiating their claims. In the context of medical examinations, the VA knows or should know the qualifications of the experts it uses. It therefore must be required, when requested to do so, to put those qualifications in the record. The presumption of competence as created by the Federal Circuit adopts an adversarial procedure which benefits the VA at the cost of the veterans it is required to assist.

The adjudicatory process created by Congress is not adversarial and does not contemplate judicially created presumptions favoring the VA. Veteran is often unrepresented during the initial claims proceedings and even if they were there is no means by which veterans can compel the production of the credentials of a VA examiner. The presumption may be workable in an adversarial system but not in a non-adversarial system.

The presumption of competence of VA examiners is inconsistent with the statutory requirement that the VA make all reasonable efforts to assist veterans in obtaining evidence necessary to substantiate the veteran's claim for a

benefit under a law administered by the Secretary. *See* 38 U.S.C. § 5103A(a).

CONCLUSION

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

Respectfully submitted,

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