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 OF THE FEDERAL CIRCUIT BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

INTEREST OF AMICUS CURIAE..... 1

INTRODUCTION AND SUMMARY OF ARGUMENT..... 2

REASONS FOR GRANTING THE PETITION 6

I. THE COURT SHOULD GRANT THE PETITION AND OVERTURN THE FEDERAL CIRCUIT'S PRESUMPTION OF COMPETENCY. 6

A. The Federal Circuit Had No Basis On Which To Impose Its Presumption Of Competency..... 6

B. The Presumption Of Competency Deprives Claimants Of Due Process. . 12

1. Claimants' Property Interest In Veterans' Disability Compensation..... 13

2. High Risk Of Erroneous Deprivation; High Value Of Additional Safeguards 15

3. The Government's Interest Weighs Against The Presumption Of Competency... 21

CONCLUSION 23

TABLE OF AUTHORITIES

Page(s)

Cases

Atkins v. Parker,
472 U.S. 115, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985) 13

Bastien v. Shinseki,
599 F.3d 1301 (C.A.F.C. 2010) 4, 16

Cox v. Nicholson,
20 Vet. App. 563 (2007) 9, 10

Cushman v. Shinseki,
576 F.3d 1290 (C.A.F.C. 2009) 13

Fed. Deposit Ins. Corp. v. Mallen,
486 U.S. 230, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) 18

Gambill v. Shinseki,
576 F.3d 1307 (C.A.F.C. 2009) 20

Goldberg v. Kelly,
397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970) 14

King v. Burwell,
576 U.S. ___, 135 S. Ct. 2480, 192 L. Ed. 2d 483 (2015) 7

Mathews v. Eldridge,
424 U.S. 319, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976) 13, 14, 18, 23

Mathis v. McDonald,
No. 15-7094 (C.A.F.C. June 23, 2016) 20

Parks v. Shinseki,
716 F.3d 581 (C.A.F.C. 2013) 4, 11

Pavelic & LeFlore v. Marvel Ent't Group,
493 U.S. 120, 110 S. Ct. 456, 107 L. Ed.
2d 438 (1989) 7

Richardson v. Perales,
402 U.S. 389, 91 S. Ct. 1420, 28 L. Ed.
2d 842 (1971) 13

Rizzo v. Shinseki,
580 F.3d 1288 (C.A.F.C. 2009) 9, 10

Town of Castle Rock, Colo. v. Gonzales,
545 U.S. 748, 125 S. Ct. 2796, 162 L.
Ed. 2d 658 (2005) 13

United States v. Griffin,
303 U.S. 226, 58 S. Ct. 601, 82 L. Ed.
764 (1938) 6

Walters v. Nat'l Ass'n of Radiation
Survivors,
473 U.S. 305, 105 S. Ct. 3180, 87 L. Ed.
2d 220 (1985) 14

Washington v. Nicholson,
21 Vet. App. 191 (2007) 20

Constitutional Provisions

U.S. Const., art. I, § 1 7

Statutes

38 U.S.C. § 1101 *et seq.* 14

38 U.S.C. § 1110 14

38 U.S.C. § 1111 ..... 8, 9

38 U.S.C. § 1112 ..... 8, 9

38 U.S.C. § 1116 8

38 U.S.C. § 1117 8

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38 U.S.C. § 1121 14

38 U.S.C. § 1132 8

38 U.S.C. § 1133 8

38 U.S.C. § 1137 9

38 U.S.C. § 1153 9

38 U.S.C. § 1154(b) 9

38 U.S.C. § 5103A 9, 10

38 U.S.C. § 5107(b) 9

38 U.S.C. § 7292 ..... 4, 7, 8, 10

Rules and Regulations

38 C.F.R. § 3.159(a)(1) 10

38 C.F.R. § 4.1 ..... 10, 14

38 C.F.R. § 4.2 10

S. Ct. R. 10(a) 6

S. Ct. R. 37.1 2

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Barton F. Stichman et al., *Veterans Benefits Manual* § 1.1.2 (2016 ed.) 20

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H.R. Rep. No. 963, 100th Cong., 2d Sess., reprinted in 1988 U.S. Code Cong. & Admin. News 5782 14

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INTEREST OF AMICUS CURIAE[1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the Bar of the United States Court of Appeals for the Federal Circuit ("Federal Circuit"). The FCBA unites the different groups across the nation that practice before the Federal Circuit, seeking to strengthen and serve the court. Among other activities, the FCBA helps facilitate *pro bono* representation for veterans with disability-compensation appeals before the Federal Circuit. The FCBA strives to improve the appellate process with an eye toward fundamental fairness to all—including veterans' disability-compensation claimants who proceed *pro se* before the Federal Circuit or any lower tribunal.[2]

Given its activities, the FCBA is well-positioned to describe why the Court should grant the petition for a writ of certiorari and overturn the Federal Circuit's presumption that any medical health practitioner whom the Department of Veterans Affairs ("VA") selects to provide an evaluation regarding a veterans' disability-

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[1] Pursuant to Rule 37.6, *amicus curiae* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus curiae* or its counsel made any monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this brief. *See* S. Ct. R. 37.2(a).

[2] FCBA members who are government employees played no role in deciding whether to file this brief or in developing this brief's content.

compensation claim is competent to do so. This "presumption of competency" should be overturned because: (1) the Federal Circuit lacked any congressionally authorized basis to impose it; and, if the following issue were reached, (2) the presumption deprives claimants—particularly *pro se* claimants such as Mr. Mathis—of Due Process.

Many of the FCBA's additional arguments for granting a writ of certiorari and overturning the Federal Circuit's presumption of competency are duplicative of arguments already before the Court. *See, e.g.*, Pet. at 11–16, 23–28. The FCBA joins those arguments and, herein, addresses only the Federal Circuit's lack of a basis to impose the presumption of competency and the presumption's violation of Due Process. *See* S. Ct. R. 37.1.

INTRODUCTION AND SUMMARY OF ARGUMENT

There is no doubt the VA is under considerable strain to adjudicate, timely and accurately, the more than one million veterans' disability-compensation claims it receives each year. *See, e.g.*, VA, *Board of Veterans' Appeals Annual Report, Fiscal Year 2015*, at 30 ("BVA FY2015 Report"), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2015AR.pdf; VA, *Board of Veterans' Appeals Annual Report, Fiscal Year 2014*, at 30 ("BVA FY2014 Report"), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2014AR.pdf; VA, *Board of Veterans' Appeals Annual Report, Fiscal Year 2013*, at 28 ("BVA FY2013 Report"), *available at* http://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2013AR.pdf. Currently, more than 700,000

claims await an initial or appellate VA decision. *See* Office of Performance Analysis and Integrity, Veterans Benefits Administration ("VBA"), *Monday Morning Workload Report* (Dec. 19, 2016), at tab "Traditional Aggregate (TA)," *available at* http://www.benefits.va.gov/REPORTS/detailed_claims_data.asp. The number of claims that the VA receives to adjudicate has been increasing. *Compare* BVA FY2014 Report at 30 (1,114,000 claims); *with* BVA FY2015 Report at 30 (1,235,000 claims).

Nor is there doubt the VA's strain adversely affects veterans. Congress and the VA have long striven to alleviate these problems. *See, e.g.*, Statement of Daniel Bertoni, Director, Education, Workforce, and Income Security Issues, U.S. Government Accountability Office, *Testimony Before the Committee on Veterans' Affairs, U.S. Senate*: *Veterans' Disability Benefits: Challenges to Timely Processing Persist*, GAO-13-453T, at 1 (Mar. 13, 2013), *available at* http://www.gao.gov/assets/660/652979.pdf ("For years, the disability claims process has been the subject of concern and attention by VA, Congress, and Veterans Service Organizations (VSO), due in part to long waits for decisions and the large number of pending claims."). A comprehensive solution, however, has remained elusive. The VA's ongoing struggle to adjudicate claims timely and accurately continues to affect millions of our nation's veterans and their families.

At issue in this case is a well-intentioned, yet fundamentally flawed, attempt by the Federal Circuit to streamline the VA's disability compensation system. Adding its policymaking voice to Congress's and the VA's, the Federal Circuit has

crafted a novel presumption that any medical health practitioner whom the VA selects to provide a medical evaluation regarding a veterans' disability-compensation claim is competent to provide that evaluation. To rebut this presumption, "a veteran must set forth *specific reasons* why the veteran believes an examiner is not qualified before the VA has to provide any evidence regarding the examiner's qualifications." App. 20 (Reyna, J., concurring) (citing *Bastien v. Shinseki*, 599 F.3d 1301, 1307 (C.A.F.C. 2010)). "If a veteran fails specifically [to] object to an examiner's competence while his case is before the Board, any such challenge is waived." *Id.* (citing *Parks v. Shinseki*, 716 F.3d 581, 586 (C.A.F.C. 2013)).

However laudable the Federal Circuit's stated purposes for imposing its presumption of competency—simplifying and shortening the veterans' disability-compensation claims process, *see Parks*, 716 F.3d at 585—the presumption suffers from numerous fatal flaws. The FCBA herein addresses the following two.

First, the Federal Circuit had no basis on which to impose its presumption of competency. Under 38 U.S.C. § 7292, the Federal Circuit's bases for reviewing veterans' disability-compensation claims are narrowly circumscribed. Although the Federal Circuit may "interpret" statutory provisions affecting a veteran's disability-compensation claim, the Federal Circuit may not make, mend, or seek to improve federal veterans' disability-compensation legislation. *See* 38 U.S.C. §§ 7292(a), (c), (d). Here, imposing its presumption of competency has been no mere "interpretation" of a statutory provision. The

Federal Circuit's attempt to make, mend, or improve federal veterans' disability-compensation legislation without any basis to do so has usurped Congress's legislative power.

Second, if reached, the presumption of competency deprives claimants—particularly *pro se* claimants such as Mr. Mathis—of Due Process. The presumption substantially increases the risk of erroneous adverse claim decisions by insulating the VA's error-prone process of selecting medical evaluators from review by claimants, thereby depriving claimants of important personal property rights and undermining Congress's explicit public policy that veterans' disability-compensation proceedings be non-adversarial and sympathetic to veterans. Meanwhile, at best, the presumption reduces costs for the government only trivially.

Each of these issues is important to our nation's large population of veterans and merits granting the petition for a writ of certiorari.[3]

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[3] Even if the Court is hesitant to grant the petition in order to overturn the Federal Circuit's presumption of competency on the ground that the Federal Circuit had no basis to impose it or that the presumption violates the Fifth Amendment, granting the petition remains appropriate because the presumption is, on the merits of its policymaking, disastrous. For the same reasons that the presumption deprives claimants of Due Process, subverts Congress's imperative that the veterans' disability-compensation process be non-adversarial, with the VA fully and sympathetically developing a veteran's claim to its optimum, *see, e.g.*, Pet. at 11–16, and, under this Court's guidance for when to impose new evidentiary presumptions, is inappropriate, *see, e.g.*, Pet. at 23–28, (continued…)

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT THE PETITION AND OVERTURN THE FEDERAL CIRCUIT'S PRESUMPTION OF COMPETENCY.

A. The Federal Circuit Had No Basis On Which To Impose Its Presumption Of Competency.

Whether the Federal Circuit had any basis on which to impose its presumption of competency must be resolved before addressing the presumption on its merits. *See, e.g.*, *United States v. Griffin*, 303 U.S. 226, 229, 58 S. Ct. 601, 82 L. Ed. 764 (1938) ("Since lack of jurisdiction of a federal court touching the subject matter of the litigation cannot be waived by the parties, we must upon this appeal examine the contention; and, if we conclude that the District Court lacked jurisdiction of the cause, direct that the bill be dismissed."). This threshold issue resolves the matter because, for the following reasons, the Federal Circuit lacked any basis on which to impose its presumption of competency.

The Federal Circuit's bases for review extend to what the Constitution and Congress have granted and no further. Its bases for reviewing veterans' disability-compensation claims are, by statute,

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imposing the presumption on veterans' disability-compensation claimants—particularly *pro se* claimants such as Mr. Mathis—has been so far a departure from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's supervisory power. *See* S. Ct. R. 10(a).

narrowly circumscribed. *See* 38 U.S.C. § 7292. They are, in summary and subject to certain narrowing provisions, to adjudicate the validity of a U.S. Court of Appeals for Veterans Claims decision on a rule of law, statute, regulation, or interpretation thereof; and to interpret Constitutional and statutory provisions. *See id.* §§ 7292(a), (c), (d).

The Federal Circuit typically must confine its review to "relevant questions of law." *See id.* § 7292(d)(1). For example, it may not adjudicate questions of fact in veterans' disability-compensation claims, except as necessary to resolve constitutional questions. *Id.* § 7292(d)(2). It also may not adjudicate a law's or regulation's application to a veterans' disability-compensation claim, except as necessary to resolve constitutional questions. *Id.*

Additionally, of particular relevance here, 38 U.S.C. § 7292 expressly addresses the Federal Circuit's basis for reviewing a statutory provision affecting a veteran's disability-compensation claim: merely to "interpret" it. *Id.* §§ 7292(c), (d)(1). Neither the Constitution nor any federal statute provides the Federal Circuit a basis on which to make, mend, or seek as a policy matter to improve federal veterans' disability-compensation legislation. *See* U.S. Const., art. I, § 1 (granting plenary federal legislative power to Congress); *Pavelic & LeFlore v. Marvel Ent't Group*, 493 U.S. 120, 126, 110 S. Ct. 456, 107 L. Ed. 2d 438 (1989) ("Our task is to apply the text [in that case, of a Federal Rule of Civil Procedure], not to improve upon it."); *see also, e.g.*, *King v. Burwell*, 576 U.S. ___, 135 S. Ct. 2480, 2505, 192 L. Ed. 2d 483 (2015) (Scalia, J., dissenting) ("Congress, not this Court, [is] responsible for both making laws and

mending them. This Court holds only the judicial power—the power to pronounce the law as Congress has enacted it. We lack the prerogative to repair laws that do not work out in practice . . . ."); 38 U.S.C. § 7292 (containing no purported grant to the Federal Circuit of any basis to make, mend, or improve federal legislation). Such legislative action is beyond the Federal Circuit's purview.

Here, making, mending, or seeking as a policy matter to improve federal legislation is precisely what the Federal Circuit has attempted to do in crafting its presumption of competency. Indeed, Congress—to which the Constitution grants this prerogative—has imposed numerous, specific presumptions for veterans' disability-compensation claims. *See, e.g.*, 38 U.S.C. § 1111 (presumption, favoring wartime veterans, that the individual was medically sound when entering into service); *id.* § 1112 (presumption, favoring wartime veterans, that certain specified diseases are service-connected); *id.* § 1116 (presumption, favoring certain Vietnam veterans, that certain specified diseases are service-connected; authorizing the Secretary of Veterans Affairs ("Secretary") to apply the presumption to additional diseases); *id.* § 1117 (presumption, favoring certain Persian Gulf War veterans, that certain specified diseases are service-connected; authorizing the Secretary to apply the presumption to additional diseases); *id.* § 1118 (presumption, favoring veterans, that certain illnesses associated with service in the Persian Gulf during the Persian Gulf War are service-connected); *id.* § 1132 (presumption, favoring peacetime veterans, that the individual was medically sound when entering into service); *id.* § 1133 (presumption, favoring peacetime

veterans, that certain tropical diseases are service-connected); *id.* § 1137 (extending presumptions in § 1111 and § 1112 to "any veteran who served in the active military, naval, or air service after December 31, 1946"); *id.* § 1153 (presumption, favoring veterans, that the worsening of a disease or injury during service was aggravated by service); *cf. id.* § 1154(b) (lowering evidentiary burden for combat veterans to prove service connection); *id.* § 5107(b) ("When 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."). A presumption of competency is not among these statutory presumptions. Nor is *any* presumption that favors the VA over the claimant, which was the effect of the presumption of competency for Mr. Mathis's claim.

The Federal Circuit's presumption of competency did not arise from an "interpretation" of a federal statute. When creating the presumption, the Federal Circuit did not consider any of the statutory presumptions affecting veterans' disability-compensation claims. Indeed, the only federal statute affecting veterans' disability-compensation claims that the Federal Circuit appears materially to have considered is 38 U.S.C. § 5103A, which addresses the VA's duty to assist claimants.[4] No mere

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[4] In *Rizzo v. Shinseki*, 580 F.3d 1288 (C.A.F.C. 2009), in which the Federal Circuit established the presumption of competency, the Federal Circuit "adopt[ed] the reasoning of the Veterans Court in *Cox* [*v. Nicholson*, 20 Vet. App. 563 (2007)]." *Rizzo*, 580 F.3d at 1291. In *Cox*, the United States Court of (continued…)

"interpretation" of § 5103A, however, could support the Federal Circuit's presumption of competency. The statute addresses the *VA's burden to obtain* evidence necessary to substantiate a veteran's disability-compensation claim, not what evidence *is necessary* to substantiate the claim—much less what evidence is necessary to substantiate the claim when a VA medical practitioner has provided an evaluation adverse to the claimant.[5]

In short, this is not a circumstance where the Federal Circuit has sought to interpret an ambiguous Constitutional or statutory provision. Rather, the Federal Circuit has crafted an entirely

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Appeals for Veterans Claims—an Article I court—had held that (i) presuming a medical examiner's competence does not violate the Secretary's duty under 38 U.S.C. § 5103A to make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim by providing a medical examination or obtaining a medical opinion when such an examination or opinion is necessary to make a decision on the claim, and (ii) the examiner may be a registered nurse practitioner instead of a doctor. *See* 20 Vet. App. at 568–69.

[5] Nor could the Federal Circuit's presumption of competency have resulted from the Federal Circuit's review of VA regulations. Although the court appears to have considered several VA regulations when creating the presumption of competency, it did not, pursuant to 38 U.S.C. § 7292, review whether they were lawful. Instead, the Federal Circuit presumed the regulations were lawful and addressed only whether a presumption of competency would be consistent with them. *See Rizzo*, 580 F.3d at 1291 (adopting the reasoning of *Cox*, 20 Vet. App. at 568–69 (concluding that 38 C.F.R. §§ 4.1 and 4.2 do not prohibit a presumption of competency and that 38 C.F.R. § 3.159(a)(1) does not require limiting the presumption to doctors)).

new presumption that would operate in addition to (and at crosscurrents with) the numerous presumptions for veterans' disability-compensation claims that Congress has created. The Federal Circuit lacked any basis for such legislative action.

The Federal Circuit's stated policy goals for its presumption of competency confirm that its imposition of the presumption is legislative in nature, not simply statutory "interpretation." As the Federal Circuit articulated in *Parks v. Shinseki*, the purpose of its presumption of competency is to simplify and shorten the veterans' disability-compensation claims process: "Repeated unnecessary remands for additional evidence complicate many cases and lead to system-wide backlogs and delays. Requiring the Board to present extensive evidence on the competence of a professional presumed to be competent is not only illogical, but adds to those delays." 716 F.3d at 585. To repeat, that policy goal—however laudable—is within the purview of Congress.

Notwithstanding the Federal Circuit's lack of a basis on which to create its presumption of competency, that presumption is only becoming more entrenched in Federal Circuit precedent. In this case, six Federal Circuit judges voted to deny rehearing en banc based on legislative-type policy concerns about *removing* the presumption of competency, now that it is in place, thereby reinforcing the Federal Circuit's departure from its statutorily limited bases for review and increasing the presumption's inertia within the circuit. *See* App. 82 (Hughes, J., concurring in den. of reh'g en banc, joined by Prost, C.J., and Lourie, O'Malley, Taranto, and Chen, J.J.)

("The dissent has provided no guidance as to how the elimination of this limited presumption would work with regard to the millions of disability evaluations that have already been provided and form the basis for the continuing evaluation of the millions of pending claims for benefits. Would the Secretary be required to provide an affidavit or some other supporting evidence of the examiner's competence before the Regional Office or the Board could rely on that examination report? Would the Secretary have to appoint a specialist for each particular ailment a veteran alleges, as Mathis implies would be necessary? If so, that will create an incredible burden and may impair the operations of the VA, a result that will negatively impact veterans."). These judges' reasoning indicates that the Federal Circuit's presumption of competency is becoming increasingly entrenched in the Federal Circuit's precedent, thus calling for this Court's immediate intervention.

In imposing its presumption of competency, the Federal Circuit has exceeded its limited bases for reviewing veterans' disability-compensation claims and usurped Congress's legislative authority. To restore the distribution of power prescribed by the Constitution and Congress, this Court should grant the petition for a writ of certiorari.

B. The Presumption Of Competency Deprives Claimants Of Due Process.

Because the Federal Circuit lacked any basis to impose its presumption of competency, this Court could—and, the FCBA respectfully submits, should—grant the petition and then overturn the presumption on that ground alone. If, however, the Court were to examine the presumption on its

merits, the Court would see that the presumption is untenable for the additional reason that it deprives claimants of Due Process.

When assessing whether a procedure violates the Fifth Amendment's guarantee of Due Process, this Court balances (1) the importance of the interest at stake; (2) the risk of an erroneous deprivation of that interest because of the procedure in question, and the probable value of additional procedural safeguards; and (3) the government's interest. *See Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S. Ct. 893, 47 L. Ed. 2d 18 (1976). Here, all three factors are aligned and show that the presumption of competency violates the Due Process rights of veterans' disability-compensation claimants—particularly *pro se* claimants such as Mr. Mathis.

1. Claimants' Property Interest In Veterans' Disability Compensation

As the Federal Circuit has acknowledged, the Fifth Amendment's Due Process Clause protects a veteran's property interest in her legitimate claim to entitlement to disability compensation. *See Cushman v. Shinseki*, 576 F.3d 1290, 1296–97 (C.A.F.C. 2009) (citing *Town of Castle Rock, Colo. v. Gonzales*, 545 U.S. 748, 756, 125 S. Ct. 2796, 162 L. Ed. 2d 658 (2005); *Atkins v. Parker*, 472 U.S. 115, 128, 105 S. Ct. 2520, 86 L. Ed. 2d 81 (1985); *Mathews*, 424 U.S. at 332; *Richardson v. Perales*, 402 U.S. 389, 401–02, 91 S. Ct. 1420, 28 L. Ed. 2d 842 (1971)).

Because veterans' disability compensation is not granted solely on the basis of need, this Court has remarked that veterans' disability benefits are "more akin to the Social Security benefits involved in

Mathews than they are to the welfare payments" at issue in *Goldberg v. Kelly*, 397 U.S. 254, 90 S. Ct. 1011, 25 L. Ed. 2d 287 (1970). *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 333, 105 S. Ct. 3180, 87 L. Ed. 2d 220 (1985). Stated differently, *Walters* suggests that, for Due Process purposes, a veteran's property interest in VA disability compensation not only exists, but is at least as strong as a Social Security Disability Insurance ("SSDI") beneficiary's property interest in SSDI benefits.

This makes sense. The protections Congress has enacted to guarantee a sympathetic, pro-claimant claim-adjudication process for veterans are at least as strong as the protections for SSDI claimants. *See* 38 U.S.C. § 1101 *et seq.*; *see generally* H.R. Rep. No. 963, 100th Cong., 2d Sess., at 13, reprinted in 1988 U.S. Code Cong. & Admin. News 5782, 5795 ("Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation . . . ."). Veterans' disability compensation not only provides for our nation's disabled workers, it also repays, in some small measure, those who have sacrificed their well-being in service to our nation, to an extent impairing their earning capacity. *See* 38 U.S.C. §§ 1110, 1121; *see also, e.g.*, 38 C.F.R. § 4.1; Abraham Lincoln, 2d Inaugural Address (Mar. 1865) ("To care for him who shall have borne the battle . . . .").

For Due Process purposes, as this Court suggested in *Walters*, a veteran's property interest in VA disability compensation is at least as strong as a SSDI claimant's property interest in SSDI benefits.

The veteran's property interest therefore weighs considerably in favor of requiring procedural protection.

2. High Risk Of Erroneous Deprivation; High Value Of Additional Safeguards

Among the many flaws of the presumption of competency, it increases the risk of erroneous decisions adverse to claimants. This is, in part, because the VA's process for selecting a VA medical health practitioner to evaluate a veteran's disability-compensation claim is insulated from the claimant's review and prone to error.

First, the VA's process is insulated from the claimant's review: for most claims, the VA has total control of the selection process and shares too little information about the selected evaluator to make a meaningful challenge possible. The VA, not the claimant, determines whether a medical evaluation is necessary. *See* Veterans Administration Adjudication Procedural Manual M21-1, Manual Rewrite ("VA Manual M21-1"), § III.iv.3.A.1.a (change date Dec. 12, 2016), *available at* http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/article/554400000015809/M21-1-Part-III-Subpart-iv-Chapter-3-Section-A-Examination-Requests-Overview. When an evaluation is necessary, the VBA, not the claimant, requests one using a VA software tool that forwards the request—depending on the type of evaluation and examination facilities' locations, capabilities, and availability—to a Veterans Health Administration ("VHA") medical facility or a contract examination vendor. *See id.*

§§ III.iv.3.A.1.a, c, e (change date Dec. 12, 2016), § III.iv.3.A.2 (change date Nov. 3, 2016). Unless the claim is on remand from the BVA and the BVA remand order specifies otherwise, "[t]he choice of examiners is up to the VA medical facility conducting the examination." *Id.* § III.iv.3.A.6.d (change date July 30, 2015). Moreover, "VA medical facilities (or the medical examination contractor) are responsible for ensuring that examiners are adequately qualified." *Id.* § III.iv.3.D.2.b (change date Dec. 15, 2016), *available at* http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/article/554400000015812/M21-1-Part-III-Subpart-iv-Chapter-3-Section-D-Examination-Reports. The VA does not identify its evaluator to the claimant before the evaluation. Additionally, the VA has concluded that a claimant possesses "no legal right to be accompanied by counsel during an examination, or [to] record an examination." *Id.* § III.iv.3.A.1.k (change date Dec. 12, 2016), *available at* http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/article/554400000015809/M21-1-Part-III-Subpart-iv-Chapter-3-Section-A-Examination-Requests-Overview. It also now instructs its personnel that "[t]here is a presumption that a selected medical examiner is competent." *See id.* § III.iv.3.D.2.o (change date Dec. 15, 2016), *available at* http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/554400000001018/article/554400000015812/M21-1-Part-III-Subpart-iv-Chapter-3-Section-D-Examination-Reports (citing *Bastien*, 599 F.3d at 1307 (applying the presumption of competency)).

When issuing an evaluation report, the VA requires only minimal information from the evaluator regarding the evaluator's competency: her credentials (e.g., M.D., P.A., or N.P.); her medical license number; and, when "a specialist examination is required or requested, as in traumatic brain injury (TBI) examinations," her specialty. *Id.* § III.iv.3.D.2.b. Evaluation reports typically contain little or no additional information regarding the evaluator's competency. *See* App. 17, 21 (Reyna, J., concurring). Additionally, although a claimant may theoretically raise concerns to the VA about the evaluator's competency, in practice few claimants even receive a copy of the evaluation report during proceedings before the VA. The VA does not notify claimants when it receives medical evaluation reports, and a claimant's evaluation report is typically not available to her during proceedings before the VA—particularly if she is proceeding *pro se*.

Under these circumstances, claimants—particularly those proceeding *pro se*—face an impossible situation. As Judge Reyna observed below:

> Under the presumption, no Board or judicial review of a VA examiner's qualifications occurs unless the veteran makes a specific objection to the examiner's qualifications while the case is before the Board. The veteran is hobbled in making a specific objection because the VA does not by default disclose any information about the examiner's qualifications other than his

> or her credentials, such as "MD." If a veteran asks for an examiner's qualifications, the VA will not provide them unless it is ordered to do so.[6] The Board has at times refused to order the VA to do so because the veteran has not raised a specific objection to the examiner's competence. This creates a catch-22 situation in which the veteran must have grounds to object to an examiner's competence before the veteran can learn the examiner's qualifications.

App. 17 (Reyna, J., concurring).

Not only is the VA's process for selecting a medical health practitioner insulated from the claimant's review, it is also prone to error. Based on the VA's track record in selecting medical evaluators, the risk of the presumption of competency causing

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[6] Although Judge Hughes's opinion concurring in the denial of rehearing en banc disputes that the VA *always* refuses to provide the claimant with the evaluator's qualifications unless ordered to do so, the opinion provides no indication that the VA voluntarily provides this information in many, let alone most, of the million-plus claims it adjudicates each year. *See* App. 81 (Hughes, J., concurring in den. of reh'g en banc). Yet, in determining the risk of an erroneous deprivation of rights under *Mathews*, this Court focuses its analysis on the *majority* of cases, not the few resulting in a best-case outcome. *See, e.g.*, *Fed. Deposit Ins. Corp. v. Mallen*, 486 U.S. 230, 244–45, 108 S. Ct. 1780, 100 L. Ed. 2d 265 (1988) (determining risk of erroneous deprivation of rights based on the situation "in most cases").

erroneous deprivations to claimants is substantial. In June 2016, the VA admitted that a review of the medical health practitioners selected to provide evaluations between 2007 and 2015 regarding one common type of claim—traumatic brain injury—revealed that more than 24,000 claimants received examinations from unqualified practitioners. App. 90 n.5 (Reyna, J., dissenting from den. of reh'g en banc) (citing VA, *VA Secretary Provides Relief for Veterans with Traumatic Brain Injuries* (June 1, 2016), http://www.va.gov/opa/pressrel/pressrelease.cfm?id=2795 [hereinafter VA, *VA Secretary Provides Relief*]). This result is alarming, particularly since, in 2007, the VA implemented an express policy "requiring that one of four specialists—a psychiatrist, physiatrist, neurosurgeon or neurologist—complete TBI [traumatic brain injury] exam[ination]s when VA does not have a prior diagnosis." VA, *VA Secretary Provides Relief*; *see also* VA Manual M21-1 § III.iv.3.D.2.j (change date Dec. 15, 2016), *available at* http://www.knowva.ebenefits.va.gov/system/templates/selfservice/va_ss/#!portal/55440000000101 8/article/554400000015812/M21-1-Part-III-Subpart-iv-Chapter-3-Section-D-Examination-Reports. The VA also requires TBI evaluators to indicate their medical specialty in their reports. *See* VA Manual M21-1 § III.iv.3.D.2.b ("The specialty of the exam provider must be indicated, if a specialist examination is required or requested, as in traumatic brain injury (TBI) examinations."). Notwithstanding these clear imperatives, the VA still selected unqualified TBI evaluators for more than 24,000 claimants. *See* App. 90 n.5 (Reyna, J., dissenting from den. of reh'g en banc). It is difficult to imagine that the VA has a better track record with respect to claims for which, as here, its selection

protocol is less clear or does not require evaluators to provide their credentials with as much specificity.

The significant chance that the VA will select unqualified evaluators—increased by the presumption of competency—creates a risk of widespread and serious harm to veterans. As the VA conceded below, "[t]he provision of medical examinations and opinions is part of VA's central mission," and "[a]s part of its duty to assist, VA provides over a million disability evaluations yearly." Respondent-Appellee's Resp. to Pet. for Reh'g En Banc, at 8, ECF 72, *Mathis v. McDonald*, No. 15-7094 (C.A.F.C. June 23, 2016). The potential consequences of using unqualified evaluators, moreover, are serious: "Because of the immense importance of medical evidence in the VA claims process," medical examinations and opinions "can bear significantly upon the outcome of the claim for VA benefits." *Washington v. Nicholson*, 21 Vet. App. 191, 197 (2007) (Hagel, J., concurring); *see also* App. 91 (Reyna, J., dissenting from den. of reh'g en banc) ("A veteran's claim to disability benefits often will rise or fall based on whether the Board believes an examiner's testimony." (citing *Gambill v. Shinseki*, 576 F.3d 1307, 1322–23 (C.A.F.C. 2009) (Bryson, J., concurring))). Whether a claimant is awarded benefits or wrongfully denied benefits can have enormous consequences for his well-being, particularly since, for many veterans, veterans' disability compensation is a substantial or their sole source of income. *See, e.g.*, Barton F. Stichman et al., *Veterans Benefits Manual* § 1.1.2, at 8 (2016 ed.) (observing that "[m]ost VA claimants are not wealthy" and that the availability of VA benefits "makes a big difference in the[ir] quality of life").

Removing the presumption of competency would provide additional procedural safeguards to ensure a fair disability evaluation process. It would afford claimants a meaningful opportunity to challenge the competence of VA medical evaluators and would give the VA a meaningful opportunity to review its evaluators' qualifications. As Judge Reyna reasoned, "[R]emoving the presumption would result in an administrative record upon which the Board could properly review an examiner's qualifications when weighing the persuasiveness of her reports. In addition, having an examiner's CV would permit a veteran to determine whether or not to challenge the examiner's competence." App. 99 (Reyna, J., dissenting from den. of reh'g en banc). In light of the high incidence of the VA's selecting unqualified evaluators, these greater opportunities for the VA and claimants to review VA evaluators' qualifications would have significant value in ensuring that evaluations are conducted by those who are qualified to perform them. Qualified examiners, in turn, are more likely to provide accurate opinions, which would protect veterans from being wrongfully denied compensation for meritorious claims. App. 32 (Reyna, J., concurring).

3. The Government's Interest Weighs Against The Presumption Of Competency.

The presumption of competency undermines critical public-policy goals, while—at best—reducing the burden on the VA only marginally. As the petition addresses in detail, the presumption of competency subverts Congress's express public-policy goals for the VA disability-compensation system: that it be non-adversarial and sympathetic to

claimants. *See* Pet. at 11–16. Additionally, the government has an interest in the veterans' disability-compensation system producing accurate and reliable results—awarding compensation for meritorious claims—yet the presumption of competency hamstrings veterans' and the VA's ability to ensure that evaluators are qualified to render their opinions. *See* App. 43 (Reyna, J., concurring).

Not only does the presumption of competency undermine critical public-policy goals, it also—at best—only minimally reduces the burden on the VA. Providing information sufficient to establish an examiner's competence would not be difficult or costly. "The VA . . . has already promulgated a clear standard for the VA and the Board to apply when deciding whether a medical examiner is competent . . . ." App. 97 (Reyna, J., dissenting from den. of reh'g en banc). It currently applies that standard "when it reviews the credentials of private physicians providing opinions and examinations on behalf of veterans, for whom there is no presumption [of competency]." App. 98 (Reyna, J., dissenting from den. of reh'g en banc). The burden on the VA to demonstrate its evaluators' competence would be minimal: "The VA could meet this requirement by attaching an examiner's curriculum vitae (CV) to her report, and, if necessary, having her state in her report why she is qualified." App. 18 (Reyna, J., concurring). A VA medical evaluator could reuse her CV; she would not need to create a new document from scratch for every claim. Similarly, an evaluator could reuse a statement describing why she is qualified to opine on a particular type of medical issue. App. 30–31 (Reyna, J., concurring).

Since the presumption of competency undercuts important public-policy goals and—at best—only minimally reduces the burden on the VA, the government's interest weighs against the presumption. Thus, all three of the factors articulated in *Mathews* are aligned and indicate that the presumption of competency violates claimants' Due Process rights. The FCBA respectfully requests that the Court grant the petition so that it may correct this serious injury.

CONCLUSION

For the foregoing reasons, as well as the reasons set forth in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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