No. 24-____

IN THE
Supreme Court of the United States

LOUIS FRANTZIS,
Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

"The fundamental requirement of due process is the opportunity to be heard 'at a meaningful time and in a meaningful manner.'" *Mathews* v. *Eldridge*, 424 U.S. 319, 333 (1976). Therefore, where Congress has conditioned the grant of benefits on "an assessment of the recipient's credibility," Congress also generally requires the agency to conduct a hearing that permits "personal contact between the recipient and the person who decides his case." *Califano* v. *Yamasaki*, 442 U.S. 682 (1979). "The one who decides must hear." *Morgan* v. *United States*, 298 U.S. 468, 481 (1936).

Federal law has long granted veterans the right to an administrative hearing regarding a benefits claim. *See, e.g.*, 38 U.S.C. § 4002 (1958); 38 U.S.C. § 7113(b). Veterans who exercise that right can speak directly to a member of the Board of Veterans Appeals. *See* 38 U.S.C. § 7107(c). The credibility determinations that the Board makes based on hearing testimony are final; they cannot be disputed in later proceedings before the Court of Veterans Appeals or in the Federal Circuit. *See* 38 U.S.C. §§ 7261(a)(4), 7292(a).

The question presented is whether, at least where the Board's denial of a veteran's claim is grounded in a credibility determination, the governing federal statutes or the Due Process Clause require that the Board member who conducts the hearing must be the same Board member who makes a credibility determination regarding the veteran's testimony.

PARTIES TO THE PROCEEDING

All parties are named in the caption.

Petitioner Louis Frantzis was the appellant in both the U.S. Court of Appeals for Veterans Claims and the U.S. Court of Appeals for the Federal Circuit.

Respondent Secretary of Veterans Affairs Denis McDonough was the appellee in the Veterans Court and in the Federal Circuit. McDonough is being sued in his official capacity only.

CORPORATE DISCLOSURE STATEMENT

This proceeding does not involve any nongovernmental corporations.

RELATED PROCEEDINGS

This petition arises from the following proceedings:

- *Frantzis* v. *McDonough*, No. 2022-2210 (Fed. Cir. June 4, 2024);
- *Frantzis* v. *McDonough*, No. 20-5236 (Vet. App. June 21, 2022).

Counsel is not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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PETITION FOR A WRIT OF CERTIORARI

Louis Frantzis respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS AND ORDERS BELOW

The Federal Circuit's opinion is available at 104 F.4th 262 and is reproduced at App. 1a-6a. The order of the Veterans Court denying full court review, and the accompanying dissenting opinion, is not reported but is available at 2022 WL 2980978 and is reproduced at App. 65a-67a. The opinion of the Veterans Court is reported at 35 Vet. App. 354 and is reproduced at App. 7a-64a. Finally, the opinion of the Board

of Veterans' Appeals is unreported and is reproduced at App. 65a-67a.

JURISDICTION

The Federal Circuit entered judgment on June 4, 2024. On August 27, 2024, the Chief Justice extended the deadline to file this petition for a writ of certiorari to and including October 18, 2024. This Court's jurisdiction is invoked under 28 U.S.C. § 12454(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant provisions are set out in the addendum to this petition.

INTRODUCTION

Throughout our Nation's history, Congress has provided generous benefits for those who serve our country in uniform. Today, those benefits are awarded through an administrative process that includes three potential layers of review for *legal* error. But there is only one chance to get the *facts* right.

A veteran who files a claim at a regional office of the Department of Veterans Affairs and is denied benefits can seek de novo review at the Board of Veterans' Appeals. *See* 38 U.S.C. § 7104(a). At the Board, the veteran is entitled to a hearing in which the veteran can present live testimony to the Board regarding the veteran's claim. *Id.* § 7107. The Board will then issue findings of fact and conclusions of law. *Id.* § 7104(d). When it comes to credibility determinations made on the basis of hearing testimony, the Board's determination is final. *See* 38 U.S.C. § 7261(a)(4); *id.* § 7292(a). Although Congress has provided for review of the Board's *legal* errors at the Court of Appeals for

Veterans Claims and the Federal Circuit, these courts lack the power to revisit certain *factual* errors, including the Board's credibility determinations. *Id*.

Recently, the Board has adopted a decision-making process through which *one Board member* receives testimony at a Board hearing and *a different Board member* makes the resulting factual findings. That is what happened to Petitioner Louis Frantzis. Frantzis is a veteran who served honorably in the United States Army. He sought benefits for a head injury he sustained during his service. However, the Board denied Frantzis the full scope of benefits that he requested. That denial was grounded in a credibility determination; the Board concluded that the documentary evidence contradicted and outweighed the oral testimony that Frantzis and his wife had provided at his hearing. Yet, the Board member who made that credibility determination was not the same Board member who received the Frantzises' testimony. Worse, because the applicable statutes require the Veterans Court and the Federal Circuit to defer to the Board's credibility determinations, Frantzis was unable to challenge that determination.

Frantzis's case broke new ground for the Board. The Veterans Court had previously held "that the pertinent statutes * * * regarding Board hearings entitle a claimant to an opportunity for a hearing before all the Board members who will ultimately decide his appeal." *Arneson* v. *Shinseki*, 24 Vet.App. 379, 386 (2011); *see also id*. (vacating the Board's decision because one member of the three Board member panel had not participated in a Board hearing with the claimant). But, based on changes to the statutory scheme that Congress made in 2017, the Veterans

Court reevaluated that precedent and concluded that "nothing in the statutory provisions * * * requires that the Board member who conducts a hearing must also decide the appeal." *Frantzis* v. *McDonough*, 35 Vet. App. 354, 365 (2022), aff'd, 104 F.4th 262 (Fed. Cir. 2024). The *Frantzis* decision divided the Veterans Court, with multiple judges—including the Chief Judge—arguing that swapping decisionmakers between the hearing and the decision violates the due process rights of the veterans. However, the Board has taken full advantage of the Veterans Court's reversal, and of the Federal Circuit's endorsement of that ruling. The Board has now decided roughly 700 cases in which it has cited the *Frantzis* decision for the proposition that the Board can swap decisionmakers at any time.

The Federal Circuit gravely erred in blessing the Board's new practice of switching decisionmakers. Congress has directed that, once a "proceeding" is "assign[ed]" to an individual Board member or a panel of Board members, that individual or panel must "make a determination thereon." 38 U.S.C. § 7102(a). The ordinary meaning of "proceeding," when used in the administrative law context, encompasses any hearing conducted as part of the proceeding. *See Administrative Proceeding*, BLACK'S LAW DICTIONARY 48 (11th ed. 2019) ("A *hearing*, inquiry, investigation, or trial before an administrative agency.") (emphasis added). The statutory scheme and the veterans canon reinforce this reading.

The Federal Circuit's reading of the relevant statutes is also impossible to reconcile with the commands of the Due Process Clause. "[W]hen [the government] opts to act in a field where its action has significant

discretionary elements, it must nonetheless act in accord with the dictates of the Constitution—and, in particular, in accord with the Due Process Clause." *Evitts* v. *Lucey*, 469 U.S. 387, 401 (1985). And one fundamental requirement of the Due Process Clause is that "[t]he one who decides must hear." *Morgan* v. *United States*, 298 U.S. 468, 481 (1936). Where "the weight ascribed by the law to the findings" made after a hearing are "conclusive[]," "the officer who makes the findings" must have "addressed *himself* to the evidence." *Id.* (emphasis added). "It is not an impersonal obligation." *Id.*

This Court should grant review to correct the decision below. The question presented is important. The veteran's right to a hearing before the Board is meaningless without a corresponding right to be heard by the Board member who will make credibility determinations. The question presented is also recurring; relying on the Veterans Court and the Federal Circuit's approval of the swap in Frantzis's case, the Board has swapped decisionmakers in hundreds of subsequent proceedings, denying veterans fair consideration of their hearing testimony. And this case presents a good vehicle. The outcome of Frantzis's claim turned on a credibility determination.

This Court should grant the petition and reverse.

STATEMENT

Louis Frantzis is a veteran who served honorably in the United States Army. Frantzis sought service connection for headaches caused by a injury he sustained during service. The Department of Veterans Affairs initially denied his claims. However, Frantzis ultimately secured a hearing from the Board of Veterans' Appeals. Frantzis and his wife both testified at the

hearing. One Board Member conducted the hearing. A different Board Member issued the resulting decision, which denied Frantzis's request based on a credibility determination. Frantzis appealed. The Veterans Court held, over a lengthy dissent, that the Board member conducting a claimant's Board hearing need not be the Board member who ultimately decides the appeal. The Veterans Court denied full court review, again over a dissent. The Federal Circuit affirmed.

1. **Overview of the Veterans Benefits Process**. Since Congress first established it in 1930, VA has administered the federal program that provides benefits to veterans. *Walters* v. *Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Under this program, veterans or their dependents can submit a claim for "any benefit under the laws administered by the Secretary." 38 U.S.C. § 5100; *see id.* § 101(13)-(15). These benefits include medical assistance, education benefits, pensions, and compensation for veterans with disabilities linked to their military service—that is, "service-connected" disabilities. *Walters*, 473 U.S. at 309; *Henderson* v. *Shinseki*, 562 U.S. 428, 431 (2011).

"[I]n order for benefits to be paid or furnished," a veteran must file a claim with the Department of Veterans Affairs. 38 U.S.C. § 5101(a)(1)(A). A regional VA office will then make a decision about the claim. 38 U.S.C. §§ 511, 510. This initial process is "designed to function * * * with a high degree of informality and solicitude for the claimant." *Henderson*, 562 U.S. at 431 (quoting *Walters*, 473 U.S. at 311). VA is required to "assist veterans" in substantiating their claims and "must give veterans the 'benefit of the doubt' whenever * * * evidence on a material issue is roughly equal." *Id.* at 431-432.

"[I]f a veteran is dissatisfied with the regional office's decision, the veteran may obtain *de novo* review by" the Board of Veterans' Appeals. *Id.* at 431. The Board is the entity within the VA that makes the agency's final decision in cases appealed to it. *See* 38 U.S.C. 7101 (2018 & Supp. II 2020); 38 U.S.C. 7104(a). The process before the Board differs from the process before the regional VA office in that it is more adversarial; once a claim reaches the Board, the VA no longer has a duty to assist the veteran-claimant. *See* 38 U.S.C. § 5103A(e). Although the veteran proceeds at this point without the VAs help, the veteran does have a right to a hearing before the Board makes its findings of fact and conclusions of law on the veteran's claim. *Id.* § 7102(a); 7107(c); 7104(d). The Board can (and usually does) assign both its hearing responsibilities and its decision-making authority to a subset of its members. 38 U.S.C. § 7102(a). Either an individual Board member or a panel of three Board members may conduct a hearing and issue a decision. *Id*.

If the veteran thinks the Board has erred in its construction of the relevant law, he can appeal to the Court of Appeals for Veterans Claims, an Article I tribunal. 38 U.S.C. § 511(b)(4). The Veterans Court has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals." 38 U.S.C. § 7252(a). But Congress has limited the Veterans Court's review to "the record of proceedings before the Secretary and the Board," 38 U.S.C. § 7252(a), (b), and the Veterans Court cannot revisit the Board's credibility determinations, 38 U.S.C. § 7261(a)(4); *see also Jones* v. *Derwinski*, 1 Vet.App. 210, 217 (1991). Moreover, the VA further distances itself from the veteran-claimant at this stage, turning from aiding veterans in

establishing their claims to defending the denial of benefits. *See* Pub. L. No. 100-687, § 301(a), 102 Stat., at 4116.

The Veterans Court's decisions are reviewable, in turn, by the Federal Circuit. 38 U.S.C. § 7292. But the Federal Circuit's review is even more limited. The Federal Circuit may not consider "a determination as to a factual matter" at all; it can consider only "the validity of a decision of the Court on a rule of law or of any statute or regulation * * * that was relied on by the [Veterans] Court in making the decision." *Id*. § 7292(a). The Federal Circuit's jurisdiction is exclusive. *Id.* at § 7292(c). At this stage, too, the VA is an adversary—not a supporter—of the veteran. *See* Pub. L. No. 100-687, § 301(a), 102 Stat., at 4116.

2. **Recent changes to the Board's Adjudicatory Process.** In 2017, Congress enacted and the President signed into law the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"), Pub. L. No. 115–55, 131 Stat. 1105. The AMA changed the VA administrative appeals system. Under the previous system, veteran disability claimants had only one pathway to administrative review of an unsatisfactory initial decision on their disability claim.

Pursuit of benefits through the previous system took years, largely because it "permitted claimants to submit new evidence at virtually any time prior to a final Board decision." *Mil.-Veterans Advoc.* v. *Sec'y of Veterans Affs.*, 7 F.4th 1110, 1118 (Fed. Cir. 2021). "The VA, moreover, had a statutory duty to assist the claimant in obtaining evidence in support of the appeal throughout the entire appeals process." *Id*. Because of these features, "nearly half of the appeals

before the Board resulted in a remand * * * for additional development and readjudication." *Id*.

As relevant here, the AMA sought to speed up review by introducing several statutory reforms to the Board's process. These amendments "reflect Congress's goal of streamlining the administrative appeals system while still protecting claimants' due process rights." *Id.* at 1119.

Under the AMA, when appealing to the Board, claimants must now choose one of three Board dockets: "direct review" docket; "additional evidence" docket; or "hearing" docket. 38 U.S.C. § 7105(b)(3); *see Andrews* v. *McDonough*, 34 Vet.App. 151, 157 (2021). "[T]he choice of docket impacts the record that the Board may consider when adjudicating a claim." *Andrews*, 34 Vet.App. at 157. Where the veteran-claimant elects the Direct Review docket, the Board reviews the appeal without additional evidence, considering only the evidence that was available at the time of the VA's initial decision. 38 U.S.C. § 7113(a); *see* 38 C.F.R. § 20.301. Where the veteran-claimant elects the Additional Evidence docket, the Board considers any additional evidence the veteran-claimant chooses to provide. 38 U.S.C. § 7113(c); *see* 38 C.F.R. § 20.303. And where the veteran-claimant elects the Hearing docket, the Board considers the same evidence that it may consider on the additional evidence docket, along with any testimony made at the hearing. 38 U.S.C. § 7113(b); *see* 38 C.F.R. § 20.302.

In conducting this statutory overhaul in the AMA, Congress rewrote significant chunks of the veterans benefits statutes. In one such change, Congress replaced Section 7107 with entirely new text. That section had previously included one provision explicitly

requiring the Board to offer the veteran a hearing, and another provision explicitly requiring that the Board member who conducted the hearing must participate in the final determination of the claim. *See* 38 U.S.C. § 7107(b) (1994) ("The Board shall decide any appeal only after affording the appellant and opportunity for a hearing."); § 7107(c) (1994) ("Such member or members designated by the Chairman to conduct the hearing shall * * * participate in making the final determination of the claim."). The revised Section 7107 does not include these provisions. In enacting the AMA, Congress did not, however, disturb Section 7102, which provides that "[a] proceeding instituted before the Board may be assigned to an individual member of the Board or to a panel of not less than three members of the Board," who "shall make a determination thereon, including any motion filed in connection therewith." *Id.* § 7102(a).

3. **Veterans Administration Proceedings.** In 2009, Frantzis filed a disability claim with the VA. Frantzis had been injured while in active service when another soldier kicked him in the chest, lifting him up in the air. App. 9a-10a. When Frantzis landed, his head crashed onto a concrete slab, and he woke up in a hospital on base with a concussion. The VA granted Frantzis service connection for his headaches, but with a noncompensable rating.[1] *Id.* at 10a.

[1] The VA initially denied Frantzis's claim based on the lack of service treatment records. App. 9a. Frantzis appealed and requested a Board hearing. The Board granted Frantzis a hearing in 2013. *Id.* Frantzis testified at that hearing, which resulted in a remand for further factual development. *Id.* at 10a. It was after this factual development that the VA granted service connection. *Id.* These events took place prior to the AMA's 2017 reforms. In 2018, Frantzis's claim migrated into the AMA's new process. *Id.*

Frantzis appealed, seeking an increased rating and an earlier effective date for his service-connected injury. He also requested a hearing. *Id.*

In 2019, Board Member James Reinhart heard Frantzis's administrative appeal. *Id.* at 10a-11a. Frantzis and his wife both testified regarding the experience and effects of Frantzis's headaches. *Id.* Board Member Reinhart guided the Frantzises' testimony—asking questions and offering explanations of terms of art. For example, Board member Reinhart explained to the Frantzises that in deciding the veteran's case, the Board would consider only the symptoms the veteran experienced during the timeframe covered by the disputed rating decisions, not his current symptoms. *Id.* at 31a-32a. Board member Reinhart also explained to the Frantzises that "prostrating headaches," from the VA's perspective, are "very frequent, and they cause economic problems." *Id.* Board member Reinhart elicited testimony from the Frantzises that Mr. Frantzis had been experienced prostrating headaches, at least once a week, since 1986. *Id.* at 31a-32a.

Board Member Theresa Catino issued the resulting denial of Frantzis's requests for an increased rating and an earlier effective date for his service-connected injury. *Id.* at 11a. Despite the fact that a different Board Member had presided over the hearing, Board Member Catino grounded her denial of Frantzis's requests in a credibility determination. Board Member Catino purported to assess the hearing testimony and concluded that it was inconsistent with treatment records and other documentary evidence. *Id*. In particular, Board Member Catino acknowledged the testimony that "the severity of [appellant's] headaches [have] been characteristic of prostrating attacks," but

found that other, nontestimonial evidence contradicted the live testimony. *Id.* Board Member Catino believed that Frantzis's treatment records "indicated that his headaches were of less severity" than Frantzis's live testimony suggested. *Id*. (internal quotation marks omitted).

4. **Veterans Court Proceedings.** Mr. Frantzis appealed to the Veterans Court, arguing that the same Board member who conducts a hearing must also issue the resulting decision. A divided panel of that court rejected that argument, and affirmed the Board's decision.

The majority's decision relied on Congress's revision of Section 7107. App. at 17a. The majority noted that, prior to the AMA, there was an explicit statutory requirement that the Board member who conducted the hearing must participate in the final determination of the claim. *See* 38 U.S.C. § 7107(c) (1994). The AMA amended 38 U.S.C. § 7107(c) and removed that language. AMA § 2(t), 131 Stat. at 1112–13; *see also* 38 U.S.C. § 7107(c) (2017). The majority reasoned that "Congress's removal of the statutory language [at Section 7107(c)] is a significant indication of its intent to no longer maintain such a requirement under the AMA." App. 18a. The majority also rejected Frantzis's "conten[tion] that section 7102 contains such a requirement." *Id.* at 19a.

Finally, the majority declined to consider Frantzis's arguments grounded in the fair process doctrine. *Id.* at 24a-25a. The court had issued an order, prior to oral argument, directing the parties to address whether Frantzis had been denied fair process when the Board switched decisionmakers. The court, however, "decline[d] to consider" the parties' fair process

arguments, explaining that "[c]ourts generally should not advance arguments for represented parties." *Id.* at 25a.

Judge Jaquith penned a lengthy dissent. There, he argued that "[n]otwithstanding the majority's disregard for it, section 7102's actual words support" Frantzis's position. *Id.* at 42a. Judge Jaquith also argued that several tiebreakers supported application of the same-judge requirement, including the "pro-veteran canon" and "[v]eterans' entitlement to fair process in the adjudication of their claims." *Id.* at 45a, 63a. With respect to fair process, Judge Jaquith also noted that, while he "share[d] the majority's concern over the timing and thoroughness of the arguments on the veteran's behalf," he found "waiver of the veteran's right to fair process to be too harsh a sanction," especially in light of the repeated references to fairness in the veterans' submissions. *Id.* at 58a-59a.

Mr. Frantzis then sought full court review. The Veterans Court denied that request. *Id.* at 65a.

Dissenting from the denial of full court review, Chief Judge Bartley, joined by Judge Jaquith, "express[ed] profound disagreement with the Court's denial of en banc review." *Id.* at 66a. She explained her view that "the right to a full and fair hearing before the individual who will decide your case" is "not purely statutory, but is also grounded in constitutional due process and basic tenets of fair play that permeate and undergird nearly every aspect of VA's nonadversarial benefits system." *Id.* She also noted her disagreement with the waiver ruling, explaining that she saw "no principled reason to delay consideration of this exceptionally important question and in the interim allow veterans at

the Board to be deprived of their right to fair process." *Id.* at 66a-67a.

5. **The Federal Circuit's Decision.** Mr. Frantzis appealed to the Federal Circuit. The Federal Circuit affirmed. The Federal Circuit's decision mirrored the Veterans Court decision. It concluded that "[t]he express language for the same member requirement no longer exists" at Section 7107(c), and concluded that Section 7102(a) could not stand in its place because "[t]he language of § 7102 remained the same before and after enactment of the AMA." App. 4a. And "[t]o the extent Mr. Frantzis argues the fair process doctrine creates a procedural right," the Federal Circuit concluded that "the argument was not presented below and is thus forfeited." *Id.* at 6a.

REASONS FOR GRANTING THE PETITION

I. THE PLAIN TEXT OF THE VETERANS' BENEFITS STATUTES INCLUDES THE SAME MEMBER REQUIREMENT.

The Federal Circuit's rule is impossible to square with the plain language of the veterans' statutes. The text of Section 7102(a) unambiguously indicates that the obligation to make a determination in an assigned proceeding includes the obligation to conduct the hearing in the case.

A. Section 7102(a) Requires The Same Board Member Who Hears A Case To Find The Facts In The Case.

1. Congress directed that, once a "proceeding" is "assigned to an individual Board member or a panel of Board members, that individual or panel must "make a determination thereon." 38 U.S.C. § 7102(a).

The ordinary meaning of "proceeding," when used in the administrative law context, encompasses any hearing conducted as part of the proceeding. *See Administrative Proceeding*, BLACK'S LAW DICTIONARY 48 (11th ed. 2019) ("A *hearing*, inquiry, investigation, or trial before an administrative agency, usu. Adjudicatory in nature but sometimes quasi-legislative.")(emphasis added); *Administrative Hearing*, *id.* ("An administrative-agency *proceeding* in which evidence is offered for argument or trial.") (emphasis added). Thus, for example, "[a] number of lower courts have concluded that * * * 'hearing' is roughly synonymous with 'proceeding.' " *Graham Cnty. Soil & Water Conservation Dist.* v. *U.S. ex rel. Wilson*, 559 U.S. 280, 290, n.8 (2010).

Because the term "proceeding" encompasses any "hearing" conducted in conjunction with that proceeding, Congress's direction that a Board "member or panel assigned a proceeding" must "make a determination thereon" also encompasses a direction that the Board member or panel assigned a proceeding must conduct the hearing in that proceeding.

2. Moreover, by noting that "a proceeding * * * includ[es] any motion," Congress further underscored that the term "proceeding" sweeps in any smaller constituent parts of the proceeding. 38 U.S.C. § 7102(a).

Where, as here, Congress names only one specific example, "includes" does not indicate that the general term includes *only* those items that are similar to the named example. Instead, "includes" suggests that the general term encompasses a specific item that might otherwise be overlooked. *See Helvering* v. *Morgan's, Inc.*, 293 U.S. 121, 125 n.1 (1934) (" '[I]ncludes' imports a general class, some of whose particular

instances are those specified in the definition."). For example, Congress used this construction when it provided that " 'State' includes the District of Columbia," 3 U.S.C. § 21(a), " 'recreational purposes' includes hunting," 7 U.S.C. § 1997(a)(4), and " 'burial' includes inurnment," 10 U.S.C. § 985(c). In each of these examples, Congress used "includes" to suggest that the general term is broader than the reader might ordinarily assume.

That is exactly the construction that Congress employed here. When Congress mandated that the "member or panel assigned a proceeding shall make a determination thereon, *including any motion filed in connection therewith*," Congress explicitly prohibited the practice of breaking off a smaller piece of a case, and assigning that piece to a different Board member or panel. 38 U.S.C. § 7102(a) (emphasis added). Instead, Congress required that the Board member or panel assigned to a "proceeding" must "make a determination" *both* with respect to the proceeding as a whole, *and* with respect to any smaller parts of the proceeding, even those parts that could be separated from the proceeding, such as a "motion." *Id*.

Thus, in specifying that the Board member or panel assigned to a "proceeding" must "make a determination" *both* with respect to the proceeding as a whole, *and* with respect to any smaller parts of the proceeding, Congress necessarily specified that the Board member or panel who decides the case must be the same Board member or panel who conducts the hearing.

B. The Statutory Scheme Confirms That The Same-Member Requirement Applies.

The statutory scheme confirms that the best reading of Section 7102(a) is a reading that includes the same member requirement. In the AMA, Congress crafted a statutory scheme in which the hearing is something more than an opportunity to provide the Board with additional evidence.

Under the AMA, when appealing to the Board, claimants must choose one of three Board dockets—"direct review" docket; "additional evidence" docket; or "hearing" docket—and "the choice of docket impacts the record that the Board may consider when adjudicating a claim." *Andrews*, 34 Vet.App. at 157. In this statutory scheme, the only substantive difference between the Additional Evidence docket and the Hearing Docket is the opportunity to provide live testimony. If the claimant merely wished to submit written testimony to the Board—in the form of a transcript of oral testimony given elsewhere, or even in a heart-felt letter—the veteran-claimant could select the Additional Evidence Docket.

The Hearing Docket must, therefore, be understood to do *something more* than provide the decisionmaker with a transcript of the veteran-claimant's testimony. Otherwise the Hearing docket would duplicate the Additional Evidence docket. S*ee City of Chicago* v. *Fulton*, 592 U.S. 154, 159 (2021) ("The canon against surplusage is strongest when an interpretation would render superfluous another part of the same statutory scheme."). The *something more* that the Hearing Docket does is grant the veteran-claimant the opportunity to speak directly to the decisionmaker.

C. The Veterans Canon Confirms That The Same-Member Requirement Applies.

The well-established principle that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor" also counsels in favor of reading Section 7102(a) to require the Board member who conducts the hearing to also make any necessary credibility determinations. *Henderson*, 562 U.S. at 441. This Court has applied the pro-veteran canon when, as here, the Court is faced with a statute designed to protect veterans from procedural barriers to the receipt of benefits. *See, e.g.*, *id.* (applying canon to reject "[r]igid jurisdictional treatment" of appeal deadline).

II. THE CANON OF CONSTITUTIONAL AVOIDANCE COMPELS FRANTZIS'S READING.

The canon of constitutional avoidance also strongly suggests that the best reading of Section 7102(a) includes the same-member requirement. Under this rule, courts should "shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems." *Jennings* v. *Rodriguez*, 583 U.S. 281, 286 (2018). As Chief Judge Bartley noted in her dissent, "the right to a full and fair hearing before the individual who will decide your case" is "not purely statutory, but is also grounded in constitutional due process and basic tenets of fair play." App. at 66a. Because the only construction of Section 7102(a) that avoids constitutional doubts is a construction that requires the Board member who conducts the hearing to make credibility determinations, the court is obliged to adopt that construction.

A. The Board's New Practice Of Switching Decisionmakers Between The Hearing And The Decision Presumptively Violates The Due Process Clause.

Some elements of the adjudicatory process are so central to fair adjudication that their absence violates the Due Process Clause without the need for any further balancing of costs and benefits. These "basic procedural protections of the common law," which the Court can identify by reference to "traditional practice," are "so fundamental" that their "abrogation * * * raises a presumption" of a due process violation. *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 430 (1994). This is one of them. Where credibility determinations made based on live testimony are dispositive, the official who conducts the hearing must make any necessary credibility determinations in the first instance.

1. Our legal tradition includes a deep-rooted belief in the value of live testimony to the factfinder. "More than 100 years ago, Lord Coleridge stated the view of the Privy Council that a retrial should not be conducted by reading the notes of the witnesses' prior testimony," because " '[t]he most careful note must often fail to convey the evidence fully in some of its most important elements,' " such as "the look or manner of the witness: his hesitation, his doubts, his variations of language, his confidence or precipitancy, his calmness or consideration.' " *United States* v. *Raddatz*, 447 U.S. 667, 679, (1980) (quoting *Queen* v. *Bertrand*, 4 Moo. P.C.N.S. 460, 481, 16 Eng. Rep. 391, 399 (1867).

Even in the administrative context, this Court's earliest cases emphasized that "[t]he one who decides must hear," such that where Congress has delegated a particular task to "a department in the

administrative sense," Congress does not intend "that one official may examine evidence, and another official who has not considered the evidence may make the findings and order." *Morgan* v. *United States*, 298 U.S. 468, 481 (1936). Instead, the "conclusiveness" and "weight ascribed by the law to the findings * * * rests upon the assumption that the officer who makes the findings has addressed himself to the evidence." *Id*. "It is not an impersonal obligation." *Id*. And although "[t]his necessary rule does not preclude practicable administrative procedure in obtaining the aid of assistants in the department"—for example, "[e]vidence may be taken by an examiner" and "may be sifted and analyzed by competent subordinates"—"there must be a hearing in a substantial sense," and to give a hearing "substance," "the officer who makes the determinations must consider and appraise the evidence which justifies them." *Id*. at 481-482.

2. These principles have animated a series of this Court's decisions, which hold that a decisionmaker's evaluation of live testimony—as opposed to written submissions—is necessary where credibility is at issue.

For example, in *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), this Court held that Social Security recipients, seeking waivers to avoid recoupment of overpaid benefits, were entitled to an opportunity to appear in person to show they were not at fault in getting the overpayment, because "written review hardly seems sufficient to discharge the Secretary's statutory duty to make an accurate determination." *Id.*, at 696. The Court explained that, because the statute "require[d] an assessment of the recipient's credibility," the statute called for "personal contact between the recipient

and the person who decides his case." *Id*. at 697. "[W]ritten submissions are a particularly inappropriate way to distinguish a genuine hard luck story from a fabricated tall tale." *Id.*[2]

This Court also expressed reservations about written submissions in in *Goldberg* v. *Kelly*, 397 U.S. 254 (1970), disapproving a "paper review" rather than an oral hearing prior to termination of welfare benefits, in spite of the fact in that case that a full evidentiary hearing and judicial review would be available later. The Court offered two reasons for that conclusion, first pointing out that "[w]ritten submissions are an unrealistic option for most recipients, who lack the educational attainment necessary to write effectively and who cannot obtain professional assistance," and second, noting that "written submissions do not afford the flexibility of oral presentations; they do not permit the recipient to mold his argument to the issues the decision maker appears to regard as important." *Id.* at 269.

The Court said the same thing in *Raddatz*, 447 U.S. 667, where this Court upheld the constitutionality of the Magistrates Act against a Due Process challenge, in part, because there was no reason to believe that credibility determinations had been rejected. In that case, a federal district court judge had upheld a magistrate's finding, after a suppression hearing, that a criminal defendant had confessed voluntarily. In doing so, the district court judge had not recalled the

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[2] Although the case was decided on statutory, rather than Due Process Grounds because of the canon of constitutional avoidance, the lower court in that case had reached the same result through a constitutional analysis. *See Califano*, 422 U.S. at 692; *see also Elliott* v. *Weinberger*, 564 F.2d 1219 (9th Cir. 1977).

witnesses to repeat their testimony. The defendant advanced—and the Court rejected—the argument that Due Process required the district court judge to personally hear witness testimony whenever a question of credibility arose. However, in rejecting that argument, a plurality of the Court explicitly conditioned its holding on the fact that the district court judge in that case had *accepted* the magistrate's credibility findings. *See id.* at 681 n.7. The Court thought it "unlikely that a district judge would *reject* a magistrate's proposed findings on credibility when those findings are dispositive and substitute the judge's own appraisal; to do so without seeing and hearing the witness or witnesses whose credibility is in question could well give rise to serious questions which we do not reach." *Id.*[3]

We could go on. *See, e.g.*, *Peretz* v. *United States*, 501 U.S. 923, 939 (1991) (observing that, in some cases,

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[3] The Court's concern that a district court's rejection of the magistrate's credibility determination would violate the Due Process Clause was not only noted by the plurality in *Raddatz*, it was also the central feature of the concurring and dissenting opinions, joined collectively by five Justices, all of whom agreed that the Due Process Clause would not permit a district court to reject a magistrate's credibility finding without personally observing the witness. *See Raddatz*, 477 U.S. at 684 (Blackmun, J., concurring) ("I would distinguish between instances where the district court rejects the credibility-based determination of a magistrate and instances, such as this one, where the court adopts a magistrate's proposed result."); *id.* at 686 (Powell, J., concurring in part and dissenting in part) ("[D]ue process requires a district court to rehear crucial witnesses when, as in this case, a suppression hearing turns *only* on credibility."); *id.* at 691 (Stewart, J., dissenting) ("[T]he District Judge could not make the statutorily mandated 'de novo determination' without being exposed to the

the magistrate's determination might "turn[] on the credibility of witnesses" and noting that "[w]e presume, as we did in *Raddatz* when we upheld the provision allowing reference to a magistrate of suppression motions, that district judges will handle such cases properly if and when they arise"); *Parham* v. *J. R.*, 442 U.S. 584, 607 (1979) (requiring a personal "interview with the child" before institutionalizing a child for mental health care); *Memphis Light, Gas & Water Div.* v. *Craft*, 436 U.S. 1, 18 (1978) ("hearing" prior to termination of utility services should provide, at a minimum, an "opportunity for a meeting with a responsible employee empowered to resolve the dispute"); *Morrissey* v. *Brewer*, 408 U.S. 471, 489 (1972) (parole revocation hearing must include, among other things, "opportunity to be heard in person").

3. These precedents foreclose the Board's new practice of switching decisionmakers between the hearing and the decision.

At least with respect to cases in which the factfinder rejects a claim based on a credibility determination, that credibility determination must be based—in some meaningful sense—on a personal assessment of the hearing testimony. Because the Board's new practice permits a factfinder to reject a benefits claim based on a credibility determination that is wholly

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one kind of evidence that no written record can ever reveal—the demeanor of the witnesses."); *id.* at 694 (Marshall, J., dissenting) ("Under * * * a procedure" in which "a judge is required to conduct a *de novo* determination without hearing the witnesses when the factual issues have turned on issues of credibility," "the judge's determination is so inevitably arbitrary * * * that I believe it to be prohibited by the Due Process Clause * * * .").

unmoored from the hearing, the Board's practice violates the Due Process Clause.

It is no answer to these cases to note that the Board of Veterans Appeals is an administrative agency, as opposed to an Article III court. *Morgan*, *Califano*, and *Goldberg* concerned agency decision-making. And the *Raddatz* plurality repeatedly equated the question presented there with agency decision-making, stating that a district court judge's review of a magistrate's hearing on a suppression motion is "a situation" that is "comparable to * * * actions of an administrative tribunal on findings of a hearing officer." 447 U.S. at 680.

Nor can the "informal and nonadversarial" nature of the veterans benefits system affect the interests involved. *See Walters*, 473 U.S. at 323. Congress has made substantial changes to the veterans benefits system since *Walters* was decided that have made the process significantly more formal and adversarial. In 1988, Congress made proceedings before the Veterans Court and Federal Circuit adversarial, and provided that the VA has no duty to assist the veteran before those courts. *See* Pub. L. No. 100-687, § 301(a), 102 Stat., at 4116. Congress pushed the veterans benefits system still further into an adversarial framework in 2017, when Congress eliminated the VA's duty to assist claimants during the Board's review. *See* Pub. L. No. 115–55, § 2(d). The "informal and nonadversarial" system described in *Walters* no longer exists—or at the very least, that description does not fairly characterize proceedings that take place after the initial review in the VA's regional office.

Finally, the system cannot be saved by the fact that the Board member who conducts the hearing is a

member of the same agency as the Board member who makes the factual findings. To be sure, there would not be a Due Process violation if the Board member who conducts the hearing prepares an initial report making credibility determinations in the first instance. *See Raddatz*, 447 U.S. at 680; 298 U.S. at 480. But that is not the process the Board employs here. Instead, the Board's process does not provide for an initial report, or even for any sort of communication between the Board member who hears the case and the Board member who decides it. Instead, the Board's process fundamentally breaks the connection between the hearing and the factfinding. Therein lies the violation.

When, as here, the agency's own rules require it to base its final decision on the factfinder's credibility judgments regarding live testimony, and courts lack the power to disturb those judgments on review, due process must then require that those judgments were made by a factfinder who received the testimony.

B. Fair Process Principles Require The Same Result.

This Court has recognized that sometimes, despite silence in the applicable statute as to a particular procedural requirement, a procedural requirement may be implicit in the statute when "viewed against our underlying concepts of procedural regularity and basic fair play." *Gonzales* v. *United States*, 348 U.S. 407, 412 (1955). The Federal Circuit and the Veterans Court call this principle—as it applies in the veterans benefits context—the "fair process" principle. *See, e.g.*, *Austin* v. *Brown*, 6 Vet.App. 547, 551 (1994). For all the same reasons that the Board's process creates serious constitutional doubts, the fair process principle

suggests that the Board's hearings be conducted by the fact-finder. *See supra* at 19-25.

III. THE DECISION BELOW IS WRONG.

The Federal Circuit didn't grapple with any of the arguments above. Instead, its conclusion rested solely on a faulty reading of the statutory history. The argument that the court of appeals advanced—changes to the statutory scheme under the AMA suggest that Congress eliminated the hearing-specific same-member requirement—does not support that court's conclusion. And even if it did, the Due Process Clause would forbid that result.

A. The Federal Circuit Was Wrong To Rely On Repealed Statutory Text To Nullify Section 7102(a)'s Same-Judge Requirement.

1. As the Federal Circuit noted, prior to the AMA, the veterans' benefits statutes included a provision, codified at 38 U.S.C. § 7107(c)," providing that " '[s]uch member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision * * * , participate in making the final determination of the claim.' " *See* App. 4a (quoting 38 U.S.C. § 7107(c) (1994)). However, "[t]he AMA amended 38 U.S.C. § 7107(c) and removed the language," resulting in veterans' benefits scheme where "[t]he express language for the same member requirement no longer exists." *Id*.

The Federal Circuit mistook the significance of this change because it failed to consider the complete statutory context. The requirement that the Board member who hears a case should decide it is an old one. Every iteration of the veterans benefits statutes since the Board was first constituted included a provision

governing the assignment of members to the Board, and every iteration of that provision has included a requirement that the Board members assigned to a case must decide it. In focusing on the change that Congress made in 2017, the Federal Circuit lost sight of an earlier statutory change—made in 1994—that explains why the statutory language that Congress cut in 2017 does not have the significance that the Federal Circuit would ascribe to it.

The same-member requirement has the same birthdate as the Board itself. The same-member requirement was in the Executive Order through which President Franklin D. Roosevelt first created the Board of Veterans' Appeals. *See* Exec. Order No. 6230 Veterans Regulation No. 2(a), Part II (July 28, 1933). In the subsection of that Order permitting the "Chairman" of the Board to "divide the Board into sections of three members, [and] assign the members of the Board thereto," the Order specified that "[a] section of the Board shall make a determination on any proceeding instituted before the Board * * * assigned to such section by the Chairman." *Id*. at 6. The same subsection required the Board to hold hearings, and stated that the same-member requirement applied to hearings granted by the Board. *Id*. In the President's words: the Board must "maintain[]" a "hearing docket," through which "formal recorded hearings shall be held by such associate member or members as the Chairman may designate," provided that "the associate member or members [are] of the section which shall make the final determination in the claim." *Id*. at 6.

Congress ultimately codified these provisions 25 years later. *See* Pub. L. No. 85-56, 71 Stat. 128 (1957).

Congress's only alteration to this text was to name the section: "Assignment of members of Board." *Id*.; *see also* Pub. L. No. 102–40, § 402(b)(1), 105 Stat. 187, 238–39 (1991) (renumbering § 4004(a) as § 7104(a)).

These provisions remained unchanged until 1994, when Congress enacted that the Board of Veterans' Appeals Administrative Procedures Improvement Act. *See* Pub. L. No. 103–271, § 7(a)(1), (b)(1), 108 Stat. 740, 742–43 (1994). A few years prior, Congress had codified the veteran-claimant's right to a hearing before the Board, which had previously been protected only by federal regulation. *See* VJRA, Pub. L. No. 100–687, § 203(a), 102 Stat. 4105, 4110–11 (1988) ("The Board shall decide any * * * appeal only after affording the claimant an opportunity for a hearing."); *see also* 38 C.F.R. § 19.133(a) (1965). Congress had added that hearing right to the section of the veterans' benefits statutes governing "Assignment of members of Board." *Id*. But, in the 1994 Act, Congress moved the hearing requirement to a new section titled "Appeals: dockets; hearings," and Congress made a conforming change to the section titled "Assignment of members of Board": Congress moved the third sentence of that provision—the sentence that reiterated the same-member requirement in hearing-specific terms—to the section titled "Appeals: dockets; hearings," immediately following the newly codified hearing right. *See* Pub. L. No. 103–271, § 7(a)(1), (b)(1), 108 Stat. 740, 742–43 (1994).

As the Federal Circuit noted, in 2017, Congress later rewrote the section titled "Appeals: dockets; hearings," replacing it with entirely new text. *See* AMA, Pub. L. No. 115–55, 131 Stat. 1105 (2017). Congress kept the title of that provision the same—"Appeals:

dockets; hearings"—but literally nothing else. Along with everything else in that section, Congress deleted the provision regarding the veteran-claimant's hearing right that Congress had codified in 1988, and the provision regarding the hearing-specific same-member requirement that Congress had added in 1994. By contrast, Congress left Section 7102(a) undisturbed.

Congress's 2017 deletion of the hearing-specific same-member requirement therefore cannot be read as Congress's repudiation of that requirement. The better reading of the statutory history is that, in leaving the section titled "Assignment of members of Board" unchanged, Congress retained the same-member requirement. *See Rudisill* v. *McDonough*, 601 U.S. 294, 309 (2024) ("[S]ection headings ... 'supply cues' as to what Congress intended.") (alterations in original) (citation omitted).

2. The Federal Circuit's various reasons for rejecting this reading simply do not add up.

First, the Federal Circuit was wrong to conclude that Section 7102(a)'s meaning could not be altered by Congress's enactment of the AMA. App. 4a-5a. When a later statute amends a prior enactment, the amendment may clarify the meaning of other provisions in the statute, including unchanged provisions. *See, e.g.*, *Ciminelli* v. *United States*, 598 U.S. 306, 312 & n.2 (2023); *see also* Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation of Legal Texts 252-254 (2012) (explaining that a "logical consequence of" the "the *in pari materia* canon" is the "principle that the meaning of an ambiguous provision may change in light of a subsequent enactment.").

Second, the Federal Circuit placed too much importance on the canon against surplusage when it

concluded that Congress could not have intended, in the 1994 Act, to codify the same-member requirement twice. App. 5a. As explained above, Congress could well have understood the provisions to be mutually reinforcing. *See Lamie* v. *U.S. Trustee*, 540 U.S. 526, 536 (2004) ("Our preference for avoiding surplusage constructions is not absolute.").

Third, the Federal Circuit's decision proves too much. As noted above, in completely re-writing Section 7107, Congress also removed the provision explicitly guaranteeing veterans' right to a hearing before the Board. But that right is guaranteed through other provisions that implicitly guarantee a right to a hearing. *See, e.g.*, 38 U.S.C. § 7113(b) (permitting veterans to choose the Board's "hearing" docket).

B. The Federal Circuit's Reading Violates The Due Process Clause.

Even if the Federal Circuit were correct that Congress's revisions to Section 7107(c) can only be read to eliminate the same-member requirement, that reading cannot stand because it violates the Due Process Clause. That is the result suggested by this Court's precedents. *See supra* at 19-25. However, the more formal analytical framework of *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), also reinforces the conclusion that the Board is depriving veterans of their right to Due Process. *Mathews* requires the Court to weigh (1) the private interests at stake; (2) the effect on decision-making accuracy of the procedure at issue; and (3) the public interests implicated. *Id.* at 335.

The first factor—the private interests at stake—weighs in the veterans' favor: veterans have a significant interest in the receipt of disability benefits. A veteran's property interest in VA disability compensation

not only exists, but is at least as strong as a Social Security Disability Insurance beneficiary's interest in benefits. *See Walters*, 473 U.S. at 333 (stating that veterans' disability benefits are "akin to the Social Security benefits involved in *Mathews*"); *see also Cushman* v. *Shinseki*, 576 F.3d 1290, 1296-97 (Fed. Cir. 2009). Indeed, it is likely stronger because veterans' benefits not only provide for our nation's disabled workers, it also compensates those who have sacrificed their wellbeing in service to our nation. *See* 38 U.S.C. §§ 1110, 1121. The veteran's property interest therefore weighs considerably in favor of requiring procedural protection.

The second factor—the effect on decision-making accuracy of the procedure at issue—also weighs in the veterans favor: the Board's practice of switching decisionmakers creates a high risk of erroneous deprivation of rights. The effect of a factfinder's presence at a hearing on enhancing decision-making accuracy is self-evident and has been emphasized repeatedly in this Court's decisions. *See, e.g.*, *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 496 (1951) ("[E]vidence supporting a conclusion may be less substantial when an impartial, experienced examiner who has observed the witnesses and lived with the case has drawn conclusions different from the Board's than when he has reached the same conclusion.").

Indeed, in deciding administrative due process cases, this Court has insisted upon personal observation of witnesses by the trier of fact wherever credibility determinations are critical. In *Goldberg* v. *Kelly*, 397 U.S. 254, 268 (1970), the Court struck down the procedures by which the City of New York terminated

welfare benefits because they did not permit welfare recipients "to appear personally * * * before the official who finally determines continued eligibility." The Court explained that its conclusion was based in part on its judgment that, "[p]articularly where credibility and veracity are at issue, as they must be in many termination proceedings, written submissions are a wholly unsatisfactory basis for decision." 397 U.S. at 269. In *Mathews* v. *Eldridge*, on the other hand, the Court declined to require an opportunity for personal observation of witnesses in cases of social security benefit termination, in large part because the issues in those cases turn upon medical evidence, in which "the 'specter of questionable credibility and veracity is not present.' " 424 U.S. at 344 (quoting *Richardson* v. *Perales*, 402 U.S. 389, 407 (1971)). This case falls much closer to *Goldberg* than *Matthews* because the Board's credibility determinations are unreviewable on appeal, *see supra* at 7-8, and because Congress has already required that the Board provide veterans with the opportunity for a hearing, *see supra* at 9.

The third factor—the public interest implicated—also weighs in the veteran's favor: Swapping factfinders undermines critical public-policy goals, and does not burden the VA. The Government should share the veteran's interest in remedying the error in order to effectuate Congress's clear mandate that eligible veterans receive assistance with their disabilities. *Cf. Lassiter* v. *Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."). And since all Board members both conduct hearings and issue final determinations, there is no reason to believe that requiring

them to perform both functions in one case would be unduly costly.

IV. THE QUESTION PRESENTED WARRANTS REVIEW IN THIS CASE.

A. No Further Percolation Is Possible.

The Federal Circuit's cramped interpretation of Section 7102 now governs all veterans. The Federal Circuit is the only Article III court of appeals with jurisdiction over VA determinations of veterans benefits. 38 U.S.C. § 7292(c). Thus, there is no opportunity for a circuit split on the question presented here to develop in the lower courts.

Worse, the Board's decision to switch factfinders in Frantzis's case was no aberration. The Board has swapped decisionmakers post-hearing in a staggering number of cases—by our count, *742* cases—and the Board continues to cite Frantzis's case as precedent permitting this practice. *See, e.g.*, (Title Redacted by Agency), Bd. Vet. App. A24021817 (Apr. 29, 2024) ("The Board notes that the undersigned Veterans' Law Judge (VLJ) did not conduct the June 2023 hearing. Unlike the legacy appeal system, under the Appeals Modernization Act (AMA) the VLJ who conducts a Board hearing is not required to decide an AMA appeal.") (citing *Frantzis* v. *McDonough*, 35 Vet. App. 354 (2022)). Hundreds and hundreds of veterans have already been denied a fair hearing. This Court need not wait for that number to reach the thousands.

B. The Question Presented Is Vitally Important.

The initial factfinder's personal observation of the witness promotes both accuracy in credibility determinations and the public's faith in the administrative

process as a whole. "The tendency to require oral hearings has become so automatic that judicial opinions often devote little discussion to the reasons why our society adheres, in this day of computers and sophisticated print media, to the notion that a right to a personal oral exchange can be a critical element of justice," but there are "at least three societal goals served by an oral" hearing: "the desire for accuracy, the need for accountability, and the necessity for a decisionmaking procedure which is perceived as 'fair' by the citizens." *Gray Panthers* v. *Schweiker*, 652 F.2d 146, 161 (D.C. Cir. 1980).

Indeed, as Judge Jaquith explained in dissent from the Veteran's Court decision, the facts of Frantzis's case illustrate each of these points. "Because the pivot point" in the Board's ultimate denial of the full scope of Frantzis's claim was the severity and frequency of Frantzis's headaches "it was particularly significant that" Board member Reinhart "asked the veteran and his wife specific questions that they answered under oath regarding the frequency and severity of the veteran's headaches." App. 51a-52a. Moreover, "Board member Reinhart concluded the hearing by thanking the veteran and his wife for their testimony—and telling the wife: 'I want to thank you for your help in the memory issues and everything like that. You were very helpful.' " *Id.* at 52a. Yet, "the substituted Board member, Theresa Catino," summarily rejected that testimony, calling into question just how "helpful" the ordeal of a hearing really was. *Id*.

C. This Case Is A Good Vehicle For This Court To Address The Question Presented.

Credibility was central to the Board's rejection of Frantzis's claim. *See* App. at 53a (Judge Jaquith

expressing the opinion that "the Board decision screams 'I don't believe you,' " because the decision credited a form with a checked box over Frantzis's testimony). And Frantzis's arguments regarding Section 7102(a)'s text, along with his general objection to the unfairness of the Board's process, were pressed and passed on below.

CONCLUSION

The petition for a writ of certiorari should be granted and the decision reversed.

Respectfully submitted,

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