No. 24-452

IN THE

Supreme Court of the United States

LOUIS FRANTZIS,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM, IN SUPPORT OF THE PETITIONER

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IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

Amicus Curiae National Law School Veterans Clinic Consortium (the "Consortium"), a 501(c)(3) organization, submits this brief in support of the position of the Claimant-Appellant, Louis Frantzis.[1] The Consortium's Board authorized the filing of this brief.

The Consortium is a collaborative effort led by the nation's law school legal clinics and is dedicated to addressing the unique legal needs of U.S. military veterans and supporting veterans law clinics at law schools nationwide. The Consortium works with like-minded stakeholders to advance common interests and address U.S. military veterans' unique legal needs on a pro bono basis. Members of the Consortium work daily with veterans, advancing benefits claims through the VA appeals process.

The Consortium is keenly interested in this case in light of the important procedural issue presented. It respectfully submits that the removal of language from 38 U.S.C. § 7107(c) in the Appeals Modernization Act, which eliminated the language requiring that the Board member who conducts the hearing be the same member to decide the case (hereafter "the same judge requirement"), was done without Congressional intent and should not be upheld.

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1. No party or counsel to a party authored this brief in whole or part, and no party or counsel to a party contributed money to fund the preparation or submission of this brief. Only amicus curiae itself paid for the preparation and submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Veterans appealing Department of Veterans Affairs ("VA") benefit denials wait years for the opportunity to tell their story directly to a judge with the Board of Veterans Appeals ("Board member"). A veteran's right to a hearing, however, is close to meaningless without a corresponding right to be heard by the judge who will decide the merits of the case and whether the testimony provided is credible. The Board's recently adopted practice of judge-swapping—allowing one Board member to preside over the hearing, and a different Board member to actually decide a veteran's case—transforms hearings into "paper reviews[s]." *Goldberg* v. *Kelly*, 397 U.S. 254 (1970). This is especially harmful to veterans because the Board hearing is a veteran's chance to convince a judge face-to-face of his credibility. The Veterans Court and the Federal Circuit are statutorily required to defer to the Board's factual findings, so a Board member's credibility determinations are final and unappealable. *See* 38 U.S.C. §§ 7261(a)(4), 7292(a).

Furthermore, the Federal Circuit erred in finding that the amendment to 38 U.S.C. § 7107(c) under the Appeals Modernization Act (AMA) demonstrated Congressional intent to abrogate the requirement that the same Board member who conducts the hearing must decide the case. Such a change would certainly have been discussed if it was intended; previously proposed AMA changes that negatively impacted veterans have generated heavy Congressional discussion. The AMA was not designed to eliminate core pro-claimant adjudicatory procedures and 38 U.S.C. § 7107 retains the same judge

requirement. The Consortium respectfully asks this Court to grant certiorari to correct the Federal Circuit's misinterpretation of the legislature's intent and protect a veteran's important right to have his hearing conducted by the actual fact-finder in his case.

ARGUMENT

I. Veterans Wait Years for a Hearing Because They Want to Be Heard by the Judge Actually Deciding Their Case.

Veterans must wait years for the opportunity to speak directly to a Board member about their case. In the first three quarters of 2024, veterans requesting a hearing on their AMA appeal waited an average of 1,038 days (2.8 years) for a Board of Veterans' Appeals decision. *See* Board of Veterans' Appeals Quarterly Report, AMA Average Days to Complete, 2024, https://www.bva.va.gov/Quarterly_Reports.asp.[2] Veterans choose a Board hearing over the faster direct or evidence submission dockets to address the decisionmaker on their case directly. The hearing "is the veteran's one opportunity to personally address those who will find facts, make credibility determinations, and ultimately render the final Agency decision on his claim." *Cook v Snyder*, 28 Vet. App. 330, 336-337 (2017).

2. These numbers reflect a mean, not a median. They underestimate the waiting period for a veteran whose case is not advanced due to advanced age, serious illness, or financial hardship. Those appeals are prioritized, regardless of docket order, and are decided within a few months, skewing the data as to how long the average person is waiting.

In many cases, a veteran's claim hinges on his testimony. That evidence alone can be enough to establish entitlement to disability compensation. *See*, *e.g.*, *Jandreau v. Nicholson,*, 492 F.3d 1372, 1376-77 (Fed. Cir. 2007) (holding that the VA erred in concluding that veteran's lay evidence by itself was inadequate to establish element of veteran's claim). A veteran's lay testimony may be the only evidence establishing that an in-service illness or injury occurred, when it occurred, or how it affects the veteran.

Research has shown that "veterans trust decisionmakers who have met with them and listened to them." *Veterans Appeals Experience: Listening to the Voices of Veterans and Their Journey in the Appeals System*, 2016, p. 34. To better understand how veterans experience the appeals process, a group of six VA researchers spoke at length with more than 90 veterans. *Id.* One of their five key findings was "Veterans want to be heard." Veterans stated that:

> • "I feel better knowing that somebody did listen. If it don't [sic] get no further than where it's at, I'm alright."
>
> • "We were saying a prayer and in the prayer it wasn't that we were praying that 'Oh I pray you get the highest disability rating and you get that check and all that money.' No, it was 'I am praying that your voice is finally heard after all these years.'"
>
> • "I just want them to hear what I got to say because I tried to tell them years ago how simple it was."

> • Somebody needs to hear it even if it's just that gentleman [the judge], somebody needs to hear it. Because it's not nothing. It's his life, it's our life, it's our kids' lives." *Id.*

Allowing a veteran the opportunity to tell his story and address the decisionmaker directly fosters a feeling of control in the veteran and promotes the public's faith in the administrative process as a whole. The legal process itself can be a distressing experience, particularly for individuals already suffering from post-traumatic stress disorder and related mental health conditions. *The Litigant-Patient: Mental Health Consequences of Civil Litigation*, J Am Acad Psychiatry Law, Vol. 27, No. 2, 1999. Studies show that individuals who fare best emotionally during the legal process are those who maintain a sense of control over the process. *Id.* Conversely, when a veteran receives a decision on his claim rendered by a judge who had no contact with him at any point in the proceeding, it is unlikely he feel in control of the legal process. A veteran then loses faith in the system if he goes through the stress of a Board hearing only to be informed that a different Board member will actually decide his case. A veteran's inability to face his decisionmaker and plead his case leaves him feeling helpless.

II. Board Members Make Better Credibility Determinations When They Observe Veterans and Witnesses.

Judges are better able to discern the truth when they observe a witness' demeanor. *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985). This Court has said, "[o]nly the trial judge can be aware of the variations in demeanor

and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Id.* The importance of demeanor as an indicator of credibility is the basis of the general requirement of live testimony, the right of confrontation, and the hearsay rule. *See*, *e.g.*, *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). A judge's opportunity to observe the demeanor of witnesses is a core basis for reviewing courts' deference to factual determinations of trial courts and hearing officers. *See*, *e.g.*, *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 495-96 (1951).

As Veterans Court Judge Jaquith stated in his dissent in this case, the hearing judge's "interaction with the veteran and his wife put him in position to assess their credibility and judge whether any inconsistencies between their testimony and treatment and examination records were minor, innocent variances or indicators of the veteran's and his wife's unreliability." *Frantzis v. McDonough*, 35 Vet. App. 354, 381 (2022) (Jaquith, G., dissenting). It is that judge who should have been the decisionmaker in Mr. Frantzis' case.

III. The Practice of "Judge-Swapping" Exacerbates the Existing "Credibility Trap" Veterans Confront at Board Hearings.

The Board's practice of switching decisionmakers further exacerbates the "credibility trap" encountered by veterans at the Board: the informal and non-adversarial design of the Board appeal process deprives many veterans of the opportunity to defend themselves against attacks on their credibility effectively. *See generally* Daniel L. Nagin, *The Credibility Trap: Notes on a VA*

Evidentiary Standard, 45 U. MEM. L. REV. 887, 901 (2015). In traditional adversarial proceedings, if a party successfully cross-examines his opponent, the opponent will have the opportunity to rehabilitate himself, through re-direct, a rebuttal witness, or other means. *Id.* at 900. However, in the non-adversarial context of a Board hearing it is unlikely that a veteran will be aware that his credibility is questioned, and thus has no opportunity to rehabilitate himself. "Instead, the veteran will first learn that his credibility was even in question when he receives the final Board decision in his appeal." *Id.* This is precisely what occurred in Mr. Frantzis' case, where the Board member presiding at the hearing told Mr. Frantzis' wife that her testimony was "very helpful" and then the substituted Board member issued a decision that "screams 'I don't believe you.'" *Frantzis*, 35 Vet App. 354 at 382 (Jaquith, G., dissenting).

As Judge Jacquith noted in his dissent in the Veterans Court, the Board member conducting a hearing is obliged

> 'to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position,' as well as to ask questions 'to explore fully the basis for [the] claimed entitlement.' 38 C.F.R. §3.103(d)(2) (2021). That obligation goes unfulfilled when the decisionmaker who identifies and resolves the issues is substituted after the hearing." *Id.* at 384, n.238.

In fact, the "credibility trap" problem is compounded when the decisionmaker makes credibility determinations

based on a paper record rather than being present at an oral hearing. In this scenario, the veteran has no meaningful notice that his credibility is in dispute. He is robbed of the ability to perceive even informal and indirect indications that the Board member questions his credibility. He does not have the opportunity to intuit the decisionmaker's skepticism through tone of voice or nonverbal cues—such as demeanor, facial expression, head nods, or eye contact. Unaware that his credibility is being questioned by an unseen decisionmaker, he is unable to rehabilitate himself. Where the decisionmaker is not present at the hearing, veterans will have no opportunity to address the skepticism before they are blindsided by a final decision. The Board's current practice of switching out Board members is detrimental to a veterans' sense of justice and the VA's ability to assess credibility and ensure appropriate benefit distribution.

IV. The AMA Was a Collaborative Effort. Any Conscious Change to The Legacy System That Negatively Affected Veterans Would Have Been Discussed.

From the conception of AMA, collaboration occurred between VSOs, VA, and Congress. Then ranking member of the House Veterans' Affairs Committee, Rep. Tim Walz "want[ed] to pay tribute to the role the VSO community, . . . [for] being there and willing to work through this" in his statement during a House legislative hearing on AMA. *Veterans Appeals Improvement and Modernization Act of 2017: Hearing Before the H. Comm. on Veterans' Affs.*, 115th Cong. 2 (2017). On the day the AMA took effect in 2019, VA published an article emphasizing that the implementation of AMA occurred

"as a direct result of collaboration among VA, Congress and [VSOs]." *VA's Appeals Modernization Act takes effect today: New law streamlines department's current claims and appeals process for Veterans*, VA News (Feb. 19, 2019, 12:55 PM), https://news.va.gov/press-room/vas-appeals-modernization-act-takes-effect-today-new-law-streamlines-departments-current-claims-and-appeals-process-for-veterans/.

Vice Chairman of the Board of Veterans' Appeals ("Board"), Kenneth Arnold, told Congress as much in November 2023: "The new AMA system . . . was designed and developed through full partnership between VA, the VSOs, . . . and Congressional staff." *Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal, Hearing Before the Subcomm. on Disability Assistance and Mem'l Affs. of the H. Comm. on Veterans' Affs.*, 118 Cong. (2023) (statement of Kenneth A. Arnold, Vice Chairman, Board of Veterans' Appeals, Department of Veterans Affairs).

V. When The Same Judge Requirement Was Last Reviewed In 1994, The Impacts of a Change Were Explicitly Discussed.

In 1958, a statute outlining the assignment of Board members to cases and hearings became law. § 4002, 72 Stat. 1105, 1241 (1958). This statute created a team of three Board members, who would together issue decisions on appeal. These teams were called "sections." The statute required that the Board member who conducted the hearing must be "of the section which will make final determination in the claim." § 4002, 72 Stat. 1105, 1241 (1958). This created the requirement that the Board

member who held the hearing must play a substantial role in drafting the decision. A 1994 revision moved this requirement to 38 U.S.C. § 7107 following substantial discussion regarding the "same judge" requirement. Before the legislation in 1994 passed, a VA representative spoke before the Senate Committee on Veterans' Affairs regarding his concern that the above provision was in conflict with a requirement that also existed in § 7107. *Pending Veterans Legislation, Hearing Before the S. Comm. on Veterans' Affs.*, 103 Cong. (1994) (statement of R. John Vogel, Under Secretary for Benefits, Department of Veterans Affairs). He recognized that this requirement was at odds with § 7107(c), which prohibited the judge who originally made a determination from participating in reconsideration of that decision. *Id.* This presented a concern to VA that due to the fact-intensive nature of appeals to the Board, "excluding the original deciding Board member would waste scarce resources," and that no decisionmaker would be as familiar with the facts as the member who "heard testimony in an appeal and observed the witnesses." *Id.* If the Board member who conducts the hearing provides value for a determination on reconsideration, then failing to utilize the Board member who participated in the hearing in the original determination also wastes scarce resources.

Even if, or perhaps especially if, VA has veered from its 1994 position, a discussion would have taken place during the creation of AMA. Other AMA departures from the Legacy system that negatively impacted veterans were heavily examined, such as the end of the Board's duty to assist. Rep. Esty and Rep. Sablan asked questions of VA representatives and Rep. Bost discussed it in his opening statement during a legislative hearing

regarding this change. *Veterans Appeals Improvement and Modernization Act of 2017: Hearing Before the H. Comm. on Veterans' Affs.*, 115th Cong. 3, 22, 24–25 (2017). Disabled American Veterans, National Organization of Veterans' Advocates, Paralyzed Veterans of America, and Vietnam Veterans of America each discussed the duty in their statements as well. *Id.* at 38, 51–52, 60, 64. The removal of the Board's duty to assist was a substantial departure from the highly paternalistic Legacy system, and that change was of great significance to the veteran community. Accordingly, it makes sense that it was discussed. As evidenced by the attention this issue has garnered throughout the appellate process thus far, the "same judge" requirement is also significant.

Removing the same judge requirement negatively impacts veterans and would have been discussed by someone during the collaborative process if it was intentionally changed. The purpose of AMA was to provide a better, more efficient, appeals process. Cheryl Mason, then Chairman of the Board, articulated that the mission of the Board is "to hold hearings and provide timely appeals decisions." *Examining the VA Appeals Program: Examining the State of Modernization Efforts, Hearing Before the Subcomm. on Disability Assistance and Mem'l Affs. of the H. Comm. on Veterans' Affs.*, 117 Cong. (2021) (statement of Cheryl Mason, Chairman, Board of Veterans' Appeals, Department of Veterans Affairs). Allowing any available judge to review the hearing transcript and issue a decision can be viewed as an advancement in the interest of efficiency, consistent with the purpose of AMA. But if this were a conscious change, a step toward efficiency would have been celebrated, or at a minimum, discussed.

CONCLUSION

The opportunity to speak directly to the decisionmakers in their cases promotes veterans' well-being as well as the truth-seeking process itself. The same-judge requirement gives veterans the opportunity to be heard while also allowing them to read judges' subtle cues and respond accordingly. Board members, on the other hand, have the benefit of important demeanor evidence that aids them in making accurate credibility determinations. Section 7107(c) of the Appeals Modernization Act was not designed to eliminate core pro-claimant adjudicatory procedures. The Consortium respectfully requests that the Court grant certiorari to correct the Federal Circuit's misinterpretation of Congressional intent.

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