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 FOR *AMICUS CURIAE* FEDERAL CIRCUIT BAR ASSOCIATION IN SUPPORT OF PETITIONER

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INTERESTS 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. The organization unites different groups across the nation that practice before the Federal Circuit to serve the court and assist it in protecting the rights of the parties appearing before it and their interests in obtaining a just outcome. In particular, the FCBA helps facilitate pro bono representation for veterans with potential or actual litigation within the Federal Circuit's jurisdiction, with a view to strengthening the adjudication process. The interpretation of veterans' benefit statutes and regulations is central to the representation of veterans, and the role and effect of the Pro-Veteran Canon is a recurring source of uncertainty and unpredictability in veterans' cases before the Federal Circuit. Where key procedural rights of veterans are at issue, as they are in this case, clarification on the role of the Canon is particularly important to ensuring a just outcome.

Because the respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the Association's decision-making regarding whether to participate as an amicus in this

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[1] No counsel for a party authored any part of this brief, and no person other than *amicus curiae*, its members, or its counsel made a monetary contribution intended to fund its preparation or submission. Counsel of record for both parties received timely notice of the intention to file this brief.

litigation, developing the content of this brief, or the decision to file this brief.

SUMMARY OF THE ARGUMENT

Over the 91 years that the Board of Veterans' Appeals (the "Board") has adjudicated veterans benefit claims, the Board has afforded claimant veterans with their only opportunity to be heard in person by the decisionmakers deciding their claims. Thus, when a regional office of the Department of Veteran Affairs (the "VA") initially denies a veteran's claim for a service-related disability, the veteran can challenge that denial by testifying first-hand about his injuries and responding directly to questions at a hearing before one of the Veterans Law Judges ("Board member") that comprise the Board. Congress, the courts, and the VA have all long recognized the crucial role of this procedural right in ensuring the fairness of the veterans benefits system and minimizing the risk that veterans are denied compensation they are owed. *See* S. REP. NO. 100–418, at 39 (1988) (observing the "significant difference in achieving favorable resolution of a claim" that "a personal appearance before the Board" can make); *Arneson v. Shinseki*, 24 Vet. App. 379, 382 (2011) (acknowledging the significance of "the opportunity for a personal hearing before the Board" as "the veteran's one opportunity to personally address those who will find facts"); VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 158 (Jan. 18, 2019) (describing the many benefits of an "in-person hearing" compared to recorded testimony).

At issue in Mr. Frantzis's Petition is whether Congress intended to authorize the Board to deprive veterans of this long-standing procedural right by assigning one Board member to hold a live hearing and another to make the findings and determinations based on the cold hearing record. Salient to that inquiry is whether and how courts must apply the Pro-Veteran Canon—the principle that veterans benefit statutes be construed liberally in the veterans' favor—before concluding that a statute "unambiguously" evinces an intent to deprive veterans of an established right.

In this case, an array of statutory provisions reflect Congress's consistent intent over the decades to preserve the veteran's right to address the trier of fact in the midst of other administrative changes. The assignment of Board members to cases has consistently required that the Board member assigned to a "proceeding" "shall make a determination thereon." 38 U.S.C. § 7102(a) (1994). A separate provision governing the Board's conduct of hearings has guaranteed veterans the right to elect an in-person hearing even if the Board initially schedules them to appear via videoconference. *Id.* at § 7107(d). Up until 2017, that statutory section also contained two other relevant provisions: subsection (b), requiring that the Board decide an appeal only after affording the appellant an opportunity for a hearing, *id.* at § 7107(b); and subsection (c) authorizing the Board's Chairman to designate one or more Board members to conduct "formal recorded hearings," provided that those same Board members "participate in the final determination on the claim at issue," *id.* at § 7107(c).

In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"), Pub. L. No. 115–55, 131 Stat. 1105, to, among other things, create new pathways for veterans appealing their claims. Congress omitted the language in subsections (b) and (c) of § 7107 concerning the Board's obligation to provide the veteran with the opportunity for a hearing and its authority to designate Board members to conduct those hearings and render a final determination. It preserved, however, the veteran's right to elect an in-person hearing in § 7107, as well as the requirement under § 7102 that the Board member assigned to a proceeding "make the determination thereon." Congress did not grant the Board discretion to assign a different Board member to hear a veteran's case, and another Board member to decide that case. Congress expressed no intent in the legislative record to abrogate the veteran's right to appear before the factfinder. Indeed, the AMA intentionally preserved the "hearing docket" as a separate avenue for appeal from tracks allowing the supplementation of the record with other record evidence.

Nonetheless, based alone on the omission of the language that the member who conducts the hearing shall "participate in making the final determination" in Congress's rewrite of § 7107(c), the Court of Appeals for Veterans Claims ("Veterans Court") and Federal Circuit inferred that Congress intended to authorize the Board to split proceedings, between a Board member that hears the case, and a Board member who decides the case. The Veterans Court disregarded the Pro-Veteran Canon by deeming the

statutory language "unambiguous." Pet. App. 24a n. 74 ("We note that we do not need to resort to the pro-veteran canon of construction because we find the statutes clear as to the issue; in other words, we do not find the statutes ambiguous."). The Federal Circuit did not address the Canon at all. Pet. App. 1a-7a.

When properly applied, the Pro-Veteran Canon guards against interpretive shortcuts inconsistent with Congressional purpose, to ensure that an interpretation expanding the VA's authority at the expense of veterans' rights and interests is tested against Congress's express pro-veteran intent. The Court should grant certiorari to examine whether the Veterans Court and Federal Circuit's decision to abrogate a veteran's right to a hearing before the Board member who renders the final determination in his or her case, is consistent with the statute's plain language and Congressional intent, as expressed in the Pro-Veteran Canon.

ARGUMENT

I. The Opportunity to Testify Live Before the Decision Maker is a Critical and Longstanding Right of Veterans Seeking Benefits under the VA System.

The VA adjudicates federal veterans' benefit claims for service-related disabilities. A VA regional office makes an initial decision on a veteran's benefit claim. The veteran may then appeal that decision and seek de novo review on issues of law and fact by the Board of Veterans' Appeals. *See* 38 U.S.C. §§ 7104(a),

7105. Board decisions are "based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." *Id.* at § 7104(a). The veteran may then appeal the Board's decision to the Veterans Court, an Article I tribunal, which reviews the Board's decision on issues of law de novo and issues of fact for clear error. *See id.* at §§ 7251, 7261.

Within this system of review, veterans have benefited from having the Board member who receives evidence also make the factual determinations on that evidence. *See, e.g.*, Board of Veterans' Appeals: Rules of Practice, 38 C.F.R. § 20.604 (2019) (for legacy appeals, "[t]he Member or panel to whom a proceeding is assigned . . . shall conduct any hearing before the Board in connection with that proceeding"). This principle and process—that the person receiving the evidence render the decision—is well-established within our judicial system. "For the weight ascribed by the law" to a tribunal's findings of fact, the "one who decides must hear." *Morgan v. United States*, 298 U.S. 468, 481 (1936); *see also Califano v. Yamasaki*, 442 U.S. 682, 697 (1979) ("We do not see how [credibility] can be evaluated absent personal contact between the recipient and the person who decides his case."). Any appellate standard of review for findings of fact is predicated on this process. "Determining the weight and credibility of the evidence is the special province of the trier of fact." *Inwood Lab'ys, Inc. v. Ives Lab'ys, Inc.*, 456 U.S. 844, 856 (1982).

The Veterans Court, VA, and Congress have all acknowledged the importance of this right in the

adjudication of veterans' benefits claims. The Veterans Court previously observed that "the opportunity for a personal hearing before the Board is significant because it 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." *Arneson*, 24 Vet. App. at 382. This benefit to the veteran is significantly undermined if the Board member who hears the evidence is different from the Board member who ultimately decides the claim.

The VA has also acknowledged the importance of an in-person hearing when it explained its decision not to replace in-person hearings with recordings. The VA noted that inefficiencies of in-person hearings were "greatly outweighed by the benefits of an in-person hearing, the purpose of which is to elicit relevant and material testimony, assess the credibility of witnesses, resolve disputed issues of fact, and pose follow-up questions to witnesses and representatives." VA Claims and Appeals Modernization, 84 Fed. Reg. at 158.

The legislative history of the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105, demonstrates that Congress likewise understands the benefits of in-person hearings to veterans. A Senate Veterans' Affairs Committee report remarked on a correlation between personal hearings before the Board and successful claims. In fiscal year 1987, 19.5% of the claims heard personally by a Board member in Washington, D.C., were granted, and 30.6% of claims heard by a Board member at a travel hearing were granted. S. REP. NO. 100–418, at 39. By contrast, the overall Board

allowance rate in the same year was much lower: 12.8%. *Id.* Although the Senate Committee acknowledged that these statistics were not conclusive, it nevertheless observed that they were "very suggestive that a personal appearance before the Board makes a significant difference in achieving favorable resolution of a claim." *Id.*

In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act of 2017 ("AMA"), Pub. L. No. 115–55, 131 Stat. 1105. Prior to the AMA, 38 U.S.C. § 7107(c) expressly provided that the board member or panel that heard a veteran's appeal would "participate in making the final determination of the claim" in that appeal. With the AMA, Congress removed this provision, such that "[t]he express language for the same member requirement no longer exists" in 38 U.S.C. § 7107. Pet. App. at 4a-5a. From this silence, the Veterans Court and Federal Circuit have concluded that the VA is permitted to split proceedings, between a Board member who hears the evidence and a Board member who makes the determination. *Id.* This was error.

The Pro-Veteran Canon compels a different outcome.

II. Congress Built the VA's Adjudicatory System on the Pro-Veteran Canon

The Pro-Veteran Canon is a long-applied and well-established tool of statutory interpretation. It instructs that, when a court construes a veteran's benefit statute, any "interpretive doubt" must "be resolved in the veteran's favor." *Brown v. Gardner*,

513 U.S. 115, 118 (1994); *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).

This Court first articulated the Pro-Veteran Canon in a series of decisions dating back to World War II. The Court explained that, when weighing competing interpretations, veterans benefit statues should "always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need."). The Pro-Veteran Canon has held across the intervening years. *See, e.g.*, *Alabama Power Co. v. Davis*, 431 U.S. 581, 584-85 (1977) (discussing the Pro-Veteran Canon in the context of the Military Selective Service Act of 1967); *Coffy v. Republic Steel Corp.,* 447 U.S. 191, 196 (1980) (discussing the Pro-Veteran Canon in the context of the Vietnam Era Veterans' Readjustment Assistance Act of 1974); *King v. St. Vincent's Hosp.,* 502 U.S. 215, 221 n.9 (1991) (discussing the Pro-Veteran Canon in the context of the Veterans' Reemployment Rights Act); *Henderson*, 562 U.S. at 441 (discussing the Pro-Veteran Canon in the context of the Veterans' Judicial Review Act of 1988 and subsequent amendments).

The Pro-Veteran Canon is thus "long applied," *Henderson*, 562 U.S. at 441, and a "guiding principle" in veterans' benefit jurisprudence, *Alabama Power*, 431 U.S. at 584. What is more, because the Pro-Veteran Canon is well-established as a basic rule of statutory construction, Congress is "presum[ed]" to know and understand the Pro-Veteran Canon when it

enacts laws. *St. Vincent's*, 502 U.S. at 220-21 n.9 (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)); *see also Traynor v. Turnage*, 485 U.S. 535, 546 (1988) ("It is always appropriate to assume that our elected representatives, like other citizens, know the law.").

Indeed, Congress's knowledge and understanding of the Pro-Veteran Canon is a safe presumption. Congress built the modern VA's adjudicatory system on the Pro-Veteran Canon. When creating the Veterans Court, Congress expressly stated that it had "designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits," in which "Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. REP. No. 100-963, at 13 (1988); *see also id.* (The "VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt."). As several congresspeople recently observed in an amicus brief, "[b]ecause Congress knows that *courts* will apply the pro-veteran canon to the veteran-benefits statutes it enacts, the canon is effectively woven into the text of the laws *Congress* passes." Brief of Senator Tim Kaine et al., as Amici Curiae Supporting Petitioner, 26, *Rudisill v. McDonough*, 601 U.S. 294 (2024) (No. 22-888) (emphasis in original).

"Congress has expressed special solicitude for the veterans' cause" and "made clear that the VA is not an ordinary agency." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). The VA's adjudicatory system in particular is "a unique administrative scheme," that Congress designed "'to function throughout with a high degree of informality and solicitude for the

claimant.'" *Henderson*, 562 U.S. at 431, 438 (quoting *Walters v. National Ass'n of Radiation Survivors,* 473 U.S. 305, 311 (1985)). Congress's solicitude for veterans is "plainly reflected" in laws that place "a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Id.* at 440. The Pro-Veteran Canon is thus particularly relevant to questions of process and procedure, where it operates as an interpretive check, to avoid non-sensical results and ensure that the VA's adjudicatory system continues to work as Congress intended—to the benefit of the veteran. *Compare Henderson*, 562 U.S. at 431, 440-41 (discussing the Veteran Court's "unique administrative scheme"), *with Rudisill v. McDonough*, 601 U.S. 294, 314-18 (2024) (Kavanaugh, J. concurring) (Pro-Veteran Canon cannot properly be used to expand benefits entitlement).

For example, in *Henderson*, this Court declined to impose a 120-day filing deadline for veterans' appeals, with its decision grounded in the recognition that "[r]igid jurisdictional treatment of the 120–day period for filing . . . would clash sharply with" unique pro-veteran system Congress had built. *Henderson*, 562 U.S. at 441. The Court explained that, "[p]articularly in light" of the Pro-Veteran Canon, there was not "any clear indication" in the statue "that the 120–day limit was intended to carry the harsh consequences that accompany the jurisdiction tag." *Id.*

III. The Veterans Court and Federal Circuit Improperly Disregarded the Pro-Veteran Canon to Abrogate Longstanding Veterans' Rights

The Federal Circuit's decision in *Frantzis* was not based on the plain language of any statute. Rather, the Federal Circuit relied on inferred Congressional intent, based on statutory silence, without consideration of the Pro-Veteran Canon. Pet. App. at 4a-5a. "Congressional silence," however, "lacks persuasive significance." *Brown*, 513 U.S. at 121.

Simply, the Board's split decision-making process is not authorized by any statute or regulation. Rather the VA relies on Congress's removal of certain language to implicitly authorize split decision making. Pet. App. at 4a-5a, 19a ("We find the removal of this statutory language . . . highly significant"). Prior to the AMA, 38 U.S.C. § 7107(c) provided that the board member or panel that heard a veteran's appeal would "participate in making the final determination of the claim" in that appeal. With the AMA, Congress removed this provision, such that "[t]he express language for the same member requirement no longer exists" in 38 U.S.C. § 7107. Pet. App. at 4a-5a. It did not, conversely, expressly authorize the Veterans Court to split hearing and decision-making authority. The Veterans Court acknowledged as much below: "[N]othing in the statutory provisions Congress enacted . . . requires that the Board member who conducts a hearing must also decide the appeal. And to be clear, the converse is true as well" since "the statues don't prohibit [the] VA from allowing a different Board member to decide" either. Pet. App. at 24a.

Nor does statutory context suggest split decision making. In 38 U.S.C. § 7107, Congress retained the right of a veteran assigned to a video-conference hearing by the Board, to request and be granted an in-person hearing instead. *See* 38 U.S.C. § 7107(c)(1), (c)(2)(B). If anything, this indicates the continued importance of a personal appearance before the decision-maker. *See* S. REP. NO. 100–418, at 39 (observing the "significant difference in achieving favorable resolution of a claim" that "a personal appearance before the Board" can make); VA Claims and Appeals Modernization, 84 Fed. Reg. at 158 (describing the many benefits of an "in-person hearing" compared to recorded testimony).

Nor does VA regulation disclose, much less authorize, the Board's split decision-making process. The enacting regulation states only that "[h]earings will be conducted by a Member or panel of Members of the Board" and, if "a proceeding has been assigned to the panel," one of the Members will be designated "as the presiding Member." 38 C.F.R. § 20.706; *see also* VA Claims and Appeals Modernization, 84 Fed. Reg. 2449 (Feb. 7, 2019) (publishing effective date of 38 C.F.R. § 20.706, promulgated under AMA).

Nor is there any legislative history where Congress articulated its intent to create a split decision-making process. Neither the Veterans Court, nor the Federal Circuit, has identified any legislative history where Congress states it intended to authorize a split decision-making process through the amended statute. *See generally* Pet. App. at 1a-64a; 38 U.S.C. § 7107. The legislative history for the AMA evidences Congress's intent to "streamline VA's appeals process while protecting veterans' due process rights," to "help

ensure that the process is both timely and fair." H.R. REP. No. 115-135, at 5 (2017); *see also* S.R. REP. No. 115-126, at 15 (2017) (discussing choice to revise 38 U.S.C. § 7107(c) to eliminate "[i]n-person field hearings" through the AMA, without reference to split decision-making).

Under such circumstances, with no express Congressional directive and only silence to go on, the Federal Circuit and Veterans Court should have considered the Pro-Veteran Canon. The Federal Circuit and Veterans Court should have begun from the default assumption that Congress would have intended to preserve the longstanding right of veterans to be heard in-person by the factfinder in their proceeding. *See Henderson*, 562 U.S. at 441.

Instead, the Federal Circuit and Veterans Court set aside fair process arguments on the erroneous premise that veterans' system is adversarial. *See* Pet. App. at 6a, 27a-28a. This reasoning is erroneous, because it is inconsistent with this Court's precedent. "The contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson*, 562 U.S. at 440. Congress's solicitude for veterans is "plainly reflected" in laws that place "a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions," such that statutory silence cannot be read as authorization to abrogate rights or impose additional burdens. *Id.*; *see also St. Vincent's*, 502 U.S. at 220 & n.9 (declining to "find equivocation in the statute's silence so as to render it susceptible to interpretive choice" that is contrary to the Pro-

Veteran Canon); *Brown*, 513 U.S. at 118-20 (declining to impose burden to prove fault element "[w]ithout some mention of" it in the statute, as "unreasonable," with the VA's positions, at best, precluded by the Pro-Veteran Canon).

It is also erroneous because it is inconsistent with the available evidence of Congressional intent. The plain language of the controlling statute still states 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 "make a determination thereon." 38 U.S.C. § 7102(a). It is evidenced in the legislative history, which provides that any amendments were intended to "streamline VA's appeals process while protecting veterans' due process rights." H.R. REP. NO. 115-135 at 5. It is confirmed by the VA's own, public understanding of the statute. 38 C.F.R. § 20.706.

IV. This Court Should Grant Certiorari to Apply the Canon and Restore the Veteran's Right to Testify Before the Decision Maker

As of the filing of this brief, at least 760 decisions of the Veterans Court have cited this case in rejecting a veteran's challenge to the issuance of findings and decisions by a Board member who was not present at the hearing where the veteran provided live testimony.

The Federal Circuit and VA's presumed Congressional intent here is contrary to the Pro-Veteran Canon. Under the Pro-Veteran Canon, Congress is presumed to legislate to the benefit of the veteran, with "interpretive doubt" resolved in the

veteran's favor. *Brown*, 513 U.S. at 118; *see also Henderson*, 562 U.S. at 441. At bottom, this means Congress's silence cannot be read as authorization to abrogate a long standing procedural right. If Congress had intended such a fundamental change, it would have expressly said so.

CONCLUSION

The Petition for a writ of certiorari should be granted.

Respectfully submitted,

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