No. 24-452

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

REPLY IN SUPPORT OF CERTIORARI

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INTRODUCTION

The government claims the decision below correctly read the statutory history, the question presented is not important, and this case would make a poor vehicle. None of those contentions is persuasive. On the merits, the government fails to respond to any of Frantzis's arguments regarding the statute's *existing* text, as opposed to text that Congress deleted. The question presented is important because reviewing courts' deference to the Board's factual findings is grounded in the Board member's personal interaction with the veteran-claimant at the hearing. It frequently recurs, as illustrated by the nearly 800 Board decisions following *Frantzis*. And this vehicle is a good

one; this is the case in which the courts below first announced the challenged interpretation of the statute, and the lengthy dissent in the Veterans Court ensured that the issues were well ventilated. Certiorari should be granted.

ARGUMENT

A. The Decision Below Is Wrong.

The government's brief in opposition does not grapple with the existing text of Section 7102(a) whatsoever. Instead, the government's textual arguments rely solely on the deleted text previously codified at Section 7107(c). But "[t]he starting point in discerning congressional intent is the *existing* statutory text, and not the predecessor statutes." *Lamie* v. *U.S. Trustee*, 540 U.S. 526, 534 (2004) (emphasis added). The government's response is therefore fatally incomplete. It is also unpersuasive. The statutory history is ambiguous, *contra* BIO 9-12, there are no negative practical implications of the same-member requirement, *contra id.* at 11, and the Due Process Clause supports Frantzis's reading of the statute, *contra id.* at 14-16.

1. Section 7102(a)'s text unambiguously indicates that the obligation to make a determination in an assigned proceeding includes the obligation to conduct the hearing in the case.

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); Pet. 14-15. The ordinary meaning of "proceeding" in the administrative law context encompasses any hearing conducted as part of the proceeding. Pet. 14-15. Moreover, by noting that a proceeding "includ[es] any motion," Congress underscored that "proceeding" sweeps

in any smaller constituent parts. 38 U.S.C. § 7102(a); Pet. 15-16. The same-member requirement also gives effect to the statutory scheme, as a hearing before the decisionmaker is the only difference between the Hearing and Additional Evidence Dockets. Pet. 17.

Yet the government does not respond to any of that. The government offers no alternative definition of "proceeding" or alternative purpose for the "motion" clause. Nor does it offer a different reading of the statutory scheme. The government's response on the text turns *solely* on text no longer in the statute. "Congress's post–[2017] legislative silence" is "unavailing to the Government." *Brown* v. *Gardner*, 513 U.S. 115, 121 (1994). Such "congressional silence lacks persuasive significance." *Id.* (citation omitted).

2. The government, like the Federal Circuit, relies on "statutory history" for its argument, citing Congress's elimination of "the same-member requirement from Section 7107." BIO 9-11. The government also appeals to superfluidity, arguing (at 11) that under Frantzis's reading, "from 1994 until 2017, Section 7107(c) imposed a hearing-specific command that was superfluous in light of * * * Section 7102(a)." But that argument is flawed for three reasons. *See* Pet. 26-30.

First, contemporaneous sources noted the superfluidity, and viewed it as part of Congress's design: Before the AMA, the Veterans Court read Section 7107(c) and Section 7102(a) as mutually reinforcing provisions. *See Arneson* v. *Shinseki*, 24 Vet. App. 379, 384 (2011) (explaining that the same-member requirement is based on "section 7102(a) and its interaction with all of section 7107"); *see also* App. 45a (Jaquith, J., dissenting: "[T]he majority sees a separation of the

provisions that *Arneson* does not support. Instead, the Court considered sections 7102 and 7107 together.").

Therefore, Frantzis's reading of section 7102(a)—not the government's—is bolstered by any superfluidity between the pre-AMA versions of sections 7102(a) and 7107(c). "It is not only appropriate but also realistic to presume that Congress [is] thoroughly familiar with [relevant] precedents * * * and that it expects its enactments to be interpreted in conformity with them." *North Star Steel Co.* v. *Thomas*, 515 U.S. 29, 34 (1995) (citation omitted). And Congress, legislating against the backdrop of the Veterans Court's holding that sections 7102(a) and 7107(c) covered the same ground, *see Arneson*, 24 Vet. App. at 384, could reasonably have believed that Section 7102(a) would protect the same-member requirement even after the AMA's rewrite of Section 7107(c).

Second, the government fails to grapple with the more serious superfluidity problem in its own reading of the statute. As previously explained, *see* Pet. 17, the statutory scheme confirms that the best reading of Section 7102(a) includes the same-member requirement because the only substantive difference between the Board's Additional Evidence Docket and the Hearing Docket is the opportunity to provide live testimony. The Hearing Docket must be understood to do *something more* than provide the decisionmaker with a transcript. That *something more* is the opportunity to speak directly to the decisionmaker.

Third, the government overreads the significance of Congress's revision of Section 7017 because, in completely re-writing Section 7107 through the AMA, Congress also removed the provision explicitly guaranteeing veteran-claimants' right to a hearing before

the Board. *See* Pet. 9-10; *see also* 38 U.S.C. § 7107(b) (1994). But the government does not dispute that veteran-claimants still have a right to a hearing. That right is implicitly guaranteed through other provisions. *See, e.g.*, 38 U.S.C. § 7113(b) (permitting veterans to choose the Board's "hearing" docket). Similarly, although Congress removed the provision making the same-member requirement explicit, other provisions implicitly provide the same protection.

3. The government also stands up and knocks down a series of strawmen related to the "practical implications of [Frantzis's] reading." BIO 11.

First, the government suggests (at 9, 11) that Frantzis reads Section 7102(a) to wholly "forbid[] reassignment." Not so. Frantzis argues only that, *with respect to cases in the Board's Hearing Docket*, Section 7102(a) requires the Board member making a determination to be the same one conducting a hearing. The same-member requirement would not prohibit reassignment pre-hearing. And where the veteran-claimant has not requested a hearing, the same-member requirement presents no barrier to reassignment at all; cases in the Direct Review or Additional Evidence Dockets could be reassigned at any time because a newly-assigned Board member or panel could review relevant evidence at any time.

Second, the government asserts (at 11) that a provision forbidding reassignment "imposes some inefficiencies," and "those problems * * * may have prompted Congress to delete the same-member requirement." But the government cites no delay from the 1994-2017 period in which the Board recognized the same-member requirement. And Frantzis is unaware of any AMA statutory provisions or legislative

history supporting the view that the same-member requirement caused inefficiency. Indeed, the legislative history does not mention the same-member requirement at all. *See* CAFed Bar Amicus Br. 13-14; Veterans Clinic Amicus Br. 8-11.

Because the AMA's legislative history does not discuss the same-member requirement, the legislative history the government cites (at 12) is untethered to any relevant statutory text. The inefficiencies discussed in the legislative history relate exclusively to the legacy system's single pathway to administrative review of an unsatisfactory initial decision on a disability claim. *See* H.R. Rep. No. 115–135, at 5-8 (2017); S. Rep. No. 115–126, at 27 (2017). Congress attempted to fix that problem by creating separate procedural lanes related to the type of reevaluation requested by the veteran-claimant. *See* Pet. 8-9; *see also* S. Rep. No. 115–126, at 29.[1]

4. The Federal Circuit's decision blessing the Board's new practice of switching decisionmakers also breaks with this Court's due process precedents. Pet. 18-25, 30-33.

The government disputes (at 14-16) the constitutional dimensions of the Board's error, but again attacks a strawman. The government says (at 14) that "this Court's observations about deference stop well short of recognizing a Due Process Clause right to have a hearing conducted by the same adjudicator

[1] For the same reason, the government is wrong to suggest that the pro-veteran canon is inapplicable here because the aforementioned "inefficiencies" would harm veterans. BIO 12. The government's claimed "inefficiencies" related to the same-member requirement are wholly speculative. The pro-veteran canon supports Frantzis's reading. *See* CAFed Bar Amicus Br. at 5-15.

who issues the final decision." That may be so, but Frantzis's constitutional avoidance argument turns only on this Court's precedents suggesting that "[w]here 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." Pet. 19.

The argument that Frantzis makes is much more conservative than the argument the government attacks in its brief. For example, Frantzis's avoidance argument would not reach a review scheme in which Congress permits the agency to switch decisionmakers after the hearing, but the official who receives live testimony conveys recommended credibility findings to the official charged with making the factual findings. The constitutional problem, in Frantzis's view, arises only where—as here—there is no connection between the decisionmaker's credibility finding and the claimant's live testimony.

In any event, the government's attempts to distinguish this Court's due process precedents on their facts does little to aid the government's argument. In each of these cases, this Court expressed strong reservations about credibility determinations made on a cold record. *See Morgan* v. *United States*, 298 U.S. 468, 481 (1936); *Califano* v. *Yamasaki*, 442 U.S. 682, 696 (1979); *Goldberg* v. *Kelly*, 397 U.S. 254, 269 (1970); *United States* v. *Raddatz*, 447 U.S. 667, 679, (1980). These decisions suggest that credibility determinations must be based 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 wholly unmoored

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

B. The Question Presented Is Important and Frequently Recurring.

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. *See* Pet. 33-34; CAFed Bar Amicus Br. 5-8; Veterans Clinic Amicus Br. 3-8. Indeed, "veterans wait years for a hearing because they want to be heard by the judge actually deciding their case." Veterans Clinic Amicus Br. 3 (capitalization altered). Yet, since the Veterans Court and the Federal Circuit freed the Board of the same-member requirement, the Board has swapped decisionmakers post-hearing nearly *800 cases*.

The government attempts to downplay the importance of the question presented by suggesting that the Board's credibility determinations may be revisited by reviewing courts. *See* BIO n.*. But that's not quite right. The Board's credibility determinations carry great weight. The Federal Circuit may *not* review "a determination as to a factual matter" unless it is connected to a constitutional issue. 38 U.S.C. § 7292(a); *see also id.* § 7292(d). The Veterans Court can do a bit more, but not much, reviewing factual findings for "clear error," *Grimes* v. *McDonough*, 34 Vet. App. 84, 89 (2021), which that court understands to require great deference to the Board's credibility determinations. *See, e.g.*, *Jones* v. *Derwinski*, 1 Vet. App. 210, 217 (1991) ("[T]he assessment of the credibility of the veteran's sworn testimony is a

function for the BVA in the first instance," and "is *not for this Court to find*.") (emphasis added).[2]

As the Veterans Court explained before the AMA amendments, the "obvious reason the Court defers to the Board's assessment of a witness's credibility is that the Board has had the opportunity to observe the witness firsthand, whereas the Court has not." *Arneson*, 24 Vet. App. at 383; *see also id.* at 383 ("[T]he 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.") (emphasis added). Yet the decisions below undercut that reasoning, taking the "personal hearing" and turning it into a cold record review.

C. This Case Is A Suitable Vehicle.

1. Frantzis adequately preserved his claim. The continuing validity of the same-member requirement was both pressed and passed upon by the courts below—indeed, in this case, the Board, Veterans Court, and Federal Circuit announced their view that the AMA eliminated the same-member requirement. The Board has leaned into that decision, citing and applying the

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[2] In the government's view, *Jones* stands only for the proposition that the Veterans Court—"in that case"—"merely declined to make a credibility determination in the 'first instance.' " BIO n.*. But *Jones* is oft-cited for the proposition that credibility determinations are the province of the Board. *See, e.g.*, *Smith* v. *Derwinski*, 1 Vet. App. 235, 237-238 (1991) ("Credibility is determined by the fact finder. As this Court determined in *Jones*, [at 217], the Court cannot determine the credibility of a veteran's sworn testimony. Determination of credibility is a function for the BVA."); *Wilson* v. *Derwinski*, 2 Vet. App. 16, 20 (1991) (similar).

Veterans Court's *Frantzis* decision *nearly 800 times* since it was issued.

The government nevertheless argues that the vehicle is flawed. The government first suggests (at 13) that Frantzis waived his constitutional arguments, but the government does not argue that this purported waiver creates a barrier to this Court's consideration of that claim. Nor could it. Frantzis's constitutional arguments merely provide additional reasons for interpreting the statute as Frantzis suggests.

In any event, there was no waiver here. App. at 58a-59a. Before the Veterans Court, Frantzis contended that the Board impermissibly switched judges "without providing notice." Vets. Ct. Dkt. No. 26 at 12. That argument "invoked the touchstone of fairness in veterans law: 'notice and an opportunity to be heard at virtually step in the process.' " App. at 65a (Jaquith, J., dissenting). The Veterans Court clearly picked up on this argument because, after the briefs were filed, the Veterans Court deemed fair process "relevant to the issue in this case" and ordered the parties to prepare to discuss how fair process applied here. Vets. Ct. Dkt. No. 34 at 1.[3]

If this Court saves the question presented for another day, the Board will simply continue to wave it

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[3] The government also finds fault (at 13) in Frantzis's election to proceed under the AMA. But that choice does not create a barrier to review either. Even if Frantzis chose to have his claim adjudicated under the AMA, he did not choose to permit the Board to swap decisionmakers after his hearing. The agency made no advance announcement that it would no longer abide by the same-member requirement. Frantzis could not have known that the Board would interpret Section 7102(a)—which the AMA did not amend—in the way that it did.

away with a citation to the *Frantzis* decision, as it has already done nearly 800 times. The time to decide is now.

2. This case is a good vehicle because credibility was central to the result here.

Board Member Catino's "implicit adverse credibility determination is obvious from [ ] the words she used." App. 59a (Jaquith, J., dissenting). Board Member Catino stated that, although "the Veteran and his wife testified that the severity of his headaches has been characteristic of prostrating attacks since 2009," "the evidence does not show that his headaches were productive of prostrating attacks." Vets. Ct. Dkt. No. 8 at 6-7.

The government seizes on the medical evidence cited by Board Member Catino, arguing that "[t]he Board's determination that petitioner's lay testimony was outweighed by medical evidence does not support the sort of credibility determination that is sometimes afforded deference." BIO 14 (citing *Anderson* v. *City of Bessemer City*, 470 U.S. 564 (1985)). Far from presenting a barrier to review, the government's observation only underscores why this Court's intervention is necessary. If Board Member Catino's decision lacks the type of "credibility determination that is sometimes afforded deference," that is because she did not conduct the hearing. Instead, she reviewed a transcript of Board Member Reinhart's conversation with Frantzis and his wife. It is no surprise, then, that Board Member Catino's decision includes no information about "the variations in demeanor and tone of voice that bear so heavily on the listener's understanding of and belief in what is said." *Anderson*, 470 U.S. at 575. She never heard the witnesses.

And to the extent the government suggests (at 14) that the documentary evidence was so compelling that the witnesses' credibility could not have made a difference, the government is wrong. The medical evidence here largely supported Frantzis's claim. "[T]here are only a few VA treatment reports in the record for the relevant period," and each of them corroborate Frantzis's description of his symptoms. App. 60a. There is "(1) A February 2010 nurse's note that says the veteran was having headaches that caused blurred vision four to five times per day and chronic pain," "(2) a March 2013 neurology consultation note from a resident physician that * * * says that the veteran had experienced headaches * * * as severe as 10 out of 10," and "(3) a disability benefits questionnaire a doctor completed in November 2014 describing similar symptoms and concluding that the veteran had 'very frequent prostrating (and prolonged) attacks of migraine headaches.' " *Id.* at 60a-61a.

The only medical record that did not support Frantzis's claim was a checkbox on "the April 2014 C&P examination report," which "says only this: 'Does the Veteran have characteristic prostrating attacks of migraine/non-migraine headache pain? [ ] Yes [X] No.' " *Id.* at 60a. And that checkbox is the basis for Board Member Catino's conclusion that medical records "indicated that [Frantzis's] headaches were of *less* severity" than he testified. *Id.* (emphasis added). There is every reason to believe that the checkbox would have received less weight had Board Member Catino, like Board Member Reinhart, had a personal conversation with Frantzis and his wife.

CONCLUSION

For the foregoing reasons, and those in the petition, the petition should be granted.

Respectfully submitted,

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