No. 12-389

In The Supreme Court of the United States

LADY LOUISE BYRON,

Petitioner,

v.

ERIK K. SHINSEKI,
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 *AMICI CURIAE* GOLD STAR WIVES OF AMERICA, MILITARY ORDER OF THE PURPLE HEART, NATIONAL ASSOCIATION FOR UNIFORMED SERVICES, NATIONAL VETERANS LEGAL SERVICES PROGRAM, AND PARALYZED VETERANS OF AMERICA IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether the U.S. Court of Veterans Claims has the authority and responsibility to reverse a denial of benefits where the record is complete and there is no *bona fide* issue for remand and thus no agency discretion to exercise upon a remand.

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INTEREST OF *AMICI CURIAE*[1]

This case presents the issue of whether a prevailing claimant before the Court of Appeals for Veterans Claims ("CAVC") must endure a pointless and lengthy delay in remanded proceedings before the Board of Veterans' Appeals ("BVA") even though the record is complete and there is no *bona fide* issue for remand, and thus no discretion for the BVA to exercise upon a remand. That is an issue of grave concern to *amici* – veterans organizations well-aware that administrative errors and resulting delays are the norm, not the exception for veterans in need.

Congress vested the CAVC with broad discretion to decide whether reversal or remand is appropriate in a given case. Where the BVA has failed to make a factual determination due to legal error, but the record is fully developed and there is only one legally permissible outcome based on the facts, the proper and mandatory appellate remedy is for the CAVC to reverse, not to remand.

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[1] Pursuant to the Court's Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part, that no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel made such a monetary contribution. Pursuant to Rule 37.2, counsel of record for both Petitioner and Respondent were notified at least ten days prior to the due date of this brief of the intention to file. The parties' written consents to the filing of this brief have been filed with the Clerk's office.

Amicus curiae Gold Star Wives of America ("GSW") is an organization of widows and widowers whose spouses died while on active duty or as the result of a military service connected cause. GSW was formed during World War II to provide support for the spouses and children of those who lost their lives while serving in the Armed Forces of the United States. It is a congressionally chartered, nonprofit veterans' service organization. Eleanor Roosevelt was a member and one of the original 15 signers when the organization was incorporated in the State of New York in 1945. The primary mission of GSW is to provide service, and support to these widows and widowers.

Amicus curiae Military Order of the Purple Heart ("MOPH") was formed in 1932 for the protection and mutual interest of all who have received the Purple Heart. The Purple Heart is a combat decoration awarded to members of the armed forces of the United States who are wounded by an instrument of war by the hands of the enemy. Composed exclusively of Purple Heart recipients, MOPH is the only veterans' service organization comprised strictly of "combat" veterans. Nonetheless, MOPH exists to assist all veterans in working with the VA and in filing claims for available benefits. The MOPH Service Program has experts on veterans' benefits at various administration regional offices, hospitals, veterans' centers, and state and county veterans' facilities. The MOPH Service Program's benefits experts process veterans' claims for compensation, pension, medical care,

education, job training, employment, veterans' preferences, and housing, death, and burial benefits.

Amicus curiae National Association for Uniformed Services was founded in 1968 to protect and enhance the earned benefits of uniformed servicemembers, retirees, veterans, and their families and survivors, while maintaining a strong defense. It also seeks to foster *esprit de corps* among uniformed services personnel and veterans of the United States, through nonpartisan advocacy on Capitol Hill and with other government officials.

Amicus curiae National Veterans Legal Services Program ("NVLSP") is an independent nonprofit organization that has worked since 1980 to ensure that the United States government provides our Nation's 25 million veterans and active duty personnel with the federal benefits they have earned through their service to the country. In addition, and of particular relevance here, NVLSP is a veterans' service organization recognized by the Secretary under 38 U.S.C. § 5902 to assist veterans in the preparation, presentation and prosecution of claims for benefits before the VA. In this capacity, NVLSP has directly represented hundreds of veterans in proceedings before the Board of Veterans' Appeals. NVLSP has been instrumental in the passage of landmark veterans' rights legislation, and it has successfully challenged unfair practices by the VA that deprived veterans and their families of hundreds of millions of dollars in benefits. It also serves as a national support center that recruits, trains, and

assists thousands of volunteer lawyers and veterans' advocates. NVLSP publications provide veterans, their families, and their advocates with the information necessary to obtain the benefits to which they are entitled under the law. For the last ten years NVLSP has published the *Veterans Benefits Manual*, which has become the leading guide for advocates and attorneys who help veterans and their families obtain benefits from the VA.

Amicus curiae Paralyzed Veterans of America ("PVA") is a national, Congressionally-chartered veterans service organization headquartered in Washington, DC. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of armed forces veterans who have experienced spinal cord injury or dysfunction. PVA seeks to improve the quality of life for veterans and all people with spinal cord injury and dysfunction through its medical services, benefits, legal, sports and recreation, architecture and other programs. PVA advocates for quality health care, for research and education addressing spinal cord injury and dysfunction, for benefits based on its members' military service and for civil rights, accessibility and opportunities that maximize independence for its members and all veterans and non-veterans with disabilities.

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REASONS FOR GRANTING THE PETITION

It is essential for the Court to understand that denial of Ms. Byron's petition would be the practical equivalent of an affirmance on the merits. It is difficult to imagine a veteran claimant ever again presenting this important procedural question to the Court. If the Federal Circuit decision in this case stands, veterans who prevail at the CAVC but win futile remands rather than outright reversals will have little reason to seek reversal from the Federal Circuit or this Court. They would face certain defeat before a panel of the Federal Circuit, which would be bound by the precedential decision in this case. Given that no Federal Circuit judges dissented from the denial of Ms. Byron's petition for rehearing *en banc*, there is no reason to believe that the Federal Circuit, with exclusive jurisdiction over appeals of CAVC decisions, will correct its own mistake.

A denial of Ms. Byron's well-presented petition for writ of *certiorari* would send a strong implicit message to the many claimants who face Ms. Byron's predicament: appealing a CAVC decision ordering a futile remand would itself be futile. Faced with such grim appellate prospects, the obvious choice for the claimant is to endure the pointless remand and hope that the superfluous fact-finding on remand does not take years to complete. The *status quo* would prevail, and veterans would continue to face scores of unnecessary remands in an already overburdened veterans' claims system.

ARGUMENT

UNDER THE VETERANS' JUDICIAL REVIEW ACT, THE CAVC HAS BROAD DISCRETION TO DECIDE WHETHER TO REVERSE OR REMAND A CASE, AND IT HAS THE DUTY TO REVERSE WHERE A REMAND WOULD BE FUTILE.

I. The System that Congress Created for the Adjudication of Veterans' Benefits Claims Is Fundamentally Different than Ordinary Civil Litigation.

In this veterans' claims case, the Federal Circuit's fundamental error was to treat the procedural question presented as though it is no different than judicial review of final decisions of the Board of Immigration Appeals. Relying on two immigration cases – *Gonzales v. Thomas*, 547 U.S. 183 (2006) (*per curiam*) and *INS v. Ventura*, 537 U.S. 12 (2002) (*per curiam*) – the Federal Circuit established a nearly automatic rule that requires the CAVC to remand whenever the BVA errs to the prejudice of the claimant, and even if only a single, obvious factual finding remains necessary to establish entitlement to the claim. *Byron v. Shinseki*, 670 F.3d 1202, 1205-06 (Fed. Cir. 2012). This rigid application of *Thomas* and *Ventura* overlooks the uniqueness of the statutory scheme for veterans' claims, and echoes the Federal Circuit's error in *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (*en banc*), *rev'd*, 131 S. Ct. 1197 (2011).

In *Henderson*, the Federal Circuit applied *Bowles v. Russell*, 551 U.S. 205 (2007), an ordinary civil case, to the question of whether the 120-day limit for veteran appeals to the CAVC is jurisdictional. 589 F.3d at 1213-17. In a unanimous decision, this Court reversed, basing its decision largely on the uniqueness of veterans' claims procedures: "The contrast between ordinary civil litigation – which provided the context of our decision in *Bowles* – and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." 131 S. Ct. at 1205-06. The Court also distinguished its holding in *Stone v. INS*, 514 U.S. 386, 405 (1995) (120-day limit to appeal final decisions of the Board of Immigration Appeals was jurisdictional) by looking closely at the statutory scheme Congress created for the benefit of veterans. 131 S. Ct. at 1204-06.

Here, the Federal Circuit neither cited *Henderson* nor followed its teachings on the proper interpretation of statutes that created the CAVC and give it broad discretion to reverse or remand a case, as it deems appropriate. A proper application of *Henderson* to the statutory analysis in this case reveals that *Thomas* and *Ventura* are just as inapposite to the reverse/remand question here as *Bowles* and *Stone* were to the appellate deadline question presented in *Henderson*.

II. Properly Interpreted, the Statutory Scheme for the Adjudication of Veterans' Benefits Claims Gives the CAVC the Power and Duty to Reverse Rather than Remand a Meritorious Case Where the Record Reveals that a Remand Would be Futile.

Congress vested the CAVC with the broad, exclusive power to review BVA decisions: "The Court shall have power to affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate." 38 U.S.C. § 7252(a). Courts have recognized that "as appropriate" is a clear statutory conveyance of discretion.[2] This statutory language is different and broader than language Congress used to vest the courts of appeals with jurisdiction to review final decisions of district courts (28 U.S.C. §§ 1291, 1295), and final agency decisions under the Administrative Procedures Act ("APA"). 5 U.S.C. § 706.

The CAVC orders some form of relief for the veteran in 79% of its merits decisions, reflecting how very different its review of BVA decisions is compared to any other court or tribunal's review of administrative decisions. *See Henderson*, 131 S. Ct. at 1201. Indeed, this extraordinarily high harmful error rate

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[2] *See, e.g., Consumer Fedn. of Am. v. United States HHS*, 83 F.3d 1497, 1502 (D.C. Cir. 1996) ("If 'as appropriate' is to have any effect, then, it must mean that the agency must specifically include the risks and consequences factors in its regulations only to the extent appropriate. To conclude otherwise * * * would violate a basic canon of statutory construction by treating the two words as surplusage. [citation]").

underscores the need of the CAVC to reverse rather than remand in appropriate cases if veterans can ever expect the BVA and the agency's regional offices to reduce their error rates. The agency, as demonstrated by over 20 years of CAVC history, will never improve its decision-making if it believes it will always get to do it over again.

Several statutory provisions evince the intent of Congress to stack the procedural deck in favor of veterans in CAVC proceedings. Only veterans – not the Secretary of Veterans Affairs – may appeal adverse decisions of the BVA to the CAVC. 38 U.S.C. § 7252(a). Under § 7261(a)(4), the CAVC reviews BVA factual findings under the "clearly erroneous" standard of review, which is less deferential than the APA's "unsupported by substantial evidence" standard under 5 U.S.C. § 706(2)(E). The CAVC may disturb BVA factual findings only where they are "adverse to the claimant" and must give the veteran the "benefit of the doubt" on close evidentiary questions. §§ 7261(a)(4), (b)(1); § 5107(b).

With so many statutory provisions designed to favor veterans and expedite the adjudication of their benefits claims, why would Congress have meant to prohibit the CAVC from deciding it would be "appropriate" under §7252(a) to reverse rather than remand a case that can only have one legally correct outcome in favor of the veteran? Such pointless procedural delays defeat the goal that veterans' claims be resolved "as quickly as practicable." 38 U.S.C. § 7267(a).

Reversing instead of remanding where the evidentiary record is complete and reveals how the only legally correct outcome would be in favor of the veteran is not appreciably different than what the CAVC already does when it disturbs "clearly erroneous" BVA factual findings adverse to the veteran, based on the evidentiary record. Even the Federal Circuit accepts that reversal rather than remand is appropriate where the relevant facts are admitted, and that the CAVC should affirm an erroneous BVA decision where the evidentiary record reveals that the legal error was harmless to the veteran. 670 F.3d at 1206. It is highly doubtful that Congress meant for the CAVC to consider whether the evidentiary record shows a BVA legal error was harmless under 38 U.S.C. § 7261(b) in a weak case, but not consider whether a complete evidentiary record establishes that reversal rather than remand is "appropriate" under § 7252(a) in a strong case.

The main policy reason for the remand rule articulated in *Thomas* and *Ventura* – the advantage of having an agency "bring its expertise to bear upon the matter" (*Ventura*, 537 U.S. at 16-17) – does not apply to the CAVC's review of BVA decisions. The CAVC has precisely the needed expertise to determine if the factual record makes reversal rather than remand "appropriate" under § 7252(a). The Court has recognized the CAVC's expertise, which is yet another critical difference between the Article III courts' review of the immigration cases at issue in *Thomas* and *Ventura*, and the CAVC's review of BVA decisions.

> It is the Veterans Court, not the Federal Circuit, that sees sufficient case-specific raw material in veterans' cases to enable it to make empirically based, nonbinding generalizations about "natural effects." And the Veterans Court, which has exclusive jurisdiction over these cases, is likely better able than is the Federal Circuit to exercise an informed judgment as to how often veterans are harmed by which kinds of notice errors. *Cf. United States v. Haggar Apparel Co*., 526 U.S. 380, 394 (1999) (Article I court's special "expertise . . . guides it in making complex determinations in a specialized area of the law").

Shinseki v. Sanders, 129 S. Ct. 1696, 1707 (2009).

III. Even Assuming this Is a Close Case, the Federal Circuit Ignored the Canon of Statutory Construction that the Applicable Statutes Are to Be Construed in the Beneficiaries' Favor, the Application of Which Requires a Ruling in Ms. Byron's Favor on the Procedural Question She Presents.

The CAVC's power under 38 U.S.C. § 7252(a) to determine whether it is appropriate to reverse rather than remand a case must be "liberally construed" in favor of veterans. *Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946). The Court reaffirmed this longstanding canon of statutory construction in *Henderson*. 131 S. Ct. at 1206. The

dissenting Federal Circuit judges in *Henderson* lamented that "[the Federal Circuit] often pays lip-service to the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor. In reality, however, it not infrequently fails in its fundamental obligation to apply the law, when the issue is an open one, in favor of the veteran." 589 F.3d at 1221 (Mayer, J., dissenting) (internal citations and quotation marks omitted).

Here, the Federal Circuit did not even pay lip-service to this canon of statutory construction in favor of veterans – it ignored the canon altogether. *Amici* respectfully submit that this is not a close case and that even under a neutral interpretation of § 7252(a) and other relevant statutes, the CAVC has the power and duty to reverse rather than remand where a complete record reveals that a remand would be futile. At a minimum, however, the statutory scheme is ambiguous on that question; any such ambiguity should and must be resolved in favor of veterans.

CONCLUSION

With respect, *amici* contend that the Federal Circuit decision in this case is erroneous and will result in scores of pointless, wasteful remands for prevailing veterans at the CAVC. It is very likely that Ms. Byron's petition will be the one and only opportunity for the Court to correct the Federal Circuit's error. Accordingly, the Court should grant Ms. Byron's

petition for writ of *certiorari* and reverse the decision of the Federal Circuit.

Respectfully submitted,

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