No. 12-389

In the Supreme Court of the United States

Lady Louise Byron,
Petitioner,

v.

Eric 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 Amicus Curiae of Professor William F. Fox in Support of Petitioner

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Interest of Amicus Curiae

Pursuant to Supreme Court Rule 37.2, Professor William F. Fox submits this brief amicus curiae in support of Petitioner.[1] Professor William F. Fox is currently a Distinguished Scholar in Residence and a member of the full-time resident faculty at the Dickinson School of Law, the Pennsylvania State University.[2] Prior to becoming a member of the Dickinson faculty, Professor Fox served for 31 years as a tenured, Ordinary Professor and full-time member of the faculty of the Columbus School of Law, The Catholic University of America. He was dean of the Columbus School of Law from 2003-2005.

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[1] Pursuant to Supreme Court Rule 37.2, all parties received notice at least 10 days prior to the due date of this amicus brief of Amicus Curiae's intent to file this brief. All parties have granted permission for the filing of this brief and the parties' written consents have been lodged with the Clerk of this Court.

Pursuant to Supreme Court Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part and that no person or entity other than Amicus Curiae has made a monetary contribution for the preparation or submission of this brief.

[2] Amicus Curiae is submitting the instant brief in his individual capacity as an attorney at law and professor of law. The Pennsylvania State University has had nothing to do with the preparation of this brief and takes no position whatsoever on the merits of the instant case.

Professor Fox served as an enlisted man in the United States Army for six years from 1961-1967, with four of those years on active duty and two as a member of the U.S. Army reserve. Due to injuries suffered while on active duty, he himself is a disabled veteran who has been receiving compensation from the Department of Veterans Affairs (formerly the Veterans Administration) since 1966.

In 1994, Professor Fox was designated Veterans Law Scholar by the Paralyzed Veterans of America (PVA). Under a grant from the PVA, he authored a book on veterans law, now in its third edition entitled "The Law of Veterans Benefits: Judicial Interpretation," one of the first book-length publications to describe and analyze the Veterans Judicial Review Act of 1988 and the then-new United States Court of Appeals for Veterans Claims (formerly the United States Court of Veterans Appeals). Since then, Professor Fox has published additional journal articles on veterans disability issues, has represented individual veteran-claimants before the United States Court of Appeals for the Federal Circuit, has testified as an expert witness before the federal district court in the case of *Veterans for Common Sense v. Peake*, 563 F. Supp. 2d 1049, *remanded with instructions to dismiss, sub nom., Veterans for Common Sense v. Shinseki*, 678 F.3d 1013 (9th Cir. 2012)(*en banc*), and has served as an expert commentator on the law of veterans

disability benefits in a number of periodicals, including the National Law Journal. The National Law Journal article is set out as Appendix E in the Petition for a Writ of Certiorari submitted in the instant case by Lady Louise Byron.

Summary of Argument

Slightly over twenty years ago, the United States Congress altered fundamentally the manner in which the United States Government deals with veterans' disability claims. Significant among all these changes was the creation of a brand new court, the United States Court of Appeals for Veterans Claims (CAVC) that was vested with exclusive jurisdiction over appeals taken from the Board of Veterans' Appeals, the entity that performs intra-agency review of claims within the Department of Veterans Affairs. The CAVC was established under Congress' power to create judicial bodies under Article I of the United States Constitution. With strict statutory limitations, appeals from the CAVC may be taken to the United States Court of Appeals for the Federal Circuit.

The CAVC was created without an accompanying body of pre-existing jurisprudence and was clearly intended by Congress to become an expert decision-making entity within the overall scheme of veterans' benefits. As such, there was no reason, gleaned either from the court's underlying statutes or from the Constitution, for the CAVC to assume all the trappings of Article III courts. The CAVC, nevertheless, decided that it would apply Article III-style concepts such as the requirement of

standing, the prohibition against issuing advisory opinions and the like.

These self-imposed limitations have gotten in the way of the CAVC's exercising its proper role as a reviewing body with exclusive authority over veterans' claims which was supposed to develop as much expertise as the Department of Veterans Affairs itself. Moreover, statutory changes enacted by Congress in 2002 have made clear that the CAVC has much more leeway in determining issues that involve factual matters than might have been the case in earlier years. Accordingly, the CAVC has clear authority to reverse, rather than remand, cases such as the instant case when the record contains all the information necessary to make a proper decision in the matter and when the only thing lacking in the record is a formal finding of fact by the Board of Veterans' Appeals.

Argument

I. This Court Has Long Recognized the Unique Nature of Veterans Disability Claims as a Component of Our Judicial System.

The United States government has authorized the award and payment of veterans' disability compensation since the Revolutionary War.[3] The Continental Congress, worried about its ability to mount and maintain a proper military force to engage the British, promised those individuals who agreed to fight for American independence certain government benefits if they became disabled as a result of their military service.[4] In 1792, when the United States Congress enacted the statute commonly referred to as the "Invalid Pensions Act,"[5] it conferred administrative decision-making powers on the then-new federal judiciary. At one point, even John Jay, the first Chief Justice of the United States, took off his judge's hat and sat as a "commissioner" to decide some of the claims under

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[3] H.R. Rep. No. 963, 100th Cong., 2d Sess. 9 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5790, *citing* United States Government Printing Office, Federal Laws Relating to Veterans of Wars of the United States 25 (1932).

[4] *Id.*

[5] 1 Stat. 243 (1792). The full title of the statute was incredibly cumbersome: "An Act to provide for the settlement of claims of widows and orphans barred by the limitations heretofore established and to regulate the claims to invalid pensions." Id. (archaic capitalization omitted).

the Act.[6] This administrative procedure lasted for less than one year and was repealed in 1793 when Congress itself agreed that the procedure was probably unconstitutional as a violation of Article III of the United States Constitution.[7] At the same time, Congress effectively closed the door to judicial review of veterans claims—a door that was not to open for nearly 200 years until the enactment of the Veterans' Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (codified in scattered sections of 38 U.S.C.) (hereafter sometimes referred to as the "VJRA".)

The VJRA repealed the statutory preclusion against judicial review and created the United States Court of Veterans Appeals (now the United States Court of Appeals for Veterans Claims)(sometimes referred to as the "CAVC") to provide a mechanism for review of claims denied by the Board of Veterans Appeals (sometimes referred to as the "BVA")—the entity within the Department of Veterans Affairs that provides intra-agency review of disability claims. The CAVC was established under Congress' authority to create judicial bodies under Article I of the Constitution and was deliberately placed outside the structure of the Department of Veterans Affairs to insure a

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[6] Susan Low Bloch & Maeva Marcus, *John Marshall's Selective Use of History in Marbury v. Madison*, 1986 Wis. L. Rev. 301, 305-09.

[7] *Id.*

significant degree of independence from the administrative agency.

In doing so, Congress rejected at least two other alternatives. The first alternative would have removed the BVA from the Department and re-constituted it as an "independent" reviewing body with authority to review de novo all decisions made within the VA.[8] The second alternative would have permitted claims decided by the BVA to be heard by the United States Courts of Appeals for the individual regional circuits.[9] The rejection of each of these alternatives shows clearly that Congress intended the CAVC to become a reviewing body with exclusive and specialized expertise devoted solely to veterans' disability claims.

In addition to this clear-cut decision establishing the decisional structure for processing disability claims, Congress inserted a number of provisions in the CAVC's statutory matrix that "place a thumb on the scale in the veteran's favor in the course of administrative *and judicial review* of VA decisions." *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009)(Souter, J. dissenting)(emphasis added.)[10]

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[8]H.R. Rep. No. 5288, 100th Cong., 2d Sess. (1988).

[9]S. Rep. No. 439, 100th Cong., 2d Sess. (1988).

[10] In support of this basic principle, Justice Souter cited the "benefit of the doubt" rule, 38 U.S.C. § 5107(b) and permitting a veteran, but not the VA, to appeal an adverse decision, 38 U.S.C. § 7252(a). Even though Mr. Justice Souter wrote in

Even more recently, this Court made a sharp distinction between certain rules and policies that control judicial review by Article III courts as contrasted with "review by an Article I tribunal as part of a unique administrative scheme." *Henderson v. Shinseki*, 131 S. Ct. 1197, 1204 (2011) (holding that the provision in the VJRA establishing a 120-day filing deadline for the filing of a notice of appeal from an adverse BVA decision is not jurisdictional.)

II. At Its Inception, the CAVC Adopted Many of the Trappings of Article III Courts Even Though It Was Not Required to do so by Constitutional Mandate or by Statute.

Unlike a number of other courts created by Congress, the CAVC had no pre-existing jurisprudence. As the court's first chief judge commented, it was a court "without antecedent."[11] For reasons never fully explained or articulated, the CAVC determined at its inception to adopt virtually all of the self-limiting judicial doctrines that Article III courts must utilize as a matter of constitutional law. For example, in one of its earliest decisions,

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dissent in Sanders, these views were reflected rather than contradicted in the Sanders majority opinion.

[11]Frank Q. Nebeker, *Jurisdiction of the United States Court of Veterans Claims: Searching Out the Limits*, 46 Me. L. Rev. 5 (2000).

Mokal v. Derwinski, 1 Vet. App. 12 (1990)the court, without being commanded to do so by Congress, adopted "*as a matter of policy*," the jurisdictional restrictions embedded in the Article III case or controversy requirement. *Id.* at 14-15 (emphasis added). The *Mokal* court went on to dismiss as moot a request, sent in the form of a letter, from the daughter of a veteran who asked the court to decide a petition that had not been fully adjudicated by the Board of Veterans Appeals. The CAVC embraced the case and controversy requirement even in the face of Congressional silence and even after noting that the statutes that created the District of Columbia court of appeals *expressly* set out a "case or controversy" requirement for that court. *United States v. Cummings*, 301 A.2d 229, 231 (D.C. 1973) (quoting D.C. Code § 11-705).

Notably, the CAVC's *Mokal* opinion also contains a statement despairing of this Court's purported lack of guidance on the appropriate operation and jurisprudential constraints for Article I courts. As the CAVC commented: "The Secretary's argument understandably shies away from a constitutional analysis of the nature of this Court's power as a court or tribunal established under Article I . . . . It is little wonder, since the Supreme Court's decisions in this area 'do not admit of easy synthesis.' " *Id.* at 14, *quoting Commodities Futures Trading Comm'n v. Schor*, 478 U.S. 833, 847 (1986).

To its credit, and along the same lines urged by Amicus Curiae in the instant brief, the CAVC looked closely at a number of decisions of this Court to observe, as has this Court, that this Court has "declined to adopt formalistic and unbending rules" in determining the manner and the extent to which Article I tribunals must carry out their business. *Mokal*, 1 Vet. App. at 14, citing *Schor*, 478 U.S. at 851 which, in turn, cited *Thomas v. Union Carbide Agricultural Products Co.*, 473 U.S. 568, 587 (1985).

There are other examples. In the face of congressional silence, the CAVC has purportedly adopted a standing requirement that is identical to that required of Article III courts. But a close examination of relevant CAVC decisions suggests that the CAVC is far less rigorous in requiring Article III-type standing than are the Article III courts themselves. *Compare Waterhouse v. Principi*, 3 Vet. App. 473 (1992), *Corchado v. Derwinski*, 1 Vet. App. 160 (1991) and *Swan v. Derwinski*, 1 Vet. App. 20 (1990) *with Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871 (1992) and *Ass'n of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150 (1970).

Absent from any of these opinions is any discussion of whether it might have been wiser for the CAVC (as an expert, specialized Article I court) to adopt the somewhat less-rigorous and broader "participation" requirements for administrative agencies set out in *Office of Communication, United Church of Christ v. Fed. Communications Comm'n*,

359 F.2d 994 (D.C. Cir. 1966). Writing for the court in *United Church of Christ*, then-circuit judge Warren Burger noted that Article III courts must apply constitutional limitations on party standing but an administrative agency, charged with protecting and articulating the "public interest" may permissibly broaden the entities that participate in any given hearing. The CAVC which is charged with looking out for the special interests of American veterans might well have adopted the *United Church of Christ* standard.

In *Nagler v. Derwinski*, 4 Vet. App. 297 (1991), the CAVC stated flatly that it would not and could not issue advisory opinions, but a close reading of the *Nagler* opinion (a lengthy excursus on awards of attorneys' fees) shows that virtually none of the court's language was compelled by the specific facts of that case. *Id.* at 303-07. *Nagler* was unquestionably an "advisory opinion" surrounded by an Article III-style disclaimer against advisory opinions.

Similarly, in *Grovhoug v. Brown*, 7 Vet. App. 209 (1994), the court remanded a Board decision because the BVA had not expressly addressed a number of Fifth Amendment due process claims made by the veteran. An Article III court probably would have been compelled to simply vacate and remand with instructions to the Board to address the claims. Not so the CAVC. The court pressed ahead with an opinion containing extensive language on

the various due process claims even while labeling those claims "premature."[12] *Id.* at 216.

By contrast, the CAVC has notably failed to exert judicial power that it unquestionably possesses under the All Writs Act, 28 U.S.C. § 1651, to issue writs of mandamus compelling agency action unreasonably withheld. In only the second full opinion issued by the CAVC, *Erspamer v. Derwinski*, 1 Vet. App. 3 (1990), the court determined that it had the authority to issue a writ of mandamus (i.e., it is a "court established by Congress"), but even in the face of a ten-year delay in processing the claim of a veteran exposed to radiation poisoning, the court declined to issue the writ. In *Bullock v. Brown*, 7 Vet. App. 69 (1994), the court refused to grant mandamus in the face of the veteran's assertion that his claim had been pending at the VA for fifteen years.

Perhaps the most egregious refusal of the CAVC to invoke its mandamus powers came in the case of *Nash v. West*, 11 Vet. App. 91 (1998), a 74-year old veteran who, much like the claimant in *Bullock* and the now-deceased husband of the petitioner in the instant case, filed a claim for

[12] Coincidentally, one of the strongest and earliest opinions of this Court condemning the use of advisory opinions was issued in the context of those Revolutionary War veteran disability applications. In re Hayburn's Case, 2 U.S. (2 Dall.) 409 (1796).

injuries suffered from exposure to atomic radiation.[13] In *Nash*, the U.S. Army veteran had been ordered into Osaka, Japan shortly after the cessation of hostilities. In 1989, he filed a claim for service connection for breast cancer in 1989. In 1997, still not having any final decision from the Department, Mr. Nash asked the CAVC for a writ of mandamus in 1997 telling the court that his "health is not good" and asking that the CAVC order the Department to make an immediate decision on his claim in the face of four earlier remands of his case from the Board to the Regional Office. *Id.* at 93. Mr. Nash very humbly and respectfully asked that a decision on his claim be made "in my lifetime." *Id.* Even in light of all this, the CAVC declined to issue the mandamus, referring to the nine-year delay in processing his claim and the four separate remands as merely "unfortunate."[14]

Had the CAVC over the now more than 20 years of its existence been more assertive and aggressive in the use of its undeniable powers of mandamus, cases such as the instant case might well have been handled far more expeditiously and without the need

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[13] Mr. Nash asserted that he had been ordered into Hiroshima as early as October 7, 1945 and that while in Osaka he was forced to eat his food off tables covered with aluminum sheets that had been salvaged from Hiroshima. 11 Vet. App. At 93.

[14] The United States Court of Appeals for the Federal Circuit has confirmed the CAVC's power to issue writs of mandamus but has never instructed the CAVC actually to issue a writ. *See, e.g.*, Cox v. West, 149 F.3d 1360 (Fed. Cir. 1998).

to pursue the issues discussed in the instant petition.

III. The CAVC Unquestionably Has the Power to Reverse the Instant Case. A Specialized, Expert Article I Court with Jurisdiction Over a "Unique" System of Benefits Is Not Bound by the Same Restrictions that the Constitution Imposes on Article III Courts.

The statutes establishing the CAVC give the court express "power to affirm, modify, or reverse a decision of the Board or to remand the matter, *as appropriate*." 38 U.S.C. § 7252 (emphasis added.) A subsequent provision, 38 U.S.C. § 7261(a)(4) authorizes the CAVC to "hold unlawful and set aside or reverse such finding if the finding is clearly erroneous."

As the Petitioner's brief emphasizes, the terms "set aside" and "reverse" were added to the CAVC's statutory matrix by the Veterans Benefits Act of 2002 (VBA), Pub. L. No. 107-330, 116 Stat. 2820, 2832, to make clear that the CAVC has the power to reverse after a mandatory review of the entire factual record. 148 Cong. Rec. S11334. Brief for Petitioner, Lady Louise Byron, at 21.

While the underlying statutes prohibit the CAVC from conducting a "trial de novo" of a

veteran's disability claim, the CAVC's broad authority to search and review the record of a claim surely authorizes the court to reverse a BVA decision when the record contains all the information necessary to make a principled decision even if the BVA has not seen fit to issue a specific finding of fact on that particular issue. A close examination of the instant case makes clear that the CAVC is engaging in excessive deference to the BVA when the court itself is—and was intended by Congress to be—an expert in the underlying subject matter, and thereby fully authorized to conduct a searching review of the entire record and enter a decision reversing the BVA, rather than merely remanding the claim.

Many of these issues were well-explicated by Professor Bruff in a seminal article on specialized courts. Harold H. Bruff, *Specialized Courts in Administrative Law*, 43 Admin. L. Rev. 329 (1991). Professor Bruff begins his analysis of specialized courts by pointing out that judges on such courts "can become expert in the substantive and procedural issues surrounding particular programs, especially highly technical ones. More accurate decisions should result." *Id.* at 330.

In analyzing the statutes that authorize the CAVC, Professor Bruff points out that Congress' authorizing the CAVC to set aside factual determinations on the basis of the "clearly

erroneous" standard, rather than the more familiar "substantial evidence" or "arbitrary and capricious" standards was done to "allow intensified fact review" that is not within the purview of traditional Article III courts. *Id.* at 361.

He goes on to comment that the intensive review of facts permitted for courts such as the CAVC is in sharp contrast to the much more limited review over CAVC decisions performed by the United States Court of Appeals for the Federal Circuit. *Id.* In other words, the CAVC was created as an expert body with significant authority to review the facts of a disability case. As he explains: "Legislative courts such as the [CAVC] stand in a closer relation to the agencies they review than do Article III courts." *Id.* Accordingly, the CAVC is an entity with significant, independent authority to determine factual issues. The court couples this power to make factual determinations with a parallel independence from the agency itself. Because the CAVC stands outside the Department of Veterans Affairs, it is "less subject to subtle socializing influences than are ALJs or similar adjudicators." *Id.* at 362.

IV. The Traditional Doctrines of Deference to the Decisions of an Administrative Agency that Govern Judicial Review by Article III Courts Do Not and Should Not Apply to the Work of a Specialized, Expert Court Such as the CAVC.

This Court has created a number of doctrines of deference that govern the non-specialized Article III courts in relation to federal administrative agencies. For example, in *Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc.*, 435 U.S. 519 (1978), this Court admonished the United States Court of Appeals for the District of Columbia Circuit for substituting its judgment on the issue of agency rulemaking procedures—a judgment that went well-beyond the procedures that the agency was willing to utilize. This Court recognized that an Article III court—a generalist court—should not interfere with the decisions of the expert administrative agency—in this case the Nuclear Regulatory Commission. In these circumstances, the court of appeals impermissibly intruded into the domain of the agency.

Five years later, in *Baltimore Gas & Electric Co. v. Natural Resources Defense Council*, 462 U.S. 87 (1983), this Court reviewed a subsequent decision involving the same agency and the same controversy by the United States Court of Appeals for the District of Columbia Circuit that had held invalid as arbitrary and capricious agency action the so-called

"Table S-3 Rule" (i.e., the merits of the controversy first considered in the *Vermont Yankee* case). In *Baltimore Gas* case, this Court admonished the reviewing Article III generalist court to be particularly deferential when reviewing the scientific determinations of the expert administrative agency. *Id.* at 450.

But neither of these two decisions contemplates the unique relationship between the CAVC and the Board of Veterans' Appeals. The CAVC is not a generalist, Article III court. It was established by Congress to develop and exercise special expertise with regard to veterans' claims. In the peculiar circumstances of the Veterans' Judicial Review Act, it is the United States Court of Appeals for the Federal Circuit—an Article III court—that is required to show exceptional deference to the decisions of the CAVC. Under 38 U.S.C. § 7292(d)(1) the Federal Circuit is authorized only to review issues of statutory interpretation.[15] Under 38 U.S.C.

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[15] In the express language of the statute, "The Court of Appeals for the Federal Circuit shall decide all relevant questions of law, including interpreting constitutional and statutory provisions. The court shall hold unlawful and set aside any regulation or any interpretation thereof (other than a determination as to a factual matter) that was relied upon in the decision of the Court of Appeals for Veterans Claims that the Court of Appeals for the Federal Circuit finds to be—(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right,

§7292(d)(2), the Circuit is prohibited from reviewing a challenge to a factual determination or a challenge to a law or regulation applied to the circumstances of a particular case (except in instances involving a challenge based on the Constitution).[16]

The Federal Circuit case law makes clear that the Circuit is substantially limited in its appellate jurisdiction and that the CAVC is not necessarily limited to conventional doctrines of judicial review imposed on Article III courts. For example, in *Newhouse v. Nicholson*, 497 F.3d 1298 (Fed. Cir. 2007), the Federal Circuit affirmed a judgment against the veteran-claimant who had argued that the CAVC was required to remand his case to the BVA for a Board determination as to whether there was prejudicial error in his case. The Federal Circuit noted its own jurisdictional limitations but went on to hold that the CAVC is not limited by the doctrine (created for Article III courts) enunciated in the seminal case of *Sec. & Exchange Comm'n v. Chenery Corp.*, 332 U.S. 194 (1947) which prohibits an Article III reviewing court from affirming an

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power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law."

[16] The express language of the statute is: "Except to the extent that an appeal under this chapter presents a constitutional challenge, the Court of Appeals may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case."

agency decision based on a ground other than that relied upon by the agency. As explained by the circuit,

> "[T]he *Chenery* doctrine is a simple but fundamental rule of administrative law . . . that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency.

Newhouse, 497 F.3d at 1301 (emphasis in the original).

Acknowledging that the underlying statute authorized the CAVC to take account of prejudicial error, the circuit held that the CAVC was not limited by the *Chenery* doctrine.

The instant case reflects these same concepts. This case is governed by the amendments made to the VJRA by the Veterans Benefits Act of 2002 which now expressly permit the CAVC to reverse the BVA's action when there is only one legally permissible view of the evidence in the complete record. As Senator Rockefeller commented, these changes in §7261(a)(4)(adding the language "or reverse" following the phrase "and set aside") authorizes the CAVC to "reverse clearly erroneous findings when appropriate, rather than remand."

148 Cong. Rec. S1132. Much as articulated by *Newhouse*, this statutory change makes clear that the CAVC is not necessarily limited by many of the doctrines of deference created by this Court for the generalist Article III courts.

CONCLUSION

For the reasons stated in this brief amicus curiae and in the Petitioner's main brief, this Court should grant the petition for writ of certiorari.

Respectfully submitted,

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