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

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

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The government's response to the Petition does not deny that the massive backlog in the veterans benefits appeals process is a national embarrassment. Nor does it deny that the CAVC deserves its reputation as a "remand mill." The government also does not deny that the high volume of remands and the related backlog could be significantly improved by eliminating needless remands such as the one ordered below.

How could it deny all this? Seven leading veterans organizations, respected media, including the NY Times and National Law Journal, and thoughtful academics, have all called for the grant of this Petition precisely because of the profound problem it addresses.

Instead of challenging the importance of the issue or suitability of the vehicle, the government attacks the merits. But to do that it has to rewrite the question presented and ignore the true issue.

The government insists that Lady Byron improperly sought initial fact-finding from the CAVC. However, the record unmistakably establishes that she simply asked the CAVC to decide whether there was a *bona fide* issue as to her entitlement to benefits that would warrant the multi-year delay of yet another remand.

The government never squarely addresses this issue or its support in this Court's jurisprudence. For instance this Court's decision in *Ventura* acknowledges that, if there is no *bona fide* issue for remand, courts are *not* mindlessly obligated to remand. *Ventura* states that futile remands should be rare, it did not say they would never occur. More fundamentally, *Ventura* did not involve our dysfunctional veterans benefits appeal system in which needless remands are ordered regularly.

In sum, Lady Byron's 41 year journey through the byzantine veterans benefits system epitomizes the problems with the CAVC appeals process. In its opposition, the government yet again fails to identify any reason to believe that Lady Byron is not entitled to benefits. The record is unanimous that she lost her husband in 1971 due to his exposure to atmospheric radiation in the 1950s in service to his country. About this, there can be no serious debate. Because there is no *bona fide* issue that could justify a remand, this 80 year-old widow deserves now the benefits that have been wrongly denied for decades. Enough is enough.

I. THE GOVERNMENT DOES NOT DENY THAT THIS CASE PRESENTS A RECURRING ISSUE OF NATIONAL IMPORTANCE

The government does not deny that the appeals system for veterans benefits is plagued with a horrendous backlog, caused in good part by the

CAVC's notorious practice of remanding most of the cases appealed to it. *See* Pet. at 30. Nor does the government deny that a decision by this Court has the potential to significantly improve this national problem.

And it would not be credible for the government to deny this. Leading veterans organizations—with the best and closest view of the system—have persuasively confirmed the extent of the remand problem at issue in this Petition. *See* Br. of *Amici Curiae* Gold Star Wives of Am., Military Order of the Purple Heart, Nat'l Assoc. for Uniformed Servs., Nat'l Veterans Legal Servs. Program, and Paralyzed Veterans of Am. in Support of Petitioner; *Amicus* Br. of the Disabled Am. Veterans in Support of Petitioner. Indeed, their unanimous and full-throated amicus support for this Petition is unprecedented. The amicus briefs testify to the extent of the remand problem that characterize the current CAVC appeal process—which will only worsen in the wake of the Federal Circuit's opinion below.

This case has also attracted the interest, if not outrage, of the public. Just days ago the New York Times editorial page published its view that this Court should grant this Petition to help address the "quagmire" of the veterans appeals backlog, including its bureaucratic habit of remanding such appeals excessively. *See* "The Paperwork Mountain

at Veterans Affairs" (Nov. 23, 2012).[1] This editorial came on the heels of a New York Times feature about this case entitled "A Case That Could Unhinge a Veterans Benefits 'Hamster Wheel.'"[2] (James Dao, Nov. 20, 2012). That article details the frustration that exists with the CAVC's remand practice that adds years to the existing delays in the appeal system. The National Law Journal also wrote a feature on this case documenting the excess delays and frustration in the veterans community about nonsensical remands. "Veterans Seek More Aggressive Action From Special Appeals Court" (May 11, 2012).[3]

As explained in the Petition, the CAVC need only recognize the statutory power that it already has to avoid the bureaucratic ping-pong illustrated by this case. While this will have a dramatic effect in terms of helping to unclog the appeals process, it requires only a limited rule that prevents remands solely when there is no *bona fide* issue warranting a remand.

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[1] http://www.nytimes.com/2012/11/24/opinion/the-paperwork-mountain-at-veterans-affairs.html.

[2] http://atwar.blogs.nytimes.com/2012/11/20/a-case-that-could-unhinge-a-veterans-benefits-hamster-wheel/

[3] http://www.law.com/jsp/nlj/PubArticleNLJ.jsp?id=1202553113627.

II. THE GOVERNMENT DOES NOT DENY THAT THIS CASE IS A GOOD VEHICLE FOR ADDRESSING THE QUESTION PRESENTED

This case is an ideal vehicle to address the basic issue of CAVC power presented in the Petition. While the government concentrates on the merits in its opposition, it does not contest this point.

First, the government does not deny that this case may be this Court's only opportunity to address this important issue. As pointed out by amici, if the decision below stands, a benefits claimant will accept a needless remand rather than appeal to try to prove entitlement to a reversal. This is especially true for the vast majority of veterans and their survivors who do not have pro bono counsel. Not only is an appeal of a remand decision expensive and time consuming, but near certain defeat is likely absent a ruling now by this Court. The Federal Circuit's decision below binds the CAVC and will discourage further attempts to help address the problem of excess remands of meritorious claims. It is now or never.

Second, this case presents a pure legal question. Contrary to the government's suggestions, the outcome of this appeal does not depend on Ms. Byron's view that the evidence in her favor is "indisputable." *See* Opp'n at 9. Here, the CAVC outright refused to review the record at all to determine if a *bona fide* issue for remand existed.

See Pet. at 22a. The Federal Circuit affirmed because the CAVC confirmed it did not have the power to even consider whether there is a bona fide issue for remand -- not because the CAVC properly found such an issue exists. *See* Pet. at 16, 7a. Specifically, the Federal Circuit ruled that the CAVC cannot review whether there is a *bona fide* issue for remand (if the agency had not reached the particular issue), but must defer totally to the government's *assertion* that the record *might* be capable of supporting more than one outcome on remand. *See* Pet. at 16, 7a. Also, both courts (and the government in its response to the Petition) ignored Ms. Byron's argument that 38 U.S.C. § 7261(a)(2) gave the CAVC the power to reverse the denial of benefits because resolution of her 41 year old claim (actively litigated for the last 15 years) had been "unreasonably delayed." *See* Pet. at 22-23. Not even lip-service was paid to this undisputed statutory authority.

In sum, the government has failed to identify any reason why this case is not a good vehicle for this Court to address the power of the CAVC (something this Court has never done) and the related remand problem that is a major cause of the veterans appeals backlog.

III. THE GOVERNMENT'S OPPOSITION TO THE PETITION IS ESSENTIALLY A DISPUTE ON THE MERITS THAT DODGES THE TRUE ISSUE

As every first year law student learns, determining whether a complete factual record raises a genuine issue of material fact is not the same thing as initial fact finding.

The government's entire argument on the merits is based on studiously ignoring this basic distinction. The government's failure to join the true issue is inexcusable because it requires the government to rewrite the question presented and to avoid the phrase "*bona fide* issue for remand" throughout its opposition.

Appellate courts routinely decide whether a factual record, as a matter of law, supports only one outcome. Such a decision does not constitute initial fact finding—or any kind of fact finding. This Court's decision in *Ventura* observed that in "rare" cases an agency can be reversed without having passed on a particular issue. *INS v. Ventura*, 537 U.S. 12 (2002). The government acknowledges that principle. The Federal Circuit's decision below conflicts with *Ventura* because it does not even allow for the "rare" case where the record is complete and there is no *bona fide* issue for remand. Unfortunately in the veterans appeal system, it is not as rare as it should be that benefits claims are

wrongly denied even though, as a matter of law, benefits should have been granted.

Missing the point, the government argues that "the Veterans Court does not have statutory authority to engage in such de novo fact-finding in the first instance." Opp'n at 6. The government cites cases supporting that unquestioned but inapposite proposition. *Id.* at 9. For example, the government cites this Court's decision in *DeMarco*, which held that the Court of Appeals should not have decided in the first instance a "close" "factual issue [that] was dispositive of the case[.]" *DeMarco v. United States*, 415 U.S. 449, 450 (1974). Petitioner has no bone to pick with this rule of law. It is simply irrelevant to the question presented here.

The pertinent question is whether the CAVC has the power to determine if there is a *bona fide* issue for remand. Petitioner never asked the CAVC to decide a factual question, close or otherwise, or to "receiv[e] evidence that is not part of the record before [the Board]." *Cf.* Opp'n at 15.

After 41 years, the government still points to nothing in the record suggesting that there is a *bona fide* issue for remand in this case. As it did before the CAVC and Federal Circuit, the government merely asserts that Petitioner's view of the evidence (including the unanimous declarations of five doctors in her favor) may prove "unwarranted." *See* Opp'n at 9. The government does not say why, and does not

cite any contrary evidence. Under this irrational procedure, claimants such as Ms. Byron must endure further delay on remand even though the government cannot point to any *bona fide* issue requiring remand. Congress mandated no such system that turns so capriciously on the government's mere say-so, to the detriment of the veteran.

As the numerous decisions cited in the Petition show, appellate courts have ample authority to reverse rather than remand when remand would be futile. As the Second Circuit explained in rejecting an argument identical to the argument that the government now advances, "review[ing] the record to determine whether there is a basis in fact for the [agency]'s [decision] would not require the court to substitute its own independent weighing of the evidence on a question the agency has not reached. . . . Rather, it merely determines if there was any objective evidence to support the [agency]'s determination." *Watson v. Geren*, 569 F.3d 115, 129 (2d Cir. 2009). Indeed, the government appears to ultimately agree with this proposition and with Petitioner's interpretation of the case law from other circuits. While it opposes Petitioner at every turn, the government agrees that remand is "unnecessary [when] the appellate court's reasoning [leaves] the agency with no meaningful discretion to exercise." Opp'n at 17 n.3. Here, the CAVC should have heeded that principle and determined that there was no *bona fide* issue for remand, instead of cabining its

power more tightly than at least eight regional circuits.

IV. THE CAVC'S POWER TO CONSIDER THE RECORD CANNOT BE ONE-SIDED IN FAVOR OF THE GOVERNMENT

The government takes the position that the CAVC *can* sometimes properly reach factual issues that were not reached below. Opp'n at 17. The government argues that the CAVC can: (1) find that the grounds for denial of benefits are legally erroneous, (2) search the record for an alternative ground to support the denial of benefits, even if it was not reached below, and (3) conclude based on the record that it should deny the benefits because there is no *bona fide* issue for remand. The government argues that review of issues unreached by the agency is only within the CAVC's power if used to *deny* benefits under the principle of harmless error.

This position is plainly inconsistent with the government's core position on the question presented. According to the government, if the CAVC decides that the factual record supports only a result in favor of the veteran, this is improper "initial fact finding" if the agency has not yet reached the question. When that same process results in affirming the denial of benefits, the government argues that reaching factual questions untouched by the agency is proper under the rubric of "harmless error."

Such a one-sided view of the CAVC's power cannot be tolerated given its unique character. As ably explained by amicus curiae Professor William Fox, the CAVC is particularly well-suited to determine that benefits should be granted when there is no *bona fide* issue for remand:

- The CAVC has exclusive and specialized expertise devoted solely to veterans' disability claims;

- The CAVC is an Article I court unconstrained by all the formalities of Article III courts;

- The CAVC must apply the "benefit of the doubt" provision of 38 U.S.C. § 7261(b)(1) on factual issues and must apply the "canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki,* 131 S. Ct. 1197, 1206 (2011);

- The CAVC has the statutory obligation to compel action of the Secretary of Veterans Affairs "unlawfully withheld or unreasonably delayed;" 38 U.S.C. § 7261(a)(2)

- The CAVC has authority to review the factual record, in contrast to the much more limited review over CAVC decisions performed by the Federal Circuit.

Despite these differences and additional powers, the government and the Federal Circuit

insist that the CAVC has less authority than generalist Article III courts to determine if a *bona fide* issue for remand exists. That view should be corrected.

V. REVIEW BY THIS COURT COULD PROVIDE GREAT RELIEF TO VETERANS AND THEIR SURVIVORS

Perhaps the most puzzling (or, if one is personally invested in the issues, galling) arguments by the government is that the CAVC's automatic-remand process somehow benefits veterans as a group.

The government argues that "[v]eterans as a group benefit from an interpretation that requires initial factfinding by the Secretary and the Board in the 'pro-claimant' non-adversarial system, as a part of which the Department is statutorily required to assist veterans in developing evidence and understanding the Department's decisions." Opp'n at 14.

This argument does not make sense. Allowing the CAVC to reverse a denial of veterans benefits when there is no *bona fide* issue can only favor veterans. A swifter award of deserved benefits simply cannot be adverse to veterans individually or as a group. Moreover, this argument is hard to swallow given that a broad range of diverse veterans groups support the Petition.

The government's paternalistic argument is also off-point because, as explained above, Ms. Byron has not asked the CAVC to perform initial fact finding or to assist her in developing evidence. The record conclusively proves she deserves the denied benefits and there is no *bona fide* issue that warrants further processing. She has been waiting more than forty years and is at the end of her life. More processing by different bureaucracies does not benefit her. This is particularly true because the agency has already been found to have denied her claim wrongfully multiple times.

In sum, veterans as a group would benefit from an end to the "hamster wheel" adjudicatory process. Each case remanded when there is no *bona fide* issue (a) imposes years of further delay on the claimant in that case, and (b) increases the BVA's already staggering docket, resulting in delay for other claimants waiting to have their cases heard. As this Court recognized long ago, "judicial review of agency action [should not be] a ping-pong game." *NLRB v. Wyman-Gordon*, 394 U.S. at 766 n.6. The CAVC has ample authority to determine if remand "would be an idle and useless formality." *Id.* The Federal Circuit's refusal to recognize that authority—to the detriment of veterans and the veterans' appeals system—should be corrected.

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For the foregoing reasons and those stated in the petition for a writ of certiorari, the Petition should be granted.

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Respectfully submitted,

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