No. 22-2210

IN THE
UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

LOUIS R. FRANTZIS,
Claimant-Appellant,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,
Respondent-Appellee

Appeal from the United States Court of Appeals for Veterans Claims,
Judges Michael P. Allen, Joseph F. Falvey, Jr., & Grant C. Jacquith,
In Case No. 20-5236

BRIEF OF THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM AND THE VIETNAM VETERANS OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-2210

Short Case Caption Frantzis v. McDonough

Filing Party/Entity Louis R. Frantzis

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Name: Mark R. Lippman

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
National Law School Veterans Clinic Consortium		
The Vietnam Veterans of America		

☐ Additional pages attached

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii-iv

IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE 1-2

STATEMENT PURSUANT TO PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E) 3

INTRODUCTION 3-5

ARGUMENTS

NEITHER THE TEXT NOR LEGISLATIVE HISTORY OF THE AMA SHOWS CONGRESSIONAL INTENT TO COMPROMISE THE FAIR PROCESS DOCTRINE BY ELIMINATING THE SAME-JUDGE REQUIREMENT 5-22

THE COURT BELOW ERRED BY REFUSING TO CONSIDER THE FAIR PROCESS PRINCIPLE IN ITS INTERPRETATION OF SECTIONS 7102 AND 7107 22-26

CONCLUSION 26

CERTIFICATE OF COMPLIANCE 27

TABLE OF AUTHORITIES

Cases **Page**

Adden v. Middlebrooks, 688 F.2d 1147 (7th Cir. 1982) 24, 25
Am. Land Title Ass'n v. Clarke, 968 F.2d 150 (2d Cir. 1992) 16
Anderson v. West, 12 Vet. App. 491 (1999) 18, 19
Arneson v. Shinseki, 24 Vet.App. 379 (2011) 6, 7, 15, 20, 21, 22, 24
Astoria Fed. Sav. & Loan Ass'n v. Solimino, 501 U.S. 104 (1991) 6
Becton Dickinson and Co. v. C.R. Bard, Inc., 922 F.2d 792
(Fed. Cir. 1990) 23
Bloate v. U.S., 559 U.S. 196 (2010) 14
Bradley v. Sec'y of Health & Hum. Servs., 991 F.2d 1570
(Fed. Cir. 1993) 7, 8
Bryant v. Wilkie, 33 Vet. App. 43 (2020) 6
Burns v. U.S., 501 U.S. 129 (1991) 12
Califano v. Yamasaki, 442 U.S. 682 (1979) 10
Canup v. Chipman-Union, Inc., 123 F.3d 1440 (11th Cir. 1997) 11
Carbino v. West, 168 F.3d 32 (Fed. Cir. 1999) 23
Checo v. Shinseki, 748 F.3d 1373 (Fed. Cir. 2014) 24
Chisom v. Roemer, 501 U.S. 380 (1991) 21
Church of Scientology v. IRS, 484 U.S. 9 (1987) 19
Clinchfield Coal Co. v. Fed. Mine Safety & Health Com., 895
F.2d 773 (D.C. Cir. 1990) 16
Comm'r v. Lundy, 516 U.S. 235 (1996) 18
Cook v. Snyder, 28 Vet. App. 330 (2017) 9, 11, 15
Cook v. Wilkie, 908 F.3d 813 (Fed. Cir. 2018) 13
Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc., 783 F.3d 976
(4th Cir. 2015) 23, 24
Frankel v. Derwinski, 1 Vet.App. 23 (1990) 25
Frantzis v. McDonough, 35 Vet.App. 354 (2022)
4, 5, 12, 16, 20, 22, 24, 25, 26
Greene v. McElroy, 360 U.S. 474 (1959) 10
Hamdan v. Rumsfeld, 548 U.S. 557 (2006) 18
Hazan v. Gober, 10 Vet.App. 511 (1997) 21
Henderson v. Shinseki, 562 U.S. 428 (2011) 12, 13
Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) 6
Hormel v. Helvering, 312 U.S. 552 (1941) 25
Huber v. Taylor, 469 F.3d 67 (3d Cir 2006) 25
In re RFC & ResCap Liquidating Trust Action, 444 F. Supp. 3d 967

(D. Minn. 2020) 19
Irons & Sears v. Dann, 606 F.2d 1215 (D.C. Cir. 1979) 12
Jerman v. Carlisle, McNellie, Rini, Kramer & Ulrich, L.P.A.,
559 U.S. 573 (2010) 20, 21
Kamen v. Kemper Fin. Servs., Inc., 500 U.S. 90 (1991) 23
Kennedy v. Lockyer, 379 F.3d 1041 (9th Cir. 2004) 14
Laird v. Tatum, 409 U.S. 824 (1972) 10
Leatherbury v. Dep't of Army, 524 F.3d 1293 (Fed. Cir. 2008) 7
Manning v. Caldwell, 930 F.3d 264 (4th Cir. 2019) 25
Marincas v. Lewis, 92 F.3d 195 (3d Cir. 1996) 11
Marx v. General Revenue Corp., 568 U.S. 371 (2013) 12
Prillaman v. Principi, 346 F.3d 1362 (Fed. Cir. 2003) 8
Robbins v. U.S. R.R. Ret. Bd., 594 F.2d 448 (5th Cir. 1979) 10, 11
Simmons v. Wilkie, 30 Vet.App. 267 (2018) 5
Sindi v. El-Moslimany, 896 F.3d 1 (1st Cir. 2018) 26
Smith v. Wilkie, 32 Vet.App. 332 (2020) 24
Taylor v. U.S., 495 U.S. 575 (1990) 11, 15
U.S. v. Brown, 415 F.3d 1257 (11th Cir. 2005) 10
U.S. v. Security Pac. Business Credit, 956 F.2d 703 (7th Cir. 1992) 16
U.S. v. Thomas, 684 F.3d 893 (9th Cir. 2012) 8
U.S. v. United Continental Tuna Corp., 425 U.S. 164 (1975) 11
U.S. v. Vonn, 535 U.S. 55 (2002) 12
U.S. v. Wilson, 503 U.S. 329 (1992) 15, 22
U.S. v. 1998 BMW "I" Convertible, 235 F.3d 397 (8th Cir. 2000) 8
U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.,
508 U.S. 439 (1993) 23
Zhou Yun Zhang v. U.S. Ins, 386 F.3d 66 overruled on other grounds by Shi Liang Lin v. U.S. Dep't of Just., 494 F.3d
296 (2d Cir. 2007) 9

Statistes & Regulations **Page**

38 C.F.R. § 3.103(c)(2) 9
38 U.S.C. § 7102 5, 10, 13, 14, 21
38 U.S.C. § 7107 4, 5, 10, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22
38 U.S.C. § 7261(b)(2) 5
Appeals Modernization Act (AMA 2017) 4, 13, 15, 17, 18, 20

Other Sources **Page**

Appellant's Opening Brief filed at Veterans Court 23
BLACK'S LAW DICTIONARY 1221 (7th ed. 1999) 14
Reading Law: The Interpretation of Legal Texts 107 (2012) 20
S.R. Rep. 115-126 19, 20
105th Cong., 1st Sess., H.R. 105-62 (April 14, 1997) 21
106th Cong., 2d Sess., H.R. 106-781 (Veterans Claims Assistance Act 2000) (July 24, 2000) 21
115th Congress, 1st Session, S.R. Rep. 115-126 (July 10, 2017) 16, 17, 18
142 Cong. Rec. H10182 (Sept. 11, 1996) 21

IDENTITY OF AMICI CURIAE, THEIR INTEREST IN THE CASE, AND SOURCE OF AUTHORITY TO FILE

The National Law School Veterans Clinic Consortium (NLSVCC)[1] is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC's mission is to work with likeminded stakeholders to gain support and advance common interests with the Department of Veterans Affairs (VA), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country. NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in this case considering the important procedure issue presented which greatly affects disability compensation.

Vietnam Veterans of America ("VVA") is a national nonprofit organization and is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. As the Vietnam war came to an end and years passed, it became clear that established veterans service organizations had failed to make issues of concern for Vietnam

[1] NLSVCC wishes to thank and acknowledge the following students, who were instrumental in researching for and editing this brief – Parker Owens, Ethan Attebery, and Alex Hockman of the University of Missouri School of Law and Mason Bo of the Stetson University College of Law.

veterans a priority. In response, VVA founded Vietnam Veterans of America Legal Services ("VVALS") to assist veterans seeking benefits and services from the government. VVA has played a leading role in advocating for the creation of judicial review, culminating in the creation of an Article I Court of Appeals for Veterans Claims ("Veterans Court"). In the Veterans Court, veterans can now challenge Agency benefits determinations before an independent court. In the 1990s, VVALS evolved into the current VVA Service Representative program that continues to represent and advocate for veterans today.

The primary issue in this appeal – whether the Board member who hears a case must decide it – falls squarely within the day-to-day business of the NLSVCC and VVA, and dramatically impacts the adjudication of their clients' claims. As a matter of fair process in the VA adjudication system, both NLSVCC and VVA submit that the Veterans Court's decision below must be reversed.

Counsel for Appellant and Counsel for the Secretary of the Veterans' Affairs have consented to the filing of this amicus brief. FRAP 29(a)(2).

STATEMENT PURSUANT TO PURSUANT TO FEDERAL RULE OF APPELLATE PROCEDURE 29(a)(4)(E)

i) No party's counsel has authored the brief in whole or in part;

ii) No party or party's counsel has contributed money intended to fund the preparation or submission of the brief;

iii) No person, other than amicus curiae, its members, or its counsel, have contributed money that was intended to fund the preparation or submission of the brief.

INTRODUCTION

In *Frantzis v. McDonough*, 35 Vet.App. 354 (2022), a divided panel of the Veterans Court held that the amendment to 38 U.S.C. § 7107(c) under the Appeals Modernization Act (AMA 2017) eliminated the requirement that the same Board member(s) who conducts the hearing must decide the case, (hereafter "the same-judge requirement"). According to the majority, the amendment's omission of the pre-AMA language demonstrated Congressional intent to abrogate this requirement. *Id.* at 362-63.[2]

[2] Prior to the AMA, Section 7107(c) read: "A hearing docket shall be maintained and formal recorded hearings shall be held by such member or members of the Board as the Chairman may designate. *Such member or members designated by the Chairman to conduct the hearing shall, except in the case of a reconsideration of a decision under section 7103 of this title, participate in making the final determination of the claim.*" § 7107(c) (2016) (italics added).

AMA Section 7107(c) provides: "(1) For cases on a docket maintained by the Board under subsection (a) that may include a hearing, in which a hearing is requested in the notice of disagreement, the Board shall notify the appellant whether a Board hearing will be held— ''(A) at its principal location; or ''(B) by picture and voice transmission at a facility of the Department where the Secretary has provided suitable facilities and equipment to conduct such hearings." **(2) (A)** Upon notification of a Board hearing at the Board's principal location as described in subparagraph (A) of paragraph (1), the appellant may alternatively request a hearing as described in subparagraph (B) of such paragraph or subparagraph (C) of this paragraph. If so requested, the Board shall grant such request. **(B)** Upon notification of a Board hearing by picture and voice transmission as described in subparagraph (B) of paragraph (1), the appellant may alternatively request a hearing as described in subparagraph (A) of such paragraph or subparagraph of (C) of this paragraph. If so requested, the Board shall grant such request. **(C)(i)** Upon notification of a Board hearing under subparagraph (A) or (B) of paragraph (1), the appellant may alternatively request a hearing by picture

Amici submit that the lower court misinterpreted the legislative intent of amended Section 7107(c). Neither the AMA nor any other Congressional act, for that matter, was designed to eliminate core pro-claimant adjudicatory procedures. For this and other reasons, 38 U.S.C. § 7102 and/or 7107 retain the same-judge requirement.[3]

ARGUMENT

I. NEITHER THE TEXT NOR LEGISLATIVE HISTORY OF THE AMA SHOWS CONGRESSIONAL INTENT TO COMPROMISE THE FAIR PROCESS DOCTRINE BY ELIMINATING THE SAME-JUDGE REQUIREMENT

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and voice transmission— **(I)** at a location selected by the appellant; and **(II)** via a secure internet platform established and maintained by the Secretary that protects sensitive personal information from a data breach. **(ii)** If an appellant makes a request under clause (i), the Board shall grant such request. § 7107(c) (2017).

[3] The panel suggested that the same-judge requirement should be understood as a case-by-case determination, rather than a categorical one, noting a situation in which it might apply: "[P]erhaps the doctrine would have some purchase in a situation in which a Board member deciding a case made negative credibility determinations about a witness appearing at a hearing when the Board member did not preside at the hearing." 35 Vet.App. at 367 n.88. This observation conflates the interpretative question from that of prejudicial error. As a matter of statutory construction, Sections 7102 or 7107 or both either does or does not give the claimant the right to have the same judge who heard the case decide it. If this legal question is resolved in the affirmative, then, in this and other cases, the Veterans Court must decide the question of prejudicial error under 38 U.S.C. § 7261(b)(2): Whether, viewed against the totality of the evidence, the denial of the right might have affected the outcome. *Simmons v. Wilkie*, 30 Vet.App. 267, 279 (2018) (explaining that prejudice is established where the error "affected or could have affected the outcome of the determination").

Fair process is a core doctrine of VA adjudication and serves as a presumptive background principle for interpreting Title 38 statutes and regulations. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991). In the present case, neither the text nor the legislative history of the AMA rebuts this principle, nor shows a specific intent to remove the same-judge requirement.

The fair process principle inheres in the pro-claimant, non-adversarial structure of the VA adjudicatory system:

> Appellants have a right to fair process in the development and adjudication of their claims and appeals before VA. This non-constitutional right stems, in part, from the nature of the nonadversarial VA benefits adjudication system, which is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process. This includes providing fair process during VA's solicitation, gathering, and development of evidence.

Bryant v. Wilkie, 33 Vet. App. 43, 46-47 (2020) (citations and internal quotation marks omitted); *see Hodge v. West,* 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("[I]n the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight.").

In *Arneson v. Shinseki*, 24 Vet.App. 379 (2011), a pre-AMA opinion, the Veterans Court discussed fair process in the context of three-member Board panels

charged with hearing and deciding cases. *Arneson* pointed out that credibility determinations would be compromised if one or more panel member(s) deciding the case had not participated in the Board hearing:

> [T]he piecemeal assignment of Board members to a panel post-hearing – such that Board members are assessing credibility based on a second-hand conveyance or a review of a transcript – undermines the claimant's ability to personally impress his credibility upon his factfinders. [¶] [T]he right to a hearing as a conduit for conveying one's credibility could be rendered meaningless if the credibility determinations of one Board member who attended the hearing were overruled by two Board members who did not attend that hearing.

Id. at 387 (citations omitted).

Indeed, an adjudicatory system which allows one judge to hear a case while another decides it makes a mockery of a claimant's right to a hearing and to fair process. Above all else, the purpose of a hearing is to ensure that adjudicators/finders-of-fact evaluate the demeanor of witnesses while testifying under oath, and then, based upon these contemporaneous observations, to make crucial credibility determinations. "This requirement to defer to the [administrative judge's] credibility findings spring[s] from a fundamental notion of fairness . . . [that] great deference must be granted to the trier of fact who has had the opportunity to observe the demeanor of the witnesses, whereas the reviewing body looks only at cold records." *Leatherbury v. Dep't of Army,* 524 F.3d 1293, 1304 (Fed. Cir. 2008) (citation and internal quotation marks omitted); *Bradley v.*

Sec'y of Health & Hum. Servs., 991 F.2d 1570, 1575 (Fed. Cir. 1993) ("Such credibility determinations are virtually unreviewable by our court.") (citations and internal quotation marks omitted); *Prillaman v. Principi, 346 F.3d 1362, 1367 (Fed. Cir. 2003)* (applying deference to BVA credibility determinations).

As such, credibility determinations based upon live testimony advance the accuracy and integrity of the adjudicatory process, while those based upon a cold record clearly do not. The need to "hear live testimony so as to further the accuracy and integrity of the factfinding process are not mere platitudes. Rather, live testimony is the bedrock of the search for truth in our judicial system." *U.S. v. Thomas*, 684 F.3d 893, 903 (9th Cir. 2012). "[J]udges simply cannot decide whether a witness is telling the truth on the basis of a paper record and must observe the witnesses' demeanor to best ascertain their veracity—or lack thereof." *U.S. v. 1998 BMW "I" Convertible*, 235 F.3d 397, 400 (8th Cir. 2000) (citations omitted).

More specifically, "[a] fact-finder who assesses testimony together with witness demeanor is in the best position to discern, often at a glance, whether a question that may appear poorly worded on a printed page was, in fact, confusing or well understood by those who heard it; whether a witness who hesitated in a response was nevertheless attempting truthfully to recount what he recalled of key events or struggling to remember the lines of a carefully crafted script; and whether

inconsistent responses are the product of innocent error or intentional falsehood." *Zhou Yun Zhang v. U.S. Ins*, 386 F.3d 66, 73-74 *overruled on other grounds by Shi Liang Lin v. U.S. Dep't of Just.*, 494 F.3d 296 (2d Cir. 2007) (citations and internal quotations marks omitted).

Beyond enhancing credibility determinations, Board hearings trigger critical procedures under 38 C.F.R. § 3.103(c)(2),[4] namely, requiring judges to identify and clarify the issues on appeal and to suggest the submission of favorable evidence. *Cook v. Snyder*, 28 Vet. App. 330, 337 (2017) ("In addition to providing hearing officers opportunities to make credibility determinations, ask relevant questions, and generally associate otherwise anonymous claims for benefits with individual claimants, personal hearings before the Board can serve as fora in which claimants can receive information necessary for the fair and efficient development of their claims."). These dual obligations apply to all hearings, but their course will vary depending upon the state of the record, and upon the impressions of each

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[4] Section 3.103(c)(2) provides, in relevant part: "It is the responsibility of the VA employees conducting the hearings to explain fully the issues and suggest the submission of evidence which the claimant may have overlooked and which would be of advantage to the claimant's position. To assure clarity and completeness of the hearing record, questions which are directed to the claimant and to witnesses are to be framed to explore fully the basis for claimed entitlement rather than with an intent to refute evidence or to discredit testimony." 38 C.F.R. § 3.103(c)(2) (2020).

judge. Judges often see cases differently – *i.e.,* "[j]udges are not fungible"[5] – and so the framing of the issues and recommendations for record development will reflect the hearing judge's unique take on the proceeding. Come time for adjudication, the same judge will have the best contextual understanding of the case. *U.S. v. Brown*, 415 F.3d 1257, 1265 (11th Cir. 2005) ("Being at the trial as the proceedings occur and the evidence unfolds, a trial judge has an advantageous familiarity with the proceedings and may have insights not conveyed by the record about the evidence and the issues relating to it.") (citation and internal quotation marks omitted). By eliminating the same-judge requirement, *Frantzis* fractures this unitary and case-sensitive process.

Set against these truth-seeking and pro-claimant imperatives underscoring fair process, Sections 7102 and 7107 presume the same-judge requirement, barring some explicit indication otherwise. *See Greene v. McElroy,* 360 U.S. 474, 508 (1959) (stating that "fair procedure" even though not grounded in the constitution should be presumed unless Congress explicitly indicates otherwise); *Califano v. Yamasaki*, 442 U.S. 682, 693 (1979) ("[T]his Court has been willing to assume a congressional solicitude for fair procedure, absent explicit statutory language to the contrary.") (citing *Greene*); *Robbins v. U.S. R.R. Ret. Bd.*, 594 F.2d 448, 452 (5th Cir. 1979) ("It is established that administrative procedures that at best skirt the

[5] *Laird v. Tatum*, 409 U.S. 824, 834 (1972) (citation and internal quotations marks omitted).

edge of due process will not be approved unless explicitly authorized.") (citing *Greene*). Since a VA claimant's "right to a hearing is so fundamental to fair proceedings that it [was] elevated to the level of a statutory guarantee,"[6] "it can be assumed that Congress intends that procedure to be a fair one."[7]

Thus, the question on appeal boils down to whether the AMA speaks clearly enough to rebut the strong presumption in favor of the same-judge requirement. If Congress intended to eliminate this fundamental requirement, we would expect the AMA's text or at least its legislative history to clearly say so. *Canup v. Chipman-Union*, *Inc*., 123 F.3d 1440, 1443 (11th Cir. 1997) ("We would expect Congress to speak more clearly if it intended such a radical change in the application and understanding of its . . . statutes."); *U.S. v. United Continental Tuna Corp*., 425 U.S. 164, 169 (1975) (when Congress intends to "repeal" a fundamental provision of a statute, one would expect "some expression by Congress that such results are intended"); *Taylor v. U.S.,* 495 U.S. 575, 591 (1990) ("Without a clear indication that with the 1986 amendment Congress intended to abandon its general approach of using uniform categorical definitions to identify predicate offenses, we do not interpret Congress's omission of a definition . . . in a way that leads to odd results

[6] *Cook v. Snyder*, 28 Vet.App. 330, 336 (2017) (quoting Senate Report of the Veterans Judicial Review Act of 1988).

[7] *Marincas v. Lewis*, 92 F.3d 195, 203 (3d Cir. 1996).

....”); *Irons & Sears v. Dann*, 606 F.2d 1215, 1220-21 (D.C. Cir. 1979) (“we would in any event be extremely reluctant to impute to Congress an intent to eliminate the long-standing [procedure] …. absent rather unambiguous indications that this is what Congress really wanted”).

No such showing exists. Neither the text nor the legislative history of the AMA clearly and affirmatively demonstrates Congressional intent to eliminate the same-judge requirement. The majority below relies upon a negative inference/implication to argue this intent: *i.e.*, the omission of the pre-AMA language of Section 7107(c) shows Congress’ desire to jettison the requirement.[8] “The force of any negative implication, however, depends on context.” *Marx* v. *General Revenue Corp.*, 568 U.S. 371, 381 (2013). Not every omission reflects such deliberate and purposeful intent, *Burns v. U.S.*, 501 U.S. 129, 136 (1991), and other indicia of intent, (*e.g.*, different textual indicators, statutory purpose, legislative history), may point in another direction. *Id.* (“An inference drawn from congressional silence certainly cannot be credited when it is contrary to all other textual and contextual evidence of congressional intent.”); *Marx*. 568 U.S. at 381. In some cases, there maybe two or more equally plausible explanations for the omission. *U.S. v. Vonn*, 535 U.S. 55, 65-66 (2002). If so, this

[8] *Frantzis*, 35 Vet.App. at 362 (“Congress still consciously elected to remove the requirement that a Board member who conducts a hearing must ‘participate in making the final determination of the claim.’”) (citation omitted).

ambiguity must be resolved in the veterans' favor. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).

Here, the AMA omitted several parts of former Section 7107, and two, in particular, should be considered together rather than in isolation. As the Veterans Court below pointed out, the language of former Section 7107(c) was removed, but so was the text of former Section 7107(b). Notably, these were the only provisions of Section 7107 addressing the Board's *adjudicative* responsibilities in cases involving hearings. *See* § 7107(b) (2016) ("The Board shall decide any appeal only after affording the appellant an opportunity for a hearing."),[9] 7107(c) (2016) ("Such member or members designated by the Chairman to conduct the hearing shall … participate in making the final determination of the claim."). Under the AMA, Section 7107 is now exclusively limited to Board *administrative* matters for hearings: docketing of hearings, § 7107(a)(1)(B)(i), 7107(b) and scheduling the location and type of hearings, § 7107(c)(1), (c)(2).

Section 7102(a), on the other hand, retained its broad mandatory language for Board *adjudicative* functions:

> 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. *A member or panel assigned a proceeding shall make a*

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[9] *Cook v. Wilkie*, 908 F.3d 813 (Fed. Cir. 2018) (discussing the important effect of former Section 7107(b), requiring requested hearings at every stage of Board adjudication).

> *determination thereon, including* any motion filed in connection therewith. The member or panel, as the case may be, shall make a report under section 7104(d) of this title [38 USCS § 7104(d)] on any such determination, which report shall constitute the final disposition of the proceeding by the member or panel.

38 U.S.C. § 7102(a) (italics added) (2020). This measure does not distinguish between Board adjudications involving hearings from those which do not. "A member or panel assigned a *proceeding*"[10] – *i.e.*, the case as a whole with all the issues and procedures involved therein, including a hearing – "shall make a determination thereon. . .". *Id.* (italics added). Rather than manifest a Congressional intent to eliminate the same-judge requirement, the omissions of pre-AMA Sections 7107(b) and 7107(c) reflect a more probable intent to have all Board *adjudicative* assignments, whether involving hearings or not, governed by the broad and inclusive terms of Section 7102(a).

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[10] Though undefined by VA statute, the term *proceeding* usually refers to the entire litigation, including all the steps from the beginning to the end of the case. *Proceeding*, BLACK'S LAW DICTIONARY 1221 (7th ed. 1999) (A "proceeding" is "the regular and orderly progression of a lawsuit, including all acts and events between the time of commencement and the entry of judgement."); *see Kennedy v. Lockyer*, 379 F.3d 1041, 1046-47 (9th Cir. 2004) (interpreting *proceeding* as inclusive of all acts and events of a single litigation).

That Congress added the expansive term *including* underscores the broad and inclusive meaning of *proceeding*. *See Bloate v. U.S.*, 559 U.S. 196, 206-07 (2010) (noting that the term "including" is an "expansive or illustrative term").

Alternatively, due to the many relocations and redesignations of the statutory right to a hearing and Board assignments therein[11] under pre-AMA and especially under AMA legislation, where several parts of Section 7107 were moved around and much of the statute revised, the omitted language of former Section 7107(c) could have been lost in the shuffle. In this regard, *U.S. v. Wilson,* 503 U.S. 329 (1992) is highly instructive. In *Wilson*, the High Court interpreted a certain sentencing statute, which originally designated the Attorney General to compute jail-time credit, but this reference was left out of the amendment. The Court held that, although a matter of speculation, the omission was most likely inadvertent, due to the length, complexity, and extensive revision of the amendment:

> We candidly acknowledge that we do not know what happened to the reference to the Attorney General during the revision. We do know that Congress entirely rewrote § 3568 when it changed it to its present form in § 3585(b). It rearranged its clauses, rephrased its central idea in the passive voice, and more than doubled its length. In view of these changes, and because any other interpretation would require us to stretch the meaning of the words that § 3585(b) now includes, we think it likely that the former reference to the Attorney General was simply lost in the shuffle.

[11] *See Arneson*, 12 Vet.App. at 383-85 (discussing pre-AMA history); *Cook v. Snyder*, 28 Vet.App. 330, 336 (2017) ("After several nonsubstantive recodifications and redesignations within title 38 of the U.S. Code, the statutory provision came to rest at its current place.").

Id. at 336; *see also Taylor v. U.S.*, 495 U.S. 575, 589-90 (1990) ("The legislative history as a whole suggests that the deletion of the 1984 definition of burglary may have been an inadvertent casualty of a complex drafting process."); *Am. Land Title Ass'n v. Clarke*, 968 F.2d 150, 152 (2d Cir. 1992) ("[W]e believe that this omission was inadvertent and thus we do not interpret it as having effected a repeal of section 92. Congress did not expressly repeal section 92 when it enacted the War Finance Corporation Act."); *U.S. v. Security Pac. Business Credit*, 956 F.2d 703, 707 (7th Cir. 1992) ("But no one has given us a reason for the omission, and we have not been able to think up one on our own. It appears to have been an oversight."); *Clinchfield Coal Co. v. Fed. Mine Safety & Health Com.*, 895 F.2d 773, 779 (D.C. Cir. 1990) ("The drafter (here Congress) may simply not have been focusing on the point in the second context…").

To be sure, *Frantzis* correctly pointed out that "[w]hen Congress amends legislation, courts must presume it intends the change to have real and substantial effect." 35 Vet.App. at 362-63 (citation and internal quotation marks omitted). But the pivotal question here is what change did Congress intend by amending Section 7107(c)? In its report, the Senate Committee declared that Section 7107(c)'s amendment was intended to deal with the *administrative* matter of eliminating in-person Board hearings at local regional offices:

> Section 2(t) of the Committee bill would amend section 7107(c) of title 38, U.S.C., to provide that, if a Board

> hearing is requested, it will be provided either at the Board's principal location in Washington, DC, or through video conferencing. *In-person field hearings at the regional offices would no longer be an option.* Upon notification of a hearing in Washington, DC, the appellant may request a video conference hearing instead and the Board must grant that request. Upon notification of a video conference hearing, the appellant may request a hearing in Washington, DC, instead and the Board must grant that request.

115th Congress, 1st Session, S.R. Rep. 115-126 at 15 (July 10, 2017) (italics added).

The amendment was about saving Board members the travel time and expense to conduct hearings at local regional offices. Prior to the AMA, claimants could request Board hearings to take place at their local regional offices, requiring Board members to travel to these locations. To conserve Board resources, Congress omitted this option but retained both the Board's principal location and local regional office audio/visual conferencing options. *Compare* pre-AMA of 1998, 38 U.S.C. §§ 7107(d)(1) (2016) ("An appellant may request that a hearing before the Board be held at its principal location or *at a facility of the Department located within the area served by a regional office of the Department*.") (italics added), 7107(e)(1) (2016) (providing "picture and voice transmission" for Board hearings at local regional offices); *with* AMA, 38 U.S.C. §§ 7107(c)(1)(A) & (B) (2017) ("(A) Board hearing will be held – at its principal location; or (B) by picture

and voice transmission at a facility of the Department where the Secretary has provided suitable facilities and equipment to conduct such hearings.”).

Unmistakably, the text and the drafting history of AMA Section 7107(c) illustrate purposeful exclusion -- Congress' omission of in-person hearings at regional offices was undoubtedly meant to exclude them. *Hamdan v. Rumsfeld*, 548 U.S. 557, 578 (2006). “The interrelationship and close proximity of [the aforementioned terms] of the [former and AMA] statute[s]” and their common language and subject matter compel this inference. *Comm'r v. Lundy*, 516 U.S. 235, 250 (1996).

Understood as a modest *administrative* change, the amendment to Section 7107(c) keeps the AMA's promise to respect veterans' basic procedural rights while streamlining the appeal process. In fashioning the AMA, the “VA negotiated with VSOs [veterans service organizations] and other veterans advocates to craft a proposal that would streamline VA's appeals process while *protecting veterans' due process rights*.”[12] 115th Congress, 1st Session, H.R. Rep. 115-135 at 5 (May 19, 2017) (italics added). The amendment satisfies both

[12] By *due process rights*, the House Committee Report meant rights essential to the pro-claimant VA adjudicatory scheme, not rights in a more limited constitutional sense: *i.e.,* those procedural rights necessary to fair process and fair play. *See Anderson v. West*, 12 Vet. App. 491, 497 (1999).

concerns by saving Board members the travel time to conduct in-person hearings, without compromising their essential *adjudicative* functions.[13]

On the other hand, eliminating the same-judge requirement fails on both counts. Switching judges between hearings and final adjudications may promote randomness and confusion, but hardly institutional efficiency. *Id.* More importantly, substituting judges severely undercuts veterans' basic procedural rights, and, for this reason, had the proposed amendment to Section 7107(c) been presented during the legislative process as eliminating the same-judge requirement, the bill would have had little chance of passing. *See Church of Scientology v. IRS*, 484 U.S. 9, 18 (1987) ("[A]n amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill."). At a minimum, the legislative history would have reflected the VSOs' heated opposition. *Compare id.* at 17 (a proposal which would cut against the main purpose of the bill would have "engendered some debate in the Senate") *with* S.R. Rep. 115-126 at 14-15, *supra* (noting that

[13] While not a perfect substitute for in-person hearings, virtual/picture-and-voice transmission hearings do enable judges to make visual and audio observations of witnesses, an imperative for accurate credibility determinations. *In re RFC & ResCap Liquidating Trust Action*, 444 F. Supp. 3d 967, 970 (D. Minn. 2020) (noting that "advances in [video] technology minimize . . . concerns" about the "immediacy of a living person" and the ability of the fact-finder to observe demeanor, and allow the fact-finder "to see the live witness along with his hesitation, his doubts, his variations of language, his confidence or precipitancy, [and] his calmness or consideration[.]") (citations omitted).

VSOs objected to another VA proposal during Committee hearing testimony and, as a result, Congress rejected the proposal).

In support of its interpretation, the *Frantzis* majority also reasoned that Congress was presumptively aware of the *Arneson* opinion at the time of the AMA's enactment, and deleted the pre-AMA language of Section 7107(c) to overrule its holding:

> We find the removal of this statutory language in section 7107(c) highly significant. First, "Congress is presumed to know of existing laws and regulations when it enacts new legislation." Therefore, we can presume that Congress understood the nature of our *Arneson* holding that interpreted the language of pre-AMA section 7107(c)—in addition to the pertinent regulation at the time—to require the Board member who conducted a hearing to also decide the appeal. So it's reasonable to say that Congress knew this was the law and intended to remove the requirement when it amended section 7107 and omitted that critical language.

Frantzis, 35 Vet.App. at 362 (footnote citations omitted).

This negative inference likewise is unpersuasive. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 107 (2012) (explaining that the force of negative implications/inferences depends upon context and common sense). Is it reasonable to assume that, at the time of the AMA, a lengthy and complex legislative undertaking, Congress had *Arneson*, (a case decided six years before), specifically in mind and deleted language in Section 7107(c) to

overrule its holding by silent implication?[14] *See Jerman v. Carlisle*, *McNellie, Rini, Kramer & Ulrich, L.P.A.*, 559 U.S. 573, 607 (2010) (Scalia, J., concurring). And even assuming this highly questionable proposition, *Arneson*'s limited holding does not support the majority's larger negative inference. *Id*. at 608. *Arneson* only held that the post-1994 language of both Sections 7102 and 7107 was

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[14] The silent implication rationale here does not follow Congress' standard practice. When Congress intends to overrule a specific case by VA statute, the legislative history usually speaks to this intent. *See e.g.*, 106th Cong., 2d Sess., H.R. 106-781 at 11 (Veterans Claims Assistance Act 2000) (July 24, 2000) ("The Committee's intent is to overrule that portion of the decision in *Morton* that found an implied limitation on VA's authority to provide assistance to claimants who had not submitted 'well-grounded' claims.'"); *Hazan v. Gober*, 10 Vet.App. 511, 524 (1997) (noting that the legislative history of the 1994 amendment to 38 U.S.C. § 5901(d) shows that the provision was intended to "'overrule the Court of Veterans Appeals as to one element of its decision in *Matter of Fee Agreement of Smith*'", citing Senate Report); 105th Cong., 1st Sess., H.R. 105-62 (April 14, 1997) (proposed bill, now codified under 38 U.S.C. § 7111, was intended to allow revision of Board decisions for clear and unmistakable error (CUE), noting that *Smith v. Brown*, 35 F. 3d. 1516, 1523 (Fed. Cir. 1994) prohibited CUE challenges of Board decisions); 142 Cong. Rec. H10182, 10183 (Sept. 11, 1996) (statement of Rep. Stokes) (indicating that the 1996 amendment to 38 U.S.C. § 1151 was intended to overturn the decision of *Brown v. Gardner*, 513 U.S. 115 (1994) by requiring a showing of VA fault).

The legislative history of the AMA, as lengthy as it is, does not mention a word about *Arneson* or about eliminating the same-judge requirement. *Compare Chisom v. Roemer*, 501 U.S. 380, 396 (1991) ("if Congress had such an intent, at least some of the Members would have identified or mentioned it at some point in the unusually extensive legislative history of the 1982 amendment").

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not clear enough to decide whether "a claimant is entitled to a hearing before all the Board members assigned to decide his appeal." 24 Vet.App. at 385; *see Frantzis*, 35 Vet.App. at 364 n.67 (agreeing with this reading of the holding). In short, the omitted language of 7107(c) does not square with *Arneson*'s specific holding.

All said, even absent the fair process doctrine, AMA Section 7107(c)'s text and legislative history show no intent to eliminate essential pro-claimant adjudicatory procedures, including the same-judge requirement. And, informed with the well-established fair process doctrine, the provision speaks even more persuasively against such intent. "It is not lightly to be assumed that Congress intended to depart from a long established policy." *U.S. v. Wilson*, 503 U.S. at 336 (citation and internal quotation marks omitted).

II. THE COURT BELOW ERRED BY REFUSING TO CONSIDER THE FAIR PROCESS PRINCIPLE IN ITS INTERPRETATION OF SECTIONS 7102 AND 7107

Amici maintain that the fair process issue was squarely before the lower court.

Invoking waiver, the majority in *Frantzis* cited appellant's failure to raise the fair process issue in his briefs. 35 Vet.App. at 366-67. Viewing the totality of the circumstances, however, the majority's mechanical application of the waiver rule is unfounded.

The waiver rule is well-known. The Veterans Court, like most courts, will generally disregard issues not raised in the opening brief. *Carbino v. West,* 168 F.3d 32 (Fed. Cir. 1999). The rule ensures that issues will be timely raised so that the court and the parties will have an opportunity to address them. *See Becton Dickinson and Co. v. C.R. Bard, Inc.*, 922 F.2d 792, 800 (Fed. Cir. 1990).

Here, appellant presented the issue on appeal in broad, inclusive terms: "THE BVA COMMITTED AN ERROR OF LAW WHEN IT SWITCHED JUDGES AFTER THE HEARING WAS HELD BUT BEFORE ISSUING A DECISION." Appellant's Opening Brief filed at Veterans Court at i, 7. So framed, the issue on appeal embraced all dispositive sub-issues, including the fair process issue. *U.S. Nat'l Bank of Or. v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 447 (1993) ("a court may consider an issue 'antecedent to . . . and ultimately dispositive of' the dispute before it, even an issue the parties fail to identify and brief."); *Kamen v. Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991) ("When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law.").

Having raised the principal issue, appellant's "failure to identify the applicable legal rule certainly does not diminish a court's responsibility to apply

that rule." *Dan Ryan Builders, Inc. v. Crystal Ridge Dev., Inc.*, 783 F.3d 976, 980 (4th Cir. 2015).

More importantly, where, as here, the court raises the specific issue *sua sponte*, waiver does not apply. Indeed, the very purpose of a *sua sponte* order/action is to raise and decide an otherwise forfeited issue. *Checo v. Shinseki*, 748 F.3d 1373, 1377-78 (Fed. Cir. 2014) (affirming the Veterans Court's *sua sponte* authority to raise and decide an issue otherwise forfeited by the Secretary).

In its order of April 5, 2022, the *Frantzis* panel instructed counsels to be prepared at oral argument to address the applicability of the fair process principle:

> To assist the Court in the resolution of this appeal, counsel for each party should be prepared to discuss, in addition to the other issues briefed, the impact, if any, of *Arneson v. Shinseki* on the matter at hand. In addition, the parties should also be prepared to discuss how the principle of fair process applies here. *See Smith v. Wilkie*, 32 Vet.App. 332, 337 (2020).

By this order, the panel explicitly put in play the fair process issue, affording appellant and the Secretary the opportunity to argue[15] the issue and the court to decide it. After all, the panel's *sua sponte* order could have had no other legitimate purpose.[16] In short, the *sua sponte* order removed any rationale for invoking a

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[15] *See* OA at 9:25-:39, 24:12-:45, 34:38-40:40 (appellant); 1:05:37-1:10:40; 1:11:37-1:16-47 (the Secretary).

[16] Otherwise, the panel's *sua sponte* procedure would have been an empty and wasteful exercise: The court raised the fair process issue, required the parties to

waiver.[17] *Adden v. Middlebrooks,* 688 F.2d 1147, 1156-57 (7th Cir. 1982) (finding no waiver by defendants even though defendants never raised issue during initial pleading but only during supplemental briefing ordered by the appellate court); *Huber v. Taylor*, 469 F.3d 67, 75 (3d Cir 2006) ("The corollary of *Hormel*[18] is that we are less inclined to find a waiver when the parties have had the opportunity to offer all the relevant evidence and when they are not surprised by issues on appeal.").

At the end of the day, the court's refusal to decide the most important issue of the appeal leaves its opinion half-baked. Committed to publishing its opinion,[19] the panel had every reason to address the fair process issue – a pure legal question. With so much on the line, a precedential opinion of enormous importance to claimants both present and future, counsel's oversight, non-prejudicial as it was, should not have compromised the value and completeness of the decision. *Manning v. Caldwell*, 930 F.3d 264, 271 (4th Cir. 2019) (en banc) ("[W]e have

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prepare to argue the issue, and asked numerous questions regarding it – all for what purpose? The *sua sponte* order must be given effect.

[17] The panel did not apply the waiver principle consistently. For instance, without explanation, the panel passed on the merits of appellant's interpretation of the term *proceeding* under Section 7102, even though this issue was not raised in his briefs, but only mentioned during oral argument. *Frantzis*, 35 Vet.App. at 365 n.75.

[18] *Hormel v. Helvering*, 312 U.S. 552, 556 (1941).

[19] The opinions of three-judge panels are typically published. *See generally Frankel v. Derwinski*, 1 Vet.App. 23, 25-26 (1990).

recognized that when deemed necessary to reach the correct result on matters of public importance, we may *sua sponte* consider points not presented to the district court *and not even raised on appeal by any party*.") (citations and internal quotation marks omitted, italics in original); *Sindi v. El-Moslimany*, 896 F.3d 1, 28 (1st Cir. 2018) (holding that for opinions having important and wide-ranging effect, "a mechanical application of the raise-or-waive principle" is undesirable).

By waiting "for another day" to decide "the fair process doctrine's role," the court unnecessarily delayed resolution of this pressing issue and undermined judicial and administrative economy. *Frantzis*, 35 Vet.App. at 367.

CONCLUSION

For the foregoing reasons, amici ask that the Veterans Court's decision be reversed.

Respectfully submitted,

Dated: January 5, 2023

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this brief is written in 14-point type face and contains 6,331 words, and thus complies with the word-limitation of Federal Rules of Appellate Procedure 29(a)(5) and 32(a)(7)(B)(i).

Respectfully submitted,

Dated: January 5, 2023

/s/Mark R. Lippman
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PROOF OF SERVICE

I hereby certify under penalty of perjury that on January 5, 2023, a copy of the foregoing:

BRIEF OF THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM AND THE VIETNAM VETERANS OF AMERICA AS AMICI CURIAE IN SUPPORT OF APPELLANT AND REVERSAL

was filed electronically. This filing was served electronically to all parties by operation of the Court's electronic filing system.

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