CASE 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
Judge Michael P. Allen, Judge Joseph L. Falvey, Jr., and Judge Grant C. Jaquith presiding
Case No. 20-5236

APPELLANT'S REPLY BRIEF

ROBERT C. BROWN, JR., OBA #21113
TOMMY KLEPPER & ASSOCIATES
702 WALL STREET, SUITE 100
P.O. BOX 721980
NORMAN, OKLAHOMA 73070
TEL: (405) 928-5055; 928-5059 (fax)
ATTORNEY FOR APPELLANT

JUNE 7, 2023

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 Appellant, Louis R. Frantzis

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ARGUMENT

I. THE SECRETARY WAS WRONG TO ARGUE THAT THE VETERANS COURT HAD DISCRETION TO CONSIDER (OR NOT CONSIDER) THE FAIR PROCESS DOCTRINE.

According to the Secretary "even if the Veterans Court could have considered the fair process doctrine, declining to do so was entirely within its discretion." Appellee Br. at 8-9. But in the past, the United States Supreme Court reversed a lower court (and took away that court's discretion) when it declined to apply a legal theory, because that declination created precedent.

In Kamen v. Kemper Financial Services, Inc., 500 U.S. 90, 99 (1991), the Supreme Court reversed a Seventh Circuit decision when the Seventh Circuit held that a party's challenge had come too late to be considered. Kamen, 500 U.S. at 95. The Supreme Court further stated:

> Defending the reasoning of the Court of Appeals, KFS argues that petitioner waived her right to the application of anything other than a uniform federal rule of demand because she failed to advert to state law until her reply brief in the proceedings below. We disagree. 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.

Kamen, 500 U.S. at 99. The Supreme Court further placed a footnote after that quote, saying:

> We do not mean to suggest that a court of appeals should not treat an unasserted claim as waived or that the court has no discretion to deny a party the benefit of favorable legal authorities when the party fails to comply with reasonable local rules on the timely presentation of arguments. See generally Singleton v. Wulff, 428 U.S. 106, 121, 49 L. Ed. 2d 826, 92 S. Ct. 2868 (1976). Nonetheless, if a court undertakes to sanction a litigant by deciding an effectively raised claim according to a truncated body of law, the court should refrain from issuing an opinion that could reasonably be understood by lower courts and nonparties to establish binding circuit precedent on the issue decided.

Kamen, 500 U.S. at 100, n. 5.

In Forshey v. Principi, 284 F.3d 1335 (Fed. Cir. 2002) *superceded by statute,* Veterans Benefits Act of 2002, Pub.L. No. 107-330; *as recognized in,* Flores v. Nicholson, 476 F.3d 1379, 1381 (Fed. Cir. 2007); the Federal Circuit adopted the precedent from Kamen and stated that appellate courts may apply the correct law even when the parties did not argue it, so long as the issue was properly before the court. Id. at 1356. The Federal Circuit quoted Kamen to state:

> 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.

Forshey 284 F.3d at 1357; quoting Kamen 500 U.S. at 99.

The sentence from Kamen, as quoted in Forshey, indicates that a court is permitted to follow authority that the court is aware of, even if it was not argued by the parties. Moreover, the Supreme Court's footnote from Kamen explains that a

reviewing court should reverse a lower court, if the lower court's failure to apply an unargued legal theory creates precedent. Clearly, the Supreme Court's goal was to say that courts should not punish future litigants just because the current litigant made mistakes. See Kamen, 500 U.S. at 100, n. 5.

The Frantzis issue; whether the enactment of the AMA permitted the Board of Veterans Appeals to switch judges after the hearing was held, but before the BVA issued a decision; was properly before the court. The Veterans Court deemed that Mr. Frantzis had waived fair process, and that was the legal theory that the Veterans Court declined to apply. Appx14-15. When Frantzis became a reported case the Veterans Court opinion became precedent, that is why the Supreme Court's precedent from Kamen applies to Frantzis; because in Kamen, the Supreme Court had reversed the Seventh Circuit decision in order to avoid creating a precedent that would affect future litigants due to mistakes made by a current litigant.

Because of Kamen, the Federal Circuit should now reverse the Veterans Court's decision in Frantzis and remand the case for a decision that considers the fair process doctrine. The authority from Kamen essentially removed the Veteran's Court's discretion to not consider fair process because the Frantzis decision has become precedent. See Kamen, 500 U.S. at 100, n. 5.

II. EVEN IF THE VETERANS COURT DID HAVE DISCRETION, IT ABUSED ANY DISCRETION IT HAD WHEN IT DECLINED TO CONSIDER FAIR PROCESS.

The National Law School Veterans Clinic Consortium and Vietnam Veterans of America filed an Amici Curiae brief and argued that fair process was squarely before the Veterans court and therefore the court abused its discretion in refusing to decide it. Amici Br. at 22-26. The Secretary disagreed with the Amici, asserting that the Veterans court was well within its discretion to decline review of an issue not properly raised. Appellee Br. at 28-31. Notably, even though the Secretary found error in the Veterans Court's *sua sponte* order raising the fair process issue and in its subsequent questioning of the same during oral argument, the Secretary dismissed this error as irrelevant to the question of whether the court abused its discretion, citing United States v. Sineneng-Smith, 140 S. Ct. 1575 (2020):

> The Veterans Court should not have interjected this legal issue into the case. Having done so, however, the Veterans Court did not then have an obligation to rule on the issue, which was addressed for the first time at oral argument and did not have the benefit of briefing. See Appx14-15 (noting that Mr. Frantzis "focused his arguments [before the Veterans Court] entirely on his flawed understanding of section 7102," and that his briefs before the Veterans Court "don't even mention fair process"). That the parties could address the fair process doctrine at oral argument is irrelevant to this conclusion. See Sineneng-Smith, 140 S. Ct. at 1581 (vacating the decision below even though the Ninth Circuit allowed counsel for the parties to file supplemental briefs).

Appellee Br. at 28.

The Secretary's reliance upon Sineneng-Smith was misplaced. In Sineneng-Smith, the Ninth Circuit Court of Appeals ostensibly hijacked the appeal, raising three new unrelated issues and inviting three organizations to argue them as amici in briefing and oral argument. The Supreme Court held that the Ninth Circuit had gone too far:

> [A] court is not hidebound by the precise arguments of counsel, but the Ninth Circuit's radical transformation of this case goes well beyond the pale.

Id. at 1581-82.

In so holding, the Supreme Court stated that "the party presentation principle is supple, not ironclad. There are no doubt circumstances in which a modest initiating role for a court is appropriate." Id. at 1579 (citation omitted); see United States v. Powell, 467 F. Supp. 3d 360, 383 n.13 (E.D. Va. 2020) (distinguishing the holding in Sineneng-Smith); Ward v. United States, 11 F.4th 354, 362 (5th Cir. 2021) (distinguishing Sineneng-Smith: "We find no authority that the Government's failure to brief the Section 3553(a) factors means it is error for a district court to apply them.").

After all, Arneson v. Shinseki, 24 Vet.App. 379 (2011) discussed the fair process doctrine at length in relation to the same-judge requirement. Id. at 386-88. And Arneson was clearly implicated in the present appeal. Frantzis v. McDonough,

35 Vet.App. 354, 386 (2022) (Jacquith, J., dissenting) ("Arneson discusses fair process in a situation the same as the situation here . . .").

Evaluating its summary refusal against the totality of the circumstances, the lower court abused its discretion. Manning v. Caldwell, 930 F.3d 264, 271 (4th Cir. 2019) (en banc) ("[T]he matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals, to be exercised on the facts of individual cases.") (quoting Singleton v. Wulff, 428 U.S. 106, 121 (1976).

Citing only the general rule of party presentation,[1] the Veterans Court failed to weigh the relevant factors in its summary denial. James v. Jacobson, 6 F.3d 233, 239 (4th Cir. 1993) ("[abuse of discretion's] most obvious manifestation is in a failure or refusal, either express or implicit, actually to exercise discretion, deciding instead as if by general rule"); Clyma v. Sunoco, Inc., 594 F.3d 777, 783 (10th Cir. 2010) ("By simply denying the application in a minute order without any substantive explanation, we cannot say the district court exercised any meaningful discretion. And we have long held that a court's failure to exercise meaningful discretion constitutes an abuse of discretion."). Specifically, the court neglected to consider whether determining the fair process issue would prejudice the Secretary; whether deciding the issue would

[1] Frantzis, 35 Vet.App. at 366-67.

be of exceptional importance to veterans and their advocates; whether the issue itself was a pure question of law; whether it would likely appear in future appeals;[2] and whether appellant's failure to raise the issue was deliberate or inadvertent. Manning, 930 F.3d 271-72; Sindi v. El-Moslimany, 896 F.3d 1, 28 (1st Cir. 2018).

A court's discretion may be broad, but it has limits:

> Discretion is not whim. [I]n a system of laws discretion is rarely without limits, even when the statute does not specify any limits upon the district courts' discretion. [A] motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles.

Halo Elecs., Inc. v. Pulse Elecs., Inc., 579 U.S. 93, 104 (2016) (citations, internal quotation marks and one alteration omitted).

III. ACCORDING TO 38 U.S.C. § 7102 THE BVA SHOULD NOT HAVE SWITCHED JUDGES AFTER HOLDING THE HEARING.

In the opening brief, Mr. Frantzis argued that the pre-AMA and AMA versions of 38 U.S.C. § 7102 are identical because Congress made no changes to the statute when it enacted the AMA. The statute states:

> **7102. Assignment of members of Board**
>
> (a) 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

[2] The fair process issue as it relates to the same-judge requirement will most definitely appear in future appeals until it is finally decided in a published opinion.

> make a 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.
>
> (b) A proceeding may not be assigned to the Chairman as an individual member. The Chairman may participate in a proceeding assigned to a panel or in a reconsideration assigned to a panel of members.

Applnt. Br. at 12-14.

The Secretary's brief responded by arguing Section 7102 did not prohibit the BVA from assigning the second judge to Mr. Frantzis' case after the hearing was held so that second judge would rightfully be able to make the determination for the case. The Secretary bolsters his argument by focusing on the fact that Section 7102 contains the word "proceeding," while the word "hearing" is written in Section 7107. Appellee Br. at 19-22.

The problem with the Secretary's argument is that a proceeding is not separate and distinct from a hearing, especially as the term is used in Section 7102(a). A proceeding is more general and inclusive than a hearing. Cf. S.D. Warren Co. v. Me. Bd. Of Envtl. Prot., 547 U.S. 370, 379 (2006) (rejecting the proposition that a statute which "pair[s] a broad statutory term with a narrow one shrinks the broad one").

Instead, a hearing is a procedure included in a proceeding. Amici's Br. at 14, n.10.[3]

This definition of a proceeding under Section 7102 is consistent with its common legal meaning[4] and with its use in neighboring provisions.[5] See Frantzis, 35 Vet.App. at 365 n.75 (noting that Sections 7104 and 7105 use the term proceeding or its equivalent to refer to "all the acts and events that will occur between the initiation of appellate review and the final determination").

The flaw in the Secretary's argument is that he conflates the ideas of proceeding and procedure, by first focusing on the proceeding being a hearing (Appellee Br. at 21), but later focusing on the proceeding being a written decision (Appellee Br. at 22). 38 U.S.C. § 7104(d)(1) ("Each decision of the Board shall include – a written statement of the Board's findings and conclusions, and the reasons or bases for its findings and conclusions, on all material issues of fact and law presented on the record;....").

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[3] According to Black's Law Dictionary, 1241 (8th ed. 2004), the word procedure normally refers to "a specific method or course of action,"and Merriam Webster's Collegiate Dictionary, 990 (11th ed. 2003) says a procedure is a "particular way of accomplishing something or acting."

[4] Amici's Brief at 14 n.10.

[5] Barela v. Shinseki, 584 F.3d 1379, 1383 (Fed. Cir. 2009) ("When interpreting a statute, however, courts must consider not only the bare meaning of each word but also the placement and purpose of the language within the statutory scheme.")

A. THE INDEFINITE VERSUS THE DEFINITE ARTICLE.

The Secretary makes much of the indefinite article "a" in Section 7102, claiming it connotes plurality not singularity. Appellee Br. at 20-21. "This phrasing," the Secretary argues, "indicates that more than one board member or panel may be assigned to a given proceeding, and that more than one determination may be necessary during the proceeding's lifecycle." Appellee Br. at 21 (citation omitted). This cursory analysis overlooks the statute's studied use of indefinite and definite articles.

Section 7102(a) states, in full:

> *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* 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) (2020) (italics added).

The indefinite articles refer to a single, albeit unspecified, Board member/panel and proceeding. McFadden v. United States, 576 U.S. 186, 191 (2015) ("When used as an indefinite article, *a* means [s]ome undetermined or unspecified particular.") (citation omitted). And this reference is later particularized by the subsequent use of

definite articles. Schroeder ex rel. United States v. United States, 793 F.3d 1080, 1084-85 (9th Cir. 2015) ("the use of a definite article preceded by an indefinite article can be persuasive evidence that Congress intended to link two clauses").

In sum, Section 7102(a) contemplates a *proceeding* in which the same assigned Board member/panel discharges all its procedures, including conducting a hearing, if any, and making a final determination. To be sure, there may be more than one *proceeding* in a veteran's overall bid for disability benefits, as veterans frequently file claims at different times, resulting in separate appeal streams. See Elkins v. Gober, 229 F.3d 1369, 1374-76 (Fed. Cir. 2000). But again, for each *proceeding* under Section 7102(a), only the Board member/panel assigned may perform its procedures.

B. CONGRESSIONAL INTENT AND LEGISLATIVE HISTORY.

The Secretary contends that the legislative history of Section 7102 favors reading the same-judge requirement out of the current version of the statute. Appellee Br. at 23-24. The Secretary points out that the pre-1994 version,[6] which contained the operative language (later omitted from AMA Section 7107(c)), was

[6] Section 7102(b) then read: "(b) A hearing docket shall be maintained and formal recorded hearings shall be held by such member or members as the Chairman may designate, the member or members being of the section which will make a determination in the claim." § 7102(b) (1993).

moved to Section 7107(c) in 1994. From this, the Secretary gleans Congressional intent to remove the same-judge requirement from Section 7102.

The Amici argued that the Secretary's position fails for three reasons:

First, the broad terms of the current version of Section 7102(a) cannot be reconciled with the Secretary's narrow interpretation.

Second, Congress's reason for moving this language from one nearby section to another could be anyone's guess. See Cervantes-Gonzalez v. INS, 244 F.3d 1001, 1005 (9th Cir. 2000) ("The motive behind moving amended § 212(i) to Subtitle C is itself ambiguous. Perhaps Congress moved the provision so that it would no longer fall under Subtitle A's general effective date clause prohibiting it from applying to pending cases. Or perhaps Congress inadvertently forgot to attach an effective date clause after the provision was moved. We refuse to speculate."). Its hop between two neighboring provisions hardly signifies a material change in the statutory scheme or in Congress's overall intent. Most likely, the text was lost in this ever-shifting patchwork of provisions. Amici Br. at 15-16, 15 n.11.

Third, the Secretary claims that Amici's construction of Section 7102(a) would prevent a veteran's appeal from moving forward if the designated Board member were to pass away or be disqualified. Appellee Br. at 22. The Secretary is simply wrong. If a Board member were to pass away during a *proceeding*, the claimant

could either waive his/her right to the same judge or request the designation of another.

C. LEGISLATIVE HISTORY DOES NOT SUPPORT THE SECRETARY'S ARGUMENT THAT NO PART OF TITLE 38 CONTAINS A SAME-JUDGE REQUIREMENT.

The Secretary argued that when Congress rewrote the "new Section 7107" the "post-AMA Section 7107 no longer provides that the board member who holds a hearing must also 'participate in making the final determination of the claim.'" The Secretary then stated: "Nor does this language (or any similar language) appear elsewhere in Title 38." Appellee Br. at 11.

In the alternative, Mr. Frantzis has argued that "both versions [of Section 7102]state that the member or panel assigned to the proceeding 'shall make a determination thereon.'" Applnt. Br. at 10-14. So Mr. Frantzis argues, what Congress kept written in Section 7102 contradicts the Secretary's statement that no similar language appears anywhere in Title 38.

In their brief, Amici asked the pivotal question: "What change did Congress intend by amending Section 7107?" They answered their question by looking at Congressional committee Reports, saying that 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 by Amici). Amici Br. at 16-17. Moreover, the Amici quoted the House Committee:

> 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*."

Amici Br. at 18, quoting 115th Congress, 1st Session, H.R. Rep. 115-135 at 5 (May 19, 2017) (italics added by Amici).

Together, those committee reports say that Congress's intent when enacting changes to Section 7107 was to (1) remove travel-board hearings and conduct in-person hearings only at VA headquarters; and (2) create a stream-lined process that protects veterans' due process rights. Nothing was written into the statute (or appears in the committee reports for that matter) that showed any intent to throw out the same-judge requirement that had been written into the pre-AMA version of the law.

When the Secretary analyzed the Amici's citations to those House and Senate Committee Reports, the Secretary concluded:

> Once legislation is amended, the new text is the law, and where it clearly makes a change, that governs. Indeed, this is so even when the legislative history consisting of the codifiers' report expresses the intent to make no change. Here, Congress plainly changed Section 7107 by removing the same board member requirement that was part of the statutory text prior to the AMA. Regardless of what Members of Congress thought about their legislation at the time, the change they undeniably implemented must be given full force and effect.

Appellee Br. at 14 (internal citations omitted). Furthermore, the Secretary argued that removal of words from a statute, regardless of the remaining words, contains a meaning that must be inferred. Appellee Br. at 11-12.

The Amici's brief argued the Veterans Court had been wrong to apply a "negative inference/implication" to determine that removal of the same-judge requirement from Section 7107 meant Congress intended to jettison the same-judge requirement. Amici Br. at 12.[7] Amici cited multiple Supreme Court decisions to support the notion that, because the Secretary (and the Veterans Court's majority) have drawn a negative inference from what was taken out of the statute, that it is imperative for this Court to be informed by relevant legislative history. The Amici

[7]Frantzis, 35 Vet.App. at 362, n. 8 ("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.).

cited Marx v. General Revenue Corp., 568 U.S. 371, 381 (2013) for the proposition that negative implication depends on context; Burns v. U.S., 501 U.S. 129, 136 (1991) for the propositions that (i) not every omission reflects deliberate and purposeful intent, and (ii) other factors outside the written legislation (e.g., different textual indicators, statutory purpose, legislative history) may point in another direction; U.S. v. Vonn, 535 U.S. 55, 65-66 (2002) for the proposition that there may be two or more equally plausible explanations for the omission; and Henderson v. Shinseki, 562 U.S. 428, 441 (2011) for the proposition that ambiguity must be resolved in the Veteran's favor. Amici Br. at 12-13.

CONCLUSION

Appellant, Louis R. Frantzis, hereby replies to the Appellee Brief, filed by Secretary of Veterans Affairs, Denis McDonough. Mr. Frantzis quoted Supreme Court precedent from Kamen to explain that the Secretary was wrong when he argued that the Veterans Court had discretion to consider (or not consider) the fair process doctrine. Kamen reversed a Seventh Circuit decision, and cautioned that courts should not decline to consider unargued legal theory if the outcome of the case produces a precedent that potentially binds future litigants. Since the Veterans Court's decision in Frantzis created precedent, the Veterans Court's really did not have discretion to not consider the fair process doctrine.

Mr. Frantzis also argued even if the Veterans Court did have discretion, it abused its discretion when it declined to consider fair practice. Mr. Frantzis cited the First Circuit, the Fourth Circuit and the Tenth Circuit to describe the limits to the amount of discretion an appellate court really has, and explained that the Veterans Court abused discretion by its absolute refusal to consider fair practice.

Mr. Frantzis argued that a proper reading Section 7102 instructs that the judge or panel who was assigned at the beginning of a case needs to be the judge or panel who makes the decision. Section 7102 contemplates a proceeding in which the same judge or panel performs all the duties, including conducting a hearing, if any, and making a final determination.

Respectfully submitted;

/s/ Robert C. Brown Jr.

Robert C. Brown Jr., OBA #21113
Email - bobbrown@tommyklepperlaw.com
TOMMY KLEPPER & ASSOCIATES
702 Wall Street, Suite 100 (73069)
Post Office Box 721980
Norman, Oklahoma 73070
Telephone: 405/928-5055

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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Signature: /s/Robert C. Brown, Jr.

Name: Robert C. Brown, Jr.

CERTIFICATE OF SERVICE

I, Robert C. Brown Jr. hereby certify that on
[appellant/petitioner or attorney therefor]

06/07/2023 I served a copy of the foregoing Appellant's Brief, to:
[date]

Borislav Kushnir , at Steven.Kushnir@usdoj.gov
[counsel for/or appellee/respondent]

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/s/Robert C. Brown Jr.
Signature

06/07/2023
Date

Robert C. Brown Jr.
Tommy Klepper & Associates, PLLC
P.O. Box 721980
Norman, OK 73070
[Full name and address of attorney]