2022-2210

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOUIS FRANTZIS,

Claimant-Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 20-5236, Judge Grant Jaquith, Judge Joseph L. Falvey, Jr., Judge Michael P. Allen

---

BRIEF OF RESPONDENT-APPELLEE

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

Of Counsel:

Y. KEN LEE
Deputy Chief Counsel

DEREK SCADDEN
Attorney
Office of General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

ERIC P. BRUSKIN
Assistant Director

BORISLAV KUSHNIR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480, Ben Franklin Station
Washington, DC 20044

Attorneys for Respondent-Appellee

May 18, 2023

TABLE OF CONTENTS

INTRODUCTION 1

STATEMENT OF THE ISSUES 3

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS 3

I. Nature Of The Case 3

II. Statement Of Facts And Course Of Proceedings Below 3

SUMMARY OF THE ARGUMENT 8

ARGUMENT 9

I. Jurisdiction And Standard Of Review 9

II. The Veterans Court Correctly Held That, By Amending 38 U.S.C. § 7107, Congress Eliminated The "Same Board Member" Requirement From Title 38 10

III. The Veterans Court Correctly Held That 38 U.S.C. § 7102 Does Not Impose Its Own "Same Board Member" Requirement, Nor Does It Nullify Congress's Revision Of 38 U.S.C. § 7107 16

IV. The Veterans Court Did Not Abuse Its Discretion By Declining To Consider The Fair Process Doctrine 26

CONCLUSION 31

TABLE OF AUTHORITIES

Cases

Agri Processor Co. v. N.L.R.B.,
514 F.3d 1 (D.C. Cir. 2008).....25

Almendarez-Torres v. United States,
523 U.S. 224 (1998) 18

Am. Bus Ass'n v. Slater,
231 F.3d 1 (D.C. Cir. 2000).....21

Arneson v. Shinseki,
24 Vet. App. 379 (2011)..... 6, 10, 17

Bayer CropScience AG v. Dow AgroSciences LLC,
851 F.3d 1302 (Fed. Cir. 2017) 30

BedRoc Ltd., LLC v. United States,
541 U.S. 176 (2004) 17

Blubaugh v. McDonald,
773 F.3d 1310 (Fed. Cir. 2014) 10

BNSF Ry. Co. v. Loos,
139 S. Ct. 893 (2019) 14

Bostock v. Clayton Cnty.,
140 S. Ct. 1731 (2020) 13

Bryant v. Wilkie,
33 Vet. App. 43 (2020).....30

Carbino v. West,
168 F.3d 32 (Fed. Cir. 1999) 27

Checo v. Shinseki,
748 F.3d 1373 (Fed. Cir. 2014) 28

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.,
467 U.S. 837 (1984) 18

Ciena Corp. v. Oyster Optics, LLC,
958 F.3d 1157 (Fed. Cir. 2020) 29

Emenaker v. Peake,
551 F.3d 1332 (Fed. Cir. 2008) 27

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 13, 15

Exxon Mobil Corp. v. Allapattah Servs., Inc.,
545 U.S. 546 (2005) 13

Freytag v. Comm'r,
501 U.S. 868 (1991) 29

Goodman v. Shulkin,
870 F.3d 1383 (Fed. Cir. 2017) 9

Greenlaw v. United States,
554 U.S. 237 (2008) 27

Griffin v. Oceanic Contractors, Inc.,
458 U.S. 564 (1982) 22

Obsidian Sols. Grp., LLC v. United States,
54 F.4th 1371 (Fed. Cir. 2022) 17

Guillory v. Shinseki,
669 F.3d 1314 (Fed. Cir. 2012) 9

Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.,
572 U.S. 559 (2014) 30

Holliday v. Principi,
14 Vet. App. 280 (2001).....30

Huber v. Taylor,
469 F.3d 67 (3d Cir. 2006) 30

King v. Burwell,
576 U.S. 473 (2015) 17

Kisor v. Wilkie,
139 S. Ct. 2400 (2019) 17-18

Manning v. Caldwell,
930 F.3d 264 (4th Cir. 2019) 30

Mattox v. McDonough,
34 Vet. App. 61 (2021),
aff'd, 56 F.4th 1369 (Fed. Cir. 2023) 4

Nat'l Ass'n of Mfrs. v. Dep't of Def.,
138 S. Ct. 617 (2018) 23

Progressive Indus., Inc. v. United States,
888 F.3d 1248 (Fed. Cir. 2018) 31

Reiter v. Sonotone Corp.,
442 U.S. 330 (1979) 23

Res-Care, Inc. v. United States,
735 F.3d 1384 (Fed. Cir. 2013) 20

Roberts v. McDonald,
27 Vet. App. 108 (2014) 30

Robinson v. Shinseki,
557 F.3d 1355 (Fed. Cir. 2009) 29

Rodriguez v. United States,
480 U.S. 522 (1987) 25

Ross v. Blake,
578 U.S. 632 (2016) 12

Rudisill v. McDonough,
55 F.4th 879 (Fed. Cir. 2022) 24

Sindi v. El-Moslimany,
896 F.3d 1 (1st Cir. 2018) 30

Sprinkle v. Shinseki,
733 F.3d 1180 (Fed. Cir. 2013) 31

Stanley v. Dep't of Justice,
423 F.3d 1271 (Fed. Cir. 2005) 12, 14

United States v. Castleman,
572 U.S. 157 (2014) 23

United States v. Sineneng-Smith,
140 S. Ct. 1575 (2020) 7, 26, 27, 28

United States v. Welden,
377 U.S. 95 (1964) 25

United States v. Wilson,
503 U.S. 329 (1992) 16

Statutes

38 U.S.C. § 7102 ..... *passim*

38 U.S.C. § 7102 (1993) 23

38 U.S.C. § 7104 20

38 U.S.C. § 7107 (2022) 11, 18

38 U.S.C. § 7107 (2016) ..... *passim*

38 U.S.C. § 7292 ..... 9, 10, 29

Veterans Appeals Improvement and Modernization Act of 2017,
Pub. L. No. 115-55, 131 Stat. 1105 ..... 4, 11, 14

Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994,
Pub. L. No. 103-271, 108 Stat. 740 23-24

Regulations

38 C.F.R. § 3.2400(c)(1) 4

38 C.F.R. § 20.107 22

38 C.F.R. § 20.604 25

38 C.F.R. § 20.704 25

Other Authorities

ANTONIN SCALIA & BRYAN A. GARNER,
READING LAW: THE INTERPRETATION OF LEGAL TEXTS (2012) 12, 14, 25

STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, respondent-appellee's counsel states that he is unaware of any other appeal in or from this same action that was previously before this Court or any other appellate court under the same or similar title. Counsel further states that he is unaware of any cases pending before this Court or any other court that may directly affect or be directly affected by this Court's decision in this appeal.

2022-2210

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

LOUIS FRANTZIS,

Claimant-Appellant,

v.

DENIS McDONOUGH,
Secretary of Veterans Affairs,

Respondent-Appellee.

BRIEF OF RESPONDENT-APPELLEE

INTRODUCTION

After the Department of Veterans Affairs (VA) denied him the disability compensation he sought, claimant-appellant Louis Frantzis appealed the matter to the Board of Veterans' Appeals (board). Mr. Frantzis received a board hearing in 2019, and a final board decision a few months later. But the board member who conducted the hearing was not the same as the board member who authored the decision in his case. Mr. Frantzis now appeals the substitution to this Court, arguing that Title 38 of the United States Code requires the same board member to both conduct the board hearing and issue the board decision.

Had Mr. Frantzis made this argument under the law that existed in 2016, he would have had a point. After all, a statutory provision extant at the time contained the very "same board member" requirement that Mr. Frantzis now seeks to enforce. *See* 38 U.S.C. § 7107(c) (2016). But in 2017, Congress enacted legislation that eliminated this requirement from the statutory text. Binding precedent makes clear that the Court may not sidestep Congress's legislative choice. Nor should the Court read a "same board member" requirement into other sections of Title 38, as doing so would impart a strained statutory interpretation and conflict with a handful of traditional interpretive canons.

Mr. Frantzis also argues that the fair process doctrine supports his position. Below, the United States Court of Appeals for Veterans Claims (Veterans Court) declined to consider this argument because it was neither raised nor briefed by the parties. The Veterans Court correctly determined that it should not resolve the case on a legal question it interjected *sua sponte*. And even if the Veterans Court could have addressed the issue, its decision not to do so does not amount to an abuse of discretion.

For these reasons, the Court should affirm the Veterans Court's decision.

STATEMENT OF THE ISSUES

1. Whether the Veterans Court erred by holding that, under the Veterans Appeals Improvement and Modernization Act of 2017, the board member who conducts the board hearing is not statutorily required to author the final board decision.

2. Whether the Veterans Court abused its discretion by declining to consider an argument not properly raised before it.

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

Claimant-appellant, Louis Frantzis, appeals the decision of the Veterans Court in *Louis R. Frantzis v. Denis McDonough, Secretary of Veterans Affairs*, Case No. 20-5236 (Vet. App. June 21, 2022), Appx2-42, which affirmed a September 11, 2019 decision of the board, Appx51-58, denying an increased rating and an earlier effective date for service-connected tension headaches.[1]

II. Statement Of Facts And Course Of Proceedings Below

Mr. Frantzis served honorably in the United States Army from 1979 to 1982. Appx59.

In August 2014, the VA granted Mr. Frantzis service connection for tension headaches. *See* Appx258-265. A VA Regional Office (RO) later increased the

[1] "Appx__" refers to pages in the Joint Appendix.

disability rating associated with Mr. Frantzis's condition. *See* Appx272-277. Mr. Frantzis disagreed with various aspects of that rating decision. *See* Appx280-281. In 2015, after the VA issued a statement of the case, *see* Appx282-301, Mr. Frantzis appealed the rating decision to the board, *see* Appx302.

While Mr. Frantzis's case was pending before the board, Congress enacted, and the President signed into law, the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (AMA). The AMA established a "concurrent system of adjudication" that channeled claims into one of two distinct tracks: a "new appeals system" for adjudicating new claims for disability compensation, and the existing system that continued adjudicating "legacy claims." *Mattox v. McDonough*, 34 Vet. App. 61, 68 (2021), *aff'd*, 56 F.4th 1369 (Fed. Cir. 2023). Within this framework, the term "legacy claims" refers to claims initially decided by the VA prior to February 19, 2019. *See* AMA at § 6, 131 Stat. at 1127. But to streamline claim adjudication, the AMA also allowed claimants with legacy claims to "elect" the new appeals system over the legacy process. *See* AMA at §§ 2(x)(3), 2(x)(5), 131 Stat. at 1115. Congress authorized the Secretary of Veterans Affairs to establish a program that would facilitate such an election. *See* AMA at § 4(b)(1), 131 Stat. at 1120. The Secretary, in turn, established the Rapid Appeals Modernization Program (RAMP) for this purpose. *See* 38 C.F.R. § 3.2400(c)(1).

In June 2018, Mr. Frantzis opted into the new appeals system by electing to participate in RAMP. Appx303. The VA confirmed Mr. Frantzis's election. *Id.* Mr. Frantzis then requested a board hearing. *See* Appx344-347. This request was made with the understanding that Mr. Frantzis's legacy claim would be subject to "the new application requirements outlined in the new appeals system." Appx344.

Mr. Frantzis received a board hearing on May 6, 2019. At that hearing, which was held via video conference, Mr. Frantzis and his wife testified before board member James Reinhart. *See* Appx320-343. A transcript of the hearing was associated with Mr. Frantzis's claim file. *See id.* Four months later, on September 11, 2019, the board issued a decision denying an increased rating and an earlier effective date for Mr. Frantzis's service-connected tension headaches. *See* Appx51-58. Board member Theresa Catino authored the board decision. Appx58.

Mr. Frantzis appealed the board decision to the Veterans Court. As relevant here, Mr. Frantzis argued that the board member who conducted his hearing must also be the board member to ultimately issue the board decision in his case. *See* Appx6.[2] This argument was based entirely on Mr. Frantzis's reading of 38 U.S.C. § 7102, which, he claimed, contains this requirement. *See id.* In response, the Secretary argued that the relevant statutory provision is 38 U.S.C. § 7107, and that

[2] Mr. Frantzis also argued before the Veterans Court that the board did not properly evaluate the evidence before it or, alternatively, that it failed to provide adequate reasons or bases for its decision. *See* Appx6. Mr. Frantzis does not repeat these additional arguments here. *See generally* Applnt. Br.

Congress expressly eliminated the "same board member" requirement when it enacted the AMA. *See id.* After briefing concluded but before oral argument, the Veterans Court issued an order directing the parties to be prepared to discuss two additional matters at oral argument: the import of *Arneson v. Shinseki*, 24 Vet. App. 379 (2011), and the fair process doctrine. *See* Appx15. The parties argued the case before the Veterans Court in April 2022.

On June 21, 2022, a divided panel of the Veterans Court affirmed the board decision. Relying on *Arneson*, the panel majority first concluded that only Section 7107 governs board hearings. Appx8-9. While that provision used to expressly require that the same board member or members who conduct hearings "shall . . . participate in making the final determination of the claim," the Veterans Court found that Congress eliminated this requirement when it enacted the AMA. Appx9-10. The Veterans Court held that it must give effect to this legislative choice. Appx10-11.

The panel majority next considered other possible sources for the "same board member" requirement. The Veterans Court rejected Section 7102 as one potential source, finding that this provision governs case assignments rather than board hearings, such that it "just does not speak to the issue at hand." Appx11. The Veterans Court further held that the VA's implementing regulations likewise offer no support for Mr. Frantzis's position. *See* Appx14.

Finally, the panel majority declined to consider the fair process doctrine as an independent source for the "same board member" requirement. The Veterans Court stressed that "courts should not be advocates," as doing so would disrupt the adversarial system that places the onus on parties to "advance[e] the facts and argument entitling them to relief." Appx15 (quoting *United States v. Sineneng-Smith*, 140 S. Ct. 1575 (2020)). And because Mr. Frantzis's briefs before the Veterans Court "don't even mention fair process," the panel concluded that it should "leave for another day an exploration of the fair process doctrine's role, if any, on the issue before the Court." *Id.*

Judge Jaquith dissented from the panel decision. In his view, both Section 7102 and the fair process doctrine support the conclusion that the same board member must conduct hearings and issue the board decision. *See* Appx21-30. Because he would have found the statutory language ambiguous, Judge Jaquith would have applied the pro-veteran canon to support Mr. Frantzis's interpretation of Section 7102. *See* Appx30-31. Additionally, although he "share[d] the majority's concern over the timing and thoroughness of the arguments on the veteran's behalf," Judge Jaquith would not have declined to consider the fair process doctrine. Appx38-42.

After the panel majority affirmed the board decision, Mr. Frantzis petitioned the Veterans Court for full court review. *See* Appx43. The Veterans Court denied

the motion. *Id.* Chief Judge Bartley, joined by Judge Jaquith, dissented from the denial because the panel majority declined to address the fair process doctrine. Appx43-44. Chief Judge Bartley did not, however, express disagreement with the panel majority's interpretation of statute and regulation. *See id.*

This appeal followed.

SUMMARY OF THE ARGUMENT

Mr. Frantzis and amici urge the Court to ignore Congress's revisions to Section 7107, and ask it to conclude that Title 38 continues to impose the "same board member" requirement on all cases that come before the board. Their arguments, however, are incompatible with the unambiguous statutory language. In enacting the AMA, Congress plainly removed the "same board member" requirement from Section 7107, and the Court must give the removal full force and effect. Reading this requirement back into the statutory scheme through Section 7102 would contravene Congress's intent, discount the substantive differences between the two provisions, and lead to absurd results.

Without a statutory hook, Mr. Frantzis and amici lean on the fair process doctrine. But the Veterans Court correctly declined to consider the issue because Mr. Frantzis did not rely on it in his briefing. In fact, the doctrine was only raised late into the litigation by the Veterans Court itself. And even if the Veterans Court could have considered the fair process doctrine, declining to do so was entirely

within its discretion. Given the highly deferential standard of review applicable to discretionary decisions of this nature, Mr. Frantzis and amici have not established an abuse of discretion in this case.

In the end, the Secretary's interpretation of the relevant statutory provisions offers the most natural and consistent reading, and the Veterans Court's decision not to consider an underdeveloped argument was a reasonable one. The Court should accordingly affirm the Veterans Court's decision.

ARGUMENT

I. Jurisdiction And Standard Of Review

This Court's jurisdiction to review decisions of the Veterans Court is "limited by statute." *Goodman v. Shulkin*, 870 F.3d 1383, 1385 (Fed. Cir. 2017). The Court may review "the validity of a decision of the [Veterans] Court on a rule of law or of any statute or regulation . . . or any interpretation thereof (other than a determination as to a factual matter) that was relied on by the [Veterans] Court in making the decision." 38 U.S.C. § 7292(a). But unless the case presents a constitutional issue, this Court "may not review (A) a challenge to a factual determination, or (B) a challenge to a law or regulation as applied to the facts of a particular case." *Id.* at § 7292(d)(2). In other words, this Court lacks jurisdiction to review "disagreements with how the facts were weighed or how the law was applied to the facts." *Guillory v. Shinseki*, 669 F.3d 1314, 1320 (Fed. Cir. 2012).

This Court reviews legal determinations of the Veterans Court *de novo*. *Blubaugh v. McDonald*, 773 F.3d 1310, 1312 (Fed. Cir. 2014). The Court "may set aside the Veterans Court's interpretation of a regulation only if it is unconstitutional, violative of statute, procedurally defective, or otherwise arbitrary." *Id.* (citing 38 U.S.C. § 7292(d)(1)).

II. The Veterans Court Correctly Held That, By Amending 38 U.S.C. § 7107, Congress Eliminated The "Same Board Member" Requirement From Title 38

Before Congress enacted the AMA, Section 7107 of Title 38 governed hearings before the board. 38 U.S.C. § 7107 (2016) (titled "Appeals: dockets; hearings"). This provision afforded claimants an opportunity for a board hearing. *Id.* at § 7107(b) (2016). Board hearings were to be "held by such member or members of the Board as the Chairman may designate." *Id.* at § 7107(c) (2016). And, as relevant here, Section 7107 provided that "[s]uch member or members designated by the Chairman to conduct the hearing shall . . . participate in making the final determination of the claim." *Id.*

This language, the Veterans Court has found, "[o]bviously" means that "if a case is assigned to be adjudicated by an individual member of the Board, that member must conduct the hearing." *Arneson*, 24 Vet. App. at 385. After also reviewing relevant VA regulations, the Veterans Court concluded in *Arneson* that a "claimant must [] be afforded the opportunity for a hearing before every member

of the panel that will ultimately decide his case." *Id.* at 386. It is accordingly undisputed that "the law at the time [*Arneson* was decided] required all Board members who participated in rendering a decision [to] also have been involved in a Board hearing afforded to [the claimant]." Appx9-10.

But in 2017, Congress re-wrote Section 7107. *See* AMA at § 2(t), 131 Stat. at 1112-13. The new Section 7107 continues to govern hearings before the board. 38 U.S.C. § 7107 (2022) (titled "Appeals: dockets; hearings"). And, as before, this provision continues to guarantee board hearings to claimants who request them. *Id.* at § 7107(c) (2022). However, 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." *See generally id.* Nor does this language (or any similar language) appear elsewhere in Title 38. By enacting the AMA, Congress thus affirmatively deleted the "same board member" requirement from the statutory text. It is undisputed that this new version of Section 7107 is applicable to Mr. Frantzis. *See* Appx303, Appx344 (Mr. Frantzis elected to participate in RAMP, with the understanding that his legacy claim would be subject to "the new application requirements outlined in the new appeals system").

The Veterans Court panel majority gave full effect to Congress's legislative choice. It noted that "Congress [] consciously elected to remove the requirement" that appeared in the pre-AMA version of Section 7107, and held that it was "not

[the Veterans Court's] job" to "re-insert statutory provisions that Congress has removed." Appx10-11. Instead, the Veterans Court explained, its "task is to give effect to statutes as Congress has written them." Appx11.

This Court should affirm the Veterans Court's sensible decision. "When Congress amends legislation, courts must presume it intends the change to have real and substantial effect." *Ross v. Blake*, 578 U.S. 632, 641-42 (2016) (quotations and alterations omitted); *see also* ANTONIN SCALIA & BRYAN A. GARNER, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 256 (2012) ("[A] change in the language of a prior statute presumably connotes a change in meaning."). This is particularly true when Congress removes statutory language with significance. In *Stanley v. Department of Justice*, 423 F.3d 1271 (Fed. Cir. 2005), for example, this Court found it significant that Congress deleted the words "for cause" from a statutory provision that governs the removal of United States Trustees, finding that the statute's "plain language" and "attendant legislative history" compel the conclusion that "the Attorney General need not show cause before removing a Trustee." *Id.* at 1274. Likewise here, the Court should enforce Congress's decision to eliminate the "same board member" requirement from Section 7107.

Other than expressing general disagreement with the Veterans Court's decision on this point, Mr. Frantzis offers no substantive response to the analysis

above. *See* Applnt. Br. at 12. Amici, on the other hand, appear to offer two arguments in favor of discounting the AMA revisions to Section 7107. For the reasons explained below, neither argument has merit.

First, amici argue that the Court should examine legislative history, including Senate and House of Representatives Committee Reports, to discern what change Congress intended when it amended Section 7107 in 2017. *See* Amici Br. at 16-18. The Supreme Court, however, has cautioned against such an undertaking. "[L]egislative history is not the law," because "[i]t is the business of Congress to sum up its own debates in its legislation, and once it enacts a statute we do not inquire what the legislature meant; we ask only what the statute means." *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018) (cleaned up). This is so, in part, because legislative history is subject to "strategic manipulations" and can "often [be] murky, ambiguous, and contradictory." *Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). And even where legislative history unanimously and unambiguously indicates that Congress did not intend a reading gleaned from the statute's plain language, reliance on legislative history should be avoided because "the limits of the drafters' imagination supply no reason to ignore the law's demands." *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731, 1737 (2020); *see also id.* at 1749-50 (rejecting legislative history at odds with the plain

meaning of Title VII). Where the statutory command is clear, legislative history has no place in statutory interpretation.[3]

These principles equally hold true when Congress amends existing legislation. Once legislation is amended, "[t]he new text is the law, and where it clearly makes a change, that governs." READING LAW at 257. Indeed, "[t]his is so even when the legislative history consisting of the codifiers' report expresses the intent to make no change." *Id.* Here, Congress plainly changed Section 7107 by removing the "same board member" requirement that was part of the statutory text prior to the AMA. *See* AMA at § 2(t), 131 Stat. at 1112-13. 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.

But even if the Court were to examine the legislative history invoked by amici, it would provide no solace to Mr. Frantzis. The Committee Reports cited by amici do not expressly discuss the "same board member" requirement within the

[3] Although this Court claimed to rely on "attendant legislative history" in *Stanley*, 423 F.3d at 1274, the Court actually examined relevant *statutory* history instead. *See* READING LAW at 256 ("[Q]uite separate from legislative history is *statutory* history – the statutes repealed or amended by the statute under consideration." (emphasis in original)). Unlike legislative history, statutory history is a probative measure of what a statute plainly means. *See BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 906 (2019) (Gorsuch, J., dissenting) (pointing out that statutory history, defined as "the record of enacted changes Congress made to the relevant statutory text over time," "isn't the sort of unenacted legislative history that often is neither truly legislative (having failed to survive bicameralism and presentment) nor truly historical (consisting of advocacy aimed at winning in future litigation what couldn't be won in past statutes)").

pre-AMA version of Section 7107. *See* Amici Br. at 16-18. Given that the legislative history is not directly on point, the Court should not venture to "divine messages from congressional commentary directed to different questions altogether," as doing so might "threaten[] to substitute [the Court] for the Congress." *Epic Sys.*, 138 S. Ct. at 1631 (quotations omitted, second alteration in original).

Amici nonetheless invoke legislative history, notwithstanding its silence on the particular statutory language at issue here. Specifically, they argue that the cited congressional materials indicate Congress's desire to put in place modest efficiencies (*i.e.*, to reduce the time and cost associated with board members traveling to regional offices) without jeopardizing the procedural rights of veterans. *See* Amici Br. at 16-18. The overarching intent behind the AMA, however, was a broader move toward quicker adjudication of veterans' claims. *See* H.R. REP. NO. 115-135 at 5 (noting that "VA's current appeals process is broken," and estimating that "if the current appeals process is not changed, claimants will wait an average [of] ten years for a final appeals decision by the end of 2027"). Allowing one board member to conduct the hearing and another board member to issue the decision is entirely consistent with the efficiency principles underlying the AMA, as doing so could spread the board's workload and eliminate dependance on the productivity of individual board members. Viewing the legislative history

accompanying the AMA as a whole, it is just as likely – if not more so – that Congress acted with purpose to eliminate the "same board member" requirement.

Second, putting aside legislative history, amici suggest that the "same board member" requirement may have been inadvertently "lost in the shuffle" when Congress re-wrote Section 7107. Amici Br. at 15. In support, amici rely primarily on *United States v. Wilson*, 503 U.S. 329 (1992). *See id.* But in *Wilson*, the Supreme Court noted the possibility of oversight only after interpreting the statutory provision at issue with the help of textual cues, such as verb tense, and traditional canons of statutory interpretation, including the avoidance of absurd results. 503 U.S. at 333-36. Here, in contrast, the AMA offers no indication that eliminating the "same board member" requirement was anything other than a deliberate choice. The Court should not disregard the AMA's plain text on little more than an unsupported assumption of congressional error.

III. The Veterans Court Correctly Held That 38 U.S.C. § 7102 Does Not Impose Its Own "Same Board Member" Requirement, Nor Does It Nullify Congress's Revision Of 38 U.S.C. § 7107

To support their argument that a statutory "same board member" requirement continues to exist in the AMA's wake, Mr. Frantzis and amici next turn to 38 U.S.C. § 7102. This provision, which Congress did not amend through the AMA, states, in relevant part:

> 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.

38 U.S.C. § 7102(a). Mr. Frantzis and amici argue that this provision imposes a standalone "same board member" requirement, regardless of what Section 7107 might provide.

The Veterans Court panel majority rejected this argument, finding that Section 7102 "just does not speak to the issue at hand" because it "governs the assignment of cases to Board members," not the rules applicable to board hearings. Appx11. The Veterans Court reached this conclusion after examining the text of Section 7102 and the *Arneson* decision. *See id.* In *Arneson*, the Veterans Court similarly held that "[S]ection 7102 governs the assignment of cases" while "Section 7107 governs Board hearings." 24 Vet. App. at 384.

When called upon to interpret statutes, the Court's "inquiry begins with the statutory text, and ends there as well if the text is unambiguous." *BedRoc Ltd., LLC v. United States*, 541 U.S. 176, 183 (2004). The Court "do[es] not look at the text in a vacuum, but rather, [it] must consider the words 'in their context and with a view to their place in the overall statutory scheme.'" *Obsidian Sols. Grp., LLC v. United States*, 54 F.4th 1371, 1374 (Fed. Cir. 2022) (quoting *King v. Burwell*, 576 U.S. 473, 486 (2015)). To determine whether an ambiguity exists, "a court must exhaust all the 'traditional tools' of construction" at its disposal. *Kisor v. Wilkie*,

139 S. Ct. 2400, 2415 (2019) (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)).

Applying these principles to Sections 7102 and 7107 reveals that the Veterans Court panel majority reached the correct result. The pre-AMA version of Section 7107 prescribed a wide variety of matters related to board hearings, including: the board's timing for considering and deciding appeals, *see* 38 U.S.C. § 7107(a)(1) (2016); claimants' right to a hearing, *see id.* at § 7107(b) (2016); the manner of designating board members to hearings, *see id.* at § 7107(c) (2016); and the location of board hearings, *see id.* at § 7107(d)(1) (2016). The post-AMA version of Section 7107 similarly focuses on matters related to board hearings. *See* 38 U.S.C. § 7107(c) (2022) (prescribing the manner and scheduling of board hearings). Conversely, Section 7102 does not mention hearings at all, instead covering only the assignment of board members to "proceeding[s] instituted before the Board." 38 U.S.C. § 7102. The headings associated with these provisions further demonstrate that Section 7107 addresses "hearings," while Section 7102 addresses the "[a]ssignment of members of [the] Board." These headings are yet another indicator that Section 7107, not Section 7102, is the section that governs board hearings. *See Almendarez-Torres v. United States*, 523 U.S. 224, 234 (1998)

("[T]he title of a statute and the heading of a section are tools available for the resolution of a doubt about the meaning of a statute." (quotations omitted)).[4]

Mr. Frantzis and amici appear to diverge in how they respond to these differences between Sections 7102 and 7107. Mr. Frantzis, for his part, argues that the issue he raises concerns "the assignment of the members of the Board rather than the contents of the docket or the conduct of the hearing." Applnt. Br. at 16. He thus seems to embrace the distinction between Sections 7102 and 7107, but claims that the former, rather than the latter, is applicable to his case.

This argument misconstrues the issue facing the Court. Nothing within Section 7102 can be read to have prohibited the board Chairman from assigning board member Catino, who authored the board decision, to Mr. Frantzis's case, as that provision only describes what board members must do *after* their assignment. *See* 38 U.S.C. § 7102(a) ("A member or panel assigned a proceeding shall make a determination thereon . . ."). Instead, properly understood, Mr. Frantzis argues in this appeal that board member Reinhart, who conducted the hearing, had an obligation to also draft the board decision. As the Veterans Court panel majority correctly held, it is Section 7107, not Section 7102, that speaks to board member Reinhart's responsibilities in connection with the board hearing he oversaw on May 6, 2019. Appx11.

[4] *See also* Applnt. Br. at 15 (agreeing that "[t]he written title for each section informs the reader of the importance of that section").

In contrast to Mr. Frantzis, amici seem to resist the notion that Section 7102 and the pre-AMA version of Section 7107(c) are distinct. In their view, both provisions contain identical "same board member" requirements, such that Congress's decision to eliminate one had no meaningful impact on board member Reinhart's obligation to decide Mr. Frantzis's case. *See* Amici Br. at 13-14.

The plain text of these provisions, however, demonstrates that amici are incorrect. To start, 38 U.S.C. § 7102(a) sets out the responsibilities of a board member "assigned a proceeding," whereas 38 U.S.C. § 7107(c) (2016) sets out the responsibilities of a board member "designated . . . to conduct the hearing." As the Veterans Court panel majority correctly held, "proceeding" and "hearing" are not synonymous terms. *See* Appx13 n.75. "A cardinal doctrine of statutory interpretation is the presumption that Congress's use of different terms within related statutes generally implies that different meanings were intended." *Res-Care, Inc. v. United States*, 735 F.3d 1384, 1389 (Fed. Cir. 2013) (internal quotations omitted). This presumption makes sense here, as using "proceeding" and "hearing" interchangeably would lead to "nonsensical" results in other parts of Title 38, including 38 U.S.C. § 7104. *See* Appx13 n.75.

Additionally, Congress used the indefinite article "a," as opposed to the definite article "the," to describe the subject of Section 7102 ("*[a]* member or panel") and their obligations toward the claimant ("shall make *a* determination

thereon"). 38 U.S.C. § 7102(a) (emphasis added). This phrasing 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. *See Am. Bus Ass'n v. Slater*, 231 F.3d 1, 4-5 (D.C. Cir. 2000) ("[I]t is a rule of law well established that the definite article 'the' particularizes the subject which it precedes. It is a word of limitation as opposed to the indefinite or generalizing force of 'a' or 'an.'" (cleaned up)). The language used in Section 7102 is particularly noteworthy when compared to the pre-AMA version of Section 7107(c), which indicates that board hearings in legacy appeals must be held before a single board member or panel designated by the board Chairman, and that this board member or panel must "participate in making *the* final determination of the claim." 38 U.S.C. § 7107(c) (2016) (emphasis added).

Taken together, these textual cues demonstrate that the requirement within Section 7102(a) is inherently different from the requirement within the pre-AMA version of Section 7107(c). In stating that "[a] member or panel assigned a proceeding shall make a determination thereon," Section 7102 simply provides that a board member assigned to a proceeding has a responsibility to make all necessary determinations during the course of their assignment. When board member Reinhart was assigned to the proceeding at the hearing stage, he was responsible for all determinations that happened to cross his path, "including any motion filed

in connection therewith." 38 U.S.C. § 7102(a). Then, when board member Catino was assigned to the proceeding at the post-hearing stage, she was responsible for all subsequent determinations. Board member Catino dutifully fulfilled her obligation by authoring the final board decision in Mr. Frantzis's case. *See* Appx51-58.

The interpretation described above is the only one that avoids absurd results. If Section 7102 was read as contemplating the assignment of a single board member or panel to the entire proceeding, then the board would be incapable of reassigning an ongoing case when necessary. So, for instance, if a board member assigned to a board appeal passes away or is disqualified under 38 C.F.R. § 20.107 during the appeal's pendency, the board would be powerless to reassign the matter and move the case forward. Relatedly, if Section 7102 was read to only allow a single "determination" during the entire proceeding, then the board could not make decisions during the pendency of a board appeal, including the resolution of motions filed by the claimant. Such absurd results, which could be highly detrimental to claimants' board appeals, should be avoided whenever possible. *See Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available.").

Several other canons of statutory interpretation further undermine the notion that Section 7102 furnishes the very "same board member" requirement that expressly appeared within the pre-AMA version of Section 7107(c). Under amici's reading, one of these statutory provisions would necessarily have been a needless appendage before 2017, thus violating two related canons: the presumption against ineffectiveness, which embodies "the idea that Congress presumably does not enact useless laws," *United States v. Castleman*, 572 U.S. 157, 178 (2014) (Scalia, J., concurring); and the canon against surplusage, which generally requires courts "to give effect, if possible, to every word Congress used," *Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 632 (2018) (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979)).

The distinction between the two provisions is further validated by the statutory history of Section 7102. Prior to 1994, Section 7102 addressed the requirements applicable to both board hearings and board proceedings. *See* 38 U.S.C. §§ 7102(b)-(c) (1993). As for board hearings, Section 7102 provided that the board member or panel designated to conduct the hearing "will make a final determination in the claim." *Id.* at § 7102(b) (1993). But in 1994, Congress moved the clause governing board hearings – including the "same board member" requirement located therein – to Section 7107. *See* Board of Veterans' Appeals Administrative Procedures Improvement Act of 1994 at § 7, Pub. L. No. 103-271,

108 Stat. 740. Reading a "same board member" requirement back into Section 7102, despite the change Congress implemented nearly 30 years ago, would contravene this history.

In short, the Secretary's interpretation of Section 7102 assigns unique meanings to distinct statutory terms, avoids absurdities that are incompatible with the purpose and structure of Title 38, and gives effect to the statutory changes Congress implemented over the years. The Court should adopt this interpretation, and conclude, as the Veterans Court panel majority did below, that 38 U.S.C. § 7102, plainly read, does not contain a standalone "same board member" requirement.[5]

Amici alternatively argue that Congress's decision to restructure Section 7107 as part of the AMA imbued new meaning to Section 7102. *See* Amici Br. at 13-14. They thus seem to suggest that even if Section 7102 did not originally contain a "same board member" requirement, Congress impliedly added such a requirement, without any changes to the statutory text, by amending Section 7107.

[5] It is unclear whether Mr. Frantzis or amici ask the Court to apply the pro-veteran canon to the Court's interpretation of Sections 7102 or 7107. To the extent they do, such an application would be improper because the plain and unambiguous language of these provisions resolves the issue before the Court. *See Rudisill v. McDonough*, 55 F.4th 879, 887-88 (Fed. Cir. 2022) (en banc) ("Whatever role [the pro-veteran] canon plays in statutory interpretation, it plays no role where the language of the statute is unambiguous[.]").

This argument is without merit. "[A]mendments by implication, like repeals by implication, are not favored, and will not be found unless an intent to repeal or amend is 'clear and manifest.'" *Agri Processor Co. v. N.L.R.B.*, 514 F.3d 1, 4 (D.C. Cir. 2008) (quoting *United States v. Welden*, 377 U.S. 95 (1964), and *Rodriguez v. United States*, 480 U.S. 522 (1987)) (internal citations and alterations omitted). Here, there is no indication that Congress intended to keep the "same board member" requirement once the AMA was enacted. Nor is there any indication – let alone a "clear and manifest" one – that Congress wished to do so by imparting new meaning onto Section 7102 without changing a word of the statutory text. Congress did not amend Section 7102 by implication. *See also* READING LAW at 256 ("[I]f a statute providing for an award to the prevailing party of 'attorney's fees and expert-witness fees' has been amended to award only 'attorney's fees,' there would be no basis for the argument (sometimes made) that attorney's fees include reimbursement of the attorney's expenditures for expert witnesses.").[6]

[6] In addition to Sections 7102 and 7107 of Title 38, the Veterans Court panel majority also held that VA's implementing regulations, 38 C.F.R. §§ 20.604 and 20.706, do not create a "same board member" requirement either. *See* Appx14. Because neither Mr. Frantzis nor amici challenge this conclusion on appeal, we need not address it in our brief.

IV. The Veterans Court Did Not Abuse Its Discretion By Declining To Consider The Fair Process Doctrine

The Veterans Court declined to consider what role, if any, the fair process doctrine should play in deciding Mr. Frantzis's claim. *See* Appx15. The panel majority noted that Mr. Frantzis only raised this point "[a]t oral argument, largely in response to a pre-argument order the [Veterans] Court issued." *Id.* And it concluded that it should not address the argument in this case because "[c]ourts generally should not advance arguments for represented parties when such parties have declined to do so themselves." *Id.* (citing *Sineneng-Smith*, 140 S. Ct. 1575).

In dissent, Judge Jaquith opined that the Veterans Court should not have declined to address the fair process doctrine in Mr. Frantzis's case, finding "waiver of the veteran's right to fair process to be too harsh a sanction." Appx39. Both Mr. Frantzis and amici echo this sentiment on appeal. Mr. Frantzis adopts Judge Jaquith's position in full, without making any distinct arguments of his own. *See* Applnt. Br. at 19. Amici, in turn, argue that waiver is inapplicable where, as here, the lower court raised a legal issue *sua sponte*. *See* Amici Br. at 22-26.

This Court has long recognized that the Veterans Court is not required to consider an argument that a litigant failed to timely raise. The Veterans Court's Rules of Practice and Procedure require appellants to provide a statement of the issues in their opening brief. *See* Ct. App. Vet. Cl. R. 28(a)(3). This rule, much like the corresponding Federal Rule of Appellate Procedure, means that "the

failure of an appellant to include an issue or argument in the opening brief will be deemed a waiver of the issue or argument." *Carbino v. West*, 168 F.3d 32, 34 (Fed. Cir. 1999). As such, "[a]n improper or late presentation of an issue or argument under the [Veterans] [C]ourt's rules need not be considered and, in fact, ordinarily should not be considered." *Id.* *See also Emenaker v. Peake*, 551 F.3d 1332, 1339 (Fed. Cir. 2008) ("[T]he Veterans Court is not required to consider an appellant's argument that is made for the first time in a reply brief in that court.").

Additionally, as the Veterans Court panel majority correctly held below, an adversarial system where parties are represented by counsel "rel[ies] on the parties to frame the issues for decision and assign[s] to courts the role of neutral arbiter of matters the parties present." *Sineneng-Smith*, 140 S. Ct. at 1579 (quoting *Greenlaw v. United States*, 554 U.S. 237, 243 (2008)). Courts "do not, or should not, sally forth each day looking for wrongs to right," but should instead "wait for cases to come to them, and when cases arise, courts normally decide only questions presented by the parties." *Id.* (cleaned up). As a general matter, it is inappropriate for a court to *sua sponte* raise legal arguments on a party's behalf. *See id.* at 1582 (vacating a decision that relies on an argument raised by the Ninth Circuit and

remanding the case "for reconsideration shorn of the [argument] interjected by the appellate panel and bearing a fair resemblance to the case shaped by the parties").[7]

These twin principles demonstrate that the Veterans Court panel majority correctly declined to consider the fair process doctrine. 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).

Amici (but nor Mr. Frantzis) suggest that an imprecise characterization of the issues before the Veterans Court was broad enough to encompass the fair process doctrine, thus putting the matter squarely before the Veterans Court. *See* Amici Br. at 23-24. This claim, however, is nothing more than a disagreement

[7] Although courts may not raise arguments about the merits of the cases before them, they can, and often do, raise jurisdictional or certain other threshold matters on their own, including the timeliness of a notice of appeal. *See Checo v. Shinseki*, 748 F.3d 1373, 1377-78 (Fed. Cir. 2014).

with the Veterans Court's factual determination that Mr. Frantzis did not present any argument regarding fair process prior to oral argument. The Court lacks jurisdiction to review such factual determinations on appeal. *See* 38 U.S.C. § 7292(d)(2); *Robinson v. Shinseki*, 557 F.3d 1355, 1362 (Fed. Cir. 2009) ("In this case, the [Veterans] [C]ourt found as a factual matter that the record did not raise any issue of direct service connection. . . . [T]he factual determinations of the [Veterans] [C]ourt are beyond our jurisdiction to review.").

Finally, amici argue that the fair process doctrine presents such an important question that the Veterans Court could not have declined to consider it. *See* Amici Br. at 25-26. To be sure, some issues are so important that waiver rules may be relaxed. In one Appointments Clause case, for instance, this Court recently held that "courts of appeals may forgive waiver or forfeiture of claims that implicate structural constitutional concerns." *Ciena Corp. v. Oyster Optics, LLC*, 958 F.3d 1157, 1160 (Fed. Cir. 2020). The Court stressed, however, that it "do[es] not believe [courts] are always bound to do so." *Id.* Thus, the Court explained, "it is a *discretionary* decision to forgive waivers of non-jurisdictional challenges." *Id.* at 1161 (emphasis added); *accord Freytag v. Comm'r*, 501 U.S. 868, 878 (1991) (recognizing the Supreme Court's "discretion to consider nonjurisdictional claims that had not been raised below"). To the extent the Veterans Court could have

considered the fair process doctrine at all (even though the parties never raised or briefed the issue), doing so was, at most, a discretionary decision.[8] [9]

"Traditionally, . . . decisions on matters of discretion are reviewable for abuse of discretion." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 (2014). "Abuse of discretion is a highly deferential standard of appellate review." *Bayer CropScience AG v. Dow AgroSciences LLC*, 851 F.3d 1302, 1306 (Fed. Cir. 2017). "An abuse of discretion exists when, *inter alia*, the lower court's decision was based on an erroneous conclusion of law or on a clearly erroneous

[8] The cases cited by amici support the conclusion that application of the waiver rule is discretionary in nature. *See 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." (cleaned up)); *Sindi v. El-Moslimany*, 896 F.3d 1, 28 (1st Cir. 2018) ("Since the application of the so-called raise-or-waive principle is discretionary and non-jurisdictional, an appellate court may, under exceptional circumstances, elect to reach unpreserved issues in order to forestall a miscarriage of justice."); *Huber v. Taylor*, 469 F.3d 67, 74 (3d Cir. 2006) ("[E]ven if an issue was not raised, this Court has discretionary power to address issues that have been waived." (cleaned up)).

[9] In dissent, Judge Jaquith correctly noted that a small number of Veterans Court decisions seem to require consideration of fair process in every case. *See* Appx41 n.263 (citing, *inter alia*, *Roberts v. McDonald*, 27 Vet. App. 108 (2014), and *Holliday v. Principi*, 14 Vet. App. 280 (2001)). These decisions conflict not only with Federal Circuit and Supreme Court precedents regarding courts' discretion to entertain nonjurisdictional arguments that had been waived, but they also contradict other decisions of the Veterans Court. *See, e.g., Bryant v. Wilkie*, 33 Vet. App. 43, 48 (2020) (recognizing that certain rights protected by the fair process doctrine may be waived). Regardless, because neither Mr. Frantzis nor amici rely on these Veterans Court precedents in their briefs, the Court need not address them here.

finding of fact." *Progressive Indus., Inc. v. United States*, 888 F.3d 1248, 1255 (Fed. Cir. 2018).

Here, in declining to address the fair process doctrine, the Veterans Court did not make any errors of law or clear errors of fact. To the contrary, the Veterans Court correctly explained that the issue was not adequately argued by the parties, and aptly concluded that it was therefore better to "leave [the matter] for another day." Appx15. The Veterans Court's decision not to rule on a grossly underdeveloped legal question was not an abuse of discretion.[10]

CONCLUSION

For these reasons, the Court should affirm the Veterans Court's decision.

Respectfully submitted,

BRIAN M. BOYNTON
Principal Deputy Assistant Attorney General

PATRICIA M. McCARTHY
Director

[10] If the Court nonetheless rules that the Veterans Court had an obligation to address the fair process doctrine, the Secretary requests a remand to permit the Veterans Court to consider the issue in the first instance. *See Sprinkle v. Shinseki*, 733 F.3d 1180, 1187-90 (Fed. Cir. 2013) (Taranto, J., dissenting).

/s/ Eric P. Bruskin
ERIC P. BRUSKIN
Assistant Director

Of Counsel:

Y. KEN LEE
Deputy Chief Counsel

DEREK SCADDEN
Attorney
Office of General Counsel
U.S. Department of Veterans Affairs
810 Vermont Avenue, NW
Washington, DC 20420

/s/ Borislav Kushnir
BORISLAV KUSHNIR
Trial Attorney
Commercial Litigation Branch
Civil Division
U.S. Department of Justice
P.O. Box 480
Ben Franklin Station
Washington, DC 20044
Telephone: (202) 307-5928
Facsimile: (202) 353-0461
Email: Steven.Kushnir@usdoj.gov

May 18, 2023

Attorneys for Respondent-Appellee

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2022-2210

Short Case Caption: Frantzis v. McDonough

Instructions: When computing a word, line, or page count, you may exclude any items listed as exempted under Fed. R. App. P. 5(c), Fed. R. App. P. 21(d), Fed. R. App. P. 27(d)(2), Fed. R. App. P. 32(f), or Fed. Cir. R. 32(b)(2).

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because it meets one of the following:

☑ the filing has been prepared using a proportionally-spaced typeface and includes 8,066 words.

☐ the filing has been prepared using a monospaced typeface and includes _____ lines of text.

☐ the filing contains _____ pages / _____ words / _____ lines of text, which does not exceed the maximum authorized by this court's order (ECF No. _____).

Date: 05/18/2023

Signature: /s/ Borislav Kushnir

Name: Borislav Kushnir

Save for Filing