

No. 2024-1543

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

DAVID A. HAMILL,

Claimant-Appellant,

v.

DENIS McDONOUGH, Secretary of Veterans Affairs,

Respondent-Appellee.

On Appeal from the United States Court of Appeals for Veterans Claims,
No. 22-7344, Judge Grant Jaquith, Judge Scott Laurer, Judge Joseph L. Toth

**BRIEF FOR *AMICUS CURIAE* THE VETERANS OF FOREIGN WARS OF
THE UNITED STATES IN SUPPORT OF APPELLANT AND REVERSAL**

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July 12, 2024

CERTIFICATE OF INTEREST

Counsel for Amicus Curiae Veterans of Foreign Wars of the United States certifies the following:

1. Represented Entities. Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case.

Veterans of Foreign Wars of the United States

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). 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.

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). 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.

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None.

5. Related Cases. Other than the originating case(s) for this case, are there related or prior cases that meet the criteria under Fed. Cir. R. 47.5(a)?

Yes (file separate notice; see below) No N/A (amicus/movant)

If yes, concurrently file a separate Notice of Related Case Information that complies with Fed. Cir. R. 47.5(b). Please do not duplicate information. This separate Notice must only be filed with the first Certificate of Interest or, subsequently, if information changes during the pendency of the appeal. Fed. Cir. R. 47.5(b).

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None.

Dated: July 12, 2024

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TABLE OF CONTENTS

	Page
CERTIFICATE OF INTEREST	i
TABLE OF AUTHORITIES	iv
STATEMENT OF INTEREST OF <i>AMICUS CURIAE</i>	1
SUMMARY OF THE ARGUMENT	1
ARGUMENT	3
I. DUE PROCESS REQUIRES PROVIDING VETERANS WITH NOTICE OF ALL THEIR OPTIONS TO APPEAL A COD DETERMINATION	3
A. COD Determinations Can Leave Disabled Veterans Ineligible For Benefits Indefinitely And Appealing The Determination Is The Only Way To Remedy The Legal Bar	3
B. Due Process Requires That A COD Determination Provide Veterans Sufficient Notice.....	8
II. IMPLICIT DENIALS FOR COD DETERMINATIONS DEFY CONGRESSIONAL INTENT	9
A. Implicit Denials In COD Determinations Are Contrary To Congress’s Intent Under The AMA To Expand Notice To Veterans Of Their Appellate Options.....	10
B. Implicit Denials In COD Determinations Is Contrary To Congress’s Intent Under The AMA To Generate Early Resolutions Of Appeals.....	13
CONCLUSION.....	14
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

Adams v. Shinseki, 568 F.3d 956 (Fed. Cir. 2009)6
Cushman v. Shinseki, 576 F.3d 1290 (Fed. Cir. 2009)8
Deshotel v. Nicholson, 457 F.3d 1258 (Fed. Cir. 2006)6
Stone v. INS, 514 U.S. 386 (1995) 11

FEDERAL STATUTES

38 U.S.C. § 5104 (1994) 11
38 U.S.C. § 5104 (2022) 11
38 U.S.C. § 5108 (2017)4
Appeals Modernization Act*passim*

REGULATIONS

38 C.F.R. § 3.12(a).....3

OTHER AUTHORITIES

163 Cong. Rec. H4457 (daily ed. May 23, 2017) (statement of Rep. Roe).....9
Andy L. Blevins et al., *It’s Not “Quality of Life,” It’s “Life or Death,”* Minority Vets (July 8, 2020), <https://www.congress.gov/116/meeting/house/110852/documents/HHRG-116-VR09-20200708-SD101.pdf>3, 4, 5
Appeals Modernization, U.S. Department of Veterans Affairs, <https://benefits.va.gov/benefits/appeals.asp>7

Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal, Veterans of Foreign Wars (Nov. 29, 2023), <https://www.vfw.org/advocacy/national-legislative-service/congressional-testimony/2023/11/examining-the-va-appeals-process-ensuring-high-quality-decision-making-for-veterans-claims-on-appeal>9

How Common Is PTSD In Veterans? U.S. Department of Veterans Affairs, https://www.ptsd.va.gov/understand/common/common_veterans.asp4

H.R. Rep. 115-135 (2017).....10, 11, 12, 13

Legislative Hearing on the Veterans Appeals Improvement and Modernization Act of 2017, House Hearing, 115th Congress (May 2, 2017) (statement of David C. Spickler, U.S. Department of Veterans Affairs).....13

Lost In Translation: How VA’s Disability Claims and Appeals Letters Should Be Simplified, Veterans of Foreign Wars (Mar. 20, 2024), <https://www.vfw.org/advocacy/national-legislative-service/congressional-testimony/2024/3/lost-in-translation-how-vas-disability-claims-and-appeals-letters--should-be-simplified>5, 13

M21-1, Adjudication Procedures Manual, Part X.iv.1.A.1.b. Definition: *COD Determination*3

Nino C. Monea, *Just How Paternalistic is the VA? An Examination of the “Non-Adversarial” Veterans’ Benefits System*, 126 W. VA. L. REV. 77, 124-125 (2023).....14

S. Rep. No. 115-126 (2017)*passim*

VA Decision Reviews and Appeals, U.S. Department of Veterans Affairs, <https://www.va.gov/decision-reviews/>8

What Veterans Benefits Do I Get With Other-Than-Honorable Discharge?, Law Office of Michael D.J. Eisenberg, <https://www.eisenberg-lawoffice.com/blog/what-benefits-do-i-get-with-oth-discharge>3

STATEMENT OF INTEREST OF *AMICUS CURIAE*¹

The Veterans of Foreign Wars of the United States (“VFW”) is a congressionally chartered veterans service organization (“VSO”) established in 1899 that, with its Auxiliary, represents approximately 1.5 million members. The VFW helped establish the Veterans Administration (“VA”) and create the World War II GI Bill and the Post-9/11 GI Bill. The VFW also closely worked with the VA in drafting of the Veterans Appeals Improvement and Modernization Act of 2017 (“AMA”).

VFW has a significant interest in ensuring that veterans’ notice and due process rights are protected when applying for benefits under the AMA. The expansion of notice under the AMA is a foundational element of Due Process to veterans. It is important to the VFW that veterans are notified of critical information regarding their benefits, so that they are not prejudiced by the ambiguity that Congress sought to eliminate when it enacted the AMA.

SUMMARY OF THE ARGUMENT

The AMA was enacted to “empower Veterans” by “providing them with the ability to tailor the [appeals] process to meet their individual needs.” S. Rep. No.

¹ No counsel for any party authored this brief in whole or in part, and no person or entity other than *amicus* and their counsel made a monetary contribution intended to fund the preparation or submission of this brief. All parties have consented to the filing of this *amicus* brief.

115-126, at 30 (2017). Congress recognized that the AMA “would require [the] VA to modify its claims decision notices to ensure they are *clearer* and *more detailed*” to “help Veterans and their advocates make informed choices as to which [] review option makes the most sense.” *Id.* at 31 (emphases added). The VA worked in close collaboration with VSOs on the reform proposal that was incorporated into the AMA to ensure that the new appeals process was “timely, transparent, and fair.” *Id.* at 30. Yet the VA continues to issue decisions which provide *no statement* about whether it is reopening or denying on the merits a character of discharge (“COD”) determination. By depriving the veteran of any information regarding the basis for this important determination, the VA blatantly ignores the AMA’s amendments to 38 U.S.C. § 5104, and forces the veteran to decide whether and how to appeal the decision in the dark.

The Court of Appeals for Veterans Claims (“CAVC”) improperly blessed extending the implicit denial doctrine to COD determinations, subverting the notice requirements of the AMA. This Court should correct the CAVC’s error and empower veterans, just as Congress intended, by requiring that the VA provide veterans with detailed decisions explaining the reasons and bases for their COD decisions. Doing so will also fulfill Congress’s desire that veterans receive their earned benefits for the sacrifices they have made for this country.

ARGUMENT

I. DUE PROCESS REQUIRES PROVIDING VETERANS WITH NOTICE OF ALL THEIR OPTIONS TO APPEAL A COD DETERMINATION

A. COD Determinations Can Leave Disabled Veterans Ineligible For Benefits Indefinitely And Appealing The Determination Is The Only Way To Remedy The Legal Bar

Every year, tens of thousands of military service members who are discharged from the military are locked out of VA services. Upon discharge, the veteran receives a “character of service” (“COS”) determination,² which dictates whether that veteran is eligible to receive benefits from the VA. Any veteran who receives a COS of OTH³ is presumed disqualified from VA benefits until a formal review, known as a COD determination, is completed. 38 C.F.R. § 3.12(a).

² Veterans receive a Form DD214 from their military branch when they are discharged, which includes a COS. Though veterans will receive a review of the COS from the VA when they apply for VA benefits, the VA looks to the COS provided by the military branch and maintains that determination absent extenuating circumstances explaining the “Other Than Honorable” (“OTH”) discharge. The VA also considers the character of military service prior to any negative incidents and the length of military service and performance throughout it. *What Veterans Benefits Do I Get With Other-Than-Honorable Discharge?*, The Law Office of Michael D.J. Eisenberg, <https://www.eisenberg-lawoffice.com/blog/what-benefits-do-i-get-with-oth-discharge>; M21-1, Adjudication Procedures Manual, Part X.iv.1.A.1.b. Definition: *COD Determination*.

³ As of 2017, there were over 500,000 veterans across all military branches that have received an OTH discharge. See Andy L. Blevins et al., *It's Not "Quality of Life," It's "Life or Death,"* Minority Vets, 1-2 (July 8, 2020), <https://www.congress.gov/116/meeting/house/110852/documents/HHRG-116-VR09-20200708-SD101.pdf>.

Further, an OTH discharge can result in a permanent bar from government jobs, loss of assistance in the transition from military to civilian life, and serious disadvantages in the job market.⁴ There is also a negative stigma associated with OTH discharges, which may prevent veterans from seeking benefits even if they are eligible.⁵ The consequences of an OTH discharge are thus extremely severe.

Fortunately, veterans can apply to have denied claims readjudicated (also known as “reopened”) by submitting new and relevant evidence. 38 U.S.C. § 5108 (2017). If the VA determines that the evidence is new and relevant, it is thereby required to readjudicate the veteran’s claim, taking into consideration all of the evidence of record. *Id.* For example, a veteran with an OTH discharge may submit evidence that their discharge was connected to mental health conditions to show that their discharge should be considered honorable for VA purposes.⁶ Indeed, OTH discharges are often the result of unaddressed mental health problems.⁷ Behaviors that are considered misconduct or criminal in nature are

⁴ *Id.* at 7.

⁵ *Id.* at 2.

⁶ Many veterans suffer from PTSD, and the prevalence can vary depending on the service era. For instance, the VA reported that 29% of veterans who served in Iraq and Afghanistan will suffer from PTSD at some point in their lives. PTSD is three times more likely among veterans who deployed compared to those who did not. *How Common Is PTSD In Veterans?*, U.S. Department of Veterans Affairs, https://www.ptsd.va.gov/understand/common/common_veterans.asp.

⁷ Blevins, *supra* at 4.

“often categorized without consideration of the impact that mental health issues and military sexual trauma (MST) have on service members.”⁸ Additionally, “many service members with PTSD symptoms do not seek mental health care due to widespread stigmatization and fear of losing their careers,” so they may turn to substances as a substitute for professional care.⁹ Unfortunately, considerations regarding mental health or trauma are often absent when the military originally assigns a discharge characterization.¹⁰ Thus, submitting such evidence to the VA can lead to a change in eligibility for benefits, ensuring veterans receive their earned entitlements.

After a veteran applies for readjudication under Section 5108, the VA issues a decision letter. These letters are critically important to the disability system, yet are complex and often require the assistance of a professional to decipher.¹¹ The VA’s decision may outline whether it is granting or denying requests for service-connected disability, whether it is granting or denying a request to reopen a claim

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.* at 5.

¹¹ *Lost In Translation: How VA’s Disability Claims and Appeals Letters Should Be Simplified*, Veterans of Foreign Wars (Mar. 20, 2024), <https://www.vfw.org/advocacy/national-legislative-service/congressional-testimony/2024/3/lost-in-translation-how-vas-disability-claims-and-appeals-letters-should-be-simplified> (“Lost In Translation”).

for new and relevant evidence, or whether it is granting or denying a COD determination on the merits. However, sometimes, the VA addresses some claims explicitly and seemingly overlooks other claims. Courts have characterized this as an “implicit denial” of the ignored claims.

For example, in *Adams v. Shinseki*, 568 F.3d 956 (Fed. Cir. 2009), where the claimant applied for benefits for two related heart conditions, the VA explicitly denied benefits for one heart condition, and its silence as to the other heart condition was deemed an implicit denial due to the similarity in the two conditions. Similarly, in *Deshotel v. Nicholson*, 457 F.3d 1258 (Fed. Cir. 2006), where the claimant applied for benefits for head trauma/headaches and a psychiatric disability resulting from a head injury, and the VA explicitly granted benefits only for head trauma/headaches, the court found that the claim seeking a psychiatric disability was implicitly denied. In *Adams* and *Deshotel*, each claimant would have known his options for appealing the implicit denials, *i.e.*, to appeal the denial of service-connection for the rejected condition.

Here, Mr. Hamill’s decision letter explicitly granted service-connection for PTSD, explicitly denied service-connection for acid reflux, irritable bowel syndrome, migraines, and traumatic brain injury, but was silent as to his COD determination—which the CAVC found was implicitly denied. Appx6-7. Unlike the claimants in *Adams* and *Deshotel*, Mr. Hamill was left completely in the dark

as to whether the VA denied his request to reopen the COD based on insufficient evidence or the VA reopened the COD determination based on the new and relevant evidence he submitted (*i.e.*, whether there was new and relevant evidence) and then denied it on the merits. Without knowing the basis for the VA's decision, Mr. Hamill is forced to make an uninformed decision regarding his appeal.

There are five options under the AMA to appeal the VA's denial: (1) higher-level review of the VA's decision by a regional office ("RO"); (2) direct review at the Board of Veterans' Appeals (the "Board"); (3) an evidentiary Board appeal; (4) a hearing at the Board; or (5) supplemental claim procedure, where veterans submit new evidence and have their claims reconsidered.¹² There are significant differences between these appellate paths. For example, veterans cannot submit new evidence if they choose higher-level review by an RO or direct review at the Board based on the evidence of record.¹³ In contrast, new evidence can be submitted in evidentiary Board appeals and Board hearings, or in the supplemental claim procedure.¹⁴ If the result of any one of the five appellate paths is unsatisfactory, veterans may be eligible to continue to pursue their appeal via one

¹² *Appeals Modernization*, U.S. Department of Veterans Affairs, <https://benefits.va.gov/benefits/appeals.asp>.

¹³ *Id.*

¹⁴ *Id.*

of the other paths.¹⁵ Given the various available options, it is vital that veterans with COD denials have sufficient information regarding their claim decisions so that they can choose the appellate option most appropriate to the veteran's circumstances.

B. Due Process Requires That A COD Determination Provide Veterans Sufficient Notice

Veterans have a due process right to receive fair notice of the VA's decision denying the veteran's request to reopen a COD determination. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). A veteran whose request to reopen his COD determination has been denied must have sufficient notice of the denial in order to make an informed appellate decision.

Failing to detail the reasoning for the denial of a COD determination does not provide reasonable notice to the veteran of whether the VA denied reopening the COD claim because of insufficient evidence, or whether it reopened the COD based on sufficient new evidence but continued to find the veteran's service dishonorable for VA purposes. This violates the veteran's due process rights because the veteran cannot know what issue to appeal, let alone which of the appellate options is best suited to the veteran's case. This is exemplified by Mr. Hamill's May 2021 decision letter, which said nothing about his COD. Appx56-

¹⁵ *VA Decision Reviews and Appeals*, U.S. Department of Veterans Affairs, <https://www.va.gov/decision-reviews/>.

65. Mr. Hamill is forced to make an uninformed choice on appeal since he does not know the basis of the denial or that the claim was even considered. Rendering a veteran helpless when facing the multitude of available appellate options constitutes a failure to provide sufficient notice as required by the Due Process Clause of the Fifth Amendment.

II. IMPLICIT DENIALS FOR COD DETERMINATIONS DEFY CONGRESSIONAL INTENT

Congress's goal in enacting the AMA in 2017 is inherent in the very name of the Act: to improve and modernize veterans appeals. The legacy appeals system that existed prior to the AMA was confusing and complex; veteran appellants often had to endure lengthy delays that could last for years.¹⁶ Many veterans experienced delays of more than five years, and it was estimated that by 2027, that delay could increase to ten years. 163 Cong. Rec. H4457 (daily ed. May 23, 2017) (statement of Rep. Roe).

Congress took action. In enacting the AMA, Congress sought to expand notice to veterans so that veterans can "make informed choices as to which

¹⁶ *Examining the VA Appeals Process: Ensuring High Quality Decision-Making for Veterans' Claims on Appeal*, Veterans of Foreign Wars (Nov. 29, 2023), <https://www.vfw.org/advocacy/national-legislative-service/congressional-testimony/2023/11/examining-the-va-appeals-process-ensuring-high-quality-decision-making-for-veterans-claims-on-appeal>. At the time that Congress was drafting the AMA, there were 470,000 veterans who were waiting for a decision on their appeal. 163 Cong. Rec. H4457 (daily ed. May 23, 2017) (statement of Rep. Roe).

[appellate] review option makes the most sense.” S. Rep. No. 115-126, at 31 (2017). This way, veterans can choose the best appellate option to “meet their individual needs,” and streamline the appellate process—avoiding the lengthy delays that plagued the legacy system. *See id.* at 30. Implicit denials in COD determinations undermine Congress’s intent in enacting the AMA because they do not inform the veteran what exactly was denied—the claim to reopen, or the COD determination itself—leaving the veteran unable to know the best appellate option for the veteran’s specific circumstances.

A. Implicit Denials In COD Determinations Are Contrary To Congress’s Intent Under The AMA To Expand Notice To Veterans Of Their Appellate Options

The drafters of the AMA intended to create a streamlined appeal system that would “empower Veterans by providing them with the ability to tailor the [appeals] process to meet their individual needs,” something which was “not available in the [legacy] appeals process.” S. Rep. No. 115-126, at 30 (2017). The five appellate options introduced by the AMA were intended to provide each veteran with more tailored options for their specific circumstances so that their case could be effectively resolved in the most efficient manner. *See* H.R. Rep. 115-135, at 5 (2017) (AMA is meant to make the appeals process “both timely and fair”); S. Rep. No. 115-126, at 30 (2017) (AMA was designed to be “simpler and easier for [v]eterans to understand” and to generate early resolutions of appeals).

As part of this effort, Congress also revised the notice requirements in 38 U.S.C. § 5104(b) to help veterans decide which appellate avenue to take. *See* H.R. Rep. 115-135, at 3 (2017). Previously, notice of decisions under Section 5104(b) only required two elements: “(1) a statement of the reasons for the decision, and (2) a summary of the evidence considered by the Secretary.” 38 U.S.C. § 5104(b) (1994). Under the AMA, Section 5104(b) now requires *seven* elements in the notice: “(1) Identification of the issues adjudicated. (2) A summary of the evidence considered by the Secretary. (3) A summary of the applicable laws and regulations. (4) Identification of findings favorable to the claimant. (5) In the case of a denial, identification of elements not satisfied leading to the denial. (6) An explanation of how to obtain or access evidence used in making the decision. (7) If applicable, identification of the criteria that must be satisfied to grant service connection or the next higher level of compensation.” 38 U.S.C. § 5104(b) (2022). Section 5104(b) under the AMA requires that “[*e*]ach notice” regarding a decision affecting the provision of benefits to a claimant “shall also include *all*” of the seven criteria listed above. *See* 38 U.S.C. §§ 5104(a) and (b) (2022) (emphases added). “When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.” *Stone v. INS*, 514 U.S. 386, 397 (1995). This Court should heed Congress’s revision, which shows that Congress expected the VA to comply with all seven criteria recited in section 5104(b).

Indeed, Congress specifically intended the VA to do more to provide notice to veterans as compared to the legacy system, acknowledging that the AMA would “require [the] VA to *enhance the information included in notifications* of decisions on claims for benefits.” S. Rep. No. 115-126, at 6 (2017) (emphasis added). “[T]hat [the] VA issue detailed decision notification letters” was key to Congress’s intent “to help *better inform the veteran’s decision regarding whether to appeal VA’s rating decision.*” H.R. Rep. 115-135, at 3 (2017) (emphasis added). Congress acknowledged that the AMA “would require [the] VA to modify its claims decision notices to *ensure they are clearer and more detailed.* This notice would *help Veterans and their advocates make informed choices* as to which [] review option makes the most sense.” S. Rep. No. 115-126, at 31 (2017) (emphases added).

The CAVC’s extension of implicit denial to COD determinations clearly conflicts with Congress’s express intent under the AMA to provide veterans with notice to make informed choices as to their appellate options. The CAVC majority was wrong to find that “the notice [Mr. Hamill] received was adequate, even if it wasn’t textbook.” Appx6. The implicit denial of a COD determination leaves a veteran uninformed and helpless as he considers his appellate options. Without knowing the basis of the denial, the veteran is left in the same “continuous loop of evidence gathering and readjudication of the same appeal” that Congress sought to

avoid. *Legislative Hearing on the Veterans Appeals Improvement and Modernization Act of 2017*, House Hearing, 115th Congress (May 2, 2017) (statement of David C. Spickler, U.S. Department of Veterans Affairs).

B. Implicit Denials In COD Determinations Is Contrary To Congress’s Intent Under The AMA To Generate Early Resolutions Of Appeals

Another major goal of the AMA was to address the lengthy delays that plagued the legacy system. *See* H.R. Rep. 115-135, at 2 (2017) (“The purpose of H.R. 2288 is to expedite VA’s appeals process...”). The AMA was designed to be “simpler and easier for [v]eterans to understand” and to generate early resolutions of appeals. S. Rep. No. 115-126 at 30 (2017). Extending the implicit denial doctrine to COD determinations will only create delays. *First*, veterans will be slowed down by the fact that they cannot understand the notices issued by the VA. For example, the VFW found that “[w]hen common and easily comprehensible language is used” in decision letters, “this resulted in decreased time needed to manage expectations and a reduction in potential appeals.”¹⁷ A claim that can be conclusively denied “even if the VA does not expressly tell the veteran why it denied the claim” means that veterans likely need to “hire a lawyer[] if they want

¹⁷ *Lost In Translation*, *supra* n.11.

to know the fate of their claims,”¹⁸ adding to the time it takes to “unconfound” the process. *Second*, the appeal process will be slowed down by the trial-and-error process of veterans choosing appellate options that are not best suited for the circumstances of their case, and then being re-fed back into the system to try another avenue.

The Court should safeguard Congress’s goals in enacting the AMA and reject extending the implicit denial doctrine to COD determinations.

CONCLUSION

The CAVC’s decision extends implicit denials to COD determinations despite Congress’s express directive to the VA to provide more notice to simplify and accelerate veterans appeals under the AMA. COD determinations affect whether veterans are eligible to receive their earned benefits and are therefore crucially important to veterans’ health and lives following military discharge. The CAVC’s decision will disempower veterans, like Mr. Hamill, from pursuing the appropriate appellate options for the specific circumstances of their case. *Amicus curiae* VFW urges the Court to act in accordance with legislative intent and reverse the CAVC’s decision.

¹⁸ Nino C. Monea, *Just How Paternalistic is the VA? An Examination of the “Non-Adversarial” Veterans’ Benefits System*, 126 W. VA. L. REV. 77, 124-125 (2023).

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