No. 19-604

In The Supreme Court of the United States

ERNEST L. FRANCWAY, JR.,

Petitioner,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

BRIEF OF *AMICUS CURIAE* NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus Curiae National Law School Veterans Clinic Consortium ("the Consortium") is an active advocate for veterans and their interests. The Consortium is made up of member law school clinic directors and pro bono attorneys who regularly represent veterans and other claimants in connection with benefits administered by the United States Department of Veterans Affairs ("VA"). The Consortium disagrees with any continued application of the presumption that a VA examiner is competent. This judicially-created presumption achieves only minimally-increased efficiency at the expense of disabled veterans. The Consortium argues that instead, the VA should be required to establish its examiner is competent before relying on that examiner's report.

SUMMARY OF ARGUMENT

The Federal Circuit's decision to uphold the presumption of competency for VA examiners, by imposing a "requirement" on the veteran to challenge competency

[1] None of the parties to this case nor their counsel authored this brief in whole or in part, and no person or entity made a monetary contribution specifically for the preparation or submission of this brief. *Amicus curiae* files this brief with the written consent of all parties. All parties received timely notice of *amicus curiae*'s intention to file this brief.

in the first instance, places a significant burden on disabled veterans in a beneficent system designed to serve veterans. The decision is wrong for three reasons.

First, the practical impact of requiring veterans to challenge the competency of a VA examiner is a presumption that the examiner is competent. Changing the label does not change the impact; the burden remains on the veteran to raise an issue the veteran is ill-equipped to address, particularly without counsel, rather than on the VA, which has a statutory duty to assist veterans.

Second, data reveals that the VA is relying on incompetent VA examiners. Thus, it is incorrect and unjust to assume VA examiners are competent, in light of data to the contrary, especially to the detriment of disabled veterans. To illustrate the problems created by the presumption of competency, the Consortium offers several examples in which the VA examiner's competency was effectively unchallengeable, even with the assistance of counsel. These examples demonstrate how the presumption of competency hinders proper development of claims. They further illustrate that VA examiners' shortcomings demonstrate systemic issues that should preclude requiring disabled veterans to raise VA examiner competency.

Third, requiring the veteran to first challenge a VA examiner's competency before having access to that VA examiner's curriculum vitae (CV) effectively insulates examiners from accountability in the VA system.

A request for the examiner's CV is anything but simple in the VA system. The VA's adjudicatory process, designed to be uniquely pro-claimant, depends on competent VA examiners providing adequate VA examinations. By forcing veterans to challenge an examiner's competency without reasonable access to the relevant information, the "requirement" undermines both the VA's statutory duty to assist and the system's pro-claimant design.

ARGUMENT

I. THE *FRANCWAY* "REQUIREMENT" IS EFFECTIVELY THE SAME AS THE PRESUMPTION OF COMPETENCY.

In *Francway*, the Court of Appeals for the Federal Circuit, en banc, determined that the "presumption of competency," applied to VA examiners, should now be recast as a "requirement" that the veteran raise the issue of VA examiner competence. *Francway v. Wilkie*, 940 F.3d 1304, n.1 (Fed. Cir. 2019), *appeal docketed*, No. 19-604 (U.S. Nov. 8, 2019). This decision does not meaningfully change the substance of the law. The Petitioner has fully briefed this issue, and the Consortium references the argument here as a foundational starting point to the Consortium's additional arguments in support of the Petition.

II. THE VA'S OWN INVESTIGATIONS AND VETERANS' ACTUAL EXPERIENCES BOTH SHOW VA IS RELYING ON INCOMPETENT VA EXAMINERS AT THE EXPENSE OF DISABLED VETERANS.

When a veteran files a claim for disability compensation and the veteran's file contains insufficient medical information to adjudicate the claim, the VA must provide an examination. To award a rating for the veteran's service-connected disability, an examination is necessary to assess the severity of the condition. In these instances, the VA can use its own examiners or, alternatively, contract with a medical provider.

However, data from the VA Office of the Inspector General shows significant instances of incompetent examinations. The Consortium's cases confirm these systemic problems. Thus, requiring veterans to raise the issue of competency places the burden on the wrong player in the system. The VA has a statutory duty to assist the veteran and has failed to consistently fulfill that duty by providing examiners competent to perform particular examinations. The burden to establish competency should fall on the VA.

A. Internal Review by the Office of the Inspector General (OIG) Shows the VA Is Relying on Incompetent Examiners at the Expense of Disabled Veterans.

The VA recognizes Traumatic Brain Injury ("TBI") as the "signature injury of the Iraq and Afghanistan"

wars. Lisa K. Lindquist et al., *Traumatic Brain Injury in Iraq and Afghanistan Veterans: New Results from a National Random Sample Study*, 29 J. Neuropsychiatry & Clinical Neurosciences 254 (2017). Between 2002 and 2018, nearly 350,000 service members were diagnosed with at least one TBI. *Id*. Of the hundreds of thousands of veterans who experience TBI, 80% are diagnosed with multiple comorbid psychiatric conditions. *Id*. A TBI diagnosis is directly correlated to increased rates of Post-Traumatic Stress Disorder (PTSD) and suicidal ideation, among other symptoms. *Id*. In fact, service members who are diagnosed with TBI are over 1.5 times more likely to die from suicide than service members not diagnosed with TBI. *Id*.

Veterans who experienced at least one TBI make up 41% of homeless veterans. B. Palladino et al., *Risk of Suicide Among Veterans with Traumatic Brain Injury Experiencing Homelessness*, J. Mil. & Veterans' Health, Jan. 2017, at 34. VA suggests that the presence of TBI and/or mental disorders is the strongest predictor for veteran homelessness. Dep't of Veterans Affairs Office of Inspector Gen., No. 11-03428-173, *Homeless Incidents and Risk Factors of Becoming Homeless in Veterans* at 41-42 (2012).

These findings should drive the VA to be especially conscientious with TBI examinations. Yet, to an alarming extent, the VA has failed to follow its own policies and procedures and relied on examiners incompetent to evaluate and diagnose TBI.

In September 2018, the VA OIG released a report reviewing VA policy for administering TBI evaluations. Dep't of Veterans Affairs Office of Inspector Gen., No. 16-04558-249, *VA Policy for Administering Traumatic Brain Injury Examinations* ii (2018). The Report explained that in 2008, the VA revised its own policy to ensure that examinations relating to TBI would only be conducted by specialists in one of four areas: physiatry, neurology, neurosurgery, and psychiatry. *Id*. at i. Despite this policy, 317 veterans at the Minneapolis VA Medical Center received initial TBI medical examinations by nurse practitioners, not a required specialist, in contravention of VA's own policy directive. *Id.* at ii.

In response to the Minneapolis data, the Veterans Benefits Administration (VBA) ordered a nationwide audit of TBI examinations. *Id*. This audit found that over 24,000 veterans had received TBI examinations from someone who was not qualified in one of the four previously-identified areas of specialty. *Id*. Because of the changes in TBI worksheets, the VA could not verify that all eligible veterans were contacted about this error, nor that the error was corrected in every case. *Id*. at 11. The Report revealed a lack of central authority and contradictory policies between the Veterans Health Administration and the VBA regarding VA exams, which led to inconsistent application of VA policy at the expense of disabled veterans. *Id*. at 4. As a direct result of these failures, disabled veterans were denied compensation for TBI or experienced delays in receiving compensation to which they were entitled. *Id.* at 16.

The issue of competent examiners is not isolated to a specific condition, location, or timeframe. Instead, the examples below demonstrate a systemic problem that undermines the VA's duty to assist veterans, and should preclude any presumption of competency.

B. Veterans' Actual Experiences Confirm That VA Reliance on Incompetent VA Examiners Causes Injustice and Delay for Disabled Veterans.

The following cases illustrate the harmful effects of assuming VA examiners' competency until a veteran challenges that default position. First, these cases illustrate that the VA too often provides incompetent examiners. Second, even if the veteran would like to challenge the examiner's competency, VA often fails to provide the necessary information to do so.

1. Veteran Elton Gildersleeve

Elton Gildersleeve, a client of the Veterans Clinic at the University of Missouri School of Law (Missouri Clinic), developed a serious genitourinary condition while serving in the United States Marine Corps during the Vietnam War. The condition worsened after service.

After a VA regional office denied Mr. Gildersleeve's claim in 2003, and following a long appeals process, the United States Court of Appeals for Veterans Claims (CAVC) remanded the claim in 2010 to secure an adequate medical opinion. Although multiple VA opinions

were obtained, none addressed whether the genitourinary condition was related to service, and none properly considered an in-service notation of prostatitis, which could have caused the genitourinary condition. The examiner's failure to follow VA's explicit instruction to assume the veracity of the in-service genitourinary symptoms and post-service continuity of symptoms necessitated another CAVC appeal in 2014.

After the second CAVC remand, counsel submitted a report from a board-certified urologist and Clinical Professor of Urology who concluded it was as likely as not that Mr. Gildersleeve's disorder was related to his service. Notwithstanding this report from a highly qualified urologist, yet another VA exam was obtained in 2015. The credentials of the VA examiner were not shared with Mr. Gildersleeve or his counsel, and only after a Google search did counsel learn the examiner was an occupational medicine specialist. This examiner opined that "it is less likely as not" that the genitourinary condition was related to service.

The Missouri Clinic challenged the C&P examiner's qualifications. To support its challenge, the Clinic made *five* requests to the VA between July 2015 and October 2016 for the VA examiner's CV. Without providing the CV, the Board of Veterans' Appeals (Board) nonetheless denied the veteran's claim again in December 2016, finding that the veteran had not disputed the 2015 VA exam.

After another appeal, the CAVC remanded the claim, this time with a specific direction that the Board

address the repeated requests for the June 2015 examiner's CV.

In June 2018, the Board remanded the case for yet another medical opinion. This time, however, the Board specified that a urologist should do the examination and directed the examiner to provide information about his or her qualifications and credentials.

To date, this exam has still not been performed, and the claim originally filed in 2003 remains pending. Mr. Gildersleeve's sixteen-year experience reflects the practical truth for many veterans examined by incompetent examiners. The request to challenge credentials is left unaddressed, and the claim lingers on and on.

2. Veteran Howard Flett

Mr. Flett, represented by the Missouri Clinic, and his wife have both testified that he suffers from back pain since the time of a 1957 in-service incident. The Board made a "Finding of Fact" that Mr. Flett suffered "[s]ymptoms of low back pain continuously since service."

Nevertheless, in 2014, the Board denied the claim, relying on an examiner's opinion that no nexus existed between the in-service injury and the current back condition. After an appeal, the CAVC remanded the claim to obtain an adequate medical opinion.

On remand, Mr. Flett provided an opinion from a board-certified orthopedist asserting a nexus between the 1957 incident and the current back issue. The RO

nonetheless denied the claim again, relying upon an examination by a VA Nurse Practitioner (NP). The NP's report failed to acknowledge the Board's positive Finding of Fact conceding Mr. Flett's continuous back pain since service.

Mr. Flett challenged the VA opinion. He submitted medical articles that contradicted the examiner's conclusions and submitted the opinion of a second board-certified physician (in Emergency Medicine), who explained why a nexus existed between the 1957 event and the current back issue. Nonetheless, the same NP re-issued his report, again finding no nexus.

On three occasions, the Missouri Clinic requested the NP's CV, under *Nohr v. McDonald*, 27 Vet. App. 124 (2014) and 38 U.S.C. § 5103A (2018). The Board eventually ordered that the CV be produced, but it was not provided until it was attached to the Supplemental Statement of the Case, when the claim was again denied.

The CV revealed that the NP's qualifications did not remotely match those of the board-certified doctors who submitted contrary opinions. The CV also revealed the NP's only specialization appeared to have been in podiatry and that the NP's licensure and certification expired in 2013.

3. Surviving Spouse Linda Ferrell

Linda Ferrell is the widow of Army combat veteran James Ferrell, who served in Vietnam as a mechanic, gunner, and helicopter crew chief. Mr. Ferrell suffered head trauma when his helicopter was shot down in 1967 while he was fighting against the Tet Offensive. The VA rated him 100% disabled due to PTSD arising from this event. He was also deemed presumptively exposed to Agent Orange.

In 2008, Mrs. Ferrell noticed her husband stumbling, with slurred speech and glassy eyes. At a VA emergency room, he was examined for six minutes, provided no treatment, and discharged with a diagnosis of bronchitis. When his symptoms did not improve, Mrs. Ferrell took him to a private hospital, where tests revealed a fast-acting brain tumor. Eighteen days after VA had discharged him, Mr. Ferrell died at the age of sixty.

Mrs. Ferrell applied for benefits under 38 U.S.C. § 1151, based on the VA emergency room staff's negligence, as well as for Dependency and Indemnity Compensation (DIC) arising from her husband's death. The RO denied all claims. On appeal, the Board remanded the claim to secure additional medical opinions.

VA subsequently provided three medical opinions, each summarily dismissing any connection between Mr. Ferrell's brain tumor and a "head injury" or any "other incident" in service. The opinions concluded that the VA hospital staff was not negligent. Relying on these opinions, the Board denied Mrs. Ferrell's claims.

At the CAVC, Mrs. Ferrell, then represented by the Veterans Legal Clinic at Harvard Law School (Harvard Clinic), argued that the opinions were inadequate because they lacked rationale and relied on an inaccurate factual premise. The VA examiner concluded that the brain cancer was not related to service because no published studies identified head trauma as a risk factor for cancer. But such studies *did* exist. Because VA had not supplied the examiner's credentials, Mrs. Ferrell could not challenge the examiner's competence and could only argue that the opinions themselves were inadequate. She asked the Court to take judicial notice of the existence of the studies to support a finding that the VA examiner's opinions were inadequate.

Ultimately, the VA agreed to remand Mrs. Ferrell's case, acknowledging VA's failure to provide an adequate medical opinion. Mrs. Ferrell was eventually approved for benefits based on a private medical opinion. But the VA's presumption of competence precluded early scrutiny of the VA examiner's experience because Mrs. Ferrell had no information providing a basis to challenge the examiner's competency, adding years to Mrs. Ferrell's claim.

4. Veteran Gregory Horne

Mr. Horne received a letter from VA in November 2016 proposing severance of service connection for Lyme disease. Mr. Horne's representative faxed a request for the CVs of the doctors who completed his examinations. In January 2017, his representative,

NLSVCC member Luke Miller, directly challenged the competence of one of the VA examiners. At a June 2017 hearing at the San Diego Regional Office, Mr. Horne and his representative again requested CVs of medical examiners.

In November 2018, Mr. Horne received notice that the VA would proceed in severing service connection for Lyme disease. In April 2019, Mr. Horne filed a Notice of Disagreement arguing that "on at least [three] separate occasions the VA examiner's competency was challenged, which included requests for her CV to confirm she had the required training and experience to render an adequate medical opinion." In May 2019, Mr. Horne filed another statement arguing that he was erroneously denied the CVs of the VA examiners and requested, for the fourth time, the CVs of all C&P examiners. To date, Mr. Horne has not received any of the requested CVs.

5. Veteran Raymond Goodwin

Paralyzed Veterans of America (PVA) member Raymond Goodwin has several service-connected conditions. Beginning in 2007, Mr. Goodwin sought service connection for residual effects of a stroke and a seizure, which he claimed were caused by the medications that he takes for other service-connected conditions. A VA doctor in Florida provided an unfavorable opinion in 2011, but the PVA questioned the doctor's rationale, leading the Board to remand Mr. Goodwin's case for a neurology specialist's opinion. The specialist's opinion

was provided on October 15, 2013, with the specialist noting on his signature block that he was a Fellow of the American Association of Neurological Surgeons.

Several months later, the Board remanded again, with instructions to obtain another opinion from an expert in neurology. Another VA doctor offered the third opinion; however, this time, there was nothing to indicate whether that doctor had the requisite expertise. The PVA challenged the use of the second doctor's opinion at the Board, which held that the doctor was presumed to be qualified, absent evidence to the contrary.

Mr. Goodwin appealed to the CAVC, and PVA was able to secure a Joint Motion to Remand in May 2015. VA attorneys and PVA agreed that despite the Board's request for a specialist, there was no information provided to confirm that a specialist actually reviewed the case. The parties agreed that no indication was given that the doctor had any expertise in neurology, the specifically-requested area of medical expertise. Nonetheless, the Board erroneously relied on this opinion to deny Mr. Goodwin his benefits, based on the presumption that the doctor was competent.

6. Veteran BK[2]

In 2003, BK, a veteran who served in the late 1960s, filed a claim for VA benefits for PTSD based on Military Sexual Trauma (MST). BK was persistently

[2] The initials BK were assigned by the Veterans Court to this veteran in order to protect her privacy.

sexually harassed and raped by a fellow service member. She became pregnant from the rape and was discharged. BK raised this child, but never married. She was later diagnosed with depression, anxiety, and ultimately PTSD.

VA requested a C&P opinion on whether the evidence showed that a trauma occurred. The examiner concluded that there was no evidence to support BK's story. The claim was denied, in large part due to the examiner's conclusion that the veteran's account of the rape was not credible.

But the examiner was unqualified to opine on the question. She had no qualifications in, or experience with, trauma and sexual assault. Her written opinion implicitly conceded she lacked expertise concerning sexual assault. She indicated she needed to consult with a clinical social worker to provide an opinion as to whether the veteran's behavior was consistent with MST survivors. There is no indication that this social worker met the veteran or reviewed her file. Regardless, the examiner relied on the social worker's extemporaneous input about sexual trauma, input that was not part of the record, to form her own "expert" opinion.

The VA examiner grounded her opinion on fallacious assumptions about rape victims, including that the veteran's post-service sexual history precluded a finding of PTSD resulting from MST, because a person with PTSD would typically avoid situations that remind her of the trauma, suggesting that an actual rape victim would remain celibate for decades following an

attack. A licensed clinical social worker, who has conducted several studies on MST victims and who was consulted by counsel, described the VA examiner's assertion as an inaccurate and uninformed statement of PTSD symptomology.

The Board twice denied this veteran's claim, relying each time on the above examiner's opinion. Represented each time at the Court of Appeals for Veterans Claims by The Veterans Legal Clinic at the Legal Services Center of Harvard Law School (and after the second remand before the Agency as well) BK's claim churned through the appellate process.

Upon remand from the Court to the Board in 2016, the veteran's counsel requested the examiner's CV, explicitly basing this request on the VA's duty to assist and the veteran's right to challenge the examiner's competence. The Board denied the request, erroneously treating it as a request made under the Freedom of Information Act (FOIA) rather than an obligation under its duty to assist. In the fall of 2016, counsel reiterated that the request was made pursuant to the VA's duty to assist, citing the recent CAVC decision in *Nohr*. Counsel simultaneously appealed the FOIA denial.

The VA Office of General Counsel responded to the FOIA appeal contending that the duty to assist did not apply to this type of request, instructing counsel to instead file a separate FOIA request with the VA healthcare facility that conducted the examination. VA provided no information about the examiner's

qualifications. Nor did VA assist the veteran in developing evidence that would allow the veteran to challenge the examiner's competence.

These accounts demonstrate the shallow value of a veteran's right to request an examiner's CV. Beyond that, these accounts show that the default position that VA examiners are competent is specious.

III. THE PRESUMPTION OF COMPETENCY INSULATES THE VA FROM ACCOUNTABILITY FOR RELYING ON INCOMPETENT EXAMINERS.

The presumption of competency insulates the VA from accountability in fulfilling its statutory duty to assist, and thus disadvantages veterans. First, the requirement presupposes that veterans actually know that the requirement to challenge competency exists. This is problematic because fewer veterans are represented by attorneys in the VA system than are *pro se* or represented by non-lawyer service officers. Dep't of Veterans' Affairs, *Board of Veterans' Appeals, Annual Report, Fiscal Year 2018*, at 31. Additionally, even if a veteran knows about the requirement to challenge examiner competency, VA routinely fails to provide necessary information, including the examiner's CV, so that veterans may object based on a colorable foundation.

A. The Presumption of Competency Disproportionately Burdens *Pro Se* Veterans in a System Designed to Be Uniquely Friendly to Those Same Veterans.

Congress designed the VA disability claims process to be non-adversarial and veteran-friendly. A veteran engaged in this system, in which VA has a statutory duty to assist veterans, is far less likely to be represented by an attorney than to be operating *pro se* or with the help of a non-lawyer service officer. In 2018, only eighteen percent of the veterans with cases before the Board were represented by an attorney. *Id*. at 23, 31.

Adjudicators in the VA system should compensate for veterans' lack of legal sophistication by "sympathetically" reading and developing the claim. Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The New "Paternalism"*, 1 Veterans L. Rev. 2 (2009). The need for this solicitous compensation in VA processes has been confirmed by this Court. This Court held that mandatory enforcement of a 120-day deadline to file a notice of appeal at the CAVC clashed sharply with the solicitude Congress intended to confer upon veterans in the federal statutory benefits scheme. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011). The majority opinion explained, "The contrast between ordinary civil litigation . . . and the system Congress created for veterans is dramatic," concluding that the VA must "place a thumb on the scale in the veteran's favor." *Id.* at 440.

While lawyers who represent veterans must stay apprised of Federal Circuit decisions, veterans operating *pro se* are unlikely to be aware of Federal Circuit precedent requiring them to challenge VA examiner competency or the technicalities of raising that challenge. In fact, in a system in which the VA has a statutory duty to assist the veteran, a *pro se* veteran would have no reason to know that he or she must challenge the competency of the VA-provided examiner or risk losing that opportunity forever.

Veterans seeking disability benefits are also, by definition, struggling with disabilities. Several common disabilities seen in veterans affect their cognitive capacities, including TBI. *See* 38 C.F.R. § 4.124a (VA Rating Schedule for TBI). The presumption of competency, if consistently applied, assumes that all veterans, even those operating *pro se* and suffering from debilitating cognitive disabilities, will be aware of and understand intricate requirements found in Federal Circuit footnotes.

The presumption of competency thus contradicts the pro-claimant system Congress has designed. Veterans are more often than not legally unsophisticated and not represented by attorneys. When the VA provides a veteran with an incompetent examiner, the *pro se* disabled veteran will either accept the incompetent examiner as inevitable or will fail to raise the issue of competency properly, waiving the issue on appeal. Thus, many veterans will fall victim to supposedly informal VA procedures, which ironically were designed to protect them.

B. The Challenge Required By *Francway* Is Effectively Impossible to Make.

If obtaining the information necessary to challenge the VA examiner's competency was a simple process, the burden to raise such a challenge may be less of a problem for disabled veterans. In *Francway*, the Federal Circuit found that once a request for the CV is made, VA's duty to assist requires compliance with the request. 940 F.3d at 1308. The examples above highlight the practical problems.

Federal Circuit case law also illuminates the problem. In his concurrence in *Mathis v. McDonald*, Judge Hughes suggested "the VA's obligations to develop the record and to assist the veteran . . . ensure that a veteran will have access to information regarding a medical examiner's credentials when appropriate." *Mathis v. McDonald*, 834 F.3d 1347, 1349 (Fed. Cir. 2016) (Hughes, J., concurring) (citing *Nohr v. McDonald*, 27 Vet. App. 124 (Ct. Vet. App. 2014)). Judge Hughes held out *Nohr* as one example in a line of "cases where the veteran [had] requested the CV of his examiner, [and] the VA [had] been directed to comply with this request." *Id.*

Nohr is actually an example of the complexity veterans face in obtaining even basic information to support a competency challenge. Even with advantages unusual for most VA claimants, Mr. Nohr endured a lengthy, complicated request process that never resulted in an order directing the VA to produce the examiner's credentials. Mr. Nohr had two key

advantages most VA claimants do not have: (1) attorney representation, and (2) a VA examiner who admitted she may not be qualified. Through counsel, Mr. Nohr was able to raise a constitutional claim, issue interrogatories, request a subpoena, and submit an affidavit, all legally-sophisticated actions a *pro se* veteran would be highly unlikely to take. *Nohr*, 27 Vet. App. at 125, 128.

Second, Mr. Nohr's examiner qualified her opinion by stating "I recognize my personal limitation." *Id*. at 127. This unusual admission was the only evidence cited by the CAVC to find that the veteran's request for the examiner's credentials was not a "fishing expedition." *Id.* at 132-33.

Even with these vital advantages, it took over two years to obtain access to the examiner's qualifications. *Id*. at 133 ("At a minimum, Mr. Nohr's request required a response from the [BVA] – i.e., a statement of reasons or bases why Mr. Nohr was not entitled to answers to his questions and why clarification was unnecessary.").

Obtaining examiner credentials is not a simple process. *Nohr* was narrowly grounded in the VA examiner's explicit admission that she may have lacked the appropriate expertise. *Id.* (noting "a potentially ambiguous statement by [the VA medical examiner]"). Without such unusual self-reflection from a VA examiner, a veteran will have no foundation for even requesting an examiner's credentials in the first instance.[3]

[3] The requirement to challenge the examiner's competency without evidence is also in tension with the prohibition on

Furthermore, it was Mr. Nohr's *counsel* who initially acted upon this ambiguous statement, *id.* at 127-28, and most veterans do not have counsel.

The realities underlying requesting a CV, as described in the examples above and *Nohr*, demonstrate the difficulty of obtaining VA medical examiners' credentials in the ordinary course.

C. The Presumption of Competency Is a Harmful Outlier in American Civil Law That Prevents Both Veterans and VA Adjudicators From Ensuring VA Decisions are Based on Reliable Expert Opinions.

In federal court, if a party seeks to admit the testimony of an expert witness, that party must first lay the foundation for the witness under Federal Rule of Evidence 702.[4] FED. R. EVID. 702. Under the *Daubert*

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representatives "[k]nowingly presenting to VA a frivolous claim, issue, or argument." 38 C.F.R. § 14.633(c)(4) (2019) (defining frivolity as being "unable to make a good faith argument on the merits of the position taken"). The Consortium is concerned that the requirement to challenge the examiner's credentials without any knowledge of those credentials forces a representative to make arguments without an underlying factual basis as to whether the argument is colorable, placing that individual in a precarious position given his or her obligations to advance only good faith arguments.

[4] While the Federal Rules of Evidence are not binding in adjudication of veterans' benefits claims, the Federal Circuit has affirmed the CAVC's use of the Rules as guidance in considering the probative value of medical evidence. *AZ v. Shinseki*, 731 F.3d

standard, a trial judge must act as the gatekeeper regarding expert testimony. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993). One main component of this charge is to ensure the credibility of expert witnesses by establishing reliability. *Id*. at 590. A party bears the burden of establishing the reliability of its own expert. *Bourjaily v. United States*, 483 U.S. 171 (1987).

A VA medical examiner is like the civilian medical expert – both provide specialized professional opinions regarding complex topics, which influence the legal rights and obligations of parties. VA medical examiners are "'nothing more or less than expert witnesses who provide opinions on medical matters.'" *See Mathis*, 834 F.3d at 1358 (Reyna, J., dissenting from denial of rehearing en banc).

Despite the similar roles of civil medical experts and VA medical experts, in the VA system, the presumption of competency allows the VA to rely on a VA examiner about whom it knows nothing and for whom it has offered no foundation of reliability. As noted by Judge Reyna, this means the veteran has no viable option to meaningfully confront an examiner upon whose opinion the VA will rely. *Id*. at 1356. Presuming VA examiners' competence also leaves the Board with incomplete information, unable to validly confirm reliability.

1303, 1316 (Fed. Cir. 2013); *Nieves-Rodriguez*, 22 Vet. App. at 302.

Though most *pro se* veterans are unable to offer a private medical opinion in support of a claim, when veterans do offer their own medical experts in response to a VA exam, the Board must weigh the conflicting opinions. *Nieves-Rodriguez*, 22 Vet. App. at 300. The Board is required to evaluate whether there is some nexus between the qualifications and opinion of each expert. *Parks v. Shinseki*, 716 F.3d 581, 585 (Fed. Cir. 2013). However, under *Francway*, the Board must meet its responsibility to weigh conflicting expert evidence without any information about the experts' qualifications. As the concurrence in *Mathis* explained, this makes weighing the evidence impossible:

> Determining whether an opinion is adequate and weighing its probative value solely on its analysis without knowledge of its author's qualifications can lead to absurd results. Because the analysis turns on an author's skill in opinion-writing rather than her skill in medicine, a skilled opinion-writer could write persuasive opinions about issues she is entirely unqualified to opine about.

Mathis v. McDonald, 643 F. App'x 968, 979 (Fed. Cir. 2016) (Reyna, J., concurring).

The presumption of competency thus obscures from both veterans and VA adjudicators the information necessary to ensure expert opinions are reliable. When only one medical opinion is in the record, the veteran cannot obtain the information necessary to challenge it unless the examiner has admitted some

lack of qualification. The Board also has no information to evaluate the examiner's reliability. Even when the veteran presents a conflicting medical opinion, the Board cannot accurately determine whether the medical evidence is in equipoise, much less apply the benefit of the doubt to the veteran, as required by statute. 38 U.S.C. § 5107(b) (2018) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."). The resulting effect is inconsistent with the non-adversarial, veteran-friendly nature of the VA claims process.

CONCLUSION

The VA's mission is "To care for him who shall have borne the battle and for his widow, and his orphan." Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865) *in* 6 *Compilation of the Messages & Papers of the Presidents* 276 (James D. Richardson comp., 1897). In contrast to this mission, the Federal Circuit's decision perpetuates a harmful and unsupported rule that will endure to the detriment of disabled veterans without the intervention of this Court. Given the commitment our nation has made to honor the men and women who served, especially those with disabilities, this issue is of significant importance to society in general. The

Consortium respectfully requests that the petition for a writ of certiorari be granted.

Respectfully submitted,

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