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

REPLY BRIEF FOR THE PETITIONER

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The Department of Veterans Affairs and its reviewing courts currently deny veterans disability benefits by applying a judge-made presumption that relieves the VA of the burden to demonstrate that its medical examiner is competent. That presumption finds no basis in any statute or regulation, and it conflicts with the core tenets of the pro-claimant VA benefits system. The court below not only reaffirmed the presumption of competency, it *expanded* it, holding for the first time that VA medical examiners are not only presumed competent but also presumed to be specialists in any given area of medicine. This is an exceptionally important question, and the decision below is wrong. Certiorari is warranted.

The Government does not dispute the importance of this issue. But it nevertheless urges the Court to deny certiorari, primarily on the basis that the en banc court's two-sentence footnote "overrul[ing]" some undefined aspects of the doctrine (and leaving other undefined aspects in place) "resolve[s]" all the problems with the presumption. BIO 14–19. Far from it. That footnote does not address the most problematic aspect of the doctrine—which is that this court-made presumption exists at all—and its ambiguity adds further complexity to an already complicated system that veterans are ill equipped to navigate. The footnote fixes nothing, and this Court's intervention is needed.

There is also no benefit to waiting. This case is an excellent vehicle, and no better one is likely to arise.

The Government's suggestion (at 19) that the Court should instead grant review in a case in which the veteran has raised a "specific [and] substantiated" challenge to his examiner's competence misses the point. The question presented here is whether the presumption should survive at all, not whether the Court should adjust the presumption's procedural niceties.

The Government's hypothetical vehicle, moreover, is unlikely ever to occur. Essentially, the Government envisions that a veteran—a layperson who may never even have met the examiner—will be able to articulate, without any evidence, why the examiner was not competent to opine on a given medical issue. That is highly improbable.

In short, as amici explain, "[a] presumption that places complicated evidentiary burdens on veterans simply has no place in an adjudicatory framework that has historically and substantially advantaged veterans." MVA Br. 3. The Court should grant certiorari and reverse the judgment below.

I. The Court should grant certiorari to disavow the presumption of competency.

A. The judge-made presumption of competency has no place in the pro-claimant VA benefits regime.

1. The VA benefits regime—by express design—is "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). In this

paternalistic system, Congress explained, there is "no room for such adversarial concepts as cross-examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof." H.R. Rep. No. 100-963, at 13 (1988). Instead, the statutory regime favors the veteran at every turn. The VA has an affirmative duty to aid veterans in developing their claims, *see* 38 U.S.C. § 5103A(a), and, when it comes time to render a decision, "the VA must give the veteran the benefit of any doubt," *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011); *see* 38 U.S.C. § 5107(b). The statutory and regulatory framework is shot through with rules and presumptions, every one of which favors the veteran. Pet. 22. "This entire scheme is imbued with special beneficence from a grateful sovereign." *Padgett v. Nicholson*, 473 F.3d 1364, 1368 (Fed. Cir. 2007).

The presumption of competency stands as a glaring anomaly in this uniformly pro-claimant regime. The presumption tasks veterans with the affirmative obligation to request the examiner's credentials and raise challenges to the examiner's competence. If the veteran fails to discharge these burdens, the presumption permits the VA and the courts to assume, without any evidence, that the examiner is qualified. The presumption thus undermines the core tenets of the VA benefits system: it impedes veterans in their pursuit of benefits, contrary to the duty to assist; it resolves doubts against the veteran, contrary to the benefit-of-the-doubt rule; and it disfavors veterans, contrary to the pro-veteran canon of construction. Pet. 28–30.

If this doctrine were, as the Government suggests (at 12), an agency-created "rule[] of procedure," it would be bad enough. But the agency did not invent the presumption of competency—the courts did. And they did so without so much as attempting to tie the presumption to any "relevant statute[]" or regulation. *See Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari). Instead, the Federal Circuit devised the doctrine by ripping the presumption of regularity—historically applied to ministerial acts like the mailing of documents—from its conceptual roots and applying it in a context for which it is decidedly ill suited. *See Rizzo v. Shinseki*, 580 F.3d 1288, 1292 (Fed. Cir. 2009); Pet. 24–28. The Government cites no case outside of *Rizzo* and its progeny applying the presumption of regularity to substantive agency action. As Judge Reyna observed, "it was unprecedented to apply the presumption of regularity to a process such as determining whether a nurse is qualified to provide an opinion on a particular issue." *Mathis v. McDonald*, 643 F. App'x 968, 975 (Fed. Cir. 2016) (Reyna, J., concurring); *see also* MVA Br. 7–8.

The Government's suggestion (at 16–17) that the presumption of competency is not an application of the presumption of regularity is wrong. The Federal Circuit has stated clearly that it is: the VA enjoys a "presumption of regularity" that permits it to "presume[]" that its examiners are "qualified to provide a medical opinion in a particular case." *Parks v. Shinseki*, 716 F.3d 581, 584–85 (Fed. Cir. 2013).

In short, the presumption is illegitimate, unsound, and inconsistent with the VA benefits system.

2. The Government's attempts to defend the presumption on the merits merely underscore the case for certiorari. The Government's contention (at 11–12) that agencies are not "restricted by rigid rules of evidence" and may consider "all relevant and material information" is a non sequitur. Of course the agency may consider all relevant evidence; the question is whether the agency may *assume*, in the absence of *any* evidence, that its chosen medical examiner is competent to administer a particular examination. If there were any doubt about the answer to that question, it would be resolved by 38 U.S.C. § 5107(b), which provides that, "[w]hen there is an approximate balance of positive and negative evidence" on any material issue, "the Secretary shall give the benefit of the doubt to the claimant." The presumption of competency thus has it backwards: when the qualifications of the examiner are in question, the benefit of the doubt is given to the VA instead of the veteran.[1]

It is particularly important that the agency honor the benefit-of-the-doubt rule when it comes to examiner competency because, as amici explain, the VA frequently "rel[ies] on incompetent examiners at the expense of disabled veterans." NLSVC Br. 4–17;

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[1] The Government's assertion (at 12) that "Petitioner does not address Section 5107(b)" is bizarre. That section is one of the cornerstones of Francway's argument. *See* Pet. 8–9, 28–30.

see also Pet. 26–27. The agency's assumption that its examiners are competent is thus not only contrary to the law—it is generally wrong on the facts.

The Government's assertion (at 12) that a disavowal of the presumption of competency would impose a "judge-made evidentiary rule[]" on the VA is deeply ironic. The presumption *is* a judge-made rule—one that frustrates the core objectives of the comprehensive statutory and regulatory framework in which it operates. The presumption answers questions (Who is responsible for ensuring that the veteran receives an adequate examination? To whose detriment does a lack of evidence redound?) that the statute already addresses. And the presumption answers them in precisely the wrong way.

Nor would jettisoning the presumption "jeopardize veterans' ability to secure benefits," BIO 13. The VA *already* requires veterans to substantiate the qualifications of private examiners who submit opinions on behalf of veterans, reasoning that the agency is "unable to assess their experience or qualifications to render an opinion when they do not include information regarding their specialty or a CV." *Mathis*, 643 F. App'x at 979 (Reyna, J., concurring); MVA Br. 6–7. If the VA cannot credit an opinion *favorable* to the veteran without evidence of the examiner's qualifications, it should not credit an *unfavorable* opinion without that information.

Put simply, the presumption of competency lacks any basis. The Government cannot cite a single statute, regulation, or rule supporting it. Because the Government cannot defend the presumption, it

hangs its argument almost entirely on the en banc court's opaque footnote. BIO 14–19. But, as discussed below, that footnote does not come close to solving the underlying problems with the presumption.

B. The en banc court's footnote neither resolves the problems with the presumption of competency nor clarifies the doctrine's scope.

Contrary to the Government's argument (at 14–19), the en banc court's footnote "overrul[ing]" some unspecified aspects of the presumption of competency, Pet. App. 6a n.1, does not address the doctrine's myriad flaws.

As an initial matter, the footnote does not resolve the core problem with the presumption, which is that it exists at all. The presumption improperly absolves the VA of duties that the relevant statutes and regulations affirmatively impose upon it. Specifically, the VA must "obtain[] a medical opinion when … necessary to make a decision on the claim." 38 U.S.C. § 5103A(d)(1). And that opinion must qualify as "competent medical evidence," *see* 38 C.F.R. § 3.159(c)(4); *Parks*, 716 F.3d at 584, defined as "evidence provided by a person who is qualified … to offer medical diagnoses, statements, or opinions." 38 C.F.R. § 3.159(a)(1). The presumption of competency relieves the VA of those burdens and thus renders these explicit statutory and regulatory directives a nullity. *See Parks*, 716 F.3d at 584–85 (presumption permits VA to assume that its

examiners' opinions constitute "competent medical evidence").

On this point, the Government offers no argument. Instead, the Government seeks to downplay the negative practical effects of the presumption. These arguments are irrelevant because they do not engage with the key issue of the doctrine's legitimacy. But they also fail on their own terms.

The Government notes (at 15) the panel's statement that, "[o]nce the request is made for information as to the competency of the examiner, the veteran has the right, absent unusual circumstances, to the curriculum vitae and other information about qualifications of a medical examiner" (quoting Pet. App. 10a). The panel did say that. But it *also* said that, to overcome the presumption, the veteran must provide a "specific[] … challenge" to the examiner's qualifications. Pet. App. 8a. And the panel explicitly reaffirmed *Parks*, which held that "a veteran challenging the qualifications of a VA-selected physician must set forth the specific reasons why the veteran believes the expert is not qualified to give a competent opinion." 716 F.3d at 585; *see* Pet. App. 6a n.1 (declining to overrule *Parks*); *id.* at 7a–8a (reaffirming *Parks*).

Parks also demonstrates the error of the Government's statement (at 15, 18) that "the 'presumption' properly understood is simply a 'requirement' that veterans must raise the issue of examiner competency if they want the VA to resolve

it." *Parks* made clear that "raising the issue" of competency is only the "*first step* to overcoming the presumption." 716 F.3d at 585 (emphasis added). The second step requires "the veteran to *provide information* to overcome the presumption." *Id.* (emphasis added); *accord* Pet. App. 8a.

The VA Manual confirms that the presumption continues to impose substantial burdens on veterans seeking disability benefits. According to the Manual, "[t]he mere fact that" a veteran challenges the examiner's qualifications "does *not* mean that … there is a further duty to assist to obtain records or another examination." VA Manual M21-1 III.iv.3.D.2.o (emphasis in original). The Manual further instructs that "[t]here is a presumption that a selected medical examiner is competent," *id.*, and refers VA personnel to *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010). *Bastien*, in turn, held that "any challenge to the expertise of a VA expert must set forth the specific reasons why the litigant concludes that the expert is not qualified to give an opinion." *Id.* at 1307.

Moreover, as amici explain, while "[t]he objection must include more than a request for credentials, or a challenge to the VA's failure to introduce evidence of competence, … beyond that the contours of the required objection remain vague." MVA Br. 9 (citations omitted). The en banc court's footnote does nothing to clarify this ambiguity. If the Federal Circuit itself cannot describe the required showing with more precision than this, veterans attempting

to navigate the system without legal representation do not stand a chance.

In short, while the presumption of competency may now bear the less-threatening title "requirement," the substantive import of the doctrine has not changed. It still perpetuates a "regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve." *Mathis*, 137 S. Ct. at 1995 (Gorsuch, J., dissenting from denial of certiorari).

II. The panel's transformation of the presumption of competency into a presumption of expertise lacks a legal or logical basis.

Even if the Court does not overrule the presumption of competency in its entirety, the Court should still grant certiorari and reverse the Federal Circuit's unprecedented expansion of the doctrine in this case.

The Board mandated that Francway receive an examination from "an appropriate medical specialist." C.A.J.A. 1046. Yet the Federal Circuit held that the presumption of competency still applies, meaning that *any* provider chosen by the VA to examine Francway was not only presumed *competent*, but was also presumed to be a *specialist* in diagnosing and treating back disorders. That expansion of the doctrine finds no basis in law or logic. *See* Pet. 33–36.

The Government says (at 18) that this is "a distinction without a difference." The VA itself believes otherwise. The VA Manual explicitly distinguishes between a "specialist"—defined as "a clinician who specializes in a particular field"—and an ordinary examiner. VA Manual M21-1 § III.iv.3.A.1.h. Accordingly, the Board's instruction that Francway be examined by a "specialist" was no empty gesture. The Board itself "believe[d] that [Francway's] 'particular case' require[d] qualifications," BIO 18, different from those of a generalist.

The remand order, moreover, placed upon the VA an affirmative obligation to ensure that Francway's examiner was, in fact, a specialist. *See* Pet. 35. But the VA dispatched a generalist, thus violating the remand order and its duty to assist. The Federal Circuit then relied on the presumption of competency to excuse those failures. In effect, the court used the presumption to shift the relevant burdens from the VA—where they properly reside—onto the veteran.

Moreover, contrary to the Government's suggestion (at 18), *Parks* does not support the court's expansion of the presumption. *Parks* held that the VA could presume that "a nurse practitioner selected by the VA is qualified to perform *as designated*." 716 F.3d at 585 (emphasis added). Thus, a nurse practitioner is presumptively a competent nurse practitioner, and an internist is presumptively a competent internist. Until the decision below, the Federal Circuit had *never* held that an internist is

presumptively a specialist in orthopedics. This Court's intervention is necessary to correct this misguided expansion of an already ill-conceived doctrine.

III. This case is an excellent vehicle through which to resolve the questions presented.

This case is an optimal vehicle for this Court to address the presumption of competency. It squarely presents the issue of the doctrine's continuing viability, and the questions presented were exhaustively briefed in the court of appeals and constitute the sole ground supporting the judgment below. Pet. 36–40.

This case, moreover, presents the problems of the presumption in particularly stark relief. The Board itself determined that a specialist was necessary to properly evaluate Francway's claim. Yet the VA—in contravention of the duty to assist—failed to demonstrate that Francway's examiner was so qualified. The court's use of the presumption to excuse that failure is a paradigmatic example of the unfairness this doctrine perpetuates.

The Government's response (at 19) that Francway did not "challenge the competency of his medical examiner before the Board" gets things backwards. Given the Board's order—which indisputably put the examiner's qualifications at issue—the burden was on the VA to show that the examiner was qualified, not on Francway to show the contrary. And the Federal Circuit should not

have relied on a court-created presumption to excuse the VA's failure to meet that statutory burden.

The Government's suggestion (at 19) that this Court should wait to review a case that presents "questions about how specific or substantiated a veteran's challenge must be in order to trigger the VA's obligation to demonstrate an examiner's competence" is simply a repackaged version of the Government's merits argument. This case will allow the Court to make clear that—at least where the VA itself requires an examination from a specialist—the veteran has no such obligation in the first place.

In any event, the Government's hypothetical vehicle is a chimera. The Government imagines a veteran—operating without legal or medical training in a non-adversarial system in which the VA has consistently aided the development of the veteran's claim—who will know that, on the issue of *examiner competency alone*, he bears the burden to specifically articulate, without any evidence, why the examiner was not competent to opine on a given medical issue. That is highly unlikely. And, the longer this issue goes unaddressed, the more veterans will have their benefits improperly withheld based on an illegitimate judge-made doctrine incompatible with this pro-claimant system.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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