No. _____

In The
Supreme Court of the United States

FLORENCE JONES,

Petitioner,

v.

DENIS R. MCDONOUGH,
Secretary of Veterans Affairs,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

When a federal agency fails contemporaneously to explain its reasons for an action, the law speaks of two options. One is for the agency to act anew. The other is for it to elaborate its reasons retrospectively.

In speaking of an *agency* elaborating its reasons, though, the law is imprecise. The phrase is anthropomorphic. Also, no agency is a monolith. The imprecisions have led to what is now a circuit split as to who within an agency may elaborate the initial reasons for an agency's action retrospectively. Below, the Federal Circuit created that split by holding that who within an agency elaborates the action's reasons does not matter. That the "agency" speaks is, to it, enough.

Here, the agency at issue is the Department of Veterans Affairs ("VA"). One of its departments is the Veterans Benefits Administration ("VBA"), which has Regional Benefit Offices ("RO"). They decide disability-compensation claims in the first instance. A separate VA department, the Board of Veterans' Appeals ("Board"), reviews appeals. In the proceedings below, an RO staffer found against the petitioner without providing adequate reasons. Later, a Board judge purported to elaborate VA's reasons, retrospectively, for the RO staffer's initial decision. The Federal Circuit affirmed on the basis that the "agency" had spoken.

The question presented is this: For an agency to cure a prior failure to explain adequately its reasons for an action, must the retrospective elaboration be of a decisionmaker with authority to take the action at issue lawfully?

RELATED PROCEEDINGS

Florence Jones v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 18-2376 (Fed. Cir. judgment entered July 15, 2020)

Florence Jones v. Denis McDonough, Secretary of Veterans Affairs, No. 17-0105 (Vet. App. judgment entered June 21, 2018)

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INTRODUCTION

This Court has not squarely articulated who within a federal agency may elaborate, in retrospect, the agency's initial reasons for a prior action that the agency failed contemporaneously to explain adequately. The lack of guidance has created enough ambiguity that, in the decision below, the Federal Circuit created a circuit split on this issue.

The other circuits to address this issue require the elaboration to come from a "proper decisionmaker," or similarly phrased individual, at the agency who has authority to take the action at issue. This also is how the Court leans on related issues. Even so, in the decision below, the Federal Circuit employed a legal standard that permits apparently *any* agency actor to elaborate the reasons for a challenged action.

In particular, an RO staffer provided inadequate reasons when denying the petitioner's claim. The petitioner appealed up to the U.S. Court of Appeals for Veterans Claims ("Veterans Court"), which remanded for VA to cure the inadequately explained action. On that remand, a different VA actor within a different VA body, fulfilling a different role, elaborated VA's reasons for the initial action. That second actor was a judge on VA's top appellate tribunal, the Board.

The record does not suggest that the Board judge received any input on the issue from the RO staffer who made the initial decision at issue—or, for that matter, any VA staffer who lawfully could have. The record also does not suggest that the Board judge had

authority to take the action at issue independently. Indeed, the action at issue—determining in the first instance a claimant's entitlement under 38 C.F.R. § 3.156(c) to relief from administrative error—is one that *no* Board judge in this case could have performed lawfully in the first instance.

On appeal, and over the petitioner's objection, the Federal Circuit refused to differentiate among VA's various decisionmakers. It instead employed a monolithic approach when assessing what reasons *VA* elaborated for *VA* action. On that legal standard, the Federal Circuit permitted the Board-supplied retrospective rationale for an RO staffer's prior decision to stand as the *agency*'s reasons.

This Court's review is warranted to clarify that, for an agency's retrospective elaboration of its initial action to be valid, the elaboration must be of a decisionmaker with authority to take the action lawfully.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 964 F.3d 1374 (Fed. Cir. 2020). Pet. App. 1a-15a. The order of the Court of Appeals denying rehearing and rehearing en banc is not reported. Pet. App. 33a-34a. The opinion of the Veterans Court is not officially reported but appears at 2018 WL 2431188. Pet. App.

16a-23a. The opinion of the Board is not reported. Pet. App. 24a-32a.

JURISDICTION

The Federal Circuit entered judgment on July 15, 2020, Pet. App. 1a-15a, and denied a timely petition for panel rehearing on September 16, 2020, Pet. App. 33a-34a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

REGULATORY PROVISIONS INVOLVED

This case involves 38 C.F.R. §§ 3.156 and 3.400(q) (2016). These regulations are reproduced at Pet. App. 35a-38a.

STATEMENT OF THE CASE

The petitioner's late husband incurs a right-leg injury during military service, and a scar at the injury site.

The petitioner is Florence Jones, surviving spouse of U.S. Army veteran Thomas E. Jones. *See* Pet. App. 16a. Mr. Jones served in the Army from August 1967 to October 1974. *Id.* at 17a. In February 1971, he reported pain in his right leg caused by an infected cut. *Id.* He received stitches. *See id.* A scar developed at the injury

site. *See id.* A Kansas Army National Guard physician noted the scar in March 1987. *See id.*

VA grants disability-compensation for right-leg wound; denies original disability-compensation claim, based on military medical records received, for psychiatric disorder.

In June 1994, Mr. Jones filed a disability-compensation claim with VA for two conditions: the right-leg wound and a psychiatric disorder. *See id.* at 17a. VA granted the right-leg claim. *See id.* VA denied the claim for a psychiatric disorder because it had not acquired military medical records for Mr. Jones that evidenced a stressor to cause such a condition. *See id.* Mr. Jones did not timely perfect an appeal of the denial of his psychiatric-disorder claim. *See id.*

VA, to be clear, had not received all of Mr. Jones's military medical and personnel records. *See id.*

VA denies later disability-compensation pleadings for psychiatric disorder.

Among the pro-veteran features of the VA claims system, a claimant may at any time submit new and material evidence to "reopen" a previously denied claim. *See* 38 C.F.R. § 3.156(a) (2016). The previous denial remains on the books, but reopening a claim permits ultimate merits proceedings through which the claimant may secure VA entitlements effective from as early as the date of the application to reopen. *See id.* § 3.400(q)(2).

A separate, stronger, narrower pro-veteran feature of the VA claims system is for "reconsideration." At any time after VA initially decides a claim, it must "reconsider" the claim when VA newly receives or associates with the claimant's agency record "relevant official service department records." *Id.* § 3.156(c)(1).

"Reconsideration" is special. Unlike "reopening," it renders non-final the prior unappealed VA decision. *See, e.g.*, *Emerson v. McDonald*, 28 Vet. App. 200, 206–07 (2016). If VA makes an award based in any part on the newly received or associated official service department records, this exception to finality can provide powerful relief because it permits the VA to make the award effective as far back as the date of the *claim's original* filing. *See* 38 C.F.R. § 3.156(c)(3), (4). That, in turn, can mean the difference of years of back pay in disability compensation to the claimant.

In October 2002, Mr. Jones filed what VA construed as an application to "reopen" his claim for a psychiatric disorder. *See* Pet. App. 17a. If this were the end of the story, the earliest effective date to validly at issue would have been in October 2002—the date of the application for reopening. *See supra* at 4–5.

It is, instead, rather the story's beginning. In 2006, during the proceedings on reopening, an RO staffer admitted being uncertain as to whether all of Mr. Jones's official service department records had been received. *See* Pet. App. 18a. The uncertainty is important because, to repeat, if VA received or associated with the

agency record any relevant official service department records after its December 1994 initial denial of Mr. Jones's psychiatric-disorder claim, section 3.156(c) would require VA to determine Mr. Jones's entitlement to not just mere "reopening" but, instead, "reconsideration"—with its potential for a back-pay award of disability compensation to as far in the past as June 1994.

VA attempted beginning in June 2006 to secure a full copy of Mr. Jones's military personnel file and military medical records. *See id.* Also in June 2006, an RO staffer concluded that Mr. Jones's active duty medical records were unavailable in 1994 and that VA received them in March 2006. *See* Pet. App. 3a, 18a. There is no dispute that these records constitute "official service department records" within the meaning of section 3.156(c).

Meanwhile, during this time Mr. Jones's claim was bouncing around VA's front-line and appellate tribunals—always, following an adverse decision, on timely appeal. *See* Pet. App. 18a. In August 2008, VA's highest appellate tribunal, the Board, granted "reopening." *See id.* It remanded the claim to VBA's front-line adjudicatory body, the RO, for further factual development and decision on the claim's ultimate merits issues. *Id.*

In 2010, as revised in 2011, the RO awarded entitlement to a "total" disability evaluation with back pay retroactive to October 2002. *See id.* The RO still had not, however, resolved whether the award was based in

any part on relevant official service department records that VA received or associated with the agency record at any time following the December 1994 denial. *See id.*

Mr. Jones sought review, urging entitlement to "reconsideration"—and, in turn, an award with back pay retroactive to as far back as June 1994 instead of October 2002. *See id.*

After additional denials and timely appeals, Mr. Jones's claim—for which Mrs. Jones now had substituted as claimant—reached the Veterans Court. *See id.* In January 2016, the Veterans Court vacated an adverse Board decision as to reconsideration and remanded the claim with instructions for VA to determine whether either of two of Mr. Jones's official service department records—a set of February 1971 military medical records and a March 1987 Army National Guard physician report—triggered entitlement to reconsideration. *See id.* at 18a–19a.

In September 2016, the Board denies entitlement to 38 C.F.R. § 3.156(c) reconsideration of the psychiatric claim. It neither consulted with nor referred the matter to RO staff.

On remand from the Veterans Court's 2016 decision, the Board found that Mr. Jones's February 1971 military medical records had been associated with the agency record "[f]ollowing the December 1994 rating decision" but that it remained unclear as to whether that was their *first* association with the claims file. *See*

Pet. App. 26a, 31a. Instead of ending its analysis there and sending the matter to a front-line adjudicator, the Board proceeded to state that "these additional records did not provide the basis, in all or in part," of the RO's later grant. *Id.* at 31a.

The Board judge here provided no indication that this statement was a report of any finding by any RO staffer. *See id.* at 31a–32a. Nor is there any indication that the Board judge otherwise had consulted with the RO staffer who had granted Mr. Jones's award on the psychiatric claim. *See id.* Nor, for that matter, any RO staffer in a like role. *See id.* Nor that the Board's determination was based on any evidence within the Board's authority to address in the first instance. *See id.* On the face of the Board judge's decision, this instead was a conclusion that the Board judge was ascribing to the RO staffer who had granted that award. *See id.* The record does not reveal what the actual decisionmaker, or for that matter any RO or other VA staffer with lawful authority to grant the award, considered as the grant's reasons.

Because the Board judge found that "the award of service connection was not based in all or in part on the association of these additional February 1971 service records with the file," the Board judge denied entitlement to section 3.156(c) reconsideration. *Id.* at 32a.

The Veterans Court affirms based on the appellate Board judge's retrospective reasons for the front-line RO staffer's prior decision.

Mrs. Jones timely appealed. *See* Pet. App. 16a. The Veterans Court, with jurisdiction pursuant to 38 U.S.C. § 7252(a), noted the Board's finding "that it was unclear whether that [February 1971 service] record was associated with [Mr. Jones's] file at the time of the December 1994 decision." *Id.* at 16a, 21a. The Veterans Court then acknowledged that "the Board" found that the record was not the basis for "the eventual grant of [Mr. Jones's] claim." *Id.* at 21a–22a. Without addressing whether "the Board" validly could have provided that retrospective elaboration of the RO staffer's 2010 grant, the Veterans Court found "no error" and affirmed. *Id.* at 22a–23a.

The Federal Circuit affirms, not inquiring into who within VA provided what reasons, when.

Mrs. Jones timely appealed to the Federal Circuit, which affirmed. *See* 2a. It noted that "the DVA [Department of Veterans Affairs] reopened Mr. Jones's claim in 2008." 9a. It acknowledged that, "as found by the Veterans Court, the DVA considered the February 1971 service records, together with all the other evidence of record, during the remand proceedings [in 2010] before the regional office." *Id.* at 9a–10a.

The Federal Circuit then treated VA as a unitary organization in its analysis of the issue on appeal, characterizing Mrs. Jones's contention as being "that

DVA failed to 'reconsider' her claim" and stating that "she does not point to any evidence that the *DVA* failed to reconsider." *Id.* at 10a (emphases added). "Nor does she suggest what the *DVA* should have done differently," the Federal Circuit stated, "in order to comply with the obligation to 'reconsider' the claim." *Id.* (emphasis added).

"Because the *DVA* considered Mr. Jones's claim in view of the records that Ms. Jones alleges should have been a part of the claimant's file from the outset," the Federal Circuit continued, "the *DVA* 'reconsidered' the claim per 38 C.F.R. § 3.156(c)(1)." *Id.* at 10a–11a (emphases added). The Federal Circuit found "no legal error" in the Veterans Court's conclusion that "the Board" in 2016 "had correctly applied the law regarding the effective date for the award," with "the Board examin[ing] whether the award" made by the RO "was based in whole or in part on any of the service records" associated with the agency record after December 1994. *Id.* at 11a.

It is that monolithic approach to VA, with no inquiry into which actors within the agency provided what reasons, when, regarding the challenged action, through which the Federal Circuit broke with its sister circuits and that warrants granting this petition.

REASONS FOR GRANTING THE PETITION

The circuits now have split as to who within an agency may elaborate the agency's initially inadequate

reasons for an action. *See infra* Part I.A. Granting the petition is warranted to reverse the Federal Circuit's decision below, which erroneously treats agencies as monolithic and glosses over who within an agency may elaborate the action's initial reasons. *See infra* Part I.B.

Underscoring the need for this Court's guidance, the question of who within a federal agency may elaborate the agency's reasons for an action is important both to our country's former service members and their loved ones, and beyond the VA claims context to agency claimants more broadly. *See infra* Part II. The Court should provide that guidance here because this case presents an ideal vehicle for resolving the issue. *See infra* Part III.

I. GRANTING THE WRIT IS WARRANTED TO CLARIFY FOR THE CIRCUITS THAT A RETROSPECTIVE ELABORATION OF AN AGENCY'S REASONS MUST BE OF A DECISIONMAKER WITH AUTHORITY TO TAKE THE ACTION AT ISSUE LAWFULLY.

"It is a 'foundational principle of administrative law' that judicial review of agency action is limited to 'the grounds that the agency invoked when it took the action.'" *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S.Ct. 1891, 1907, 207 L.Ed.2d 353 (2020) ("*Regents*") (quoting *Michigan v. EPA*, 576 U.S. 743, 758, 135 S.Ct. 2699, 2710, 192 L.Ed.2d 674 (2015)); *SEC v. Chenery Corp.*, 318 U.S. 80, 87, 63 S.Ct. 454, 459, 87 L.Ed. 626 (1943) ("*Chenery I*").

"If those grounds are inadequate, a court may remand for the agency to do one of two things. First, the agency can offer 'a fuller explanation of the agency's reasoning *at the time of the agency action*.'" *Regents*, 140 S.Ct. at 1907–08 (quoting *Pension Benefit Guaranty Corp. v. LTV Corp.*, 496 U.S. 633, 654, 110 S.Ct. 2668, 2680, 110 L.Ed.2d 579 (1990) ("*LTV*") (emphasis in *Regents*)); citing also *Alpharma, Inc. v. Leavitt*, 460 F.3d 1 (D.C. Cir. 2006). "Alternatively, the agency can 'deal with the problem afresh' by taking new agency action." *Id.* (quoting *SEC v. Chenery Corp.*, 332 U.S. 194, 201, 67 S.Ct. 1575, 1579, 91 L.Ed. 1995 (1947) ("*Chenery II*")).

When an agency seeks to cure initially inadequate reasons by elaborating them retrospectively, the question arises of who within the agency may provide the elaboration. This Court repeatedly has suggested, although not squarely on this issue, that not just anyone will do.

For example, this Court has described why the judiciary typically should remand agency reason-giving errors to the agency. When doing so, the Court has highlighted how such remands facilitate and benefit from the functions of agency decisionmakers. *See, e.g.*, *INS v. Ventura*, 537 U.S. 12, 17, 123 S.Ct. 353, 355–56, 154 L.Ed.2d 272 (2002) ("The [Board of Immigration Appeals] has not yet considered the . . . issue. And every consideration that classically supports the law's ordinary remand requirement does so here. The agency can bring its expertise to bear upon the matter; it can evaluate the evidence; it can make an initial

determination; and, in doing so, it can, through informed discussion and analysis, help a court later determine whether its decision exceeds the leeway that the law provides.").

Likewise, to be eligible for *Auer* deference, an agency's interpretation of its own regulation must reflect its "authoritative, expertise-based, 'fair[, or] considered judgment.'" *Kisor v. Wilkie*, ___ U.S. ___, 139 S.Ct. 2400, 2414, 204 L.Ed.2d 841 (2019) (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S.Ct. 2156, 2166, 183 L.Ed.2d 153 (2012)); *see also Auer v. Robbins*, 519 U.S. 452, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945). "Of course, the requirement of 'authoritative' action must recognize a reality of bureaucratic life: Not everything the agency does comes from, or is even in the name of, the Secretary or his chief advisers." *Id.*, 139 S.Ct. at 2416. "But there are limits." *Id.* "The interpretation must at the least emanate from those actors, using those vehicles, understood to make authoritative policy in the relevant context." *Id.* at 2416–17 (collecting examples); *see also id.* at 2424 (remanding in part for the lower courts to determine whether a single Board judge's regulatory interpretation is eligible for *Auer* deference).

The Court also repeatedly has rejected agency counsel's attempts to provide *post hoc* rationalization for the agency's action (or interpretation of law). In this context, it has noted that "[i]t is the administrative official and not appellate counsel who possesses the

expertise that can enlighten and rationalize the search for the meaning and intent of Congress." *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Reserve Sys.*, 468 U.S. 137, 143–44, 104 S.Ct. 2979, 2983, 82 L.Ed.2d 107 (1984); *accord, e.g.*, *Investment Co. Institute v. Camp*, 401 U.S. 617, 627–28, 91 S.Ct. 1091, 1097–98, 28 L.Ed.2d 367 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156, 168–69, 83 S.Ct. 239, 245–46, 9 L.Ed.2d 207 (1962).

Further recognizing that agency decisions come not from an anthropomorphic monolith but, instead, individual decisionmakers, the Court long has permitted at least narrow inquiry into such issues as an individual agency decisionmaker's improper motive. *See, e.g.*, *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 420–21, 91 S.Ct. 814, 825–26, 28 L.Ed.2d 136 (1971); *United States v. Morgan*, 313 U.S. 409, 421–22, 61 S.Ct. 999, 1004–05, 85 L.Ed. 1429 (1941). The same is true of inquiry into whether the decisionmaker's stated reasons were mere pretext. *See Dep't of Commerce v. New York*, ___ U.S. ___, 139 S.Ct. 2551, 2575–76, 204 L.Ed.2d 978 (2019).

Despite this Court's focus on the agency decisionmaker, sufficient ambiguity remains that the circuits now have split as to how closely to inquire into who within the agency elaborates an agency action's initially inadequate reasons. *See infra* Part I.A. Granting the petition is warranted (i) to clarify that the elaboration must be from an individual within the agency with authority to take the action at issue lawfully, and

(ii) to reverse the Federal Circuit's erroneous contrary legal standard. *See infra* Part I.B.

A. The Lower Courts Now Have Split on Who Within an Agency May Elaborate Its Initial Reasons for an Action.

Federal courts frequently remand agency actions because the agency failed contemporaneously to provide adequate reasons for the action. The U.S. Court of Appeals for the D.C. Circuit has addressed perhaps most directly from whom within the agency that elaboration must originate. It requires that, when an agency provides or elaborates the rationale for its action, it must be through a "proper decisionmaker." *See Alpharma*, 460 F.3d at 6–7 (quoting *Local 814, Int'l Bhd. of Teamsters v. NLRB*, 546 F.2d 989, 992 (D.C. Cir. 1976)). The circuit's decisions suggest being a "proper decisionmaker" requires having lawful authority to take the agency action at issue. *See id.* at 7; *Menkes v. Dep't of Homeland Sec.*, 637 F.3d 319, 337 (D.C. Cir. 2011).

Other circuits have signaled strongly that they adhere to the same view. *See, e.g.*, *Brodsky v. U.S. Nuclear Regulatory Comm'n*, 704 F.3d 113, 124 (2d Cir. 2013) ("[W]e remand . . . so that the agency may[] . . . supplement the administrative record to provide an explanation, *with supporting affidavits or findings of fact*, as to why [the sought action] was inappropriate or impracticable. . . ." (emphasis added)); *Public Power Council v. Johnson*, 674 F.2d 791, 793–94 (9th Cir.

1982) (similar); *see also, e.g.*, *Radford v. Colvin*, 734 F.3d 288, 295 (4th Cir. 2013) (remanding "for further explanation by the ALJ [administrative law judge]" when it was "the ALJ's decision" that had failed to provide adequate reasons for the agency's action).

In the decision below, the Federal Circuit broke from that view. It employed a legal standard pursuant to which who within the agency provides what reasons, when, simply does not matter. Instead, because *VA* provided reasons for the initial *VA* action, to the Federal Circuit's analysis it was immaterial that *VA*'s initial action was through a front-line RO staffer while the retrospective elaboration of that action's reasons was through an appellate administrative Board judge with no input from that RO staffer—or any other with lawful authority to take the action at issue. *See supra* at 9–10.

B. Granting the Petition Is Warranted to Reverse the Federal Circuit's Decision Below, Which Erroneously Permits Apparently *Anyone* Within an Agency to Elaborate Its Initial Reasons.

The effect of the decision below is to permit apparently *anyone* within a federal agency to elaborate the agency's initial reasons for its action on review. The approach is problematic for at least three reasons.

First, it contravenes the principles that drive the "foundational principle of administrative law" articulated in *Chenery I* and *Chenery II*. It is bedrock that

an agency must provide the reasons for its action contemporaneously—or, at minimum, later amplify retrospectively the action's contemporaneous reasons. *See Chenery I*, 318 U.S. at 94 (holding that agency "action cannot be upheld merely because findings might have been made and considerations disclosed which would justify [the administrative] order"); *Chenery II*, 332 U.S. at 196 ("When the case was first here, we emphasized a simple but fundamental rule of administrative law. That rule is to the effect that a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *Regents*, 140 S.Ct. at 1907–08 (quoting *LTV*, 496 U.S. at 654).

No matter whether that principle's legal foundation is statutory, prudential, or constitutional in nature—an open question—, the *Chenery* principle comprehends and governs our federal agencies. *See, e.g.*, *Camp,* 401 U.S. at 628 ("Congress has delegated to the administrative official and not to appellate counsel the responsibility for elaborating and enforcing statutory commands."); *Burlington Truck Lines*, 371 U.S. at 169; *see also Regents*, 140 S.Ct. at 1909 (collecting additional prudential reasons for requiring contemporaneous agency explanation for agency action, including "agency accountability" (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643, 106 S.Ct. 2101, 2121, 90

L.Ed.2d 584 (1986)); "confidence that the reasons given are not simply 'convenient litigating position[s]'" (quoting *Christopher*, 567 U.S. at 155; and that, "particularly when so much is at stake, that 'the Government should turn square corners in dealing with the people'" (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S.Ct. 289, 301, 7 L.Ed. 240 (1961) (Black, J., dissenting))); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197, 61 S.Ct. 845, 853, 85 L.Ed. 1271 (1941) ("[I]t will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order."); *Panama Refining Co. v. Ryan*, 293 U.S. 388, 431, 55 S.Ct. 241, 253, 79 L.Ed. 446 (1935); *see also* Kevin M. Stack, *The Constitutional Foundations of* Chenery, 116 Yale L.J. 952, 992–1000 (2007) (addressing how the *Chenery* principle supports "the constellation of values served by the nondelegation doctrine—promoting political accountability of decision-making as well as nonarbitrariness and regularity").

Just as importantly, the *Chenery* principle comprehends and governs our agencies as they exist in reality. *Cf. Kisor*, 139 S.Ct. at 2414. The Federal Circuit's analysis requires viewing each agency in simplistic, monolithic caricature—a single "agency" that acts as one, disregarding the agency's many different actors in different agency bodies, fulfilling different roles. *See supra* at 9–10. Granting the petition is warranted to clarify to all circuits that, in this area of administrative law as well as others, reality prevails.

Second, more narrowly, the Federal Circuit's approach contravenes Congress's intent for the statutory scheme that Congress provides, as grateful sovereign, to benefit our country's former service members and their dependents and survivors. *See, e.g.*, *Shinseki v. Sanders*, 556 U.S. 396, 416, 129 S.Ct. 1696, 1709, 173 L.Ed.2d 532 (2009) (Souter, J., dissenting) (recognizing "Congress's understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"); *see also Henderson v. Shinseki*, 562 U.S. 428, 441 131 S.Ct. 1197, 1206, 179 L.Ed.2d 159 (2011) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21, n.9, 112 S.Ct. 570, 574, 116 L.Ed.2d 578 (1991)); *Brown v. Gardner*, 513 U.S. 115, 118, 115 S.Ct. 552, 555, 130 L.Ed.2d 462 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor."). Permitting just *any* VA employee to elaborate retrospectively VA's reasons for denying a veteran's or surviving spouse's claim flies in the face of Congress's purpose.

Third, the Federal Circuit's approach frustrates the regulation, codified at 38 C.F.R. § 3.156(c), that the Secretary of Veterans Affairs promulgated to help ensure that VA makes claimants whole from administrative error. The RO staffer failed to address whether Mr. Jones's February 1971 military medical records contributed in any part to his entitlement to disability compensation for his psychiatric claim. It can be no

answer that the VA administrative appellate judge articulated, on unsolicited first-instance review, a reason why the RO staffer might conclude that these records did *not* so contribute. *Cf. Beraud v. McDonald*, 766 F.3d 1402, 1407 (Fed. Cir. 2014) (requiring similar VA adjudication and reason-giving in the context of 38 C.F.R. § 3.156(b)); *Bond v. Shinseki*, 659 F.3d 1362, 1367–68 (Fed. Cir. 2011) (same).

Indeed, the approach flips section 3.156(c) on its head. Accepting Board-supplied elaboration for an RO staffer's initial reasons regarding this predicate to relief in no way makes the claimant whole against VA's conceded administrative error in failing, before the initial, December 1994 denial, to add all relevant official service department records to the agency record. It instead does the opposite, compounding the initial administrative error in failing to add those documents with the RO staffer's later error in failing to address entitlement to an award based in any part on the late-gotten proof. Meanwhile, adjudicating the claim as one for mere section 3.156(a) "reopening," with its truncated protections and limitation of back pay to the filing date of the *application for reopening* instead of that for the *initially decided claim*, is plainly inferior for the claimant when considering what section 3.156(c) "reconsideration" provides. *See supra* at 4–5.

In short, Mrs. Jones did not ask the Board to take this claim out of the RO's hands. The Board judge erred in doing so. The reviewing courts erred in affirming. The legal standard that the Federal Circuit employed in the proceedings below, departing from this Court's

analysis and creating a circuit split, warrants this Court's prompt intervention.

II. GRANTING THE WRIT IS WARRANTED DUE TO THE QUESTION PRESENTED'S RECURRENCE AND IMPORTANCE.

The Federal Circuit's error would, without this Court's prompt intervention, improperly inhibit a nationwide public benefit program that provides critical sustenance to a large, vulnerable population.

There are approximately 19.2 million living United States veterans, 22.6 million veterans' dependents, and 616,000 veterans' survivors—that is, nearly 42.3 million people potentially entitled to file claims for veterans' benefits. U.S. Dep't of Veterans Affairs, *FY 2021 Budget Submission, Vol. 1*, at 5 (Feb. 2020). In 2019, almost five million veterans received disability compensation, and the VA anticipates paying nearly six million disability compensation recipients in 2021. U.S. Dep't of Veterans Affairs, *Annual Benefits Report FY 2019*, at 9 (2020); U.S. Dep't of Veterans Affairs, *FY 2021 Budget Submission, Budget in Brief*, at 1 (Feb. 2020).

The Federal Circuit's refusal to require that a proper decisionmaker within VA elaborate VA's initial reasons for an action harms this at-risk population, taking the reason-giving out of the hands of the decisionmakers best placed to explain VA's action.

Meanwhile, section 3.156(c) entitles nearly *any* claimant, whose claim VA has decided, to reconsideration "at any time." 38 C.F.R. § 3.156(c)(1). This exception to the prior decision's finality is an entitlement that spans the lifetime of the veteran and, subsequently, any substitute claimant such as the surviving spouse here. Clarifying who within VA may elaborate the agency's reasons regarding reconsideration, when, thus has reach to not just the millions of claims that VA recognizes as pending. It also affects many millions more that VA has closed for no timely appeal, yet for which VA has received official service department records (or still might) that show its denial to have resulted from administrative error.

What is more, the Federal Circuit's ruling will have far-reaching effects that the court did not recognize and could not have intended. In departing from the circuits' prior uniformity in requiring an agency's elaboration of previously inadequate reasons to be of a proper agency decisionmaker, the Federal Circuit has injected uncertainty into how courts of appeals that have not yet been squarely presented with this issue will decide it.

That, in turn, jeopardizes whether circuits will apply the legal standards that this Court plainly intends to govern whether a federal agency's retrospective elaboration of reasons is lawful. Providing clarity, by contrast, would realign the circuits and support the many virtues of *Chenery*. *See supra* at 16–18.

III. THIS CASE IS AN IDEAL VEHICLE TO ADDRESS WHEN VA'S NON-ADVERSARIAL ADJUDICATORY PROCESS REQUIRES A *PER SE* PREJUDICE RULE.

This case squarely presents the question of whether *any* agency personnel may elaborate the agency's initial reasons for challenged agency action. It does so on facts that accentuate the error of the Federal Circuit's departure from this Court's and its sister circuits' rulings. The Federal Circuit disregarded who provided VA's elaboration of action against a military veteran and, later, surviving spouse in a statutory system that Congress set up to benefit exactly such individuals. It did so in the context of a regulation, section 3.156(c), that the Secretary promulgated to benefit the same group. And it did so when that means contravening section 3.156(c)'s purpose of making a claimant whole from administrative error, instead essentially doubling down on it.

Meanwhile, the administrative appellate Board judge who spoke for the front-line RO staffer could hardly be further removed within the agency from the initial decisionmaking. That analysis of the appellate judge, who lacked authority to decide this issue in this claim in the first instance, should be vacated under a decision clarifying that, for an agency's retrospective elaboration of its initial action to be valid, the elaboration must be of a decisionmaker with authority to take the action lawfully.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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