No. 20-1190

In The
Supreme Court of the United States

RICHARD D. SIMMONS,

Petitioner,

v.

DENIS MCDONOUGH,
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 NATIONAL VETERANS LEGAL SERVICES PROGRAM AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

National Veterans Legal Services Program ("NVLSP") is one of the nation's leading organizations advocating for veterans' rights. Founded in 1981, NVLSP is an independent, nonprofit veterans service organization recognized by the Department of Veterans Affairs ("VA") dedicated to ensuring that the government honors its commitment to veterans. NVLSP prepares, presents, and prosecutes veterans' benefits claims before VA, pursues veterans' rights legislation, and advocates before this and other courts. As a result of these efforts, NVLSP has secured more than $5.2 billion in VA benefits for veterans and their families.

The issues in the petition for certiorari lie at the core of NVLSP's experience and expertise. NVLSP has extensive experience representing veterans before VA and is intimately familiar with the VA claims process, the challenges veterans often face raising their claims with precision, and the challenges of appealing a denial of those claims. NVLSP has a strong interest in the pro-claimant policy adopted by Congress in the Veterans Judicial Review Act, among other laws, and the pro-veteran canon of statutory interpretation.

[1] The parties were timely notified of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly eight decades, courts have construed statutes to benefit veterans like Richard Simmons. Mr. Simmons served in the U.S. Navy from November 1968 to January 1970. While serving, Mr. Simmons was diagnosed with depression. A few years after his service, a Department of Veterans Affairs Regional Office ("RO") issued a rating decision denying him a service connection (i.e., a finding that his condition was related to his service) for rheumatoid arthritis and anxiety disorder with depressive features. In 2005, Mr. Simmons unsuccessfully filed a request for revision, claiming that there was clear and unmistakable error in the RO's rating decision.

The Board of Veterans' Appeals ("Board") concluded that Mr. Simmons did not suffer an in-service injury or disease, and therefore denied his claim for service connection related to his current injury or disease (rheumatoid arthritis and anxiety disorder with depressive features). Mr. Simmons appealed to the U.S. Court of Appeals for Veterans Claims ("CAVC"), which affirmed the Board's denial of Mr. Simmons's request for revision. Though the CAVC found the Board erred—Mr. Simmons *was* diagnosed with depression during service—the CAVC nonetheless held that the Board's error did not prejudice Mr. Simmons because, according to the CAVC, Mr. Simmons could not prove a nexus between his current anxiety diagnosis and his in-service depression diagnosis. The Federal Circuit affirmed based on this Court's decision

in *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009). But the Federal Circuit incorrectly applied *Sanders* because it did not account for the Board's failure to apply all three requirements of the prima facie service connection case.

This Court should grant Mr. Simmons's petition for two reasons. First, the Court must reaffirm the broad scope of the pro-veteran canon, which influenced and created the backdrop for Congress to pass the Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100-687, 102 Stat. 4105 (1988), *codified at* 38 U.S.C. §§ 7251–98 *et seq*. And second, this Court must correct the Federal Circuit's misapplication of *Shinseki v. Sanders*.

This Court should clarify that the longstanding pro-veteran canon of statutory interpretation continues to apply to all language in the VJRA and all VA regulations, including the VA's duty to consider "*all* information and lay and medical evidence of record in a case" before it when veterans claim benefits. 38 U.S.C. § 5107(b) (emphasis added). This Court's clarification will guarantee that the VA, the CAVC, and the Federal Circuit interpret laws and regulations to fulfill their essential purpose—protecting the men and women of the U.S. military who have served their country and ensuring that their contributions are acknowledged through the appropriate and just award of benefits for injuries they sustained as a result of that service.

Relatedly, the Court must clarify the reach of *Shinseki v. Sanders*. *Sanders* instructs reviewing courts to consider the particulars of each case and

allows courts to place the burden of prejudice on the claimant. 556 U.S. at 407–10. But here, the Federal Circuit relied on *Sanders* for much more; the court applied *Sanders* to a case where the Board had failed to complete its analysis of the prima facie service connection claim, supplying a missing analytical link. In doing so, the Federal Circuit affirmed legal analysis performed in the first instance by the CAVC, not the VA or the Board. The *Chenery* doctrine expressly forbids this, requiring reviewing courts to rely on the specific grounds used by agencies to reach their conclusions. Moreover, expanding *Sanders* in this way eviscerates the pro-veteran canon, which requires the agency and the courts to aid claimants in developing their claims and resolving claims in favor of veterans when possible.

ARGUMENT

I. The Court should grant the petition to reaffirm the broad scope of the pro-veteran canon.

A. This Court has adopted the pro-veteran canon in favor of veterans seeking claims since at least the World War II era.

As the United States deployed millions of people in the struggle against the Axis Powers, this Court first articulated a canon that statutory ambiguity in laws passed to provide veterans with benefits should always be resolved in favor of the veteran. In 1943, Justice

Robert Jackson remarked that a federal law granting courts discretion to stay civil cases involving service-members must "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Shortly after World War II's conclusion, Justice William Douglas opined that laws granting benefits to veterans must "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

As both the number of veterans entitled to claim benefits—and the number of benefit denials—grew over the course of the twentieth century, legislators, veterans' groups, and veterans themselves began to see the need for judicial review of benefit denials. The result was the VJRA. According to one commentator, the legislation's goal was increased accountability for veterans' claims. James D. Ridgeway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 256 (2010).

The VJRA's passage increased support and acknowledgment of the pro-veteran canon. In the first case involving veterans' benefits that made it to the Supreme Court after the VJRA's passage, this Court reaffirmed that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991)). Most recently, this Court

applied the pro-veteran canon in holding that the VJRA's 120-day deadline for filing an appeal with the CAVC is procedural rather than jurisdictional. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).

The pro-veteran canon this Court formulated nearly 80 years ago reflects Congress's longstanding and deep "solicitude" for veterans. *United States v. Oregon*, 366 U.S. 643, 647 (1961). "A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412. Indeed, this policy of recognizing service is reflected in the entire veterans benefit system, which "is imbued with special beneficence from a grateful sovereign." *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004). Congress has required, for example, that the VA must help claimants develop their claims for benefits. 38 U.S.C. § 5103A; *see also Sanders*, 556 U.S. at 412 ("VA has a statutory duty to help the veteran develop his or her benefits claim."). Congress has also required a presumption of service connection for servicemembers who were in the Vietnam War—to afford them "the benefit of the doubt in the face of scientific uncertainty." *Procopio v. Wilkie*, 913 F.3d 1371, 1384 (Fed. Cir. 2019) (O'Malley, J., concurring); *see also* 38 U.S.C. § 1116. And the VJRA itself commands the VA to "give the benefit of the doubt to the claimant." 38 U.S.C. § 5107(b); *id*. § 7261(b)(1). This Court has recognized that Congress intended to "place a thumb on the scale in the veteran's favor." *Henderson*, 562 U.S. at 440. The late Justice Antonin Scalia went further,

describing the pro-veteran canon as "more like a fist than a thumb, as it should be." *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, Veterans L.J. 1 (Summer 2013), http://www.cavcbar.net/Summer%202013%20VLJ%20Web.pdf.

B. Courts have consistently used the pro-veteran canon to benefit veterans.

Courts have "long applied the 'canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (quoting *King*, 502 U.S. at 220–21 n.9). A review of this Court's application of the pro-veteran canon reveals a longstanding commitment to interpreting laws and regulations to benefit veterans.

To cite but a few examples, this Court has:

- Held that the 120-day deadline to file an appeal with the CAVC, 38 U.S.C. § 7266(a), is procedural, rather than jurisdictional, reasoning especially "in light of" the pro veteran canon, the 120-day deadline did not "carry the harsh consequences that accompany the jurisdiction tag." *Id*.

- Rejected the Secretary of Veterans Affairs' argument that statutory silence should be construed to find veterans at fault for injuries they claim under 38 U.S.C. § 1151. This Court questioned whether interpreting the federal statute in the manner advocated by the Secretary "would be possible after applying the rule that interpretive doubt is to be resolved

in the veteran's favor." *Brown*, 513 U.S. at 117–18.

- Interpreted a provision of the Veterans' Reemployment Rights Act, 38 U.S.C. § 2024(d), to impose no time constraints on when a servicemember retains a right to civilian employment after having to leave and serve in the military. This Court "ultimately read the provision in [the veteran's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King*, 502 U.S. at 220 n.9.

- Held the Vietnam Era Veterans' Readjustment Assistance Act of 1974, 38 U.S.C. § 2021 *et seq*. (1980), required employers bound by a collective-bargaining agreement to count military service in calculating seniority in awarding supplemental unemployment benefits. *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 205–06 (1980). The law "is to be liberally construed for the benefit of the returning veteran." *Id*. at 196.

- Acknowledged that the Soldiers' and Sailors' Civil Relief Act of 1940, Pub. L. No. 76-861, 54 Stat. 1178, is "always to be liberally construed" to veterans' benefit, but granted courts discretion to see that the Act's provisions "are not put to such unworthy use" by servicemembers deliberately shielding their obligations behind the law's protections. *Boone*, 319 U.S. at 575.

C. The pro-veteran canon applies to the VJRA's requirement that the Board review *all* information before it.

The VJRA governs judicial review of VA decisions denying individual claims for federal veterans' benefits. Central to that review is whether *the VA* considered "all information and lay and medical evidence" in the record of a claim before it. 38 U.S.C. § 5107(b); *id*. § 7261(b)(1).

The VJRA does not call for the *reviewing court*—the CAVC—to consider on its own "all information" contained in the record. Under the statute's carefully calibrated assignment of responsibility, that is a job for the VA. The VJRA's command that *the VA* "shall consider all information" before it is unambiguous. But, to the extent the CAVC bypasses this statutory requirement and purports to consider all information in place of the VA, the pro-veteran canon forecloses this overly broad scope of review that operates against veterans' interests. Under the VJRA, the CAVC may *only* review "the record of proceedings" below and must take into account the VA's consideration of "all information and lay and medical evidence of record in a case" before it. 38 U.S.C. §§ 5107(b), 7261(b)(1); *see also* 38 U.S.C. § 7104(a) (Board's decision "shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation"); *id*. § 7104(d)(1) (decision must include "a written statement of the Board's findings and conclusions, and the reasons or bases for

those findings and conclusions, on all material issues of fact and law presented on the record.").

Allowing the CAVC to exceed its defined role under the VJRA violates the pro-veteran canon. To the extent that previous Federal Circuit decisions hold otherwise, they are wrong. *See, e.g.*, *Newhouse v. Nicholson*, 497 F.3d 1298, 1302 (Fed. Cir. 2007) ("The [VJRA] does not limit the Veterans Court's inquiry to the *facts* as found by the Board." (emphasis added)). When the CAVC usurps the role of the VA, it deprives veterans of full legal review, in the first instance, by the agency charged with assisting them: the VA. If the CAVC faces a situation like Mr. Simmons's where the VA clearly misapplied governing law and failed to consider all elements of a prima facie case, the VJRA requires remand for further analysis. Doing so aligns with the pro-veteran canon of statutory interpretation because it is the VA that must "consider all information and lay and medical evidence of record," 38 U.S.C. § 5107(b), as well as all "applicable provisions of law and regulation," 38 U.S.C. § 7104(a). Under the VJRA, it is not up to the CAVC to stand in for the VA and consider elements of the prima facie case that the VA did not analyze.

Requiring the VA to perform its statutorily prescribed role benefits veterans. No longer would veterans need to appeal denial of benefits to the CAVC or Federal Circuit for the Board's refusal to consider "all information." Appeals, after all, are time-consuming, costly, and involve courts one or more steps away from the record. Even more, federal law requires the VA to

help claimants develop their claims for benefits. 38 U.S.C. § 5103A. Even if a reviewing court determines that it can consider no further evidence (as was the case Mr. Simmons), it is the VA that must make this determination. The VA, after all, uniquely plays an advocate role for veterans. *Sanders*, 556 U.S. at 412 ("[T]he VA has a statutory duty to help the veteran develop his or her benefits claim."). On the other hand, neither the CAVC nor the Federal Circuit, in reviewing the record, are similarly bound to help claimants develop their claims for benefits. 38 U.S.C. § 7261(b) (limiting scope of CAVC review to "the record of proceedings before the Secretary and the Board"). The VA is the forum for initial determinations, and remand back to the VA can only benefit veterans.

II. The Court should grant Mr. Simmons's petition to clarify the reach of *Shinseki v. Sanders* and reaffirm the pro-veteran canon.

A. *Shinseki v. Sanders* does not permit the Veterans Court or the Federal Circuit to avoid the *Chenery* doctrine, as each court did here.

Here, the Federal Circuit relied on this Court's decision in *Shinseki v. Sanders* to affirm the CAVC, but *Sanders* is the wrong framework for Mr. Simmons's case. Broadly speaking, *Sanders* prohibits rigid, *per se* presumptions of prejudice, and instead instructs courts to conduct harmless error analyses that consider the contours of the individual case. *Sanders*, 556

U.S. at 407. *Sanders* did not, however, contemplate a situation like Mr. Simmons's where the reviewing courts applied essential legal principles in the first instance *after* the Board failed to do so—a clear violation of the *Chenery* doctrine and the requirements of the VJRA, which must be interpreted to benefit veterans.

Sanders involved two civil cases where the VA denied veterans' claims for disability benefits. In the first case, Woodrow Sanders claimed that a bazooka exploded near his face during service, causing later blindness in his right eye. *Sanders*, 556 U.S. at 401–02. In the second case, Patricia Simmons sought benefits for hearing loss due to the noisy environment where she worked during her service. *Id*. at 404–05. The VA determined that neither veterans' current injuries were linked to the injuries they sustained during service. *Id*. at 402, 404–05. In both cases, the veterans argued on appeal to the CAVC that they did not receive proper notice about the additional medical evidence the VA would have needed to find a service connection. *Id*. at 403, 405. In both cases, the Federal Circuit agreed with the veterans that the notice errors were not harmless. *Id.* at 403–04, 405.

This Court "conclude[d] that the Federal Circuit's harmless-error framework is inconsistent with the" VJRA for three reasons. *Id*. at 414. First, the Federal Circuit's framework was too "complex, rigid, and mandatory." *Id*. at 407. Second, the framework imposed "an unreasonable evidentiary burden upon the VA." *Id*. at 408. Third, the framework required "the VA, not the claimant, to explain why the error is harmless." *Id*. at

409. What *Sanders* did for veterans' appeal jurisprudence can be stated simply: it requires the Federal Circuit to take a holistic approach when reviewing these appeals. This review includes analyzing the particular facts and evidence of each case and correctly placing the burden to prove prejudice on the veteran when circumstances dictate.

Sanders applies when the Board considered all material legal provisions, such as analyzing whether a claimant met his burden to establish a prima facie service connection case. In both cases underlying *Sanders*—involving Woodrow Sanders and Patricia Simmons—the Board reviewed all three service connection requirements; it analyzed whether the veterans had a current disability, whether they incurred or aggravated an injury or disease during service, and whether there was a nexus between the current injury or disease and in-service injury or disease. *Shedden v. Principi*, 381 F.3d 1163, 1166–67 (Fed. Cir. 2004) (explaining the three requirements to establish service connection); *Sanders v. Nicholson*, 20 Vet. App. 143 (2005), *rev'd and remanded*, 487 F.3d 881 (Fed. Cir. 2007); *Simmons v. Nicholson*, 20 Vet. App. 386 (2005), *aff'd and remanded*, 487 F.3d 892 (Fed. Cir. 2007). Because the Board—not the reviewing court—completed the three-pronged service connection legal analysis, neither appellate court needed to go beyond the Board's legal reasoning; the reviewing courts needed only to review the specific facts and evidence submitted.

Thus, in *Sanders*, this Court had no reason to address the *Chenery* doctrine, which prohibits a reviewing court from sustaining "the agency's ruling on a ground different from that invoked by the agency." *Mayfield v. Nicholson*, 444 F.3d 1328, 1334 (Fed. Cir. 2006) (citing *Sec. & Exch. Comm'n v. Chenery Corp.*, 318 U.S. 80, 87 (1943) and *Sec. & Exch. Comm'n v. Chenery Corp.*, 332 U.S. 194, 196 (1947); *see also Bivings v. U.S. Dep't of Agric.*, 225 F.3d 1331, 1335 (Fed. Cir. 2000) (A court "cannot affirm the agency on a theory that, although supported by the record, was not the basis for the agency's ruling."). *Sanders*'s applicability, therefore, is limited to cases where the Board has conducted a complete legal analysis, and the reviewing courts are called upon merely to review the legal effect, if any, of the lower tribunal's duly made factual findings.

B. The Federal Circuit's decision in this case unjustifiably extends *Shinseki v. Sanders*.

The Federal Circuit's decision pits an unduly expansive reading of *Sanders* against the longstanding *Chenery* doctrine and, in so doing, erodes the pro-veteran canon. The veterans in *Sanders* had the benefit of a Board decision that considered all three prongs of the prima facie service connection claims. And because the Board had considered all three elements of the claimants' prima facie service connection claims, the *Chenery* doctrine played no role in *Sanders*. In other words, the reviewing courts did not go beyond

the legal grounds that the Board considered for denying the veterans' claims. *See Mayfield*, 444 F.3d at 1336; *cf. Newhouse*, 497 F.3d at 1301 (reiterating that the *Chenery* doctrine is implicated when the reviewing court is dealing with a determination or judgment that the administrative agency must make).

That framework fails when, as here, the Board does *not* decide all three prongs of the prima facie service connection claim—and, correspondingly, fails to consider "all information and lay and medical evidence of record" before it, or articulate its "reasons and bases" for its "findings and conclusions" as the VJRA requires. 38 U.S.C. § 5107(b); *see also Huston v. Principi*, 18 Vet. App. 395, 402 (2004) (the Board was required to analyze the three prongs required to establish service connection); *see also* 38 U.S.C. § 7104(a), (d)(1) (requiring the Board to decide all material issues of fact and law). *Sanders* only goes so far as to prohibit *per se* findings of prejudice; it does not authorize reviewing courts to contravene *Chenery* and make legal conclusions in the first instance.

In this case, the Board determined that Richard Simmons did not have an in-service injury or disease, which presupposed that no nexus could exist between an in-service injury or disease and a current injury or disease. But the CAVC found that Mr. Simmons suffered from depression during his service. Had the Board considered that Mr. Simmons suffered from in-service depression, it might have viewed his current, documented anxiety diagnosis in a different light. The Board might have found that a "nexus" exists for

purposes of the third prong, or the Board might have required the VA to further develop the record to better understand the relationship between Mr. Simmons's in-service depression and his current anxiety. *Huston*, 18 Vet. App. at 403 ("[I]nitial adjudication . . . could have precipitated further claim-development action that would have discovered that evidence and resulted in a favorable determination of his claim. It would be pure speculation to conclude otherwise."). Either way, it was not for the reviewing courts to make the "nexus" determination in the first instance; *Sanders* was not meant to reach this far.

The CAVC should have remanded to the Board once it determined that Mr. Simmons had met the in-service prong of his service connection claim. 38 U.S.C. § 5107(b). Doing so would have forced the Board to consider "all information" as the VJRA requires. *Id*. Contrary to the Federal Circuit's order, this remand would not have been the kind of *per se* prejudice finding that *Sanders* prohibits. Instead, remand would have been consistent with the pro-veteran canon and the particular facts of this case.

Remand would benefit Mr. Simmons and other similarly situated veterans who apply for benefits. Under the applicable regulations, all reasonable doubts are to be resolved in favor of the veteran, and decisions are rendered in the best interest of the veteran. 38 C.F.R. §§ 3.159(c) ("VA's duty to assist claimants in obtaining evidence"), 3.103(a) (VA is obligated to assist claimant and "render a decision which grants every benefit that can be supported in law while protecting

the interests of the Government"), 3.102 (doubts are resolved in favor of claimant); *see also Morgan v. Wilkie*, 31 Vet. App. 162, 167–68 (2019) ("The Secretary is required to maximize benefits." (cleaned up) (quoting *Bradley v. Peake*, 22 Vet. App. 280, 294 (2008)). Remand is also appropriate because the Board was required to "consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary." 38 U.S.C. §§ 5107(b), 7104(a). Remand is compelled here because the *Chenery* doctrine prohibits the CAVC from sustaining the Board's ruling based on grounds that the Board was required to consider but did not. *Mayfield*, 444 F.3d at 1334. And remand is supported by many pro-veteran statutes and regulations that require remand at all levels of the claims process. *See, e.g.*, 38 C.F.R. § 3.105(a)(1) ("Where evidence establishes such error, the prior decision will be reversed or amended."); 38 U.S.C. § 5109A(a) ("If evidence establishes the error, the prior decision shall be reversed or revised.").

Sanders is not a sea change in the area of veterans' benefits. Rather, this Court explicitly recognized the pro-veteran canon, 566 U.S. at 412, but did not view it as controlling on the facts before it. In addition to the grounds Mr. Simmons asserted below, this Court should grant the petition for writ of certiorari to clarify *Sanders*'s limited reach and reaffirm the pro-veteran canon as applied to the VJRA. *Sanders* does not and cannot disrupt 80 years of solicitude toward veterans, nor does it permit reviewing courts to sidestep

Chenery's requirement that the VA analyze service connection factors in the first instance.

CONCLUSION

This Court should grant Mr. Simmons's petition for a writ of certiorari and reverse the judgment of the Federal Circuit with instructions to remand for further fact-finding.

Respectfully submitted,

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