

22-6093
No. 22

ORIGINAL

IN THE

Supreme Court of the United States

STEVEN L. LONDON,

Petitioner,

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS
AFFAIRS,

Respondent.

On Petition for Writ of Certiorari to the United States
Court of Appeals for the Federal Circuit

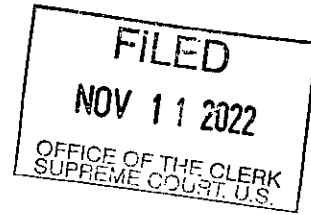
PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Under 31 U.S.C. § 3702(b), “A claim against the Government presented under this section must... be received by the official responsible... for settling the claim or by the agency that conducts the activity from which the claim arises *within 6 years after the claim accrues...*” (emphasis added.) Veterans who miss the six-year statutory deadline – even with service-connected physical or mental impairment – are barred from recovering retroactive disability reaching beyond six years backwards from the original date of application where the retiree meets all eligibility requirements. In *Cushman*, the Federal Circuit held “Veteran’s disability benefits are nondiscretionary, statutorily mandated benefits... We conclude that such entitlement to benefits is a property interest protected by the Due Process Clause of the Fifth Amendment to the United States Constitution.” *Cushman v. Shinseki*, 576 F.3d (Fed. Cir. 2009). Despite the unresolved issues present, the Federal Circuit held Mr. London had received the relief sought.

The questions presented are:

- (1) Does *Cushman’s* determination of the constitutional duty to protect a veteran’s property rights apply to the six-year statutory deadline in 31 U.S.C. § 3702(b) for seeking retroactive benefits, and, if so, are the Government’s challenged actions lawful?
- (2) Because 31 U.S.C. § 3702(b) limits retroactive benefits to a six-year statutory deadline, to what extent is the Government liable for avoidable damages resulting from its actions prior to and following the expiration of the statutory deadline.

(ii)

**PARTIES TO THE PROCEEDINGS AND RULE 29.6
STATEMENT**

Petitioner Steven L. London was Claimant-Appellant in No. 22-1503.

Respondent Denis McDonough, Secretary of Veterans Affairs, was Respondent-Appellee in No. 22-1503.

There are no publicly held corporations involved in this proceeding.

(iii)

RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *London v. McDonough*, United States Court of Appeals for the Federal Circuit, No. 22-1503
- *London v. McDonough*, United States Court of Appeals for the Federal Circuit, No. 20-1915
- *London v. McDonough*, United States Court of Appeals for Veterans Claims, No. 22-529
- *London v. McDonough*, United States Court of Appeals for Veterans Claims, No. 19-5784

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(x)

PETITION FOR A WRIT OF CERTIORARI

U.S. Army veteran Steven L. London respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *London v. McDonough*, United States Court of Appeals for the Federal Circuit, No. 22-1503 (Fed. Cir. 2022) (per curiam).

The opinion of the United States Court of Appeals for the Federal Circuit is reported at *London v. McDonough*, United States Court of Appeals for the Federal Circuit, No. 20-1915 (Fed. Cir. 2021) (per curiam).

The opinion of the United States Court of Appeals for Veterans Claims is reported at *London v. McDonough*, United States Court of Appeals for Veterans Claims, No. 19-5784 (Vet. App. December 29, 2021).

STATEMENT OF JURISDICTION

The jurisdiction to hear this timely filed petition is invoked under 28 U.S. Code § 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 3702 of title 31 is titled "Authority to settle claims." Section 3702(b)(1)(A) states:

A claim against the Government presented under this section must contain the signature and address of the claimant or an authorized representative. The claim must be received by the official responsible under subsection (a) for settling the claim or by the agency that conducts the activity from which the claim arises within 6 years after the claim accrues

except—as provided in this chapter or another law; or

31 U.S. Code § 3702(b)(1)(A).

Section 1413a of title 10 is titled “Combat-related special compensation.” Section 1413(a) states:

The Secretary concerned shall pay to each eligible combat-related disabled uniformed services retiree who elects benefits under this section a monthly amount for the combat-related disability of the retiree determined under subsection (b).

10 U.S. Code § 1413a.

INTRODUCTION

When combat-disabled veterans are medically retired from military service, they have six years to file an application for combat related special compensation (CRSC) contingent upon service connection of eligible disabilities by the Veterans Affairs (VA). These veterans' CRSC benefits extend backwards from the original date of application where the retiree meets all eligibility requirements. If they fail to file a CRSC claim within six years of eligibility, they lose the retroactive CRSC to which they would otherwise be entitled. This case presents important, multi-faceted questions: does the six-year filing deadline of § 3702(b)(1)(A) impose a duty to act and to service connect disabilities prior to the expiration of the federally mandated six-year deadline for CRSC claims? And, if the Secretary fails to do so, are the Courts obligated to compel the Secretary to action to release property interests protected by the Due Process Clause of the Fifth Amendment to the United States Constitution? Furthermore, to what extent is the Government liable for avoidable damages resulting from its actions prior to and following the expiration of the statutory deadline?

In its per curiam decision, the Federal Circuit did not address these questions and dismissed the appeal on the presumption that relief sought through mandamus was obtained. Mr. London challenged the court's presumption.

Because the Federal Circuit has exclusive jurisdiction to review veterans' benefits statuses, *see* 38 U.S. Code § 7292(c), the Federal Circuit's decision is unlikely to be addressed or resolved by any other circuit courts. Accordingly, this appeal is ripe for Supreme Court review.

The issues presented here are important to tens of thousands of current and future military veterans and extend to all U.S. citizens who raise due process challenges and Tort Claims against the Government. It is an unfortunate reality that many veterans face prolonged legal battles to receive their disability benefits earned through their honorable service. Indeed, the sad paradox is that the very prejudicial errors the judicial system is designed to address, often cause avoidable harm to veterans, leading to deprivations of their legal rights.

STATEMENT OF THE CASE

A. Background

Mr. London served honorably in the U.S. Army from May 2004 to December 2013. App. 77a-79a. Mr. London's service-induced disabilities include traumatic brain injury (TBI), arthritis, and fibromyalgia, *inter alia*. App. 80a-84a. The VA has service connected some disabilities and denied others on appeal. *Ibid*.

B. Proceedings before the Federal Circuit and below

Mr. London first applied for disability benefits in July 2013 as part of the VA Benefits Delivery at Discharge program. App. 85a. In 2014, Mr. London

timely filed multiple Notices of Disagreements with the Secretary's various decisions. App. 87a-88a, 91a-97a. In a July 2014 letter, the Secretary confirmed receipt of Mr. London's disagreements. App. 98a-100a. In November 2017, the Secretary issued Statements of Case (SOCs). App. 91a. The Secretary received Mr. London's timely-filed answers to the SOCS on January 05, 2018. App. 101a-103a.

The Secretary identified Mr. London's eight (8) answer letters to the SOCs as four (4) Notices of Disagreement (NODs) and dismissed the evidence of decision errors raised in each letter. Ibid. Mr. London's eight (8) letters noted challenged errors in the SOC within 60 days of receiving the SOCs. App. 104a. After the Secretary rejected Mr. London's letters, the Military Order of the Purple Heart (MOPH), then representing Mr. London, filed a VA Form 9. The Secretary informed Mr. London, by letter, on February 28, 2018, of the certification of his appeals to the Board of Veterans Appeals (Board). App. 105a.

After multiple Advancement on Docket (AOD) letters, denials, and a Congressional inquiry, London received approval for his AOD request on May 22, 2019. App. 106a-107a. On April 30, 2019, June 11, 2019, and July 05, 2019, Mr. London faxed three (3) separate requests to schedule a hearing date with the BVA. App. 108a-114a. On August 16, 2019, London informed the BVA of intentions to file a petition for extraordinary relief. App. 115a-118a. After postponement of Mr. London's hearing due to technical difficulties, the Board issued a decision and multiple remands after the expiration of the six-year CRSC statute. App. 119a-133a. In a February 06, 2020, letter, Mr. London requested the Board amend its decision based on errors. App. 134a-168a. Prior to the Board's January 21, 2020, decision letter, London filed a petition for extraordinary

relief with the Veterans Court on August 21, 2019, to avoid the expiration of the statute of limitations for CRSC applications. App. 169a-174a.

After a Congressional inquiry, the Board verified receipt of London's motion to revise the Board decision based on clear and unmistakable error and provided information concerning Mr. London's unresolved appeals. App. 175a-176a. In Mr. London's first appeal to the Veterans Court, *London v. McDonough*, No. 19-5784 (Vet. App.), the Court rejected his request for mandamus. App. 3a-4a. This denial led to Mr. London's first appeal to the Federal Circuit, *London v. McDonough*, No. 2020-1915 (Fed. Cir.). App. 177a-178a.

The Federal Circuit issued its March 15, 2021, Order to vacate and remand the Veterans Court's decision. Mr. London was awarded costs, but it appears he has yet to receive them. Following the order, the Veterans Court continued its denials, and Mr. London timely appealed again to the Federal Circuit. App. 18a, 28a-30a, 179a.

On October 18, 2021, the Board issued judgment based on contested evidence. App. 180a-211a. The Board's decision is currently on appeal in *London v. McDonough*, No. 2022-529 (Vet. App.)

Following Mr. London's second timely appeal, *London v. McDonough*, No. 2022-1503 (Fed. Cir.) the Federal Circuit denied Mr. London's request for mandamus, and his timely filed petition for rehearing. App. 49a-52a. The Federal Circuit rejected Mr. London's requests to stay its mandate and to stay and recall its mandate, as moot. App. 57a-58a.

Thus; although the judgments below are per curiam affirmances, the opinions lack clarity and support by leaving multiple issues raised below unanswered.

REASONS FOR GRANTING THE PETITION

I. THE FEDERAL CIRCUIT'S ABDICATION OF ITS ROLE IN DECIDING ALL ISSUES RAISED WITHIN ITS APPELLATE JURISDICTION REQUIRES JUDICIAL REVIEW

This case is ripe for Supreme Court review because it involves clear intra-circuit conflicts with authoritative decisions regarding issues for which the Federal Circuit has exclusive appellate jurisdiction. Specifically, 38 U.S.C. § 9292(c) gives the Federal Circuit "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretations thereof" raised in an appeal from the Veterans Court. The Veterans Court, in turn, has exclusive jurisdiction to review decisions of the Board, which is part of the VA. See 38 U.S.C. § 7252(a).

By overlooking questions of law and fact raised before it, the Federal Circuit abdicates its role in deciding all issues raised within its appellate jurisdiction. Judicial review is necessary to correct the prejudicial errors and concrete harm Mr. London suffers. In *London v. McDonough*, No. 2022-1503 (Fed. Cir.) Mr. London's Opening Brief raises a non-exhaustive list of errors and harm he suffers, to include due process rights, exercise of undue power, and improper application of laws and guidelines, inter alia.

Unfortunately, the Federal Circuit's refusal to compel the Secretary to lawful action allows the Secretary's unlawful actions to escape review, while

dismissing Mr. London's appeal as moot. App. 50a-52a.

The Federal Circuit's presumption of mootness bypasses the unresolved constitutional issues in Mr. London's appeal, whereas this Court has generally declined to deem cases moot that present issues or disputes that are "capable of repetition, yet evading review." *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007).

The unresolved issues in this appeal (Tort Claim against the Secretary¹, expiration of the CRSC statute of limitations, improper disability ratings, inter alia) are capable of repetition and they evade review. App. 212a-213a. Under the legal theory of mootness, Mr. London's case fits within the established exception to mootness for disputes capable of repetition, yet evading review. *Los Angeles v. Lyons*, 461 U. S. 95, 109 (1983).

The exception applies where "(1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration, and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Spencer v. Kemna*, 523 U. S. 1, 17 (1998) (internal quotation marks and brackets omitted).

The avoidable expiration (930+ days since) of the six-year federal statute of limitations governing CRSC and Mr. London's timely filed, yet unresolved (940+ days) Tort Claim against the Secretary satisfy the first prong

¹ Tort damages (\$800,307.96) from Mr. London's timely-filed, unanswered Tort Claim against the Secretary can be increased due to the Secretary's continued non-compliance with the law (and additional evidence following the 2019 filing of the unresolved Tort Claim).

for an exception to mootness. App. 214a. Mr. London's total interests (Tort Claim, retroactive VA disability pay, and lost and retroactive CRSC pay) exceed \$960,000. Ibid.

The second prong of the "capable of repetition" exception requires a "reasonable expectation" or a "demonstrated probability" that "the same controversy will recur involving the same complaining party." *Murphy v. Hunt*, 455 U. S. 478, 482 (1982) (per curiam).

In his Original Brief and En Banc Review petition, Mr. London establishes the challenged actions of the Secretary and the Courts which caused and continue to cause unlawful "concrete harm" he suffers. *London v. McDonough*, No. 22-1503 (Fed. Cir.) Throughout the life of Mr. London's appeals, the Secretary and the Courts below have demonstrated their unwillingness or inability to timely, fully, and properly adjudicate all issues raised. Their willful failures to correct their prejudicial actions show deliberate neglect of their legal obligations. Ibid.

Mr. London's multi-year appeals demonstrate continuous violations of his due process and property interests protected under the Fifth Amendment. U.S. Const. amend. V.

In turn, Mr. London's continued suffering of "concrete harm" establishes Article III standing. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). Article III authorizes this Court to resolve the "cases" and "controversies" forced upon Mr. London by the unlawful actions of the Secretary and Courts below. U.S. Const. art. III.

Mr. London demonstrates the required "personal stake" or standing to establish a case or controversy

under Article III: *Raines v. Byrd*, 521 U. S. 819 (1997). Mr. London's "personal stake" involves, inter alia, continuous violations of his due process and property interests protected under the Fifth Amendment. U.S. Const. amend. V.

Mr. London demonstrates standing because (i) he suffers an injury in fact that is concrete, particularized, and actual or imminent; (ii) the injury is caused by the defendant; and (iii) the injury would likely be redressed by judicial relief. See *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992).

The Federal Circuit's decision impedes due process of law by overlooking questions of law and fact raised before it and below. Those questions address, inter alia, Mr. London's concerns about the Secretary's bad evidence and misinformation (to include a December 15, 2021, Letter claiming the Secretary does not possess Mr. London's Service Treatment Records – an erroneous and disproven claim). App. 40a. Mr. London's En Banc petition notes the points of law and fact the Federal Circuit overlooked include court-reported informational errors, unobtained relief, live controversies, and unresolved questions of exceptional importance. *London v. McDonough*, No. 22-1503 (Fed. Cir.)

The Federal Circuit's awareness and apparent disregard of the Veteran's Court's refusal to contemplate evidence obstructs Mr. London's fair opportunity to be heard. *Ibid.* Due process of law has been interpreted to include notice and a fair opportunity to be heard. See *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950).

The Federal Circuit's abdication of its authority to decide all issues raised within its appellate jurisdiction

deprives Mr. London of his fair opportunity to be heard. *Id.*

The Due Process Clause of the Fifth Amendment guarantees that an individual will not be deprived of life, liberty, or property without due process of law. U.S. Const. amend. V. When constitutional rights are denied, the Federal Circuit's presumption of mootness allows the Government's illegal denial of those rights to escape judicial review.

Absent direct intervention from this Court, Mr. London will continue to suffer violations of his statutory and constitutional rights.

II. ESTABLISHING GOVERNMENT LIABILITY FOR DAMAGES ARISING FROM PREJUDICIAL ACTIONS GREATLY IMPACTS VETERANS AND THEIR FAMILIES

The uncorrected prejudicial errors of the Secretary, the Federal Circuit, and Courts below violate Mr. London's due process and property rights. App. 104a, App.134a-168a, App. 212a-214a. Despite Mr. London's repeated pleas, neither the Secretary nor the Federal Circuit have remedied their respective prejudicial errors. *Ibid.* Because the Courts below have not compelled the Secretary to action compliant with the law, Mr. London has exhausted all means to obtain his desired relief in his legacy appeals.²

This Court's determination of the Government's (Secretary and Federal Circuit) liability for damages arising from their actions (and inactions) would aid the administration of due justice in this appeal, impacting thousands of veterans who raise due process appeals.

² Mr. London's unresolved appeals fall under the Veterans Affairs "legacy" appeals system (appeals prior to 2019 Appeals Modernization Act)

A. The Federal Circuit Is Liable for Its Actions Found Contrary to Law or Good Order

The Federal Circuit's presumption of mootness and its dismissal of Mr. London's appeal clearly violate Mr. London's fundamental right to due process and cause "concrete harm" by encouraging and permitting the Secretary's unlawful withholding of his property interests. By not compelling the Secretary to lawful action, the Federal Circuit's challenged actions encourage the Secretary's continued violations of Mr. London's (and other veterans) statutory and constitutional rights. See *London v. McDonough*, No. 22-1503 (Fed. Cir.)

The Federal Circuit's challenged actions contradict the guidelines set forth in the Code of Conduct for U.S. Judges. Specifically, Mr. London raises concern with the Federal Circuit's apparent disregard for the Code of Conduct for U.S. Judges Canons 3(A)(5); 3B(6); and 2A. App. 215a-217a.

Sadly, these actions erode Mr. London's and the public's trust in the Federal Circuit to provide a fair process, presenting an incomplete and inconsistent record of the Mr. London's disabilities and disability rating percentages. See *Oppenheimer v. Derwinski*, 1 Vet. App. 370, 371 (1991); also, *Russell v. Principi*, 3 Vet. App. 310, 313-14 (1992).

The Federal Circuit's disregard of the Veterans Court's refusal to contemplate evidence, its tolerance of the Secretary's bad evidence, and its omission to act on credible evidence, unduly delay the administration of justice. App. 218a-220a. An error in admission of evidence is reversible if the ruling affected a substantial right of a party. See Fed. R. Ev. 103(a). Mr. London's due process and property interests, substantial constitutional rights, remain unlawfully withheld and unreasonably delayed. The Federal Circuit is well-informed its decisions contradict the following

authoritative decisions of this Court and other U.S. Courts of Appeals. Its refusal to follow legal precedents unduly deprives Mr. London of justice.

In his En Banc petition, Mr. London respectfully submitted that the Federal Circuit's decision contradicts the following decisions of the Supreme Court, its Court, and other U.S. Courts of Appeals. Insomuch, review of the Federal Circuit's decision is needed to maintain decisional uniformity with: *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 242 (1993); *Community Nutrition Institute v. Young*, 773 F.2d 1356, 1361 (D.C.Cir.1985); *Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1057 (8th Cir. 2000); *Cushman v. Shinseki*, 576 F.3d. 1290 (Fed. Cir. 2009); *Cutler v. Hayes*, 818 F.2d 896 (D.C. Cir. 1987); *England v. La State Bd. Of Med Exam'rs*, 259 F.2d 626, 627 (5th Cir. 1958); *Erspamer v. Derwinski*, 1 Vet. App. 3 (1990); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Los Angeles v. Lyons*, 461 U. S. 95, 109 (1983); *Lujan v. Defenders of Wildlife*, 504 U. S. 555, 560-561 (1992); *MCI Communications Corp. v. FCC*, 627 F.2d 322, 340 (D.C.Cir.1980); *Morgenstern v. Wilson*, 29 F.3d 1297 (8th Cir. 1994); *Mullane v. Cent. Hanover Tr. Co.*, 339 U.S. 306, 313, 70 S.Ct. 652, 94 L.Ed. 865 (1950); *Murphy v. Hunt*, 455 U. S. 478, 482 (1982); *Raines v. Byrd*, 521 U. S. 819 (1997); *Richard v. West* 161 F.3d. 719, 723 (Fed. Cir. 1998); *Russel v. Principi*, 3 Vet. App. 310, 313-14 (1992); *Spencer v. Kemna*, 523 U. S. 1, 17 (1998); *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190 (2021). App. 221a.

Unfortunately, the Federal Circuit's decision leaves the prejudices, misconduct, undue power, unreasonableness, and the timely-filed Tort Claim present in Mr. London's appeals unresolved, causing continued harm and deprivation of Mr. London's constitutional and statutory

rights. Mr. London openly raised these issues in his Opening Brief and En Banc petition to the Federal Circuit. *London v. McDonough*, No. 22-1503 (Fed. Cir.)

Absent a detailed remand order from this Court, Mr. London's constitutional and statutory rights will continue to be violated.

B. The Secretary Is Liable for the VA's Actions Found Contrary to Law or Good Order

This Court may view the Secretary's refusal to timely, fully, and properly adjudicate Mr. London's appeals as a refusal to act. Federal laws and regulations including 38 CFR § 3.304; 38 U.S. Code § 1154; 38 CFR § 4.40, inter alia, impose a duty to act, and the Secretary is in breach of his duty. The Secretary, well-informed of the harm he inflicts upon Mr. London, committed, and continues these specific egregious acts, thus requiring a writ of mandamus and judicial intervention. App. 222a-223a. The Veterans Court's belief (and the Federal Circuit's affirmation of it) that the Secretary's 8+ year unreasonable delay in Mr. London's appeal is not egregious enough to warrant mandamus, lacks proper legal justification. App. 224a.

1. Egregious Acts

The Secretary, through his actions and inaction, has caused, and causes Mr. London harm through due process violations, exercise of undue power, and improper application and neglect of laws, inter alia. These prejudicial actions are openly challenged throughout all levels of Mr. London's appeals. App. 222a-223a, App. 225a.

Most recently, the Secretary purports that the Pittsburgh Regional Office (which handles overseas cases like Mr. London's) is missing emails from 07/12/2020 to 07/13/2021. App. 226a-228a. Mr. London submitted

evidence of his 06/25/2021 verified response to scheduling examinations, documentation originally absent from the Record Before the Agency (RBA). App.226a-230a. The Secretary's submission of Mr. London's purported lack of response was a key prejudicial factor the Board used in its denial of Mr. London's appeals, stating that Mr. London never responded to an email for scheduling requests. App.180a-211a. Despite Mr. London's timely answer to the examination request, the Secretary has yet to properly schedule any required exams.

2. Due Process Violations

The Secretary holds and delays release of Mr. London's disability entitlements. In turn, until the Secretary properly resolves Mr. London's appeals, Mr. London cannot submit an accurate application for CRSC entitlements.³ Thus, the Secretary causes an avoidable, factual loss of CRSC entitlements. Also, Mr. London's timely-filed Tort Claim against the Secretary, dated and filed on December 16, 2019, remains unanswered and requires action. App. 231a. See 28 U.S. Code § 2401; 28 U.S. Code § 2675(a). The Secretary, well-informed of these issues, knowingly violates Mr. London's property rights. App. 232a-233a.

3. Exercise of Undue Power

The Secretary impedes Mr. London's right to choose healthcare and treatment options. See *England v. La State Bd. Of Med Exam'rs*, 259 F.2d 626,627 (5th Cir. 1958). The Secretary also undermines Mr. London's financial security by unlawfully withholding Mr. London's entitlements for several years. App. 232a.

³ The six-year federal statute of limitations to apply for CRSC benefits expired on or about 12/31/2019.

38 U.S.C. § 7261(a)(2) expressly provides the Veterans Court the power to "compel action of the Secretary unlawfully withheld, or unreasonably delayed." In Mr. London's case, the Secretary unlawfully possesses a property interest and unreasonably delays the release of those entitlements. The Veterans Court, bound by the law to compel the Secretary to release Mr. London's unreasonably delayed property interests, abdicates its authority, allowing the Secretary's unlawful actions to persist. The Federal Circuit also abdicates its authority to correct decisions of the Veterans Court which impede Mr. London's constitutional and statutory rights. 38 U.S. Code § 7292 instructs the Federal Circuit to "hold unlawful... the decision of the Court of Appeals for Veterans Claims... contrary to constitutional right", inter alia.

A reasonable mind could conclude that the Secretary demonstrates a lack of interest in properly, fully, and timely adjudicating Mr. London's appeal, or he would have done so already. Instead, the Secretary unnecessarily prolongs the appeals process and violates Mr. London's statutory and constitutional rights several times.

4. The Secretary's Submission of and Failure to Remove Bad Evidence

Multiple times, Mr. London challenged the credibility of and raised objection to improper evidence submitted by the Secretary. App. 234a-235a.

Mr. London informed the Federal Circuit of the Secretary's intent to influence the Veterans Court's judgment with misinformation persists. App. 234a, App. 236a-237a. One clear example is the Secretary stating that London did not respond to June 2021 email, when he in fact did. App. 229a-230a. The Secretary and Courts below make no attempt to remove or correct the Secretary's apparent misinformation.

5. The Secretary's Prejudicial Errors

The Board, aware of London's continuous overseas residence, entered an incorrect mailing address, which triggered improper stateside exams. App. 238a-243a. Two-plus (2+) years following the Board's prejudicial error, the Secretary has not provided all necessary exams for Mr. London's appealed disabilities.

6. The Secretary's Patterns of Misconduct

Mr. London questions what legal provision(s) justification(s) the Courts below use to justify the Secretary's prolonged unlawful actions. App. 244a-246a. The Secretary's patterns of misconduct include, but are not necessarily limited to, due process violations, unlawful possession of property, and omission to act. App. 247a.

C. The Courts Below and the Secretary Share Liability for Challenged Unlawful Actions

Mr. London openly plead with the Federal Circuit to "end the Secretary's irreparable harm, which leads to avoidable stress which continuously exacerbates Mr. London's disabilities." App. 248a. The Federal Circuit understands sanctions could be pursued if its actions ran contrary to the law. Ibid. More than once Mr. London informed the Federal Circuit "the Court's and Secretary's inability or unwillingness to correct these prejudicial errors, increases their liability for further legal sanctions." App. 249a. Given ample time to comply with statutory and constitutional provisions, both the Federal Circuit and the Secretary have chosen not to correct their challenged unlawful actions.

Since the expiration of the CRSC statute of limitations, the Courts prolong Mr. London's continued suffering of over 930+ days of lost entitlements. App. 250a. The Federal Circuit and the Secretary also leave Mr. London's timely filed Tort Claim against the Secretary unresolved for 940+ days. Ibid. Mr. London's En Banc petition to the Federal Circuit details unresolved prejudicial errors. Ibid.

To be certain, the challenged actions and inactions of the Federal Circuit and the Secretary are prejudicial to the administration of due justice. App. 251a-252a. This Court's intervention is required to expedite the due administration of justice in Mr. London's appeal.

III. THIS CASE IS A GOOD VEHICLE TO RESOLVE DUE PROCESS CHALLENGES

This case is an ideal vehicle to resolve due process challenges following the Federal Circuit's decision of mootness and whether its judgment supersedes the Supreme Court's authoritative decisions on mootness.

In addition, the issue of due process was specifically and carefully preserved at every level of the adjudicative process in this case, from the agency level through Mr. London's appeals to the Federal Circuit. Thus, there are no concerns that the lower tribunals did not have clear opportunities to consider and address this issue. In fact, due process connects all issues raised before the Veterans Court and the Federal Circuit, making this a highly focused appeal with one major determinative legal issue.

This Court has jurisdiction over this appeal, the petitioner has standing, and the issue of due process is clearly ripe for review. Thus, there are no procedural hurdles or jurisdictional pitfalls associated with this case.

There are no disputed factual issues precluding this Court from reaching and resolving the legal questions presented – whether *Cushman's* determination applies to the statutory deadline in 31 U.S.C. § 3702(b) for seeking retroactive benefits, and, if so, are the Government's challenged actions lawful?

The follow-up question addresses 31 U.S.C. § 3702(b)'s limit on retroactive benefits to a six-year statutory deadline, and asks "To what extent is the Government liable for avoidable damages resulting from its actions prior to and following the expiration of the statutory deadline?"

In any event, the question of whether a remand is necessary if this Court concludes that due process is a constitutional right is not a question that turns on disputed facts. Rather, it turns on a disputed principle of *jurisprudence*, namely whether an appellate court shares liability for concrete damages caused by an agency's action when a court allows those actions to evade judicial review.

IV. THE FEDERAL CIRCUIT'S DECISION BELOW SHOULD BE OVERTURNED BECAUSE IT IS INCONSISTENT WITH SUPREME COURT PRECEDENT AND OTHER FEDERAL CASES

In his En Banc petition, Mr. London informed The Federal Circuit of the authoritative decisions of this Court and other Courts of Appeal with which its decision is contradictory. *London v. McDonough*, No. 22-1503 (Fed. Cir.) Despite this evidence, the Federal Circuit's decision arbitrarily prevents Mr. London's appeal from affecting a substantial amount of people, even beyond veteran law.

Mr. London's appeal provides significance for the growth and development of the law because it interprets fundamental legal and constitutional rights under established and clarified precedent to resolve similar cases.

Unfortunately, the Federal Circuit's submission of incorrect information (appeals timeline), live controversies, and improper legal standards applied throughout the appeals process, persist. Mr. London raises these concerns in his En Banc petition. *London v. McDonough*, No. 22-1503 (Fed. Cir.)

Mr. London's unresolved questions of exceptional importance before the Federal Circuit and below address mootness, and violations of constitutional and statutory rights. Mr. London's appeal affects other litigants, and the unresolved issues before the Federal Circuit (and below) require judicial review.

The Federal Circuit's decision unlawfully permits the Secretary to eliminate Mr. London's ability to collect earned benefits for his disabilities – both VA disability compensation and CRSC entitlements. Throughout his appeals, Mr. London clearly raised his concerns about proper adjudication prior to the six-year federal statute of limitations surrounding CRSC entitlements. App. 253a-260a. Unfortunately, the Secretary and the Courts below, capable and with authority to do so, did not act in the interest of due justice prior to the expiration of the federal statute governing CRSC.

In similar fashion, this Court has described the copyright damages statute as “a three-year look-back limitations period.” *Petrella v. Metro-Goldwyn-Mayer, Inc.*, 572 U.S. 663, 670 (2014). In *Petrella*, the Court explained that a copyright owner can sue *anytime* during an ongoing infringement. *Id.* At 682-83. “She will miss out on damages

for periods prior to the three-year look-back, but her right to prospective injunctive relief should, in most cases, remain unaltered." *Id.* The six-year look-back period in the patent damages statute operates similarly, and this Court has likewise described it as a statute of limitations. See *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 137 S. Ct. 954, 961-62 (2017).

In Mr. London's appeals, the Secretary and Courts below, prior to and after, are fully aware of the six-year statute of limitations concerning CRSC throughout the lifecycle of appeals. Mr. London's unresolved, yet timely-filed Tort Claim against the Secretary follows similar logic to *Petrella* inasmuch that Mr. London continues to seek damages against the Secretary for infringements of Mr. London's constitutional and statutory rights. Unfortunately, the Secretary and Courts below abdicate their authority and responsibility to make Mr. London's claims whole, in full accordance to the law. The Courts below and the Secretary are in breach of their respective legal duties owed to Mr. London in resolving the appeals before them.

The Federal Circuit's decision incorrectly purports that relief sought has been obtained, and therefore moots Mr. London's appeal. Its decision neglects the continued deprivation of Mr. London's constitutional and statutory rights – something this Court has determined as an exception to mootness in multiple instances. See *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449, 462 (2007); *Los Angeles v. Lyons*, 461 U. S. 95, 109 (1983); *Spencer v. Kemna*, 523 U. S. 1, 17 (1998) (internal quotation marks and brackets omitted).

The Federal Circuit's decision does not address or remedy Mr. London's concerns about the Veterans Court's improper application of legal standards and error of reliance on an undeveloped evidentiary record. One such error is the Federal Circuit's reliance on the Secretary's misinformation that Mr. London did not reply to an email for examination scheduling.

App. 234a. The record shows Mr. London did reply, and the Board made its decision based on improper evidence. App. 229a-230a. Unfortunately, the Federal Circuit and the Veterans Court decline to correct this prejudicial error within the scope of their authority.

Furthermore, the Federal Circuit and Veterans Court appear to go so far as to construe the *absence* of certain facts in the undeveloped record as dispositive factual findings. See *Florida Power & Light Co. v. Lorion*, 470 U.S. 729, 744 (1985) ("If the record before the agency does not support the agency action, if the agency has not considered all relevant factors, or if the reviewing court simply cannot evaluate the challenged agency action on the basis of the record before it, the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation."); *Camp v. Pitts*, 411 U.S. 138, 142 (1973) ("[T]he focal point for judicial review should be the administrative record already in existence, not some new record made initially in the reviewing court.")

In Mr. London's appeal, the Federal Circuit did not remand the appeal to the Veterans Court for proper adjudication, investigation, or explanation. Instead, the Federal Circuit disregarded Mr. London's evidence-based pleas, effectively ending his appeal with issues raised unresolved. *London v. McDonough*, No. 22-1503 (Fed. Cir.) The Federal Circuit's decision forces Mr. London to petition this Court for a Writ of Certiorari to compel action of the Secretary and the Courts below to comply with constitutional and statutory provisions.

In essence, this appeal reaches this Court because the Secretary's and the Courts' unlawful actions deprive Mr. London's constitutional and statutory rights. Further, the Secretary and Courts below willfully overlook Mr. London's evidence-based pleas to release his property rights.

Mr. London requests this Court remand his appeal with specific instructions to: 1) timely release all property interests in full; 2) order the Secretary to award full remuneration for lost CRSC entitlements; 3) deliver a signed letter of apology from the Federal Circuit; 4) deliver a signed letter of apology from the Secretary; and 5) enforce the Secretary's and the Court's immediate compliance with the Constitution and applicable federal laws.

This Court should find the Secretary's and the Federal Circuit's challenged actions contrary to the law and good order, and award the damages sought in Mr. London's Tort Claim, thereby providing relief for the irreparable damage (8+ years lost in appeals, inter alia) Mr. London has suffered and continues to suffer.

CONCLUSION

For the reasons explained above, the Court should grant this petition.

Respectfully submitted,

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