No.

IN THE

Supreme Court of the United States

DAVID FORSYTHE,

Petitioner,

v.

DENIS MCDONOUGH, Secretary of Veterans Affairs,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Application to the Honorable John G. Roberts, Jr.,
as Circuit Justice for the Federal Circuit

Pursuant to Supreme Court Rule 13.5, Applicant David Forsythe hereby requests a 40-day extension of time, to and including January 16, 2024, within which to file a petition for a writ of certiorari.

1. The decision below is *Forsythe v. McDonough*, No. 22-1610 (Fed. Cir. 2023). The Federal Circuit issued its opinion on March 24, 2023, *see* App. A, and denied rehearing en banc on September 5, 2023, *see* App. B. Unless extended, Applicant's time to seek certiorari in this Court expires December 4, 2023. Applicant is filing this application at least ten days before that date. *See* S. Ct. R. 13.5. This Court's jurisdiction would be invoked under 28 U.S.C. § 1254(1). Respondent does not object to this extension request.

2. This case concerns the interpretation of an important statute governing veterans' disability claims, 38 U.S.C. § 5103(a)(1). That provision requires the Department of Veterans Affairs (VA) to provide "notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." VA has implemented that statute with a regulation, 38 C.F.R. § 3.159(b)(1), that requires the agency to issue such a notice "when VA receives a complete or substantially complete initial or supplemental claim."

For the last several years, however, VA has refused to issue notice after receiving claims for disability benefits. Instead, the agency has attached to its standard claim form a document that purports to identify the medical or lay evidence necessary to substantiate *twelve* different types of claims, leaving veterans to decipher which disclosures pertain to their particular type of claim. *See* App. A at 15. Because VA provides that attachment to veterans before it knows anything about their specific claims, the attachment cannot account for relevant information "previously provided to the Secretary" in any particular applicant's case. 38 U.S.C. § 5103(a)(1).

Mr. Forsythe applied for and was denied VA disability benefits under that notice regime. He sought benefits for a left-shoulder condition that his physician determined was likely related to his military service. App. A at 2. VA later ordered its own examination, and the VA doctor who assessed Mr. Forsythe concluded that his shoulder condition was likely unrelated to service. *Id.* at 3. With just those two competing medical reports in the record, VA credited its own doctor's assessment

and denied Mr. Forsythe's claim. The Board of Veterans Appeals affirmed. *Id.* Mr. Forsythe then appealed to the Court of Appeals for Veterans Claims, arguing (among other things) that VA had failed to provide the notice required by 38 U.S.C. § 5103(a)(1) and 38 C.F.R. § 3.159(b)(1), and that proper notice would have prompted him to submit additional, dispositive evidence in support of his claim—including corroborating lay testimony and records of earlier medical examinations. The Veterans Court rejected this argument, concluding that VA had satisfied the governing statute and regulation merely by attaching purported notice to its standard claim form. App. A at 3-4.

A divided panel of the Federal Circuit affirmed. The majority first held that § 5103(a)(1) "does not require the agency to wait to provide notice until after it receives a veteran's application." *Id.* at 5-6. The majority did not explain how VA could tailor pre-application notice to account for information "previously provided to the Secretary," as the statute requires. The majority then acknowledged that VA's regulation expressly requires the agency to provide notice "[w]hen VA receives a complete or substantially complete initial or supplemental claim." *Id.* at 7 (quoting 38 C.F.R. § 3.159(b)(1)) (emphasis removed). But the majority effectively dismissed the regulation as embodying "outdated" VA policy and "urge[d]" VA in a footnote to amend the regulation to match the majority's understanding and "avoid any further confusion." *Id.* at 7-8 & n.1. The majority also ruled that any error in defying the governing regulation was harmless, on the ground that Mr. Forsythe would not have benefited from receiving better-tailored notice of potential additional evidence

after submitting the application that attached only his recent doctor's report. *Id.* at 8-9.

Judge Mayer dissented. He explained that VA had plainly violated at least its governing regulation, which remained in force despite the majority's suggestion that it no longer matched VA's undocumented "intent." *Id.* at 12-14. Judge Mayer also diagnosed the many ways that the attachment to VA's standard claim form failed to provide the "clear and timely" notice required by statute and regulation, including the attachment's lack of tailoring to "*the particular type of claim* being asserted by the veteran." *Id.* at 11, 14-15 (quotation marks omitted). Judge Mayer would have held that VA's properly promulgated regulation "means what it says" and "remand[ed] this case for the VA to apply" it correctly by affording Mr. Forsythe the appropriate notice. *Id.* at 14, 16.

3. The issues presented are of exceptional importance. The majority violated bedrock administrative law principles by effectively setting aside VA's regulation as "outdated" and instructing the agency in a footnote to amend the regulation to match the majority's view of how it should work. That ruling calls into question the legal force of properly promulgated regulations and the orderly relationship between agencies and courts, as defined by this Court's foundational ruling in *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954).

Ensuring adequate evidentiary notice to veterans is critical to the functioning of VA's benefits system. Inadequate notice threatens to derail vital support for veterans across the country, undermining a system that Congress designed to be

"unusually protective of claimants." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 437 (2011) (quotation marks omitted).

4. A 40-day extension within which to file a certiorari petition is reasonable and necessary.

a. Additional time is necessary for counsel to become fully familiar with the issues, the record, and relevant case law, and to best present the issues for this Court's review.

b. The request is further justified by undersigned counsel's press of business on other pending matters. Among other things, counsel has a joint petition for certiorari due in this Court on November 1, regarding *Bufkin v. McDonough*, No. 22-1089 (Fed. Cir.) and *Thornton v. McDonough*, No. 21-2329 (Fed. Cir.) (extension requests pending); a reply brief in *In re Canon Inc.*, No. 24-102 (Fed. Cir.), due on October 16; a response brief in *Gesture Technology Partners, LLC v. Apple Inc.*, No. 23-1463 (Fed. Cir.), due on October 27; a reply brief in *Apple Inc. v. Gesture Technology Partners, LLC*, No. 23-1494 (Fed. Cir.), due on November 2; a response and reply brief in *Apple Inc v. Gesture Technology Partners, LLC*, No. 23-1475 (Fed. Cir.), due on December 5; a response and reply brief in *Apple Inc. v. Gesture Technology Partners, LLC*, Nos. 23-1501, 23-1554 (Fed. Cir.), due on December 18; and an answering brief in *Fintiv, Inc. v. Apple Inc.*, No. 23-2208 (Fed. Cir.), due on December 19.

The requested 40-day extension would cause no prejudice to Respondent, who has advised that he has no objection to the extension.

Respectfully submitted,

/s/ Melanie L. Bostwick
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