No. 20-1148

In The Supreme Court of the United States

ROBERT M. SELLERS,

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

BRIEF OF NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM AS *AMICUS CURIAE* IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTERESTS OF AMICUS CURIAE

The National Law School Veterans Clinic Consortium (NLSVCC) submits this brief in support of the Petitioner, with consent from both parties.[1] The Board of NLSVCC, a 501(c)(3) organization, authorized the filing of this brief.

NLSVCC is a collaborative effort of the nation's law school legal clinics and pro bono advocates dedicated to addressing the needs of veterans. Members of NLSVCC work on a daily basis with veterans, many with mental health issues. Our members advocate in a backlogged VA system, often urging VA to fulfill its statutory duties to assist in the development of a claim, and to maximize benefits. NLSVCC is highly interested in seeing its clients receive the totality of their benefits without a hyper-technical "condition or symptom" requirement derived from a form.

SUMMARY OF THE ARGUMENT

Veterans commonly bear the burden of mental health issues after military service. They also commonly struggle to recognize, describe, and report their mental health symptoms. Among veterans, a cloud of

[1] The parties have consented to the filing of this brief, after timely notice. Pursuant to Supreme Court Rule 37.6, counsel states no party or counsel to a party authored this brief in whole or part and no party or counsel to a party contributed money to fund the preparation or submission of this brief. Only *amicus curiae* itself paid for the preparation and submission of this brief.

stigma surrounds mental illness and results in many veterans suffering in silence. For a veteran carrying the weight of daily mental stress, taking the first step to ask VA for help can seem like standing at the base of an unclimbable mountain. Fortunately, VA adjudicators are trained to assist the veteran reach the summit—the most accurate and appropriate compensation and care for the burdens the veteran is carrying—known as a claim's "optimum."

To begin this climb, veterans must simply indicate to VA they have a disability stemming from their military service. From there, VA has a duty to develop a veteran's claim for disability benefits throughout the journey, assisting the veteran who may lack even the most basic understanding of how symptoms reasonably reveal potential disabilities.

Congress designed the VA system to be non-adversarial and veteran-friendly, but it has grown to be complex and intimidating. A veteran needs VA's expert helping hand from the beginning to have any hope of properly navigating the benefits system and obtaining optimal compensation and care.

ARGUMENT

I. The prevalence and seriousness of mental illness in veterans give this case nationwide importance.

Mr. Sellers has suffered from PTSD, depression and "prominent insomnia" since his military service.

Pet. Br. at 4-5. These types of mental health issues are pervasive among our nation's veterans. In this case, Mr. Sellers did not obtain disability benefits for his mental health issues until twenty years after leaving the service. Veterans like Mr. Sellers struggle to take the first step and ask for help; they need VA's assistance at the beginning and throughout the process to ensure their disabilities are accurately and appropriately compensated.

A. Our nation loses seventeen veterans per day to suicide.

The rate of veteran suicide is tragically high in the United States; approximately seventeen veterans die by suicide each day. *2020 National Veteran Suicide Prevention Annual Report*, Dep't of Veteran Affairs (Nov. 12, 2020), https://www.va.gov/opa/pressrel/pressrelease.cfm?id=5565. This shocking number does not even include active-duty service members, National Guard servicemembers, and reservists. Leo Shane III, *New Veteran Suicide Numbers Raise Concerns Among Experts Hoping for Positive News*, Military Times (Oct. 9, 2019), https://www.militarytimes.com/news/pentagon-congress/2019/10/09/new-veteran-suicide-numbers-raise-concerns-among-experts-hoping-for-positive-news/. VA Secretary McDonough recently emphasized that veteran suicide is an urgent national problem that must be solved. *A Message from VA Secretary Denis McDonough*, Dep't of Veteran Affairs VAntage Point Blog (Feb. 9, 2021), https://blogs.va.gov/VAntage/84509/.

Veterans who lack resources to cover basic needs are three times more likely to have suicidal ideation than those who are financially secure. Eric B. Elbogen, et al., *Risk Factors for Concurrent Suicidal Ideation and Violent Impulses in Military Veterans*, 30(4) Pyschol. Assessment 425-35 (2018), https://pubmed.ncbi.nlm.nih.gov/. VA disability compensation thus provides life-saving income support. *See Martin v. O'Rourke*, 891 F.3d 1338, 1352 (Fed. Cir. 2018) (Moore, J., concurring, "The men and women in these cases protected this country and the freedoms we hold dear; they were disabled in the service of their country; the least we can do is properly resolve their disability claims so that they have the food and shelter necessary for survival.").

Because a lack of basic income support exacerbates and accelerates veterans' vulnerability to suicidal ideation, VA must address veterans' financial problems through proper claims adjudication. Proper adjudication requires VA to fulfill its statutory duties, including the duty to sympathetically review a claim, to assist in the development of a claim, and to maximize benefits. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see infra* Part II.C. VA's limited processing of only those conditions or symptoms identified by a disabled veteran on a dense agency form does not fulfill these duties. Thus, the Federal Circuit's decision, in effect, serves as a judicial imprimatur on VA's avoidance of its critical duties.

B. Veterans of all eras suffer higher rates of mental illness than the civilian population, including veterans of the Vietnam and Gulf War eras like Mr. Sellers.

Mental health issues are not unique to any one war-time period. Approximately one in four veterans of all eras seeking primary care in 2010 suffered from mental illness. Pet. Br. at 33. Mr. Sellers served during the Vietnam and Gulf Wars, eras that had significant mental health impacts on veterans.

1. Vietnam veterans still suffer mental health impacts fifty years after service.

Eight million Americans served in the Vietnam War and were subjected to—among other horrors—jungle warfare, Agent Orange exposure, firefights, bombing, and brutal living conditions. Many Vietnam veterans were unable to shake these experiences and brought the effects of war home. Unfortunately for this group of veterans, PTSD was not a recognized part of VA's disability compensation system until 1980. Matthew J. Friedman, *PTSD History and Overview*, Dep't of Veterans Affairs, PTSD: National Center for PTSD, https://www.ptsd.va.gov/professional/treat/essentials/history_ptsd.asp (last visited March 14, 2021).

By 1988, the comprehensive National Vietnam Veterans Readjustment Study found mental illness was a pervasive problem for this era of veterans. Richard Kulka, et al., *Contractual Report of Findings from the*

Nat'l Vietnam Veterans Readjustment Study, NVVRS 1 (Nov. 7, 1988), *available at* https://www.ptsd.va.gov/professional/articles/article-pdf/nvvrs_vol1.pdf. Over fifteen percent of all male Vietnam veterans—500,000 husbands, fathers and sons—suffered from PTSD. *Id*. at 2. Of all male Vietnam veterans, *more than half* experienced "clinically significant stress reaction symptoms." *Id*. at 7. Vietnam veterans also suffered from major depressive disorder (MDD) at high rates. *Id*. at VI-45. Twenty percent of Vietnam veterans with PTSD were found to have a lifetime diagnosis of depression. *Id*. at 44.

A 2015 follow-up study found that hundreds of thousands of Vietnam veterans still experience mental illness. Charles Marmar, et al., *Course of Posttraumatic Stress Disorder 40 Years After the Vietnam War: Findings from the Nat'l Veterans Longitudinal Study*, 72(9) Jama Psychiatry 875, 875 (Sep. 2015), https://pubmed.ncbi.nlm.nih.gov/26201054/. It is estimated that over one quarter-million Vietnam veterans currently suffer from PTSD, and one-third have current MDD. *Id*.

Prevalent mental health issues create functional impairment. Vietnam veterans with PTSD "perform[] less proficiently on tasks assessing sustained attention, working memory, and initial registration of verbal information compared with Vietnam veterans without mental disorder diagnoses." Jennifer Vasterling, et al., *Attention, Learning, and Memory Performances and Intellectual Resources in Vietnam Veterans: PTSD and No Disorder Comparisons*, 16(1) Neuropsychology 5,

10 (2002), https://pubmed.ncbi.nlm.nih.gov/11853357/. These functional impairments are precisely the reason Congress imposed a broad duty on VA to ensure veterans receive the maximum benefits to which they are entitled. Using a condition-or-symptom restriction to limit claim scope places the burden on the functionally-impaired veteran, impermissibly limiting VA's duty to assist.

2. Gulf War veterans also experience high rates of mental health issues and cognitive impairment.

A deployment to the Middle East can result in many medical and mental health issues. One study shows that seventy-nine percent of Gulf War veterans reported at least one chronic medical condition, and of deployed veterans, fifty-two percent screened positive for at least one mental health condition. *Health of Gulf War and Gulf War Era Veterans*, Dep't of Veteran Affairs Gulf War Newsletter (Winter 2016), https://www.publichealth.va.gov/exposures/publications/gulf-war/gulf-war-winter-2016/health-status.asp.

Gulf War Illness (GWI) remains the most prominent issue affecting Gulf War veterans today. Research Advisory Committee on Gulf War Veterans' Illnesses, *Gulf War Illness and the Health of Gulf War Veterans: Scientific Findings and Recommendations*, Dep't of Veteran Affairs (Nov. 2008), https://apps.dtic.mil/sti/pdfs/ADA490518.pdf. GWI typically includes persistent memory and concentration problems in addition to

other chronic abnormalities not explained by diagnoses. *Id*. GWI has various causes, including exposure to pyridostigmine bromide (PB) pills, which were designed to protect troops from nerve agents and other toxins. Mary G. Jeffrey, et al., *Neuropsychological Findings in Gulf War Illness: A Review*, Frontiers in Psychology (Sep. 2019), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC6775202/. In an effort to deal with the confounding health issues experienced by Gulf War veterans, Congress mandated that certain symptoms be presumptively service-connected, including neurological signs and symptoms. 38 U.S.C. § 1117(g)(6).

Because veterans suffer from mental health issues, cognitive and functional impairments, and complex illnesses like GWI, Congress has time and again recognized the immediate and serious need for VA to assist veterans across service eras. Veterans with severe and disabling mental health conditions, navigating the claims process pro se, need a flexible and non-adversarial framework to ensure that VA grants every benefit to which they are entitled.

II. Veterans with disabling mental illness need VA's assistance to navigate the complicated bureaucratic claims process to obtain life-saving income support.

Veterans face many obstacles in identifying and disclosing mental health conditions. Military culture notoriously "emphasizes self-reliance and toughness," giving rise to an ethos in which some veterans feel they

must "do their best to cope by themselves with negative affect and difficult emotions." Magdalena Kulesza et al., *Help-Seeking Stigma and Mental Health Treatment Seeking Among Young Adult Veterans*, Mil. Behav. Health 3 (2015), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4672863/pdf/nihms690483.pdf. Veterans tend to avoid treatment for their mental health even with significant symptoms. Kulesza, *supra* (noting approximately fifty percent of recent veterans had not sought treatment for their mental health). The stigma and complexity of mental health issues heighten the importance of VA fulfilling its broad statutory duty to connect these veterans with benefits to which they are entitled.

A. The VA adjudication system is a labyrinth for veterans, especially those suffering from mental health issues.

Claimants do not have the benefit of attorneys when first filing their disability compensation claims and thus have great difficulty navigating VA's labyrinthine bureaucratic systems. *See Martin*, 891 F.3d at 1352 (Moore, J., concurring, "Established with the intent of serving those who have served their country, the veterans' disability benefits system is meant to support veterans by providing what are often life-sustaining funds. Instead, many veterans find themselves trapped for years in a bureaucratic labyrinth, plagued by delays and inaction.").

When VA fails to assist veterans with benefits issues from the beginning, veterans can wait years, and sometimes decades, before they are accurately and appropriately compensated for the burdens they carry from service. *See Martin*, 891 F.3d at 1352. This failure impacts not only veterans, but also their families. For instance, in 1987, widow Aracelis Rodriguez, requested survivor pension five separate times by personally visiting the VA Regional office; each time VA told her she was ineligible. *Rodriguez v. West*, 189 F.3d 1351, 1352 (Fed. Cir. 1999). In March 1990, she filed a written application. *Id*. VA then approved the pension application with an effective date of April 1990. *Id*. Mrs. Rodriguez appealed, arguing the effective date should have been 1987 when she personally visited VA to apply for benefits. *Id*.

The court did not recognize Mrs. Rodriguez's attempts to ask VA for help as a claim. The Federal Circuit affirmed a denial of benefits on the basis that 38 C.F.R. § 3.1(p) (1987) defined a "claim" as a communication in writing, even though the statute, 38 U.S.C. § 5102, did not specify the manner of the communication. *Id*. at 1353. The court further found that the statutory language mandating aid to applicants in 38 U.S.C. § 7722(d) (*repealed* 2006) did not impose an enforceable legal obligation upon VA as it was only "hortatory." *Id*. at 1355.

Mrs. Rodriguez's case highlights the difficulties pro se veterans and their families face even simply raising a claim in the complex VA system without proper VA assistance. VA did not inform Mrs.

Rodriguez that she was incorrectly applying for her pension when she personally sought help at VA office. She understood that she was entitled to aid in the application process, which is the clear import of § 7722(d). The record showed Mrs. Rodriguez requested benefits prior to 1990, but VA denied an earlier effective date because the statute was hortatory. In Mr. Sellers' case, the duty to assist is not hortatory; it is a statutory mandate that must be enforced.

VA, not the veteran, is in the best position to connect symptoms and conditions in the record with compensable disabilities. A case recently handled by the Robert W. Entenmann Veterans Law Clinic at Hofstra Law illustrates the errors and delays that result when VA narrowly construes its duty to assist. Mr. Rigoberto Rosario served in the U.S. Army from 1979 to 1982 and from 1990 to 1991. As part of Operation Desert Shield/Storm, he was deployed to Southwest Asia where he was exposed to combat and environmental toxins. He now suffers from service-connected PTSD, asthma, and lower back injuries.

The very nature of Mr. Rosario's disabilities made describing those disabilities, and even his symptoms, difficult from the start. The record, however, revealed classic symptoms of disabilities that commonly arise from service in the Gulf War, something VA is trained to identify. Mr. Rosario first applied for VA disability compensation for "memory loss," and other conditions in 1994. In 1995, VA denied all of his claims. After his timely appeal, VA ordered a medical examination for mental disorders in 1998. The examiner noted that

Mr. Rosario saw "many dead bodies, and women and kids wounded and dead," and that he experienced flashbacks. The examiner observed that Mr. Rosario's memory and concentration were "not very strong" and noted that Mr. Rosario's sleep was "very light," and he was "always on the alert." The examiner diagnosed Mr. Rosario with persistent depressive disorder.

VA could have reasonably connected the symptoms and conditions in the record to more than one compensable disability. But despite the examiner's findings and diagnosis, VA denied Mr. Rosario's claims for "dysthymic disorder claimed as memory loss due to an undiagnosed illness," and all other claims. In 2016, Mr. Rosario applied for VA disability compensation for PTSD, asthma, and back conditions. After three more denials, VA finally granted Mr. Rosario service-connected PTSD in 2020. Even though Mr. Rosario claimed memory loss—a known symptom of PTSD as well as a presumptive neurological symptom—in 1994, VA assigned an effective date of 2016. *See* 38 U.S.C. § 1117(g)(6); 38 C.F.R. § 4.130.

Had VA properly handled Mr. Rosario's application from the beginning, he would not have had to wait twenty-six years to receive the benefits that address the burdens he carries from service. Once the error was uncovered, VA could have made up for lost time by assigning the correct effective date for his claims. Mr. Rosario's experience is not an isolated incident. This injustice will continue to harm veterans if VA follows the Federal Circuit's decision in this case. Mr. Sellers, like Mr. Rosario and Mrs. Rodriguez, only needed VA's

helping hand to obtain appropriate benefits for his disability.

B. VA's failure to recognize reasonably identifiable conditions results in systematic breaches of its duty to assist.

The Veterans Court elucidated a straightforward application of VA's statutory duty to assist that is in line with Congress' unambiguous intent for a pro-veteran system. Under the Veterans Court test, "a general statement of intent to seek benefits, coupled with a reasonably identifiable" condition found in records in VA's possession may constitute a claim. *Sellers v. Wilkie*, 30 Vet. App. 157, 161 (2018). This is a natural application of the VA benefits framework; it recognizes the importance of a non-adversarial system and resolves ongoing intra-circuit inconsistency.

In contrast to the Veterans Court approach to providing assistance at the beginning of the adjudication process, the Federal Circuit's approach impermissibly limits the scope of VA's duty to assist. Instead of placing the burden of identifying the benefits issues on the experts, the Federal Circuit approach allows VA to rely on the claim form to *limit* benefits to conditions or symptoms raised by the veteran, even with facially obvious diseases or injuries in the record.

1. Congress designed VA's broad duty to assist to facilitate the non-adversarial nature of the VA benefits system.

Congress implemented the VA benefits system through a veteran-friendly statutory framework. This "strongly and uniquely pro-claimant" system is distinctively non-adversarial. *Hodge*, 155 F.3d at 1362. A non-adversarial system implies that VA must assist veterans in fully and sympathetically developing each claim "to its optimum." H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5762, 5794-95. The statutory duty to assist requires VA to "determine all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled as a claim for [e.g.] TDUI." *Roberson v. Principi*, 251 F.3d 1378, 1384 (Fed. Cir. 2001); 38 U.S.C. § 5103A; *Hodge*, 155 F.3d at 1362-63.

The scope of VA's duty to assist is defined by reading the statutory and regulatory framework as a whole. Throughout the claims process, VA must do all of the following:

> (1) Notify the veteran if the application is incomplete and identify the information necessary to complete it. 38 U.S.C. § 5102(b); *Robinette v. Brown*, 8 Vet. App. 69, 77-78 (1995);
>
> (2) Assist the veteran in obtaining relevant records and notify the veteran "of any information and medical or lay evidence" necessary to support the claim or to complete the

application. 38 C.F.R. § 3.159(b) & (c); *Jones v. Wilkie*, 918 F.3d 922, 926 (Fed. Cir. 2019) (holding VA may avoid the duty under 38 U.S.C. § 5103A(a)(2) only when "no reasonable possibility exists that such assistance would aid in substantiating the claim.");

(3) Obtain a medical evaluation for the veteran if the medical opinions in the record are insufficient. 38 C.F.R. § 3.159(c)(4);

(4) Apply veteran-friendly presumptions, including:

> (i) the doctrine of benefit of the doubt, resolving all reasonable doubts "in favor of the claimant," 38 C.F.R. §§ 3.102, 4.3;
>
> (ii) the interpretive doubt principle: "if there is any ambiguity in the text, the statute must be interpreted in the veteran's favor," *Robinette*, 8 Vet. App. at 78 (citing *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994));
>
> (iii) the veteran seeks the maximum available benefit for all potential claims including those not expressly raised, *Roberson*, 251 F.3d at 1384; *AB v. Brown*, 6 Vet. App. 35, 38 (1993); *see also Scott v. McDonald*, 789 F.3d 1375, 1381 (Fed. Cir. 2015); and
>
> (iv) VA reviews all records "with due consideration to the policy of [VA] to administer the law under a broad and liberal interpretation consistent with the

> facts in each individual case," 38 C.F.R. § 3.303.
>
> (5) Make a determination based on the entire record prior to a decision on the merits. 38 U.S.C. § 7104(a). This includes records in VA's constructive possession, that is documents within the Secretary's control that "could reasonably be expected to be a part of the record." *Bell v. Derwinski*, 2 Vet. App. 611, 613 (1992); *Euzebio v. McDonough*, No. 2020-1072, ___ F.3d ___, 2021 WL 800594, *13 (Fed. Cir. March 3, 2021) (holding Agent Orange reports generated for VA's benefit are relevant and reasonably expected to be part of the record and did not create an "unworkable standard.").[2]

VA's duty to assist does not end after an initial determination. If that award is less than allowed by law, "it follows that such a claim remains in controversy where less than the maximum available benefit is awarded." *AB*, 6 Vet. App. at 38. At each level of review, VA's duty remains. If VA faces an administrative burden in flagging reasonably identifiable conditions on its first review, it can later identify the earliest effective date supported in the medical record for eligible service-connected conditions. In this way, the system is designed to always move toward the most accurate and

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[2] A reviewer " 'ignor[ing] [a report] she knows exists' and knows 'contains important . . . information,' cannot 'possibly be the outcome of a rational system of adjudication, especially one designed to be pro-veteran and non-adversarial.' " *Euzebio*, 2021 WL 800594, at *10.

appropriate compensation to which a veteran is entitled.

2. The Veterans Court test recognizes the importance of a non-adversarial system and resolves ongoing intra-circuit inconsistency.

The Veterans Court applied VA's duty to assist in line with the pro-veteran and non-adversarial purpose of the VA benefits system by focusing on VA's duty and not the burden imposed on the veteran. First, the expertise of the VA adjudicators is eminently suited to identifying conditions consistent with military service. The Federal Circuit recently emphasized this same point, stating, "it is unclear what the Government believes VA adjudicators are meant to do if not evaluate and draw conclusions from record evidence to discern its impact on individual cases." *Euzebio*, 2021 WL 800594, at *13 (citing 38 U.S.C. §§ 5107(b), 7104(a), 7252(b); 38 C.F.R. §§ 3.102, 3.159, 3.303). The non-adversarial approach is especially important for veterans facing complex, stigmatized, and frequent occurrences of mental health issues. VA adjudicators are in the best position to identify common conditions or symptoms suffered by our nation's veterans. *See infra* Part III (discussing VA's implementation of its duty to assist for stigmatized conditions).

Second, the Federal Circuit's inconsistent approach to this issue requires the Supreme Court's

guidance. The Federal Circuit has created two contrary standards regarding VA's duty and the scope of a veteran's "claim." In *Shea v. Wilkie*, 926 F.3d 1362 (Fed. Cir. 2019), the Air Force diagnosed the veteran with adjustment disorder with anxiety and depressed mood, which was later exacerbated after an automobile accident. In 2007, the veteran filed a claim for service connection for four physical disabilities. She referred to the medical records where she had received treatment after the accident. VA granted service-connection for the physical disabilities, and similar to *Sellers*, did not tag her mental health issues. In 2008, she opened a claim for PTSD and VA granted service-connection as of the date of her application. Appealing for an earlier effective date from her initial claim for service-connection in 2007, the Federal Circuit held that although the veteran had not raised PTSD in the 2007 claim, "where a claimant's filings refer to specific medical records, and those records contain a *reasonably ascertainable diagnosis of a disability*, the claimant has raised an informal claim for that disability." *Id*. at 1370 (emphasis added).

Here, Mr. Sellers was diagnosed with a mental health condition while on active duty. In 1996, he filed a claim for physical disabilities, pointed the VA to his military medical records, and included a remark, "Request for [service-connection] for disabilities occurring during active-duty service." *Sellers v. Wilkie*, 965 F.3d 1328, 1330 (Fed. Cir. 2020). VA did not grant service-connection for his mental health condition despite it being clearly and repeatedly referenced in

his military treatment records. He was subsequently granted service-connection for MDD and PTSD but denied the 1996 effective date. *Id*. at 1338. Despite the holding in *Shea*, the Federal Circuit held on appeal that Mr. Sellers failed to identify his disability in 1996 with even "a high level of generality." *Id*. at 1335. Contrasting the case with *Shea*, the court noted "[in *Shea*] the veteran's claim pointed to specific medical records in which the veteran's psychiatric condition was noted." *Id*.

The difference between these two holdings is at best puzzlingly nuanced; at worst, it fosters uncertainty on the scope of the claim and VA's duty to assist.[3] The Veterans Court's decision in *Sellers* follows naturally from the holding of *Shea*. Meanwhile, the reversal at the Federal Circuit level endorses a weak application of VA's duty. This approach will at the very least result in inconsistent interpretation by VA adjudicators at all levels of review. More likely, the resulting systematic breaches of VA's duty to assist will cause eligible veterans to wait decades for life-saving support.

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[3] Intra-circuit splits are appropriate for Supreme Court review when "certification can serve the interests not only of legal clarity but also of . . . economy and [']the proper administration and expedition of judicial business.[']" *United States v. Seale*, 558 U.S. 985 (2009). *Seale*'s sound principle is particularly helpful where one circuit has exclusive jurisdiction as here.

3. When VA ignores reasonably identifiable conditions in the record, it systematically deprives veterans of benefits they have earned.

The Federal Circuit's approach in *Sellers* enables VA to systematically breach its duty to assist by ignoring reasonably identifiable conditions, including those that are clearly compensable. The Secretary argues that disabled veterans, when utilizing the VA claim form, must identify (albeit generally) every possible condition connected to the benefits sought. *Sellers*, 965 F.3d at 1330. VA claim forms exist as a tool to assist the veteran to maximize his or her benefits. VA should not use this tool as a shield to limit the benefits for which the veterans are eligible. In so doing, VA systematically breaches its duty to assist by elevating form over substance. VA relies on veterans to identify all their potential issues through self-reported conditions or symptoms, meanwhile persistently ignoring reasonably identifiable conditions in the record. This breach of duty is further compounded both by the complexity of the labyrinthine VA system and the cognitive impairments faced by many veterans with mental health issues. *See supra* Parts I & II.B.

The scope of VA's duty must be viewed in light of the minimal requirements expected of veterans. Nothing in the relevant statutes or regulations indicates the veteran must do anything more than identify the type of benefit sought. 38 C.F.R. §§ 3.1(p), 3.160(a). The purpose of creating standardized forms was to improve the quality of VA response and "provide veterans . . .

with a *clearer and easier way* to initiate and file claims." Standard Claims and Appeals Forms, 79 Fed. Reg. 57,660 (September 25, 2014) (emphasis added). Further, when incorporating the claim form process, VA stated "[t]his *rulemaking will not affect veterans' eligibility for benefits*, but rather prescribe that they must use a standard application form to formally apply for benefits." *Id*. at 57,661 (emphasis added).

Requirements of the veteran to identify "any" symptoms or medical conditions related to the benefit sought is limited to "the extent the form prescribed by the Secretary so requires." 38 C.F.R. § 3.160(a)(4); *see also* 38 C.F.R. § 3.159 (defining "substantially complete application.") The claim form provides only one-half line for the veteran to identify symptoms and conditions, and also allows for general remarks. The form does not, however, require an exhaustive list of symptoms or conditions, nor does it warn that a failure to provide an exhaustive list limits benefits awarded.

The Federal Circuit's holding in *Sellers* is antithetical to the core policy of a non-adversarial, veteran-friendly system—it pits veteran against VA, precisely what Congress sought to avoid. It allows VA to use the claim form to place boundaries around the claim at the beginning of the review process; it relies on the veteran's description of symptoms, a description uninformed by medical, legal, or administrative expertise. As repeatedly held by the Federal Circuit, the court cannot "impose[] on veterans a requirement inconsistent with the general character of the underlying statutory scheme for awarding veterans' benefits."

Hodge, 155 F.3d at 1362 (citing *Coffy v. Republic Steel Corp*., 447 U.S. 191, 196 (1980)).

The claim form should not shield VA from responsibility for future additions or corrections to those benefits issues, nor cut off VA's continuous duty to reach the most accurate and appropriate compensation for each veteran (i.e., develop each claim to its optimum). It is Congress who has the authority, not VA or the Court, to redefine the scope of VA's duty to assist should it desire to do so. *Mathis v. Shulkin*, 137 S.Ct. 1994, 1995 (2017) (Gorusch, J., dissenting from denial of certiorari: "[H]ow is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?").

III. VA adjudicators are experts in veteran claims review and are in the best position to properly develop and maximize veterans' benefits.

VA is equipped—and is the most well-situated in the VA adjudication process—to review the military and medical evidence in a veteran's disability claims file and develop the issues contained therein. VA's expertise in developing reasonably identifiable conditions in the record stands in starkest contrast to veterans suffering from disabling mental health conditions lacking medical expertise to communicate their

symptoms. Current policies and procedures reflect the need for VA to fulfill its duty to assist in light of the stigma associated with certain mental health issues.

A. Military Sexual Trauma cases illustrate VA's ability to robustly perform its duty to assist.

Reporting symptoms of certain types of stigmatized mental health issues is a high barrier for veterans. VA's duty to recognize those symptoms in the record is vital to achieving a veteran-friendly system. For example, Military Sexual Trauma (MST) and its related mental health conditions plague our nation's veterans. Laura Wilson, *The Prevalence of Military Sexual Trauma: A Meta-Analysis*, 19 Trauma, Violence & Abuse 584, 592-93 (2018). VA's national screening program found approximately one in three women and one in fifty men have experienced MST. *Id*. Many other mental health issues are strongly associated with MST, including PTSD, anxiety disorders, depression, dissociative disorders, eating disorders, bipolar disorder, substance use disorders, and personality disorders. Jenny Hyun, Joanne Pavao & Rachel Kimerling, *Military Sexual Trauma*, 20 PTSD Res. Q. 1, 2 (2009).

Due to the stigma and self-blame associated with MST, veterans are not likely to disclose MST unless directly asked. *Id*. VA itself notes that "many incidents of personal trauma are not officially reported, and the victims of this type of in-service trauma may find it difficult to produce evidence." U.S. Dep't Veterans Affairs,

M21-1 Adjudication Procedures Manual (M21-1) pt. IV, subpt. ii, ch. 2, § D.5.b. As a result, VA tells its adjudicators to request information from the veteran as "compassionately as possible." *Id*. This instruction is important given that VA may not treat the absence of military documentation concerning the assault as evidence the assault did not occur. *AZ v. Shinseki*, 731 F.3d 1303 (Fed. Cir. 2013).

VA promulgated a specific regulation for PTSD symptoms related to MST. Under 38 C.F.R. § 3.304(f)(5), VA will accept "evidence from sources other than the veteran's service records" as corroboration of an in-service event, and will consider "evidence of behavior changes," or "markers" as well. Markers include "a request for a transfer to another military duty assignment; deterioration in work performance; substance abuse; episodes of depression, panic attacks, or anxiety without an identifiable cause." *Id*.

The M21-1, pt. IV, subpt. ii, ch. 1, § D, shows VA is keenly aware of the need to properly implement VA's broad duty to assist in MST cases based upon this array of acceptable evidence. The Manual provides explicit step-by-step instructions for developing these issues, including the collection of all records, follow-up requests to the veteran for necessary details of the incident, and review and annotation of the primary sources of evidence. M21-1, pt. IV, subpt. ii, ch. 1, § D.5.d. This roadmap for adjudicators also requires VA to obtain alternative sources of evidence identified by the veteran and review all of the records for evidence of markers. *Id*. Recently, the Veterans Court

found VA must secure the records of other servicemembers identified by the veteran, which may contain information substantiating the claim—or tell the veteran why it will not secure these records. *Molitor v. Shinseki*, 28 Vet. App. 397, 410 (2017).

VA already trains adjudicators to administer a non-adversarial system for veterans who experience MST. As reflected in the M-21-1, VA should administer a similar, yet simpler approach to reviewing other claims for disability benefits. The adjudication required for MST issues demonstrates VA's important role in assisting veterans. If VA trains adjudicators to provide the robust analysis outlined above, the Court need not stretch to conclude VA should have read Mr. Sellers' service medical records and adjudicated his mental health condition in 1996.

B. Current training manual provisions demonstrate VA should have recognized Mr. Sellers' mental health condition in 1996.

Mr. Sellers' general request for service-connected disability benefits combined with the evidence in his record required VA to acknowledge MDD as a claim in 1996. The M21-1 instructs adjudicators to "recognize, develop, clarify, and decide all issues and claims." M21-1, pt. III, subpt. iv, ch. 6, § B. Adjudicators must consider issues that arise based on VA's review of the evidence, reading the statement sympathetically, *even if not expressly claimed*. *Id*. The Manual notes VA "does

not expect, nor does the law require, claimants to articulate with medical precision the disabilities for which compensation is sought." *Id*. Further, VA trains its adjudicators to ensure that the claim is clarified when it is not clearly defined. *Id*. Notably, the Manual does not limit development to only claimed conditions or symptoms.

Although the law has changed since 1996,[4] today's Manual demonstrates how VA should have processed Mr. Sellers' application. Although Mr. Sellers did not expressly claim MDD, he was not required to do so. Mr. Sellers' application for service-connected disability benefits was enough to trigger VA's duty to sympathetically read his statement and evidence in the record, including his service treatment records, and develop potential claims to their optimum. Mr. Sellers' request for service-connected benefits, ample evidence of mental health issues in the record, and VA's broad duty to assist makes it clear that Mr. Sellers established a claim for benefits for his mental health condition in 1996.

Had VA followed the proper procedures pursuant to VA's duty to assist, it would have connected Mr. Sellers with benefits for his mental health conditions in 1996. If nothing else, VA could have course corrected and fully and sympathetically developed his claim upon appeal. The Federal Circuit's decision endorses

[4] In 2000, after the decision in *Morton v. West*, 12 Vet. App. 477 (1999), Congress passed the VCAA which reestablished Congress' original intent that VA assist claimants in their pursuit of benefits, regardless of whether a claim was well grounded.

VA's ongoing failure of its duty to assist and establishes yet another obstacle in the path of Mr. Sellers and many of our nation's most vulnerable veterans in obtaining their earned disability benefits.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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