No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Congress requires that, when a court finds error in a Department of Veterans Affairs ("VA") action, the court must "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2); *see* 5 U.S.C. § 706 (requiring the same for review of other federal agencies' actions). The provision's purpose is to avoid rendering courts "impregnable citadels of technicality." *Shinseki v. Sanders*, 556 U.S. 396, 407, 129 S. Ct. 1696, 1705, 173 L. Ed. 2d 532 (2009). It is *not* to unwind *Chenery*.

Nor can it be. *Chenery* reflects and enforces a requirement of the U.S. Constitution. In particular, for a delegee of Congress's Article I legislative power to invoke that power validly, the delegee must state the basis for doing so. *Chenery* requires the delegee's reasons to be those contemporaneous to the action.

The Court, to be sure, has never clarified that *Chenery*'s foundation is the Constitution rather than a statutory requirement or prudential concern. A circuit split has resulted on this important issue.

In the decision below, the Federal Circuit forbade all *per se* rules that deem prejudicial any kind of VA error whatsoever. The error subjugates *Chenery* to a mere statute, thrusting VA's overseeing courts into upholding agency error on precisely the *post hoc* rationalization that *Chenery* prohibits. *Chenery*'s constitutional nature requires the opposite result.

The question presented is: Must a court, when taking due account of the rule of prejudicial error on review of agency action, comport with *Chenery*?

RELATED PROCEEDINGS

Richard D. Simmons v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 19-1519 (Fed. Cir. judgment entered July 17, 2020)

Richard D. Simmons v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 16-3039 (Vet. App. judgment entered Nov. 27, 2018)

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INTRODUCTION

The Court has not clarified on what legal grounds it decided *SEC v. Chenery Corp.*, 318 U.S. 80, 63 S. Ct. 454, 87 L. Ed. 626 (1943) ("*Chenery I*"), and *SEC v. Chenery Corp.*, 332 U.S. 194, 67 S. Ct. 1575, 91 L. Ed. 1995 (1947) ("*Chenery II*"; collectively, "*Chenery*"). Whether *Chenery* rests on grounds of statute, prudence, or the Constitution carries far-reaching consequences for courts reviewing agency action. It resolves whether they *must* remand if deeming an agency's error harmless would violate *Chenery*.

This petition asks the Court to clarify that *Chenery*'s legal foundation is the Constitution. In particular, *Chenery* enforces the requirement that, for an invocation of Congress's delegation of legislative power to pass Article I muster, the delegee must state its contemporaneous basis for invoking that power.

Because the *Chenery* principle is of the Constitution, it takes precedence over any statute. That includes the provision of the Veterans' Judicial Review Act ("VJRA"), Pub. L. 100-687, 102 Stat. 4105 (1988), codified at 38 U.S.C. § 7261(b)(2), and Administrative Procedure Act ("APA"), Pub. L. 79-404, 60 Stat. 237 (1946), codified at 5 U.S.C. § 706, for courts reviewing agency error to take due account of the rule of prejudicial error.

In the decision below, the Federal Circuit barred, for not taking due account of the rule of prejudicial error, all *per se* rules that would deem prejudicial any agency error of any kind whatsoever. That sweeping

decision requires upholding agency error even when doing so requires *post hoc* rationalization.

Here, that took the following form. Congress entitles our country's military veterans to compensation for disabilities resulting from their military service. A veteran's claim for service connection has three prima facie elements: (1) a current disability, (2) an in-service incurrence of disability, and (3) a nexus between the current disability and the in-service incurrence. The first two prima facie elements antecede the third.

VA denied Mr. Simmons's claim on the second prima facie claim element. VA did not address the third. The U.S. Court of Appeals for Veterans Claims ("Veterans Court") found that VA erred with respect to the claim element that VA addressed. The court then suggested that *Sanders* prohibits any *per se* rule that would deem prejudicial *any* kind of agency error. It resolved the previously unaddressed third claim element against Mr. Simmons, and it affirmed.

The Federal Circuit then affirmed, interpreting *Sanders* as a *per se* bar against *per se* rules of prejudicial error. It did not address *Chenery*.

The Federal Circuit's silence as to *Chenery* implicitly subjugates *Chenery* to the statutory provision to take due account of the rule of prejudicial error. The holding cannot be correct. It favors a statute over a requirement of the Constitution.

The harm of the Federal Circuit's error extends beyond even the millions of our country's veterans in

proceedings under the VJRA. Its reasoning applies with equal force to court review of agency error under the APA's nearly identical harmless-error provision.

This Court's review is warranted to clarify that: (1) *Chenery* sets precedent regarding no mere statute or prudential concern but, instead, a requirement of the Constitution; and, accordingly, (2) irrespective of any statutory provision, a court must deem prejudicial any kind of agency error that, to let stand, would violate *Chenery*'s bar of *post hoc* rationalization.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 964 F.3d 1381 (Fed. Cir. 2020). Pet. App. 1–10. The order of the Court of Appeals denying rehearing and rehearing en banc is not reported. Pet. App. 72–73. The opinion of the Veterans Court is reported at 30 Vet. App. 167 (2018). Pet. App. 11–46. The opinion of the Board of Veterans' Appeals is not officially reported but appears at 2016 WL 3651237 (Bd. Vet. App. May 13, 2016). Pet. App. 47–71.

JURISDICTION

The Federal Circuit entered judgment on July 17, 2020, Pet. App. 1–10, and denied a timely petition for rehearing en banc on October 1, 2020, Pet. App. 72–73. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED

This case involves Article I, Section 1, of the U.S. Constitution: "All legislative Powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives." It also involves 5 U.S.C. § 706 (2020); 38 U.S.C. §§ 105(a) and 311 (1970); 38 U.S.C. §§ 1110, 5107, 5109A, and 7261(b)(2) (2020); and 38 C.F.R. §§ 3.105(a) and 3.156(a) (2019). Relevant portions of these provisions are reproduced at Pet. App. 76-84. All citations below to these provisions are, except otherwise noted, to the foregoing versions.

STATEMENT OF THE CASE

Mr. Simmons receives treatment during his military service for a psychiatric condition.

The petitioner, Richard D. Simmons, served honorably in the U.S. Navy from November 1968 to January 1970. Pet. App. 4; Pet. App. 12. When he sought to enter military service, the Navy provided Mr. Simmons with a medical examination. *See* Pet. App. 12. The examining physician documented no psychiatric symptoms. *Id.*

Throughout Mr. Simmons's military service, he experienced feelings of depression and homesickness. Pet. App. 4–5. The Navy hospitalized him in April 1969 following a suicide attempt. Pet. App. 12. The examining medical professional's impression

was of "depressive reaction," "attempted suicide." *Id.* That individual diagnosed Mr. Simmons with "situational depression." Pet. App. 13.

In December 1969, a military clinician opined that Mr. Simmons had no evidence of psychosis. *Id.* This individual diagnosed Mr. Simmons with immature personality disorder. *Id.* Mr. Simmons was discharged the next month. *See id.*

VA denies Mr. Simmons's original claim for service-connected compensation.

"Service connection" is a determination that a disabling condition was suffered, contracted, or aggravated while in line of duty, typically entitling a U.S. military veteran to monthly disability compensation. *See*, *e.g.*, 38 U.S.C. § 1110; *Saunders v. Wilkie*, 886 F.3d 1356, 1361 (Fed. Cir. 2018). A claim of service connection has three prima facie elements: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *E.g.*, *Saunders*, 886 F.3d at 1361.

In June 1974, following a December 1972 grant of VA non-service-connected pension benefits due to polyarthritis of multiple joints, Mr. Simmons applied with VA for service-connected disability compensation for conditions including rheumatoid arthritis and a psychiatric condition. *See* Pet. App. 5; Pet. App. 13–14. He attached a private hematologist's opinion that "it is

a reasonable presumption that the illness manifested as mental depression during [service] is the same illness now manifested as arthritis involving multiple joints." Pet. App. 14. The hematologist added that "it [is] likely that the chronic disorder [Mr. Simmons] now has was present at the time of his military service." *Id.*

In August 1974, VA provided Mr. Simmons with separate physical and psychiatric medical examinations. *See* Pet. App. 5; Pet. App. 14. VA diagnosed him with arthritis and a nervous condition with depressive features as a result of arthritis. *See* Pet. App. 5.

Even so, in September 1974 VA denied service connection for rheumatoid arthritis and a nervous condition. Pet. App. 5; Pet. App. 15. VA's adjudicator found no evidence that Mr. Simmons had suffered a chronic neurosis or arthritis during service. Pet. App. 5; Pet. App. 15.

VA also concluded that Mr. Simmons's anxiety disorder was not related to the immature personality disorder diagnosed in December 1969. *See* Pet. App. 15. VA instead found that his nervous condition was a by-product of the arthritis for which VA had granted pension benefits, on a basis that had not required a showing of the "service connection" necessary for VA disability compensation, in December 1972. *See* Pet. App. 5. Mr. Simmons did not timely perfect a direct appeal. *See* Pet. App. 15.

VA denies Mr. Simmons's later pleadings for service-connected compensation.

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

In 1977, Mr. Simmons applied to reopen his previously denied claims. Pet. App. 15. VA granted reopening but again denied them. *Id.* In 1990, Mr. Simmons again applied to reopen the claims. Pet. App. 15–16. On appeal to VA's highest appellate tribunal, the Board of Veterans' Appeals ("Board"), VA granted reopening but, at the claims' merits stage, again denied them. Pet. App. 16. Mr. Simmons did not timely file a direct appeal. *Id.*

Another pro-veteran feature of the VA claims system permits relief from an adverse VA decision, at any time, without a timely direct appeal or reopening. It requires VA to revise its decisions for clear and unmistakable error ("CUE"). *See* 38 U.S.C. § 5109A; 38 C.F.R. § 3.105(a).

In December 2005, Mr. Simmons moved to revise, for CUE, VA's September 1974 denial. Pet. App. 16. That motion initiated the current proceedings. VA denied the motion, Mr. Simmons appealed up to the Veterans Court, and that court vacated the motion's denial

and remanded the claim. *See* Pet. App. 16–17. On remand, the Board in May 2016 again denied Mr. Simmons's motion to revise VA's September 1974 decision for CUE. *See* Pet. App. 17–18. That agency decision underlies this petition.

In May 2016, the Board denies revision on the basis that Mr. Simmons had not established service connection's second prima facie claim element. It did not address the third element.

The three prima facie claim elements to establish service connection are, to repeat, (1) a current disability, (2) an in-service incurrence of disability, and (3) a causal nexus between the two. The nexus requirement, by examining "the" present disability and "the" disability incurred or aggravated during service, presupposes the existence of both. Accordingly, the first two prima facie claim elements for establishing service connection logically antecede the third.

The specific basis for Mr. Simmons's motion to revise the September 1974 denial of service connection is that VA clearly and unmistakably erred with respect to two legal presumptions that address service connection's second prima facie element, "in-service incurrence." *See* Pet. App. 17–26.

In particular, a VA claimant typically must prove each prima facie claim element to the standard of approximately at least as likely as not, with the claimant receiving the benefit of doubt. *See* 38 U.S.C. § 5107. Congress, however, long has eased claimants' burdens

by providing them with several statutory presumptions. The two presumptions pertinent to Mr. Simmons's CUE motion are the presumptions, extant in 1974, of sound condition and of line of duty. *See* 38 U.S.C. §§ 105(a), 311 (1970).

The presumption of sound condition, as extant in 1974, requires VA to deem the U.S. military to have accepted each service member in sound health except as "noted at the examination, acceptance, and enrollment" for service. 38 U.S.C. § 311 (1970). This presumption aids VA claimants in meeting service connection's second prima facie claim element, cabining when VA may consider a claimant who has a clear military entrance medical examination, and evidence of suffering a health condition during service, to have incurred that health condition. *See*, *e.g.*, Pet. App. 20–21.

The presumption of line of duty, as extant in 1974, requires VA to deem an injury or disease incurred during active service "to have been incurred in line of duty and not the result of the veteran's own misconduct." 38 U.S.C. § 105(a) (1970). It also aids VA claimants in meeting service connection's second prima facie element, cabining VA in determining whether a claimant, who has evidence of suffering any health condition during a period of active service, incurred that condition due to the veteran's own misconduct. *See*, *e.g.*, Pet. App. 23–24.

The Board denied Mr. Simmons's motion for revision because, as the Veterans Court determined on

appeal, the Board clearly misapplied the law as to both of these presumptions. *See* Pet. App. 20–26. With respect to the presumption of sound condition, the Board "acknowledged several in-service psychiatric symptoms and that they were not noted upon entry." Pet. App. 23. Even so, "it found that the presumption of soundness did not apply." *Id.* With respect to the presumption of line of duty, the Board "acknowledged several in-service notations of psychiatric symptoms." Pet. App. 25. Even so, "it found that the presumption of service incurrence [line of duty] did not apply." *Id.*

The Board did not go on to address service connection's third prima facie element. *See* Pet. App. 70–71. It denied revision based entirely on the second prima facie element. *See* Pet. App. 63–70.

The Veterans Court affirms based on a first-instance finding that, in its view, Mr. Simmons had not established service connection's third prima facie claim element.

Mr. Simmons timely appealed. The Veterans Court, with jurisdiction pursuant to 38 U.S.C. § 7252(a), expressly determined that the Board's rejections of the presumptions of sound condition and line of duty were due to clear misapplications of law. *See* Pet. App. 23, 25–26.

The Veterans Court addressed its statutory duty to take due account of the rule of prejudicial error. *See* Pet. App. 29–45. It interpreted this Court's decision in *Sanders* typically to require "case-specific application

of judgment without relying on mandatory presumptions of prejudicial error," and to "l[eave] the door open" only to "make non-binding generalizations about inherently prejudicial errors, that is, errors where the 'natural effect' is prejudicial." Pet. App. 34–35; *accord* Pet. App. 31–32. It rejected a "non-binding generalization[ ]" here that depriving a claimant of the presumptions of sound condition and line of duty has the "natural effect" of being prejudicial. *See* Pet. App. 35–38.

The Veterans Court then addressed whether the Board's errors were prejudicial in the individual case's circumstances. Pet. App. 39–45. It concluded that they were not. *See* Pet. App. 45.

The reason had nothing to do with how the Board's errors affected its determination regarding Mr. Simmons's second prima facie element. *See* Pet. App. 39–45. Instead, the Veterans Court concluded that the Board's clear errors of law were harmless on the basis of the court's own, first-instance review of whether Mr. Simmons has satisfied service connection's third prima facie element. *See* Pet. App. 43–45. The court found that Mr. Simmons had not established service connection's third element because, "[d]espite Mr. Simmons's assertions to the contrary, the private physician [hematologist] did not provide an opinion linking his then-current acquired psychiatric disorder to his in-service diagnoses of depressive reaction and situational depression or to any symptoms of mental depression"; and because, the court suggested, other evidence in the agency record was unfavorable on this third claim element. Pet. App. 44.

The Federal Circuit affirms because it reads* Sanders *to bar all* per se *rules deeming prejudicial any agency error of any kind.

On appeal, the Federal Circuit affirmed. Consistent with its scope of jurisdiction under 38 U.S.C. § 7292, it addressed only whether the Veterans Court committed an error of law in rejecting a *per se* rule deeming prejudicial VA's error in depriving a claimant of the presumptions of sound condition and line of duty. *See* Pet. App. 7. It held that Mr. Simmons's argument for a *per se* rule of prejudicial error "is clearly foreclosed by § 7261(b)(2) and the reasoning in *Sanders*." Pet. App. 8–9. "Contrary to Mr. Simmons's view," the Federal Circuit continued, "nothing in *Sanders*'s disapproval of per se rules for harmless error analysis suggests that it is constrained to the context of 'notice errors.' " Pet. App. 9. "Likewise, § 7261(b)(2)'s mandate for the Veterans Court to 'take due account of the rule of prejudicial error' applies to all cases under the jurisdiction of the Veterans Court and is not limited to notice errors." *Id.*

The Federal Circuit also doubled down on the Veterans Court upholding, as harmless, VA error as to service connection's second prima facie element based on the Veterans Court's first-instance determination that, in its view, Mr. Simmons has not satisfied service connection's third prima facie element. In particular, the Federal Circuit articulated understanding of what the Veterans Court had done here, noting that "the Veterans Court determined that the Board's failure to apply the two presumptions, although incorrect, was

harmless because Mr. Simmons failed to prove the third requirement necessary for the receipt of benefits—the so-called 'nexus' requirement." Pet. App. 7. The Federal Circuit further noted that "the presumptions of soundness and service connection are not relevant to the third requirement for establishing entitlement to disability benefits—the nexus requirement." Pet. App. 9. Notwithstanding that the Board's decision on review had made no determination as to that third prima facie claim element, the Federal Circuit also articulated concern that "[a] per se rule of prejudice for failure to apply the two presumptions—which are relevant to the second requirement and not the third, nexus requirement—would . . . undo any proper VA finding that the claimant had failed to establish a causal nexus." Pet. App. 9–10.

The Federal Circuit thus confined its analysis to its reading of *Sanders* and section 7261(b)(2). It did not address *Chenery*, nor how its reading of *Sanders* and section 7261(b)(2) interacts with *Chenery*.

REASONS FOR GRANTING THE PETITION

The Federal Circuit's erroneous decision is emblematic of lower courts' widespread confusion and deep divide on how to view *Chenery*. The strongest understanding, which comes from academia, is that *Chenery*'s legal foundation is no mere statute or prudential concern but, instead, the Constitution. *See* Kevin M. Stack, *The Constitutional Foundations of*

Chenery, 116 Yale L.J. 952, 981–1003 (2007); *infra* Part I.A. Pursuant to that correct view, the decision below warrants reversal, with instructions to remand, because no statutory provision for courts reviewing agency action to take due account of the rule of prejudicial error can alter *Chenery*'s bar against the agency action's *post hoc* rationalization. *See infra* Part I.B.

That the *Chenery* principle takes precedence over any statute carries tremendous importance for administrative law. That is so for many of our country's military veterans claiming service-connected disability compensation or other VA entitlements. *See infra* Part II.A. It also is so for federal-court review of federal-agency action more generally. *See infra* Part II.B. For all of these reasons, and because this case presents an ideal vehicle for resolving these issues, *see infra* Part III, Mr. Simmons respectfully submits that the petition's question presented warrants granting a writ of certiorari in this case.

I. GRANTING THE WRIT IS WARRANTED TO RESOLVE, FOR THE SPLIT CIRCUITS, THAT *CHENERY* STATES A REQUIREMENT OF THE U.S. CONSTITUTION.

A. The Lower Courts Have Split on How to Understand *Chenery*. The Strongest View Is That *Chenery* Addresses When Invoking an Article I Delegation Is Valid.

The circuits have split as to how to understand *Chenery*. Before addressing that split, it will be useful

to summarize the *Chenery* decisions and their progeny. *See infra* Part I.A.1.

One group of circuits understands *Chenery* to be statutory in nature, addressing either (i) court review of agency decisions under particular statutes or (ii) a broader presumption of Congress's intent for court review of agency decisions under any statute. Notwithstanding the intermittent language from this Court on which these views rely, neither satisfactorily explains *Chenery*. *See infra* Part I.A.2.

A second group of circuits understands *Chenery* to reflect prudential concerns. This view also derives from language of this Court but suffers conceptual flaws. *See infra* Part I.A.3.

The strongest view of *Chenery* comes from academia. As Professor Kevin M. Stack explains, *Chenery* reflects and enforces the requirement that, to invoke validly a delegation of Congress's delegated legislative power, the delegee must state the basis for invoking that power. *See infra* Part I.A.4.

1. The *Chenery* Decisions and Progeny

In *Chenery*, officers, directors, and controlling shareholders of a public utility holding company sought review of a Securities and Exchange Commission ("SEC") order that rejected a proposed reorganization plan in the light of certain of those individuals' stock purchases. *See Chenery I*, 318 U.S. at 83–85. The

SEC had based the order on the individuals' fiduciary duties. *See id.* at 85.

This Court, on review of the order, did not question *that* the SEC could bar the plan at issue. *See id.* at 85, 90–92. Even so, the Court held that it must confine its review to the rationale that the SEC had provided for its action. *See id.* at 88. Holding that rationale invalid, the Court remanded. *See id.* at 95.

The SEC then "reexamined the problem, recast its rationale and reached the same result." *Chenery II*, 332 U.S. at 196. The matter again came before this Court, which analyzed the new order's substance *and* the agency's contemporaneous rationale for it. *See id.* at 199–201, 204–07. It upheld them. *See id.* at 207.

The substance of *Chenery*'s holding is fairly clear. Agency action "must be measured by what the [agency] did, not by what it might have done. It is not for us to determine independently" whether another rationale would provide a basis for the action to be valid. *See Chenery I*, 318 U.S. at 93–94. Thus, agency "action cannot be upheld merely because findings might have been made and considerations disclosed which would justify [the agency's] order. . . ." *Id.* at 94; *accord Chenery II*, 332 U.S. at 196 ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to

affirm . . . by substituting what it considers to be a more adequate or proper basis.").

As the Court since has explained, *Chenery* does not prohibit an agency from curing its initially inadequate rationale by retrospectively amplifying its "explanation of the agency's reasoning *at the time of the agency action*." *Dep't of Homeland Sec. v. Regents of the Univ. of Cal.*, ___ U.S. ___, 140 S. Ct. 1891, 1907–08, 207 L. Ed. 2d 353 (2020) ("*Regents*") (emphasis in *Regents*; quoting *Pension Benefit Guar. Corp. v. LTV Corp.*, 496 U.S. 633, 654, 110 S. Ct. 2668, 2680, 110 L. Ed. 2d 579 (1990)). The agency just "may not provide new" rationale for its initial action. *Id.*, 140 S. Ct. at 1908 (citing *Camp v. Pitts*, 411 U.S. 138, 143, 93 S. Ct. 1241, 1244, 36 L. Ed. 2d 106 (1973) (*per curiam*)). Additionally, the *agency*'s ability retroactively to amplify its initial reasons does not extend to permit a *court* to supply its own rationale justifying the agency action. *Cf. id.*, 140 S. Ct. at 1909 ("[W]e refer to this as a prohibition on *post hoc* rationalizations . . . because the problem is the timing. . . .").

Nor does *Chenery* require remanding when, irrespective of the reasons given, the agency's action is the only one permissible. As the Court long has recognized, to remand in these circumstances "would be an idle and useless formality. *Chenery* does not require that we convert judicial review of agency action into a ping-pong game." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6, 89 S. Ct. 1426, 1430 n.6, 22 L. Ed. 2d 709 (1969).

"The basic rule here," then, "is clear." *Regents*, 140 S. Ct. at 1909. Outside of the few clarifications that the Court has made regarding *Chenery*'s scope, "[a]n agency must defend its actions based on the reasons it gave when it acted." *Id.*

The key question is *why*. Whether the answer sounds in statute, prudence, or the Constitution matters a great deal. As the Court repeatedly has described, *Chenery*'s requirement of contemporaneous agency reasons is "foundational" for administrative law. *See*, *e.g.*, *Regents*, 140 S. Ct. at 1909; *Michigan v. EPA*, 576 U.S. 743, 758, 135 S. Ct. 2699, 2710, 192 L. Ed. 2d 674 (2015). Meanwhile, the answer to *why* resolves when, if ever, a court may depart from *Chenery* for a statutory requirement, such as the VJRA's and APA's provision to take due account of the rule of prejudicial error.

This question remains unsettled. To start, neither *Chenery* decision specifies its foundation. Instead, both provide indirect and somewhat mixed messages.

In *Chenery I*, after giving scant introduction to the proclamation *that* "[t]he grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based," 318 U.S. at 87, the Court likened its role in reviewing agency action to that of an appellate court reviewing "a determination of fact which only a jury could make." *Id.* at 88. It stated that, "[i]f an order is valid only as a determination of policy or judgment which the agency alone is authorized to make and which it has not made,

a judicial judgment cannot be made to do service for an administrative judgment." *Id.*

"For purposes of affirming no less than reversing," the Court continued, "an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." In *Chenery II*, the Court followed those words by stating that for a federal court to affirm an agency action based on the court's own reasons "would propel the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S. at 196.

As what some have seen as breadcrumbs along a different path, the Court also stated in *Chenery I* that "the orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained." 318 U.S. at 88. "We do not intend," the Court continued, "to enter the province th[at] belongs to the Board, nor do we do so. All we ask of the Board is to give clear indication that it has exercised the discretion with which Congress has empowered it. This is to affirm most emphatically the authority of the Board." *Id.* at 94–95 (quoting *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177, 197, 61 S. Ct. 845, 853, 85 L. Ed. 1271 (1941)).

The context of *Phelps Dodge*'s quoted sentence, in turn, is as follows. Its prior sentence begins with the predicate that "Congress has defined the authority of the Board and the procedure by which it must be asserted and has charged the federal courts with the duty of reviewing the Board's orders." 313 U.S. at 97.

The sentence continues by articulating the prudential consideration that "it will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order." *Id.*

As addressed more fully in the sections that follow, this Court has provided additional language over time that also has been interpreted to lead down different paths. Just what *kind* of precedent *Chenery* sets remains an open question that increasingly has left court review of agency action in disarray. Some view *Chenery*'s principal holding to be statutory. *See infra* Part I.A.2. Others, prudential. *See infra* Part I.A.3. Still others, to describe a requirement of the Constitution. *See infra* Part I.A.4. The latter view is the strongest, and clarifying that to be so warrants granting this petition.

2. The Statutory Views of *Chenery*

Two views have emerged that explain *Chenery*'s foundation—and, consequently, reach—as merely statutory. On one, *Chenery* is "of" a specific statute such as the APA. On the other, *Chenery* is statutory in a broader sense, describing a presumption regarding Congress's intent when it delegates power to a federal agency by statutorily permitting it to act with the force of law.

Multiple circuits hold the first view. *See Lin v. DOJ*, 453 F.3d 99, 106 (2d Cir. 2006) ("It is precisely *because* factfinding in both the asylum and the

withholding context is expressly committed [by statute] to the discretion of the Executive Office of Immigration Review . . . that, when those findings rely upon legal errors, the appropriate remedy is generally to vacate those finding and remand to the [agency]. . . ." (emphasis in *Lin*; citing *Chenery I*, 318 U.S. at 94)); *Local Joint Exec. Bd. of Las Vegas v. NLRB*, 309 F.3d 578, 583 (9th Cir. 2002) (applying *Chenery* "[b]ecause [of] the focus of this [APA] requirement"); Pet. App. 7–10 (permitting, based on the VJRA's prejudicial-error provision, the Veterans Court to uphold VA action based on the Veterans Court's *post hoc* rationalization as to a prima facie claim element that the VA decision on review did not address).

Even so, this view can be dispensed with quickly. It has two immediate, major flaws.

First, *Chenery I* predates at least two of the statutes, the APA and VJRA, of which courts in this group understand *Chenery* to be a creature. *Compare Chenery I*, 318 U.S. at 80 (1943), *with* 60 Stat. at 237 (1946), *and* 102 Stat. at 4105 (1988). And so the timing doesn't work. That becomes all the more apparent when considering that this Court has "interpreted the APA not to 'significantly alter the common law of judicial review of agency action.' " *Kisor v. Wilkie*, ___ U.S. ___, 139 S. Ct. 2400, 2419–20, 204 L. Ed. 2d 841 (2019) (quoting *Heckler v. Chaney*, 470 U.S. 821, 105 S. Ct. 1649, 84 L. Ed. 2d 714 (1985)).

Second, the Court has applied *Chenery* where the APA's requirements do not apply. *See Pitts*, 411 U.S. at

140–43. *Chenery* thus reaches territory that, under this narrower statutory view, would be off limits.

The broader statutory view understands *Chenery* to articulate a presumption that Congress intends, when delegating *any* legislative power to an agency, to delegate it to that branch of government *exclusively*. On this view, *Chenery* requires courts to set aside agency action that lack contemporaneous agency reasons to avoid the judiciary, by supplying court-created rationale, reaching into a zone that Congress presumably has reserved to an agency exclusively. *See*, *e.g.*, *Eggers v. Clinchfield Coal Co.*, 29 Fed. Appx. 144, 149 (4th Cir. 2002) ("*Chenery* is based on the proposition that unlike lower courts, agencies exercise their discretion as the repositories of a Congressionally-delegated power to make policy; thus, just as an appellate court cannot take the place of a jury in finding facts, it may not take the place of an agency in advancing a rationale for agency action."); *Canonsburg Gen. Hosp. v. Burwell*, 807 F.3d 295, 304 (D.C. Cir. 2015) (quoting *Chenery I*'s "entrusted to the agency" language and *Chenery II*'s "propel the court" language, *see infra*). Under this view, to be clear, Congress may dictate the result by statute. *See GTE South, Inc. v. Morrison*, 199 F.3d 733, 742 (4th Cir. 1999) (qualifying the statement that, "when an agency bases its order on an unsupportable rationale, we cannot uphold the order on an alternative ground that would require us to exercise any discretionary judgment entrusted to the agency," by providing that "[t]hese principles arising from *Chenery* must be applied in light of the [statute at bar]").

This view of *Chenery* has more going for it. *Chenery I* indeed states that, "for purposes of affirming no less than reversing its orders, an appellate court cannot intrude upon the domain which Congress has exclusively entrusted to an administrative agency." 318 U.S. at 88. Additionally, *Chenery II* elaborates that a court's refusal to supply rationale on which to affirm the agency's result serves to avoid "propel[ling] the court into the domain which Congress has set aside exclusively for the administrative agency." 332 U.S. at 196.

What is more, this Court repeatedly has extolled *Chenery*'s virtues on essentially this ground. *See Smith v. Berryhill*, ___ U.S. ___, 139 S. Ct. 1765, 1779, 204 L. Ed. 2d 62 (2019); *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 169, 83 S. Ct. 239, 246, 9 L. Ed. 2d 207 (1962) (describing the requirement for contemporaneous agency reasons as "not to deprecate, but to vindicate the administrative process"); *INS v. Orlando Ventura*, 537 U.S. 12, 16, 123 S. Ct. 353, 355, 154 L. Ed. 2d 272 (2002) (denying that an "appellate court [could] intrude upon the domain which Congress has exclusively entrusted to an administrative agency" (alteration in original) (quoting *Chenery I*, 318 U.S. at 88)); *Heckler v. Lopez*, 463 U.S. 1328, 1333, 104 S. Ct. 10, 13, 77 L. Ed. 2d 1431 (1983) (quoting the "propel" language of *Chenery II*, 332 U.S. at 196); *see also Dep't of Commerce v. New York*, ___ U.S. ___, 139 S. Ct. 2551, 2573, 204 L. Ed. 2d 978 (2019) ("That principle [requiring the agency's contemporaneous explanation] reflects the recognition that further judicial inquiry into

'executive motivation' represents 'a substantial intrusion' into the workings of another branch of Government and should normally be avoided." (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268, n.18, 97 S. Ct. 555, 565, 50 L. Ed. 2d 450 (1977)).

Even so, this view of *Chenery* somewhat begs the question. Yes, preserving for an agency the selection of its own, valid reasons for an action honors the delegee branch. There are, however, competing virtues—including efficiency. *See generally Regents*, 140 S. Ct. at 1935 (Kavanaugh, J., dissenting in part). Viewing agency choice as a virtue does not intrinsically answer *why* the Court would make such a far-reaching presumption that Congress intends to promote that virtue above all others. *See* Stack, 116 Yale L.J. at 981 & n.113 ("Other than the basic idea that Congress grants agencies authority because of their expertise and responsiveness, we do not yet have reasons of principle or policy for making this uphold-only-for-reasons-given presumption about Congress's intentions."; citing David J. Barron & Elena Kagan, Chevron's *Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 203, 223, as "arguing that policy judgments should inform presumptions of congressional intentions about *Chevron's* application").

3. The Prudential View of *Chenery*

A second view understands *Chenery*'s foundation to be prudential. This view also appears to arise from

language in *Chenery I*. *See* 318 U.S. at 88 ("[T]he orderly functioning of the process of review requires that the grounds upon which the administrative agency acted by clearly disclosed and adequately sustained."); *see also Phelps Dodge*, 313 U.S. at 197 ("[I]t will avoid needless litigation and make for effective and expeditious enforcement of the Board's order to require the Board to disclose the basis of its order.").

Additionally, this Court often has spoken of *Chenery*'s sound sense and effects. *See*, *e.g.*, *Burlington Truck Lines*, 371 U.S. at 169; *see also Regents*, 140 S. Ct. at 1909 (collecting additional prudential reasons for requiring contemporaneous agency explanation for agency action, including "agency accountability" (quoting *Bowen v. Am. Hosp. Ass'n*, 476 U.S. 610, 643, 106 S. Ct. 2101, 2121, 90 L. Ed. 2d 584 (1986)); "confidence that the reasons given are not simply 'convenient litigating position[s]' " (quoting *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 155, 132 S. Ct. 2156, 2166, 183 L. Ed. 2d 153 (2012)); and that, "particularly when so much is at stake, that 'the Government should turn square corners in dealing with the people' " (quoting *St. Regis Paper Co. v. United States*, 368 U.S. 208, 229, 82 S. Ct. 289, 301, 7 L. Ed. 2d 240 (1961) (Black, J., dissenting))).

Multiple circuits have indicated that they adhere to this understanding of *Chenery* as prudential. *See*, *e.g.*, *Rizek v. SEC*, 215 F.3d 157, 161 (1st Cir. 2000) (citing the "orderly functioning" rationale); *Hargenrader v. Califano*, 575 F.2d 434, 436 (3d Cir. 1978) (same); *Schofield v. Saul*, 950 F.3d 315, 320 (5th Cir. 2020)

(same); *Dixie Sand & Gravel Corp. v. Holland*, 255 F.2d 304, 309–10 (6th Cir. 1958) (same); *Singh v. Gonzales*, 495 F.3d 553, 557 (8th Cir. 2007) (same); *Midwest Maint. & Constr. Co. v. Vela*, 621 F.2d 1046, 1051 (10th Cir. 1980) (same). *Cf. Clement v. SEC*, 674 F.2d 641, 646 (7th Cir. 1982) ("[O]nce an agency has decided on a course of action, any subsequent consideration it gives to the merits may be somewhat biased towards justifying its original decision. We think therefore that Order II commands less deference. . . .").

Yet this view of *Chenery* remains unsatisfactory, at least insofar as it suggests that the *Chenery* principle is *wholly* prudential. Certainly, the principle accomplishes much. Yet neither *Chenery* decision goes so far as to rule out a firmer ground for their key holding than that it makes for good law. *See* 318 U.S. at 88; 332 U.S. at 196; *see generally, e.g.*, *Pavelic & LeFlore v. Marvel Ent. Grp.*, 493 U.S. 120, 126, 110 S. Ct. 456, 460, 107 L. Ed. 2d 438 (1989) (describing that the Court's baseline "task is to apply the text [in that case, of a Federal Rule of Civil Procedure], not to improve upon it."); *King v. Burwell*, 576 U.S. 473, 515, 135 S. Ct. 2480, 2505, 192 L. Ed. 2d 483 (2015) (Scalia, J., dissenting) (describing similarly the general status quo that "Congress, not this Court, [is] responsible for both making laws and mending them."). Meanwhile, when the Court sets forth a rule of law that is wholly prudential, it says so. *See*, *e.g.*, *Warth v. Seldin*, 422 U.S. 490, 498–500, 95 S. Ct. 2197, 2205–06, 45 L. Ed. 2d 343 (1975).

4. The Constitutional-Law View of *Chenery*

The strongest view of *Chenery* is as being of constitutional law, addressing when an agency's invocation of Congress's delegation to act with the force of law passes Article I muster.

This view builds from the Court's historical approach toward the nondelegation doctrine, which spoke of two requirements. First, Congress must provide intelligible principles for invoking the delegated authority. Second, when invoking that authority, the delegee must state the basis for doing so. In particular, *Chenery* addresses the second requirement.

In historical context, *Chenery* followed decisions such as *Mahler v. Eby*, where the Court reversed deportation orders because they did not include express findings of the statutory requisites being met. *See* 264 U.S. 32, 40–45, 44 S. Ct. 283, 286–88, 68 L. Ed. 549 (1924). *Mahler* embraced the rule in *Wichita Railroad & Light Co. v. Public Utilities Commission*, 260 U.S. 48, 43 S. Ct. 51, 67 L. Ed. 124 (1922), that "the lack of an express finding [could not] be supplied *by implication"* or by reference to litigation documents before the agency, concluding that such a defect "goes to the existence of the power on which the proceeding rests." *Mahler* concluded that the lack of findings regarding the contingency conditions was fatal to the validity of the agency's action not only "on the language of the statute, but also on general principles of constitutional government." 264 U.S. at 44.

Similarly, in *Panama Refining Co. v. Ryan*, the Court struck down, on nondelegation grounds, executive orders by the sitting President because they included no statement of their predicate grounds. *See* 293 U.S. 388, 431–33, 55 S. Ct. 241, 253–54, 79 L. Ed. 446 (1935). The Court reasoned that even if ascertaining the prerequisites for the President's action were possible, "it would still be necessary for the President to comply with those conditions and to show that compliance as the ground of his prohibition." *Id.* at 431. The Court specifically embraced *Mahler* and *Wichita Railroad*, reaffirming that accompanying reasons were necessary to comport with the Constitution's requirements and that such a failure cannot be overcome "by implication." *Id.* at 433 (quoting *Wichita R.R.*, 260 U.S. at 59); *see also* Stack, 116 Yale L.J. at 987–88.

As Professor Stack posits, additional considerations point to *Chenery*'s foundation as being to address this second requirement for a delegee validly to invoke Congress's Article I legislative power.

First, "[t]he parallels between *Chenery* and this aspect of the nondelegation doctrine are quite striking." Stack, 116 Yale L.J. at 991. "Both doctrines specify the source and timing of the justification for the agency's actions." *Id.* "In particular, under both . . . the agency's statement of the grounds for its action is a necessary predicate to the exercise of delegated authority." *Id.* at 991–92. Additionally, both "expressly prohibit the agency from evading those requirements by having another institution, such as a court, supply the necessary justification by implication, or by having

the agency's own counsel do so in the process of litigation, as opposed to at the time of the agency's action." *Id.* at 992.

Additionally, the prudential reasons that make *Chenery good* law also inform why it is part of *the* law of our Constitution. *See generally id.* at 992–1000. Those reasons, after all, support nondelegation principles. *See* Stack, 116 Yale L.J. at 992–1000.

One might argue, to be sure, that this view runs into difficulty in the form of the Court's recent statement that a court may address issues that the agency initially did not "in rarer cases, such as where the Government joins the claimant in asking the court to reach the merits. . . ." *Smith*, 139 S. Ct. at 1780 n.21. Yet Mr. Simmons understands *Smith*'s statement to reflect nothing more than the principle that an agency may cure initially inadequate reasons retrospectively.

For all of these reasons, Mr. Simmons respectfully submits that viewing *Chenery* to be of the Constitution most faithfully captures the decisions' legal foundation. Granting the petition is warranted for the Court to clarify that this long-acknowledged "foundation" of administrative law addresses the second requirement for an agency's invocation of Congress's delegation of Article I legislative power to be constitutional—and, as such, that *Chenery* takes precedence over any statute.

B. Granting the Petition Is Warranted to Reverse the Federal Circuit's Decision Below, Which Erroneously Subjugated *Chenery* to the VJRA.

In the decision below, the Federal Circuit held that *Sanders* bars all *per se* rules that would deem prejudicial any agency error of any kind. *See* Pet. App. 7–10. The effect of its decision is to subjugate *Chenery* to the VJRA's statutory requirement for a court reviewing VA action to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

As a proper understanding of *Chenery*'s legal foundation makes clear, *Sanders* did no such thing. Nor could it have. *Chenery* does not set forth a mere statutory or prudential principle that *Sanders* could have abrogated. It instead sets forth Article I precedent to which the VJRA must adhere. The Federal Circuit's contrary interpretation warrants granting the petition and reversing.

The Federal Circuit misapprehended *Sanders*. In *Sanders*, the parties asked this Court to evaluate the Federal Circuit's extant framework for taking due account of the rule of prejudicial error, pursuant to the VJRA, of VA error in providing statutorily required notice. *See* 556 U.S. at 399. The Court concluded that the Federal Circuit's framework was too rigid and "too likely too often to require the [Veterans Court] to treat as harmful errors that in fact are harmless." *Id.*

Sanders nowhere cites *Chenery*, but there was no need. *Sanders* rejected what amounted to a rule of *per*

se prejudice encompassing all VA notice errors on the basis that VJRA's prejudicial-error provision "seeks to prevent appellate courts from becoming 'impregnable citadels of technicality.'" *See id.* at 407 (quoting *Kotteakos v. United States*, 328 U.S. 750, 759, 66 S. Ct. 1239, 1245, 90 L. Ed. 1557 (1946)). This did no violence to *Chenery*, which as noted "does not require that we convert judicial review of agency action into a ping-pong game." *Wyman-Gordon*, 394 U.S. at 766 n.6. *Sanders* thus stands for the proposition that, irrespective of considerations including whether VA adequately has explained adverse action even in the light of a notice error, its adverse action at least sometimes will be its only permissible action.

The same analysis simply does not hold for *all* kinds of VA error. Mr. Simmons's case is illustrative. VA committed clear errors of law in rejecting the second prima facie element of Mr. Simmons's claim for service connection. *See* Pet. App. 23, 25–26. VA did not address, at all, the third element. *See* Pet. App. 63–71.

What is more, that third prima facie claim element is logically downstream of the second. *See supra* at 2. Mr. Simmons presented materials on that third element. *See* Pet. App. 13–14. The Veterans Court nevertheless injected itself into first-instance decision-making, finding that VA's errors as to the second prima facie claim element were harmless because—in the Veterans Court's view—VA would have denied the third. Pet. App. 43–45.

This, then, presents altogether a different circumstance from *Sanders*. VA rejected antecedent prima facie claim elements and stopped its reasoning there. The agency record contains materials supporting the downstream prima facie claim element. The Veterans Court made no determination that these materials *could* not carry the day—only that, in the Veterans Court's view, they *would* (or *should*) not do so. That runs about as far afoul of *Chenery* as one can get.

What is more, given that VA stopped its reasongiving at the second prima facie element, the only way for a reviewing court to let that decision stand would be to sail the third prima facie element's unchartered waters. VA's clear misapplications of law with respect to the presumptions of sound condition and line of duty thus were by their very nature a kind that would require a court to contravene *Chenery* to uphold. No matter what the VJRA says about taking due account of prejudicial error, *Chenery* forecloses *post hoc* rationalization as a matter of constitutional law.

In short, *Sanders* in no way prohibits a *per se* rule that deems prejudicial VA errors of the nature at issue here. The Federal Circuit's contrary ruling—and, indeed, even broader misinterpretation of *Sanders* as prohibiting not just this but *any per se* rule of prejudice—warrants granting the petition and reversing.

The same is true even if, in the alternative, *Chenery* describes a presumption that, when Congress delegates legislative power to an agency, it delegates to the agency exclusively. Neither the VJRA nor the APA

contains any indication in its respective text or legislative history that Congress intended to delegate to any court the ability to find agency error harmless on the basis of a reviewing court's first-instance factfinding on any issue potentially in dispute.

To the contrary, the statutory scheme that Congress has created as a grateful sovereign to benefit this most favored class, our country's military veterans, makes plain Congress's intent to *require* the rule of *per se* prejudice for which Mr. Simmons advocates. Throughout this scheme, Congress has placed a thumb on the scale in the veteran's favor. *See*, *e.g.*, *Sanders*, 556 U.S. at 416 (Souter, J., dissenting). Consistent with Congress's purpose, this Court has long applied the canon that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441, 131 S. Ct. 1197, 1206, 179 L. Ed. 2d 159 (2011) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21, n.9, 112 S. Ct. 570, 574, 116 L. Ed. 2d 578 (1991)); *Brown v. Gardner*, 513 U.S. 115, 118, 115 S. Ct. 552, 555, 130 L. Ed. 2d 462 (1994) ("[I]nterpretive doubt is to be resolved in the veteran's favor.").

At worst for Mr. Simmons here, VJRA's requirement to "take due account of the rule of prejudicial error" is ambiguous. Congress provided statutory presumptions of sound condition and line of duty to reinforce its intent to have an adjudicatory process that reduced the evidentiary burden on those who served. Such presumptions afford our military veterans the luxury of not having to produce specific evidence to

establish a point at issue. Additionally, the plain language of both 38 U.S.C. § 105(a) (1970) and 38 U.S.C. § 311 (1970) show the presumptions to mandatory, thereby imposing an affirmative duty on VA to afford these presumptions.

Against all of that, the decision below imposes on military veterans a burden to show prejudice that extends beyond the prima facie claim element for which VA failed to afford them presumptions that Congress plainly required, to a downstream claim element that the VA decision on review did not touch. Meanwhile, much remains undecided about what Congress intended for the statutory phrase "take due account of the rule of prejudicial error" to mean. *See*, *e.g.*, Craig Smith, Note, *Taking "Due Account" of the APA's Prejudicial-Error Rule*, 96 Va. L. Rev. 1727, 1727–28 (2010); Devon Hudson MacWilliam, Note, *More Guidance Please: Proving Prejudicial Error Under the APA*, 39 B.C. Env't Aff. L. Rev. E. Supp. 55 (2012). To resolve all of this against the veteran would be anathema to Congress's intent for this claim system.

What is more, where, as here, the Federal Circuit deviates from a federal law or the pro-veteran principles animating it, this Court routinely has intervened and corrected the Federal Circuit's misinterpretation. *See* S. Ct. R. 10(c) ; *Kisor*, 139 S. Ct. at 2424 (remanding to the Federal Circuit to "seriously think through" its decision that VA regulation was ambiguous); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1979, 195 L. Ed. 2d 334 (2016) (VA obligated to apply pro-veteran contracting rules to every award, not merely

to meet minimum contracting goals); *Henderson*, 562 U.S. at 441 (120-day deadline for appealing from Board to Veterans Court not jurisdictional); *Scarborough v. Principi*, 541 U.S. 401, 419, 124 S. Ct. 1856, 1868, 158 L. Ed. 2d 674 (2004) (veteran's EAJA application was timely where curative amendment of initial application was filed outside 30-day filing period); *Gardner*, 513 U.S. at 118–19 (overturning as inconsistent with controlling statute VA regulation requiring veteran seeking certain benefits to prove disability resulted from negligent VA treatment). Instances of the Court taking up questions of administrative law more broadly, or of the Constitution, are legion.

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

Underscoring the need for this Court's review, the Federal Circuit's error would, without this Court's prompt intervention, improperly restrict a nationwide public benefit program that provides critical sustenance to a large population.

There are approximately 19.2 million living United States veterans, 22.6 million veterans' dependents, and 616,000 veterans' survivors—that is, nearly 42.3 million people potentially entitled to file claims for veterans' benefits. VA, *FY 2021 Budget Submission, Vol. 1*, at 5 (Feb. 2020). In 2019, almost five million veterans received disability compensation, and the VA anticipates paying nearly six million disability

compensation recipients in 2021. VA, *Annual Benefits Report FY 2019*, at 9 (2020); VA, *FY 2021 Budget Submission, Budget in Brief*, at 1 (Feb. 2020). Meanwhile, every single court appeal of or petition against VA error requires the court to "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

The Federal Circuit's wholesale bar against all *per se* rules of law to deem prejudicial any kind of any VA error whatsoever not only violates *Chenery*, it as a practical matter limits the availability of VA benefits to those veterans who are able to persuade the court sitting in first-instance review of even acknowledged agency error, of even those claim elements that VA's decision on review does not address. Such questions strain expert policymakers and medical professionals, yet the Federal Circuit's rule penalizes often injured and uncounseled veterans as to whose claim the VA has erred.

The Federal Circuit's rule will have a particularly harsh impact on the veterans proceeding before the Veterans Court *pro se*. Approximately 27 percent of Veterans Court claimants do so. U.S. Court of Appeals for Veterans Claims*, Fiscal Year 2019 Annual Report* 1 (2019). Without the help of trained lawyers, many veterans will be harmed by the Federal Circuit's erroneous *per se* bar of rules of *per se* prejudice. There is little reason, for example, to expect a veteran proceeding *pro se* in this beneficent paternalistic claims system that Congress created specifically for this most favored class would know that, when VA has made one error,

that the veteran also must persuade the court of any or all "downstream" issues.

What is more, the Federal Circuit's ruling will have far-reaching effects that the court did not recognize and could not have intended. The ruling has significant ramifications for the APA. It, like the VJRA, requires courts to take due account of the rule of prejudicial error. 5 U.S.C. § 706. The statutes' provisions here are nearly identical. *Compare id. with* 38 U.S.C. § 7261(b)(2). Indeed, Congress intended for the VJRA's prejudicial-error provision to mirror the APA's. *See* S. Rep. No. 100-418, at 61 (1988). The Federal Circuit's subjugation of *Chenery* to the statutory provision to take due account of the rule of prejudicial error thus has significance for many fields of U.S. law.

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

This case squarely presents the question of whether and when VA's non-adversarial adjudicatory process would permit a *per se* prejudice rule.

Indeed, this case presents the legal issue as a standalone question, without any need to address complicating factual considerations. When the Veterans Court finds, as it did in this case, that the VA erred in analyzing two statutory presumptions that speak to a single prima facie claim element, and upholding the error would require violating *Chenery*'s prohibition

against *post hoc* rationalization such as by addressing in the first instance a logically downstream issue, the court must deem the agency's error prejudicial as a matter of law.

CONCLUSION

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

Respectfully submitted,

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February 18, 2021