No. 25-735

IN THE

Supreme Court of the United States

FLOYD D. JOHNSON,

Petitioner,

v.

UNITED STATES CONGRESS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

The National Law School Veterans Clinic Consortium ("NLSVCC") submits this brief in support of the petition of Appellant, Floyd D. Johnson. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

The NLSVCC is a collaborative effort led by the nation's law school veterans legal clinics, dedicated to addressing the unique legal needs of U.S. military veterans and supporting law school veterans clinics nationwide. The NLSVCC believes that law school veterans clinics play a fundamental role in safeguarding and advocating for veterans' legal rights, including by advancing scholarship and training advocates for veterans.

The NLSVCC works with like-minded stakeholders to support and advance common interests with the U.S. Department of Veterans Affairs (VA), Congress, state and local veterans service organizations, court systems, educators, and other entities for the benefit of veterans. It also supports the dual teaching and advocacy missions of the nation's law school veterans clinics through cross-clinic collaboration.

The NLSVCC's interest in Veteran Johnson's appeal stems from our members' commitment to serving the legal interests of veterans, including those, like the Appellant,

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1. In compliance with Rule 37.6, amicus affirms that no counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

seeking judicial relief as to constitutional challenges. As an organization whose members are veterans' advocates and scholars, amicus NLSVCC has an important interest in requesting that this Court issue a decision in support of Veteran Johnson and similarly situated veterans, correcting the Eleventh Circuit's finding that the Veterans Judicial Review Act (VJRA) restricts judicial review.

SUMMARY OF THE ARGUMENT

Veterans lack access to the judiciary when challenging a law under the United States Constitution in the Eleventh and Eighth Circuits, even as six circuits allow challenges to statutes violating veterans' constitutional rights to proceed. If this Court closes the circuit courts' doors to such challenges, it will have closed what is often the only workable avenue veterans have to hold their government to account under the United States Constitution.

The combination of the delay inherent in the multi-step veterans benefits adjudication system and issue exhaustion doctrine as interpreted by the United States Court of Appeals for Veterans Claims ("Veterans Court") and Federal Circuit—and the reality that constitutional avoidance doctrine too often sends constitutional questions embedded in veterans benefits appeals back to the agency unanswered—precludes veterans from obtaining full judicial review of their constitutional challenges. The veterans benefits adjudication system was designed to allow veterans to represent themselves. In this non-adversarial context, veterans are unlikely to raise constitutional challenges before the agency. Yet if a veteran fails to raise an issue before the agency, the veteran has given up that argument and often cannot

raise it going forward due to issue exhaustion doctrine as currently applied in the Veterans Court and Federal Circuit.

In the event that a veteran *does* raise the constitutional issue before the agency, the agency cannot answer the constitutional question, as it is bound by statute and regulations and cannot overturn laws of Congress. When the case is appealed to the Veterans Court and Federal Circuit, the courts are likely to avoid the constitutional question by pointing to all-too-common errors in the underlying agency adjudication instead. These administrative and judicial structures minimize veterans' ability to challenge statutes under the Constitution, allowing unconstitutional laws to stay on the books and continue impinging on other veterans' rights.

By contrast, access to all circuits allows constitutional questions to be addressed head-on, and refined through different judicial perspectives before reaching this Court rather than siloed in one singular circuit. This Court should correct the Eleventh Circuit's decision and allow all circuits to review challenges to unlawful statutes under the United States Constitution.

ARGUMENT

I. Veterans' Benefits Adjudication Processes and Doctrine Suppresses Judicial Review of Constitutional Questions in the Veterans Court and Federal Circuit.

Circuits have "long recognized [that] the character of the veterans' benefits [system] is strongly and uniquely

pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). *See also Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009); *Collaro v. West*, 136 F.3d 1304, 1308-09 (Fed. Cir. 1998). Within a "nonadversarial" and "paternalistic system," veterans still retain protections afforded to them by the U.S. Constitution. *Collaro* at 1309-10; *see also Cushman v. Shinseki*, 576 F.3d 1290, 1302 (Fed. Cir. 2009) (holding that veterans maintain Fifth Amendment rights to procedural due process in benefits adjudications). Yet current Veterans Court and Federal Circuit doctrine and systemic delay, avoidance, and error in veterans' benefits processing operate to suppress veterans' challenges not only to unconstitutional agency action, but to unconstitutional statutes as well. While there may be good structural reasons to resolve a charge that the agency has acted unconstitutionally in an individual veteran's claim on alternate grounds, those reasons disappear when a veteran like Mr. Johnson challenges a Congressional enactment.

A. Issue Exhaustion Doctrine as Applied on a Case-By-Case Basis to Veterans Benefits Appeals Blocks Constitutional Challenges.

Coinciding with growing formalization of the nonadversarial system, veterans law jurisprudence has increasingly imposed issue exhaustion on claimants who fail to raise constitutional claims for the first time at the agency-level Board of Veterans' Appeals (BVA). *See e.g., Prewitt v. McDonough*, 36 Vet. App. 1, 4 (2022) (holding that issue exhaustion barred constitutional claim not raised before the BVA); *see also* Morgan Zimarakos, *Hear Them Out? Issue Exhaustion Doctrine in a Nonadversarial Administrative System*, 14 Belmont

L. Rev. ____ (forthcoming 2026) (detailing the current veterans' benefits issue exhaustion doctrine). Generally, issue exhaustion refers to the principle that a party may be barred from raising an argument on appeal if the argument was not first raised at the lower tribunal or agency. *Sims v. Apfel*, 530 U.S. 103, 107-08 (2000). In ordinary adversarial litigation, this doctrine serves common institutional interests, including efficiency, development of the factual record, and providing the initial decisionmaker an opportunity to correct alleged error. *Id.* at 108-09. However, this Court has repeatedly recognized that those rationales weaken substantially in nonadversarial administrative systems, *id.* at 110-12, of which veterans' benefits adjudication is a prime example.

Despite this Court's admonition against reflexive, judicially-created issue exhaustion requirements, there are troubling signs that the Veterans Court and Federal Circuit may require veterans with constitutional challenges like Veteran Johnson's to raise these issues at the BVA before seeking judicial review. In *Carr v. Saul*, this Court considered whether structural constitutional arguments advanced by Social Security applicants are subject to issue exhaustion if those arguments were not made before the agency. 593 U.S. 83 (2021). In a unanimous decision, this Court held that applying issue exhaustion to constitutional challenges related to agency proceedings is inappropriate where the proceeding is nonadversarial and so nonanalogous to judicial proceedings, the character of the claims in question does not bear on the agency's expertise, and the agency lacks the power to remedy the constitutional deficiency. *Id.* at 92-94; *see also* Zimarakos, *Hear Them Out?*.

Few published decisions from the Veterans Court and Federal Circuit have interpreted *Carr* in the context of judicial review of veterans' benefits appeals raising constitutional challenges. However, the cases that engage with the issue suggest that veterans' challenges to unconstitutional statutes in the course of their benefits appeals may go unheard. In 2022, the Federal Circuit held that the Veterans Court did not err in finding that the issue exhaustion doctrine barred a Vietnam veteran's due process challenge to an agency notice that he had not raised before the BVA. *Morris v. McDonough*, 40 F.4th 1359, 1361 (Fed. Cir. 2022). The court reasoned that *Carr* did not govern the case before it, as *Carr* addressed a "judicially created issue-exhaustion requirement," but the Veterans Court has discretionary statutory authority to impose issue exhaustion in constitutional challenges to agency action. *Id.* at 1363-4 (interpreting 38 U.S.C. § 7261(a)(3)).

On its own, *Morris* does not itself raise the alarm for challenges like Veteran Johnson's. But in *Prewitt v. McDonough* shortly thereafter, the Veterans Court considered whether *Carr's* futility considerations applied to constitutional challenges to the VA's adjudication structure. 36 Vet. App. 1, 4 (2022). The veteran appellant in *Prewitt* had raised a structural Appointments Clause challenge similar to that raised by the *Carr* appellant, among others. *Id.* at 5 (Falvey, J., concurring). Yet rather than hear the claimant's constitutional concerns in the first instance, the Veterans Court read *Morris* for the proposition that "the Federal Circuit has made clear [that] the issue-exhaustion doctrine applies to constitutional arguments" without distinguishing among the various kinds of constitutional challenges that might be brought,

and remanded the veteran's claim with all its underlying constitutional argument to the Board. *Id.* at 4. The Veterans Court wrote, "the Board's inability to invalidate VA's adjudication process on constitutional grounds [would] not render presentation of that issue to the Board futile, because the Board could provide information and analysis useful to the resolution of constitutional arguments by this Court," *id.* at 4. This suggestion was belied, however, by the two concurrences' robust debate on the Appointments Clause question. *Id.* at 5-30 (concurring opinions of Falvey, J. and Jacquith, J.). Neither concurring judge's analysis of this structural constitutional question seemed to suffer from lack of BVA development.

The irony of the Veterans Court requiring the BVA to hear issues of constitutional concern first, is that because the BVA cannot remedy unconstitutional or otherwise unlawful statutes and agency regulation as per 38 C.F.R. § 20.105, it regularly demurs from offering "opinion" on constitutional questions. *See, e.g.,* Bd. Vet. App. 1725838, No. 13-14 136, 2017 BVA LEXIS 29898, at *4 (July 7, 2017) (citing *Giancaterino v. Brown*, 7 Vet. App. 555, 557 (1995) for the proposition that "the Board may express an opinion on a constitutional claim but is not required to do so"); Bd. Vet. App. 1312191, No. 12-21 108, 2013 BVA LEXIS 19203, at *18-21 (Apr. 12, 2013) (writing, "the Board declines to express an opinion as to the constitutional arguments regarding the statutes and regulations at issue, as the Board has no jurisdiction to remedy the constitutional challenge"); Bd. Vet. App. 1131905, No. 11-01 921, 2011 BVA LEXIS 35793, at *9-10 (Aug. 30, 2011) (citing this Court's opinion in *Johnson v. Robison*, 415 U.S. 361, 368 (1974) for "the principle that adjudication of the constitutionality of congressional enactments

has generally been thought beyond the jurisdiction of administrative agencies."). This pattern dovetails with this Court's observation in *Carr* that "agency adjudications are generally ill-suited to address structural constitutional challenges, which usually fall outside the adjudicators' areas of technical expertise." *Carr v. Saul*, 593 U.S. 83, 92 (2021). It is notable, too, that the Veterans Law Judges who serve on the BVA are not required by law to possess expertise in veterans law, let alone in constitutional law. 38 U.S.C. § 7101A.

Moreover, relying upon the BVA as a venue to develop constitutional arguments is unlikely to lead to thorough consideration of constitutional issues arising from veterans' benefits. Scholars have long observed that the BVA struggles to render timely and accurate decisions under a high volume of appeals. David Ames et al., *Due Process & Mass Adjudication: Crisis & Reform*, 72 Stan. L. Rev. 1, 17-19 (2020) (describing delay and declining decisional quality at the BVA in the face of worsening backlogs). The BVA's error rate on issues of veterans' law remains high, evidenced by the Veterans Court's statistics showing high rates of remand or vacatur. U.S. Court of Appeals for Veterans Claims, Annual Report 2024, at 3, https://www.uscourts.cavc.gov/documents/FY2024AnnualReport.pdf. (showing roughly 83% of appeals remanded, reversed, or vacated and remanded in whole or in part). In this context, layering an expectation that the BVA consider every constitutional question in the first instance is inadvisable.

The consequence of these decisions is that issue exhaustion continues to be applied to constitutional claims advanced by veterans, despite this Court's decision in *Carr*.

B. Veterans Within "Claimant-Friendly" Agency Proceedings Are Unlikely to Meaningfully Raise Constitutional Challenges and Avoid Issue Exhaustion.

Beyond structural factors limiting the propriety of the BVA as a venue for constitutional challenges, the very nature of the veterans' benefits adjudicatory process limits opportunities for significant numbers of veteran claimants to meaningfully raise constitutional challenges. The vast majority of VA claims are adjudicated by non-attorney employees. Stacey-Rae Simcox, *Thirty Years after Walters the Mission is Clear, the Execution is Muddled: A Fresh Look at the Supreme Court's Decision to Deny Veterans the Due Process Right to Hire Attorneys in the VA Benefits Process,* 84 U. Cin. L. Rev. 671, 677 (2016). Additionally, many constitutional concerns are never raised outside of the agency due to the length of time it can take to receive a resolution of a veteran's claims. Because receiving decisions from the BVA routinely takes well over two years, veterans are strongly incentivized to pursue appeals not at the BVA or the Veterans Court, but at the Regional Office, which is the lowest level of agency adjudication. *More Board Personnel Address Pending AMA Appeals and Wait Times*, U.S. Dep't Veterans Affrs., Bd. Of Veterans' Appeals (Jan. 31, 2025), https://department.va.gov/board-of-veterans-appeals/decision-wait-times/more-board-personnel-address-pending-ama-appeals-wait-times/ (reporting average days pending for Appeals Improvement and Modernization Act (AMA) appeals between 506 to 791 days as of January 2025); Bd. Of Veterans' Appeals, Report of the Chairman, Fiscal Year 2024, at 39 (reporting average of roughly six years between filing and disposition of Legacy appeals during Fiscal Year 2024).

Moreover, veterans are often unrepresented by attorneys during agency proceedings. *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). This trend holds true at the BVA. In 2022, approximately 0.5% of veterans with pending BVA appeals are represented by private attorneys and representatives. Bd. of Veterans' Appeals, Report of the Chairman, Fiscal Year 2022, at 35, https://department.va.gov/board-of-veterans-appeals/wp-content/uploads/sites/19/2025/04/2022_bva2022ar.pdf.

As a consequence, many veterans seeking judicial review may be obtaining attorney representation for the first time in the course of their appeal. U.S. Court of Appeals for Veterans Claims, Annual Report 2024, at 1 (showing 12% of pro se appellants obtain representation by the time of case disposition). While an attorney might be better placed to identify and persuasively argue constitutional issues on behalf of their client, the specter of issue exhaustion may bar them from doing so regardless of whether judicial review presents the veteran's first meaningful opportunity to raise such arguments. An attorney in this situation may be left with only those constitutional arguments that a veteran has already made before the BVA, if the concerns are raised at all.

But the likelihood is slim that a *pro se v*eteran will know to raise a constitutional argument before the agency to circumnavigate issue exhaustion. Veterans filing appeals to the BVA do not receive notice that their failure to raise all plausible issues may later preclude them from obtaining judicial review on these points. 38 C.F.R. § 20.200—Rule 200 (describing notice of appeal rights provided by the agency of original jurisdiction). And again, the BVA lacks authority to invalidate statutes enacted by Congress or to

provide definitive relief on constitutional questions. See *Elgin v. Dep't of the Treasury*, 567 U.S. 1, 16 (2012) (citing *Thunder Basin*, 510 U.S. 200, 215 (2012), "This Court has also stated that 'adjudication of the constitutionality of congressional enactments has generally been thought beyond the jurisdiction of administrative agencies."). In a system designed to be accessible to pro se veterans, extending the requirement that veterans first raise constitutional challenges before the agency is unlikely to result in meaningful consideration of constitutional questions at the agency or judicial levels.

C. Because of Error Endemic to Agency Adjudication, the Veterans Court and the Federal Circuit Are Unlikely to Reach Constitutional Questions.

Even if a veteran preserves a constitutional question at the BVA, the Veterans Court is unlikely to reach that issue. If this Court affirms the Eleventh Circuit, veterans would have limited remedies to challenge statutes and regulations under the United States Constitution. The constitutional avoidance doctrine and the last resort rule encourage federal courts to avoid constitutional claims when another avenue of relief is available. *Lyng v. Northwest Indian Cemetary Protective Ass'n*, 485 U.S. 439, 445 (1988); *see also Ashwander v. TVA*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (explaining that "if a case can be decided on either of two grounds, one involving a constitutional question, the other a question of statutory construction or general law, the Court will decide only the latter.") The Veterans Court has closely followed this doctrine, acknowledging that it "must avoid constitutional questions whenever possible." *Crumlich v. Wilkie*, 31 Vet. App. 194, 201 (2019).

Although constitutional avoidance is an important feature in the federal courts, the rate of error at VA means that its effects are especially pronounced at the Veterans Court and the Federal Circuit. In each decision, the BVA must provide reasons or bases for its findings and conclusions on all material issues of fact and law. *See* 38 U.S.C. § 7104. This is the most common error in BVA decisions, as it requires the BVA to identify findings it deems crucial to its decision and to account for evidence it finds persuasive and unpersuasive. *Moore v. Derwinski*, 1 Vet. App. 401, 404 (1991). The BVA must analyze the "credibility and probative value of the evidence" and provide its reasons or bases for rejecting any evidence. *Id.*

The number of cases remanded from the Veterans Court back to the agency suggests that constitutional avoidance is likely. In FY 2025, 8,758 appeals were completed. *See* U.S. Court of Appeals for Veterans Claims, Annual Report 2025 , http://uscourts.cavc.gov/documents/FY2025AnnualReport.pdf. About 73% of the appeals were jointly remanded by the parties because of a clear error by the BVA. *Id.* Counsel in these cases understand that even if a constitutional issue underlies the claim, the court would require that the other errors be resolved before it would ever reach a constitutional question. Because of the BVA's high error rate, it is unlikely that the Veterans Court or the Federal Circuit reach constitutional questions in the cases where they are present. In the *Prewitt* case, for example, the Veterans Court found that the doctrine of constitutional avoidance also counseled against addressing the veteran's Appointments Clause challenge. 36 Vet. App. at 4. The Appointments Clause challenge that Veteran Prewitt attempted to raise in the course of his benefits appeal has not been addressed at the Veterans Court

or Federal Circuit since his case was remanded four years ago. The constitutional avoidance doctrine is an important feature of the courts overall, but its operation in the veterans benefits context means that critical constitutional question may never be addressed. There must be a quicker avenue for obtaining judicial review for facial constitutional challenges to statutes affecting veterans benefits. Allowing veterans to access federal courts to answer important constitutional questions in a timely manner will make better precedent for veterans across the country.

II. Constitutional Questions Related to Veterans' Benefits Statutes Are Best Developed Among the Multiple Circuits.

Even if the Veterans Court and Federal Circuit were regularly ruling on the constitutionality of acts of Congress affecting veterans' benefits, there would be good reason for veterans, the agency, Congress, and this Court alike to support development of constitutional questions among the multiple circuits. If only the Veterans Court and Federal Circuit can rule on the constitutionality of acts affecting veterans' benefits, then a single line of the unelected judicial branch can entrench an unconstitutional law to veterans' detriment—or can thwart constitutional Congressional acts nationwide by striking down a statute as unconstitutional *in toto*—unless and until this Court grants certiorari. This Court then has benefit of only one strain of court decisions when wading through the issue, if it grants certiorari at all due to a lack of a circuit split. *See* Ryan Stephenson, *Federal Circuit Case Selection at the Supreme Court: An Empirical Analysis*, 102 Geo. L. J. 271, 274 (2013) (finding that 70% of cases granted

certiorari emerge from circuit or state highest court splits).

By contrast, a constitutional challenge litigated by different parties in multiple circuits allows for the possibility of multiple different outcomes. This Court is then well-positioned to resolve a mature circuit split developed over time. *See Johnson v. U.S. R.R. Ret. Bd.*, 969 F.2d 1082, 1093 (D.C. Cir. 1992) (extolling the "value" of "letting important legal issues percolate throughout the judicial system, so the Supreme Court can have the benefit of different circuit court opinions on the same subject" (internal citation omitted). In the meantime, the agency may be able to continue implementing the Congressional act at least in part. *See Heartland Plymouth Ct. MI, LLC v. Nat'l Lab. Rels. Bd.*, 838 F.3d 16, 22 (D.C. Cir. 2016) (laying out conditions under which inter-circuit agency non-acquiescence may be appropriate); *see also Trump v. CASA*, 606 U.S. 831, 861 (2025) (limiting preliminary injunctive relief on constitutional claims to provide only "complete relief to each plaintiff with standing to sue").

In other words, the availability of multi-circuit review of constitutional challenges to statutes affecting veterans' benefits may better preserve the separation of powers by allowing the agency to enforce Congressional acts at least in part until this Court resolves the split. *See Trump*, 606 U.S. at 861 (noting that "federal courts do not exercise general oversight of [a branch of government, here the Executive branch]; they resolve cases and controversies consistent with the authority Congress has given them.") The availability of multi-circuit review of constitutional

challenges to statutes affecting veterans' benefits would also offer new sets of veteran plaintiffs the opportunity to continue fighting for their constitutional rights in the courts even after one court wrongfully entrenches an unconstitutional statute in another case. It would, too, offer this Court multiple courts' best thinking as it considers whether to take the extraordinary step of rendering a Constitutional act a nullity. *See* Richard L. Revesz, *Specialized Courts and the Administrative Lawmaking System*, 138 U. Penn. L. Rev. 1111, 1157-58 (1990).

From the jurist's perspective, there is indeed no particular advantage to running constitutional challenges to statutes affecting veterans' benefits first through the agency, and then to the Veterans Court and Federal Circuit. There is some efficiency and accuracy advantage to restricting review of decisions made "under" such laws to specialist courts. 38 U.S.C. § 511(a)); 38 U.S.C. § 7252 (giving the Veterans Courts "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals"); 38 U.S.C. § 7292(c) (setting out the parameters of Federal Circuit jurisdiction over appeals from the Veterans Court). There is perhaps also some similar advantage in restricting judicial review of facial challenges to agency regulations to a specialist court. 38 U.S.C. § 502 (giving such jurisdiction to the Federal Circuit). The idea is that specialist courts develop deep familiarity with a given agency or statutory structures, and as such can often quickly understand the import of the facts of record, can easily see how a given question on review fits into the broader legal framework, and may be more sensitive to

the practical implications of their decision-making. *See* Revesz, 138 U. Penn. L. Rev. at 1117-21.

By their very nature, however, constitutional challenges such as Veteran Johnson's neither require nor particularly benefit from specialized court expertise; indeed, "facial" challenges are definitionally acontextual. *See Sabri v. United States*, 541 U.S. 600, 609 (2004) (describing facial challenges as challenges where "no application of the statute would be constitutional.") Indeed, non-specialist federal courts may be better positioned to properly adjudicate the constitutionality of statutes affecting veterans' benefits because they have experience adjudicating the same trans-substantive rights across a wider range of statutory frameworks. They may therefore be better positioned to see the implications of their rulings on the development of American constitutional law writ large. For this reason, reading the VJRA to permit multi-circuit review of facial challenges to the constitutionality of statutes affecting veterans' benefits reads the VJRA to better protect veterans and Congressional acts affecting veterans' benefits alike.

CONCLUSION

For the foregoing reasons, this Court should correct the Eleventh Circuit's decision limiting veterans' ability to seek review of issues affecting their constitutional rights in the Veterans Court. Allowing veterans to pursue redress of the violation of their constitutional rights in any federal district and circuit court is to the benefit of our nation's veterans and our judicial system more generally.

Respectfully submitted,

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