No. 12-389

In the Supreme Court of the United States

LADY LOUISE BYRON, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the Court of Appeals for Veterans Claims correctly remanded this case to the Board of Veterans' Appeals to make initial factual findings in a non-adversarial setting.

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OPINIONS BELOW

The decision of the court of appeals (Pet. App. 1a-7a) is reported at 670 F.3d 1202. The decisions of the Court of Appeals for Veterans Claims (Pet. App. 8a-23a) and the Board of Veterans' Appeals (Pet. App. 24a-64a) are not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 17, 2012. A petition for rehearing was denied on June 19, 2012 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on September 17, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

Section 7261 of Title 38, United States Code, provides as follows:

Scope of review

(a) In any action brought under this chapter [38 U.S.C. 7251 et seq.], the Court of Appeals for Veterans Claims, to the extent necessary to its decision and when presented, shall—

(1) decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability of the terms of an action of the Secretary;

(2) compel action of the Secretary unlawfully withheld or unreasonably delayed;

(3) hold unlawful and set aside decisions, findings (other than those described in clause (4) of this subsection), conclusions, rules, and regulations issued or adopted by the Secretary, the Board of Veterans' Appeals, or the Chairman of the Board found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or

(D) without observance of procedure required by law; and

(4) in the case of a finding of material fact adverse to the claimant made in reaching a decision in a case before the Department with respect to benefits under

> laws administered by the Secretary, hold unlawful and set aside or reverse such finding if the finding is clearly erroneous.
>
> (b) In making the determinations under subsection (a), the Court shall review the record of proceedings before the Secretary and the Board of Veterans' Appeals pursuant to section 7252(b) of this title [38 U.S.C. 7252(b)] and shall—
>
> (1) take due account of the Secretary's application of section 5107(b) of this title [38 U.S.C. 5107(b)]; and
>
> (2) take due account of the rule of prejudicial error.
>
> (c) In no event shall findings of fact made by the Secretary or the Board of Veterans' Appeals be subject to trial de novo by the Court.
>
> (d) When a final decision of the Board of Veterans' Appeals is adverse to a party and the sole stated basis for such decision is the failure of the party to comply with any applicable regulation prescribed by the Secretary, the Court shall review only questions raised as to compliance with and the validity of the regulation.

38 U.S.C. 7261.

STATEMENT

1. Veterans and their dependents are entitled to certain disability and death benefits administered by the Department of Veterans Affairs (Department). To be compensated for a present disability or death, a claimant typically must demonstrate: (1) death or the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) nexus, or the causal relationship between death or the present disability and the disease or injury incurred or aggravated dur-

ing service. 38 U.S.C. 1110, 1310; *Holton* v. *Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009). By statute, the Secretary of Veterans Affairs (Secretary) may presume that the requisite nexus exists between radiation exposure during service and specific diseases. 38 U.S.C. 1112(c).

2. Petitioner is the surviving spouse of veteran Dennis Donald Acheson, who died in 1971 of reticulum cell sarcoma, a type of non-Hodgkin's lymphoma. Pet App. 34a; see *id.* at 9a-10a. Petitioner sought dependency and indemnity compensation benefits from the Department, contending that her husband's death resulted from his radiation exposure at atmospheric nuclear testing sites. *Id.* at 36a-37a; see *id.* at 10a. Petitioner's claim was initially denied because the Department of Defense, through a search of its radiation dosimetry data, could not verify Mr. Acheson's presence during any atmospheric nuclear testing. *Id.* at 42a-43a.

By operation of 38 C.F.R. 3.311, however, the Secretary conceded Mr. Acheson's exposure to radiation during service and presence during Operation "Upshot-Knothole," despite the inability of the Department of Defense to verify his participation. Pet. App. 44a; see 38 C.F.R. 3.311(a)(4)(i). Based on that concession, the Secretary ultimately granted petitioner survivor benefits in 2003, relying on the presumption of service connection granted by 38 U.S.C. 1112(c) for non-Hodgkin's lymphoma.[1] Pet. App. 44a; see *id.* at 11a. The effective

[1] Although service connection is presumed for non-Hodgkin's lymphoma, the earliest possible effective date pursuant to the liberalizing regulation is May 1, 1988, the date that disease was added to the presumptive condition list. See 38 U.S.C. 5110(g); 38 C.F.R. 3.114(a); Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. No. 100-321, § 2(a), 102 Stat. 485; see also Pet. App. 54a-55a.

date for the benefit award was initially set as August 1995, one year before what the Secretary initially believed to be the date of petitioner's application as required by regulation. *Id.* at 44a, 46a; 38 C.F.R. 3.114; see Pet. App. 12a.

3. Petitioner sought an earlier effective date based upon her original 1971 application for benefits. Pet. App. 45a-51a. The Board of Veterans' Appeals (Board) ultimately set May 1988 as the effective date because that was the earliest date that non-Hodgkin's lymphoma qualified for presumptive service connection under Section 1112(c). *Id.* at 54a-55a. The Board did not determine whether petitioner could qualify for an earlier effective date by proving "direct" service connection (*i.e.*, without relying upon any presumption). *Id.* at 55a; see *id.* at 20a-21a. The Board did not consider the evidence in favor of direct service connection or make any factual finding that the evidence of record could establish Mr. Acheson's presence during atmospheric nuclear testing. See *id.* at 28a-29a (setting out the Board's findings of fact).

4. On petitioner's appeal to the Court of Appeals for Veterans Claims (Veterans Court), the Secretary and petitioner agreed that the Board had erred by failing to decide whether petitioner could prove each element of service connection by a preponderance of the evidence. Pet. App. 15a, 20a. The Veterans Court determined that remand was the appropriate remedy for the Board's error and consequent failure to make any factual findings concerning direct service connection. *Id.* at 21a-23a. The Veterans Court declined to address "whether direct service connection and an earlier effective date are warranted because that would require it to make factual determinations in the first instance based on the evidence

the Board failed to consider, which it may not do." *Id.* at 21-22a. The Veterans Court explained that "[w]hile [petitioner]'s analysis of the evidence may very well be correct, it represents exactly the kind of factual determination reserved for the Board in the first instance." *Id.* at 22a.

5. The court of appeals affirmed. Pet. App. 1a-7a. The court held that "when the Board * * * fails to make the relevant initial factual findings, 'the proper course for the Court of Appeals [is] to remand the case to the [Board] for further development and application of the correct law.'" *Id.* at 5a (quoting *Hensley* v. *West*, 212 F.3d 1255, 1264 (Fed. Cir. 2000)). The court concluded that "[w]hen there are facts that remain to be found in the first instance, a remand is the proper course." *Id.* at 6a. Finding that there remained unresolved factual issues as to whether Mr. Acheson was ever exposed to radiation during his time of service, and whether such radiation exposure (if it occurred) caused his death, the court of appeals affirmed the Veterans Court's order remanding the case to the Board to make those determinations in the first instance. *Id.* at 7a.

The court of appeals denied petitioner's petition for rehearing en banc. Pet. App. 65-66a.

ARGUMENT

The court of appeals correctly affirmed the Veterans Court's judgment remanding petitioner's claim to the Board for initial factfinding. The Board never determined whether a direct connection existed between the death of petitioner's husband and his military service, and the Veterans Court does not have statutory authority to engage in such de novo factfinding in the first instance. Contrary to petitioner's contentions (Pet. 15-19), the decision of the court of appeals does not conflict

with any decision of this Court or of any other court of appeals. Further review is not warranted.

1. In the veterans' benefits system, a claim is first adjudicated by the regional office, which has a duty to assist veterans in developing the evidence necessary to substantiate their claims. See 38 U.S.C. 5103A(a). If the evidence is in equipoise, claimants are given the "benefit of the doubt." 38 U.S.C. 5107(b). A claimant dissatisfied with the decision of the regional office may appeal to the Board, where the case is afforded de novo review. 38 U.S.C. 7104(a). The Board's written decision must contain adequate "reasons or bases," accounting for the evidence that the Board finds to be persuasive and analyzing the credibility and probative value of all material evidence submitted by a claimant. 38 U.S.C. 7104(d)(1); see *Washington* v. *Nicholson*, 19 Vet. App. 362, 367 (2005).

If a claimant disagrees with any aspect of the Board's decision, she is entitled to independent judicial review by the Veterans Court in an adversarial proceeding. 38 U.S.C. 7263, 7266. The Veterans Court is authorized to review "the record of proceedings before the Secretary and the Board," 38 U.S.C. 7252(b), and to "affirm, modify, or reverse a decision of the Board or to remand the matter, as appropriate," 38 U.S.C. 7252(a). With respect to a "finding of material fact adverse to the claimant," the Veterans Court may "hold unlawful and set aside or reverse such finding if the finding is clearly erroneous." 38 U.S.C. 7261(a)(4). However, "[i]n no event shall findings of fact made by the Secretary or the Board * * * be subject to trial de novo by the [Veterans] Court." 38 U.S.C. 7261(c).

2. Recognizing the limited scope of the Veterans Court's appellate review, the court of appeals correctly

affirmed the remand of petitioner's claim to the Board. To establish a direct service connection for her husband's death, petitioner must present evidence to the Department demonstrating (1) the death of her husband; (2) in-service incurrence or aggravation of a disease or injury; and (3) a nexus between the death of her husband and the disease or injury incurred or aggravated during service. Pet. App. 17a; 38 U.S.C. 1110, 1310; *Holton* v. *Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009). A determination of direct service connection is a factual finding made by the Department and the Board that the Veterans Court reviews under a clearly erroneous standard. Pet. App. 17a. Because of a conceded legal error, however, the Board in this case failed to evaluate or find facts relating to petitioner's claim of a direct service connection. See *id.* at 20a ("The [Veterans] Court agrees with the Secretary and [petitioner] that the Board improperly failed to make a determination about whether direct service connection is warranted."); *id.* at 56a (declining to address the direct service connection claim because, "even assuming arguendo" that the evidence supported such a claim, the effective date of benefits would not change). The court of appeals correctly held that, when the Board "fails to make the relevant initial factual findings, 'the proper course for the [Veterans Court] is to remand the case to the Board for further development and application of the correct law.'" *Id.* at 5a (quoting *Hensley*, 212 F.3d at 1264) (alterations omitted); see *Webster* v. *Derwinski*, 1 Vet. App. 155, 159 (1991) ("Because we are a Court of review, it is not appropriate for us to make a de novo finding.").

The Veterans Court's remand order is consistent with the fundamental principle that "factfinding is the basic responsibility of district courts, rather than appellate

courts." *DeMarco* v. *United States*, 415 U.S. 449, 450 n.* (1974). Thus, this Court has vacated a judgment when it found that "the Court of Appeals should not have resolved in the first instance this factual dispute which had not been considered by the District Court." *Id.* at 450; see *Sprint/United Mgmt. Co.* v. *Mendelsohn*, 552 U.S. 379, 387 (2008) ("Rather than assess the relevance of the evidence itself and conduct its own balancing of its probative value and potential prejudicial effect, the Court of Appeals should have allowed the District Court to make these determinations in the first instance, explicitly and on the record."); *Maine* v. *Taylor*, 477 U.S. 131, 145 (1986) ("As this Court frequently has emphasized, appellate courts are not to decide factual questions *de novo*."); *Icicle Seafoods, Inc.* v. *Washington*, 475 U.S. 709, 714 (1986) ("If the Court of Appeals believed that the District Court had failed to make findings of fact essential to a proper resolution of the legal question, it should have remanded to the District Court to make those findings."). Applying those principles to the scheme established by Congress for review of veterans' benefit claims, the court of appeals and the Veterans Court correctly recognized that initial determinations regarding the weight and probative value of petitioner's proffered evidence of a direct service connection should be made by the Board rather than by an appellate court. See Pet. App. 7a, 22a.

Petitioner's claim of error (Pet. 15) depends on an unwarranted assumption that the evidence "indisputably supports an award of benefits." That assertion is based on facts that have never been evaluated or adjudicated by the Secretary or the Board, *i.e.*, whether petitioner's husband was actually exposed to radiation during service (without the benefit of the presumption of Section

3.311) and whether any such exposure was causally related to his lymphoma. Pet. App. 7a. Although petitioner contends (Pet. 10) that no evidence contradicts the evidence she has supplied, the probative value of her evidence has never been evaluated by an agency factfinder as directed by Congress. While petitioner faults the Secretary for asserting that there remain factual issues to resolve (Pet. 11, 16), her claim of judicial error is based solely upon her own assertions regarding the as-yet-unevaluated evidence. The Board is the entity Congress charged with making "findings and conclusions * * * on all material issues of fact and law," 38 U.S.C. 7104(d)(1), and the court of appeals and Veterans Court properly recognized that the Board should have the opportunity to perform that duty in the first instance.

3. Contrary to petitioner's contentions, the court of appeals did not "reject[] the Futility Rule" (Pet. 15), "reject[] * * * the [Veterans Court's] jurisdictional statutes" (Pet. 19), or "rel[y] chiefly on a case that has been explicitly overruled by Congress [or] on inapplicable immigration case law" (Pet. 19-20).

a. Applying what petitioner calls (Pet. 15) the "Futility Rule," this Court has held that an appellate court may affirm rather than remand a case when it is clear from the record that the lower tribunal would reach the identical result on remand. For example, in *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759 (1969), the court of appeals had reversed a National Labor Relations Board (NLRB) order on the ground that the authority for the order was an improperly promulgated rule. *Id.* at 761 (plurality). While agreeing that the invalid rule should be set aside, a plurality of this Court nonetheless affirmed the agency's order based upon the NLRB's inherent authority to issue such orders in adjudicatory

proceedings. *Id.* at 765. Under these circumstances, the plurality found that a remand to the NLRB would be futile because it was clear that the agency would issue the same order based on this inherent authority instead of the now-invalid rule. *Id.* at 766 n.6. Similarly, this Court has affirmed an agency's order despite flawed reasoning because the Court found that the agency was *required* to reach the same result for a different legal reason, making remand pointless. *Morgan Stanley Capital Grp. Inc.* v. *Public Util. Dist. No. 1*, 554 U.S. 527, 544-545 (2008). This Court has repeatedly cautioned, however, that when an agency has not made an initial *factual* determination, "the proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Gonzales* v. *Thomas*, 547 U.S. 183, 186 (2006) (quoting *INS* v. *Orlando Ventura*, 537 U.S. 12, 16 (2002) (quoting *Florida Power & Light Co.* v. *Lorion*, 470 U.S. 729, 744 (1985))); see Pet. App. 5a.

The court of appeals did not reject the futility rule, as petitioner suggests (Pet. 15-17), but faithfully applied this Court's precedents to the facts of this case. Petitioner asked the Veterans Court to reverse the Board's decision on the basis of facts never found or evaluated by the Secretary or Board. Far from being an "idle and useless formality" (Pet. 17), remand will allow the Board, after considering the evidence in the first instance, to determine whether the requisite connection exists between the death of petitioner's husband and his military service.

b. The court of appeals correctly interpreted the jurisdictional statutes governing the Veterans Court and faithfully applied this Court's recent decision in *Henderson* v. *Shinseki*, 131 S. Ct. 1197 (2011). Section 7252

grants the Veterans Court power to affirm, modify, or reverse a decision of the Board, or remand "as appropriate," but it also limits the Veterans Court's review "to the scope provided in section 7261." 38 U.S.C. 7252(a) and (b). Section 7261(a)(4) states that, "in the case of a finding of material fact adverse to the claimant," the Veterans Court may "hold unlawful and set aside or reverse such finding if the finding is clearly erroneous." 38 U.S.C. 7261(a)(4). That provision presupposes an initial factual determination by another decision-maker; it does not authorize the Veterans Court to find the facts de novo. Section 7261(a)(1) provides that the Veterans Court may "decide all relevant questions of law, interpret constitutional, statutory, and regulatory provisions, and determine the meaning or applicability" of the Secretary's orders when necessary to its decision, a catalogue of legal powers that does not include de novo factfinding. 38 U.S.C. 7261(a).

Other provisions within Section 7261(a) similarly restrict the Veterans Court to the traditional role of an appellate court. See 38 U.S.C. 7261(a)(2) (conferring mandamus power), 7261(a)(3) (authorizing court to set aside Board decisions as arbitrary and capricious, contrary to constitutional rights, in excess of statutory authority, or procedurally flawed). And Section 7261(c) prohibits the Veterans Court from subjecting factual findings made by the Board or Secretary to "trial de novo." 38 U.S.C. 7261(c). Thus, the court of appeals' determination that remand was appropriate was not a "rejection of the [Veterans Court's] jurisdictional statutes" as petitioner contends (Pet. 19), but instead reflected a correct understanding of the Veterans Court as an appellate court possessing limited powers of review.

Contrary to petitioner's suggestion (Pet. 20-22), neither the court of appeals nor the Veterans Court questioned the Veterans Court's authority to reverse Board decisions outright under appropriate circumstances. If the Board makes findings of fact but denies a claimant benefits based on an error of law, the Veterans Court may reverse rather than remand if it applies correct legal principles to the facts as the Board has found them and concludes that the claimant is entitled to benefits. Cf. Pet. App. 5a (explaining that remand is generally appropriate "when the Board misinterprets the law *and fails to make the relevant initial factual findings*") (emphasis added). Here, by contrast, the Veterans Court appropriately recognized that it was "not positioned to make findings about factual determinations yet to be made." *Id.* at 22a.

Petitioner also suggests (Pet. 23-25) that the court of appeals failed to interpret the Veterans Court's jurisdictional statutes "in a favorable manner to the claimant" as required by *Henderson*, *supra*. While the applicable canon of construction requires statutes for the benefit of veterans to be interpreted in their favor, that rule assists in the resolution of genuine ambiguity and does not apply when the meaning of the statute is plain. *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994); *Haas* v. *Peake*, 544 F.3d 1306, 1308-1309 (Fed. Cir. 2008). Petitioner argues (Pet. 24) that the Veterans Court failed to apply this favorable reading because "[Section] 7252(a) specifically authorizes the [Veterans Court] to reverse instead of remand," and "[Section] 7261(a)(2) specifically requires the [Veterans Court] to compel unreasonably delayed action of the Secretary." As explained above, however, neither of those provisions suggests that the Veterans Court can properly function as an initial factfinder. And

even if the statute were ambiguous, the pro-veteran canon of construction would support the reading most beneficial to veterans as a group, not the interpretation that benefits a particular claimant. See *Sears* v. *Principi*, 349 F.3d 1326, 1331-1332 (Fed. Cir. 2003), cert. denied, 541 U.S. 960 (2004). Veterans as a group benefit from an interpretation that requires initial factfinding by the Secretary and the Board in the "pro-claimant" non-adversarial system, as a part of which the Department is statutorily required to assist veterans in developing evidence and understanding the Department's decisions. 38 U.S.C. 5107(b).

c. The court of appeals did not erroneously rely on an overruled decision or on distinguishable immigration cases. Petitioner contends (Pet. 25-27) that the court of appeals should not have relied on *Hensley* v. *West*, 212 F.3d 1255 (Fed. Cir. 2000), because it was overruled by the Veterans Benefits Act of 2002 (VBA), Pub. L. No. 107-330, 116 Stat. 2820. The VBA amended 38 U.S.C. 7261(a)(4) to authorize the Veterans Court to "reverse" a finding of material fact adverse to the claimant "if the finding is clearly erroneous." § 401(a)(2), 116 Stat. 2820, 2832. During the legislative debates on that provision, Senator Rockefeller stated (see Pet. 26) that the addition of the phrase "or reverse" was "intended to emphasize that [the Veterans Court] should reverse clearly erroneous findings when appropriate, rather than remand the case." 148 Cong. Rec. 22,807, 22,913 (2002). Although Senator Rockefeller stated that the new language would "overrule" the aspect of *Hensley* that "emphasized that [the Veterans Court] should perform only limited, deferential review of [Board] decisions," he also observed that "nothing in this new language is inconsistent with the existing section 7261(c),

which precludes the court from conducting trial de novo when reviewing [Board] decisions, that is, receiving evidence that is not part of the record before [the Board]." *Ibid.* Thus, even if a single Senator's statement were an authoritative guide to the interpretation of the VBA amendments, it would not support petitioner's argument in this case.

Petitioner is likewise wrong in contending (Pet. 27-29) that the court of appeals erred by relying on this Court's decisions in *Thomas* and *Ventura*. Petitioner argues (Pet. 28) that "*Thomas* and *Ventura* are distinguishable from this case, because they merely reiterate the established rule that appellate courts cannot engage in de novo fact-finding—a rule that is fully consistent with the jurisdictional statutes of the [Veterans Court]." But that rule is not distinguishable; it is exactly the rule recognized and applied by both the court of appeals and the Veterans Court here. See Pet. App. 5a, 21a-23a. In both *Thomas* and *Ventura*, the Court admonished that, when an agency has made a reversible error but the ultimate outcome of the case depends on the resolution of factual issues that the agency has not yet addressed, the "proper course, except in rare circumstances, is to remand to the agency for additional investigation or explanation." *Thomas*, 547 U.S. at 186 (quoting *Ventura*, 537 U.S. at 16). The court of appeals correctly held that no such rare circumstances were present in this case, and it accordingly applied the general rule mandating remand for further agency proceedings. Pet. App. 5a-6a.[2]

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[2] The rule governing remands has particular force when a factual issue requires consideration by the agency with appropriate expertise. See Pet. App. 5a-6a; *Ventura*, 537 U.S. at 16-17; *Thomas*, 547 U.S. at 186-187; see also *SEC* v. *Chenery Corp.*, 318 U.S. 80, 95-96

4. The Federal Circuit's decision does not conflict with any decision of another court of appeals. Petitioner identifies (Pet. 17-18 & n.3) a number of cases in other circuits that she claims apply the so-called futility rule. As the court of appeals recognized, however, "[n]one of the rare circumstances found in the cases cited by [petitioner] from other circuits is present in the current case." Pet. App. 6a. The reversals in some of the cases on which petitioner relies were based on appellate determinations that the agency's factual findings were clearly erroneous or not supported by substantial evidence. See, *e.g.*, *Felisky* v. *Bowen*, 35 F.3d 1027, 1041 (6th Cir. 1994) (reversing ultimate factual determina-

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(1943). Petitioner's amici disagree, contending that the Veterans Court, as an Article I court, need not afford the same deference to the Secretary as an Article III court would. Fox Amicus Br. 15-18; Vet. Org. Amicus Br. 10-11. Citing *Newhouse* v. *Nicholson*, 497 F.3d 1298 (Fed. Cir. 2007), Professor Fox suggests that the Veterans Court is not constrained by conventional appellate doctrines. Fox Amicus Br. at 20. But the court in *Newhouse* simply held that the Veterans Court could determine in the first instance whether an error was prejudicial or harmless in light of its statutory directive to "take due account of the rule of prejudicial error." 497 F.3d at 1301-1302; see 38 U.S.C. 7261(b)(1). That explicit statutory directive does not transform the Veterans Court into a factfinding court or alter its nature as an appellate court of limited review. The policy considerations favoring remand—agency expertise in evaluating evidence, providing an opportunity for the agency to outline its reasoning, etc.—operate with no less force in this context than in the immigration context discussed in *Ventura*, and indeed may apply with even greater force because of the pro-claimant nature of the Board's review. Such policy considerations are implicit in the statutory requirement that the Board provide written "reasons or bases" for its decisions. 38 U.S.C. 7104(d)(1); see Pet. App. 23a (noting that the Board "did not include in its decision any discernable statement of reasons or bases which would allow the [Veterans] Court to review its decision").

tions where the court found administrative law judge's credibility determinations not supported by substantial evidence); *Watson* v. *Geren*, 569 F.3d 115, 129 (2d Cir. 2009) (reversing agency decision that had "no basis in fact"). Pursuant to 38 U.S.C. 7261(a)(4), the Veterans Court is similarly empowered to reverse clearly erroneous factual findings, *when such findings are present*. No such findings were made by the Board in this case.

In other cases on which petitioner relies, the reviewing court engaged in harmless-error review and affirmed the agency's ultimate conclusion despite legal or procedural errors. See *Hussain* v. *Gonzales*, 477 F.3d 153, 157-158 (4th Cir. 2007) (stating that *Ventura* and *Thomas* concerned an appellate court's authority "to review in the first instance *factual* issues not considered by the Board," and distinguishing its case as presenting a "legal, not a factual, conclusion"); *Krauss* v. *Oxford Health Plans, Inc.*, 517 F.3d 614, 630 (2d Cir. 2008) (finding remand unnecessary despite procedural errors below because the denial of the ERISA claim "was, as a substantive matter, an appropriate" decision); *Xiao Ji Chen* v. *United States Dep't of Justice*, 471 F.3d 315, 339 (2d Cir. 2006) (applying harmless-error review to affirm the agency). The Federal Circuit has recognized that the Veterans Court can similarly engage in harmless-error review when necessary and can affirm (rather than remand) where appropriate. See *Newhouse*, 497 F.3d at 1301-1302.[3]

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[3] In the rest of the decisions that petitioner cites (Pet. 17 n.3) as applications of the "futility rule," appellate courts found remand unnecessary because the appellate court's reasoning left the agency with no meaningful discretion to exercise. See *Moisa* v. *Barnhart*, 367 F.3d 882, 887 (9th Cir. 2004) (holding that remand was unnecessary because there were "no outstanding issues" and the "ALJ would

be required to find" a particular way on remand); *Sierra Club* v. *United States EPA*, 346 F.3d 955, 963 (9th Cir. 2003) (reversing the EPA's factual finding regarding the cause of emissions exceedances and finding remand futile because there was "no possibility" of another interpretation); *Holohan* v. *Massanari*, 246 F.3d 1195, 1208-1210 (9th Cir. 2001) (holding that the ALJ had reached a decision not supported by substantial evidence and had committed legal error, and that remand was futile because it was "clear from the record that the ALJ would be required to award benefits"); *Nielson* v. *Sullivan*, 992 F.2d 1118, 1122 (10th Cir. 1993) (reversing the agency and awarding Social Security benefits where the "Secretary failed to show good cause for failure to adduce relevant evidence" before the agency and the evidence all supported a finding of disability (citing *Allen* v. *Bowen*, 881 F.2d 37, 44 (3d Cir. 1989)); *Davis* v. *Shalala*, 985 F.2d 528, 534 (11th Cir. 1993) (finding that the agency had applied the wrong legal standards but that remand was not necessary where the "Secretary has already considered the essential evidence and it is clear that the cumulative effect of the evidence establishes disability without any doubt"); *George Hyman Constr. Co.* v. *Brooks*, 963 F.2d 1532, 1539 (D.C. Cir. 1992) (finding remand futile because "only one disposition [wa]s possible as a matter of law"); *Mowery* v. *Heckler*, 771 F.2d 966, 973 (6th Cir. 1985) (reversing the Social Security Administration's factual findings and awarding benefits because the "record compel[led] a finding of disability"); *Vista Hill Found., Inc.* v. *Heckler*, 767 F.2d 556, 566 & n.9 (9th Cir. 1985) (finding remand unnecessary where the agency's action was arbitrary and capricious). In the only case cited by petitioner in which the agency had not considered the evidence at all or made any factual findings, the court examined the case law and, applying the same principle that the court of appeals applied here, remanded the case to allow the agency to consider the evidence initially. See *Seavey* v. *Barnhart*, 276 F.3d 1, 11 (1st Cir. 2001) ("When an agency has not considered all relevant factors in taking action, or has provided insufficient explanation for its action, the reviewing court ordinarily should remand the case to the agency."). To the extent that any of these decisions could be read as inconsistent with the court of appeals' decision here, they are also inconsistent with this Court's summary reversals in *Thomas* and *Ventura*, which postdated most of the cases cited by petitioner.

Petitioner cites no decision authorizing an appellate court to expedite the resolution of an administrative proceeding by deciding material issues of fact that the agency had not considered in the first instance. Such an approach would be inconsistent with this Court's decisions in *Ventura* and *Thomas*, and with settled understandings of the proper role of appellate courts. Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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