No. 24-452

In the Supreme Court of the United States

LOUIS FRANTZIS, PETITIONER

v.

DENIS R. MCDONOUGH,
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 correctly rejected petitioner's contention that the member of the Board of Veterans' Appeals who conducted his hearing was also required to issue the Board's decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 104 F.4th 262. The order of the United States Court of Appeals for Veterans Claims (Veterans Court) (Pet. App. 72a-74a) denying en banc review is not published in the Veterans Appeals Reporter but is available at 2022 WL 2980978. The decision of the Veterans Court (Pet. App. 8a-71a) is reported at 35 Vet. App. 354.

JURISDICTION

The judgment of the court of appeals was entered on June 4, 2024. On August 27, 2024, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 18, 2024, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Secretary of Veterans Affairs is authorized to "decide all questions of law and fact" affecting "the provision of benefits by the Secretary to veterans or the dependents or survivors of veterans." 38 U.S.C. 511(a). The Secretary has delegated the authority to decide such questions in individual cases to regional offices of the Department of Veterans Affairs located throughout the United States. See 38 U.S.C. 315 and 512(a). If a claimant is dissatisfied with the regional office's decision, he may appeal the decision to the Board of Veterans' Appeals (Board) by filing a notice of disagreement. 38 U.S.C. 7105. The Board is responsible for issuing the Secretary's "[f]inal decisions" on all claims for disability compensation that come before it. 38 U.S.C. 7104(a).

Since 1988, the Board's decisions have been subject to review in the Veterans Court, an Article I tribunal. 38 U.S.C. 211(a) (1988); see *Henderson* v. *Shinseki*, 562 U.S. 428, 432 (2011). The Veterans Court may "decide all relevant questions of law," and—"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)(1) and (4).* Certain legal determina-

* The petition's introduction and statement cite 38 U.S.C. 7261(a)(4) for the proposition that "the Veterans Court cannot revisit the Board's credibility determinations." Pet. 7; see Pet. 2. That citation appears to be mistaken because the provision does not reference credibility determinations and states that "finding[s] of material fact" are reviewable under the clear error-standard. 38

tions of the Veterans Court are subject to further review by the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292.

b. Over the last three decades, Congress has made several amendments to the statutory provisions that govern the Board's adjudication of administrative appeals of benefits decisions. Before 1994, 38 U.S.C. 7102 set out procedures for assigning benefits proceedings and holding hearings. 38 U.S.C. 7102 (Supp. III 1991). In 1994, Congress amended Section 7102 so that it provided (as relevant here) that "[a] proceeding instituted before the Board may be assigned to an individual member" or panel, who "shall make a determination thereon, including any motion filed in connection therewith." 38 U.S.C. 7102(a) (1994). Section 7102 further provided that the "[t]he member or panel * * * shall make a report," which "shall constitute the final disposition of the proceeding by the member." *Ibid.* At the same time, Congress moved to Section 7107 the language that specifically addressed hearings. 38 U.S.C. 7107 (1994). Revised Section 7107(b) provided that "[t]he Board shall decide any appeal only after affording the appellant an opportunity for a hearing." 38 U.S.C. 7107(b) (1994). Revised Section 7107(c) provided that, except in cases of reconsideration, the "member or members designated by the Chairman to conduct the hearing shall participate in making the final determination of the claim." 38 U.S.C. 7107(c) (1994).

In 2017, Congress enacted the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Pub.

U.S.C. 7261(a)(4). The statement also cites (Pet. 7) *Jones* v. *Derwinski*, 1 Vet. App. 210, 217 (1991), but the Veterans Court in that case merely declined to make a credibility determination in the "first instance." *Ibid.*

L. No. 115-55, 131 Stat. 1105. The AMA did not change the relevant language of Section 7102, but it revised Section 7107(a) and (b) to require the Board to maintain a hearing docket and permit motions for expedited review. Current Section 7107(c) eliminates any reference to the requirement that a hearing must occur before the member or members who participate in the final determination. Instead, the provision now calls for hearings to be held either live or via video conferencing. See 38 U.S.C. 7107(c).

These and other revised procedures apply to all benefits claims for which the initial decision is rendered on or after February 19, 2019. See AMA § 2(x), 131 Stat. 1115; *Mattox* v. *McDonough*, 56 F.4th 1369, 1375 (Fed. Cir. 2023). The pre-AMA procedures continue to apply to claims that were decided before February 19, 2019, unless the veteran opts into the new procedures through a congressionally authorized program. *Ibid.*

2. Petitioner served honorably in the United States Army from 1979 to 1982. Pet. App. 8a. In 2009, he sought disability compensation for service-connected headaches. *Id.* at 10a. The regional office ultimately granted his claim, but gave him a disability rating of 0%, which meant that he was not entitled to any disability compensation. *Id.* at 11a. In subsequent proceedings, petitioner's disability rating was increased to 10% for 2010-2014, and 50% from November 2014 onwards. *Ibid.*

Petitioner appealed the pre-2014 ratings to the Board. Pet. App. 8a-9a. Because petitioner's initial claim was decided before February 2019, he was not automatically subject to the AMA's revised appellate procedures, but petitioner opted into the AMA-controlled procedures. *Id.* at 11a. Petitioner also requested a hearing, which was held via videoconference in May 2019. *Id.* at

12a. At that hearing, petitioner and his wife testified before Board Member James Reinhart, and a transcript of the hearing was associated with petitioner's claim file. *Ibid.* Approximately four months later, in September 2019, the Board issued a decision denying a higher disability rating and an earlier effective date for petitioner's service-connected headaches, signed by Board Member Theresa Catino. *Ibid.*; see C.A. App. 51-58.

The Board's decision began with an explanation of the general rule that headaches warrant a disability rating of 50% when the servicemember has "very frequent completely prostrating and prolonged attacks productive of severe economic inadaptability." C.A. App. 54. The Board then described petitioner's relevant medical records from 2009 to 2014, *id.* at 54-56, as well as testimony given by petitioner and his wife at the hearing, *id.* at 56. The Board acknowledged that petitioner and his wife had "testified that the severity of his headaches had been characteristic of prostrating attacks since 2009." *Ibid.* The Board found, however, that the evidence did not support that testimony because petitioner's "treatment records and [an] April 2024 examination report indicated that [petitioner's] headaches were of less severity and contemporaneously documented his symptoms and the severity of his headaches." *Id.* at 57. "Accordingly, the Board f[ound] the lay assertions of prostrating attacks [we]re outweighed by the other evidence of record." *Ibid.*

3. a. Petitioner appealed the Board's decision to the Veterans Court. Pet. App. 8a-71a. As relevant here, petitioner argued that Section 7102 "requires that the same Board member who conducts a hearing must also issue a decision in the appeal." *Id.* at 13a. The court rejected that contention. *Id.* at 16a-25a. The court

acknowledged its prior holding in *Arneson* v. *Shinseki*, 24 Vet. App. 379 (2011), that the pre-AMA statutory scheme required the Board member who conducted the hearing to author the decision. Pet. App. 17a. But the court observed that *Arneson*'s holding was based on language that the AMA had subsequently removed from Section 7107—specifically, former Section 7107(c)'s command that the "member or members designated by the Chairman to conduct the hearing shall * * * participate in making the final determination of the claim." *Id.* at 18a-19a (quoting 38 U.S.C. 7107(c) (2016)). The court found "the removal of the statutory language * * * highly significant." *Ibid.* The court also rejected the contention that Section 7102(a)—which the AMA did not amend—should be interpreted to compel the same result as the prior language of Section 7107(c). *Id.* at 21a-25a.

The Veterans Court also "decline[d] to consider how the fair process doctrine may apply," finding that argument waived. Pet. App. 27a-28a. The court explained that the "'fair process doctrine'" is generally described "as an obligation placed on [the Department of Veterans Affairs] to provide claimants fair process in the adjudication of their claims," even (at times) when those processes are "not required by statute or regulation." *Id.* at 27a. But the court observed that petitioner had not invoked the fair process doctrine until oral argument, when he briefly discussed it "largely in response to a pre-argument order." *Ibid.* The court declined to "reach out to decide th[e] appeal based on a ground [petitioner] did not raise." *Id.* at 28a.

Finally, the Veterans Court rejected petitioner's argument that the Board had erroneously failed to "consider the statements both he and his wife made" at the

hearing. Pet. App. 30a. The court explained that petitioner was "simply wrong when he state[d] that the Board did not consider these statements as evidence." *Ibid.* The court observed that the Board had considered the testimony and had "explained that [it was] outweighed by other evidence of record." *Id.* at 31a. In a footnote, the court also rejected the dissent's assertion that the Board had "implicitly found that appellant and his wife were not credible." *Id.* at 31a n.100. The court explained that this "theory that was not presented on appeal," noting that petitioner did "not even challenge the Board's weighing of the evidence, let alone an alleged implicit credibility finding." *Ibid.*

b. Judge Jaquith dissented. Based on Section 7102 and the fair process doctrine, he would have held that the same Board member who conducts the hearing must issue the decision, particularly where credibility determinations are involved. Pet. App. 32a-65a.

c. The Veterans Court denied a motion for full court review. Pet. App. 73a-74a. Chief Judge Bartley, joined by Judge Jaquith, dissented from the denial, based on her view that the panel should have addressed the fair process doctrine. *Ibid.*

4. The court of appeals affirmed. Pet. App. 1a-7a. The court recognized that, before the AMA amendments were enacted, Section 7107(c) had provided that "the Board member who conducted the hearing must participate in the final determination of the claim." *Id.* at 4a. The court observed, however, that petitioner had elected to have his appeal determined under the AMA, and that the AMA amendments had "removed the language that required the same judge for both the hearing and final determination." *Ibid.* (citation omitted).

The court of appeals also rejected petitioner's contention that Section 7102 currently imposes the same requirement. Pet. App. 5a-6a. The court observed that, if it accepted petitioner's argument that the "unchanged language of Section 7102" imposes the same requirement as the now-excised language in Section 7107(c), that would mean that the pre-AMA language in Section 7107(c) had been superfluous. *Id.* at 5a.

The court of appeals also found that petitioner had forfeited any claim under the fair process doctrine or the Constitution. Pet. App. 6a. The court observed that "[t]here is uncertainty surrounding this doctrine and how it is applied," describing the doctrine as "a recognition that due process applies in the claimant process." *Ibid.* But the court found that, "[t]o the extent [petitioner] argues the fair process doctrine creates a procedural right, the argument was not presented below and is thus forfeited." *Ibid.*

ARGUMENT

Petitioner contends (Pet. 14-18) that, under 38 U.S.C. 7102(a), the same member of the Board of Veterans' Appeals who conducts the hearing must also issue the Board's decision. That contention is at odds with the plain text of Section 7102 and with the statutory history. While the requirement that petitioner advocates once appeared in 38 U.S.C. 7107(c), Congress removed the relevant language in 2017, and Section 7102(a) does not maintain the same-member requirement in effect.

Petitioner also contends (Pet. 18-26) that he has a Due Process Clause right to have the same Board member preside over his hearing and issue the opinion, at least where the Board makes an adverse credibility determination. That contention is not properly presented

here, both because the court of appeals found that petitioner had forfeited any constitutional argument, Pet. App. 6a, and because the Board did not make an adverse credibility determination in petitioner's case, *id.* at 31a. In any event, petitioner cites no precedent of this Court or any other court that has recognized a Due Process Clause right to have the same adjudicator hear and issue the decision in an administrative appeal. And this case would be a poor vehicle for the Court to consider whether such a right exists, since petitioner did not assert the argument below.

1. The court of appeals correctly rejected petitioner's contention that Section 7102 requires the same Board member who conducts the hearing to issue the Board decision. Pet. App. 5a. Section 7102 states that a Board member or panel "assigned a proceeding shall make a determination thereon, including any motion filed in connection therewith," and that the resulting report shall constitute the "final disposition." 38 U.S.C. 7102(a). That language provides that the member or panel assigned to a proceeding must issue a final Board decision and decide all of the related motions. But nothing in the text prohibits reassignment, and once a proceeding is reassigned, it is the member or panel who is currently assigned to the proceeding who "shall make" the necessary determinations. *Ibid.* Indeed, reading Section 7102 to bar reassignments would produce absurd results because a member or panel assigned to a proceeding would be forced to see the proceeding through to final disposition, no matter what conflicts, illnesses, or other obstacles might arise.

The statutory history confirms this plain-text reading. Before 1994, Section 7102 governed both Board proceedings in general and hearings in particular. See

38 U.S.C. 7102 (Supp. III 1991). In a set of 1994 amendments, Congress moved the hearing-specific material to Section 7107. 38 U.S.C. 7107 (1994). The 1994 version of Section 7107 included a hearing-specific requirement that "[s]uch member or members designated by the Chairman to conduct the hearing shall * * * participate in making the final determination of the claim." Pet. App. 4a (quoting 38 U.S.C. 7107(c) (1994)). It is undisputed that this text required the same Board member to both conduct the hearing and issue the decision in a particular proceeding. See *Arneson* v. *Shinseki*, 24 Vet. App. 379, 386 (2011).

In 2017, however, Congress eliminated the same-member requirement from Section 7107. 38 U.S.C. 7107(c); see pp. 3-4, *supra*. That provision now specifies that a hearing may occur in person or via video conference, and it places limits on when those two options may be used. *Ibid.* The prior same-member language does not appear either in Section 7107(c) or elsewhere in the statute. The AMA amendments therefore leave the Board free to assign different members to conduct the hearing and issue the decision in a particular proceeding. At oral argument before the Veterans Court, respondent explained that the Board has used this freedom to "try[] to make the process more efficient," programming the Board's computer system to assign the decision in a case to the Board member who "heard the hearing if they're available," but to assign the case to a different member if the member who conducted the hearing is "not available" within a specified time. Pet. App. 55a.

b. Petitioner asserts (Pet. 14-16) that Section 7102 requires—and has always required—that the Board member who conducts the hearing must also issue the decision. That requirement, petitioner contends, is conveyed

by the language stating that "[a] member or panel assigned a proceeding shall make a determination thereon, including any motion filed in connection therewith." 38 U.S.C. 7102(a). Petitioner does not explain, however, why that language forbids reassignment. Nor does he grapple with the practical implications of his reading.

It is one thing to require—as Section 7107(c) once did—that a decision must be issued by the adjudicator who conducted the hearing. That requirement imposes some inefficiencies, since a decision may be delayed if conflicts arise, and a hearing may even have to be repeated if the original adjudicator becomes permanently unavailable. But those problems (which may have prompted Congress to delete the same-member requirement from Section 7107(c)) are much less significant than the inefficiencies that would result if the Board member who was originally assigned to *any* proceeding was required to see that proceeding out to final disposition.

Petitioner's reading would also mean that, from 1994 until 2017, Section 7107(c) imposed a hearing-specific command that was superfluous in light of the general bar on reassignment that petitioner would read into Section 7102(a). Pet. App. 5a. This Court generally "rejects an interpretation of the statute that would render an entire subparagraph meaningless," as the Court is "'obliged to give effect, if possible, to every word Congress used.'" *National Ass'n of Mfrs.* v. *Department of Def.*, 583 U.S. 109, 128-129 (2018) (citation omitted). Although this canon of statutory interpretation can be overcome with "clear evidence that Congress intended this surplusage," *id.* at 128, petitioner points to nothing in the statutory text or history that might suggest such an unlikely design.

Petitioner is also wrong in asserting (Pet. 18) that the pro-veteran canon supports his reading of Section 7102. Courts generally apply that canon only when confronted with an ambiguity. Here, "[t]he statutory scheme and its history are clear—the same judge is not required to both conduct the hearing and author the final determination under the AMA." Pet. App. 5a-6a. Thus, even if the pro-veteran canon remains a viable tool of statutory construction, but see *Rudisill* v. *McDonough*, 601 U.S. 294, 314-318 (2024) (Kavanaugh, J., concurring), it does not apply here.

That is particularly so because petitioner's reading of Section 7102 would not produce uniformly pro-veteran results. Congress enacted the AMA for the overarching purpose of expediting the adjudication of veterans' claims, after recognizing that the old process was too sluggish to effectively resolve pending board appeals. See H.R. Rep. No. 135, 115th Cong., 1st Sess. 5 (2017) (estimating that, "if the current appeals process is not changed, claimants will wait an average [of] ten years for a final appeals decision by the end of 2027"). A categorical prohibition against reassignment would perpetuate the inefficiencies in the old system, making it harder for veterans to have their appeals adjudicated in a timely manner.

2. Petitioner alternatively contends (Pet. 18-26, 30-33) that the court of appeals' decision is wrong because the Due Process Clause requires that, "[w]here credibility determinations made based on live testimony are dispositive, the official who conducts the hearing must make any necessary credibility determinations." Pet. 19. Petitioner advances that argument first (Pet. 18-26) as a matter of "constitutional avoidance," and then (Pet.

30-33) as a free-standing Due Process Clause argument. Both versions of the argument are unpersuasive.

a. The doctrine of constitutional avoidance has no role to play here, and petitioner has forfeited his standalone constitutional claim. This Court has repeatedly explained that constitutional avoidance "has no application in the absence of . . . ambiguity." *Warger* v. *Shauers*, 574 U.S. 40, 50 (2014) (citation omitted). Here, the statutory text leaves no room for petitioner's favored interpretation. See pp. 9-10, *supra*. And petitioner's standalone constitutional claim is not properly before the Court because "the argument was not presented" before the agency or the Veterans Court "and is thus forfeited." Pet. App. 6a; see *id.* at 27a-28a. In addition, petitioner voluntarily chose to have his appeal adjudicated under the post-AMA statute, thereby forgoing his right to invoke the pre-AMA statutory procedures, including the same-adjudicator requirement under former Section 7107(c). See Pet. App. 11a. Petitioner's voluntary waiver of the procedural protection that he now asserts is constitutionally required further weakens his Due Process Clause claim.

b. In any event, the purported Due Process Clause right that petitioner asserts is not implicated here. Petitioner argues that the adjudicator who "conducts the hearing must make any necessary credibility determinations," Pet. 19, but the Board did not make any adverse credibility determinations in this case. Instead, the Board acknowledged petitioner's testimony but "f[ound] the lay assertions of prostrating attacks [we]re outweighed by the other evidence of record." C.A. App. 57. Indeed, the Veterans Court explained that, in challenging the Board's decision, petitioner had not "even challenge[d] the Board's weighing of the evidence, let

alone an alleged implicit credibility finding." Pet. App. 31a n.100.

The Board's determination that petitioner's lay testimony was outweighed by medical evidence does not constitute the sort of credibility determination that is sometimes afforded deference. This Court has explained that, when an adjudicator makes credibility determinations based on observable factors like "variations in demeanor and tone of voice," it may be appropriate to give greater deference to the factfinder who observed the testimony. *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 575 (1985). But the Court in *Anderson* also recognized that, when testimony is instead given weight based on objective evidence that can be gleaned from the record—such as documents or internal inconsistencies that "contradict the witness' story"—there is no inherent reason to defer to those who observed the testimony firsthand. *Ibid.* This case implicates the latter principle rather than the former.

c. In any event, this Court's observations about deference stop well short of recognizing a Due Process Clause right to have a hearing conducted by the same adjudicator who issues the final decision. Petitioner does not cite any decision holding that such a constitutional right exists. *Morgan* v. *United States*, 298 U.S. 468 (1936), was decided on statutory grounds, *id.* at 477, and it involved a decisionmaker who "had neither heard *nor read* evidence or argument," *id.* at 479 (emphasis added). The Board's decision here, by contrast, provides a detailed description of the evidence, including the testimony of petitioner and his wife. See C.A. App. 54-56. *Califano* v. *Yamasaki*, 442 U.S. 682 (1979), was also decided on statutory rather than constitutional grounds, and the Court focused on whether some form

of in-person hearing was required, not whether the same agency official had to conduct the hearing and issue the decision. See *id.* at 697.

Goldberg v. *Kelly*, 397 U.S. 254 (1970), is a constitutional decision, but the Court held only that the Due Process Clause requires an evidentiary hearing before welfare benefits can be terminated. See *id.* at 264-266. Even assuming the same constitutional requirement applies to petitioner's claim for veterans benefits, petitioner received a pre-decisional Board hearing in May 2019. Pet. App. 12a. And in *Mathews* v. *Eldridge*, 424 U.S. 319 (1976), the Court later held that an evidentiary hearing is not required before the termination of Social Security disability benefits, based in part on the Court's observation that adjudicators in such disputes are more likely to base their decisions on medical reports than on witness credibility. *Id.* at 343-344. The Board relied on just such medical reports here. C.A. App. 54-56.

Finally, petitioner relies (Pet. 22) on *United States* v. *Raddatz*, 447 U.S. 667 (1980). But as petitioner acknowledges (Pet. 22), the *Raddatz* plurality rejected the contention that the Due Process Clause requires district judges to personally hear witness testimony where credibility is at issue in criminal proceedings. Petitioner suggests (*ibid.*) that the Court would have reached a different outcome if it had believed that the district court would defer to a magistrate judge's *adverse* credibility determination. But even if that supposition is assumed to be correct, that would not establish a Due Process violation in the "informal and nonadversarial" veterans-benefits proceedings at issue here. *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 323 (1985); see *Henderson* v. *Shinseki*, 562

U.S. 428, 431 (2011) (citing *Walters*, *supra*). That is particularly so because the Board did not make an adverse credibility determination in deciding petitioner's appeal.

3. At a minimum, petitioner's failure to present his constitutional arguments to the agency or the Veterans Court makes this case a poor vehicle to address the question presented. Because "this Court normally proceeds as a 'court of review, not of first view,'" *United States* v. *Haymond*, 588 U.S. 634, 657 (2019) (citation omitted), it should not be the first to consider petitioner's Due Process Clause arguments, either in the context of constitutional avoidance or as a free-standing constitutional claim. As petitioner observes (Pet. 33), the Board has continued to assign a different Board member to issue a decision when the member who conducted the hearing is unavailable. If that practice gives rise to the harms petitioner hypothesizes, the Court will have other opportunities to consider the question presented in a case in which all of the issues are properly preserved.

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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