No. 01-1826

In the Supreme Court of the United States

REZI P. FORSHEY, PETITIONER

v.

ANTHONY J. PRINCIPI,
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, in reviewing an appeal from the United States Court of Appeals for Veterans Claims, a court of appeals may decline to consider arguments that were never previously raised.

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OPINIONS BELOW

The en banc opinion of the court of appeals (Pet. App. 1-58) is reported at 284 F.3d 1335. The opinion of the Court of Appeals for Veterans Claims is reported at 12 Vet. App. 71.

JURISDICTION

The en banc judgment of the court of appeals was entered on April 1, 2002. The petition for a writ of certiorari was filed on June 17, 2002. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is the surviving spouse of a veteran who died in a motorcycle accident while on active duty

in the United States Navy; a toxicology report showed that the veteran's blood alcohol level at the time of his death was 0.139%. Pet. App. 3.[1] Petitioner sought benefits for dependency and indemnity compensation, under 38 U.S.C. 1310, claiming that she was the surviving spouse of a veteran who had died from a service-connected disability.

On May 31, 1996, the Board of Veterans' Appeals denied petitioner's claim. Pet. App. 6. The Board concluded that the accident had occurred on a dry road surface, with clear weather and no apparent mechanical failure; thus, it held that "the preponderance of the evidence demonstrates that alcohol was the proximate cause of the veteran's death, and the veteran's death [was] consequently the result of his own willful misconduct." *Id.* at 6-7. The Board reached that conclusion despite a statutory "benefit of the doubt" rule, which requires favoring claimants in all closely balanced factual disputes. See *id.* at 6; 38 U.S.C. 5107(b).

Petitioner appealed to the United States Court of Appeals for Veterans Claims (Veterans Court), arguing that the Board had misapplied the "benefit of the doubt" rule. Pet. App. 7. Petitioner did not challenge any regulation of the Department of Veterans Affairs (VA), nor did she dispute that a preponderance of the evidence was the proper evidentiary standard for her case. *Ibid.* The Veterans Court rejected petitioner's arguments, holding that the Board had given her the proper "benefit of the doubt" and that a preponderance

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[1] See also *Forshey* v. *West*, 12 Vet. App. 71, 73 (Ct. Vet. App. 1998) (noting that "a blood alcohol level in the range of 0.080% to 0.100% results in intoxication that * * * results in loss of judgment and muscular coordination").

of the evidence nonetheless indicated that intoxication had proximately caused the veteran's death.

2. Petitioner appealed the Veterans Court's decision to the court of appeals. There, she argued for the first time that VA regulations did not prescribe evidentiary standards for evaluating whether injuries caused by intoxication are "willful misconduct."[2] Pet. App. 8. She further asserted for the first time that such determinations require the government to produce "clear and convincing" evidence. *Ibid.* In response, the VA claimed that the court of appeals lacked jurisdiction over those untimely raised legal issues, and that prudential considerations counseled against addressing petitioner's new arguments.

A divided panel of the court of appeals disagreed with the VA's position. A majority of the panel found that the court had jurisdiction to hear petitioner's arguments because the Veterans Court had relied on the preponderance of the evidence standard in making its decision. Pet. App. 8-9 (citing 38 U.S.C. 7292(a)). The majority also held that clear and convincing evidence was needed to prove that a veteran's injury was not service-related. *Id.* at 9.

The VA filed a petition for rehearing en banc, which was granted. A majority of the en banc court agreed with petitioner that the court had jurisdiction to consider petitioner's arguments, but it declined to hear those arguments on prudential grounds because "[o]rdinarily an appellate court does not give consideration to issues not raised below." Pet. App. 34 (quoting

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[2] See generally 38 C.F.R. 3.301(c)(2) ("If * * * intoxication results proximately and immediately in disability or death, the disability or death will be considered the result of the person's willful misconduct.").

Hormel v. *Helvering*, 312 U.S. 552, 556-557 (1941)). The court of appeals applied those principles to Veterans Court proceedings because "the Court of Appeals for Veterans Claims is a court and depends upon the adversarial parties to identify the issues for review." Pet. App. 37.

Chief Judge Mayer filed a dissenting opinion, which Judge Newman joined. Pet. App. 47-58. That opinion noted that the facts of veterans disability cases are "developed in non-adversarial circumstances, and the system is uniquely paternalistic." *Id.* at 47. Thus, it concluded that conventional issue exhaustion rules were "inappropriate." *Ibid.* The dissenters stated: "[B]ecause Congress created a veteran-friendly system, the court should generously indulge a presumption that the exceptions to issue [exhaustion] apply." *Id.* at 52.

ARGUMENT

It is beyond dispute that, in reviewing administrative or judicial adjudications, appellate courts do not ordinarily address issues that were not previously raised. "This is essential in order that parties may * * * offer all the evidence they believe relevant to the issues which the trial tribunal is alone competent to decide; it is equally essential in order that litigants may not be surprised on appeal." *Hormel* v. *Helvering*, 312 U.S. 552, 556 (1941).[3] The court of appeals' decision

[3] See *Singleton* v. *Wulff*, 428 U.S. 106, 120 (1976) ("It is the general rule, of course, that a federal appellate court does not consider an issue not passed upon below. * * * The matter of what questions may be taken up and resolved for the first time on appeal is one left primarily to the discretion of the courts of appeals."); see also *Sims* v. *Apfel*, 530 U.S. 103, 112 (2000) (O'Connor, J., concurring in part) ("In most cases, an issue not presented to an administrative decisionmaker cannot be argued for the first time in

comports with those established principles of administrative law and appellate practice, and it does not conflict with the reasoning of any decision of this Court or any court of appeals. Further review is not warranted.

1. Seeking to avoid such traditional principles, petitioner relies on this Court's decision in *Sims* v. *Apfel*, 530 U.S. 103 (2000). The Court in *Sims* held that, absent any dispositive statute or regulation, "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." *Id.* at 109. The Court stressed that "[w]here the parties are expected to develop the issues in an adversarial administrative proceeding, * * * the rationale for requiring issue exhaustion is at its greatest." *Id.* at 110.[4]

The facts of *Sims* concerned administrative proceedings before the Social Security Administration's Council of Appeals (Council), where this Court found issue exhaustion inapplicable. *Sims*, 530 U.S. at 112

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federal court. On this underlying principle * * * the Court is unanimous."); *United States* v. *L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37 (1952) ("Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires as a general rule that courts should not topple over administrative decisions unless the administrative body * * * has erred against objection made at the time appropriate under its practice."); *Trident Seafoods, Inc.* v. *NLRB*, 101 F.3d 111, 116 (D.C. Cir. 1996) ("It is a basic tenet of administrative law that each party to a formal adjudication must have a full and fair opportunity to litigate the issues to be decided by the agency."); 2 Richard J. Pierce, Jr., *Administrative Law Treatise* § 15.8, at 1017-1019 (4th ed. 2002).

[4] See also *Sims*, 530 U.S. at 112 (plurality) (finding the rationale for issue exhaustion "at its weakest" where "[t]he adversarial development of issues by the parties * * * does not exist").

(plurality); *id.* at 114 (O'Connor, J., concurring in part). Claimants seeking Council review were permitted, by regulation, to initiate an appeal by filing a three-line form, but that document provided no realistic opportunity for raising every argument relevant to the appeal. Moreover, "[a]lthough the * * * regulations warn claimants that completely failing to request Appeals Council review will forfeit * * * judicial review, see 20 C.F.R. § 404.900(b) (1999), the regulations provide *no notice* that claimants must also raise specific issues * * * to preserve them for review in federal court." *Id.* at 113 (O'Connor, J., concurring in part) (emphasis added). On the contrary, instructions on the three-line form estimated that claimants would need only 10 minutes "to read the instructions, collect the relevant information, and complete the form." *Sims*, 530 U.S. at 113 (plurality).

Four Justices noted that the form's cursory nature "strongly suggests that the Council does not depend much, if at all, on claimants to identify issues for review." *Sims*, 503 U.S. at 112 (plurality). They also noted that the Commissioner's appearance before the Council is "not as a litigant opposing the claimant, but rather just as an adviser to the Council," and that the Council's proceedings were conducted "in an informal, nonadversary manner." *Id.* at 111 (plurality) (quoting 20 C.F.R. 404.900(b) (1999)). In sum, "the regulations and procedures of the Social Security Administration * * * *affirmatively suggest* that specific issues need not be raised before the Appeals Council. * * * [T]he relevant regulations and procedures indicate that issue exhaustion before the Appeals Council is *not* required."

530 U.S. at 113 (O'Connor, J., concurring in part) (first emphasis added).[5]

Unlike the administrative process described in *Sims*, appeal to the Veterans Court is a formal, adversarial, inherently judicial procedure created to "provide a more independent review by a body which is not bound by the [VA's] view of the law, and that will be more clearly perceived as one which has as its sole function deciding claims in accordance with the Constitution and the laws of the United States." H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 26 (1988).[6] The intended value of the Veterans Court's judicial deliberations would thus be undermined if claimants could—through inattention or design—raise arguments in the court of appeals despite having failed to raise those arguments before the Veterans Court.

The statutory provisions that created the Veterans Court confirm its status as a formal, adversarial court

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[5] Petitioner seriously misreads *Sims* in suggesting (Pet. 5) that the case rested on an implicit notion that "*the parties* had a non-adversarial relationship." The *Sims* Court said nothing about any relationship between the parties; instead, it focused entirely on the character of the relevant *proceedings*. See 530 U.S. at 108-110; *id.* at 110-112 (plurality); *id.* at 113-114 (O'Connor, J., concurring in part).

[6] Indeed, appeal to the Veterans Court occurs independently of any executive influence, see 38 U.S.C. 7251 (establishing the Veterans Court under Article I of the Constitution), and the Veterans Court's basic structure is modeled on the unquestionably adversarial United States Tax Court. See 38 U.S.C. 7251; H.R. Rep. No. 963, *supra*, at 29; see also *Freytag* v. *Commissioner*, 501 U.S. 868, 890-891 (1991) (holding that the Tax Court exercises judicial powers). The allegedly "unique" fact (Pet. 6) that Veterans Court appeals are taken directly before the court of appeals—as are appeals from the Tax Court, 26 U.S.C. 7482—in no way alters the pertinent analysis of this case.

where "parties are expected to develop the issues." *Sims*, 530 U.S. at 110. The Veterans Court has jurisdiction, 38 U.S.C. 7252(b), to review Board decisions only in the context of an "action brought" by the parties, 38 U.S.C. 7261(a), based "on the record" presented by the parties, 38 U.S.C. 7252(b),[7] and with respect to legal questions "to the extent necessary to its decision *and when presented*," 38 U.S.C. 7261(a) (emphasis added). The Veterans Court's Rules of Practice and Procedure explicitly direct that an appellant's brief "must contain * * * a statement of the issues; * * * the appellant's contentions with respect to the issues *and the reasons for them*." Ct. Vet. App. R. 28 (emphasis added). Wholly unlike the administrative context discussed in *Sims*, nothing in the Veterans Court's statutes or rules could reasonably "mislead the * * * claimant to believe that issue exhaustion is not required." *Sims*, 530 U.S. at 114 (O'Connor, J., concurring in part) (citation omitted). On the contrary, the Veterans Court's statutory provisions, rules, and institutional structure suggest that a full presentation of legal arguments and issues is both appropriate and necessary.

The Veterans Court also resembles other adversarial courts in its standards for judicial disqualification, 38 U.S.C. 7264(c), and its provisions contemplating that claimants and the VA will receive adversarial legal representation. 38 U.S.C. 7263(a)-(c); Ct. Vet. App. R. 46.[8] Thus, viewed as a whole, the Veterans Court's

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[7] See also Ct. Vet. App. R. Prac. 10 (granting parties the ability to designate the record and to dispute such a designation).

[8] See also 38 U.S.C. 7265 (providing enforcement and contempt powers similar to those of other courts); 28 U.S.C. 2412(d)(2)(F)

statutory framework demonstrates Congress's clear intent to establish a formal, adversarial court. In this case, the court of appeals appropriately effected that intent by applying normal issue exhaustion principles, as set forth in *Hormel* v. *Helvering*, 312 U.S. at 556-557, and its progeny, see note 3, *supra*.

2. Petitioner has not directly argued that Veterans Court proceedings are non-judicial, informal, or non-adversarial. Instead, she asserts that certain non-adversarial administrative processes, which occurred *prior to* her appeal to the Veterans Court, mean that the latter proceedings "should likewise be assumed to be non-adversarial." Pet. 7. That novel assertion is misplaced. Neither *Sims* nor any court of appeals decision has applied such analysis of issue exhaustion to other agency adjudications, so there is no occasion for this Court to consider upsetting basic administrative law principles. See Sup. Ct. R. 10.

Furthermore, petitioner's approach is wide of the mark. The operative question here is whether petitioner's failure to raise arguments *before the Veterans Court* justified the Federal Circuit's decision not to consider them. The Federal Circuit did not attach dispositive significance to petitioner's failure to raise arguments in earlier, less formal proceedings; thus, the nature of those earlier proceedings is not relevant. Moreover, a focus on the nature of anterior proceedings would reshape the law of exhaustion and preservation. Many controversies involve, in their beginnings, some effort toward informal, non-adversarial dispute resolution. But such preliminaries cannot subvert exhaustion principles with respect to later proceedings—involving

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(designating the Veterans Court as a "court" for purposes of the Equal Access to Justice Act, 5 U.S.C. 504 *et seq.*).

representation by counsel before a court—that are manifestly formal and adversarial. In deciding whether adjudicative proceedings should incorporate normal standards for issue exhaustion, appellate courts must evaluate the specific proceeding at issue, not its precursors. Cf. *Sims*, 530 U.S. at 107 ("Whether a claimant must exhaust issues before the ALJ is not before us.").

Indeed, if the informal origins of a veterans claim could undermine formal, adversarial proceedings that later occurred in the Veterans Court, issue exhaustion principles with respect to other courts might also be weakened. See Pet. 12 ("There is no need for judicial review to be adversarial. Judicial review, especially in the context of veterans benefits, should be about determining the correct interpretation of the law."); cf., *e.g.*, *Edlund* v. *Massanari*, 253 F.3d 1152, 1158 (9th Cir. 2001) (applying issue exhaustion in a Social Security case to an argument not raised before the Council or the district court). Here, the court of appeals properly credited the Veterans Court as a formal judicial entity by applying standard requirements of issue exhaustion.

After petitioner had already pursued her claim in both administrative proceedings and Veterans Court proceedings, she asked the court of appeals to reverse the Board's factual findings by imposing an unprecedented, heightened standard of evidence. Regardless of whether that argument would have succeeded if timely presented,[9] the court of appeals correctly de-

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[9] In the court of appeals, even the dissenters acknowledged that no pertinent statutory provisions or regulations directly supported a standard of clear and convincing evidence, even though several comparable statutes expressly require such a standard. Pet. App. 55-57. In any event, granting certiorari in this case is

clined to hear the argument when it had not been previously raised. Since the court of appeals' decision is consistent with established principles of appellate practice and administrative law, and it does not contradict the reasoning of any decision of this Court or of any court of appeals, review by this Court is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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unnecessary to resolve a question that the court of appeals may decide whenever a claimant raises the issue in a timely manner.