No. 12-____

IN THE
Supreme Court of the United States

ERNEST PITTS, JR.,

Petitioner,

v.

ERIC K. SHINSEKI,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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March 21, 2013

QUESTION PRESENTED

Do veterans have a right to effective assistance of counsel under the Fifth Amendment's Due Process Clause in the adversarial proceedings before the Court of Appeals for Veterans Claims?

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PETITION FOR A WRIT OF CERTIORARI

Ernest Pitts, Jr., respectfully submits this petition for a writ of certiorari to the United States Court of Appeals for the Federal Circuit.

OPINIONS BELOW

The published opinion of the Federal Circuit (Pet. App. 1a-15a) is reported at 700 F.3d 1279. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 16a-23a) is unreported.

JURISDICTION

The United States Court of Appeals for Veterans Claims had jurisdiction under 38 U.S.C. §§ 7252(a) and 7266. The Federal Circuit had appellate jurisdiction under 38 U.S.C. § 7292. The Federal Circuit entered its judgment and opinion on November 20, 2012.

Petitioner applied to Chief Justice Roberts for an extension of time until and including March 21, 2013, which was granted on January 31, 2013. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

It is uncontested that former counsel for petitioner Ernest Pitts, Jr. provided ineffective assistance in the United States Court of Appeals for Veterans Claims (Veterans Court). This petition raises the question whether veterans in this situation have a remedy for ineffective assistance under the Fifth Amendment's Due Process Clause. In a published decision, the Federal Circuit, which has exclusive jurisdiction over appeals from the Veterans Court, resolved this

question in the negative. That decision was in error, and implicates a broader circuit split on the right to effective assistance of counsel in the civil context. As it is unlikely to be presented again, this constitutional issue—which is of obvious importance to our Nation's veterans—warrants this Court's review now.

A. *Statutory Background*

Veterans of the United States Armed Forces face an array of challenges when they return to civilian life, challenges that interfere with what should be—to the greatest extent possible—a smooth transition from the battlefield to the home. Chief among these are the physical and mental wounds that remain after a veteran's service comes to an end. As of 2011, roughly 3.5 million living United States military veterans had been found by the Department of Veterans Affairs (VA) to have incurred some form of disability in the course of their service.[1]

In recognition of the perils that veterans face during their service, our Nation since its founding has recognized the need to provide benefits tailored to their specific needs: an "emolument provided...as a result of [the veteran's] service." VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM 46 (1992) (VETERANS BENEFITS). The benefits made

[1] U.S. Census Bureau, 2011 American Community Survey, Table B21100: Service-Connected Disability-Rating Status and Ratings for Civilian Veterans 18 Years and Over, *available at* http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ACS_11_1YR_B21100&prodType=table (last viewed March 20, 2013).

available by Congress and the VA touch upon almost all aspects of a veteran's post-military life, offering—in addition to monetary compensation and pensions—prioritized access to the VA's specialized healthcare system; vocational rehabilitation and training; and a range of other substantive benefits. Although the right to such benefits has long been an integral feature of military service, the procedures for effectuating that right have become increasingly complex and, as relevant to this case, adversarial.

1. The modern system for administering veterans' benefits traces to the beginning of the last century. In 1921, Congress created the Veterans' Bureau to handle all matters relating to World War I veterans. Pub. L. No. 67-47, 42 Stat. 147 (1921). Three years later, Congress established that all determinations of fact by the director of the Veterans' Bureau would be final. World War Veterans Act of 1924, 43 Stat. 607, 608-09, § 5. Although this Court held that the director's decisions could be subject to judicial review if they were "wholly unsupported by the evidence," "wholly dependent upon a question of law," or "clearly arbitrary or capricious," *Silberschein v. United States*, 266 U.S. 221, 225 (1924), those exceptions "were so narrowly construed by the courts that they were virtually without effect," VETERANS BENEFITS 65.

Review of petitions for benefits was thus concentrated in the executive branch. Regional Offices were created to handle the initial review of veterans' claims, and 1933 saw the establishment of the Board of Veterans' Appeals (Board), which became the final arbiter of these claims for the next nearly six decades. Congress and the Veterans

Administration[2] kept benefit proceedings non-adversarial, and ultimately, as the scheme became increasingly reticulated, the VA undertook an affirmative duty to assist veterans in developing the facts pertinent to their claims. 37 Fed. Reg. 14,780 (July 25, 1972) (amending 38 C.F.R. § 3.103(a)). As this Court noted in 1985, the veterans' benefits regime at this time reflected Congress's "desire[] that the proceedings be as informal and nonadversarial as possible." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 323-24 (1985).

2. Congress effected a sea change just three years later. With the Veterans' Judicial Review Act (VJRA), Congress for the first time introduced into the veterans' benefits system two layers of judicial review: first before a newly created Article I court, the United States Court of Appeals for Veterans Claims; and then before the United States Court of Appeals for the Federal Circuit. *See* Pub. L. No. 100-687, § 301(a), 102 Stat. 4105, 4113 (1988) (creating the Veterans Court);[3] *id.* § 4092, 102 Stat. at 4120 (giving the Federal Circuit jurisdiction over appeals from the Veterans Court).

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[2] The Veterans Bureau had been renamed the Veterans Administration in 1930, when it was consolidated with several related agencies. Exec. Order No. 5398 (1930). In 1988, when it was elevated to the cabinet level, the agency was renamed again and became the Department of Veterans Affairs. Pub. L. No. 100-527, § 2, 102 Stat. 2635, 2635 (1988).

[3] This court was originally called the United States Court of Veterans Appeals. *Id.* It was renamed the United States Court of Appeals for Veterans Claims in 1998. Veterans Programs Enhancement Act of 1998, Pub. L. No. 105-368, § 511(b), 112 Stat. 3315, 3341.

The introduction of judicial review was intended to increase the accuracy of benefits decisions and the fairness of the VA's process. In the years leading up to the VJRA's enactment, multiple investigations had raised questions about the integrity and efficiency of the benefits system.[4] Against this backdrop, Congress recognized the need for an additional level of protection against errors and for "a more independent review...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. Rep. 100-963, at 26 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5808.

As a result of the VJRA, the Veterans Court has jurisdiction over veterans' appeals from adverse Board decisions. In contrast to proceedings before the VA's Regional Offices and the Board, proceedings before the Veterans Court are *adversarial* and the VA has *no duty* to assist the veteran. Indeed, the VA at this stage does an about-face, turning from aiding veterans in establishing their claims to defending the denial of benefits. Pub. L. No. 100-687, § 301(a), 102 Stat. at 4116.

The Federal Circuit, in turn, has circumscribed jurisdiction "with respect to the validity of a decision

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[4] *See* U.S. GEN. ACCOUNTING OFFICE, GAO-89-24, PROCESSING VETERANS' DISABILITY CLAIMS 2 (1986) (finding "significant problems" in the VA's claims-development, adjudication, and notice procedures); U.S. GEN. ACCOUNTING OFFICE, GAO-83-12, IMPROVED PRODUCTIVITY CAN REDUCE THE COST OF ADMINISTERING VETERANS BENEFITS PROGRAMS 6 (1982) (noting that the VA's Office of Inspector General had found that the VA's internal-review system was significantly under-reporting errors).

of the [Veterans] Court on a rule of law or of any statute or regulation...or any interpretation thereof...that was relied on by the [Veterans] Court in making the decision." 38 U.S.C. § 7292(a). The Federal Circuit's jurisdiction is exclusive. *Id.* at § 7292(c).

B. *Factual and Procedural Background*

Petitioner Ernest Pitts is a veteran of the United States Air Force, in which he served from 1971 to 1974. Pet. App. 2a. Mr. Pitts's primary responsibility during those years entailed providing airfield security in Alaska and Guam. Since his honorable discharge in 1974, Mr. Pitts has sought VA benefits with respect to five distinct disabilities: PTSD, paranoid-schizophrenia, a lower-back injury, sinusitis, and a skin disorder.

1. Although Mr. Pitts has pursued his claims in various proceedings since his discharge, the events relevant to this petition began in 2005, when the Board upheld the Atlanta Regional Office's denial of Mr. Pitts's claims for sinusitis and a skin disorder, while also denying his request to reopen his claims for PTSD, paranoid-schizophrenia, and a lower-back injury. *Id.* at 3a-4a. Mr. Pitts retained a lawyer and appealed to the Veterans Court. But prior to any decision, Mr. Pitts and the VA Secretary filed a joint motion to remand to the Board because the VA had not obtained pertinent medical records from the Social Security Administration (SSA). The Veterans Court granted this motion. *Id.* at 4a.

The Board held a hearing on remand in September 2006. *Id.* It is undisputed, as discussed below, that the Board hearing officer failed to inform Mr. Pitts—

as required by 38 C.F.R. § 3.103(c)—of the prior bases for denial and the additional evidence that would be needed to establish entitlement to benefits. Following this hearing, the Board issued an order reopening Mr. Pitts's PTSD claim because of new evidence and remanding to the Regional Office. The VA was also instructed to obtain specified records from the SSA so that the Regional Office could consider that evidence in reviewing Mr. Pitts's claims. *Id.* at 60a.

The Regional Office carried out its duties, and the case returned to the Board. Despite the new evidence that had been obtained, the Board found that Mr. Pitts had failed to establish any of his claims. *Id.* at 26a-27a.

2. Mr. Pitts retained different counsel and again appealed to the Veterans Court. Mr. Pitts's counsel presented only one argument and made a botch of it. Although counsel correctly argued that the Board hearing officer who conducted Mr. Pitts's September 2006 hearing had failed to provide Mr. Pitts with the required notice—both as to the evidentiary deficiencies in his case and the evidence that would overcome those deficiencies—he erroneously argued that it was not Mr. Pitts's burden to establish prejudice arising therefrom. *Id.* at 137a. Contrary to counsel's argument, this Court had held a year earlier in *Shinseki v. Sanders*, 556 U.S. 396 (2009), that veterans bear the burden of persuading the Veterans Court that a given error was harmful. Counsel compounded his legal error with a factual one, arguing that "[i]t would be pure speculation for the Court to conclude that had the Hearing Officer complied with 38 C.F.R. § 3.103(c) the Appellant would not be able to present evidence that may result

in the Appellant's claim being granted." Pet. App. 137a. Resting on these faulty assertions, counsel made *no attempt* to demonstrate how Mr. Pitts had been prejudiced by the hearing officer's notice error. Even after the Government pointed out the errors in its opposition brief, which cited *Sanders* (*id.* at 140a), counsel for Mr. Pitts failed to file a reply brief or take any other rectifying steps.

Counsel's errors proved dispositive. The Veterans Court agreed that the Board hearing officer had "clearly failed" to provide the notice required by § 3.103(c). *Id.* at 18a. Specifically, it found that the hearing officer (i) "fail[ed] to focus the discussion on the prior bases for denial"; (ii) "failed to mention the issue of whether there [wa]s sufficient evidence to reopen the appellant's claim of entitlement to service connection for a psychiatric disorder other than PTSD"; and (iii) "failed to discuss the evidence of record or to ask questions that might have uncovered whether the appellant still had evidence in his possession." *Id.* at 19a-20a. But pointing to counsel's legal and factual errors, the Veterans Court concluded that Mr. Pitts had not established prejudice arising from the hearing officer's failings:

> In his brief, the appellant fails to assert precisely how he was prejudiced by any purported hearing officer error or indicate what additional evidence he would have submitted if an error had not been committed.… [His] argument impermissibly shifts the burden of demonstrating a lack of harm to the Court. This is not the law.

Id. at 21a-22a.

The Veterans Court went on to conclude, without

any argumentation from counsel, that Mr. Pitts had not been prejudiced because he should have been aware of the deficiencies of his claims based on the prior appeal to the Veterans Court and the substantial size of the evidentiary record. *Id.* at 22a-23a.

3. Mr. Pitts obtained new *pro bono* counsel (the undersigned) and appealed to the Federal Circuit. There, Mr. Pitts argued that his counsel in the Veterans Court had provided ineffective assistance in violation of the Fifth Amendment's Due Process Clause and requested a remand to the Veterans Court for further proceedings. *Id.* at 75a-76a.

In a published opinion, the Federal Circuit resolved the constitutional issue, holding that veterans do not have a right to the effective assistance of counsel before the Veterans Court. The panel did not dispute circuit precedent holding that the receipt of VA benefits is protected by the Fifth Amendment's Due Process Clause, which will be invoked where the relevant statutes and regulations do not provide an adequate remedy. *See Cushman v. Shinseki*, 576 F.3d 1290, 1298 (Fed. Cir. 2009). But the panel reasoned that where, as here, the appointment of counsel is not constitutionally required, there is no right to effective assistance because "errors by private counsel are not imputed to the government." Pet. App. 8a.

The panel acknowledged that the majority of circuit courts have reached a contrary result with respect to aliens facing removal proceedings: "[A] number of courts of appeals have held that the Due Process Clause provides some level of protection against ineffective assistance of counsel in removal

(i.e., deportation) proceedings, even though the alien is not constitutionally entitled to the appointment of counsel in such proceedings." *Id.* at 10a-11a. (citations omitted). But the panel distinguished those decisions on the ground that "[r]emoval proceedings implicate an individual's liberty," whereas "only property interests are at stake" in veterans' benefits proceedings. *Id.* at 11a, 14a.

Finally, while acknowledging its jurisdiction over issues of both fact and law pertaining to Mr. Pitts's constitutional claim for ineffective assistance, *Id.* at 6a n.1, the panel held that it lacked jurisdiction to consider Mr. Pitts's freestanding challenge to the Veterans Court's finding that the hearing officer's notice error had been harmless. *Id.* at 14a-15a. Accordingly, the panel affirmed the Veterans Court's decision.

REASONS FOR GRANTING THE WRIT

This case raises an important constitutional question that implicates an entrenched circuit split regarding the right to effective assistance of counsel under the Fifth Amendment's Due Process Clause. The Federal Circuit held that veterans seeking VA benefits are not entitled to effective assistance of counsel in the Veterans Court—an adversarial stage in which the VA pivots from assisting to opposing veterans' petitions. This Court's review is warranted for several reasons.

First, the factors established by this Court for assessing the requirements of due process compel the recognition of the right to effective assistance of counsel in the Veterans Court. As this Court has held, "due process is flexible and calls for such procedural

protections as the particular situation demands." *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972). As discussed below, the procedural protection of effective counsel is called for in this unique situation given the vital importance of VA benefits to disabled veterans, the lack of adequate alternative remedies, and the need to promote—rather than negate—the Nation's longstanding concern for veterans' wellbeing. The Federal Circuit gave only cursory and superficial consideration of these factors, and its contrary conclusion cannot be sustained.

Second, there is a circuit split on the threshold question whether the right to effective assistance of counsel obtains in the civil setting. The majority of circuits in a seven-to-three split hold that the right attaches to aliens facing removal. Consideration of the question presented here, in the *sui generis* context of appeals to the Veterans Court, would enable this Court to address anterior legal questions that have divided the lower courts, such as whether the right to effective assistance is derivative of the right to appointed counsel.

Third, the precise constitutional issue presented in this case is unlikely to return to this Court. The Federal Circuit has exclusive jurisdiction over appeals from the Veterans Court and it has squarely rejected the right to effective assistance of counsel in a published opinion. A final decision on such an important issue for our Nation's veterans should come from this Court.

A. *Due Process Requires Effective Assistance of Counsel in the Veterans Court.*

This Court in *Mathews v. Elridge* identified three

factors for determining "the specific dictates of due process":

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. 319, 334-35 (1976) (citing *Goldberg v. Kelly*, 397 U.S. 254, 263-71 (1970)).

Each factor militates in favor of recognizing veterans' right to the effective assistance of counsel in proceedings before the Veterans Court. *First*, veterans have a significant interest in the receipt of VA benefits, which are intended to aid veterans in virtually all aspects of their lives and play an especially critical role for those with service-related disabilities. *Second*, there are no alternative remedies capable of protecting this important interest; neither malpractice liability nor any other substitute can replace the non-monetary benefits offered by the VA. *Third*, recognition of the right to effective assistance of counsel would align with and further the Government's special solicitude for veterans, which surely includes having their claims decided on the merits.

1. Veterans Have a Significant Interest in the Receipt of VA Disability Benefits.

a. VA benefits plainly meet the first *Mathews*

factor concerning the "private interest," given their importance to veterans' health and wellbeing. 424 U.S. at 334. The Federal Circuit's contrary decision hinged upon its characterization of veterans' benefits as implicating "property" rather than "liberty" interests—elusive terms that the panel failed to define with any precision. Apart from a most cursory acknowledgement of "the importance of benefits to claimants in the veterans' benefits system," the panel failed to meaningfully consider the nature of those benefits and their effect on veterans' lives. As described below, Congress, recognizing the myriad and lasting effects of military service, has crafted a specialized benefits system to provide tangible assistance for veterans in the key aspects of their lives.

Congress and the VA have primarily sought to address veterans' service-related disabilities by granting prioritized access to the VA healthcare system, which provides care tailored to the needs of veterans. The VA has established eight priority groups, which determine both the speed with which veterans receive care and the amount, if any, that they must pay for that care. *See* 38 C.F.R. § 17.49; 38 U.S.C. § 1710(a)(1). A veteran receiving a disability rating automatically moves to at least the third-highest group in terms of priority.[5] In a VA

[5] A veteran's disability rating represents "the average impairment in earning capacity resulting from such diseases and injuries and their residual conditions in civil occupations" 38 C.F.R. § 4.1. A disability rating of at least 70%, for example, entitles a veteran to nursing-home care. 38 U.S.C. § 1710A.

healthcare system beset with delays,[6] prioritized access can prove critical for veterans' physical and mental wellbeing. The VA estimates, for example, that, of the veterans it has treated who served in Iraq or Afghanistan, roughly one out of every three has sought treatment for PTSD.[7] Another VA study estimates—based on data reported by 21 states—that as many as 22 veterans commit suicide every day.[8]

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[6] *See, e.g.*, GOV'T ACCOUNTABILITY OFFICE, GAO-13-130, VA HEALTH CARE: RELIABILITY OF REPORTED OUTPATIENT MEDICAL APPOINTMENT WAIT TIMES AND SCHEDULING OVERSIGHT NEED IMPROVEMENT 1 (2012) ("[L]ong wait times and inadequate scheduling processes at VHA medical facilities have been long-standing problems."); VA OFFICE OF INSPECTOR GENERAL, VETERANS HEALTH ADMINISTRATION: REVIEW OF VETERANS' ACCESS TO MENTAL HEALTH CARE 2 (2012) (finding that the Veterans Health Administration fails to provide mental-health patients with timely care).

[7] *Compare* DEP'T OF VETERANS AFFAIRS, REPORT ON VA FACILITY SPECIFIC OPERATION ENDURING FREEDOM (OEF), OPERATION IRAQI FREEDOM (OIF), AND OPERATION NEW DAWN (OND) VETERANS CODED WITH POTENTIAL PTSD 3 (Jan. 2013), *available at* http://www.publichealth.va.gov/docs/epidemiology/ptsd-report-fy2012-qtr4.pdf ("[A] grand total of 273,351 OEF/OIF/OND Veterans were seen for potential PTSD at VHA facilities following their return from Iraq or Afghanistan.") *with* DEP'T OF VETERANS AFFAIRS, ANALYSIS OF VA HEALTH CARE AMONG OPERATION ENDURING FREEDOM (OEF), OPERATION IRAQI FREEDOM (OIF), AND OPERATION NEW DAWN (OND) VETERANS 5 (2013), *available at* http://www.publichealth.va.gov/docs/epidemiology/healthcare-utilization-report-fy2012-qtr4.pdf (finding that 866,182 veterans of the nation's recent military engagements have received VA healthcare).

[8] DEPT. OF VETERANS AFFAIRS, SUICIDE DATA REPORT at 15, 18-19 (2012), *available at* http://www.va.gov/opa/docs/Suicide-Data-Report-2012-final.pdf (also finding that in the 21 reporting

And it has become clear that "[v]eterans are overrepresented among the homeless population."[9] For the many veterans facing obstacles like these, a check in the mail could never suffice; rather, priority access to the specialized VA healthcare system is a necessity.[10]

Congress affords veterans other substantive benefits beyond healthcare. For instance, all disabled veterans are eligible for vocational rehabilitation benefits. 38 C.F.R. § 21.40. Through this program, the VA provides veterans with job-training, apprenticeships, and assistance with procuring and maintaining employment. The purpose of these vocational benefits is not to replace the income a veteran has lost (as a mere payment would do), but to assist the veteran in coping with service-related disabilities that affect employability, thereby helping

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states, "Veterans comprised approximately 22.2% of all suicides reported during the project period").

[9] DEPT. OF VETERANS AFFAIRS, VETERAN HOMELESSNESS: A SUPPLEMENTAL REPORT TO THE 2010 ANNUAL HOMELESS ASSESSMENT REPORT TO CONGRESS at 4 (2010), *available at* https://www.onecpd.info/resources/documents/2010AHARVeteransReport.pdf (finding that veterans account for only 9.5% of the total adult population, but 13% of the homeless-adult population).

[10] The VA argued to the Federal Circuit that even where a veteran's disability claim is denied, he may still receive prioritized access to healthcare based on financial need. Pet. App. 111a n.6. But the VA cannot dispute that a veteran with a disability rating is automatically entitled to a higher priority than a defendant who meets any financial criteria. The disability-rating system is an effective means of identifying those veterans most in need of prompt care.

to restore the veteran's earning capacity to the greatest extent possible.

The list goes on. Veterans with certain physical disabilities, for example, are entitled to specially adapted housing and adaptive equipment needed to operate a car. 38 U.S.C. §§ 2101, 3902. A disability rating also gives veterans access to life insurance, which otherwise may be effectively unavailable because of their condition. 38 U.S.C. § 1922(a).

Unique by any measure, the array of veterans' benefits is commensurate with the profound costs that military service exacts. The Federal Circuit thus erred when it blithely likened veterans' benefits to Social Security disability payments and welfare assistance. Pet. App. 13. To be sure, financial support is a key component of the VA benefits regime. But unlike the financial benefits offered under Social Security and welfare, which are generally available to the entire populace, VA benefits include corporeal services designed for, and reserved to, those who have served in our Nation's defense.[11] Congress is not simply cutting checks, and the panel's cursory analysis failed to address the differentiating aspects of veterans' benefits. The extraordinary nature of veterans' benefits befits the extraordinary sacrifice that makes them necessary. As this Court has recognized, "Congress has expressed special

[11] In the Federal Circuit, the Government contended that the number of claims for compensation far exceed any other type of claim. Pet. App. 110-11a. But the predicate to such compensation is a veteran's disability rating, which also affects eligibility for other VA programs, including prioritized access to healthcare. *See, e.g.*, 38 U.S.C. § 1710(a) (basing eligibility for hospital care on veterans' disability ratings).

solicitude for the veterans' cause. A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412. *See also Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011) ("The solicitude of Congress for veterans is of long standing.") (internal quotation marks and citations omitted).

In light of the weighty interest at stake, effective counsel is vital in proceedings before the Veterans Court. In the Regional Offices and Board of Veterans Appeals, the VA affirmatively assists veterans in their pursuit of benefits. But at the Veterans Court, for the first time, veterans face an adversarial proceeding in which the VA is now opposing their claims. The ability of veterans to discern and present meritorious arguments to the Veterans Court is made more difficult by the abstruse regulatory framework governing VA benefits. *See, e.g.*, *DeLisio v. Shinseki*, 25 Vet. App. 45, 63 (2011) (Lance, J., concurring) (noting the "unfortunate—and not entirely unfounded—belief that veterans law is becoming too complex"). The evidentiary record at this stage, furthermore, is often large, disorganized, and esoteric. *See, e.g.*, Kenneth M. Carpenter, Why Paternalism in Review of the Denial of Veterans Benefits Claims is Detrimental to Claimants, 13 KAN. J.L. & PUB. POL'Y 285, 294-95 (2004) ("[C]laim files, which can range from several hundred to several thousand pages, are without any form of organization, making the task of reviewing and understanding a claims file's contents increasingly problematic as the number of pages contained in the claims file increases."). Able counsel will often be needed to overcome these hurdles and

prosecute a successful appeal.

Indeed, while roughly half of veterans start out *pro se* in the Veterans Court, half of those litigants obtain some form of representation before the court issues its decision. *See, e.g.*, U.S. COURT OF APPEALS FOR VETERANS CLAIMS, ANNUAL REPORT: FISCAL YEAR 2011 at 1. That representation is sought in nearly three-quarters of cases before the Veterans Court reflects both the importance and complexity of these appeals. The entire congressional scheme in favor of veterans' benefits can be set at naught if counsel provides ineffective assistance at this critical juncture.

b. Although the Federal Circuit's holding was based in part on this Court's decision in *Walters*, 473 U.S. 305, that decision in fact demonstrates the need for effective counsel at the adversarial stage of the process subsequently established under the VJRA. In *Walters*, this Court held that veterans' due-process rights were not violated by a statute limiting the amount that they could pay an attorney or agent who represented them. In so holding, the *Walters* Court repeatedly emphasized that the VA system then in place was "not designed to operate adversarially." *Id.* at 333; *see also id.* at 323-24, 333 (noting "Congress' desire...that the system should be as informal and nonadversarial as possible"; reiterating that "surely Congress desired that the proceedings be as informal and nonadversarial as possible"; emphasizing that "the process here is not designed to operate adversarially"). The Court found that any alteration making the Veterans Court more adversarial would "bid fair to complicate a proceeding which Congress wished to keep as simple as possible," *id.* at 326, and

would push the VA framework towards a system "more akin to that of a judge at a trial, and less attuned to the rehabilitative needs of the individual," *id.* at 324-25. The Court added that the need for counsel was "considerably diminished" by the substitute safeguards Congress had created, including "a competent representative [from a veterans' service organization], a decisionmaker whose duty it is to aid the claimant, and significant concessions with respect to the claimant's burden of proof." *Id.* at 333-34. But, as relevant here, the *Walters* Court acknowledged that "counsel may well be needed to respond to opposing counsel or other forms of adversary in a trial-type proceeding." *Id.* at 333; *see also id.* at 322 n.10. That statement has particular resonance in light of the fundamental changes wrought by the VJRA, which added judicial review and converted the VA from an ally into an adversary in the Veterans Court.

c. Because no other court has jurisdiction over appeals from the Veterans Court, the Federal Circuit's decision will be the only one to address the specific question of veterans' right to effective assistance of counsel in the Veterans Court. But that decision implicates an entrenched circuit split on the significant threshold question of the right to effective assistance in the civil setting. As the panel acknowledged, a majority of courts of appeals have recognized the right in the context of civil removal proceedings: seven circuits recognize aliens' right to effective assistance, while three disagree.[12]

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[12] *Compare Fadiga v. Att'y Gen. U.S.*, 488 F.3d 142, 155 (3d Cir. 2007) ("A claim of ineffective assistance of counsel in

This circuit split reflects a disagreement over the anterior legal issue whether the right to *effective* counsel is derivative of the constitutional right *to* counsel. The panel below stated that "[w]hen the government is not constitutionally required to furnish counsel in particular proceedings, errors by private counsel are not imputed to the government": "[t]he client cannot claim constitutionally ineffective assistance of counsel in such proceedings…because the attorney performs in a private capacity as the client's agent, and not as a state actor." Pet. App. 8a (internal citations and quotation marks omitted). The minority of courts rejecting aliens' right to effective

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removal proceedings is cognizable under the Fifth Amendment—i.e., as a violation of that amendment's guarantee of due process."); *Zeru v. Gonzales*, 503 F.3d 59, 72 (1st Cir. 2007) ("While aliens in deportation proceedings do not enjoy a Sixth Amendment right to counsel, they have due process rights in deportation proceedings."); *Zheng v. U.S. Dep't of Justice*, 409 F.3d 43, 46 (2d Cir. 2005) (same); *Denko v. I.N.S.*, 351 F.3d 717, 723-24 (6th Cir. 2003) (same); *Nehad v. Mukasey*, 535 F.3d 962, 967 (9th Cir. 2008) (same); *Tang v. Ashcroft*, 354 F.3d 1192, 1196 (10th Cir. 2003) (same); *Dakane v. U.S. Att'y Gen.*, 399 F.3d 1269, 1273-74 (11th Cir. 2005) (per curiam) (same); *with Jezierski v. Mukasey*, 543 F.3d 886, 889 (7th Cir. 2008) ("[N]o statute or constitutional provision entitles an alien who has been denied effective assistance of counsel in his...removal proceeding to reopen the proceeding on the basis of that denial."); *Afanwi v. Mukasey*, 526 F.3d 788, 798 (4th Cir. 2008) (same), *cert. granted, vacated, & remanded by* 130 S. Ct. 350 (Mem.) (2009); *Rafiyev v. Mukasey*, 536 F.3d 853, 861 (8th Cir. 2008) (same). In addition, the Fifth Circuit "has repeatedly assumed without deciding that an alien's claim of ineffective assistance may implicate due process concerns under the Fifth Amendment." *Mai v. Gonzales*, 473 F.3d 162, 165 (5th Cir. 2006).

assistance have relied on similar reasoning. *See, e.g.*, *Rafiyev*, 536 F.3d at 861 ("Removal proceedings are civil; there is no constitutional right to an attorney, so an alien cannot claim constitutionally ineffective assistance of counsel."). These courts take an (erroneously) narrow view of the issue, reasoning that there can be no state action—and thus no constitutional violation—where a privately retained attorney performs ineffectively. *See, e.g.*, *id.* at 860 ("[W]e f[i]nd it difficult to see how an individual, such as an alien's attorney, who is not a state actor, can deprive anyone of due process rights.") (internal quotation marks and citation omitted); *Afanwi*, 526 F.3d at 799 (finding that the actions of aliens' retained lawyers "do not implicate the Fifth Amendment").

The majority of circuits reject this logic. These courts reason that even if aliens have no right to appointed counsel, their right to due process can be violated when retained counsel's performance is "so ineffective as to have impinged upon the fundamental fairness of the hearing." *Zheng*, 409 F.3d at 46; *see also, e.g.*, *Zeru*, 503 F.3d at 72; *Dakane*, 399 F.3d at 1273. Rather than focus on the basis for counsel's appointment, these courts consider the injustice that would result if the government enforced the result of a proceeding rendered fundamentally unfair by counsel's errors. *See, e.g., Aris v. Mukasey*, 517 F.3d 595, 600 (2d Cir. 2008) ("While...aliens in deportation proceedings have 'no specific right to counsel,' the Fifth Amendment does require that such proceedings comport with due process of the law."); *Zeru*, 503 F.3d at 72 (holding that although aliens have no right to appointed counsel in removal proceedings, their due-

process rights are violated where counsel's ineffectiveness renders the proceeding "fundamentally unfair"); *Fadiga*, 488 F.3d at 157 n.23 (same). This case thus presents an opportunity for this Court to address the split in authority on whether the right to effective counsel is derivative of the right to appointed counsel, which goes to the core issue whether the right to effective assistance of counsel even obtains in civil cases.

d. The Federal Circuit attempted to distinguish the removal cases by claiming that aliens' "liberty" is at issue, whereas veterans' claims "affect[] only property interests." Pet. App. 14a. But the first factor under *Mathews* (the importance of the private interest at stake) turns upon "the extent to which an individual will be condemned to suffer grievous loss" if the claim is denied. *Morrissey*, 408 U.S. at 481 (internal quotation marks and citation omitted). That test is unquestionably satisfied here given the unique nature of VA benefits, as discussed above.

The panel, furthermore, never defined "liberty" and "property" with any precision, and these roughhewn categories do little to illuminate the constitutional inquiry. The panel quoted a decision of this Court from 1945 for the proposition that "in deportation cases, 'the liberty of an individual is at stake' because deportation 'deprives him of the right to stay and live and work in this land of freedom.'" Pet. App. 11a (quoting *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)). But since VA benefits include access to specialized healthcare and vocational training, their denial can also substantially affect a veteran's ability to "live and work in this land of freedom," or, to quote another passage from *Bridges*, "visit as great a

hardship as the deprivation of the right to pursue a vocation or a calling." 326 U.S. at 147. In this sense, VA benefits also implicate a "liberty" interest.[13]

Moreover, in contrast with the Federal Circuit's (semantic) dichotomy between "liberty" and "property," several other circuits focus instead on the "life-altering character" of the right at issue. *See, e.g.*, *Ponce-Leiva v. Ashcroft*, 331 F.3d 369, 381 (3d Cir. 2003) ("The exceptional life-altering character of immigration proceedings underscores the gravity of the right to counsel during such proceedings, and courts have accordingly emphasized the distinct and fundamental importance of that right."); *Nelson v. Boeing Co.*, 446 F.3d 1118, 1121 (10th Cir. 2006) (explaining that "concerns [] based on the exceptional life-altering character of immigration proceedings, explain the extension of the [effective-assistance] right to the immigration context") (internal quotation marks and citations omitted). If "exceptional life-altering" characteristics provide the proper benchmark, veterans facing the denial of disability benefits surely qualify.

Given the divergent tests and outcomes in the courts of appeals, the proper analysis of the first *Mathews* factor in the civil context warrants this Court's attention. Whatever the test, veterans' interest in VA benefits is sufficiently significant to warrant protection under the Fifth Amendment.

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[13] Because the requirements of due process are context-specific, recognition of the right to effective assistance for veterans in the Veterans Court would not necessitate the same result for aliens facing removal.

2. Without the Right to Effective Assistance of Counsel, Veterans Would Have No Adequate Alternative Remedies.

Recognition of the right to effective assistance of counsel is further warranted because veterans have no other adequate remedy. *See Mathews*, 424 U.S. at 335 (considering "the probable value, if any, of additional or substitute procedural safeguards"). The Federal Circuit quoted two decisions stating that a malpractice action is typically the proper remedy for attorney errors in the civil context, Pet. App. 9a, but it failed to analyze whether malpractice actions provide adequate redress in this context. They do not.

As a practical matter, it is exceedingly unlikely that a veteran pursuing VA benefits will have the resources to litigate a separate malpractice action against his former attorney. *Accord Stroe v. I.N.S.*, 256 F.3d 498, 505 (7th Cir. 2001) (Wood, J., concurring in the judgment) (noting that in the removal context, "our usual assumption about the ease with which someone dissatisfied with legal representation may bring a legal malpractice action is contestable"). In addition to the financial burden of hiring a new lawyer to pursue a malpractice claim, a malpractice action could take years to run its course. For veterans with disabilities, what is needed is timely access to the VA's healthcare system—a check from ineffective counsel several years later will not suffice.

Even if a veteran had the time and resources to bring a malpractice suit, it could not replicate the benefits that the veteran would have received from the VA itself. Money is fungible and a malpractice

action might suffice where money is all that the client had lost. But as discussed above, many of the benefits at stake in the Veterans Court cannot be monetized. A malpractice judgment cannot, for example, grant prioritized access to the VA's healthcare system with its expertise in addressing veteran's medical issues, nor can a malpractice judgment replicate the VA's vocational training programs with their focus on veterans' particular needs.

Nor are there other adequate alternative remedies in this circumstance.[14] The VA has developed various programs specifically focused upon the needs of veterans. Given the serious risks created by an erroneous denial of benefits—including homelessness, worsening illness, or even suicide—as well as the lack of any alternative means of obtaining those benefits, fundamental fairness dictates that such denials *not* result from the deficient performance of counsel.

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[14] In the Federal Circuit, the Government floated two other possible avenues by which a veteran could seek redress for an attorney's ineffective assistance. *First*, the Government noted that veterans can reopen their cases by submitting new and material evidence. 38 U.S.C. § 5108; 38 C.F.R. § 3.156. But this mechanism is not intended to redress ineffective assistance of counsel and is of no use where an attorney performs deficiently but the veteran lacks evidence that is new and material. *Second*, the Government pointed out that final decisions can be collaterally attacked based upon a showing of "clear and unmistakable error" in the decision. 38 U.S.C. § 5109A(a). But this is also inapposite as it establishes a strict standard developed for a different circumstance. The Federal Circuit tellingly did not cite either as a viable remedy for ineffective assistance of counsel.

3. Recognition of the Right to Effective Assistance of Counsel Would Further the Government's Interest in the Accurate and Efficient Adjudication of Veterans' Claims.

The third consideration under *Mathews* is "the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail." 424 U.S. at 335. For several reasons, recognition of veterans' right to effective assistance of counsel would comport with the Government's historic consideration for veterans.

First, to the extent that an attorney's deficient performance undermines the fundamental fairness of a Veterans Court proceeding, the Government should share the veteran's interest in remedying the error in order to effectuate Congress's clear mandate that eligible veterans receive assistance with their disabilities. *See* 38 U.S.C. § 1110 (providing that "the United States *will* pay" compensatory benefits to veterans disabled during wartime) (emphasis added); 38 U.S.C. § 1131 (same for veterans disabled during peacetime); *cf. Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 27 (1981) ("Since the State has an urgent interest in the welfare of the child, it shares the parent's interest in an accurate and just decision."). Inherent in the adversarial Veterans Court proceeding established by Congress under the VJRA is the understanding that "accurate and just results are most likely to be obtained through the equal contest of opposed interests." *Lassiter*, 452 U.S. at 28. Where counsel's deficient performance undermines the very premise of the proceeding, courts, consistent with their general oversight of the bar practicing

before them, should intervene. It would make little sense to permit the actions of a deficient attorney at the Veterans Court to defeat the overall congressional scheme in favor of veterans—this is precisely the type of lacunae that due process is intended to fill. *See Guillory v. Shinseki*, 603 F.3d 981, 987-88 (Fed. Cir. 2010) (noting that due-process relief is necessary where statutes and regulations do not provide an adequate remedy). This result also accords with the principle that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 131 S. Ct. at 1206 (internal quotation marks and citations omitted).

Second, recognition of the right in those cases where counsel's performance is constitutionally deficient would not impose an unworkable burden on the Veterans Court. Veterans' ineffective-assistance claims could be subject to the stringent standards of *Strickland v. Washington*, under which a claimant must establish both that counsel's performance was deficient *and* that this deficient performance prejudiced the client's case. 466 U.S. 668, 687 (1984). As this Court has recognized, "[s]urmounting *Strickland*'s high bar is never an easy task." *Padilla v. Kentucky*, 559 U.S. 356, 130 S. Ct. 1473, 1485 (2010) (rejecting floodgates argument against application of *Strickland* to claims that counsel provided flawed advice as to the immigration consequences of a guilty plea). Requiring a veteran to make this showing would ensure that relief is afforded only in situations where counsel's performance actually prejudiced the veteran's application. In the few cases where counsel's performance sinks to this level—as it did

here—there is little harm to the Government from a remand for a proceeding that is free from attorney error.

Moreover, the treatment of ineffective-assistance claims in the removal context—where claimants must satisfy special procedures established by the Board of Immigration Appeals—suggests that the Veterans Court would be equally capable of doing the same. *See In re Lozada*, 19 I. & N. Dec. 637 (1988) (interim decision) (setting forth procedures for aliens to follow in claiming that they received ineffective assistance). It is unnecessary at this stage to decide what specific procedures should be used in adjudicating a veteran's claim of ineffective assistance of counsel. Such prospective procedural rules are matters appropriately left to the Federal Circuit and Veterans Court in the first instance after the right has been recognized.

B. *Mr. Pitt's Counsel Was Constitutionally Ineffective, and Mr. Pitts was Prejudiced as a Result.*

Because the Federal Circuit did not recognize a right to effective assistance of counsel, it never determined whether Mr. Pitts's counsel was ineffective in the Veterans Court. Although properly an issue for the Federal Circuit to assess on remand, *Padilla*, 130 S. Ct. at 1486-87, counsel's performance here was manifestly deficient and provides further reason to grant this petition.[15]

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[15] In the Federal Circuit, the Government agreed with Mr. Pitts that the hearing officer had failed to provide the required notice, Pet. App. 117a n.9, and that Mr. Pitts's counsel before

As noted above, in *Sanders*, this Court held that veterans alleging error bear the burden of establishing prejudice arising therefrom. 556 U.S. at 410. Thus, as part of his argument to the Veterans Court that the Board's decision violated 38 C.F.R. § 3.103(c), Mr. Pitts's counsel was required to establish prejudice. Yet he argued the exact *opposite*, maintaining that Mr. Pitts had no such burden. He then exacerbated that error by contending that "[i]t would be pure speculation for the Court to conclude that had the Hearing Officer complied with 38 C.F.R. § 3.103(c) the Appellant would not be able to present evidence that may result in the Appellant's claim being granted." Pet. App. 137a.

The VA's response brief highlighted counsel's error. Citing *Sanders*, the Secretary argued that Mr. Pitts "has not demonstrated prejudice resulting from any purported error arising from the [Board hearing officer's] duty to explain the issues or suggest the submission of evidence." *Id.* at 141a. Counsel for Mr. Pitts, however, remained mute, despite having the ability to file a reply brief. *See* U.S. COURT OF APPEALS FOR VETERANS CLAIMS, RULES OF PRACTICE & PROCEDURE 28(c). Thus, on the critical issue of whether the notice violation caused prejudice, not only did counsel misstate the law—he affirmatively undercut Mr. Pitts by (incorrectly) arguing that any prejudice would be "pure speculation."

Mr. Pitts's appeal failed because of counsel's errors. The Veterans Court ruled against Mr. Pitts

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the Veterans Court had failed to argue that Mr. Pitts had been prejudiced by this error, as required by *Sanders*, *id.* at 121a.

specifically because he had "fail[ed] to assert precisely how he was prejudiced by any purported hearing officer error or indicate what additional evidence he would have submitted if an error had not been committed," but instead "impermissibly shift[ed] the burden of demonstrating a lack of harm to the Court." Pet. App. 21a-22a. The Veterans Court then proceeded to address the issue of prejudice itself, without *any* argument from Mr. Pitts's counsel. *Id.* at 22a-23a. Had counsel actually presented argument on this critical issue, there is a "reasonable probability" that the outcome of the proceeding would have favored Mr. Pitts. *See Strickland*, 466 U.S. at 694.

Effective counsel would have argued that, had Mr. Pitts received proper guidance from the Board hearing officer, he could have provided additional evidence to support his various claims. For example, with respect to Mr. Pitts's claim for paranoid-schizophrenia, the Board noted that "the medical evidence of record clearly shows that [Mr. Pitts] has an extensive history of chronic paranoid schizophrenia." Pet. App. 31a. Pointing to that very condition, however, the Board determined that Mr. Pitts's own accounts of his disability "ha[d] become increasingly unreliable and contradictory." *Id.* But the hearing officer failed to provide the requisite notice to Mr. Pitts of this deficiency. As such, Mr. Pitts did not realize that the Board was disregarding the testimony offered to support his claim up to that point. Had he received notice, Mr. Pitts could have relied on other supporting evidence. For example, within two years of his honorable discharge, he was hospitalized and "diagnosed as a sociopathic

personality with marked manipulation." *Id.* at 41a. The timing of that diagnosis is significant, as any veteran "who developed an active psychosis [] within two years after discharge...shall be deemed to have incurred such disability in the active [service]." 38 U.S.C. § 1702. Mr. Pitts's file also included a medical examiner's report stating that by 1978—just four years after his service—he was hospitalized for an extended period "with a diagnosis of Schizophrenic Reaction with Paranoid features." Pet. App. 40a-41a. Relying on this evidence, counsel could have argued that Mr. Pitts's mental illness, emerging so close in time to his discharge, was service-connected.

In sum, on the issue held to be dispositive by the Veterans Court, counsel for Mr. Pitts made *no argument* whatever. The prejudice to Mr. Pitts from his ineffective counsel was the erroneous finding that he suffered no prejudice from the Board's violation of § 3.103(c). But for his counsel's errors, there is a reasonable probability that the Veterans Court would have granted the limited remedy that Mr. Pitts sought: a remand to the Board so that he could attempt to compile the requisite evidence.

C. *There Likely Will Be No Other Opportunity for this Court to Address this Important Constitutional Issue.*

It is unlikely that the Court will have another opportunity to address the constitutional issue presented here. Because the Federal Circuit has exclusive jurisdiction over appeals from the Veterans Court, the published decision below will conclusively resolve the due-process issue in this *sui generis* context. The Federal Circuit's flawed and cursory

analysis should not be the final decision on this matter. Given the significance of this question for our Nation's veterans, the constitutional issue squarely presented merits the Court's review now.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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