EXHIBIT 1

BRIEF *AMICI CURIAE* OF NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. AND NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM SUPPORTING APPELLANT

UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS

No. 20-7251

WILLIAM E. TERRY,
Appellant,
v.
DENIS MCDONOUGH
Secretary of Veterans Affairs,

Appellee.

ON APPEAL FROM THE
BOARD OF VETERANS' APPEALS

BRIEF *AMICI CURIAE* OF NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. AND NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM SUPPORTING APPELLANT

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INTEREST OF AMICI CURIAE

The National Organization of Veterans' Advocates, Inc. ("NOVA") is a not-for-profit educational membership organization incorporated in 1993. It is comprised of over 750 accredited attorneys, agents, and other qualified members that represent veterans before the Department of Veterans Affairs ("VA") and the federal courts. NOVA's bylaws include as its purpose the development of veterans' law and procedure through participation as amicus curiae. NOVA works to develop high standards of service and representation for all people seeking veterans' benefits, and advocates for laws and policies to improve the lives of veterans and their families. NOVA participated as a stakeholder in the discussions hosted by VA to consider changes to its adjudication system, which ultimately resulted in passage of the Veterans Appeals Improvement and Modernization Act of 2017.

The National Law School Veterans Clinic Consortium (NLSVCC) is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC's mission is working with like-minded stakeholders to gain support and advance common interests with the VA, U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in this case considering the important

disability benefits issue presented under the Veterans Appeals Improvement and Modernization Act of 2017.

NOVA and the NLSVCC appear in support of Appellant William E. Terry to respond to the two questions posed by the Court in its July 18, 2022, Order and explain why, under the Veterans Appeals Improvement and Modernization Act of 2017, the Board had jurisdiction to address Appellant's claim for service connection for sleep apnea on the merits.

INTRODUCTION

NOVA and NLSVCC ("Amici") respectfully submit the following as *amici curiae* in support of Appellant William E. Terry ("Appellant") and in response to the two questions posed by the Court in its July 18, 2022, Order.

Under the Veterans Appeals Improvement and Modernization Act of 2017, Pub L. No. 115-55, 131 Stat. 1105 (2017) ("AMA"), the Board of Veterans' Appeals ("Board") had jurisdiction to address Appellant's claim for service connection for sleep apnea on the merits for two reasons. *First*, the plain language of the statute gives the Board jurisdiction over the underlying claim for benefits Appellant filed and then supplemented. The statute does not limit the Board's review to whether the supplemental claim presented new and relevant evidence because Appellant continuously pursued the claim by seeking Board review within one year of the Agency of Original Jurisdiction's ("AOJ") decision on the supplemented claim. This interpretation of the AMA is not only consistent with the statute's language and purpose to improve a veteran's ability to pursue benefits claims, but also with the long-standing policy of putting a "thumb on the scale in the veteran's favor" when reviewing the VA's benefits determinations. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citation omitted). *Second*, even if the Court were to disagree with this reading of the statute, Appellant's underlying claim is properly before the Board because he sought review of the AOJ's merits decision on higher-level review ("HLR") within one year, and the Board can consider that merits determination without considering the denial of the supplemental claim.

Accordingly, in response to the Court's specific questions, Amici answer:

Question 1: **Did Congress intend for the Board to address service connection for sleep apnea on the merits after Appellant filed his April 2020 notice of disagreement in continuous pursuit of his August 2016 claim for service connection for sleep apnea?**

The plain language and structure of 38 U.S.C. § 5104C make clear that Congress intended for the Board to have jurisdiction over both the merits of Appellant's claim for service connection and his supplemental claim. Nothing in the AMA suggests that Congress intended to limit the Board's review to the supplemental claim where a veteran timely files a notice of disagreement ("NOD") in continuous pursuit of a claim.

Question 2: **Is the one-year deadline for taking an action under subsection 5104C(a)(1) tied to the most recent AOJ decision, and, relatedly, does section 5104C(a) require that the AOJ decision being challenged be in succession?**

The one-year deadline for taking an action under § 5104C(a)(1) is triggered by any decision with respect to a continuously pursued claim. In this case, Appellant filed within one year of both the AOJ's decision on HLR and the AOJ's decision on his supplemental claim. So, while Appellant's one year window to continue to pursue his claim under § 5104C(a)(1) again opened after the AOJ's decision on the supplemental claim, his subsequent filing of an NOD was timely even if the one-year deadline ran from the prior AOJ decision on HLR.

But the question of timing does not affect the scope of the Board's review when a veteran files an NOD with respect to a continuously pursued claim. Rather, the Board has

the authority to review any aspect of the claim, as long as it is continuously pursued. Thus, the Board may consider the original AOJ decision, the HLR decision, and a denied supplemental claim, as long as the veteran files an NOD no more than "one year after the date on which the agency of original jurisdiction issues a decision with respect to that claim." 38 U.S.C. § 5104C(a). Thus, the statute does not require the AOJ decisions to be challenged before the Board in succession. The requirement that a veteran takes further action in pursuit of a claim "in succession" prevents a veteran from pursuing multiple actions simultaneously but has no bearing on the scope of the Board's review of the merits once a veteran files an NOD under § 5104C(a)(1)(C).

ARGUMENT

Section 5104C establishes three different "actions" a veteran can take to further pursue a claim following an AOJ decision: (1) seek higher-level review; (2) file a supplemental claim; and (3) file a notice of disagreement, which provides for Board review. *Id.* § 5104C(a)(1). The statute expressly establishes that a veteran may pursue multiple actions with respect to the same claim. *Id*. § 5104C(a)(2)(B). The only stated limitations are that a veteran cannot pursue a new action *until* a prior action has been adjudicated or withdrawn—in other words, the veteran may only pursue multiple actions "in succession" rather than simultaneously—and the veteran must take action within "one year after the date on which the agency of original jurisdiction issues a decision with respect to [the] claim." *Id*. §§ 5104C(a)(2)(A)-(B), 5104C(a)(2)(A)(1). Section 5104C does *not* state that there are any limits on the scope of the Board's review once a veteran pursues the action of filing an NOD consistent with § 5104C(a)(1).

A supplemental claim allows a veteran to offer additional evidence to the AOJ to seek review within a year of an unfavorable AOJ decision. The AOJ can assess whether its decision should be changed in light of information presented or secured, allowing a veteran to develop a claim as fully as possible before appealing to the Board. If an NOD follows, the Board can assess both the merits of the claim and the supplementally provided information as follows:

1) The Board can determine that the supplemental claim provided new and relevant information for consideration of the claim, and the Board either grants or denies service connection based on the full record; or
2) The Board can determine that the supplemental claim did not provide new and relevant evidence, and the Board either grants or denies service connection based on the relevant record associated with the claim.

Amici thus contend, based on the plain language of §5104C as discussed further below, that the Board has jurisdiction to review a claim's merits regardless of whether a veteran files an NOD under § 5104C(a) after a supplemental claim (as the Secretary argues Appellant must have since it was the most recent decision) or a higher-level review decision (Appellant cited the April 2019 HLR decision in his April 2020 NOD).

But because Appellant was still within one year of the AOJ's HLR decision when he filed his NOD, even if the Court rejects Amici's interpretation of § 5104C with respect to supplemental claims, Appellant still had a right to Board review of the merits of his claim, which were addressed in the HLR decision issued less than a year before the NOD was filed. Section 5104C(a) expressly contemplates multiple AOJ decisions with respect

to the same claim, but § 5104C(a)(1) refers only to "a decision with respect to that claim," without specifying *which* AOJ decision is being referenced. The lack of specificity and use of the general article "a" rather than the specific article "the" implies that the one-year time limitation imposed by § 5104C(a)(1) allows the veteran to file an NOD on *any* AOJ decision on a particular claim within one-year. Both parties agree that Appellant's April 2022 NOD requested review of the April 2019 HLR (Appellant Brief at 13-14; Secretary's Brief ("Sec. Br.") at 3). And the Board undeniably has jurisdiction over the underlying merits of an HLR decision, as discussed below. It follows that Appellant's HLR decision was before the Board and the Board should have decided it on the merits.

I. CONGRESS INTENDED FOR THE BOARD TO ADDRESS THE UNDERLYING MERITS OF THE SLEEP APNEA CLAIM FOR WHICH APPELLANT FILED AN NOD IN ACCORDANCE WITH § 5104C(A)(1).

The plain language of the AMA makes clear that, as long as done within one year, a veteran may pursue any of three actions to challenge an adverse AOJ decision on a claim. After a veteran takes such action(s) and then files an NOD seeking Board review, the Board has the jurisdiction to hear the merits of the underlying claim, not just whether the supplemental claim included new and relevant evidence. The structure and text of other parts of the statute also supports this reading, as do the Secretary's own rulemaking and judicial decisions.

A. The plain language and structure of § 5104C show that the Board must address the merits of the claim.

The starting point for interpreting AMA Section 5104C is its plain language and structure. Indeed, the Court can end further inquiry if the statutory language is

unambiguous and "the statutory scheme is coherent and consistent." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 340 (1997) (quoting *United States v. Ron Pair Enterprises, Inc.*, 489 U. S. 235, 240) (1989).

1. A veteran who takes action "within one year" of an AOJ decision on a claim can pursue any or all of three actions to further pursue the claim.

As long as a veteran acts "on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision with respect to that claim," § 5104C(a)(1) plainly allows the veteran to "take any of the following actions" with respect to that claim:

(A) File a request for higher level review of the claim. *Id.* § 5104C(a)(1)(A). This option allows the veteran to obtain further review of the claim by the agency of original jurisdiction before appealing any dispute with respect to the claim to the Board.

(B) File a supplemental claim. *Id.* § 5104C(a)(1)(B). This option allows a veteran to provide to the agency of original jurisdiction further information, if any, to support the claim.

(C) File a notice of disagreement. *Id.* § 5104C(a)(1)(C). This option allows the veteran to appeal any dispute with respect to the claim to the Board.

Section 5104C(a)(1) thus delineates the veteran's options while making clear that "any" of these options are available at the veteran's election.

The statute makes clear in three respects that choosing one option does not foreclose pursuing any of the other options, so long as the veteran's pursuit of additional options also occurs within one year of the AOJ issuing "a decision" on the claim:

First, the statute expressly says so. Section 5104C(a)(2)(B) provides that "[n]othing in this subsection shall prohibit a claimant from taking any of the actions set forth in

paragraph (1) in succession with respect to a claim or an issue contained within the claim." "Succession" clearly modifies "taking of the actions" listed in 5104C(a)(1) by the claimant, showing that a veteran can take the listed actions "successively," meaning "one after another."

Second, § 5104C(a)(1) does *not* use the disjunctive "or" to separate the three options. Using "or" would reflect that a choice of one option forecloses pursuing another option; but Congress did not use this term in § 5104C(a)(1). In other parts of § 5104C, however, Congress did use the word "or" when separating a list of items it intended to be exclusive of one another. For example, the statute lists two ways a veteran can pursue a second review once an initial action is taken: the veteran can either await adjudication of the first action "or" withdraw the first action. *Id.* § 5104C(a)(2)(A)(i)-(ii). The statute uses the word "or" to make clear that one or the other approach can be taken, but not both. By contrast, the word "or" does not appear in separating the list of available actions set forth in § 5104C(a)(1), showing that a veteran does not have to take one action at the exclusion of pursuing others, so long as different actions are not pursued simultaneously.

Third, the express limitations that § 5104C(a) does impose on when and how a veteran can pursue the three options demonstrates that if additional limitations were intended, Congress would have expressly included them in the statute. For example, § 5104C(a)(1) expressly allows a veteran to pursue any of the three options listed therein *only if* the veteran does so within one year of an AOJ decision on the claim, and § 5104C(a)(2)(A) expressly precludes a veteran from pursuing more than one option simultaneously. By contrast, § 5104C does not say anything about a veteran's timely

pursuit of one action under § 5104C(a)(1) limiting the veteran's ability to successively pursue another.

Moreover, the plain language of the statute's limiting provisions also makes clear that a veteran can pursue the § 5104C(a)(1) options in different orders.[1] Section 5104C(a)(2)(A)(i) and (ii) each list all three options in explaining that one option must be adjudicated or withdrawn before an additional option can be pursued. Thus, for example, if a veteran were to first file a supplemental claim, the veteran would retain the option to seek higher-level review of his claim under § 5104C(a)(1)(A) *after* the "supplemental claim…is adjudicated." *Id*. § 5104C(a)(2)(A)(i). Likewise, if a veteran first filed a request for HLR but then determined that supplementing the claim would be beneficial, the veteran could file a supplemental after the HLR is adjudicated or the request for HLR is withdrawn. *Id*. § 5104C(a)(2)(A)(ii).

The statement in § 5104C(a)(2)(B) that a claimant shall not be prohibited from pursuing any of the three options "in succession" immediately follows explanation in § 5104C(a)(2)(A) that a veteran can pursue any of the three options. This further shows that the term "in succession" means that a veteran can pursue one action without limiting the veteran's ability to then pursue another. This reading of "in succession" is further reinforced by the juxtaposition of § 5104C(a)(2)(B)'s allowance of successive actions with § 5104C(a)(2)(A)'s ban on simultaneous actions. Both provisions address a veteran's

[1] Of course, a Veteran could not file an NOD, have the Board rule against him, and then seek higher-level review by the AOJ because HLR can be sought under § 5104C(a)(1)(A) after an AOJ decision, not a Board decision, but the text and structure of these sections illustrate the flexibility that Congress intended.

ability to take actions, and neither limits the scope of review should the veteran choose to file an NOD. Indeed, § 5104C(a)(2)(A)'s limitation on simultaneously pursued actions shows that where Congress intended to limit a veteran's right to pursue § 5104C(a)(1) actions it knew how to do so. The fact that § 5104C imposes no limitation on a veteran's ability to pursue an NOD under § 5104C(a)(1)(C) thus shows that none was intended.

2. Section 5104C(a)'s plain language shows that the Board has authority to review the entire claim, including the merits, when a veteran files a notice of disagreement pursuant to § 5104C(a)(1)(C).

As explained above, Section 5104C provides a veteran with flexibility in pursuing a claim at the AOJ level. For example, pursuant to § 5104C(a)(1)(A), a veteran could seek HLR of an initial AOJ decision on a claim, the adjudication of which will result in an AOJ "decision with respect to that claim." *Id.* § 5104C(a)(1). Section 5104C(a)(1) is clear that after such an AOJ "decision with respect to that claim," the veteran has a year to decide whether to further pursue the claim by taking a successive action under § 5104C(a)(1). For example, following an initial AOJ decision on a claim, a veteran could first attempt to supplement the record for his claim by filing a supplemental claim, the adjudication of which will also result in an AOJ "decision with respect to that claim," again affording the veteran a year to take a successive action in further pursuit of the claim.

As explained above, nothing in the statute indicates that a veteran's election of another § 5104C(a)(1) action before pursuing an NOD limits the veteran's rights to further pursue his claim by filing an NOD, or the Board's scope of authority in reviewing the claim. Rather, the statute expressly allows veterans to take successive actions in pursuit of

their claims, with the choice of one action not prejudicing a veteran's timely pursuit of another. Section 5104C(a)(2)(A) also supports this interpretation in making clear that all three options relate to "the same claim." This alone dispels the notion put forth by the Secretary that where a veteran opts to pursue a supplemental claim, the veteran somehow has narrowed the "claim" for purposes of future Board review solely to the issue of whether new and relevant evidence was presented. (Sec. Br. at 5-6, 14.)

Under the plain terms of § 5104C(a)(2)(A), if a veteran receives an unfavorable AOJ initial decision with respect to the merits of his claim, and within a year files a supplemental claim, once the supplemental claim is adjudicated, the veteran can "take another action set forth in [paragraph (1)]," such as filing an NOD "with respect to the same claim" (i.e. the claim on the merits).[2] Thus, the veteran would have another year after that AOJ decision on the supplemental claim to pursue another action, including by filing an NOD to secure Board review of the merits of that "same claim."

B. Other statutory provisions confirm that the Board must address the merits of a claim where an NOD is filed in accordance with § 5104C(a)(1).

Other provisions of the AMA confirm § 5104C requires the Board to exercise jurisdiction over the merits of a claim upon a veteran's timely filing of an NOD under § 5104C(a)(1)(C), regardless of whether the veteran first pursued other options under § 5104C(a)(1), such as filing a supplemental claim.

[2] Pursuant to § 5104C(a)(2)(A)(ii), the veteran also could take another action by first withdrawing the supplemental claim, in which case the one-year deadline would continue to run from the prior AOJ decision on that claim.

For example, 38 U.S.C. § 7104 (a) states that "[a]ll questions in a matter which under section 511(a) of this title is subject to decision by the Secretary shall be subject to one review on appeal to the Secretary," and delegates responsibility for that review to the Board. *See also id.* § 7104(a) ("Final decisions on such appeals shall be made by the Board."). This provision uses the broad term "[a]ll questions in a matter" to describe the veteran's guaranteed entitlement to "one review" by the Board.

Even when the AOJ issues a denial addressing only a question at the threshold of service connection, the Board's jurisdiction on appeal extends to "all questions" within "the 'matter.'" *Bernard v. Brown*, 4 Vet. App. 384, 391 (1993). In *Bernard*, this Court held that the threshold question and entitlement to service connection present two "questions" within the same "matter." *Id.* That "matter" is "the veteran's claim of entitlement to VA benefits … under section 1110." *Id.* The Board's jurisdiction thus is "not limited to the specific" threshold question "actually decided" by the AOJ but instead also encompasses the question of the veteran's entitlement to service connection. *See id.* at 392.

In *Bernard*, the threshold question that the AOJ denied was whether the veteran had presented new and material evidence to reopen a claim in "legacy" proceedings. *See id.* The Court held that, on appeal, the Board had jurisdiction to decide not only that threshold question but also the veteran's entitlement to service connection. *See id.* That analysis is conceptually no different than where the AOJ denies that a veteran presented new and relevant evidence to support supplemental claim review. The particular threshold question has changed, but § 7104 (a)'s "[a]ll questions in a matter" language and its embrace of

threshold and service-connected "questions" within the same "matter" remain the same. Under the principles of *Bernard*, the Board's jurisdiction is not limited to the question of new and relevant evidence but instead also encompasses the question of the veteran's entitlement to service connection.

Section 7104 (a) further explains that "[d]ecisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation." *Id.* By its terms, then, § 7104 (a) establishes a veteran's right to a full and complete Board review based on the entire record. *See Bernard*, 4 Vet. App. at 392 (quoting the same provision as support for why the Board has jurisdiction to decide the question of service connection in an appeal from an AOJ denial as to a threshold question). This language cannot be squared with the Secretary's position here. Under the Secretary's reasoning, a veteran would be precluded from *ever* having Board review of the merits of a claim—notwithstanding the veteran's diligence in pursuing the claim by never allowing more than a year to elapse after an AOJ decision—solely because the veteran first unsuccessfully sought to strengthen a claim by filing a supplemental claim before filing an NOD.

In the same vein, 38 U.S.C. § 5107 (b) says that "[t]he Secretary shall consider all information and lay and medical evidence of record in a case before the Secretary with respect to benefits under laws administered by the Secretary." That provision requires the Secretary to "give the benefit of the doubt to the claimant" whenever there is "an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter." *Id*. § 5107(b). Again, this requirement supports the view that

the Board is not limited in its authority to review a claim where, as Appellant did here, a veteran files an unsuccessful supplemental claim before filing an NOD. By contrast, the Secretary's position here cannot be reconciled with § 5107(b). Accepting the Secretary's interpretation, the Board would forever ignore the record with respect to the merits of a veteran's claim where the veteran pursued a supplemental claim before seeking Board review pursuant to § 5104C(a)(1)(C).

C. Department of Veterans Affairs rulemaking supports the Board's jurisdiction over the merits of Appellant's claim.

Rulemaking by the Department of Veterans Affairs further supports the Board's jurisdiction over the merits of Appellant's claim and undermines the Secretary's arguments in this case. In its rulemaking to implement the AMA, the VA explained § 5104C(a) as follows:

> Pursuant to Public Law 115–55, Congress shifted from a single-option appellate system to a multi-option appellate system involving the following three options: a supplemental claim, higher level review by the AOJ, and appeal to the Board. **In addition to alternatives for pursuing appeals, the new system allows claimants to pursue appellate options in succession, each relating back to the same AOJ decision for effective date purposes. VA acknowledges that this approach treats supplemental claims differently based on whether they were filed within one year of a prior decision. If a supplemental claim is filed within one year of a prior decision, the supplemental claim relates back to the claim that gave rise to the earlier claim.** As a result, the relevant time period with respect to the supplemental claim overlaps the time period considered in the earlier decision and **is considered a continuation of that claim**. **A supplemental claim filed more than one year after a prior decision, on the other hand, is distinct from the prior decision because it does not overlap with the timeframe considered in the prior decision,** and, thus, is the beginning of a new claim for the purposes of assigning an effective date and a new claim—or a new case—for the purpose of determining when attorney fees may be charged.

VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 150 (Jan. 18, 2019) (emphasis added). This statement confirms that a supplemental claim filed pursuant to §5104C(a)(1)(B) "is considered a continuation" of the underlying merits claim and must be treated as such by the Board, including through a merits review of the underlying claim after a subsequent NOD. By contrast, a supplemental claim filed pursuant to § 5104C(b) "is distinct from the prior decision" and typically subject to Board review only on its own merit.

The Secretary now argues, however, that once a veteran pursues a § 5104C(a)(1)(B) supplemental claim, the only issue that remains relevant or that can be further pursued on appeal to the Board is whether the veteran presented new and relevant evidence. This litigation position is fundamentally at odds with VA's interpretation of § 5104C in the preamble to its rule implementing the AMA. As explained above, the VA previously made clear that a supplemental claim relates back to the initial claim on the merits and is considered "a continuation" of the merits claim. But while VA's interpretation in formal rulemaking is entitled to deference from the Court, the Secretary's litigation position is not. "Courts grant an agency's interpretation of its own regulations considerable legal leeway." *Barnhart v. Walton*, 535 U.S. 212, 217 (2002). By contrast, "agency litigating positions are not entitled to deference when they are merely appellate counsel's post hoc rationalizations for agency action." *Martin v. Occupational Safety & Health Review Comm'n*, 499 U.S. 144 , 156 (1991) (internal quotation omitted).

The Secretary's position in this case that the Board does not have authority to review the merits of a continuously pursued claim where a veteran first pursues a supplemental

claim that was rejected for lack of new and relevant evidence before filing an NOD cannot be harmonized with the language and structure of § 5104C. This position conflicts with the § 5104C's plain language authorizing veterans to successively pursue multiple actions with respect to the same claim and introduces limitations found nowhere in the statute. Moreover, the Secretary's reasoning conflicts with both § 5104C(b) and controlling precedent. The Secretary appears to argue that the Board lacks authority to review the merits of Appellant's claim because there is no difference between a supplemental claim under § 5104C(a)(1)(B) filed in continuous pursuit of a claim and a supplemental claim under § 5104C(b) that is not filed within a year of the last AOJ decision on the claim. But, as the Federal Circuit has ruled and § 5104C(b) makes clear, § 5104C "establishes two types of supplemental claims based on when the claim is filed: § 5104C(a) supplemental claims filed within a year of an AOJ decision, and § 5104C(b) supplemental claims filed more than a year after an AOJ decision."[3] *See Military-Veterans Advocacy v. Secretary of Veterans Affairs*, 7 F. 4th 1110, 1134 (Fed. Cir. 2021). The Secretary's litigation position

[3] The Secretary appears to argue that there is no distinction between a § 5104C(a)(2)(A) supplemental claim and a § 5104C(b) supplemental claim, which is directly in conflict with the Federal Circuit's understanding *Military-Veterans Advocacy*. In the Secretary's view, after an NOD is filed with respect to either type of supplemental claim, the Board's jurisdiction is constrained only to a review of the AOJ decision as to whether new and relevant evidence was presented, and the Board no longer has jurisdiction to review the merits of the underlying claim in either instance. (Sec. Br. at 5-6, 14.) This position cannot be squared with § 5104C(a)(2)(A), which allows a veteran to file a notice of disagreement with respect to "the same claim" (i.e., the merits claim) after a supplemental claim is adjudicated or withdrawn. Moreover, the Secretary's interpretation must be rejected because it renders § 5104C(b), which clearly distinguishes between two types of supplemental claims, meaningless. *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001).

ignores this distinction that is evident from the plain language of the statute and compelled by binding Federal Circuit precedent.[4]

Additionally, Amici's interpretation furthers the purposes of the AMA, whereas the Secretary's position does not. The full name of the AMA is the "Veterans Appeals Improvement and Modernization Act of 2017." Among the stated Congressional purposes in passing the AMA (and § 5104C specifically) was to improve the legacy veterans claims system by "giv[ing] veterans who file an appeal three procedural options." *See* H.R. RPT. 115-135, at 2 (2017). The VA's rulemaking reinforces this legislative purpose, stating "[t]he differentiated lane framework required by statute and implemented in these regulations has many advantages. It provides a streamlined process that allows for early resolution of a claimant's appeal and the lane options allow claimants to tailor the process

[4] In *Dobbs v. McDonough*, another Court of Appeals for Veterans Claims judge found that the Board has jurisdiction over the merits of a benefits claims on an appeal that followed an unsuccessful supplemental claim. No. 21-0031, 2022 BL 265628 (Vet. App. July 29, 2022). The Court vacated and remanded a decision of the Board that failed to correct an AOJ error in a claim for benefits that was followed first by a supplemental claim and then an appeal to the Board under § 5104C. *Id.* at *1, *4. The Court held that the Board erred by, among other things, "treating the supplemental claim as the beginning of the claim stream on appeal, suggesting that, once it was filed, the [AOJ] rating decision on the initial service-connection claim became final or, at least, unreviewable for any duty-to-assist errors." *Id.* at *3. The court concluded that "[c]ontrary to the Secretary's argument, in filing a supplemental claim before opting for Board review of the same claim, Mr. Dobbs did not insulate VA from the duty-to-assist error that it made in relation to the initial claim." *Id.* In other words, just like in the present case, in *Dobbs*, the Board erred by only reviewing the benefits claim for new and relevant evidence and not on its merits.

to meet their individual needs and control their VA experience." VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 138 (Jan. 18, 2019).[5]

Another purpose intended by Congress in passing the AMA was to curb the "'continuous evidence gathering and readjudication of the same matters' that caused appeals to 'churn' in the system." *Military-Veterans Advocacy*, 7 F.4th at 1118.

Both of these stated purposes of the AMA are promoted by Amici's interpretation of § 5104C. Allowing a veteran to opt for any or all of the three options set forth in § 5104C(a)(1) without limiting or prejudicing the veteran's right to seek Board review promotes claimant choice just as Congress intended. Moreover, by allowing a veteran to submit additional evidence by filing a supplemental claim without limiting or prejudicing the veteran's right to then seek Board review, the AMA encouraged veterans to develop the claim as fully as possible *before* an adverse decision is appealed to the Board, reducing churn and promoting efficiency just as Congress intended.

By contrast, the Secretary's litigation position would constrain a veteran's options to pursue a claim and foster confusion. The Federal Circuit is clear that the "[t]he VA

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[5] Many other statements by Congress and VA also explain that a key purpose of the AMA is to promote claimant choice. *See, e.g.*, Statement of Rep. Dina Titus, Legislative Hearing. on the Veterans Appeals Improvement and Modernization Act, H. Comm. On Vet. Affs, Serial No. 115-12 (May 2, 2017) ("House AMA Hearing Tr."), at 6 ("We should pass this bill so that veterans are able to choose what is the right path for them, what best fits their unique situation as they file their appeals."); Statement of David C. Spickler, Acting Vice Chairman and Executive in Charge, Board of Veterans' Appeals, House AMA Hearing Tr. at 6, 7 (advocating for the AMA on the bases that "[t]he current appeals process is confusing, inefficient, takes too long and provides veterans with no real choice," whereas "[t]he new process ... empowers veterans by providing them with the ability to tailor the process to meet their individual needs").

disability compensation system is not meant to be a trap for the unwary, or a stratagem to deny compensation to a veteran who has a valid claim." *Comer v. Peake*, 552 F.3d 1362, 1369 (Fed. Cir. 2009). Yet, the Secretary's position sets a trap where filing a supplemental claim runs the risk of robbing the veteran of due process by forever precluding Board review of the *merits* of the veteran's underlying claim. This is exactly what will happen to Appellant if the Court accepts the Secretary's position. A veteran can easily fall into this trap if the veteran is not sure whether VA has all of the information it needs before it, and thus files a supplemental claim to ensure that it does. If VA were to confirm in a supplemental claim decision that it did already have the suggested information, it would find that the evidence was not new and relevant. And, if the veteran then filed a notice of disagreement, the Secretary argues that the Board would be precluded from deciding the claim on the merits. So, the veteran's attempt to ensure the record for consideration of a claim by the Board is complete is the very action that would preclude substantive review of that claim, according to the Secretary. This interpretation would make the option of pursuing a supplemental claim in advance of a Board appeal so risky that it would be no option at all. This position is untenable and ignores the pro-veteran nature of the veteran's benefits system.

Moreover, the Secretary's litigation position is antithetical to the AMA's purpose of promoting efficiency and reducing churn. If the Secretary's position were to prevail, presenting supplemental evidence to the AOJ before an appeal to the Board could strip the Board of jurisdiction to review the merits of the veteran's claim. Instead, in order to retain the right of Board review, veterans would first have to appeal an unfavorable initial claim

decision to the Board, and then either present the supplemental evidence for the first time in its Board appeal (without the benefit of developing the record at the AOJ level) or wait and submit the supplemental evidence to the AOJ if the initial Board appeal is unfavorable.[6] Indeed, the Secretary's litigation position creates an incentive for the veteran to create churn in the system in exactly the manner Congress was trying to curb in passing the AMA.

The Secretary argues that the interpretation of § 5104C advanced by Amici would clog up the administrative process and conflict with goals of finality in agency decision-making. (Sec. Br. at 11-12.) These criticisms are unfounded. As an initial matter, veterans seeking benefits have every incentive to resolve claims favorably *and* quickly, because until then the veteran receives no benefits. This alone disincentivizes veterans from repeatedly and vexatiously pursuing spurious claims. Furthermore, § 5104C(a)(1) is self-limiting, because the three options presented therein remain available to a veteran *only* if filed within one year of an AOJ decision on a claim. Once a veteran files an NOD and pursues the claim on appeal to the Board, the claim is removed from the optionality afforded by § 5104C(a)(1) because a Board determination is *not* an *AOJ* decision on a claim that restarts the one-year clock for pursuing additional options under § 5104C(a)(1).[7]

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[6] A veteran will have to wait 550 days (1.5 years) to 730 days (2 years) for resolution on their claim if they pursue the evidence submission option or the hearing option before the Board, according to current wait time averages. Department of Veterans Affairs, Board Appeals, https://www.va.gov/decision-reviews/board-appeal/ (last updated Sep. 2, 2022).

[7] To be sure, if the Board finds in the veteran's favor after an NOD, the effective date of any benefits award would be based on the date of the initial claim that made its way to the Board for review. 38 U.S.C. § 5110. Further, a veteran still has options to appeal or supplement a claim after an unfavorable Board decision, but § 7104(b) resolves any concern that Amici's interpretation would clog up the administrative process or conflict with goals of finality in agency decision-making. It states: "Except as provided in section

D. The Secretary's litigation position is contrary to public policy.

The Secretary's position is also problematic in at least two other respects:

First, the Secretary's litigation position raises due process concerns by potentially impeding this Court's jurisdiction. The Secretary's position divests the Board of jurisdiction over the merits of a veteran's claim if the veteran unsuccessfully pursues a supplemental claim prior to seeking Board review on appeal. As a downstream consequence, this position also constrains the jurisdiction of this Court, which has jurisdiction "to review decisions of the Board of Veterans' Appeals" based "on the record of proceedings before the Secretary and the Board." 38 U.S.C. § 7252 (a)-(b). According to the Secretary's litigation position, the AOJ adjudicating a supplemental claim would not only substantially limit a veteran's right to an administrative appeal before the Board, but also would limit a veteran's due process right to judicial review of an adverse determination. This cannot be the outcome Congress intended in reforming the veterans claims process through the AMA.

Second, the Secretary's interpretation violates veteran appellants' right to "fair process." As the United States Court of Appeals for Veterans Claims has explained in myriad cases, appellants "have a right to fair process in the development and adjudication of their claims and appeals before VA." *Bryant v. Wilkie*, 33 Vet. App. 43, 46 (2020); *see also, e.g., Smith v. Wilkie,* 32 Vet. App. 332, 337 (2020) ("The Board is obligated to ensure

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5108 of this title, when a claim is disallowed by the Board, the claim may not thereafter be readjudicated and allowed and a claim based upon the same factual basis may not be considered." *Id.* § 7104(b).

that it provides to appellants fair process in the adjudication of their claims."); *Thurber v. Brown*, 5 Vet. App. 119, 122-126 (1993). An appellant's non-constitutional right to fair process "stems in part, from the nature of the nonadversarial VA benefits and adjudication system, which 'is predicated upon a structure which provides for notice and an opportunity to be heard at virtually every step in the process.'" *Bryant*, 33 Vet. App. at 46 (quoting *Thurber*, 5 Vet. App. at 123). This right to fair process also is consistent with the Supreme Court's "long applied…canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson*, 562 U.S. at 441.

The Secretary's litigation position provides the opposite of notice—it sets an undisclosed trap for the veteran whereby the veteran may lose an opportunity for merits review of a claim merely by choosing one of the options § 5104C(a)(1) expressly provides—and also reduces the veteran's opportunity for judicial review, all of which is fundamentally unfair to the veteran. The Secretary's litigation position is based on a dubious interpretation of statutory language (see section A above) that runs contrary to the VA's own rulemaking guidance (see section C above) with the effect of severely limiting a veteran's right to review by the Board and this Court with respect to the merits of a claim.

* * *

In sum, based on the plain language of § 5104C, the Board had jurisdiction and an obligation to address Appellant's claim for service connection for sleep apnea on the merits after Appellant timely filed his April 2020 NOD pursuant to § 5104C(a)(1)(C). Other provisions of the AMA, the VA's own rulemaking, Federal Circuit precedent, the stated purposes of the AMA, and public policy concerns all support this conclusion.

II. THE BOARD'S REVIEW IS NOT LIMITED SOLELY TO THE MOST RECENT AOJ DECISION ON A CLAIM, AND THE "IN SUCCESSION" LANGUAGE IN § 5104C(A) HAS NO BEARING ON THE BOARD'S REVIEW OF THE MERITS OF A CLAIM.

The Court's second question relates to both the timing of the review and the scope of the review. These are two different issues, which are addressed in turn.

A. The timing of the review of the claim is based on one-year from any AOJ decision with respect to the claim.

The answer to the second question posed in the Court's July 18, 2022, Order, again begins with the plain language and structure of the statute. Section 5104C(a)(1) states that the three options afforded to a veteran are available "on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision with respect to that claim." 38 U.S.C. § 5104C(a)(1).

Section 5104C(a) expressly contemplates the possibility of multiple AOJ decisions with respect to the same claim. First, there is the initial AOJ decision with respect to service connection. Then, under § 5104C(a)(1) a veteran may pursue either an HLR or a supplemental claim (or both, consecutively), each of which results in an additional AOJ decision. As explained above, and confirmed by the VA's own rulemaking, the § 5104C(a)(1)(A) HLR and § 5104C(a)(1)(B) supplemental claim are both part of "the same claim" as the initial AOJ decision regarding service connection. *Id.* § 5104C(a)(2)(A); 84 Fed. Reg. at 150.

Although § 5104C(a) expressly contemplates multiple AOJ decisions with respect to the same claim, § 5104C(a)(1) refers only to "a decision with respect to that claim" without specifying *which* AOJ decision is being referenced. The lack of specificity and

use of the general article "a" rather than the specific article "the" implies that the one-year window imposed by § 5104C(a)(1) is triggered by *any* AOJ decision on a continuously pursued claim. This position is further supported by the fact that elsewhere in the statute Congress expressly delineates which AOJ decision it refers to using words like "initial." *See, e.g.*, 38 U.S.C. § 5904(c) (stating that, with limited exception, "a fee may not be charged, allowed, or paid for services of agents and attorneys with respect to services provided before the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title with respect to the case").

Support for Amici's position also comes from the language and structure of § 5104C(a)(2). As discussed above, that provision allows a veteran to pursue any or *all* of the three options set forth in § 5104C(a)(1), but expressly prohibits the veteran from pursuing more than one option at a time. The only way to meaningfully preserve the optionality afforded to the veteran by the statute is to interpret the one-year deadline as tied to review of any AOJ decision with respect to the claim.

This position is further supported by the stated purposes of the AMA to provide more options to a veteran pursuing a claim, make the process more efficient, and reduce "churn" by allowing a veteran to develop a claim to the greatest extent possible at the AOJ level before taking an appeal to the Board by filing an NOD.

For these reasons, even if the Court were to disagree with Amici's interpretation of the AMA in response to Question One, above, the Court still must find that the Board had jurisdiction to review the merits of Appellant's claim. Appellant filed his NOD within a year of the HLR decision on the merits, which is an AOJ "decision with respect to that

claim" as stated in §5104C(a)(1). As a consequence, the Board could—and indeed was required to—review the AOJ's HLR merits decision, whether or not the Court agrees with Amici's analysis in Section I.

B. The "in succession" language in section 5104C(a) has no bearing on the Board's review of the merits of a claim.

As explained in answering the Court's Question One above, the phrase "in succession" makes clear that § 5104C(a)(1) options can only be pursued one after another, rather than simultaneously. However, in briefing before the Court, the Secretary appears to suggest that the term "in succession" somehow constrains the scope of the Board's jurisdiction to only the issues addressed in the AOJ's most recent decision on the claim. (Sec. Supplemental Br. at 20-21.) This position is incorrect for at least two reasons.

First, as explained above, all actions taken under § 5104C(a)(1) are taken with respect to a single indivisible claim. This position is bolstered by agency rulemaking which says that a supplemental claim "relates back to the claim that gave rise to the earlier claim" and "is considered a continuation of that claim," 84 Fed. Reg. at 150, and compelled by Federal Circuit precedent, *Military-Veterans Advocacy*, 7 F. 4th at 1134. Thus, an NOD filed pursuant to § 5104C(a)(1)(C) allows the Board to consider the merits of the claim regardless of whether the most recent AOJ decision addressed only a supplemental claim.

Second, nothing in § 5104C(a) requires a veteran to challenge decisions in succession. As noted, the Court does not even need to resolve the issue of whether the Board has jurisdiction over the merits of a supplemental claim because Appellant's April 2020 NOD was filed with respect to the April 2019 HLR decision. Appellant's September

2019 supplemental claim had been adjudicated and then he filed an NOD within one-year of the earlier April 2019 HLR decision specifically challenging *that* decision. As such, he satisfied the only limitations that Congress provided in the statute and the Board should have reviewed the HLR decision cited by Appellant in his April 2020 NOD. Since an HLR is a *de novo* review on the merits under 38 U.S.C. § 5104B (e), it follows that the Board's review of an HLR is also *de novo*. Indeed, that is consistent with the Supreme Court's long understanding that, "[i]f veteran is unsuccessful before a regional office, the veteran may obtain de novo review before the Board, and if the veteran loses before the Board, the veteran can obtain further review in the Veterans Court." *Henderson*, 562 U.S. at 440-41.

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In sum, while the Board has jurisdiction to hear Appellant's claims based on the principles explained above in answering Question One presented by the Court, it also has jurisdiction because Appellant filed the NOD within one year of the earlier HLR decision he appealed to the Board. In other words, Appellant's claim was properly before the Board for consideration on the merits because he filed an NOD within one year of the decision on his supplemental claim, and the issue before the Board includes the underlying claim. But, in this instance, there is another reason why the board has jurisdiction: the NOD was filed within one year of the HLR AOJ decision.

CONCLUSION

For the reasons set forth herein, Amici respond to the questions posed by the Court's July 18, 2022, Order as follows:

Response to Question 1: Congress intended for the Board to address service connection for sleep apnea on the merits after Appellant filed his April 2020 NOD in continuous pursuit of his August 2016 claim for service connection for sleep apnea.

Response to Question 2: By the terms of the statute, a veteran has one year from any AOJ "decision with respect to that claim." The statute includes no language specifying a specific AOJ decision or commanding that only the "most recent" decision can be challenged with an NOD. Amici's interpretation best coincides with the purpose of the AMA to provide the veteran with options in pursuing a claim.

Section 5104C(a) requires that a veteran exercise the options afforded under § 5104C(a)(1) "in succession" (i.e., more than one option cannot be pursued simultaneously), but the phrase "in succession," which appears only in § 5104C(a)(2)(B), does not restrict the Board's review to the issues addressed in the most recent AOJ decision.

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Respectfully submitted,

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