No.

IN THE

Supreme Court of the United States

DAVID FORSYTHE,

Petitioner,

v.

DENIS MCDONOUGH,
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

Falen M. LaPonzina
ADVOCATE
NONPROFIT
ORGANIZATION
1629 K Street, NW
Suite 300
Washington, DC 20006

Amari L. Hammonds
ORRICK, HERRINGTON &
SUTCLIFFE LLP
355 S. Grand Avenue
Suite 2700
Los Angeles, CA 90071

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Edmund Hirschfeld
Melanie R. Hallums
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Counsel for Petitioner

QUESTIONS PRESENTED

To ensure that veterans' claims are presented to agency decisionmakers with all available support, Congress has directed the Department of Veterans Affairs (VA) to notify each claimant of "any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." 38 U.S.C. § 5103(a)(1). VA's regulations provide that this notice must issue "when VA receives a … claim." 38 C.F.R. § 3.159(b)(1). For years, however, VA has provided no such post-claim notice to veterans, instead offering only a summary of the general evidentiary standards applicable to twelve categories of benefits on a dense form that is part of the claim application package. A divided panel of the Federal Circuit endorsed that regime in this case, holding that the statute imposes no post-claim obligation on VA and that, even if the regulation does, there is no judicial remedy for VA's noncompliance because it cannot be "prejudicial" to veterans. The questions presented are:

1. Whether the Federal Circuit misinterpreted 38 U.S.C. § 5103(a)(1) to allow VA to issue evidentiary notice only before receiving a veteran's claim, even though the statute requires notice that accounts for evidence "not previously provided to the Secretary that is necessary to substantiate the claim."

2. Whether the Federal Circuit violated the longstanding doctrine of *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), by permitting VA to violate its own regulation on the ground that the agency's noncompliance cannot be "prejudicial" to veterans.

RELATED PROCEEDINGS

David Forsythe v. Denis McDonough, Secretary of Veterans Affairs, No. 22-1610 (Fed. Cir. judgment entered Mar. 24, 2023)

David Forsythe v. Denis McDonough, Secretary of Veterans Affairs, No. 20-4449 (Vet. App. judgment entered Feb. 3, 2022)

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INTRODUCTION

Congress has long provided a uniquely claimant-friendly system for veterans seeking to recover the benefits guaranteed to them in exchange for their service to our nation. The Department of Veterans Affairs (VA) is obligated to assist these veterans—many of whom must proceed entirely on their own, and nearly all of whom lack attorney representation—to develop their claims and ensure they receive the maximum benefits allowed under law.

A core part of this system is implemented in the notice requirement codified at 38 U.S.C. § 5103(a)(1). The statute obligates VA to provide the claimant "notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." VA is also required to tell the claimant "which portion of that information and evidence" the claimant is expected to provide, and "which portion" VA itself will attempt to locate. *Id.*

Congress has directed VA to promulgate regulations "relating to the contents of notice to be provided." *Id.* § 5103(a)(2)(A). In those regulations, VA has confirmed that the required notice will issue "when VA receives a complete or substantially complete … claim." 38 C.F.R. § 3.159(b)(1).

The text of both the statute and the regulation—as well as the nature of the veterans' benefits system—makes clear that VA must provide this notice to veterans after it receives a claim. Only at that point can the agency determine what more information,

"not previously provided" to VA, might be necessary to substantiate the claim the veteran is making. 38 U.S.C. § 5103(a)(1). And this step is crucial to ensuring that the veteran claimant—likely proceeding *pro se*—understands how the claim will develop, how they can bolster their claim, and how VA will help them do so.

For nearly a decade, however, VA has deprived veterans of that vital assistance and substituted a different practice from the one contemplated by the statute and the agency's regulation. In a departure from its longstanding historical practice, the agency ceased providing each veteran evidentiary notice after receiving a claim. VA now purports to comply with § 5103(a)(1) by including a set of instructions with the application form that veterans fill out to initiate the claim process. In other words, VA is providing standard "notice" only *before* a veteran has filed a claim. And the guidance provided is minimal. The instructions merely recite the overarching standard of proof applicable to every possible type of claim for disability-related compensation. At best, the instructions tell claimants that "medical records" and "lay evidence" can be relevant, without defining those terms or providing examples of what they might include—let alone what kinds of evidence any individual veteran should be gathering to support their claim.

This approach plainly fails to fulfill VA's statutory and regulatory obligations. And it fails to achieve the intent behind those obligations—to ensure the strongest possible case is presented to agency decisionmakers. Petitioner David Forsythe's case illustrates the inequitable results of VA's noncompliance: With his

claim for service-connected disability benefits, Mr. Forsythe submitted a physician's report concluding that his shoulder disability was likely caused by his documented in-service injuries. Instead of advising Mr. Forsythe that he might need to submit other supporting evidence, VA told him the opposite: that no further action was needed on his part. VA then obtained its own medical opinion that reached the opposite conclusion from Mr. Forsythe's doctor, and it denied service-connection benefits on the ground that Mr. Forsythe hadn't shown any evidence of chronic shoulder issues or otherwise linked his disability to his service. The agency never saw Mr. Forsythe's earlier medical records supporting his contention, nor did it see statements from Mr. Forsythe's family and fellow service members who could have attested to the causal link—because it never notified Mr. Forsythe that he could or should submit that evidence before VA decided his claim.

The Federal Circuit should have corrected this error. Instead, the panel majority endorsed it, ruling that § 5103(a)(1) does not impose any post-claim notice requirement and that, although the regulation does, veterans like Mr. Forsythe are powerless to enforce it through judicial review. That ruling rests on fundamental, and independent, errors of statutory interpretation and administrative law.

First, the panel majority misconstrued § 5103(a)(1) to permit VA to issue evidentiary notice only before, not after, a veteran submits a claim. The statute's plain text requires notice of evidence "not previously provided to the Secretary" and necessary to substantiate "the claim." 38 U.S.C. § 5103(a)(1). VA

cannot possibly assess materials previously received, and fashion a responsive notice, before it even knows about a claim. The Federal Circuit held otherwise by ignoring the statute's language in favor of inferences drawn from another bill's legislative history.

Second, the panel majority violated the longstanding doctrine of *Accardi v. Shaughnessy*, 347 U.S. 260 (1954), by permitting VA to defy its own binding regulation. Whatever the statute says, there is no dispute that 38 C.F.R. § 3.159(b)(1) expressly requires post-claim notice. The majority permitted VA to defy that requirement because it concluded, as a categorical policy matter, that VA's standard practice of supplying only pre-claim guidance is not "prejudicial[ly]" worse for veterans. Pet. App. 10a. Indeed, the panel majority "urge[d] the Secretary [of Veterans Affairs] to amend this regulation" to eliminate the temporal requirement that the majority believed was absent from the statute. Pet. App. 9a n.1. But VA, not the Federal Circuit, is charged with promulgating regulations regarding notice, and it is undisputed that VA's current regulation is permissible under the statute. The Federal Circuit should have enforced that regulation. It could not avoid doing so by theorizing that there is a lack of prejudice, particularly where Mr. Forsythe demonstrated the difference properly timed notice would have made in his case.

Receiving a properly responsive, post-claim evidentiary notice is a lifeline for the many thousands of veterans who must navigate, often on their own, the "bureaucratic labyrinth" of VA's claims adjudication process. *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring). This Court

should grant certiorari to restore veterans' rights and ensure that veterans can rely on the plain text of the statutes and regulations that govern their claims.

OPINIONS AND ORDERS BELOW

The decision of the Federal Circuit is unreported and reproduced at Pet. App. 1a-19a. The decision of the Court of Appeals for Veterans Claims is unreported and reproduced at Pet. App. 20a-33a. The decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 34a-48a.

JURISDICTION

The Federal Circuit entered judgment on March 24, 2023. The Federal Circuit denied a timely petition for rehearing on September 5, 2023. On October 17, 2023, this Court extended the time within which to file a petition for a writ of certiorari to January 16, 2024. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

38 U.S.C. § 5103(a)(1) provides in pertinent part:

> [T]he Secretary shall provide to the claimant and the claimant's representative, if any, by the most effective means available, including electronic communication or notification in writing, notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of

> that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

A regulation promulgated under this statutory authority, 38 C.F.R. § 3.159(b)(1), provides in pertinent part:

> [W]hen VA receives a complete or substantially complete initial or supplemental claim, VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim (hereafter in this paragraph referred to as the "notice"). In the notice, VA will inform the claimant which information and evidence, if any, that the claimant is to provide to VA and which information and evidence, if any, that VA will attempt to obtain on behalf of the claimant.

The statute and regulation are reproduced in full at Pet. App. 53a-67a.

STATEMENT OF THE CASE

VA's universal disability benefits application provides generic information about procedures and standards for twelve claim categories

Veterans seeking to obtain benefits provided in exchange for their service generally must file a claim with the Department of Veterans Affairs. 38 U.S.C.

§ 5101(a)(1)(A). VA must provide claimants with "all instructions and forms necessary to apply for" benefits. *Id.* § 5102(a). It must also notify claimants who have filed an incomplete application of what more they need to do to complete their claim. *Id.* § 5102(b).

Then, and most importantly for this case, VA must "provide to the claimant and the claimant's representative … notice of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim." *Id.* § 5103(a)(1). This notice must "indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary … will attempt to obtain." *Id.* VA is excused from providing the requisite notice if "the evidence of record" already enables the agency to "award the maximum benefit" available. *Id.* § 5103(b)(5)(A).

Congress has directed the Secretary to promulgate regulations "relating to the contents of notice to be provided." *Id.* § 5103(a)(2)(A). VA has accordingly promulgated 38 C.F.R. § 3.159(b)(1), which provides that, "when VA receives a complete or substantially complete" claim, "VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim." The regulation reiterates the statutory obligation for VA to indicate what evidence the claimant must provide and what evidence VA itself will attempt to obtain. And it directs that the claimant must provide evidence "within one year of the date of the notice."

Until 2015, when VA received and reviewed a claim for disability benefits, it would send a letter

telling the veteran that VA was "working on your claim" and setting out, in simple language, the categories of "additional evidence" the veteran might need to provide as well as the steps VA would take to develop evidence on the claim. CAFC Reply Br. Ex. A at 1-2. The notice also clearly apprised the veteran: "If you have any information or evidence that you have not previously told us about or given to us, please tell us or give us that evidence now." *Id.* at 2.

But VA changed course in 2015. The agency no longer sends notice letters in response to each submitted claim. Instead, VA now purports to satisfy its notice obligation by providing evidentiary guidance to veterans *before* they submit their claims. VA publishes an application package, Form 21-526EZ, that veterans must use to apply for every type of disability benefit (twelve in all). CAFC Appx91, 96-100. Form 21-526EZ consists of two parts: a document titled "Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits" (the "Notice Form") and an attached application form for the veteran to complete.[1]

The Notice Form contains several pages of information written in single-spaced, nine-point font. CAFC Appx89-95. It contains logistical information on how to submit a claim. CAFC Appx89-91. It contains a generic statement of how VA will help obtain evidence on claims. CAFC Appx91. And it contains

[1] The current version of Form 21-526EZ, which does not meaningfully differ from the 2019 version Mr. Forsythe used, is available at http://tinyurl.com/mwrvvj9d.

four pages of "Evidence Tables" that say nothing about the specific types of evidence a veteran might submit to substantiate their claim but instead lay out the legal standard of proving entitlement to each type of benefit. CAFC Appx92-95.

For a veteran seeking benefits for a disability caused by an in-service injury or disease, for example, the relevant portion of the applicable Evidence Table specifies that a veteran must demonstrate "an injury in service, or a disease that began in or was made permanently worse during service, or [that] there was an event in service that caused an injury or disease"; "a current physical or mental disability"; and a "relationship" between the two. CAFC Appx92. In other words, the Evidence Table recites the three-element legal test for service-connection found in 38 U.S.C. § 1110. When it comes to proving those elements, however, the Evidence Table offers only short and high-level generalizations. It instructs that the relationship between a disability and military service "may be shown by medical records or medical opinions or, in certain cases, by lay evidence." CAFC Appx92. It likewise states that the veteran's current disability may be proven by "medical evidence or by lay evidence of persistent and recurrent symptoms of disability that are visible or observable." *Id.* It says nothing about what evidence might be necessary to demonstrate an in-service injury or disease.

Beyond such general references to "medical evidence" and "lay evidence," the Notice Form does not tell veterans anything about the types of information or evidence they might submit in support of their claims. A comparison to VA's pre-2015 notice letter

underscores the current dearth of detail. The prior letter explained that relevant medical evidence included not only a contemporary doctor's report, but *all* "treatment records" from *all* "doctors, hospitals, laboratories, medical facilities, [and] mental health facilities, as well as reports of x-rays, physical therapy, surgery, etc." CAFC Reply Br. Ex. A at 1. The prior notice further explained that relevant lay evidence included both the veteran's "own statement" and, separately, "statements from people who have witnessed how your claimed disabilities are related to service." *Id.* at 2. VA's Notice Form, by contrast, does not define the scope of "medical" or "lay" evidence.[2]

Form 21-526EZ's separate application form is formatted so that the veteran's signature automatically certifies that the veteran "received the notice attached to this application." CAFC Appx100. Veterans wishing to pursue benefits must sign the application form whether or not they in fact received and reviewed (much less understood) the separate Notice Form. And, once the veteran submits the claim, VA's standard practice is to take no further steps to comply with its notice obligations under 38 U.S.C. § 5103 and 38 C.F.R. § 3.159.

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[2] The Notice Form does tell veterans that the agency might rely on statements "from people who have witnessed how [your] symptoms affect you," but only in a separate section relating to how VA rates a disability level *after* it has found that a compensable disability exists. CAFC Appx95.

Petitioner seeks and is denied benefits for a shoulder disability linked to in-service injuries

From 1987 to 1994, David Forsythe honorably served his country in the U.S. Navy and Naval Reserve. CAFC Appx48. He sustained multiple injuries to his left shoulder while on active duty, including from a fall and a "direct blow," CAFC Appx46, and from lifting a 60-pound generator onto a helicopter, CAFC Appx58-59. Mr. Forsythe later suffered persistent shoulder problems after his military service. In March 2019, a private physician diagnosed him with a shoulder disability that was "more likely than not … directly and causally related to [his] military service." CAFC Appx59.

Mr. Forsythe accordingly applied for VA disability benefits, asserting a connection between his left-shoulder disability and his military service. CAFC Appx50-59. Mr. Forsythe filled out the application portion of Form 21-526EZ. Proceeding (as many veterans do) without assistance from an attorney or other accredited representative, he chose to include two pieces of supporting evidence: the 2019 physician's report and his own short statement. CAFC Appx57-59, 55-56. With no indication that any further support was necessary, he did not submit additional forms of corroborating evidence available to him: namely, older private medical records from his primary care physician and chiropractor documenting prior treatments for his shoulder injuries, and supporting "buddy statements" from his brother, mother, and two military friends who witnessed his ongoing shoulder problems. CAFC Reply Br. 14.

When VA received Mr. Forsythe's application, it did not advise him that additional evidence might be necessary to substantiate his claim. Just the opposite: The agency sent a letter confirming receipt of the application and advising: "No Action Needed at This Time." CAFC Appx60. VA then ordered its own medical examination. The VA doctor who examined Mr. Forsythe determined that he was experiencing shoulder pain as well as functional loss, such as reduced range of motion, CAFC Appx65-66, that affected his ability to perform "occupational task[s]," CAFC Appx70. But, although the only apparent shoulder injuries of record had occurred during Mr. Forsythe's service, the VA examiner found it "less likely than not" that his shoulder disability was service-connected. Record Before Agency 55. The examiner's rationale was that he had been "unable to find" the very evidence Mr. Forsythe possessed but had not known to submit: records of "medical care for chronic recurrent left shoulder pain or condition incurred in or caused by (the) complaints and treatment of Left shoulder condition during service." CAFC Appx63.

VA then proceeded to decide Mr. Forsythe's claim. With just the two competing medical reports in the record, VA credited its own examiner's report and denied Mr. Forsythe's claim. CAFC Appx75-76. The Board of Veterans' Appeals affirmed the denial. Pet. App. 34a. It acknowledged that Mr. Forsythe's service records "document[ed] injury to his left shoulder" and that he had "reported ongoing left shoulder pain since service." Pet. App. 37a. But the Board concluded that the opinion of Mr. Forsythe's private physician connecting his current shoulder disability to the in-service injury was "of no probative value" because he

supposedly "did not provide a rationale for his opinion" that Mr. Forsythe's "current left shoulder pain and dysfunction is more likely than not related to [his] service." Pet. App. 39a. The Board also determined that Mr. Forsythe's own "statements do not outweigh the opinion of the VA examiner … who is a skilled neutral professional." Pet. App. 40a.

Mr. Forsythe, now represented by counsel, appealed to the Court of Appeals for Veterans Claims (Veterans Court). He argued, among other things, that VA "failed to provide sufficient notice prior to its decision of what evidence was needed to establish service connection." Pet. App. 23a. The Veterans Court rejected those arguments and affirmed the denial of Mr. Forsythe's claim. Pet. App. 31a-33a. The court explained that only "generic notice" is required by law, not "an individualized explanation of the specific evidence required for each case." Pet. App. 32a. It cited Mr. Forsythe's certification, by virtue of signing the application section of Form 21-526EZ, that he had received the attached Notice Form. Pet. App. 32a. And it held that the Notice Form "satisfies VA's pre-decision notice requirements." Pet. App. 32a-33a.

A divided Federal Circuit panel endorses VA's notice practice and denies a remedy for VA's noncompliance with its own regulation

Mr. Forsythe appealed to the Federal Circuit, again arguing that VA's use of the Notice Form alone to provide evidentiary guidance to veterans does not comply with 38 U.S.C. § 5103(a)(1) or 38 C.F.R. § 3.159(b)(1). Mr. Forsythe explained that VA had violated the statute because only notice provided after

VA receives a claim—not a "Notice" attached to the claim application form—can possibly account for evidence "previously provided to the Secretary" and related to "the claim." CAFC Opening Br. 12 (quoting § 5103(a)(1)). He also explained that VA had separately violated 38 C.F.R. § 3.159(b)(1), which expressly mandates evidentiary notice "*when*"—not merely before—VA receives a claim. *Id.* Citing *Accardi*, Mr. Forsythe explained that VA was bound by that "duly promulgated" regulation. *Id.* at 17-18.

A divided panel of the Federal Circuit rejected Mr. Forsythe's arguments and endorsed VA's current notice practice. The majority first ruled that the Notice Form complies with 38 U.S.C. § 5103(a)(1). In the majority's view, the statute "does not require the agency to wait to provide notice until after it receives a veteran's application." Pet. App. 6a. The majority did not explain how the Notice Form, or any other generic document issued before the agency receives a claim, could account for evidence "not previously provided to the Secretary" regarding "the claim" at issue. 38 U.S.C. § 5103(a)(1).

Instead of reconciling its interpretation with that statutory text, the majority focused on § 5103(a)(1)'s legislative history. It noted that the prior version of the statute had specifically required VA to issue notice "*[u]pon receipt of a complete or substantially complete application*." Pet. App. 6a (quoting 38 U.S.C § 5103(a)(1) (2006)). Congress removed that separate language, but chose to retain the "not previously provided" clause, when it amended § 5103(a)(1) in 2012. Pet. App. 6a-7a; *see* Pub. L. No. 112-154, § 504, 126 Stat. 1165, 1191 (2012). The majority construed the

amendment as eliminating any "temporal requirement" from the statute, Pet. App. 7a, because a House Committee Report for a different bill had described the same textual change as "remov[ing] the requirement that the [notice] be sent only after receipt of a claim, thereby allowing VA to put notice on new claim forms." *Id.* (quoting H.R. Rep. No. 112-241, at 9 (2011)).

The majority seemed to recognize that VA's regulation expressly requires post-claim notice even if the statute does not. But it declined to enforce that requirement. The majority began by criticizing the regulation's post-claim notice requirement as embodying "outdated" VA policy preferences. Pet. App. 9a. That was so, the majority suggested, because after Congress amended § 5103(a)(1) in 2012, VA spent time "examining whether 38 C.F.R. [§] 3.159 should be amended to account for the new statute." *Id.* (quoting Standard Claims and Appeals Forms, 78 Fed. Reg. 65,490, 65,495 (Oct. 31, 2013)). Although VA ultimately retained the regulation's post-claim notice requirement, the majority concluded it was "unlikely that the agency intended" to do so. *Id.* Based on that speculation about agency intent, the majority dropped a footnote "urg[ing] the Secretary to amend this regulation," ostensibly "[t]o avoid further confusion." Pet. App. 9a n.1.

Without waiting for the agency to change its regulation, however, the Federal Circuit majority declared that veterans are powerless to enforce it through judicial review. According to the majority, VA's practice of providing only the pre-claim Notice Form cannot be "prejudicial" to claimants. Pet. App.

10a. The majority reasoned that the Notice Form's "content" is "sufficient as a matter of law," such that VA's only deviation from the regulation was delivering it "too early." *Id.* From there, the majority ruled that veterans cannot be "hindered" by receiving otherwise-adequate evidentiary notice "*too early*." Pet. App. 11a. So, in the majority's view, VA's longstanding noncompliance with its own regulation is a "harmless error" that courts need not remedy. Pet. App. 10a.

Judge Mayer dissented. He would have "remand[ed] this case for the VA to apply its regulation." Pet. App. 19a. His position was simple: Any agency, including VA, must abide by its governing regulations. Judge Mayer thus refused to "brush aside the VA's non-compliance with" 38 C.F.R. § 3.159(b)(1). Pet. App. 14a. He emphasized that, "[b]y its plain terms," the regulation requires notice "*after* the VA receives a veteran's claim for benefits." *Id.* That post-claim notice requirement, Judge Mayer explained, is a valid implementation of 38 U.S.C. § 5103(a)(1)—even accepting the majority's interpretation of the 2012 change and "viewing" the statute "through the prism of the legislative history." Pet. App. 17a.

Judge Mayer also disagreed with the majority's view that, timing aside, Form 21-526EZ provides "sufficient" evidentiary guidance to veterans "from a substantive perspective." Pet. App. 17a. He highlighted that the Notice Form "mak[es] it difficult for a veteran to ascertain precisely what kind of evidence must be submitted" for any one of the "*twelve* different types of VA benefits" claims. *Id.* For example, while the Notice Form "refers to 'lay evidence'" as potentially relevant to disability claims, "it does not necessarily

convey, in plain terms, that a claim for disability benefits can, in certain circumstances, be supported by statements from those with whom a veteran served as well as statements from a veteran's relatives and friends." Pet. App. 18a.

Mr. Forsythe petitioned for rehearing en banc, arguing that the panel majority had misinterpreted § 5103(a)(1) and separately violated *Accardi* by declining to enforce § 3.159(b)(1). CAFC Reh'g Pet. at 6-11. The Federal Circuit denied rehearing en banc without comment. Pet. App. 49a-51a.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Incorrect.

The Federal Circuit deprived veterans of critical and legally required notice by making two errors, each of which independently warrants certiorari. First, § 5103(a)(1) plainly requires VA to provide notice in response to a veteran's claim, and the majority held otherwise only by ignoring the law's text and distorting its statutory history. *Infra* § I.A. Second, the majority impermissibly declined to enforce VA's binding regulation, 38 C.F.R. § 3.159(b)(1). The majority allowed VA to replace the regulation's clear post-claim notice requirement with an entirely different practice merely because the majority viewed the substitute practice favorably. That violated *Accardi*'s bedrock rule of administrative law. *Infra* § I.B.

A. 38 U.S.C. § 5103(a)(1) requires VA to issue responsive, post-claim notice.

1. Section 5103(a)(1) specifies that VA's notice must identify "any medical or lay evidence … *not previously provided* to the Secretary that is necessary to substantiate the claim." 38 U.S.C. § 5103(a)(1) (emphasis added). For each claim, therefore, the agency must assess what evidence has been "previously provided," then tailor its notice to focus on additional forms of relevant evidence the veteran might have missed. That can happen only after VA learns of the claim. That timing is reinforced by a later section of the statute, which provides that the notice requirement "shall not apply to any claim or issue where the Secretary may award the maximum benefit in accordance with this title based on the evidence of record." 38 U.S.C. § 5103(b)(5)(A). Both provisions plainly contemplate VA issuing notice after it assesses the evidence submitted with a claim.

Congress designed § 5103(a)(1)'s notice to point veterans toward additional forms of evidence beyond what they initially provide. And with good reason. Veterans do their best to navigate the "bureaucratic labyrinth" of VA's claim process. *Martin*, 891 F.3d at 1349 (Moore, J., concurring). But they often must do so *pro se*, *infra* 33-34, with limited knowledge of agency procedure and the types of evidence that might prove dispositive. That creates a significant risk that veterans' initial submissions to VA will not include the full scope of evidence supporting their claims—and that VA will deny urgently needed benefits as a result. In this case, for example, Mr. Forsythe—proceeding *pro se*—believed that his doctor's

unequivocal finding of service connection would be sufficient. Mr. Forsythe did not know when filing his claim that VA would commission a competing medical report, or that other forms of evidence could prove dispositive in the event his doctor and VA's doctor disagreed.

The targeted guidance contemplated by § 5103(a)(1) helps veterans take an informed second look at the evidence supporting their claims before VA's adjudication. That guidance can make all the difference. Had VA applied the statute here, it would have determined that Mr. Forsythe had "previously provided" a contemporaneous doctor's report and a short statement on his own behalf. VA would then have issued notice focused on different types of evidence that could prove necessary to substantiate Mr. Forsythe's claim, including older medical records and third-party statements.

To be sure, § 5103(a)(1) permits VA to *also* provide evidentiary guidance before receiving a claim (say, attached to the claim form). That could certainly benefit veterans in its own right. But, on its own, such pre-claim guidance cannot satisfy the plain language of the statute or provide the targeted form of notice that the law requires.

2. When Congress enacts a statute, it "says what it means and means what it says." *Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) (citation omitted). Yet the Federal Circuit majority impermissibly ignored § 5103(a)(1)'s text. In particular, it offered no explanation (and there is none) for how pre-claim notice could account for evidence "not previously

provided." In place of such textual analysis, the majority relied on legislative history.

The majority focused on Congress's 2012 amendment of § 5103(a)(1). That amendment retained the "previously provided" clause while removing separate language that specifically required VA to issue notice "*[u]pon receipt of a complete or substantially complete application*." Pet. App. 6a (quoting 38 U.S.C. § 5103(a)(1) (2006)). The majority understood that amendment as a "repeal" of any "temporal requirement" regarding when VA must issue notice. Pet. App. 9a. Its rationale hinged on legislative history. The majority pointed to a single line from a House Committee Report discussing a different bill, where certain legislators described a parallel amendment as "remov[ing] the requirement that the [notice] be sent only after receipt of a claim, thereby allowing VA to put notice on new claim forms." Pet. App. 7a (quoting H.R. Rep. No. 112-241, at 9). In the majority's view, that showed both that Congress intended to remove any temporal requirement from § 5103(a)(1), and that Congress had actually done so. Pet. App. 6a-7a.

The majority's theory is wrong on both counts. Congress plainly retained a temporal requirement in the "not previously provided" language of § 5103(a)(1). Congress cut only the distinct requirement that VA issue the notice "[u]pon receipt of a complete or substantially complete application." Pet. App. 6a. But that change merely expanded the ways VA could *receive* a claim for purposes of triggering the statute's post-claim notice *requirement*. After the amendment, VA is no longer required to wait for a

submitted application to be complete (or substantially so) before issuing notice.

That was a significant change. It is not unusual for a veteran to notify VA of a claim *before* completing a corresponding application. Before 2015, for example, a veteran could make an "informal claim" by identifying "the benefit sought," and VA would treat the claim as accruing at that point if the veteran submitted a corresponding application within one year. *Sellers v. Wilkie*, 965 F.3d 1328, 1331 n.3 (Fed. Cir. 2020) (citing 38 C.F.R. § 3.155(a) (1961)). Since 2015, VA has done the same where a veteran demonstrates an "intent to file" and later files a corresponding application. *Id.* (quoting 38 C.F.R § 3.155(b)). The 2012 amendment to § 5103(a)(1) empowered VA to issue the required notice in response to an informal claim or, later, an intent to file—as long as VA has enough information to assess the evidence that has been "previously provided." Nothing about that change undercuts the need for VA to issue notice *after* learning of a claim, not before.

The majority's single line of legislative history does not show otherwise. Even if the statement clashed with § 5103(a)(1)'s post-claim notice requirement, "legislative history is not the law" and cannot supplant statutory text. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1631 (2018). That is particularly true here because the cited House Committee Report commented on a different bill from the one that Congress ultimately enacted to amend § 5103(a)(1). *Compare* H.R. Rep. No. 112-241 (2011) (addressing H.R. 2349), *with* Pub. L. No. 112-154 (2012) (enacting H.R. 1627); *cf. Wis. Pub. Intervenor v. Mortier*, 501 U.S. 597, 617

(1991) (Scalia, J., concurring) (noting "how unreliable Committee Reports are ... as a genuine indicator of congressional intent"). Perhaps a handful of legislators wanted to eliminate any post-claim notice obligations. But, as Judge Mayer correctly observed in dissent, "this intent did not explicitly make it into the law." Pet. App. 16a.

In any event, there is no clear clash between the cited statement in the House Committee Report and the text of § 5103(a)(1). As the majority emphasized in assessing legislative intent, the Committee Report asserted that dropping the "complete or substantially complete application" clause "would remove the requirement that the [notice] be sent *only* after receipt of a claim, thereby allowing VA to put notice on new claim forms." Pet. App. 7a (quoting H.R. Rep. No. 112-241, at 9) (emphasis added). That sentence is best read to present the 2012 amendment as clarifying an entirely different point: While § 5103(a)(1) still requires post-claim notice, that is not the "*only*" permissible point at which VA can provide guidance on evidentiary submissions. The statute does not preclude VA from offering additional notice that could further assist veterans, including as part of the instructional guidance on an application form.

The Federal Circuit's statutory error alone warrants certiorari and reversal. In a system that is "designed to function throughout with a high degree of informality and solicitude for the claimant," *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985), Congress imposed on the agency a straightforward requirement: tell veterans what more evidence is needed to prove up their claims before the

agency proceeds to decide those claims on the merits. VA's current practice inexplicably refuses to implement that statutory directive. Veterans have a hard enough time navigating VA's complex claims process even with the agency assistance Congress has mandated. When courts take that assistance away by ignoring plain statutory text, the claims process becomes the very opposite of the claimant-friendly system Congress intended. VA has defied § 5103(a)(1) for nearly a decade. A correction is long overdue.

B. The Federal Circuit violated the *Accardi* doctrine by permitting VA to systematically defy its own regulation.

The Federal Circuit majority compounded its statutory error by violating bedrock administrative law principles. Even accepting the majority's misreading of § 5103(a)(1), there is no dispute that 38 C.F.R. § 3.159(b)(1) expressly requires VA to provide responsive notice "when VA receives a … claim"—which means issuing notice *after* a claim is filed. Yet the majority allowed VA to disregard that regulation and substitute an entirely different practice—not merely in this case, but for all veterans—simply because the majority viewed the substitute practice favorably as a policy matter. That act of judicial policymaking violates *Accardi*, defies the Administrative Procedure Act (APA), and independently warrants this Court's intervention.

1. *Accardi* held that government agencies cannot "sidestep" immigration "regulations" as long as they "remain operative." 347 U.S. at 267. The underlying rule, as this Court has repeatedly affirmed, is simple:

The "Government [is] bound by its own regulations." *Black v. Romano*, 471 U.S 606, 622 n.18 (1985) (Marshall, J., concurring) (citing *Accardi*). It makes no difference that VA is capable of "amending the regulations" it has previously promulgated. *United States v. Nixon*, 418 U.S. 683, 696 (1974). Until VA validly amends an "extant" regulation, or Congress invalidates it, the regulation retains "the force of law." *Id.* at 695. VA must adhere to the regulation, and courts must enforce it.

Here, *Accardi* requires VA to adhere to 38 C.F.R. § 3.159(b)(1)'s post-claim notice requirement. VA promulgated that requirement pursuant to § 5103, which directs the agency to "prescribe in regulations requirements relating to the contents of notice to be provided under this subsection." 38 U.S.C. § 5103(a)(2)(A). To date, VA has elected not to amend 38 C.F.R. § 3.159(b)(1)'s post-claim notice requirement in view of the 2012 statutory amendment. That is a considered judgment by the agency. As the Federal Circuit noted, VA spent time "examining whether 38 C.F.R. [§] 3.159 should be amended to account for the new statute." Pet. App. 9a (quoting Standard Claims and Appeals Forms, 78 Fed. Reg. 65,490, 65,495 (Oct. 31, 2013)). VA chose to retain the regulation without change.

Congress, in turn, has done nothing—including in that 2012 statutory amendment—to invalidate 38 C.F.R. § 3.159(b)(1)'s post-claim notice requirement. Properly construed, the current § 5103(a)(1) still mandates the same timing. *Supra* 18-23. But even under the majority's mistaken reading, the statute at least permits VA to require post-claim notice. The

government has conceded as much. CAFC Oral Arg. 16:09-16:28; *see also* Pet. App. 16a-17a (Mayer, J., dissenting). Indeed, when Congress amended the statute in 2012, it included an express instruction that "[n]othing in the amendments … shall be construed as eliminating any requirement with respect to the contents of a notice" imposed by then-existing "regulations," including 38 C.F.R. § 3.159(b)(1). Pub. L. No. 112-154, § 504, 126 Stat. at 1192.

2. The Federal Circuit should have remanded Mr. Forsythe's claim and ordered the agency to comply with the "regulation" that "remains in force," *Nixon*, 418 U.S. at 696, by issuing responsive, post-claim notice. The importance of that notice could hardly be clearer. When Mr. Forsythe made his initial claim submission, he understandably believed that his doctor's report would suffice to connect his shoulder disability to his in-service shoulder injuries. Mr. Forsythe did not submit further corroboration on that front, because he received no indication that such evidence was necessary. *Supra* 11. Had VA adhered to 38 C.F.R. § 3.159(b)(1), it would have provided precisely that indication. The agency would have notified Mr. Forsythe that, even with his doctor's report in the record, older medical documents and buddy statements could prove necessary to establish service connection. That would have prompted Mr. Forsythe to submit the very corroborating evidence whose absence led VA to deny benefits—namely, records of "medical care for chronic recurrent left shoulder pain" in the years after Mr. Forsythe's service. CAFC Appx63.

Instead of enforcing the regulation, however, the majority doubled down on VA's *Accardi* violation. It authorized the agency to continue disregarding its own regulation on the ground that providing only the one-size-fits-all, pre-claim Notice Form is not "prejudicial[ly]" less helpful for veterans than § 3.159(b)(1)'s responsive, post-claim notice. Pet. App. 10a.

This was not a judgment that Mr. Forsythe, for reasons specific to his case, had not been prejudiced by the timing of VA's notice. The majority did not assess the "additional evidence" Mr. Forsythe would have submitted "to substantiate his claim," which would have filled the exact gap VA cited in denying benefits. Pet. App. 11a. It instead swept aside Mr. Forsythe's particularized showing of prejudice, declaring categorically that "we see no circumstance in which there could have been prejudicial error from Mr. Forsythe receiving the notice too early." *Id.* Apparently, in the majority's view, if a veteran failed to submit particular evidence based on the Notice Form, they would necessarily have failed to submit it after receiving the responsive, post-claim notice contemplated by the regulation.

The majority acknowledged that VA issues the Notice Form before it can review any particular veteran's "application and accompanying evidence." Pet. App. 10a. The majority thus recognized that the Notice Form cannot provide "notice tailored" to a specific type of claim or aimed at distinguishing between the evidence a veteran has previously provided and what might still be "missing." *Id.* In the majority's view, however, that did not matter because 38 C.F.R. § 3.159(b)(1) purportedly requires no such tailoring—

only "generic notice." *Id.* (citation omitted). So the majority deemed the Notice Form's "content … sufficient as a matter of law." *Id.* And the majority saw "no circumstance" in which receiving that generic notice "too early"—before filing a claim rather than afterward—would be less helpful for veterans. Pet. App. 10a-11a.

Having drawn that equivalence, the majority ruled that VA's decision to cast aside 38 C.F.R. § 3.159(b)(1) and provide only the Notice Form "could not have had any bearing" on how veterans marshal evidence for their claims. Pet. App. 11a-12a. Based on that policy judgment, the majority deemed VA's systematic noncompliance with its own regulation "harmless," such that veterans have no judicial remedy. *Id.*

That was a flawed and impermissible end-run around both *Accardi* and the APA. The majority may have (wrongly) considered the Notice Form to be a sensible way to provide evidentiary guidance to veterans. And it may have (again, wrongly) considered the Notice Form's functions comparable to those of the post-claim notice required by the regulation's text. But assessing the merits of those policies and choosing between them is not the Federal Circuit's job. It falls instead to VA's formal rulemaking. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2435 (2019) (Gorsuch, J., concurring) ("Once an agency issues a substantive rule through notice and comment, it can amend that rule only by following the same notice-and-comment procedures."). And VA's rules provide a clear answer: Section 3.159(b)(1) requires the agency to provide notice in response to receiving a claim. VA of course may consider "amending the regulations" through the

APA's rulemaking process. *Nixon*, 418 U.S. at 696. But the agency may not simply abandon a binding rule and unofficially substitute a new practice. And courts certainly may not endorse that maneuver by invoking their own policy preferences, even if cloaked in the language of "prejudice."

The majority's tell—its crucial footnote—crystallizes the problem. Believing that the regulation's post-claim notice requirement reflected "outdated" VA policy preferences, Pet. App. 9a, the majority "urge[d] the Secretary to amend this regulation" to demand only pre-claim notice, Pet. App. 9a n.1. As strange as that suggestion was, it at least recognized that VA must be the one to implement a policy change, not the court. The Federal Circuit should have enforced the regulation as written in the meantime. But the majority approved VA's Notice Form without any corresponding rulemaking. That left the majority in the awkward—and legally impermissible—position of asking VA to backfill its judicial policy choice by promulgating a matching rule that would "avoid further confusion." Pet. App. 9a n.1. Courts cannot dictate policymaking in that way.

3. Of course, the reason courts do not dictate policymaking is that doing so exceeds their authority and institutional competence. The majority's policy analysis is a striking example. In comparing the benefits of the pre-claim Notice Form and the responsive, post-claim notice required by 38 C.F.R. § 3.159(b)(1), the majority resorted to vague equivocations and overlooked the obvious ways in which VA's current practice deprives veterans of essential evidentiary

guidance. Those errors underscore the practical importance of *Accardi*'s rule.

The majority erred in concluding that VA's Notice Form is "legally sufficient" under § 3.159(b)(1) except for the timing of its delivery. Pet. App. 11a. The document looks nothing like the notice described in the regulation. Most glaringly, the Notice Form does not tell claimants *what types* of "information and medical or lay evidence" are "necessary to substantiate the claim" that has been submitted. 38 C.F.R. § 3.159(b)(1). It simply recites, without elaboration, that "medical" or "lay" evidence might be relevant. *E.g.*, CAFC Appx92. That is no guidance at all. It leaves disabled veterans—who may have decades' worth of paperwork relating to their medical conditions—to do all the work of determining what categories of records might be relevant to each element of their claims, and what range of corroborating evidence or statements VA might consider necessary. The whole point of the notice obligation is to remove that guesswork and tell veterans which types of evidence to provide.

This deficiency leaps out when comparing the Notice Form to the notice letter VA previously sent to claimants. Regarding service-connection claims like Mr. Forsythe's, the Notice Form merely states in passing that the connection between a current disability and prior military service "may be shown by medical records or medical opinions or, in certain cases, by lay evidence." CAFC Appx92. Veterans are given no definition of what counts as "lay evidence," have no indication of which types of medical records to include, and have no clue about the extent of

documentation that VA might deem necessary to substantiate service-connection. No surprise, then, that Mr. Forsythe did not realize he should bolster his recent physician's report with older private medical records showing continuous treatment, or that he should gather supportive statements from family and fellow servicemembers who witnessed his in-service injuries and ongoing shoulder problems. *Supra* 11.

VA's prior notice letter, in contrast, expressly instructed veterans that such "additional evidence" was worth submitting. CAFC Reply Br. Ex. A at 1-2. It called for all "treatment records" from any "doctors, hospitals, laboratories, medical facilities, mental health facilities" (including older records), along with "reports of x-rays, physical therapy, surgery, etc." (like Mr. Forsythe's chiropractic records). *Id.* at 1. The notice letter also specifically requested "statements from people who have witnessed how your claimed disabilities are related to service and/or how such disabilities affect you." *Id.* at 2. That is the sort of meaningful guidance that 38 C.F.R. § 3.159(b)(1) requires. The Notice Form fails to provide it. *See* Pet. App. 17a (dissent refusing to deem Notice Form "sufficient" from a "substantive perspective").

The majority went further astray in concluding that, if the Notice Form's disclosures were otherwise sufficient, VA could not possibly disadvantage veterans by attaching those disclosures to the application form instead of sending them in response to a veteran's claim. That change in the timing and manner of delivery plainly renders the Notice Form even less helpful to veterans. For one thing, it is far less likely that veterans will even see the Notice Form when it

is provided in its current, pre-claim manner. Form 21-526EZ is an electronic document containing both the Notice Form and the universal application form. Veterans acting *pro se* often print only the application form without recognizing the significance of the separate Notice Form, which looks at first glance like boilerplate instructions on how to properly enter information into the application form. And Veterans Service Organization staff often provide only the application form to veterans (or fill it out on their behalf). It is hardly surprising that Mr. Forsythe has no recollection of ever seeing the Notice Form, which appears nowhere in the record. CAFC Op. Br. 22; CAFC Reply Br. 11.

Providing evidentiary guidance before veterans submit their claims, rather than after, is also less likely to spur veterans to reconsider their initial assessment of relevant evidence. Once a veteran submits an application, receiving evidentiary notice will naturally spark a second look at how best to support the claim, with an eye toward additional forms of proof. VA's generic, pre-claim Notice Form is not calculated to do that. Again, Mr. Forsythe's case demonstrates how meaningful this difference can be. The Notice Form told Mr. Forsythe that he had to show an in-service injury, a current disability, and a link between the two. CAFC Appx92. He submitted a statement and a doctor's report showing those three things. CAFC Appx55-59. VA's post-claim correspondence assured him that "[n]o [a]ction [was] [n]eeded at [t]his [t]ime" and that, "if we need additional evidence to support your claim, we will contact you." CAFC Appx60. That correspondence *discouraged* Mr. Forsythe from reconsidering whether

additional supporting evidence might be necessary. Post-claim notice would have had the opposite effect. *See* CAFC Appx39-40. And it would have made all the difference to Mr. Forsythe's claim. *See supra* 25.

VA's practice of providing only the pre-claim Notice Form is simply not equivalent to 38 C.F.R. § 3.159(b)(1)'s post-claim notice regime and fails to provide due process to veterans. Perhaps recognizing as much, the Federal Circuit majority ultimately suggested that veterans can make up for the deficiency by "filing a supplemental claim" with more evidence after an initial claim fails. Pet. App. 11a. But that simply highlights the problem. A veteran forced to file a supplemental claim would not receive benefits during the ensuing delay and could lose the benefit of the initial claim's filing date. *See* 38 U.S.C. § 5110(a)(3). Veterans should not have to compensate for VA's legal failures. It is the agency's "duty to help" veterans, *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009)—not the other way around.

II. The Questions Presented Are Important And Recurring.

The questions presented here are critical to the relationship between our government and the veterans who served it—and the relationship between courts and agencies.

The interpretation of Congress's notice statute and the application of VA's notice regulation affect every one of the millions of veterans' benefits claims filed each year. *See* VA, *Veterans Benefits Administration Reports*, https://tinyurl.com/mw4zpt7h. And

notice plays a crucial role in those claims. VA's obligation to help veterans develop their claims is one of "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims." *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). It is meant "to ensure that the claimant's case is presented to the initial decisionmaker with whatever support is available." *Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006). Veterans bear the ultimate responsibility to "present and support a claim for benefits," 38 U.S.C. § 5107(a), but "[t]he government's interest in veterans cases is not that it shall win, but rather … that all veterans so entitled receive the benefits due to them," *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). In furtherance of that interest, Congress has given VA a "statutory duty to help the veteran" both "develop his or her benefits claim," *Sanders*, 556 U.S. at 412 (citing 38 U.S.C. § 5103A), and "understand the process" for doing so, *Mayfield*, 444 F.3d at 1333.

Enforcing VA's statutory duties to aid veterans throughout the claims process matters a great deal when that process has been aptly characterized as a "bureaucratic labyrinth." *Martin*, 891 F.3d at 1349 (Moore, J., concurring). It matters even more given the large numbers of veterans who must navigate this labyrinth—including the initial claim submission—without the help of an attorney and potentially with no help at all. *See, e.g.*, *Sanders*, 556 U.S. at 412 ("the veteran is often unrepresented during the claims proceedings"); *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("In most cases, claimants submit their own applications without assistance." (quoting H.R. Rep. No. 100-963, at 13 (1988)); Board of Veterans'

Appeals, *Annual Report Fiscal Year 2022* 35, 49, http://tinyurl.com/57m7hmz2 (showing, even on appeal to Board, less than 25% of claimants with attorney representation and more than 8% with no representation). An unrepresented veteran like Mr. Forsythe, entering into the daunting process of pursuing a disability benefits claim before the VA, needs the agency at least to comply with its duty to make clear to him what he needs to do if he wants to make it through the labyrinth.

VA's own data suggest that the agency is failing in providing this guidance. In recent years, more than half of veterans who seek further review of unfavorable initial decisions have had to file supplemental claims (with additional evidence), strongly suggesting that VA's current notice practice is failing to apprise veterans of the evidence necessary to substantiate their claims. Board of Veterans' Appeals, *Annual Report*, *supra*, at 22. Furthermore, each year the Board "remands tens of thousands of cases [to the regional office] for further evidence based on VA's duty to assist." *Id.* at 17. Statistics like these confirm the need for the notice obligation that Congress actually imposed, not the unlawful practice the Federal Circuit sanctioned. And they confirm the real-world prejudice experienced by claimants who are not getting the notice that VA's regulation unquestionably demands.

There is another reason that enforcing the regulation as written is important to veterans. As Judge Mayer observed in dissent, it is essential that veterans and their representatives—particularly non-lawyer representatives—can rely on the plain text of the rules governing the claims process. Pet. App. 16a-17a.

"[A] veteran should not be forced to compare and contrast different iterations of a statute and conduct a thorough study of its legislative history in order to divine the interpretation of an implementing regulation. Rather, he should be entitled to assume that the VA means what it says" in the text of those rules. Pet. App. 16a. The agency tells veterans that it will provide them with notice of the evidence they will be required to submit "when VA receives a complete or substantially complete initial or supplemental claim." 38 C.F.R. § 3.159. Veterans should be able to rely on that promise without fear that a court will decide the agency should have adopted a different regulation, or that the agency's policy choice—enshrined in a formal rule—doesn't matter to veterans.

Finally, it is important for this Court to reject the Federal Circuit's judicial policymaking—and its end-run around *Accardi*—to avoid it spreading to other contexts. That approach is bad enough (and particularly problematic) in the veterans' benefits context, and there is nothing but this Court to stop the Federal Circuit from refusing to enforce other valid VA regulations on the ground that the agency's noncompliance cannot possibly be prejudicial. But courts are commanded to conduct a prejudicial-error analysis not just in veterans' cases but in reviewing all agency decisions. *See* 5 U.S.C. § 706. This Court's review is urgently needed to make clear that those reviewing courts are not allowed to evade lawful regulations (or the *Accardi* doctrine) simply because a panel of judges can "see no circumstance in which there could have been prejudicial error" from the agency implementing a different practice from the one required by its formal rulemaking processes. Pet. App. 11a.

III. This Case Provides An Ideal Vehicle To Set Things Right.

This case provides an ideal opportunity for the Court to correct the Federal Circuit's erroneous construction of 38 U.S.C. § 5103(a)(1), reinforce *Accardi*'s rule, and restore the regime of responsive, post-claim notice that governing law requires.

The Federal Circuit squarely addressed the questions presented. The majority held both that § 5103(a)(1) does not require post-claim notice and that 38 C.F.R. § 3.159(b)(1)'s "temporal language" is effectively unenforceable in court because VA's substitute practice is not "prejudicial[ly]" worse for veterans. Pet. App. 8a, 10a. The en banc court declined to disturb those holdings, Pet. App. 50a, and they are now squarely teed up for this Court's review.

The questions presented are also outcome-determinative. Mr. Forsythe's appeal to the Federal Circuit focused exclusively on the notice error, and the appellate court denied his appeal solely based on its flawed interpretation of the notice statute and its refusal to enforce VA's notice regulation. With those errors corrected, Mr. Forsythe would be entitled to a remand to receive a proper notice that would allow him to fill the evidentiary gap that VA cited in denying his claim. *Cf. Mayfield*, 444 F.3d at 1334 (notice timing defect "cured" by remand to allow for proper notice and "readjudication" of claim).

This Court should not hesitate to grant certiorari merely because the Federal Circuit majority invoked the language of "prejudice." As explained, the

majority's rulings were not specific to the facts of Mr. Forsythe's case. *Supra* 26. The majority invoked "prejudice" only when articulating its categorical policy judgment: that VA's practice of providing the generic Notice Form with its standard application package is just as helpful for veterans as the very different and tailored post-claim notice that is actually required under law. That misguided judicial policy assessment applies with equal force to all veterans, is improper, and warrants this Court's intervention.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

Respectfully submitted,

Falen M. LaPonzina
ADVOCATE
NONPROFIT
ORGANIZATION
1629 K Street, NW
Suite 300
Washington, DC 20006

Amari L. Hammonds
ORRICK, HERRINGTON &
SUTCLIFFE LLP
355 S. Grand Avenue
Suite 2700
Los Angeles, CA 90071

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Edmund Hirschfeld
Melanie R. Hallums
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

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