No. 23-779

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Petition established that the Federal Circuit incorrectly decided an important and recurring question of law in a way that disadvantages veterans, defies Congress's intent, and permits a federal agency to violate its own binding regulation. The government's response does not dispute the importance of the question presented—nor could it, when the notice obligation at stake here applies to every one of the millions of veterans' benefits claims filed each year.

Nor does the government overcome Petitioner's showing that the Federal Circuit's decision was incorrect. The government, like the Federal Circuit, privileges unreliable legislative history over clear statutory text. The government also offers a novel argument to avoid that statutory text, but the attempt is flawed on its face. Worse, the government agrees with the Federal Circuit's decision to excuse an agency's violation of its own clear regulation not because the error was harmless in this specific case, but because—in the view of two Federal Circuit judges, at least—the violation *can never be* harmful. That contention is not only wrong, it creates dangerous precedent allowing agencies to change the rules without engaging in notice-and-comment rulemaking, so long as a reviewing court agrees that the change is good policy.

That end-run around the longstanding *Accardi* doctrine would be problematic in any context. It is especially so when applied to VA, which is charged with helping veterans secure the benefits guaranteed to them by a nation grateful for their service. The

government's half-hearted objections to certiorari—such as arguing that no circuit conflict exists in a setting where the Federal Circuit has exclusive jurisdiction—cannot stand in the way of this Court's review of a legal question that is squarely presented in this case and is tremendously important to a large population of veterans.

The Court should grant certiorari.

I. The Federal Circuit's Decision Is Wrong.

A. The government misinterprets the statute.

1. Petitioner demonstrated that 38 U.S.C. § 5103(a)(1) requires VA to provide notice of information necessary to substantiate a veteran's claim *after* that claim is submitted, not merely before. Pet. 18-23. Only then can the agency provide the responsive notice contemplated by the statute, identifying "any medical or lay evidence … not previously provided to the Secretary." 38 U.S.C. § 5103(a)(1).

The Federal Circuit majority did not attempt to square its holding with that clear temporal language in the statute. The government offers a new theory before this Court, asserting that the "not previously provided" phrase "does not speak to when the notice must be provided," but rather "indicates that a veteran need not resubmit evidence the Secretary already has." BIO 11. That argument fails for several reasons. Most critically, even if the government were correct that the "not previously provided" phrase refers only to evidence submitted with earlier claims,

the statute still would impose a clear temporal requirement. Section 5103(a)(1) does not speak to the veteran's obligations but rather describes information VA must provide to the veteran. Until a veteran submits a claim, VA has no way to know what evidence potentially relevant *to that claim* is already in the agency's possession, and therefore no way of notifying the veteran of what evidence "necessary to substantiate the claim" might be waiting in the veteran's existing file. Merely notifying all veterans on a generic claim form that VA might have some evidence from some other claim, and that the veteran need not resubmit any such evidence if it exists, plainly does not satisfy the terms of § 5103(a)(1). *Contra* BIO 11-12.

The government's post-hoc rationalization for the Federal Circuit majority's holding also ignores statutory context. Within the category of necessary evidence "not previously provided," the Secretary must notify the veteran which portion of that evidence the Secretary will attempt to obtain and which portion the veteran should provide. 38 U.S.C. § 5103(a)(1).[1] That language would make no sense if, as the government suggests, the "not previously provided" clause referred exclusively to information already in VA's possession.

In contrast to the government's proposal, Petitioner's interpretation accords with the statutory text and purpose. A claimant may submit supporting

[1] This additional statutory obligation, along with VA's separately codified duty to assist, is the basis for the language the government quotes from VA's standardized Notice Form. BIO 12.

evidence with his claim; VA's task in response is to provide "notice 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). That is what VA did before 2015, responding to all submitted claims with a letter that acknowledged the submission and stated, for example: "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." CAFC Reply Br. Ex. A at 2 (emphasis added). The agency's pre-2015 notice, unlike its practice since, is consistent with the statute's command.

2. Apart from its misinterpretation of "not previously provided," the government, like the Federal Circuit majority, relies heavily on statutory history. Given the clear statutory text, this Court need not resort to parsing such history. *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018) ("[L]egislative history is not the law."). Regardless, the legislative history supports Petitioner's plain reading of the statute. Petitioner demonstrated how Congress's 2012 removal of the introductory phrase "[u]pon receipt of a complete or substantially complete application" gave the agency flexibility in determining when to provide responsive notice to a veteran who had begun (but not substantially completed) the claim submission process. Pet. 20-21. The government does not dispute Petitioner's showing. Yet it insists that this statutory change instead removed entirely the requirement to send responsive, post-claim notice—despite the statute retaining the "not previously provided" language. BIO 10-11.

The government's only support for that atextual reading is a single statement from a committee report purporting to show that removal of the phrase "[u]pon receipt of a complete or substantially complete application" allows VA to "move[] the … notice onto the application form itself." BIO 11 (quoting H.R. Rep. No. 112-241, at 8-9 (2011)). This kind of legislative history is the least reliable. Pet. 21-22. And, as Judge Mayer's dissent noted, "this intent did not explicitly make it into the law." Pet. App. 16a. Instead, Congress retained statutory language ("not previously provided") that is flatly inconsistent with any such intention.

The government cannot avoid the clear temporal requirement by resort to a different statutory provision, 38 U.S.C. § 5103(b)(4). That provision explains that, when a veteran files a subsequent claim within one year of receiving proper notice under § 5103(a) on another pending claim, VA need not issue another notice if the earlier one "provides sufficient notice of the information and evidence necessary to substantiate such subsequent claim." *Id.* That Congress provided an exception to the responsive-notice obligation in limited circumstances underscores that responsive notice is the default requirement. *Contra* BIO 13.

B. The government endorses the Federal Circuit's improper end-run around *Accardi*.

Regardless of the statutory text, it is undisputed that VA's own regulation requires the agency to provide notice "when VA receives a complete or substantially complete initial or supplemental claim." 38 C.F.R. § 3.159(b)(1). And it is undisputed that VA's

current notice practice does not comply with this temporal requirement. The government acknowledges the well-established rule that VA, like every federal agency, is "bound by its own regulations." *Black v. Romano*, 471 U.S. 606, 622 n.18 (1985) (Marshall, J., concurring) (citing *Accardi v. Shaughnessy*, 347 U.S. 260 (1954)); *see* BIO 15. But, like the Federal Circuit majority, the government takes the position that the *Accardi* doctrine does not apply if a court decides that an agency's departure from its regulations is, as a policy matter, not prejudicial. BIO 15. This categorical harmless-error judgment is legally flawed, as it usurps the agency's rulemaking authority and reassigns it to the judiciary. Pet. 27-28. Moreover, the government ignores Petitioner's demonstration of the serious and concrete harms to Mr. Forsythe and his fellow veterans from VA's failure to comply with the notice obligation codified in binding regulations. Pet. 28-32.

1. The government's categorical harmless-error approach is wrong.

The government does not dispute Petitioner's showing that, in the Federal Circuit's view, VA's failure to provide post-claim notice can *never* be prejudicial. Pet. 25-28. On the contrary, the government embraces the majority's holding that "'receiving the notice "too early" cannot be prejudicial.'" BIO 15 (quoting Pet. App. 9a-10a). To begin with, this categorical approach conflicts with this Court's emphasis, in the context of veterans' benefits, that the harmless-error analysis requires a "case-specific application of judgment." *Shinseki v. Sanders*, 556 U.S. 396, 407 (2009); Separation of Powers Br. 4-5.

More fundamentally, as Petitioner demonstrated, this kind of categorical harmless-error judgment improperly allows an agency to "abandon a binding rule and unofficially substitute a new practice," so long as that new practice accords with a court's "own policy preferences." Pet. 28; *cf.* Military-Veterans Advocacy ("MVA") Br. 12-15. The government does not even acknowledge this problem; it certainly offers no argument for why such a practice is lawful or proper.

Instead, the government faults Petitioner for supposedly failing to show that the timing of VA's notice—in other words, VA's compliance with its own regulation—makes a difference. BIO 15. Petitioner made this showing; the government simply offers no substantive response.

First, the government is incorrect to suggest that Petitioner "does not appear to argue that he would have benefited from receiving the *same* Notice Form *after* he submitted his benefits application." BIO 15. Petitioner thoroughly demonstrated how a veteran is more likely to see a post-claim notice and to take a "second look" at their claim and consider whether to submit additional evidence. Pet. 30-32; *see also* MVA Br. 19-21; Swords to Plowshares Br. 11-12. And Petitioner was clear that these advantages flow from the timing of the notice alone, even "if the Notice Form's disclosures [are] otherwise sufficient." Pet. 30. The government does not respond.

Petitioner separately demonstrated the Federal Circuit majority's error in concluding, at the outset of its prejudice analysis, that timing is the only defect in VA's current practice. Petitioner explained how the

current Notice Form "looks nothing like the notice described in the regulation" and provides "no guidance at all" to veterans regarding what documents or evidence might be necessary to substantiate their claims. Pet. 29. Petitioner also highlighted some of the deficiencies by contrasting the current Notice Form with the responsive, post-claim letters VA sent before its 2015 change in practice. Pet. 29-30. The government offers two responses, neither of which is persuasive.

First, the government misreads *Wilson v. Mansfield*, 506 F.3d 1055 (Fed. Cir. 2007), in insisting that the content of VA's current omnibus notice is legally sufficient. BIO 12, 16. The veteran in *Wilson* "d[id] not argue that he received inadequate notice when he initially filed his claim." 506 F.3d at 1058. Instead, he argued that § 5103(a) required VA to provide him an "additional, specific notice" containing the agency's "pre-decisional assessment of the evidence." *Id.* The Federal Circuit held that § 5103(a) does not require this level of "analysis of the individual claim in each case." *Id.* at 1059. That was what *Wilson* called "specific notice." *Id.* at 1058; *contra* BIO 12. But there is a world of difference between the kind of tentative ruling that *Wilson* rejected and VA's current practice of providing legal boilerplate on an application form. Simply saying that notice can be "generic" is not an endorsement of the latter approach.

Indeed, the *Wilson* court expressly defined what it meant by "generic notice": it must "identify the information and evidence necessary to substantiate the particular type of claim being asserted by the veteran." 506 F.3d at 1059. At a minimum, then, the

notice must be responsive in that it "necessarily must be tailored to the specific nature of the veteran's claim." *Id.* at 1062.

Moreover, the sufficiency of the notice must be viewed from the veteran's perspective. Section 5103(a) ensures "that the claimant be given the required information … in a form that enables the claimant to understand the process, the information that is needed, and who will be responsible for obtaining that information." *Id.* (quoting *Mayfield v. Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006)). The current boilerplate pre-claim Notice Form utterly fails to meet those criteria. Pet. 8-9; *see* Swords Br. 16-17 (Notice Form "leave[s] the veteran to guess as to the meanings of various terms" and "divine what evidence would suffice").

The government next resists Petitioner's showing of the "meaningful difference[s]" between the notice claimants received before and after 2015. BIO 17. But it cannot dispute that the post-2015 notices do not direct the claimant to provide "any information or evidence" that was "not previously provided" to VA, and do not define legal terms like "lay evidence." Pet. 9-10. By contrast, pre-2015 notices spoke in terms veterans could understand. And they stressed that "additional evidence" might be needed beyond what the veteran initially submitted, including (for example) "any [relevant] treatment records." CAFC Reply Br. Ex. A at 1; *contra* BIO 17. That is the notice the regulation requires, and that VA no longer provides.

2. VA's pre-claim notice prejudiced Mr. Forsythe.

Petitioner also demonstrated how VA's notice practices specifically harmed him. Mr. Forsythe's claim provided everything the Notice Form said was necessary: evidence of in-service injury, a current disability, and a medical opinion linking the two. Pet. 31. Mr. Forsythe had older medical records corroborating his "chronic recurrent left shoulder pain" in the years after his service, and he could have procured supporting "buddy statements" from his family and fellow servicemembers. Pet. 11-12, 30-32. But he had no reason to know he should submit them. Instead, VA's only post-claim correspondence to Mr. Forsythe assured him that "No Action [Is] Needed at This Time" and that, should VA "need additional evidence to support your claim, [VA] will contact you." CAFC Appx60. Mr. Forsythe reasonably relied on that correspondence in not submitting additional evidence. But VA then denied his claim on the ground that the record lacked exactly this type of corroborating evidence. Pet. 25. This bait and switch is not how the process is supposed to work. *See* MVA Br. 11 ("VA should not … 'move the goal-posts' after the veteran has relied on the regulation.") (citation omitted).

The government's only response is to insist that Mr. Forsythe suffered no prejudice because he could have submitted additional evidence after the Regional Office's decision or filed a supplemental claim. BIO 14. But that defeats the whole point of the notice requirement, "to ensure that the claimant's case is presented to the initial decisionmaker with whatever support is available." *Mayfield*, 444 F.3d at 1333.

Furthermore, requiring veterans to engage in additional, post-decision procedures unnecessarily prolongs administrative proceedings and deprives veterans of crucial benefits while the agency delays. *See* Swords Br. 12-15. For example, a veteran following the government's suggested path of submitting new evidence before the Board can expect to wait on average 695 days for resolution—927 days if the veteran also wants a hearing. *Id.* at 13-14. A veteran like Mr. Forsythe should not be forced to endure additional years of delay simply because the government failed to follow its own rules.

II. The Questions Presented Are Important And Recurring.

The government does not dispute (or even address) the exceptional importance and certain recurrence of the questions presented. Pet. 32-35. They affect millions of veterans who apply for VA benefits each year and go to the heart of the beneficent, pro-claimant system that Congress has established. Pet. 32-33; MVA Br. 6-7. As Judge Mayer explained in dissent, "[i]f the [VA] is to fulfill its duty to serve veterans injured in the line of duty, … it must, at a minimum, provide clear and timely notice regarding how to file and substantiate a claim for service-connected disability benefits." Pet. App. 13a.

Those disability benefits are essential to veterans. *See* Swords Br. 8-9, 14. If left to stand, the Federal Circuit's decision endorsing VA's flawed notice practice is certain to result in more meritorious claims being denied. *See* MVA Br. 4 (Federal Circuit's holding "has already been invoked to deny benefits").

Moreover, if the government and the Federal Circuit are right that a court can declare VA's noncompliance with its own regulations harmless because two appellate judges cannot see how compliance would have made a difference to a disabled veteran proceeding pro se, then the protections guaranteed by a host of other important VA regulations are in peril. And there is no principled basis to limit this judicial policymaking to the veterans' benefits context. As Petitioner explained (and the government does not dispute), certiorari is needed to make clear that courts may not misuse harmless-error review to evade proper agency rulemaking processes. Pet. 35.

III. This Case Is An Excellent Vehicle.

The government cannot dispute that this case presents an excellent opportunity to decide the meaning of § 5103(a)(1) and confirm the importance of *Accardi*'s rule. Pet. 36-37. The Federal Circuit addressed the questions presented, holding that the statute does not require post-claim notice and that the regulation (which does require it) is effectively unreviewable in court because veterans can never be prejudiced by VA's violation. Pet. 16, 36. The en banc court declined to disturb those rulings, and the questions are squarely teed up for this Court's review.

Nor can the government deny that the Court's review could well lead to a different outcome in this case. Mr. Forsythe's appeal to the Federal Circuit focused exclusively on the notice error, and the court denied his appeal based on the majority's misinterpretation of the notice statute and its failure to enforce VA's notice regulation. Pet. 36. Proper notice

would have made all the difference to Mr. Forsythe, just as it is vital to all veterans applying for disability benefits. *See* MVA Br. 21; Swords Br. 6.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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