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

BRIEF OF SEPARATION OF POWERS CLINIC AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR., SUITE 430
ARLINGTON, VA 22201
(202) 706-5488
rmccotte@gmu.edu

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICUS CURIAE*[1]

The Separation of Powers Clinic at the Gray Center for the Study of the Administrative State, located within the Antonin Scalia Law School at George Mason University, was established during the 2021–22 academic year for the purpose of studying, researching, and raising awareness of the proper application of the U.S. Constitution's separation of powers constraints on the exercise of federal government power. The Clinic provides students an opportunity to discuss, research, and write about separation of powers issues in ongoing litigation.

The Clinic has submitted numerous briefs at this Court and the lower courts in cases implicating separation of powers, including *George v. McDonough*, 142 S. Ct. 1953 (2022), which likewise involved the Department of Veterans Affairs' improper application of its own regulations. Petitioner's case is important to *amicus* because it implicates tension between the lower court's decision and this Court's decision in *Shinseki v. Sanders*, 556 U.S. 396 (2009), which addressed the harmlessness standard when an agency does not comply with its own regulations, as well as tension within this Court's own precedent regarding the application of the Administrative Procedure Act's harmlessness standard in such circumstances.

---

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notification of the filing of this brief.

SUMMARY OF THE ARGUMENT

The Court should grant the petition for a writ of certiorari and reverse the decision below, which held harmless the Department of Veterans Affairs' (VA) violation of its own lawful regulations imposing a certain timing for notice regarding information needed to substantiate veterans' disability claims.

The Federal Circuit's view that such a violation is necessarily harmless is in significant tension with this Court's 2009 decision in *Shinseki*, which addressed the very same VA regulation and held that courts should not apply rigid rules or frameworks when evaluating whether an agency's failure to comply with its own regulations was prejudicial. *See* Part I, *infra*.

The decision below also highlights an apparent conflict between *Shinseki* and several of this Court's earlier cases holding that courts are authorized to grant judicial relief with no showing of prejudice when an agency violates certain types of valid regulations. *See* Part II, *infra*. The opinion in *Shinseki* did not address those earlier cases, and the lower courts continue to follow them, but the authorization of relief without any showing of prejudice is difficult, if not impossible, to square with *Shinseki*'s rejection of rigid rules for harmlessness.

Because only this Court can say whether its own prior decisions have been overruled, the Court should grant the petition and address whether its pre-*Shinseki* cases remain good law.

ARGUMENT

I. The Federal Circuit's Harmlessness Analysis Is Difficult to Square with This Court's Decision in *Shinseki*.

Petitioner aptly explains (Pet.23–32) why the majority decision below violated *United States ex rel. Accardi v. Shaughnessy*, 347 U.S. 260 (1954), which held that an agency is bound to follow its own "existing valid regulations," *id.* at 268. The Federal Circuit held below that the VA's regulation on the timing of certain notices provided to veterans regarding documentation needed for disability claims was lawful but "outdated" because it imposed additional requirements on the VA beyond those expressly stated in the underlying statute. Pet.App.9a & n.1 The court "urge[d]" the VA "to amend" the regulation but declined to require the VA to comply with it in the meantime. *Id.*; *see* 38 C.F.R. § 3.159(b). That approach "unjustifiably accommodates 'the [VA's] relaxed approach to amending its regulations,'" as there is little reason for an agency to update its "outdated" (but valid) regulations when a reviewing court will simply decline to enforce them anyway. *United States v. Kahn*, 5 F.4th 167, 182–83 (2d Cir. 2021) (Menashi, J, dissenting). That issue warrants this Court's review.

Amicus focuses on the majority opinion's alternative holding that any error by the VA in failing to follow its own regulation was harmless. Pet.App.9a–10a. The Federal Circuit's analysis on this point is in significant tension with this Court's

holding in *Shinseki*, which addressed the same VA regulation. *Shinseki*, 556 U.S. at 400, 403; Pet.App.9a.

In *Shinseki*, the Federal Circuit had held that any violation of the VA's notice requirements for information needed to substantiate disability claims was necessarily harmful to the veteran *unless* the VA could demonstrate that the veteran's "'actual knowledge' cured the defect" or that "the claimant could not have received the benefit as a matter of law." *Shinseki*, 556 U.S. at 407.

This Court rejected that framework and held that courts reviewing the VA's failure to comply with its notice regulations should not "determin[e] whether [that] error is harmless through the use of mandatory presumptions and rigid rules," but instead should use "case-specific application of judgment, based upon examination of the record." *Id.* Any "rigid" or "mandatory" rules would "prevent th[e reviewing] court from resting its conclusion on the facts and circumstances of the particular case." *Id.* at 408.

Shinseki did not foreclose making "empirically based … generalizations" about whether certain types of errors had the "natural effect" of resulting in prejudice, but any such generalizations must be "nonbinding" and must be made by "the Veterans Court, not the Federal Circuit." *Id.* at 412.

The decision below is difficult to square with *Shinseki*. The Federal Circuit majority opinion reasoned that the VA's failure to provide post-claim notice to veterans under 38 C.F.R. § 3.159(b) was harmless because (1) there need not be "an individualized notice tailored to [the veteran's] claim,"

and (2) there was no harm from receiving "the evidentiary notice *too early*." Pet.App.10a (emphasis in original). Under that rationale, it is unclear how any veteran could demonstrate harm from a violation of § 3.159(b). The regulation requires a certain sequence of events, and the Federal Circuit has now held that failure to follow that sequence does not result in prejudice. The decision below thus seems to enact the kind of "mandatory presumption[] and rigid rule[]" that *Shinseki* prohibited. *Shinseki*, 556 U.S. at 407.

Under *Shinseki*, it was further error for the Federal Circuit itself to adopt this rigid harmlessness framework. *Shinseki* held that the Veterans Court, "not the Federal Circuit," could adopt "generalizations" about whether certain types of errors tended to result in prejudice, but even those must be "nonbinding." *Id.* at 412. Here, the Federal Circuit's logic imposes a binding, rigid harmlessness rule in the first instance.

To be sure, in *Shinseki*, the Federal Circuit's rigid rule worked to the benefit of veterans, whereas the approach in the decision below works to the benefit of the VA. But that distinction makes no difference. If anything, *Shinseki* suggested that a rigid pro-VA harmlessness rule would be even more suspect than a pro-veteran rule. *See Shinseki*, 556 U.S. at 412.

The Court should grant review of whether the decision below complied with *Shinseki*.

II. The Court Should Resolve the Tension in Its Precedent on Harmlessness When Agencies Violate Their Valid Regulations.

This Court should also grant review to resolve significant tension between *Shinseki* and its pre-*Shinseki* caselaw about the harmlessness standard under the Administrative Procedure Act when an agency does not comply with its valid regulations.

Although *Shinseki* arose in the context of a VA regulation governed by its own review statute, this Court applied the same "'harmless-error' rule that courts ordinarily apply in civil cases" under the APA. *Shinseki*, 556 U.S. at 406–07. The Court did so because the APA and the relevant VA statute use almost identical language instructing courts to take "due account" of "the rule of prejudicial error." 38 U.S.C. § 7261(b)(2); 5 U.S.C. § 706.

Accordingly, *Shinseki*'s bar on "rigid" and "mandatory" tests for determining prejudice in the context of an agency that has violated its own regulations logically must apply with equal force to cases brought directly under the APA or reviewed under the APA's harmlessness framework.

However, in the years before *Shinseki*, this Court repeatedly authorized judicial relief in the APA context without *any* showing of harm after an agency failed to comply with certain types of valid regulations. *See* Part II.A, *infra*. This Court has never overruled those decisions, the opinion in *Shinseki* did not address them, and the lower courts continue to follow them. *See* Part II.B, *infra*. Those cases' authorization of judicial relief absent a showing of

harm in this context is difficult, if not impossible, to square with *Shinseki*'s prohibition of mandatory rules for evaluating harmlessness.

The Court should grant this case and clarify the extent to which those older decisions remain good law after *Shinseki*. Only this Court can make that determination regarding its own precedent, and it should do so now. *See* Part II.C, *infra*.

A. Before *Shinseki*, This Court Held the APA Does Not Always Require a Showing of Harm When an Agency Violates Its Own Valid Regulations.

Dating back nearly seventy years, this Court repeatedly held that the violation of certain types of agency regulations automatically warrants judicial relief, without the challenger making any showing of prejudice. The following cases were all evaluated under the APA's harmlessness framework—the same framework applicable to *Shinseki* and also here.

Service. In *Service v. Dulles*, 354 U.S. 363 (1957), the Court granted relief to a former Foreign Service officer who had been terminated in violation of the Department of State's regulations, without requiring any showing of harm or prejudice resulting from that violation.

Congress had provided the Secretary of State with plenary discretion to "terminate the employment of any officer or employee … whenever he shall deem such termination necessary or advisable in the interests of the United States," *id.* at 370, but the agency itself had limited the Secretary's termination authority to those situations where the agency's

"Loyalty Security Board" had provided a "full hearing" and then issued "unfavorable action" against the employee. *Id.* at 375; *see also id.* at 383.

The Court noted that "it is of course true that under the [statute], the Secretary was not obligated to impose upon himself these more rigorous substantive and procedural standards," but "neither was he prohibited from doing so," and under *Accardi* he could not disregard them "so long as the[y] remained unchanged." *Id.* 388.

The Court held that the Secretary had violated the agency's regulations by firing Service after he received a *favorable* ruling from the Loyalty Security Board. *Id.* at 386–88. Without requiring any showing of prejudice from violation of the agency's internal rules, this Court held that Service's "dismissal cannot stand." *Id.* at 388.[2]

Vitarelli. In *Vitarelli v. Seaton*, 359 U.S. 535 (1959), the Court similarly reversed agency action in violation of its own regulations, without any showing of harm resulting from that violation. Like *Service*, *Vitarelli* involved an agency that had self-imposed procedural requirements before it could undertake certain types of employment actions. There had to be a "statement of charges" that was "as specific and detailed as security considerations … permit," and the hearing before the security board must be "orderly" and limited to "relevan[t]" matters. *Id.* at 540–43. But

---

[2] Although the opinion in *Service* does not state the cause of action, this Court later clarified that *Service* was brought pursuant to the APA. *See United States v. Caceres*, 440 U.S. 741, 754 n.19 (1979).

Vitarelli's statement of charges "cannot conceivably be said in fact to be as specific and detailed as 'security considerations permit,'" and his hearing devolved "into a wide ranging inquisition." *Id.* at 541, 543.

The Court again held that the agency, having bound itself by regulations providing protections beyond those required by the relevant statutes, was obligated to follow those self-imposed requirements. *Id.* at 545. The agency's failure to do so meant that "the petitioner is entitled to the reinstatement which he seeks." *Id.* at 546. Again, the Court did not require any showing of prejudice resulting from the agency's failure to follow its own procedural requirements.[3]

American Farm Lines. In *American Farm Lines v. Black Ball Freight Service*, 397 U.S. 532 (1970), the Court re-affirmed *Service* and *Vitarelli* and expressly held that no showing of prejudice was required in certain circumstances when an agency violates its valid regulations.

The Court addressed a claim that the Interstate Commerce Commission's grant of temporary operating authority to a transportation carrier violated the ICC's regulations requiring certain documentation to be included in the carrier's application. *Id.* at 537. There was no dispute that some of the information had been omitted, yet the ICC granted the application anyway, and competing companies challenged the grant. *Id.* at 537–38.

---

[3] Like *Service*, the opinion in *Vitarelli* does not state the cause of action, but this Court later confirmed that it was brought pursuant to the APA. *See Caceres*, 440 U.S. at 754 n.19.

Unlike in *Service* and *Vitarelli*, the Court applied a harmless error test and concluded that the violation of the regulation—i.e., the omission of some information in the application—"did not prejudice" the competing carriers. *Id.* at 538. But rather than overrule *Service* and *Vitarelli* or state that they had simply not considered the issue of prejudice, the Court instead distinguished and re-affirmed them. Those cases, this Court held, involved regulations "intended primarily to confer important procedural benefits upon individuals in the face of otherwise unfettered discretion." *Id.* In such cases, no showing of prejudice was required. *See id.*

The regulation in *American Farm Lines*, by contrast, was a "procedural rule[] adopted for the orderly transaction of business before [the agency]." *Id.* at 539. When an agency failed to comply with that type of self-imposed regulation, a challenger must demonstrate "substantial prejudice" to obtain judicial relief. *Id.*[4]

* * *

[4] The suit in *American Farm Lines* was brought pursuant to the review provisions of the Interstate Commerce Act, rather than directly under the APA. *See, e.g.*, Jurisdictional Statement, *American Farm Lines*, 1969 WL 136700, at *2 (July 22, 1969); 28 U.S.C. § 1336 (1964). This Court, however, had previously held that review of Interstate Commerce Commission decisions is subject to the APA's harmlessness provision, *see Ill. Cent. R. Co. v. Norfolk & W. Ry. Co.*, 385 U.S. 57, 66 (1966) (citing 5 U.S.C. § 1009(e) (1964)), and the Court again held the same soon after *American Farm Lines*, *see Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc.*, 419 U.S. 281, 284 (1974).

This Court has never expressly overruled *Service*, *Vitarelli*, or *American Farm Lines*. Under that trilogy, whether prejudice must be shown turns on what type of regulation the agency violated. If the regulation "confer[red] important procedural benefits upon individuals in the face of otherwise unfettered discretion," no showing of prejudice is needed to obtain judicial relief. *Am. Farm Lines*, 397 U.S. at 538. By contrast, a showing of "substantial prejudice" is required for judicial relief if the agency violated "procedural rules adopted for the orderly transaction of business before it." *Id.* at 539.

B. The Circuit Courts Have Likewise Held That a Showing of Harm Is Not Always Necessary.

The lower courts have given effect to this Court's decisions in *Service*, *Vitarelli*, and *American Farm Lines* by adopting frameworks that distinguish between the particular type of regulation at issue.

The D.C. Circuit, for example, "has been careful to distinguish between procedural rules benefitting the agency (*American Farm Lines*) and procedural rules benefitting the party otherwise left unprotected by agency rules (*Vitarelli*)." *Lopez v. FAA*, 318 F.3d 242, 247 (D.C. Cir. 2003). Violations of the former will require a showing of prejudice, but not so for violations of regulations in the latter category. *Id.* The Eighth and Tenth Circuits have used nearly identical language. *See Rochling v. Dep't of Veterans Affs.*, 725 F.3d 927, 938–39 (8th Cir. 2013) (citing *American Farm Lines*); *St. Anthony Hosp. v. HHS*, 309 F.3d 680,

699 n.16 (10th Cir. 2002) (citing *American Farm Lines*).

The Third Circuit has interpreted *American Farm Lines* to mean no prejudice is required when an agency violates a regulation "protecting fundamental statutory or constitutional rights of parties appearing before it." *Leslie v. U.S. Att'y Gen.*, 611 F.3d 171, 177–80 (3d Cir. 2010) (citing *American Farm Lines*). The Second Circuit's test follows similar lines. *See United States v. Schiller*, 81 F.4th 64, 71 (2d Cir. 2023) (holding that prejudice required unless the regulation "affect[s] fundamental rights derived from the Constitution or a federal statute") (citing *American Farm Lines*). The Sixth Circuit eliminates the need to show prejudice not just when fundamental rights are at issue but also where a challenger was "'deprived of substantial rights because of the agency's procedural lapses.'" *Rabbers v. Comm'r Soc. Sec. Admin.*, 582 F.3d 647, 654 (6th Cir. 2009) (citing *American Farm Lines*).

Despite the slight variations in how they describe the test, the lower courts still follow the *Service*, *Vitarelli*, and *American Farm Lines* framework and authorize judicial relief in certain cases subject to the APA without making any showing of prejudice from the agency's failure to follow its valid regulations.

C. The Court Should Grant Review to Address the Extent to Which Its Pre-*Shinseki* Decisions Remain Binding.

This Court's line of precedent holding that the violation of certain types of agency regulations *automatically* warrants judicial relief is in significant

tension with this Court's 2009 holding in *Shinseki* that courts cannot impose "rigid" and "mandatory" rules regarding harmlessness when agencies fail to follow their own regulations. *See* Part I, *supra*. A showing of prejudice is either required, or not. But this Court's cases now seem to point in both directions.

This conflict is exacerbated because the opinion in *Shinseki* did not address *Accardi*, *Service*, *Vitarelli*, or *American Farm Lines*, so lower courts have no way of knowing which line controls. This confusion is compounded by this Court's rule that only it can overrule its own decisions and that the lower courts cannot anticipate or presume such an overruling. *See Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 136 (2023); *Agostini v. Felton*, 521 U.S. 203, 237 (1997); *Rodriguez de Quijas v. Shearson/Am. Exp., Inc.*, 490 U.S. 477, 484 (1989). The Court should take this opportunity to clarify the extent to which its pre-*Shinseki* decisions remain good law after *Shinseki*. Only this Court can do so.

This case presents an ideal vehicle to resolve that important issue because, as explained above, *see* Part II, *supra*, this Court held in *Shinseki* that the harmlessness test for agencies' failure to comply with their own regulations is the same for VA regulations (at issue here and in *Shinseki*) as for suits subject to the APA's framework (at issue in *Service*, *Vitarelli*, and *American Farm Lines*). Because the framework is the same across that wide swath of actions, this Court can use this one case to pronounce the proper test for all those claims.

Addressing this issue now will also provide needed direction to the lower courts, which continue to rely—even after *Shinseki*—on the framework announced in *Service*, *Vitarelli*, and *American Farm Lines*, *see, e.g.*, *Backcountry Against Dumps v. FAA*, 77 F.4th 1260, 1270–71 (9th Cir. 2023) (citing *American Farm Lines*); *Bauer v. FDIC*, 38 F.4th 1114, 1125 (D.C. Cir. 2022) (same), including in the context of VA decisions, *see, e.g., Rochling*, 725 F.3d at 938–39 (same).

* * *

Under *Shinseki*, it is difficult to justify granting judicial relief without any showing of prejudice from an agency's violation of its valid regulations. But it is equally difficult to justify an effectively mandatory rule of harmlessness in those situations, as the Federal Circuit adopted below. *See* Part I, *supra*. This Court should use this opportunity to remedy the error below and provide much needed clarity on the remaining precedential value (if any) of its pre-*Shinseki* decisions addressing harmlessness when agencies violate their own valid regulations.

Precisely because the harmlessness framework is the same across so many types of cases, there is serious risk that the Federal Circuit's approach to VA regulations will provide a blueprint for other courts to greenlight agencies' decision to ignore their own valid regulations simply out of convenience. The Court should grant this case and nip that approach in the bud.

CONCLUSION

The Court should grant the Petition.

Respectfully submitted,

R. TRENT MCCOTTER
Counsel of Record
SEPARATION OF POWERS CLINIC
GRAY CENTER FOR THE STUDY OF THE ADMINISTRATIVE STATE
ANTONIN SCALIA LAW SCHOOL
GEORGE MASON UNIVERSITY
3301 FAIRFAX DR., SUITE 430
ARLINGTON, VA 22201
(202) 706-5488
rmccotte@gmu.edu

February 20, 2024