

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 SWORDS TO PLOWSHARES
AS AMICUS CURIAE IN SUPPORT OF PETITIONER**

MAUREEN SIEDOR
AMY M. ROSE
SWORDS TO PLOWSHARES
1060 Howard St.
San Francisco, CA 94103
(415) 252-4788

GARY M. FOX
Counsel of Record
THOMAS G. SAUNDERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
gary.fox@wilmerhale.com

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INTEREST OF AMICUS CURIAE¹

Swords to Plowshares, founded by veterans in 1974, is a community-based, not-for-profit 501(c)(3) organization supporting approximately 3,000 low-income and at-risk veterans in the San Francisco Bay Area every year. Swords' mission is to heal the wounds of war; to restore dignity, hope, and self-sufficiency to all veterans in need; and to prevent and end homelessness and poverty among veterans. To that end, Swords provides veterans with access to healthcare, counseling, housing support, and employment and benefits assistance.

Swords' Legal Services Unit provides hundreds of low-income and unhoused veterans every year with pro bono advice and representation regarding their Department of Veterans Affairs (VA) benefits claims and Department of Defense discharge upgrades. All of Swords' veteran-clients are low-income, and 57% report living with a disabling condition, such as post-traumatic stress disorder (PTSD) or a traumatic brain injury (TBI). Thus, most benefits claims by Swords' veteran-clients contain a claim for PTSD, PTSD based on military sexual trauma, residuals of a traumatic brain injury, or another mental-health syndrome such as major depressive disorder or anxiety.

Swords provides legal assistance to veterans at all stages of the process for seeking benefits. Swords

¹ Pursuant to this Court's Rule 37.6, Swords affirms that no counsel for a party authored this brief in whole or in part, and no entity or person other than Swords, its members, or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Swords provided notice of its intent to file this brief to counsel of record for the parties at least ten days before the brief's due date.

assists veterans with their initial applications, administrative appeals, and appeals to federal court (if necessary). Swords has won over \$25 million in lifetime income for veterans with disabilities. In doing so, Swords has seen firsthand the futility of the VA's current approach for giving veterans only pre-claim notice of the evidence needed to substantiate their claims, the resultant harm to veterans, and the difference that post-claim notice makes for those veterans who receive it.

INTRODUCTION AND SUMMARY OF ARGUMENT

Recognizing veterans' immense sacrifices for our country, Congress promised, among other benefits, to compensate veterans for injuries or conditions connected to their service. To successfully make an initial claim for compensation for a service-connected injury or condition, there must be evidence showing an in-service injury or event, a current injury or condition, and a nexus between the current disability and the veteran's service. There are multiple types of claims related to service-connected conditions that a veteran might make, such as toxic exposure, military sexual trauma, secondary service connection, and individual unemployability. Relevant evidence can vary greatly depending on the claim type. It might include military records, VA medical or hospital records, private medical or hospital records, police reports, vital records, photographs, a supporting statement from the veteran, and/or supporting statements from others who have witnessed the veteran's injury or condition (i.e., buddy statements). Different types of evidence are needed to support different types of disability claims.

The VA must provide each veteran-claimant with notice of what evidence might be submitted to prove the relevant type of claim. More precisely, "*when* 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.” 38 C.F.R. § 3.159(b)(1) (emphases added). “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.” *Id.* (emphasis added); *see also* 38 U.S.C. § 5103(a)(1) (the VA must alert the veteran to “any information, and any medical or lay evidence, *not previously provided* to the Secretary that is necessary to substantiate the claim” (emphasis added)). In other words, Congress established a system in which notice comes *after* the veteran makes a claim. By requiring post-claim notice, Congress tried to give each veteran the best chance for obtaining benefits.

The VA has turned Congress’s carefully crafted regime for post-claim notice into a false promise. The VA has opted instead for *pre-claim* notice attached to the benefits claim form, which includes 8 pages in 9-point font with 12 “evidence tables” covering 13 types of claims that veterans might make. A split panel of the Federal Circuit condoned this practice despite the plain text of the applicable statute. And to make matters worse, the majority allowed the VA to violate its own implementing regulation, going so far as to urge the VA to promulgate a new regulation that would reflect the VA’s current interpretation of the statute.

The Federal Circuit’s decision is bad for all veterans. But the decision is particularly harmful for elderly veterans and veterans who suffer from PTSD, traumatic brain injuries, or other mental illnesses or conditions. Symptoms of these conditions include decreased executive functioning, difficulties with concentration, and

altered memories. Veterans with such symptoms are especially prejudiced by receiving only the VA's current pre-claim notice because they often cannot decipher the lengthy and confusing text printed in miniscule type.

Practical realities only worsen the impact of the Federal Circuit's decision. A veteran who works with a veterans service organization (VSO) often never sees the VA's one-size-fits-all, pre-claim notice before the VSO files the application on the veteran's behalf. And if the VA denies the veteran's application, the veteran will typically need to pursue an appeal to keep the claim alive, often by filing a supplemental claim or asking for review by a veterans law judge. The prolonged appeals process prevents veterans from obtaining benefits when they are needed most acutely, while simultaneously expending valuable VA resources. Post-claim notice would obviate the need for many of these extended appeals.

Post-claim notice is vastly more useful than pre-claim notice. The VA still sends post-claim notice letters in a limited number of situations, including for survivors of military sexual trauma, illustrating both the feasibility of providing post-claim notice and why Congress considered it so important. That post-claim notice includes bullet points in accessible language explaining: (1) the need for treatment records and the types of evidence that could be useful, (2) which evidence the VA can collect for the veteran, (3) which evidence the veteran needs to collect, and (4) the opportunity to submit a personal statement and/or buddy statements. That post-claim notice also encourages veterans to consider obtaining assistance from VSOs, which often help veterans obtain better outcomes.

The VA's current practice of sending only pre-claim notice deprives veterans of the post-claim notice that

Congress intended. Certiorari is urgently warranted to stop the detrimental effects of a regime that provides only pre-claim notice to those who served our country.

ARGUMENT

I. LACK OF POST-CLAIM NOTICE PREJUDICES THE MOST VULNERABLE VETERANS

To apply for benefits, veterans fill out VA Form 21-526EZ. *See* Pet. 8 & n.1 (providing link to current version of form). The form consists of two parts: (1) an 8-page, mostly single-spaced “Notice to Veteran/Service Member of Evidence Necessary to Substantiate a Claim for Veterans Disability Compensation and Related Compensation Benefits,” and (2) a 7-page application form, which the veteran fills out with personal information and information about the claim. The former is the sole evidentiary notice that the VA provides to veterans, with only a few limited exceptions. *See Adjudication Procedures Manual*, Veterans Benefits Admin., M21-1, III.i.2.B.1.e-f, <http://tinyurl.com/4w2v955h> (visited Feb. 20, 2024).

Despite the name of Form 21-526EZ, its notice is anything but easy to follow. The notice includes 12 “evidence tables” for 13 types of claims spanning 4 single-spaced pages. The veteran must first consult an index table that correlates each type of claim with a corresponding evidence table. The veteran is then directed to go to the relevant evidence table for further instructions on evidence the veteran should provide to support the claim. The evidence tables do not use lay terminology to describe which types of evidence the veteran can or should submit (e.g., medical records or buddy statements). Instead, the evidence tables describe what the evidence must show for the veteran to be legally entitled

to benefits. It is then up to the veteran to decide what evidence to submit to substantiate the claim.

The Federal Circuit concluded that the VA's pre-claim notice in Form 21-526EZ cannot be prejudicial because notice cannot come "too early." Pet. App. 10a. That is simply wrong. Many veterans who file for benefits suffer from PTSD, traumatic brain injuries, or other debilitating mental illnesses. Many are unhoused or are navigating unstable living conditions. And many are elderly. For all these veterans, pre-claim notice at the expense of post-claim notice is indeed prejudicial, especially given the current form of the VA's pre-claim notice.

A. Receiving Only Pre-Claim Notice Does Not Help Veterans With PTSD, Traumatic Brain Injuries, Or Other Disabilities

PTSD and traumatic brain injuries are unfortunately common among veterans. The VA reports that 29% of veterans who served in Operation Iraqi Freedom or Operation Enduring Freedom will suffer from PTSD at some point during their lives. *How Common Is PTSD in Veterans?*, U.S. Dep't of Veterans Affairs, <http://tinyurl.com/yp4t2j2j> (visited Feb. 20, 2024). PTSD particularly affects those who were harmed in battle, as 76% of "veteran and active service respondents who incurred a physical or mental injury, illness, or wound while serving in the military on or after September 11, 2001, stated [that] they have experienced post-traumatic stress disorder." Vankar, *Share of U.S. Veteran and Active Service Members of the Wounded Warrior Project Experiencing Post-Traumatic Stress Disorder as a Result of Military Service After 9/11 from 2017 to 2022*, Statista (Nov. 29, 2023), <http://tinyurl.com/47wynf3b>. And according to estimates, "between 9% and 28% of service

members” have experienced a traumatic brain injury. Reger et al., Commentary, *Traumatic Brain Injury and Veteran Mortality After the War in Afghanistan*, JAMA Network Open at 1 (2022), <http://tinyurl.com/3dhase6>. PTSD and traumatic brain injuries are thus much more prevalent in the veteran population than in the civilian population. See Am. Psychiatric Ass’n, *Diagnostic and Statistical Manual of Mental Disorders* 276 (5th ed. 2013) (“*DSM-5*”) (“In the United States, projected lifetime risk for PTSD ... at age 75 years is 8.7%.”); *id.* at 625 (“About 2% of the population lives with TBI-associated disability.”).

Certain symptoms are associated with PTSD and traumatic brain injuries. Well-documented symptoms for both conditions include decline in executive function, difficulties with concentration, and trouble with memory. The literature consistently shows that “PTSD patients perform[] significantly worse on executive function.” Olff et al., *Executive Function in Posttraumatic Stress Disorder (PTSD) and the Influence of Comorbid Depression*, 112 *Neurobiology of Learning & Memory* 114 (2014). That impaired executive function “may underlie [the] memory and concentration deficits” documented in other research. Shalev et al., *Post-Traumatic Stress Disorder*, 376 *N. Engl. J. Med.* 2459, 2463 (2017).²

² See also Dossi et al., *Neural Bases of Cognitive Impairments in Post-Traumatic Stress Disorders*, 11 *Frontiers in Psychiatry* 1, 1 (2020), <http://tinyurl.com/mww4f2x7> (“PTSD is characterized by cognitive impairments in several domains, such as attention, memory and autonomic arousal[.]”); Hayes et al., *Emotion and Cognition Interactions in PTSD*, 6 *Frontiers in Integrative Neuroscience* 1, 1 (2012), <http://tinyurl.com/3a92xu9k> (“The hallmark symptoms of PTSD involve alterations to cognitive processes such as memory, attention, planning, and problem solving[.]”); Sumner et al., *Posttraumatic Disorder Stress Symptoms and Cognitive Function in a Large Cohort of Middle-Aged Women*, 34 *Depress Anxiety*

The American Psychiatric Association instructs clinicians that those suffering from PTSD likewise report “[c]oncentration difficulties, including difficulty remembering daily events ... or attending focused tasks.” *DSM-5* at 276. Difficulties with attention and concentration, learning, and memory are all recognized symptoms of neurocognitive disorder due to a traumatic brain injury. *Id.* at 625.³

Disability benefits are critical for veterans with PTSD. One study found that “receiving PTSD benefits was associated with clinically meaningful reductions in PTSD symptoms and less poverty and homelessness.” Murdoch et al., *Long-term Outcomes of Disability Benefits in US Veterans with Posttraumatic Stress Disorder*, 68 *Arch. Gen. Psychiatry* 1072 (2011), <http://tinyurl.com/mr4x5ncu>. Although the link to improved clinical outcomes may not be obvious, approval of claims for PTSD is “associated with increased participation in

356 (2017), <http://tinyurl.com/2neckws6> (“elevated lifetime PTSD symptoms are associated with worse cognitive function”); Magruder et al., *PTSD Symptoms, Demographic Characteristics, and Functional Status Among Veterans Treated in VA Primary Care Clinics*, 17 *J. Traumatic Stress* 293, 299 (2004), <http://tinyurl.com/4da2xwf8> (“The presence of PTSD symptoms reduced functioning in all [measured] areas,” including social, physical, and emotional functioning.).

³ See also *Traumatic Brain Injury and PTSD*, U.S. Dep’t of Veterans Affairs, <http://tinyurl.com/mrxs9xxf> (visited Feb. 20, 2024) (symptoms of traumatic brain injuries include “[t]rouble staying focused” and “[m]emory problems”); *Effects of TBI*, U.S. Dep’t of Veterans Affairs, <http://tinyurl.com/yaecd2du> (visited Feb. 20, 2024) (“[d]ifficulty concentrating” is another symptom); *What Are Common Symptoms of Traumatic Brain Injury (TBI)?*, Nat’l Institutes of Health, <http://tinyurl.com/bdh33wte> (visited Feb. 20, 2024) (symptoms of even mild traumatic brain injuries include “[t]rouble with memory, concentration, attention, or thinking”).

PTSD treatment.” Liang & Boyd, *PTSD in Returning Wounded Warriors*, 22 Stan. L. & Pol’y Rev. 177, 201 (2011). On the other hand, denial of benefits claims for veterans with PTSD “leads to additional harm because PTSD has a high risk of co-occurring disorders.” *Id.* In fact, nearly 90% of men and nearly 80% of women with PTSD meet the “criteria for another psychiatric disorder, including alcohol abuse or dependence (51.9%), major depressive episodes (47.9%), and drug abuse and dependence (34.5%).” *Id.* Disability benefits drastically improve the lives of veterans with PTSD by improving their participation in treatment programs, thereby reducing their symptoms.

Veterans with PTSD routinely struggle to file benefits claims. Even when veterans previously received post-claim notice before the VA changed its view of its statutory obligation, “[v]eterans with PTSD [we]re especially likely to fall through the cracks.” Liang & Boyd, 22 Stan. L. & Pol’y Rev. at 178. “Filing a claim for benefits with the VA involves a significant amount of paperwork, which can be quite overwhelming for veterans with PTSD who are likely lacking in focus and unable to complete tasks.” Darabnia, *To Care for Him Who Shall Have Borne the Battle: Government’s Response to PTSD*, 25 Fed. Cir. B.J. 453, 477-478 (2016). The paperwork is not just voluminous, but complicated. “Eligibility qualifications alone are filled with myriad permutations” that are difficult to parse. Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 Hamline L. Rev. 19, 46 (2013).

For veterans with diminished executive functioning or difficulties with concentration, the VA’s current pre-claim notice is effectively no notice at all. Beyond the

complex eligibility requirements, the VA's pre-claim notice only adds to the difficulty by covering 13 types of claims across 8 mostly single-spaced pages in 9-point font. The veteran must determine which type of claim to file, cross-reference one of the 12 evidence tables, decipher terms of art (e.g., "secondary service connection"), digest the selected evidence table's guidance about the legal requirements for the relevant type of claim, brainstorm what kind of evidence the veteran can or should submit, gather that evidence, and submit the evidence with a completed application form. That would be a herculean task for even a skilled attorney. For those suffering from cognitive disabilities, it may well be impossible. Veterans with such disabilities are prejudiced by replacing straightforward, post-claim notice with convoluted, pre-claim notice.

B. Receiving Only Pre-Claim Notice Does Not Help Elderly Veterans

The physical and mental limitations that come with aging pose similar challenges for elderly veterans who interact with the claims process. Like those with PTSD, many elderly veterans have deteriorating executive functioning, trouble with concentration, and memory challenges. See Murman, *The Impact of Age on Cognition*, 36 Seminars in Hearing 111 (2015), <http://tinyurl.com/3uahv2uz> ("The most important changes in cognition with normal aging are declines in performance on cognitive tasks that require one to quickly process or transform information to make a decision, including measures of speed of processing, working memory, and executive cognitive function."). Elderly veterans may also have other mental or physical challenges, such as vision impairments, which can make the claims process more difficult. Pomerance, 37 Hamline L. Rev. at 47 (noting that vision impairments are more common in

older people). Veterans with such impairments “can have a tough time just reading through the pages and pages of detailed requirements, much less filling out all of the required forms.” *Id.*

Consideration of only elderly veterans underestimates the scope of the problem. For instance, “disabling effects, including an inability to think clearly, chronic fatigue, lack of ability to act decisively, [and] distracting pain” may be caused by the “veteran’s injuries and the pain medication to treat th[ose] injuries.” Chin, *Serving Those Who Served: Providing Government-Funded Attorneys to Veterans Seeking Disability Benefits from the United States Department of Veterans Affairs*, 54 U.S.F. L. Rev. 87, 97 (2019). The VA’s overly complicated, pre-claim notice helps neither elderly veterans with impairments caused by aging nor other veterans with similar impairments.

II. PRACTICAL PROBLEMS EXACERBATE THE HARM CAUSED BY LACK OF POST-CLAIM NOTICE

A. Veterans Service Organizations Often Do Not Provide Equivalent Notice

Veterans may work with veterans service organizations to obtain assistance with the claims process. But even when a veteran is able to obtain such VSO assistance, it does not vitiate the VA’s responsibility for providing veterans with post-claim notice of evidence that might be submitted to substantiate their claims. 38 U.S.C. § 5103(a)(1) (“the Secretary shall provide”). Nor does such assistance diminish the importance of post-claim notice.

Although one might expect that working with a VSO would ameliorate any problems with lack of notice to veterans, that is not always the case. Veterans who

seek assistance from VSOs may never actually see the 8-page, pre-claim notice in Form 21-526EZ. The VSO will often prepare the paperwork for the veteran's claim, and then a representative will sign and file on the veteran's behalf. *Adjudication Procedures Manual*, M21-1, I.i.2.A.4.b ("A properly appointed representative has the authority to prepare and submit certain types of claims and other claim-related documents on behalf of the represented individual without that individual's signature."). When a representative from a VSO can sign on the veteran's behalf, it is highly unlikely that the veteran would review the pre-claim notice, as the veteran would focus instead on providing information to the VSO for the representative to fill out the application form.

Post-claim notice would make a tremendous difference for veterans who work with VSOs by signaling how these veterans could improve their chances for obtaining much-needed benefits.

B. Lack Of Post-Claim Notice Unnecessarily Prolongs Administrative Proceedings

Failure to provide post-claim notice also causes an increase in otherwise unnecessary proceedings before the VA. Without post-claim notice, many veterans will not submit relevant evidence for consideration alongside their initial applications. That is precisely what happened in this case. Pet. 11. And without post-claim notice, veterans may not understand what evidence is needed to support their specific claims until the VA sends decision letters denying benefits. After these initial denials, any veteran who still wants to obtain benefits must then navigate the VA's labyrinthian appeal system and wait—again—for another adjudication. This added delay harms all veterans, but it is especially costly for vulnerable veterans who rely on monthly

compensation to meet their basic needs. *See* Hall, *SNAP Helps 1.2 Million Low-Income Veterans, Including Thousands in Every State*, Ctr. on Budget & Policy Priorities (Nov. 9, 2021), <http://tinyurl.com/32ajfwye> (offering statistics showing how many veterans live in households receiving food stamps).

If a veteran's initial application is denied, there are two pathways available for submitting additional evidence on appeal. The first option, called a supplemental claim, allows the veteran to appeal the denial of the application by submitting new evidence to support the claim. *VA Appeals Modernization*, U.S. Dep't of Veterans Affairs, <http://tinyurl.com/4zermdsr> (visited Feb. 20, 2024). The VA then re-adjudicates the claim in light of the additional evidence. The VA's stated goal is to adjudicate a supplemental claim within 125 days. *Id.* In reality, however, 34% of supplemental claims have been pending for more than 125 days. *Detailed Claims Data*, U.S. Dep't of Veterans Affairs, <http://tinyurl.com/3xcm4knc> (select Monday morning workload report for Feb. 19, 2024). On average, it takes the VA 155 days to decide a supplemental claim. *Supplemental Claims*, U.S. Dep't of Veterans Affairs, <http://tinyurl.com/2s46pbhc> (visited Feb. 20, 2024).

The second pathway is an appeal to the Board of Veterans Appeals for review by a veterans law judge. *VA Appeals Modernization, supra.* A veteran can ask the Board to review the claim with additional evidence, on what is known as the evidence-submission docket, or the veteran can request a hearing. The Board's goal is to adjudicate claims on the evidence-submission docket within 550 days and to review claims on the hearing docket within 730 days. *Id.* But in 2023, veterans waited significantly longer. On average, the Board took 695 days to resolve claims on the evidence-submission

docket, and it took 927 days to resolve claims on the hearing docket. *Board of Veterans' Appeals Decision Wait Times*, U.S. Dep't of Veterans Affairs, <http://tinyurl.com/4xvu7e7w> (visited Feb. 20, 2024). As a result, veterans wait *years* for the VA to review additional evidence submitted after the initial applications. In many instances, that wait could easily be avoided if the VA simply provided proper, post-claim notice.

These lengthy wait times are especially detrimental for vulnerable veterans, including those who are low-income, unhoused, or struggle with severe mental and physical disabilities. For example, a Swords client was forced to wait through almost a decade of appeal proceedings before he was granted service connection for his PTSD. While this client waited, he faced eviction multiple times and had to apply for emergency rental assistance from Swords. This story is neither uncommon nor merely anecdotal. Research confirms that receiving VA benefits for service-connected disabilities can be “a vital component of homelessness prevention.” Edens et al., *Association of Substance Use and VA Service-Connected Disability Benefits with Risk of Homelessness Among Veterans*, 20 *Am. J. on Addictions* 412, 417 (2011), <http://tinyurl.com/yne583fa>; see also Tsai & Rosenheck, *Risk Factors for Homelessness Among US Veterans*, 37 *Epidemiol. Rev.* 177 (2015), <http://tinyurl.com/4e8syvwb>. And for some elderly, Vietnam-era veterans, receiving disability compensation is associated with “substantial declines in acute hospitalization.” Trivedi et al., *Association of Disability Compensation with Mortality and Hospitalizations Among Vietnam-Era Veterans with Diabetes*, 182 *JAMA Intern. Med.* 757 (2022), <http://tinyurl.com/2xs85efr>. Unnecessary appeals and associated delays keep vulnerable


veterans from accessing benefits that help to keep roofs over their heads and improve their health.⁴

III. POST-CLAIM NOTICE HELPS ALL VETERANS, INCLUDING THE MOST VULNERABLE VETERANS

Although the VA incorrectly maintains that post-claim notice is not required, it still sends post-claim notice letters to some veterans. Specifically, the VA follows its sub-regulatory guidance requiring it to send post-claim notice when “the claimed issue is associated with or involves” certain topics, such as military sexual trauma or exposure to asbestos, herbicides, or mustard gas. *Adjudication Procedures Manual*, M21-1, III.i.2.B.1.f.

A Swords client recently received a post-claim notice letter after submitting a benefits claim for PTSD caused by military sexual trauma. The beginning of that notice letter is shown below:

⁴ Prolonged appeals also unnecessarily expend the VA’s resources. If the VA sent veterans post-claim notice, as the statute and the VA’s own regulation require, then the VA could avoid the need to consider many supplemental claims that would never be filed. Likewise, the VA could avoid the need to have veterans law judges conduct many hearings that would never be requested.

 **DEPARTMENT OF VETERANS AFFAIRS**

September 19, 2022

In reply, refer to:
[REDACTED]
File Number: [REDACTED]

IMPORTANT -- reply needed within 30 days

Dear [REDACTED]

We are working on your claim.

This letter tells you what we will do with your claim and what you can do to help us. Please read the enclosure to this letter entitled, *What the Evidence Must Show to Support your Claim*. The enclosure explains how we obtain evidence related to your claim and the legal requirements for supporting your claim.

What Do We Still Need From You?

We may need additional evidence from you.

- If you have any treatment records related to your claimed condition(s), send them to VA now. This includes reports or statements from doctors, hospitals, laboratories, medical facilities, mental health facilities, as well as reports of x-rays, physical therapy, surgery, etc. These reports should include the dates of treatment, findings, and diagnoses.
- If you are unable to obtain any doctor, hospital, or medical report and want us to try to obtain it on your behalf, please complete and return the enclosed VA Form 21-4142, *Authorization to Disclose Information*, and VA Form 21-4142a, *General Release for Medical Provider Information*, so that we can request treatment records from your private medical sources.
- If you have received treatment at a Department of Veterans Affairs (VA) facility or treatment authorized by VA, please tell us the dates and places of treatment. We will then obtain the necessary records if you give us enough information to locate them.
- You may also send us your own statement or statements from people who have witnessed how your claimed disabilities are related to service and/or how such disabilities affect you. All statements submitted on your behalf should conclude with the following certification: "I hereby certify that the information I have given is true to the best of my knowledge and belief."

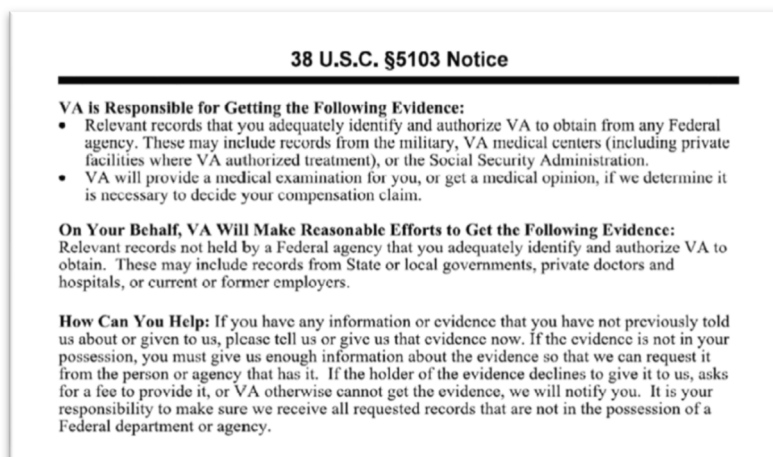
C.A. Swords Amicus Br. 8.⁵

That post-claim notice letter stands in stark contrast to the pre-claim notice condoned by the Federal Circuit in this case. Unlike the pre-claim notice in Form 21-526EZ, the first page of this exemplary, post-claim notice letter is tailored to the veteran's specific claim. The letter uses accessible language, making it clear and easy

⁵ The notice letter has been redacted only to remove personally identifiable information regarding Swords' client.

to understand. It details the need for treatment records and lists the types of medical records that could be useful. It explains that the VA can assist with obtaining medical records, and it tells the veteran how to request such assistance. And the letter plainly describes personal statements and buddy statements. Unlike the pre-claim notice in Form 21-526EZ, this post-claim notice letter lists specific kinds of evidence, documents, or records that the veteran could submit. It does not leave the veteran to guess as to the meanings of various terms of art or to divine what evidence would suffice to substantiate the claim. By clearly explaining what evidence the veteran could submit to bolster the claim, the post-claim notice letter is vastly more helpful to the veteran than any pre-claim notice ever could be.

The VA's post-claim notice letter to Swords' client also included an exhibit titled "38 U.S.C. §5103 Notice," as shown below:



C.A. Swords Amicus Br. 9. Using plain English, the exhibit describes what evidence the VA is responsible for

collecting and how the veteran can assist the VA to ensure that all available evidence is collected.

This post-claim notice is exceptionally more helpful than the VA's off-the-shelf, pre-claim notice. Given the clear instructions in the post-claim notice, the veteran may be able to provide the VA with all relevant evidence without assistance from anyone else. But if the veteran still does not fully understand the instructions or wishes to have help, the post-claim notice letter prompts the veteran to seek advice from a representative or organization. Many veterans seek such help once they realize that it is available. For instance, many veteran-clients sought assistance from Swords' Legal Services Unit only after they received similar notice letters.

This type of post-claim notice should be the norm, not the exception. The governing statute and implementing regulation dictate as much. The Federal Circuit's contrary decision deprives vulnerable veterans of the information they need to adequately pursue their claims.

* * *

Recognizing the sacrifices that come with service in the armed forces, Congress promised veterans that they would receive benefits for service-connected injuries and conditions. To facilitate the provision of benefits to *all* veterans who qualify, Congress opted to give veterans post-claim notice of the evidence needed to substantiate their benefits claims. 38 U.S.C. § 5103(a)(1); *see also* 38 C.F.R. § 3.159(b)(1). The VA's one-size-fits-no-one, pre-claim notice in Form 21-526EZ defies Congress's command. The VA's unlawful defiance of Congress's directive takes a toll on the most vulnerable veterans, including those who are elderly and those who suffer from PTSD or traumatic brain injuries. These

veterans were wounded by war because they “left private life to serve their country in its hour of great need.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). They should not be left to fend for themselves in their own hour of great need.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

MAUREEN SIEDOR
AMY M. ROSE
SWORDS TO PLOWSHARES
1060 Howard St.
San Francisco, CA 94103
(415) 252-4788

GARY M. FOX
Counsel of Record
THOMAS G. SAUNDERS
WILMER CUTLER PICKERING
HALE AND DORR LLP
2100 Pennsylvania Ave., NW
Washington, DC 20037
(202) 663-6000
gary.fox@wilmerhale.com

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