No. 15-1054

In the Supreme Court of the United States

CURTIS SCOTT, PETITIONER

v.

ROBERT A. MCDONALD,
SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the United States Court of Appeals for Veterans Claims (Veterans Court) properly declined to consider an argument that petitioner had failed to raise either (a) in a previous appeal to the Veterans Court or (b) during proceedings before the Board of Veterans' Appeals on remand from the initial Veterans Court decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 789 F.3d 1375. The opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 16a-27a) is not published in the *Veterans Appeals Reporter* but is available at 2014 WL 1089621. A prior opinion of the United States Court of Appeals for Veterans Claims (Pet. App. 48a-55a) is also not published in the *Veterans Appeals Reporter* but is available at 2010 WL 4126463. The decisions of the Board of Veterans' Appeals (Pet. App. 29a-47a, 56a-63a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 18, 2015. A petition for rehearing was denied on October 22, 2015 (Pet. App. 64a-65a). On January 11, 2016, the Chief Justice extended the time within

which to file a petition for a writ of certiorari to and including February 19, 2016, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

The United States Court of Appeals for Veterans Claims (Veterans Court) declined to address petitioner's argument that the Board of Veterans' Appeals (Board) had erroneously denied his motion for a new evidentiary hearing. The Veterans Court held that petitioner had forfeited that argument by failing to raise it either in his initial appeal to the Veterans Court or in subsequent proceedings on remand before the Board. The court of appeals affirmed. Pet. App. 1a-15a.

1. A veteran seeking benefits for a service-connected disability must file a claim for compensation at a regional office of the U.S. Department of Veterans Affairs (VA). 38 U.S.C. 5101(a)(1). Although the veteran bears the burden to present and support his claim for benefits, 38 U.S.C. 5107(a), the VA is required to assist veterans in obtaining the information necessary to substantiate their claims. 38 U.S.C. 5103A. When the evidence on an issue is in equipoise, the VA must afford the veteran the benefit of the doubt. 38 U.S.C. 5107(b); see *Henderson* v. *Shinseki*, 562 U.S. 428, 431-432 (2011).

If the regional office issues an adverse decision, the veteran may appeal that decision to the Board. 38 U.S.C. 7104(a). "The appeal should set out specific allegations of error of fact or law," and the Board "may dismiss any appeal which fails to allege specific error of fact or law in the determination being appealed." 38 U.S.C. 7105(d)(3) and (5).

A veteran initiates the appeal process by filing a notice of disagreement. 38 C.F.R. 20.200. In response, the VA provides a statement of the case, which explains its reasons for denying benefits. 38 U.S.C. 7105(d)(1). After the VA files the statement of the case, the veteran must file a substantive appeal, which may be satisfied by completing VA Form 9. 38 C.F.R. 20.202.

The regulation governing appeals to the Board specifies that, "[i]f the Statement of the Case and any prior Supplemental Statements of the Case addressed several issues, the Substantive Appeal must either indicate that the appeal is being perfected as to all of those issues or must specifically identify the issues appealed." 38 C.F.R. 20.202. The regulation further provides that "[t]he Substantive Appeal should set out specific arguments relating to errors of fact or law made by the [regional office] in reaching the determination, or determinations, being appealed." *Ibid.* Thus, an issue must either be identified in the VA's statement of the case or be separately identified by the veteran in order to be preserved for appeal. Accordingly, although the Board is required to construe "arguments in a liberal manner for purposes of determining whether they raise issues on appeal, * * * the Board may dismiss any appeal which fails to allege specific error of fact or law in the determination, or determinations, being appealed." *Ibid.*; see *Robinson* v. *Shinseki*, 557 F.3d 1355, 1361 (Fed. Cir. 2009) (explaining that the regulations impose an "obligation to raise issues in the first instance before the VA where the record is being made").

The Board's decisions "shall be based on the entire record in the proceeding and upon consideration of all

evidence and material of record." 38 U.S.C. 7104(a); see 38 C.F.R. 19.7. A Board decision constitutes the final determination of the Secretary of Veterans Affairs (Secretary) with respect to the veteran's claim. 38 U.S.C. 7104(a).

A veteran may seek review of a final Board decision in the Veterans Court. 38 U.S.C. 7261. Such review "shall be on the record of proceedings before the Secretary and the Board." 38 U.S.C. 7252(b); see 38 U.S.C. 7261(b) (In deciding each case, the Veterans Court "shall review the record of proceedings before the Secretary and the Board."). The Veterans Court's review of factual determinations is deferential. It may set aside "a finding of material fact" only "if the finding is clearly erroneous," 38 U.S.C. 7261(a)(4), and "[i]n no event" shall such findings "be subject to trial de novo by the Court," 38 U.S.C. 7261(c). Decisions of the Veterans Court may be further appealed to the United States Court of Appeals for the Federal Circuit. 38 U.S.C. 7292.

2. From January to July of 1972, petitioner served on active duty in the United States Marine Corps Reserve. Pet. App. 2a. Twenty-seven years after his discharge from the Marines, petitioner tested positive for hepatitis C. *Ibid.* In 2005, he submitted a claim for disability benefits, alleging that he had contracted hepatitis C during his service. *Ibid.* A VA regional office denied his claim, and petitioner appealed to the Board. *Ibid.*

a. At the time of his appeal, petitioner was incarcerated. Nevertheless, he sought an evidentiary hearing before the Board at a local VA office. Pet. App. 2a. In response to the VA's request for additional information, petitioner confirmed that he desired an

in-person hearing, and he stated that his projected release date was January 13, 2017, with eligibility for parole in March of 2009. *Id.* at 2a-3a. The regional office then notified petitioner that his hearing had been scheduled for March 14, 2008, in Houston, Texas. *Id.* at 3a.

Petitioner did not attend the hearing.[1] Pet. App. 3a. Although the regional office had notified petitioner that he could request a change in his hearing date up to two weeks before the scheduled hearing, petitioner made no such request. *Ibid.* Instead, nine days after he failed to appear for the hearing, petitioner moved for a new hearing, arguing that he had been unable to appear because he lacked access to transportation at the facility where he was incarcerated. *Ibid.*; C.A. App. A569, A826. The Board denied that motion, finding that petitioner had not shown good cause for failing to appear at the March 2008 hearing. Pet. App. 57a.[2] On the merits of petitioner's claim for

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[1] As petitioner notes (Pet. 9 n.1), "[i]ncarcerated veterans are sometimes allowed to leave prison for VA benefits appointments." The record does not indicate, however, whether petitioner sought permission to attend his hearing.

[2] Petitioner notes (Pet. 9) that he requested a rescheduled hearing "within the time period prescribed by regulation." But while 38 C.F.R. 20.704(d) provides that a claimant who misses a hearing may move for a new hearing within 15 days of the original hearing date, petitioner's request failed in other respects to comply with that regulation, which requires that any such motion "must explain why the appellant failed to appear for the hearing *and why a timely request for a new hearing date could not have been submitted*." *Ibid.* (emphasis added). Although the VA explained this requirement both in its initial notification of the hearing date and in a subsequent hearing reminder letter, C.A. App. A569, A572, petitioner's motion stated only that "[m]y failure to appear at the hearing was with *Good Cause* as I don't have the access for trans-

benefits, the Board concluded that "[t]he preponderance of the medical evidence is against a finding that [petitioner's] diagnosed hepatitis C is the result of active service." *Ibid.*; see *id.* at 56a-63a.

b. Petitioner, now represented by counsel, appealed to the Veterans Court, but he did not challenge the denial of his request for a rescheduled hearing. Pet. App. 3a, 17a. Accordingly, the Veterans Court did not address the Board's denial of that request. The court concluded, however, that a VA medical examiner's opinion on which the Board had relied in its decision denying petitioner's claim of service connection for hepatitis C was inadequately reasoned. The court vacated that decision and remanded. *Id.* at 48a-55a. In turn, the Board remanded petitioner's claim to the regional office for a new medical examination and readjudication of his claim. *Id.* at 43a-47a. In its remand order, the Board noted that it had previously denied petitioner's request for a rescheduled hearing and that petitioner "ha[d] not renewed his request." *Id.* at 44a; see *id.* at 3a-4a.

On remand, petitioner received a new medical examination, and in November 2011 the regional office again denied his claim. Through counsel, petitioner appealed that ruling to the Board, but he did not request a new hearing or challenge the Board's prior denial of his 2008 motion for a rescheduled hearing.

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portation and availability for my convenience at the facility here," *id.* at A826 (capitalization altered). Petitioner offered no independent explanation for why he could not have made a timely request for a postponement of the hearing prior to the original scheduled hearing date. *Ibid.*; see 38 C.F.R. 20.704(c) ("Requests for a change in a hearing date may be made at any time up to two weeks prior to the scheduled date of the hearing.").

In 2012, the Board affirmed the regional office's denial of service connection. Pet. App. 29a-42a. In its decision, the Board again noted its earlier denial of petitioner's request to reschedule his hearing and stated that petitioner "ha[d] not renewed his request." *Id.* at 30a.

c. Petitioner again appealed to the Veterans Court, which affirmed the Board's decision. Pet. App. 16a-27a. In that appeal, petitioner argued for the first time that the Board had erred in denying his 2008 motion for a rescheduled hearing. *Id.* at 4a. The Veterans Court declined to address that argument, holding that petitioner had forfeited the issue by failing to raise it either in his original Veterans Court appeal of the 2008 Board decision or before the Board in his second (*i.e.*, current) appeal. *Id.* at 17a. The Veterans Court concluded that, because petitioner was represented by counsel at both those times and had "not allege[d] ineffective representation," *ibid.*, his argument "amount[ed] to an effort to engage in undesirable piecemeal litigation," *id.* at 18a; see *id.* at 4a (noting findings by Veterans Court). The Veterans Court also affirmed the Board's holding on the merits that the evidence did not support petitioner's service-connection claim. *Id.* at 18a-27a.

d. The court of appeals affirmed. Pet. App. 1a-15a. Applying the test articulated in *Maggitt* v. *West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000), the court held that the Veterans Court was not required to address petitioner's argument that the Board should have provided him with a hearing. Pet. App. 14a. The court concluded that, under *Maggitt*'s balancing test, "the VA's institutional interests in addressing the hearing issue

early in the case outweigh [petitioner's] interests in the Veterans Court's adjudication of the issue." *Ibid.*

Petitioner argued that *Sims* v. *Apfel*, 530 U.S. 104 (2000), in which this Court held that issue exhaustion is not required in the Social Security Administration benefits system, "precludes application of the issue exhaustion doctrine in the context of veterans benefits because proceedings before the VA are non-adversarial in nature." Pet. App. 5a. The court of appeals rejected that contention. The court explained that its case-by-case approach to issue exhaustion is consistent with *Sims* because this Court recognized that the critical question is whether applicable statutes and regulations impose an issue-exhaustion requirement. Pet. App. 6a (citing *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment)). In light of that guidance from *Sims*, the court sought to "determine the extent to which statutes or agency regulations require issue exhaustion in the veterans benefits context." *Id.* at 6a-7a.

The court of appeals identified three contexts in which it had previously held that veterans'-benefits statutes and regulations require issue exhaustion. Pet. App. 7a-10a. First, "in an appeal from the [regional office] to the Board, 38 C.F.R. § 20.202 specifically requires that the errors by the [regional office] be identified either by stating that all issues in the statements of the case are being appealed or by specifically identifying the issues being appealed." *Id.* at 7a-8a (citing *Robinson*, 557 F.3d at 1361). Second, "where the alleged error was made by the *Board*, * * * 38 U.S.C. § 7252(a), requires issue exhaustion before the Board in appropriate circumstances." *Id.* at 8a (citing *Ledford* v. *West*, 136 F.3d 776, 779-780

(Fed. Cir. 1998)). Third, "in an appeal from the Veterans Court to [the Federal Circuit]," "38 U.S.C. § 7292(a) requires issue exhaustion at the Veterans Court level." *Id.* at 10a (citing *Belcher* v. *West*, 214 F.3d 1335 (Fed. Cir. 2000), cert. denied, 531 U.S. 1144 (2001)).

In sum, the court of appeals concluded, "[t]he statutes and regulations thus impose a requirement of issue exhaustion in appropriate circumstances." Pet. App. 11a. The court further explained that, "[w]hile the requirement of exhaustion is relatively strict in proceedings before the Veterans Court, * * * the non-adversarial nature of proceedings before the VA mandates a less strict requirement." *Ibid.* In determining that the Veterans Court had not erred by declining to consider petitioner's belated procedural argument here, the court of appeals acknowledged circuit precedent holding that the non-adversarial nature of veterans'-benefits proceedings makes it appropriate to give a "liberal construction" to arguments advanced by veterans and requires consideration of all record evidence in support of related claims. *Ibid.*; see *id.* at 12a-13a (citing cases). The court stressed, however, that "those cases do not go so far as to require the Veterans Court to consider procedural objections that were not raised, even under a liberal construction of the pleadings." *Id.* at 13a.

The court of appeals explained that "[t]here is a significant difference between considering closely-related theories and evidence that could support a veteran's claim for disability benefits and considering [unraised] procedural issues that are collateral to the merits." Pet. App. 13a. With respect to the latter category, the court emphasized that "[a] veteran's interest may be better served by prompt resolution of

his claims rather than by further remands to cure procedural errors that, at the end of the day, may be irrelevant to final resolution and may indeed merely delay resolution." *Id.* at 13a-14a. Because "the failure to raise an issue may as easily reflect a deliberate decision to forgo the issue as an oversight," the court reasoned, it was "appropriate for the Board and the Veterans Court to address only those procedural arguments specifically raised by the veteran, though at the same time giving the veteran's pleadings a liberal construction." *Id.* at 14a. The court therefore held "that the Board's obligation to read filings in a liberal manner does not require the Board or the Veterans Court to search the record and address procedural arguments when the veteran fails to raise them before the Board." *Ibid.* Applying that rule, and the balancing test for exhaustion established in *Maggitt*, the court of appeals concluded that the Veterans Court was not required to address petitioner's argument that the Board had erred in denying his 2008 request for a rescheduled hearing. *Ibid.*

ARGUMENT

Petitioner contends (Pet. 4) that the Veterans Court was required to consider an argument that the Board had erred in failing to afford him a rescheduled in-person hearing, even though he had failed to raise that argument either in his prior Veterans Court appeal or in his subsequent post-remand appeal to the Board. Petitioner contends (Pet. 12-24) that *Sims* v. *Apfel*, 530 U.S. 103 (2000), precludes the application of issue-exhaustion requirements in such circumstances because veterans'-benefits proceedings are non-adversarial. The court of appeals correctly rejected that argument, and the decision below does not con-

flict with any decision of this Court or another court of appeals. This Court recently denied a petition for a writ of certiorari raising a similar challenge to the application of issue exhaustion in the context of veterans'-benefits proceedings, see *Parks* v. *Shinseki*, 134 S. Ct. 2661 (2014) (No. 13-837), and there is no reason for a different result here.

1. The court of appeals correctly held that the Veterans Court was not required to consider petitioner's belated argument that the Board had erred in not providing him with a hearing in a prior appeal. The decision below did not announce any broad, new rule with respect to issue exhaustion. Instead, applying the balancing test articulated in *Maggitt*, v. *West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000), the court concluded that "the VA's institutional interests in addressing the hearing issue early in the case outweigh [petitioner's] interests in the Veterans Court's adjudication of the issue." Pet. App. 14a. The court of appeals acknowledged its precedents calling for a "liberal construction" of arguments raised by veterans given the non-adversarial nature of proceedings before the VA, *id.* at 11a; see *id.* at 12a-13a (citing cases), but explained that "those cases do not go so far as to require the Veterans Court to consider procedural objections that were not raised, even under a liberal construction of the pleadings," *id.* at 13a.

Petitioner does not challenge the court of appeals' case-specific rationale for holding that the Veterans Court had no obligation to address petitioner's claim that a procedural error occurred during the initial appeal to the Board. Petitioner contends only that the court's application of an issue-exhaustion requirement in the veterans'-benefits context conflicts with this

Court's decision in *Sims*, Pet. 12-19, and with "other circuits' understanding of *Sims*," Pet. 19-24. Those contentions lack merit.

a. Petitioner frames the question presented as "when, if ever, the [Veterans Court] may decline to address an issue properly within its jurisdiction solely because the veteran did not explicitly raise that issue during the non-adversarial proceedings before the Board." Pet. 4. In fact, the Veterans Court did not rely "solely" on petitioner's failure to reassert his request for an in-person hearing during the Board proceedings on remand. Rather, the Veterans Court observed that petitioner had failed to raise his current objection *either* in those remand proceedings *or* in his prior appeal to the Veterans Court from the Board's initial decision. See Pet. App. 17a.[3]

The Veterans Court's refusal to consider petitioner's procedural challenge was particularly sound given those circumstances. Petitioner's request for an in-person hearing during the initial Board appeal presumably reflected his belief that, in light of the record before the Board at that time, an opportunity to address the decision maker would usefully support peti-

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[3] Petitioner states that this case does not present any question concerning issue exhaustion during Veterans Court proceedings because "[t]here is no dispute that [petitioner] raised the issue of his entitlement to a hearing before the Veterans Court." Pet. 11 n.2. Although petitioner did raise the Board's prior denial of an in-person hearing as an alleged ground of error in his *second* Veterans Court appeal, he did not challenge that denial in his *initial* Veterans Court appeal. The Veterans Court in the second appeal relied in part on that failure, noting that petitioner "was represented by counsel in his [earlier Veterans Court] appeal of a May 2008 Board decision and in the Board decision now on appeal, and he did not raise this issue in either proceeding." Pet. App. 17a.

tioner's benefits claim. If petitioner believed that the Board's initial adverse decision might have been different if he had been afforded an in-person hearing, the proper time to raise that argument was in his Veterans Court appeal from that adverse decision. And because (in accordance with the Veterans Court's initial remand order) the record before the Board in the second appeal contained significant new medical evidence, Pet. App. 36a-37a, the Board had no reason to assume that petitioner continued to seek an in-person hearing in the absence of a renewed request to that effect.[4]

Thus, petitioner sought to pursue in his *second* Veterans Court appeal a procedural challenge that went solely to the conduct of the *initial* Board proceedings. The Veterans Court correctly recognized that this "argument amounts to an effort to engage in undesirable piecemeal litigation, and [petitioner] provides no compelling basis to permit it." Pet. App. 18a.

b. The decision below does not conflict with *Sims*. The question presented in that case was whether a claimant for Social Security benefits could raise an argument in federal district court when she had not specifically advanced that argument before the Social Security Appeals Council (Appeals Council) in her appeal of an adverse decision by an Administrative Law

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[4] The regulations that govern Board proceedings do not require the Board to conduct in-person hearings in all cases, but simply provide the claimant a right to a hearing upon request. See 38 C.F.R. 20.700(a). Because petitioner did not request a hearing during the second Board appeal, the Board's failure to provide one was not erroneous. Petitioner's claim of procedural error goes only to the Board's refusal in the *first* appeal to reschedule the hearing that the Board had previously granted, but for which petitioner had failed to appear.

Judge (ALJ). *Sims*, 530 U.S. at 104-105. This Court held that issue exhaustion was not required in those circumstances. *Id.* at 105. The Court emphasized that no applicable statute or regulation required issue exhaustion before the Appeals Council, *id.* at 106-110, and a four-Justice plurality found it inappropriate for courts to require such exhaustion in light of the informal and non-adversarial nature of the Social Security claims process, *id.* at 110-112. In her concurring opinion, Justice O'Connor explained that "the agency's failure to notify claimants of an issue exhaustion requirement in this context is a sufficient basis for our decision." *Id.* at 113.

The court of appeals below discussed and relied on *Sims* to guide its analysis in this case. See Pet. App. 6a. The court correctly observed that Justice O'Connor's concurrence had "made clear that *Sims* does not apply, and exhaustion is required, where applicable statutes or regulations impose an exhaustion requirement." *Ibid.* (citing *Sims*, 530 U.S. at 113 (O'Connor, J., concurring in part and concurring in the judgment)). The court further explained that, although "the non-adversarial nature of proceedings before the VA mandates a less strict exhaustion requirement" than that imposed "in proceedings before the Veterans Court" *id.* at 11a, statutes and regulations nonetheless impose issue-exhaustion requirements in several contexts, *id.* at 7a. Thus, although procedural arguments by veterans must be construed liberally, the Veterans Court is not required to consider a procedural argument that a veteran completely failed to raise before the Board. Far from contravening *Sims*'s guidance, the court of appeals relied on and applied the legal framework established by that decision.

Petitioner's claim (Pet. 12-19) of a conflict with *Sims* rests on the mistaken premise that the statutes and regulations governing veterans'-benefits proceedings do not require issue exhaustion. Petitioner asserts (Pet. 14) that "no statute or regulation requires that a veteran specifically articulate all errors before the regional office or when appealing a decision of the regional office to the Board." That is incorrect. As the court of appeals explained, "in an appeal from the [regional office] to the Board, 38 C.F.R. § 20.202 specifically requires that the errors by the [regional office] be identified either by stating that all issues in the statements of the case are being appealed or by specifically identifying the issues being appealed." Pet. App. 7a. Indeed, several years before the decision in this case, the Federal Circuit had confirmed that 38 C.F.R. 20.202 imposes an "obligation to raise issues in the first instance before the VA where the record is being made." *Robinson* v. *Shinseki*, 557 F.3d 1355, 1361 (2009).

Petitioner also suggests (Pet. 14-15), that simply checking a box on VA Form 9 indicating that the claimant "is appealing all issues" satisfies 38 C.F.R. 20.202's requirement that the veteran "specifically identify the issues appealed." That reading is contrary to Federal Circuit precedent and to the plain text of the form. The relevant box on VA Form 9 indicates that the claimant is appealing "all of the issues listed on the statement of the case and any supplemental statements of the case [from the] local VA office," not on every *possible* challenge to the regional office's ruling in the case.[5] C.A. App. A830 (capitalization al-

[5] Petitioner cites only a truncated portion of the language in Box B of Form 9. Pet. 14 n.3 ("I want to appeal all of the issues

tered). An issue not listed on the statement of the case prepared by the VA is not preserved unless the claimant specifically identifies that issue on VA Form 9 or actually raises the issue in a pleading before the Board. See *Robinson*, 557 F.3d at 1361-1362.

Petitioner is similarly mistaken in arguing that no regulation requires a claimant to undertake any specific action in order to preserve an issue for appeal following a remand. See Pet. 15 (citing 38 C.F.R. 19.38). As an initial matter, petitioner has forfeited that argument by failing to raise it before the court of appeals. See *Decker* v. *Northwest Envtl. Def. Ctr.*, 133 S. Ct. 1326, 1335 (2013) (stating that this Court is "a court of review, not of first view" (citations omitted)); *Lee* v. *Kemna*, 534 U.S. 362, 387-388 (2002). More fundamentally, 38 C.F.R. 20.202, the regulation that requires claimants to identify specific issues on appeal, contains no exception for post-remand appeals. Although a claimant need not complete a new VA Form 9 in connection with a post-remand appeal to the Board, the claimant must still raise any procedural issue on appeal, either in an initial VA Form 9 or in a

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* * * ."). The language he omits makes clear that this box only preserves for appeal "issues listed on the statement of the case and any supplemental statement of the case that my local VA office sent to me." See U.S. Dep't of Veterans Affairs, *VA Form 9, Appeal to the Board of Veterans' Appeals* (July 2015), http://www.va.gov/vaforms/va/pdf/VA9.pdf. While a claimant may instead check Box A of VA Form 9 and identify specific issues for appeal, petitioner checked Box B. See Pet. 15 n.4. The regional office's statement of the case and supplemental statement of the case did not include the Board's prior failure to provide a hearing as one of the issues in dispute. C.A. App. A203-205, A720-A726, A758-A771.

pleading before the Board, in order to preserve that issue for Board review.[6]

In explaining that circuit precedent "requires issue exhaustion before the Board in appropriate circumstances," Pet. App. 8a (citing *Ledford* v. *West*, 136 F.3d 776, 779-780 (Fed. Cir. 1998)), the court below made clear that the Veterans Court is not required "to disregard every legal argument not previously made to the Board," *id.* at 9a (quoting *Maggitt*, 202 F.3d at 1377). Instead, the court explained, *Maggitt* established a balancing test for the application of issue exhaustion, which requires an assessment of "whether the interests of the individual weigh heavily against the institutional interests the doctrine exists to serve." *Ibid.* (citing *Maggitt*, 202 F.3d at 1377). Petitioner does not challenge either the balancing test required under *Maggitt* or the court of appeals' conclusion that "the VA's institutional interests in addressing the hearing

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[6] The provision that petitioner cites (Pet. 15) merely obviates the need for a claimant to file a new notice of disagreement or VA Form 9 in order to trigger the Board's review of the issues identified in the "Supplemental Statement of the Case," which the regional office must issue if, after "additional development of the evidence or procedural development" on remand, the "benefits sought on appeal remain denied." 38 C.F.R. 19.38. Petitioner selectively quotes from the Board's remand order to argue that "nothing in the regulations and Board opinions leads veterans to believe that anything more needs to be filed to preserve all issues on re-appeal to the Board." Pet. 15. In fact, the same remand order notified petitioner that he would be given the opportunity to respond to the Supplemental Statement of the Case and that he "ha[d] the right to submit additional evidence and argument on the matter." Pet. App. 47a. The order thus made clear that, if petitioner wished to seek the Board's review of an issue not raised in the Supplemental Statement of the Case, he had the opportunity to do so before the case was "returned to the Board for further appellate review." *Ibid.*

issue early in the case outweigh [petitioner's] interests in the Veterans Court's adjudication of the issue." *Id.* at 14a.

c. For substantially the same reasons, there is also no merit to petitioner's contention (Pet. 19) that the decision below conflicts with "other circuits' understanding of *Sims*." With respect to veterans'-benefits cases specifically, no such conflict could arise, since the Federal Circuit has exclusive jurisdiction to review decisions of the Veterans Court. See 38 U.S.C. 7292(c); Pet. 24. Petitioner's claim (Pet. 22-23) of conflict between the Federal Circuit's approach to exhaustion and the approaches taken by other circuits under different legal regimes rests on the erroneous premise that the statutes and regulations governing VA benefits do not require issue exhaustion before the Board.

d. Petitioner's claim of conflicts with *Sims* and with decisions of other circuits is particularly misplaced in light of petitioner's forfeitures at two distinct stages of this case. See pp. 6-7, 12-13, *supra*. In his initial appeal to the Veterans Court, petitioner did not raise the Board's denial of his request to reschedule an in-person hearing as an alleged ground for vacatur of the Board's decision. And after the Veterans Court's initial decision remanding the case to the agency, petitioner did not renew his request for an in-person Board hearing at *any* stage in the VA's administrative proceedings. Cf. *Sims*, 530 U.S. at 107 ("Whether a claimant must exhaust issues before the ALJ is not before us."); *id.* at 117 (Breyer, J., dissenting) ("I assume the plurality would not forgive the requirement that a party ordinarily must raise all relevant issues before the ALJ."). In addition to

weakening petitioner's claim of conflicts, that procedural history makes this an unsuitable vehicle for clarifying how issue-exhaustion principles should apply in the simpler (and presumably more typical) case where a VA benefits claimant raises a particular issue before the regional office, does not pursue it before the Board, and then asserts the issue as a ground of error in his initial Veterans Court appeal.

2. Petitioner also argues (Pet. 24-29) that further review is warranted because this case presents an important legal issue with a substantial impact on veterans. That argument is premised in part on an overly-expansive interpretation of the decision below. Contrary to petitioner's argument, the court of appeals did not categorically require that an issue must be presented to the Board in order for the Veterans Court or the Federal Circuit to address it in a subsequent appeal. Rather, applying the balancing test articulated in *Maggitt*, the court simply concluded that the Veterans Court was not required to address a specific claim of procedural error by the Board that petitioner had failed to raise either in the first appeal to the Veterans Court or in the proceedings before the Board on remand. That narrow holding does not conflict with any decision of this Court or any other circuit, and it does not warrant this Court's review.

Petitioner argues (Pet. 27) that veterans are especially "likely to miss" potential procedural arguments when pursuing their claims. As the court of appeals explained, however, it is not always in a veteran's best interests to pursue any and all procedural challenges. See Pet. App. 13a-14a ("A veteran's interests may be better served by prompt resolution of his claims rather than by further remands to cure procedural er-

rors that, at the end of the day, may be irrelevant to final resolution and may indeed merely delay resolution."). Thus, "the failure to raise an issue may as easily reflect a deliberate decision to forgo the issue as an oversight." *Id.* at 14a.

Finally, petitioner contends (Pet. 28) that the decision below will have a negative impact on "unrepresented veterans" because it "has created a procedural trap for all veterans across the Nation, most being unwary and unrepresented." As explained above, however, petitioner failed to raise his current claim both in his initial appeal to the Veterans Court and in the Board proceedings on remand, and in both instances he was represented by counsel. Pet. App. 17a. And, contrary to petitioner's assertion that the court of appeals effectively demanded more of him than the VA regulations require, Pet. 28, the decision below simply requires that a claimant comply with those regulations by specifically identifying in an appeal to the Board any "procedural issues that are collateral to the merits." Pet. App. 13a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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