No. 07-1209

IN THE
Supreme Court of the United States

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, *Petitioner*,

v.

WOODROW F. SANDERS, *Respondent.*

JAMES B. PEAKE, M.D.,
SECRETARY OF VETERANS AFFAIRS, *Petitioner*,

v.

PATRICIA D. SIMMONS, *Respondent.*

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

BRIEF IN OPPOSITION FOR RESPONDENT SIMMONS

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QUESTION PRESENTED

Whether the court of appeals erred in holding that when the Department of Veterans Affairs (VA) fails to provide statutorily required notice to benefits claimants, the VA should bear the burden of showing that such an error was not prejudicial.

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Respondent Patricia Simmons files this brief in opposition to the petition for a writ of certiorari filed by James B. Peake, M.D., Secretary of Veterans Affairs.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 56a-64a) is reported at 487 F.3d 892. The order denying the petition for rehearing and rehearing en banc (Pet. App. 65a-66a) is unreported. The decision of the United

States Court of Appeals for Veterans Claims (Pet. App. 67a-82a) is unreported.

JURISDICTION

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

1. The Veterans Claims Assistance Act of 2000 provides in relevant part:

> **Notice to claimants of required information and evidence**
>
> (a) Required information and evidence.—Upon receipt of a complete or substantially complete application, the Secretary shall notify the claimant and the claimant's representative, if any, of any information, and any medical or lay evidence, not previously provided to the Secretary that is necessary to substantiate the claim. As part of that notice, the Secretary shall indicate which portion of that information and evidence, if any, is to be provided by the claimant and which portion, if any, the Secretary, in accordance with section 5103A of this title and any other applicable provisions of law, will attempt to obtain on behalf of the claimant.

38 U.S.C. § 5103(a).

2. The Veterans' Judicial Review Act provides that the United States Court of Appeals for Veterans Claims shall "take due account of the rule of prejudicial error." 38 U.S.C. § 7261(b)(2).

STATEMENT

A. Statutory Background

1. Congress has observed that the claim system of the Department of Veterans Affairs (VA) "is unlike any other adjudicative process," in that "[i]t is specifically designed to be claimant friendly." H.R. Rep. 105-52, at 2 (1997). By statute, the VA is required to assist veterans who submit a claim for benefits. *See, e.g.*, 38 U.S.C. § 5103A(a)(1). Detailed statutory notice requirements are part of this assistance. Pursuant to the Veterans Claims Assistance Act of 2000 (VCAA), the Secretary must provide the claimant with notice of the "information necessary to complete the application." *Id.* § 5102(b). In addition, the Secretary must notify the claimant of any additional information or evidence necessary to substantiate the claim, as well as which portion of that information the Secretary will attempt to obtain on the claimant's behalf. *Id.* § 5103(a). In reviewing claims, moreover, the VA must give the benefit of the doubt to the veteran whenever "there is an approximate balance of positive and negative evidence." *Id.* § 5107(b).

2. A veteran first presents a claim for benefits to a regional office of the VA, and can appeal an adverse decision of the office to the Board of Veterans Appeals (Board). The decisions of the Board are subject to review exclusively in the United States Court of Appeals for Veterans Claims (Veterans Court). *See* 38 U.S.C. § 7252(a). On review, the Veterans Court shall "take due account of the rule of prejudicial error." *Id.* § 7261(b)(2). The Federal Circuit, in turn, has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" by the Veterans Court. *Id.* § 7292(c).

3. In 2005, the Veterans Court issued an opinion that addressed the prejudicial error provision, Section 7261(b)(2), in the context of the notice requirements of the VCAA. *Mayfield* v. *Nicholson*, 19 Vet. App. 103 (2005), *rev'd on other grounds*, 444 F.3d 1328 (Fed. Cir. 2006). The court held that when the VA fails to notify the claimant of the information and evidence necessary to substantiate his or her claim (a "first-element" notice error), the VA bears the burden of demonstrating that there was no prejudice to the appellant from that error, given that such an error has "the natural effect of producing prejudice." *Id.* at 122. But when the VA fails to comply with the additional statutory notice requirements, the Veterans Court held, the claimant has the burden of showing that the error prejudiced the proceeding by affecting its essential fairness. *Id.* at 122-123.

B. Factual And Procedural History

1. Respondent Patricia Simmons served in the United States Navy from 1978 to 1980. Pet. App. 68a.[1] In 1980, she filed with a VA regional office an application for VA disability benefits for hearing loss in her left ear caused by her constant exposure, while on active duty, to a noisy work environment. *Id.* The regional office denied her claim, finding that the disability was not severe enough to be compensable, *id.* at 68a, 86a, and the Board affirmed, *id.* at 68a-69a.

In March 1998, Simmons requested that the regional office amend her claim to include right-ear hear-

[1] Respondent has married and is now known as Patricia White. In order to avoid confusion, she is referred to in this brief in opposition as Patricia Simmons.

ing loss. Pet. App. 69a. The regional office denied the claim on the ground that the right-ear hearing loss was unconnected to Simmons's service in the Navy. *Id.* The Board remanded for a determination whether the right-ear hearing loss was related to her left-ear hearing loss, and to enable the VA to comply with the requirements of the VCAA. *Id.* at 69a, 89a.

On remand, in 2001, the regional office sent a letter to Simmons purporting to provide the notice required by the VCAA. Pet. App. 69a. The VA also scheduled medical examinations for Simmons, which she missed. *Id.* at 69a-70a. Subsequently, the regional office denied her claim. *Id.* at 70a-71a. On appeal, the Board affirmed, concluding that the VA had "substantial[ly]" complied with its obligations under the VCAA, and denied her claim. *Id.* at 85a, 95a-96a.

Simmons appealed to the Veterans Court, which vacated the Board's decision and remanded her claim for re-adjudication. Pet. App. 81a. It concluded that the VA had failed to comply with the VCAA's first-element notice requirement (*i.e.*, providing notice of the information necessary to substantiate her claim), as well as the other notice requirements. *Id.* at 79a. Citing *Mayfield*, the court held that the VA had the burden of proving that the first-element notice error did not prejudice Simmons. *Id.* at 80a-81a. The court also concluded that remand was required to provide a new medical examination unless there was clear evidence that Simmons received notice relating to the exams (one of which, it appears, had been sent to the wrong address). *Id.* at 69a-70a, 76a. The VA appealed to the Federal Circuit.

2. On the same day that the Federal Circuit decided *Simmons*, the court issued its decision in *Sanders*

v. *Nicholson*. Pet. App. 1a, 56a.[2] In 1991, Sanders sought to reopen his claim, first denied in 1949, for a right-eye disability sustained while he served in the United States Army from 1942 to 1945. *Id.* at 1a-2a, 25a. As relevant here, the Board ultimately denied the claim, holding, *inter alia*, that there was no VCAA notice error. *Id.* at 30a, 43a. On appeal, the Veterans Court affirmed. The court stated that it "need not consider whether any error occurred." *Id.* at 38a. Rather, it concluded, under *Mayfield*, that because the alleged notice errors were not first-element notice errors, Sanders had the burden of showing prejudice from those errors and had failed to do so. *See id.* at 38a-39a.

Sanders appealed to the Federal Circuit, which reversed and remanded. Pet. App. 21a. The Federal Circuit rejected *Mayfield*'s approach of varying the placement of the burden depending on whether a first-element notice error is at issue. It held that "in light of the uniquely pro-claimant benefit system created by the VCAA," *id.* at 20a, *all* VCAA notice errors should be presumed prejudicial, placing the burden on the agency rather than the claimant. *Id.* at 14a. "Put simply, interpreting § 7261(b)(2) [the rule of prejudicial error] as requiring veterans to overcome a series of complex legal hurdles in order to secure the assistance mandated by Congress would clearly frustrate the purpose of the VCAA." *Id.* at 21a.

3. In *Simmons*, the Federal Circuit affirmed the Veterans Court's remand. Citing *Sanders*, the court held that "the Veterans Court properly placed the bur-

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[2] The Government has petitioned for certiorari in the instant case and in *Sanders* in the same petition.

den on the Secretary to establish that an error in a notice the [VA] was required to give Ms. Simmons was not prejudicial." Pet. App. 56a.

REASONS FOR DENYING THE PETITION

The Government's principal argument is that the Federal Circuit's application of Section 7261(b)(2), the prejudicial error rule at issue here, is in conflict with circuit court interpretations of the prejudicial error rule of the Administrative Procedure Act (APA). The Government is mistaken. Even assuming that the two provisions should be interpreted to have the same meaning, which is far from clear, the APA provision is flexible; it has at times been interpreted to place the burden of proving harmlessness on the agency defending its error. *See* Part I *infra.* Moreover, in light of the unique statutory framework—which, among other things, mandates that the agency assist the veteran—the Federal Circuit properly placed the burden on the agency when it fails to comply with the VCAA. *See* Part II *infra.*

The Government's concerns about the consequences of the Federal Circuit's approach are overstated and misplaced. Although the Government notes that veterans file 800,000 claims for veterans benefits each year, the rule of prejudicial error is only relevant on appeal. And, in fact, there are fewer than 5,000 appeals filed in the Veterans Court each year; VCAA notice violations and the rule of prejudicial error will be at issue in only a subset of these appeals. *See* Part III *infra.* Finally, even if the Court were inclined to address this question, it should do so in a different case. *See* Part IV *infra.*

I. THE APA RULE OF PREJUDICIAL ERROR IS FLEXIBLE AND CONTEXT-SPECIFIC

The Government's argument that there is a circuit split rests on its contention that the "courts of appeals are unanimous in interpreting the APA to impose upon a party challenging an agency's action the burden of showing not only that the agency erred but also that its error was prejudicial." Pet. 7. Yet even assuming *arguendo* that the APA prejudicial error rule is relevant in interpreting the different prejudicial error statute at issue here, the Government's argument fails; the courts of appeals take a flexible view of the allocation of the burden under the APA's prejudicial error rule.[3] And contrary to the Government's assertion, the burden is not always placed on the party challenging agency action.

The adaptability of the rule is supported by the language of the statute—that a court should take "due account" of the rule of prejudicial error. 5 U.S.C. § 706(2).[4] As one indication of this flexibility, courts have been "cautious" when applying the APA rule of prejudicial error—and have proceeded "gingerly"—when the circumstances so require. *See Doe* v. *Hamp-*

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[3] In many instances, moreover, courts do not address the burden of proof at all. *See, e.g.*, *Nevada* v. *Department of Energy*, 457 F.3d 78, 89-91 (D.C. Cir. 2006) (evaluating prejudicial error under the APA without considering burden); *PDK Labs. Inc.* v. *DEA*, 362 F.3d 786, 799 (D.C. Cir. 2004) (same).

[4] *See* Berger, *Do Regulations Really Bind Regulators?*, 62 Nw. U. L. Rev. 137, 160 (1967) ("The need for flexibility … was met by leaving the courts free to take '*due* account … of the rule of prejudicial error.' 'Due' means 'just and proper,' i.e., reasonable in all the circumstances, as in 'due care.'" (emphasis in original)).

ton, 566 F.2d 265, 277-278 n.29 (D.C. Cir. 1977) ("we … have been cautious in applying the doctrine of harmless administrative error when basic procedural rights have been implicated"); *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 851 n.16 (D.C. Cir. 1970) (rule of prejudicial error "must be used gingerly, if at all, when basic procedural rights are at stake"); *see also Gifford Pinchot Task Force* v. *U.S. Fish & Wildlife Service*, 378 F.3d 1059, 1071 (9th Cir. 2004) ("In the context of agency review, the role of harmless error is constrained."); *Riverbend Farms, Inc.* v. *Madigan*, 958 F.2d 1479, 1487 (9th Cir. 1992) (Kozinski, J.) ("[W]e must exercise great caution in applying the harmless error rule in the administrative rulemaking context. The reason is apparent: Harmless error is more readily abused there than in the civil or criminal trial context.").

On the question raised by the Government—which party has the burden to prove or disprove prejudicial error under the APA—the courts of appeals adapt to the circumstances. For example, although the D.C. Circuit often places the burden on the party challenging agency action (*see* Pet. 10), that court has also held that the "imposition of such a burden on the challenger is normally inappropriate where the agency has completely failed" to comply with the statutory procedural requirements set out in Section 553 of the APA. *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988). For this type of error, "a showing of actual prejudice is not required under the preju-

dicial error rule." *Sprint Corp.* v. *FCC*, 315 F.3d 369, 377 (D.C. Cir. 2003).[5]

The Ninth Circuit shifts the burden under the APA "depending on both the types of action and error at issue." *City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004). Thus, in certain contexts, the Ninth Circuit has held that "precedent dictates that the *agency* must demonstrate that its error … was harmless." *Gifford Pinchot Task Force*, 378 F.3d at 1071 (emphasis added); *see also Natural Resources Defense Council* v. *U.S. Forest Service*, 421 F.3d 797, 807 (9th Cir. 2005) ("The Forest Service bears the burden of demonstrating harmlessness.").

And the Tenth Circuit has shifted the burden of proof when addressing the APA prejudicial error rule where the context so warranted, namely, in a suit brought by Native Americans. *See Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324, 1335-1336 (10th Cir. 1982). The Tenth Circuit held that burden shifting was appropriate in light of, *inter alia*, the nature of the error and "the underlying policy of protection of the in-

[5] The Fifth Circuit has also relieved the party challenging agency error from proving prejudice in cases involving violations of notice-and-comment rulemaking; the court refuses to "assume that there was no prejudice" because, under that court's precedent, "[a]bsence of such prejudice must be clear for harmless error to be applicable." *U.S. Steel Corp.* v. *EPA*, 595 F.2d 207, 215 (5th Cir. 1979); *see also Sierra Club* v. *U.S. Fish & Wildlife Service*, 245 F.3d 434, 444 (5th Cir. 2001) (refusing to deem agency error harmless when court could "not find that prejudice was clearly absent").

terests of the Indians for whose benefit the regulation was adopted." *Id.* at 1336.[6]

The lack of a conflict warranting this Court's intervention is further demonstrated by the Federal Circuit's own treatment of the APA rule of prejudicial error. As the Government acknowledges (Pet. 10), the Federal Circuit at times places the burden of proof on the party claiming error. *See Intercargo Ins. Co.* v. *United States*, 83 F.3d 391, 396 (Fed. Cir. 1996). In other words, the Federal Circuit's shifting of the burden in this case was not due to any misunderstanding of the APA prejudicial error rule; rather, it was based on the unique statutory context at issue here.

II. GIVEN THE IMPORTANCE OF THE VCAA NOTICE REQUIREMENTS TO THE PRO-CLAIMANT VETERANS BENEFITS SYSTEM, THE FEDERAL CIRCUIT PROPERLY ALLOCATED THE PREJUDICIAL ERROR BURDEN OF PROOF TO THE AGENCY

Congress has created a uniquely pro-claimant framework to aid veterans seeking benefits. The statutory scheme mandates that the agency assist the veteran; in particular, the VCAA notice provisions set forth specific assistance that the agency is required to provide. In light of this context, the Federal Circuit correctly interpreted Section 7261(b)(2) to place the burden on the agency when it fails to comply with the VCAA notice requirements.

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[6] The Second Circuit also appears to have a flexible approach, as at least one Second Circuit case could be read to suggest that the burden can appropriately be placed on the agency. *See New York Pub. Interest Research Group* v. *Whitman*, 321 F.3d 316, 334 n.13 (2d Cir. 2003).

1. The system for adjudicating veterans benefits claims is unique in the administrative context for its manifestly pro-claimant stance. *See*, *e.g.*, *Nolen* v. *Gober*, 222 F.3d 1356, 1361 (Fed. Cir. 2000) (noting "that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant" (internal quotation marks omitted)); H.R. Rep. No. 105-52, at 2 (1997) (claim system "is unlike any other adjudicative process," in that it is "specifically designed to be claimant friendly").[7] Under this system, Congress expects the agency "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988); *see also* *Jaquay* v. *Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002) ("Congress has created a paternalistic veterans' benefits system to care for those who served their country in uniform.").

Congress safeguarded the pro-claimant orientation of the VA system when, in 1988, it added judicial review provisions and created the Veterans Court. *See* *Hodge* v. *West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("[E]ven in creating judicial review in the veterans context, Congress intended to preserve the historic, pro-claimant system."). Congress expected the Veterans Court to ensure "that veterans … receive every possible consideration when the [court] reviews a case." H.R. Rep. No. 100-963, at 26. The same legislation also codified a number of pro-claimant provisions, including the requirement that the VA "give the benefit of the

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[7] *See also Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985) (describing the veterans claims process as "designed to function throughout with a high degree of informality and solicitude for the claimant").

doubt" to the veteran whenever "there is an approximate balance of positive and negative evidence." 38 U.S.C. § 5107(b); *see also* Pub. L. No. 100-687, 102 Stat. 4105, 4106-4107 (1988).

Congress's enactment of the VCAA in 2000 reinforced and expanded this pro-claimant framework, putting in place "enormously far-reaching adjudication safeguards." *Holliday* v. *Principi*, 14 Vet. App. 280, 290 (2001), *overruled on other grounds by Kuzma* v. *Principi*, 341 F.3d 1327 (Fed. Cir. 2003). The VCAA's notice provisions are a critical part of the assistance provided to claimants. As the Federal Circuit has recognized, these provisions "ensure that the claimant's case is presented to the initial decisionmaker with whatever support is available, and … ensure that the claimant understands what evidence will be obtained by the VA and what evidence must be provided by the claimant." *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1333 (Fed. Cir. 2006). In so doing, the provisions protect the right of claimants to have "a meaningful opportunity to participate in the adjudication of [their] claims." *Kent* v. *Nicholson*, 20 Vet. App. 1, 9 (2006); *see also Mayfield*, 19 Vet. App. at 120 (notice requirement plays "a fundamental role in furthering an interest that goes to the very essence of the nonadversarial, pro-claimant nature of the VA adjudication system").

2. Notwithstanding the unique, pro-claimant system created by Congress, the Government contends that the prejudicial error rule in Section 7261(b)(2) must be interpreted to require that the claimant prove prejudice. This construction is unwarranted by the language of the provision, which, like the APA prejudicial error rule, does not allocate a burden of proof and states that "due account" should be taken of the rule of prejudicial error. It is also inconsistent with the pro-

claimant statutory scheme, as it would undermine various protections under the statute (such as the agency's duty to assist) and would permit the agency effectively to ignore the VCAA requirements. The Government's construction is especially inappropriate where, as here, the agency has failed to provide the most basic of the notifications—notice of what evidence is necessary to substantiate her claim (*i.e.*, a first-element notice error). *See* 38 U.S.C. § 5103(a); *see also Mayfield*, 19 Vet. App. at 122.

In light of the unique statutory framework and Congress's special concern for veterans, the Federal Circuit was correct to place the burden on the agency when the agency fails to comply with the VCAA requirements. As in *Jicarilla Apache Tribe* v. *Andrus*, 687 F.2d 1324 (10th Cir. 1982), in which the Tenth Circuit shifted the burden under the APA prejudicial error rule in light of, *inter alia*, "the underlying policy of protection of the interests of the Indians," *id.* at 1336, burden shifting is also appropriate here. *See also Keyes* v. *School Dist. No. 1, Denver, Colo.*, 413 U.S. 189, 209 (1973) ("There are no hard-and-fast standards governing the allocation of the burden of proof in every situation. The issue, rather, is merely a question of policy and fairness based on experience in the different situations." (internal quotation marks omitted)). If placing the burden on the agency leads to a remand, it "will of course give petitioner one more procedural bite at the apple, but it is the first bite of the quality to which [she] was entitled from the start." *McLouth*, 838 F.2d at 1324.

To the extent there is any ambiguity about whether Section 7261(b)(2) should be read to place the burden on the agency when it fails to satisfy the VCAA notice requirements, that ambiguity is properly re-

solved in the veteran's favor. "[I]t is a well-established rule of statutory construction that when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'" *National Org. of Veterans' Advocates* v. *Secretary of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (quoting *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)); *see also*, *e.g.*, *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991) (referring to "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor").

The Government's interpretation is incorrect regardless of whether Section 7261(b)(2) should be interpreted consistently with the APA prejudicial error rule. The relevance of the APA's prejudicial error rule, however, is far from clear, as this case involves a different provision in a different statute. Although the two provisions are similarly phrased, the Government fails to give proper weight to a "cardinal rule" of statutory interpretation: "that [s]tatutory language must be read in context." *General Dynamics Land Sys., Inc.* v. *Cline*, 540 U.S. 581, 596-597 (2004) (internal quotation mark omitted) (declining to hold that the word "age" had the same meaning throughout a statute); *see also*, *e.g.*, *District of Columbia* v. *Carter*, 409 U.S. 418, 420-421 (1973). In the unique context at issue, the Federal Circuit was correct to interpret Section 7261(b)(2) to place the burden on the agency.[8]

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[8] The Government also relies on the principle that "specific statutory language prevails over a more general provision." Pet. 15. The Government's petition assumes, without explanation, that the prejudicial error rule is the more specific provision. *See id.* (noting on the basis of the "specific governs the general" rule that "the VCAA cannot be read to have altered the prejudicial error

3. Contrary to the Government's argument, the court of appeals was correct to analogize the question presented to cases in the criminal and habeas contexts, *Kotteakos* v. *United States*, 328 U.S. 750 (1946), and *O'Neal* v. *McAninch*, 513 U.S. 432 (1995).

In *Kotteakos*, the Court considered the question of who should bear the burden of proving harmlessness under the federal harmless error statute. The Court made clear that this burden varied depending on the error at issue. *See Kotteakos*, 328 U.S. at 760. For mere "technical errors," the party asserting error bears the burden of proving harm; but if the "error is of such a character that its natural effect is to prejudice a litigant's substantial rights, the burden of sustaining a verdict will … rest upon the one who claims under it." *Id.* (quoting H.R. Rep. No. 65-913, at 1 (1919));[9] *see also O'Neal*, 513 U.S. at 445 ("[W]hen a habeas court is in grave doubt as to the harmlessness of an error that affects substantial rights, it should grant relief.").

These cases shed light on the burden shifting question at issue here. The D.C. Circuit, for example, has noted that the APA prejudicial error rule functions "in much the same way the harmless error rule affects ap-

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rule"). Yet, the prejudicial error rule is a general rule of review, while the VCAA establishes specific notice rights for veterans. *See Morales* v. *Trans World Airlines, Inc.*, 504 U.S. 374, 385 (1992) (explaining that "[a] general 'remedies' saving clause cannot be allowed to supersede the specific substantive pre-emption provision").

[9] In making this distinction, the Court recognized the inherent difficulty in labeling an error "technical" or "substantive," emphasized the importance of context in making that distinction, and said only experience and judgment could properly inform this inquiry. *See id.* at 761-762.

pellate review of other types of cases." *Doolin Sec. Sav. Bank, F.S.B.* v. *Office of Thrift Supervision*, 139 F.3d 203, 212 (D.C. Cir. 1998); *cf. Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (the rule of prejudicial error in the APA "sums up in succinct fashion the 'harmless error' rule applied by the courts in the review of lower court decisions as well as of administrative bodies").

And contrary to the Government's argument, the cases are not "inapplicable … because they involved an individual's loss of liberty." Pet. 19. While it is true that the Court discussed the special interests when liberty is at stake, *see Kotteakos*, 328 U.S. at 759; *O'Neal*, 513 U.S. at 440, the Court also made clear that its reasoning could not be so limited. In *O'Neal*, the Court expressly rejected a distinction between criminal and civil cases: "precedent suggests that civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *Id.* at 441; *see id.* (noting that harmless error statute "applies in both civil and criminal proceedings"). And, with respect to non-habeas civil proceedings (*i.e.*, civil cases in which liberty is not at issue), the Court made clear that the same standard applies: "if … we were to assume that the civil standard for judging harmlessness applies to habeas proceedings … it would make no difference with respect to the matter before us." *Id.* at 442.[10]

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[10] *See also O'Neal*, 513 U.S. at 450 (Thomas, J., dissenting) ("The Court concludes that … the federal harmless-error statute, 28 U.S.C. § 2111, makes no distinction between civil and criminal cases; since the rule in the criminal context places the burden of persuasion on the government, the Court decides that the same should be true in the civil context.").

III. THE CONSEQUENCES OF THE FEDERAL CIRCUIT'S APPROACH ARE NOT PROBLEMATIC

According to the Government, this Court's review is warranted because the decision below will result in a large number of agency remands that will "divert resources from the adjudication of meritorious claims." *See* Pet. 23-25. This argument is unfounded and, in any event, Congress has clearly expressed its willingness, in the context of veterans claims administration, to burden the VA when necessary to provide assistance to claimants.

In support of its claim that the decisions below will have a "significant adverse effect on the VA adjudication process," the Government states that the VA receives more than 800,000 benefits claims per year. Pet. 23. This figure, however, vastly overstates any possible effects from the decision below. In 2007, the Veterans Court received 4,644 appeals, and it remanded (in full or in part) only 2,045 cases.[11] And, of course, VCAA notice violations and the rule of prejudicial error will be at issue in only a subset of these appeals. Moreover, the Government can avoid any additional burden on the system simply by complying with the notice requirements that Congress has enacted.

The Government's arguments based on the effects of the decision below also rest on the view that the allocation of the burden to the agency will be outcome determinative. Pet. 24. Yet there are numerous ways for

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[11] *See* United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited May 15, 2008).

the agency to demonstrate a lack of prejudice;[12] and in many cases a lack of prejudice will be obvious from the record.[13]

Even if placing the burden on the agency is outcome determinative, the Government's suggestion that this warrants placing the burden on the veteran ignores the context of the claims at issue. Allocating the burden to the veteran is at least as likely to be outcome determinative,[14] especially in light of the fact that a

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[12] As the Federal Circuit explained, the agency can show, for example: (1) that lack of notice was cured by the claimant's actual knowledge; (2) "that a reasonable person could be expected to understand from the notice what was needed[;] or (3) that a benefit could not have been awarded as a matter of law." Pet. App. 14a-15a.

[13] *See, e.g.*, *Holmes* v. *Peake*, No. 06-0852, 2008 WL 974728, at *2 (Vet. App. Apr. 3, 2008) (claimant "demonstrated his actual knowledge of what was required to substantiate a higher disability rating when he specifically argued that he was entitled to a 30% disability rating and attached a copy of the pertinent rating schedule"); *Clark* v. *Peake*, No. 05-2422, 2008 WL 852588, at *4 (Vet. App. Mar. 24, 2008) ("appellant, throughout the pendency of his claim, has made submissions showing that he had actual knowledge of the need to submit evidence showing the effect that the worsening or increase of his foot condition had on his employment and daily life"); *Strock* v. *Peake*, No. 05-3560, 2008 WL 566394, at *3 (Vet. App. Feb. 7, 2008) ("the appellant's letter reveals his actual knowledge of the need for evidence to show that his disabilities were incurred during his military service and to show that his injuries existed from the time of his military service to the present").

[14] The claimant might be required to show, for example, "what evidence the appellant would have provided or requested the Secretary to obtain" had proper notice been provided, and "how the lack of that notice and evidence affected the essential fairness of the adjudication." *See Mayfield*, 19 Vet. App. at 121.

substantial percentage of claimants proceed pro se.[15] Thus, the Government's burden allocation view is premised on the notion that it is better that the veteran lose out on benefits (even where there was prejudice and benefits are clearly warranted) than the agency have to cope with additional remands. But the historical treatment of veterans claims and the express language of the VCAA make clear that Congress would prefer to place the risk—and the burden—on the Government. *See* H.R. Rep. No. 106-781, at 9 (2000) (The "goal is and has been to assist veterans in developing claims and receiving benefits for which they are eligible.").

Finally, Congress has in the past rejected efforts to preserve agency resources by burdening claimants; Congress acted to overrule a Veterans Court decision based on that rationale. In *Morton* v. *West*, 12 Vet. App. 477 (1999), the Veterans Court decided that the statutory scheme required veterans to make an initial showing that their claims were "well grounded" because "implausible claims should not consume the limited resources of the VA and force into even greater backlog and delay those claims which—as well grounded—require adjudication." *Id.* at 480. Congress immediately passed the VCAA and overturned *Morton*, *see* H.R. Rep. No. 106-781, at 11—apparently finding it acceptable to burden the VA so that all veterans receive full assistance in developing their claims.

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[15] In 2007, 53% of the claimants were unrepresented at the time of filing and 19% were unrepresented at the close of proceedings. United States Court of Appeals for Veterans Claims Annual Reports, *available at* http://www.vetapp.gov/documents/Annual_Reports_2007.pdf (last visited May 15, 2008).

IV. EVEN IF THE QUESTION PRESENTED WARRANTS REVIEW, THE COURT SHOULD NOT GRANT REVIEW IN THESE CASES

Both cases arise on interlocutory review[16] in circumstances that do not warrant this Court's review.

In *Simmons*, the resolution of the notice issue is potentially of limited consequence. As noted, the Veterans Court had two grounds for remanding Simmons's claim: the agency first had to address the deficiencies in first-element notice at issue here, and second, had to provide a medical examination unless there was clear evidence that Simmons received notice regarding the medical examinations that she had missed. Pet. App. 76a, 81a. Accordingly, although a decision by this Court on the first issue would determine whether the notice deficiency issue remains on remand, the case will still need to be remanded to address the medical examination issue, which could ultimately lead to a result in Simmons's favor.

The Government's petition in *Sanders* should be denied because the question presented is hypothetical in that case, as there has been no finding of error. Indeed, the Board expressly found that there was no VCAA error (*see* Pet. App. 43a), and this finding is reviewable by the Veterans Court only for "clear error." *See Garrison* v. *Nicholson*, 494 F.3d 1366, 1370 (Fed.

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[16] The lack of finality alone is reason enough to deny the petition. *See Virginia Military Institute* v. *United States*, 508 U.S. 946, 946 (1993) (opinion of Scalia, J., respecting the denial of a writ of certiorari) (concurring in denial because the court of appeals had "vacated the judgment … and remanded the case to the District Court"); *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916); *see also* Gressman et al., *Supreme Court Practice* § 4.18, at 280-281 (9th ed. 2007).

Cir. 2007). Neither the Veterans Court nor the Federal Circuit addressed the question whether an error had occurred in Sanders's case. *See* Pet. App. 38a (Veterans Court) (stating that it "need not consider whether any error occurred"); *id.* at 14a-21a (Federal Circuit).[17] This Court should await review where the predicate to the burden allocation question—the existence of a notice error—is established. And if the Government is correct that the issue in these cases will have far-reaching effects, then the Court will have ready opportunities to do so.

CONCLUSION

This Court should deny the petition for a writ of certiorari.

Respectfully submitted.

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[17] In fact, the Federal Circuit lacks jurisdiction over this question. *See* 38 U.S.C. § 7292(d)(2).