No. 07-1209

In the Supreme Court of the United States

JAMES B. PEAKE,
SECRETARY OF VETERANS AFFAIRS, PETITIONER

v.

WOODROW F. SANDERS

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

REPLY BRIEF FOR THE PETITIONER

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Congress directed the Court of Appeals for Veterans Claims (Veterans Court) to "take due account of the rule of prejudicial error" in reviewing administrative decisions denying claims for veterans' benefits. 38 U.S.C. 7261(b)(2) (Supp. V 2005). It did so by adopting, almost verbatim, the language of 5 U.S.C. 706, the prejudicial-error rule of the Administrative Procedure Act (APA). That rule has long been interpreted to place upon the party challenging an agency's action the burden of showing not only that the agency erred but also that its error harmed the challenger. The court of appeals erred by reading the prejudicial-error rule out of Section 7261(b)(2) and instead imposing a presumption of prejudice on the Department of Veterans Affairs (VA) in the context of errors involving the notice required by the

Veterans Claims Assistance Act of 2000 (VCAA), Pub. L. No. 106-475, 114 Stat. 2096.[1]

Respondents contend that the interpretation of Section 706 was not well settled at the time Section 7261(b)(2) was enacted. Their arguments are unpersuasive, however, because the cases on which they rely involved notice-and-comment rulemaking rather than agency adjudications like the benefit determinations at issue here. Respondents also fail to take account of the legislative history of Section 7261(b)(2), which demonstrates not only that Congress intended to incorporate the APA's rule of prejudicial error, but also that Congress understood that rule to be incompatible with a presumption of prejudice.

Similarly misplaced are respondents' arguments based on the non-adversarial nature of the VA administrative process. Veterans Court review of benefits claims, like other judicial proceedings, is adversarial. The non-adversarial character of the administrative process used to determine entitlement to veterans' benefits therefore provides no basis for abandoning ordinary principles of prejudicial error when VA administrative decisions are challenged in court.

Finally, even to the extent that the statutes give the Veterans Court discretion in applying the rule of prejudicial error, respondents fail to identify any sound basis

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[1] On October 10, 2008, the President signed into law the Veterans' Benefits Improvement Act of 2008, Pub. L. No. 110-389, 122 Stat. 4145, which amended the VCAA. Section 101(a)(1) of that Act redesignates 38 U.S.C. 5103(a) as 38 U.S.C. 5103(a)(1) but makes no substantive changes to it. 122 Stat. 4147. Section 101(a)(2) creates a new subsection, 38 U.S.C. 5103(a)(2), which requires the Secretary to promulgate regulations specifying the content of the notices to be provided to claimants. 122 Stat. 4147-4148.

for presuming prejudice. VCAA notice errors do not have the natural effect of prejudicing the claimant because the VA adjudicative system offers many opportunities to correct any error in providing the initial notice required by the VCAA. Moreover, the claimant is much more likely than is the VA to have access to information that would be relevant to determining whether any notice error affected the agency's disposition of a particular benefits claim.

As this Court has observed, judicial review of an agency's action should not be converted into "a ping-pong game" where remand is "an idle and useless formality." *NLRB* v. *Wyman-Gordon Co.*, 394 U.S. 759, 766 n.6 (1969). By creating a presumption of prejudice that, as a practical matter, would often be impossible for the VA to rebut, the decisions below do just that. Those decisions should be reversed, and the Veterans Court should instead apply ordinary principles of prejudicial-error review, which will provide relief to claimants who have actually been harmed by a VCAA notice error, while avoiding unnecessary remands in other cases.

A. Section 7261(b)(2) Incorporates The Prejudicial-Error Rule Of The APA, Which Places The Burden Of Showing Prejudice On The Party Challenging The Agency's Action

1. In directing the Veterans Court to "take due account of the rule of prejudicial error," 38 U.S.C. 7261(b)(2) (Supp. V 2005), Congress used language that is identical in all material respects to that of Section 706 of the APA, which provides that "due account shall be taken of the rule of prejudicial error" when courts review the actions of administrative agencies. 5 U.S.C. 706. As respondent Sanders concedes (Br. 10), Section

7261(b)(2) and Section 706 "have presumptively parallel meaning and application." Respondent Simmons (Br. 34) suggests that it is "unclear" whether the two provisions have the same meaning. But the similarity between the relevant texts, the settled interpretation of Section 706 at the time Section 7261(b)(2) was enacted, and the use of the definite article—suggesting an intent to adopt a specific, preexisting rule of prejudicial error—all lead to the conclusion that the two statutes should be interpreted the same way.

Respondent Simmons points out (Br. 40) that statutory language must be read in context, and that the same words may have different meanings in different statutes if the contexts vary. That proposition is correct as a general matter, but it has no application here. Section 7261(b)(2) and Section 706 both govern judicial review of agency action, and the later-enacted provision was modeled on the earlier one. Indeed, Section 7261(a), which sets out the scope of the Veterans Court's review of VA decisions, is strikingly similar to the corresponding provisions of Section 706.

Any residual doubt about the relationship between Section 7261(b)(2) and Section 706 should be dispelled by the legislative history of the Veterans' Judicial Review Act, the statute that enacted Section 7261(b)(2). Pub. L. No. 100-687, Div. A, § 301(a), 102 Stat. 4115, amended by Veterans Benefits Act of 2002, Pub. L. No. 107-330, § 401(b), 116 Stat. 2832. As the Senate Committee on Veterans' Affairs explained, Congress sought to "incorporate a reference to the 'rule of prejudicial error' *as included in the APA* (5 U.S.C. 706) so as to limit still further a court's role on review." S. Rep. No. 418, 100th Cong., 2d Sess. 61 (1988) (emphasis added); see *id.* at 60 (Although the "standard of review for factual find-

ings is new, the other major scope of review provisions * * * are derived specifically from section 706 of the APA."). There is no basis for construing Section 7261(b)(2) to impose a "rule of prejudicial error" different from the rule that generally applies to judicial review of agency action under the APA.

2. Section 706 of the APA "requires the party asserting error to demonstrate prejudice from the error." *Air Canada* v. *Department of Transp.*, 148 F.3d 1142, 1156 (D.C. Cir. 1998). Respondents argue that courts in APA cases have sometimes assigned the burden of disproving prejudice to the agency, a practice that respondents view as consistent with pre-APA cases placing the burden of showing harmlessness in civil cases on appellees. Respondents also contend that, because the statute directs courts to take "due account" of the rule of prejudicial error, courts retain discretion in deciding where to assign the burden. Those arguments do not withstand scrutiny.

a. Respondents argue that, as of 1988, it was not clear whether the party challenging an agency's action under Section 706 bore the burden of showing prejudice. Although our opening brief (at 15) cited several cases establishing that proposition, respondents note (Simmons Br. 46) that some of those cases were decided after 1988 and that some of them did not explicitly discuss the allocation of the burden of showing (or disproving) prejudice. But in none of the cases was the court's treatment of Section 706 compatible with the proposition that prejudice must be presumed. Moreover, in addition to those cases, there are numerous pre-1988 decisions in which courts of appeals refused to set aside agency action because the party challenging the action had not shown prejudice. See, *e.g.*, *McDonald Welding* v. *Webb*,

829 F.2d 593, 595 (6th Cir. 1987); *Air Transp. Ass'n* v. *CAB*, 732 F.2d 219, 224 n.11 (D.C. Cir. 1984); *National Small Shipments Traffic Conf., Inc.* v. *ICC*, 725 F.2d 1442, 1449 (D.C. Cir. 1984); *Economic Opportunity Comm'n of Nassau County, Inc.* v. *Weinberger*, 524 F.2d 393, 399-400 (2d Cir. 1975); *Chromcraft Corp.* v. *EEOC*, 465 F.2d 745, 747 (5th Cir. 1972). Those decisions make clear that reviewing courts in APA cases did not apply a presumption of prejudice akin to that imposed by the court of appeals in this case.

Respondents contend (Simmons Br. 35-36, 47) that the courts of appeals in other APA cases have required the agencies involved to prove that prejudice did not result from the agencies' errors. Most of those cases, however, did not arise out of agency adjudications, but rather involved failures by rulemaking agencies to comply with the notice-and-comment requirements of 5 U.S.C. 553. See, *e.g.*, *Sprint Corp.* v. *FCC*, 315 F.3d 369, 376-377 (D.C. Cir. 2003); *Sugar Cane Growers Coop.* v. *Veneman*, 289 F.3d 89, 96 (D.C. Cir. 2002); *McLouth Steel Prods. Corp.* v. *Thomas*, 838 F.2d 1317, 1324 (D.C. Cir. 1988); *United States Steel Corp.* v. *EPA*, 595 F.2d 207, 215 (5th Cir. 1979). Unlike a VA benefits determination, which involves the application of specific statutory criteria to a discrete set of facts, agency rulemaking decisions frequently involve the exercise of substantial discretion. It would be particularly difficult for a party challenging a newly promulgated regulation to demonstrate that the agency would have exercised that discretion in a different way if it had complied with the notice-and-comment requirements set forth in 5 U.S.C. 553. See *City of Sausalito* v. *O'Neill*, 386 F.3d 1186, 1220 (9th Cir. 2004) (distinguishing between the application of Section 706 "[i]n the rulemaking context" and "[i]n other

contexts"); cf. pp. 14, 17-19, *infra* (explaining that proper allocation of evidentiary burdens may depend in part on which party has greater access to the relevant proof).

In any event, the District of Columbia Circuit in the cases cited above has not held that *every* deviation from the requirements of 5 U.S.C. 553 is presumptively prejudicial. Rather, it has held that a rulemaking agency must disprove prejudice when the challenger demonstrates the agency's "utter failure" to provide any opportunity for public comment on the regulatory provision that was ultimately adopted. *Sprint Corp.*, 315 F.3d at 376 (quoting *Sugar Cane Growers Coop.*, 289 F.3d at 96); see *McLouth*, 838 F.2d at 1324 (distinguishing prior decisions that had required challengers to show prejudice "where the agency merely failed to provide proper access to some *supplemental* study or studies that partially undergirded its rule," and concluding that "imposition of such a burden on the challenger is normally inappropriate where the agency has completely failed to comply with § 553"). The burden-shifting rule adopted by the court of appeals for VA benefits cases extends well beyond cases in which the VA has *entirely* failed to provide notice to the claimant.

Moreover, even in cases involving the complete failure by rulemaking agencies to comply with 5 U.S.C. 553, the District of Columbia Circuit has simply held that challengers need not demonstrate that the provision of notice would have resulted in the adoption of a different rule. The court has not suggested that a challenger could obtain vacatur of an agency regulation, and a remand for further administrative proceedings, without even specifying the comments it would have submitted if notice-and-comment procedures had been followed. Respondents, by contrast, have not simply failed to es-

tablish that the presentation of specified additional evidence would have caused the VA to award them benefits. Rather, they have failed to identify any additional evidence that they would have submitted if the VA had fully complied with the VCAA's notice requirements.

b. Respondents also rely (Simmons Br. 43-44; Sanders Br. 18-19, 22-30) on various judicial decisions that preceded the adoption of the APA. To the extent that those cases involved judicial review of agency action—as opposed to appellate review of trial-court proceedings—they are consistent with the proposition that administrative decisions should not be overturned unless a showing of prejudice has been made. See, *e.g.*, *Market St. Ry.* v. *Railroad Comm'n*, 324 U.S. 548, 562 (1945) (noting that "due process deals with matters of substance and is not to be trivialized by formal objections that have no substantial bearing on the ultimate rights of parties," and declining to reverse an agency's decision "in the absence of any showing of error or prejudice"); see also *Attorney General's Manual on the Administrative Procedure Act* 110 (1947) (citing *Market St. Ry.*). Respondents contend that the burden of establishing prejudice was placed on the party challenging agency action only in cases involving "technical" errors, as opposed to errors whose "natural effect is to prejudice a litigant's substantial rights." Simmons Br. 43-44 (quoting *Kotteakos* v. *United States*, 328 U.S. 750, 760 (1946)). Even if that were true, however, a VCAA notice error is more appropriately considered a technical error than one that has the natural effect of prejudicing substantial rights. See pp. 14-23, *infra*.

In any event, what matters for purposes of interpreting Section 7261(b)(2) is not the pre-APA rule; it is the rule as Congress understood it in 1988. And even if re-

spondents' distinction between "technical" and other errors still governed when the APA was enacted in 1946, but see *Palmer* v. *Hoffman*, 318 U.S. 109, 116 (1943), there is no evidence that courts were continuing to apply that distinction, or that Congress understood them to be doing so, when Congress enacted the VCAA in 1988.

To the contrary, the Senate Committee on Veterans' Affairs made clear its understanding of Section 706 by citing the Ninth Circuit's decision in *NLRB* v. *Seine & Line Fishermen's Union*, 374 F.2d 974 (9th Cir.), cert. denied, 389 U.S. 913 (1967), a case in which the court had stated that "'the burden of showing that prejudice has resulted' is on the party claiming injury from the erroneous rulings." 374 F.2d at 981 (quoting *Palmer*, 318 U.S. at 116). See S. Rep. No. 418, *supra*, at 61. Respondents point out (Simmons Br. 38) that the Committee did not actually quote the language from *Seine & Line Fishermen's Union* about the allocation of the burden. But the Committee did quote the statement that "[p]rocedural irregularities are not per se prejudicial," and it expressed its view that "a reviewing court should consider reversal only after determining that the identified error caused substantial prejudice to the claimant's case." S. Rep. No. 418, *supra*, at 61 (quoting *Seine & Line Fishermen's Union*, 374 F.2d at 981). Those statements cannot be reconciled with the rule of presumptive prejudice adopted by the court of appeals in these cases.

c. Finally, respondents contend (Simmons Br. 13; Sanders Br. 32-35) that, because Section 7261(b)(2) uses the phrase "due account," a reviewing court possesses discretion to determine which party should bear the burden of proving or disproving prejudice. But as explained in the opening brief (at 12-13), Section 7261(b)(2)'s reference to "*the* rule of prejudicial error" presumes the

existence of an established rule that cannot be altered from case to case at the discretion of the reviewing court. A court takes "due account" of the rule by examining the record and determining whether an error in a particular case is prejudicial. It cannot take "due account" of the rule by changing what the rule is.

B. The VCAA Provides No Statutory Basis For Creating A Unique Rule Of Prejudicial Error Applicable Only To VA Adjudications

The court of appeals believed that the VCAA had "substantially overhauled the administration of the VA benefits system," thereby "abrogat[ing]" Congress's previously stated intent to follow the APA's rule of prejudicial error. Pet. App. 20a-21a. Respondents make little effort to defend that reasoning; indeed, Simmons correctly acknowledges (Br. 13) that nothing in "the VCAA's notice provision speaks directly to the allocation of the burden." Instead, like the court of appeals, Pet. App. 16a, respondents emphasize the non-adversarial, pro-claimant nature of the VA's benefits system. That argument ignores not only the statutory history discussed above, but also the important differences between the VA's administrative process and the subsequent proceedings in which courts review the agency's decisions.

1. Although the VA's administrative adjudication system generally has a pro-claimant orientation, the system is not completely one-sided. In particular, 38 U.S.C. 5107(a), which respondents ignore, provides that "a claimant has the responsibility to present and support a claim for benefits under laws administered by the Secretary." See *Jandreau* v. *Nicholson*, 492 F.3d 1372, 1375 (Fed. Cir. 2007) ("[T]he veteran has the evidentiary

burden of establishing his claim."); *Cromer* v. *Nicholson*, 455 F.3d 1346, 1350 (Fed. Cir. 2006), cert. denied, 127 S. Ct. 2265 (2007). Congress's decision to place other subordinate burdens on the VA, such as the duty to provide notice under 38 U.S.C. 5103(a) and the duty to assist under 38 U.S.C. 5103A, does not mean that Congress intended all burdens to fall on the VA. On the contrary, because the claimant bears the ultimate responsibility for establishing entitlement to benefits, Congress has found it necessary to make an express statement when it wished to place burdens on the agency. Significantly, it did not do so in Section 7261(b)(2).

No VCAA provision either explicitly or by necessary implication shifts to the VA the burden of showing that particular errors did not prejudice the claimant. As explained in our opening brief (at 20-22), the purpose of the VCAA was not to effect a radical overhaul of the VA's claims-adjudication system—much less an overhaul of the process of judicial review of the VA's decisions. Instead, its purpose was simply to overturn the Veterans Court's decision in *Morton* v. *West*, 12 Vet. App. 477 (1999), withdrawn, 14 Vet. App. 174 (2000) (per curiam), and to return the VA to its pre-*Morton* practice of assisting all veterans in the development of their claims. Respondents argue (Simmons Br. 23) that in overturning *Morton*, Congress "determined that the VA cannot fail to assist all veterans even if it perceives such assistance to be unnecessary based on the veteran's failure to show the merit of his claims." But Congress's decision to override *Morton* has no bearing on the question whether a remand is necessary in the absence of a showing of prejudice. The overturning of *Morton* merely vindicated the VA's consistent position that it generally will assist all claimants without requiring any threshold

evidentiary showing (such as proof of a "well-grounded claim") that a particular veteran is entitled to benefits. That determination about the extent of the VA's administrative duty to assist is not at issue in this case, which concerns the appellate role of the Veterans Court. Congress's decision to eliminate any evidentiary threshold for VA assistance does not mean that a litigant invoking *judicial* remedies need not show prejudice.

2. Respondents emphasize (Simmons Br. 14-15) the non-adversarial nature of the VA administrative process. But Congress intended judicial review of the VA's benefits decisions to function in the same adversarial manner that characterizes judicial review of other agency actions. See, *e.g.*, H.R. Rep. No. 963, 100th Cong., 2d Sess. Pt. 1, at 29 (1988) (explaining that Congress "has drawn on the law establishing" the Tax Court "as a model" for the Veterans Court). And a non-adversarial administrative process is entirely compatible with an adversarial process of judicial review in which the party who alleges that an error occurred in the (non-adversarial) administrative proceedings bears the burden of showing prejudice. For example, as noted in our opening brief (at 25), that is precisely the regime that governs Social Security disability proceedings.

Much of respondents' argument rests on the premise that it is somehow unrealistic to ask a claimant, after completing a non-adversarial administrative process in which a VCAA notice error occurred, to articulate some basis for concluding that the error affected the outcome of the proceeding. But the question of prejudicial error arises only upon an appeal by the claimant. In order to appeal the decision of the Board of Veterans' Appeals (Board) to the Veterans Court and raise a VCAA notice issue, the claimant necessarily will have concluded that

he or she received inadequate notice and will have initiated an adversarial proceeding raising that argument. To the extent that the error was prejudicial, the incremental burden of showing prejudice would be slight, and imposing that burden in *judicial* proceedings is by no means inconsistent with the non-adversarial nature of the administrative system.

Respondents assert (Simmons Br. 15-16) that the process of judicial review, like the administrative process, "operates in favor of the veteran." See Sanders Br. 37-39. As examples of the pro-veteran court system, they cite 38 U.S.C. 7261(b)(1) (Supp. V 2005), which directs the Veterans Court to "take due account" of the Board's application of the reasonable-doubt requirement, and 38 U.S.C. 7261(a)(4) (Supp. V 2005), which prohibits the Veterans Court from overturning "a finding of material fact" that is favorable to the claimant. Neither of those provisions says anything about the application of the rule of prejudicial error. More importantly, both of them were added to Section 7261 after the enactment of the provisions at issue here. See Veterans Benefits Act of 2002, Pub. L. 107-330, § 401(a) and (b), 116 Stat. 2832. Those subsequent amendments to Section 7261 shed no light on what Congress meant in 1988 when it required the Veterans Court to take due account of the rule of prejudicial error. See *Haynes* v. *United States*, 390 U.S. 85, 87 n.4 (1968).[2]

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[2] Respondents also invoke (Sanders Br. 12; Simmons Br. 32-33) "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). As they acknowledge, however, that principle is applicable only in cases of statutory ambiguity. And if "[s]pecific statutory language" would be sufficient to rebut any presumption in favor of a pro-claimant reading of the statute, then "a

C. A Presumption Of Prejudice From VCAA Notice Errors Is Unwarranted

Even if Section 7261(b)(2) left the allocation of the burden of showing prejudice to the discretion of the Veterans Court, the rule of presumptive prejudice imposed by the court of appeals would still be unwarranted. As respondents acknowledge (Simmons Br. 23), burdens are appropriately allocated based on "judicial evaluations of probabilities" as well as "a party's superior access to the proof." *International Bhd. of Teamsters* v. *United States*, 431 U.S. 324, 359 n.45 (1977); see *United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002). In the VCAA context, both of those factors point to placing the burden of showing prejudice on the party claiming error. First, the VA's administrative process for adjudicating benefits claims offers many procedural safeguards that have the potential to cure any harm resulting from an initial VCAA notice error. The VA's failure to comply fully with the statutory notice requirements therefore is not an error whose "natural effect is to prejudice a litigant's substantial rights." *Kotteakos*, 328 U.S. at 760. Second, once the case has reached the Veterans Court and a notice error has been discovered, the claimant is in a much better position than the VA to determine whether there has in fact been any prejudice.

1. Respondents devote considerable effort to establishing the proposition that the notice required by the VCAA can be very important to claimants. That is undisputed: the importance of notice is one reason that Congress chose to enact the VCAA, codifying the VA's

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definitive earlier interpretation" of the statutory language "should offer a similarly sufficient rebuttal." *John R. Sand & Gravel Co.* v. *United States*, 128 S. Ct. 750, 756 (2008).

practice of providing notice. But it does not follow that the failure to provide notice—or a technical error in the provision of that notice—is always, or even often, prejudicial.

Respondent Simmons contends (Br. 21) that, in the absence of proper VCAA notice, the "claim is likely to be denied." That assertion is baseless. The VCAA was not enacted until 2000, yet claims were often granted in the preceding decades, even though notice and claim-development requirements were not as specifically defined as they are under current law. That should not be a surprise, because even if the initial notice is deficient or nonexistent, the claimant may already be aware of the evidence that should be presented to support a claim. And the VA has an obligation—independent of its notice duties under the VCAA—to make reasonable efforts to obtain records relevant to the claim. 38 U.S.C. 5103A(b) and (c). When appropriate, it must provide a medical examination. 38 U.S.C. 5103A(d).

Moreover, as our opening brief explains (at 32-35), even if a veteran's claim is denied by the regional office, further administrative review may provide relief to the claimant before the case ever reaches the Veterans Court. For example, the denial of the claim by the regional office must include a statement of the reasons for the decision and a summary of the evidence that was considered. 38 U.S.C. 5104(b); 38 C.F.R. 3.103(b)(1). That statement will alert the claimant if benefits were denied because of evidentiary insufficiency. If the claimant expresses disagreement with the regional-office decision, the VA must take "such development or review action as it deems proper," 38 U.S.C. 7105(d)(1), and the claimant has additional opportunities to submit evidence, 38 C.F.R. 19.31(a). In addition, review by the

Board is de novo. 38 U.S.C. 7104(a) ("Decisions of the Board shall be based on the entire record in the proceeding and upon consideration of all evidence and material of record and applicable provisions of law and regulation."); *Disabled Am. Veterans* v. *Secretary of Veterans Affairs*, 419 F.3d 1317, 1319 (Fed. Cir. 2005), cert. denied, 547 U.S. 1162 (2006).

Respondents are also incorrect in asserting (Simmons Br. 18-19) that the "timing of the notice is significant" because "notice failures have ramifications for the entire claims process." Although the VCAA directs that notice be provided at the beginning of the claim-development process, the failure to provide the notice at that time will not necessarily cause prejudice. As discussed, the VA's duty to develop a claim continues after the regional office issues its decision. And if supporting evidence is not developed until after a claim is initially denied, the delay will not reduce the total amount of any benefits award because the effective date of the award will be the date of the original claim (or the date that is appropriate based on the facts). 38 U.S.C. 5110(a).

According to respondents (Simmons Br. 18), much of the VA's "other required assistance hinges on compliance with the notice provisions." Simmons contends (Br. 19, 21), for example, that if the VA does not notify "at the beginning of the process," the claimant may fail to "schedule additional medical examinations." But the VA's statutory duty to assist in the development of a claim—including providing medical examinations—is in no way dependent on the provision of VCAA notice. 38 U.S.C. 5103A(b) and (c). Whether or not the notice is adequate, the VA will still obtain all evidence of which it is aware and will still schedule medical examinations if appropriate.

Indeed, the facts of these cases demonstrate that the VA can assist in the development of a claim even after a defective VCAA notice. Although the VA's March 2001 letter (J.A. 41-47) did not provide Simmons with the requisite notice of the information and evidence necessary to substantiate her increased-rating claim, the VA nevertheless provided her with audiological examinations in July 2001 and August 2002 in order to evaluate the extent of her service-connected hearing loss, Pet. App. 90a-91a. In addition, before the VCAA was even enacted, the VA provided Simmons with audiological examinations in 1989, 1998, and 1999 to determine whether her service-connected hearing loss had increased. *Id.* at 88a. Much the same is true with respect to Sanders. Despite the VA's insufficient notice, Sanders was able to provide the VA with two medical reports, and he was also examined by a VA ophthalmologist. *Id.* at 46a-47a. Even now, neither respondent has made any effort to explain how additional notice would have benefitted them, or how any deficiencies in notice impeded the VA's performance of its statutory duty to assist them in developing their claims.

2. a. A presumption of prejudice from VCAA notice errors is also inappropriate because the claimant is generally in a much better position than the VA to establish whether prejudice has occurred. If a particular notice error does result in prejudice, it will likely do so by causing relevant evidence not to be presented during the administrative process. The claimant will know whether he or she had such evidence to provide. Conversely, if the error does not cause prejudice, it may be because the claimant already knew the information that would have been provided by the notice, or because there was no additional evidence to present. The VA has little abil-

ity to determine what the claimant knew or to establish the non-existence of additional evidence.

Respondents argue (Simmons Br. 28) that, "[i]f the VA has in fact complied with its duties, then it should be able to show that the veteran was not prejudiced." That is true but beside the point, since the question of prejudice arises only when the agency has *failed* to provide the required notice. Similarly misplaced is the suggestion (Sanders Br. 33) that "an odd result occurs if veterans denied or short-changed VCAA notice are then required to prove the prejudice of this error with an incomplete record caused by the VCAA error itself." See Simmons Br. 28-30. The issue of prejudice arises only if a claimant is able to establish, in the adversarial proceedings in the Veterans Court, that a VCAA notice error occurred. In other words, before the inquiry into prejudice becomes necessary, the claimant will have raised the issue of a notice error with the Veterans Court. And a claimant who possesses information and evidence that would have been responsive to the notice will point that fact out.

Respondents do not explain why a claimant who was able to make the legal arguments necessary to convince the Veterans Court that a notice error had occurred would be unable to show how the error had affected his or her case. By the time a case reaches the Veterans Court, the VA will have provided the appellant with a decision on the claim, which must contain a statement of the reasons for the decision and a summary of the evidence considered by VA. The agency's decision must also contain at least one statement of the case, including a summary of the evidence, citation to pertinent laws and regulations and a discussion of how such laws and regulations affect the agency's decision, the decision on

each issue, and a summary of the reasons for the decision. 38 U.S.C. 5104(b), 7105(d). That information should enable the claimant to identify any missing evidence.

Respondents contend that a VA benefits claimant cannot reasonably be expected to identify the evidence he or she might have submitted had notice been given. But much of the evidence will be in the claimant's possession. Respondents argue that with appropriate notice, a claimant might be better able "to rebut the [VA's] evidence." Sanders Br. 42 (quoting *Daniels* v. *Brown*, 9 Vet. App. 348, 353 (1996)). The VCAA notice, however, is issued *before* the initial decision on a claim. There is no reason, at that stage, for the claimant to attempt to develop evidence to rebut the evidence of record. Indeed, the notice requirement states that VA shall notify the claimant of what evidence he or she is required to provide to VA. 38 U.S.C. 5103(a). It does not require VA to notify a claimant of the information and evidence necessary to rebut a VA decision on a claim. See *Wilson* v. *Mansfield*, 506 F.3d 1055, 1059-1060 (Fed. Cir. 2007); *Hartman* v. *Nicholson*, 483 F.3d 1311, 1314 (Fed. Cir. 2007); *Paralyzed Veterans of Am.* v. *Secretary of Veterans Affairs*, 345 F.3d 1334 (Fed. Cir. 2003). After the initial decision is issued, the claimant may challenge the decision and is free to submit additional evidence, but the VCAA notice has nothing to do with that process.

b. Respondents suggest (Simmons Br. 28) that the "VA has better access to some facts, such as certain records." The question in a prejudice inquiry, however, is whether, as a result of the defective notice *to the claimant*, existing records that might substantiate the claim were not obtained. And the claimant is in a much better position to answer that question. For example, if the

result of defective notice was that a veteran did not notify the VA of treatment at a VA medical center, then the VA might not obtain the records of that treatment. If the claimant alerts the Veterans Court to that treatment, and thus to the existence of the records, then prejudice will have been demonstrated and a remand would be appropriate. If, even at the appeal stage (and even after having become aware of the notice that should have been given initially), the claimant still says nothing about the treatment, then any remand would be pointless, because the VA would still be unaware of the records and the remand therefore would not lead to a different result.

Respondents attempt to minimize the burden on the VA of the unnecessary remands that the decisions below will necessitate. In their view (Simmons Br. 31), "[t]here is nothing to suggest that presuming prejudice would add substantially to the number of remands." The VA must provide notice under Section 5103(a) with respect to each of the hundreds of thousands of claims for benefits filed each year, however, and even a small increase in the percentage of cases that must be remanded to the agency will therefore have significant practical consequences. Because the content of the required notice varies depending on the specific claim asserted by the veteran, it is often difficult to determine precisely what notice the VCAA requires in any given case. See *Wilson*, 506 F.3d at 1062 (notice "necessarily must be tailored to the specific nature of the veteran's particular claim"); see also *Vazquez-Flores* v. *Peake*, 22 Vet. App. 37 (2008) (VA must provide a general notice of the requirements of the particular diagnostic code for a claimant's disability). As a result, there will be many cases in

which claimants can plausibly assert that a VCAA notice error occurred.

Under the decisions below, each time the Veterans Court finds that a particular type of VCAA notice letter is inadequate, the notice that the VA provided in all similar cases before the court's decision was issued will be treated as presumptively prejudicial to the claimants involved and will likely require a remand. Avoiding those unnecessary remands is not simply a matter of "unburden[ing] the VA" (Simmons Br. 31); rather, it is about unburdening the system for providing benefits to veterans and their families. The resources available for claims adjudication are finite, and the expenditure of those resources on unnecessary remands imposes delay and hardship on other, deserving claimants.

3. Respondent Sanders contends (Br. 43) that a presumption of prejudice is appropriate because the Veterans Court lacks the ability to conduct fact-finding, and a claimant's "subjective knowledge of what he might have submitted with proper notice" is not "a part of the record on appeal." But as the Federal Circuit has explained, the obligation imposed by Section 7261(b)(2) to take account of the rule of prejudicial error "permits the Veterans Court to go outside of the facts as found by the Board to determine whether an error was prejudicial." *Mlechick* v. *Mansfield*, 503 F.3d 1340, 1345 (2007). The requirement that review be confined to the administrative record is "not violated when the Veterans Court makes a determination regarding prejudicial error in the first instance *solely* because Congress has specifically required that court to do so by statute." *Ibid.*

Moreover, making an assessment of prejudice based in part on consideration of material outside the record is consistent with judicial practice in other contexts where

agency decisions are reviewed in the first instance in an appellate court. See, *e.g.*, Administrative Orders Review Act, 28 U.S.C. 2341 *et seq.* For example, in reviewing immigration decisions, courts of appeals routinely require an alien to show prejudice from an asserted error in proceedings before the immigration judge. See, *e.g.*, *Shmyhelskyy* v. *Gonzales*, 477 F.3d 474, 482 (7th Cir. 2007) (finding no prejudice from the exclusion of a witness because the alien "has not explained what additional information [the witness] would have provided that would have affected the * * * decision"); *De Sandoval* v. *Attorney General*, 440 F.3d 1276, 1285 (11th Cir. 2006) ("Petitioner fails to show how the additional procedures she demands would have changed the result in her case."); *Ibrahim* v. *Gonzales*, 434 F.3d 1074, 1080-1081 (8th Cir. 2006) (finding no prejudice from the denial of a continuance to allow an alien to obtain an additional document because the alien "has not shown any likelihood that the outcome of the proceedings would have been different" had the document been available); *Morgan* v. *Attorney General*, 432 F.3d 226, 235 (3d Cir. 2005) (finding no prejudice from the denial of a continuance because the alien "has not demonstrated how any evidence she might have found would have affected the outcome of her case"). The courts of appeals are able to assess whether that burden has been met even though they lack the ability to conduct their own fact-finding.

If this Court were to accept respondent's contention that the harmlessness inquiry must be based on the preexisting record alone, a presumption of prejudice from VCAA notice errors would be especially difficult for the VA to rebut (and therefore especially disruptive of agency proceedings). Respondent suggests that the agency could establish, without pointing to evidence out-

side the record, "that a benefit could not have been awarded as a matter of law." Sanders Br. 56 (quoting Pet. App. 14a-15a). A frequent reason for denying benefits, however, is that no evidence exists to support the claim. The record cannot show the nonexistence of such evidence. Taken to its logical conclusion, respondent's argument suggests that VCAA notice errors will *always* be treated as prejudicial, and a remand to the agency will always be required, when the VA's stated rationale for denying the claim was that no evidence (or inadequate evidence) supported it.

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For the foregoing reasons and those stated in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

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Solicitor General

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