No. 13-7016

In the Supreme Court of the United States

BETZAIDA P. JERNIGAN, PETITIONER

v.

ERIC K. SHINSEKI, 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 petitioner, who filed an informal claim for veterans' benefits but then delayed more than six years in responding to the agency's request that she complete a formal application, is entitled to benefits from the date of her informal application.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. A1-A2) is unreported. The opinion of the Court of Appeals for Veterans Claims (Pet. App. B1-B27) is reported at 25 Vet. App. 220. The opinion of the Court of Appeals for Veterans Claims denying full-court review (Pet. App. C1-C27) is unreported. The decision of the Board of Veterans' Appeals is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 22, 2013. The petition for a writ of certiorari was filed on October 18, 2013. Petitioner's motion for leave to proceed in forma pauperis was denied on December 9, 2013. Petitioner was allowed until December 30, 2013 to pay the docketing fee and resubmit the petition, and she complied with that order on De-

cember 26, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. "[I]n order for benefits to be paid or furnished to any individual" under federal veterans-disability-benefits statutes, a claimant "must" file a "specific claim in the form prescribed by" the Secretary of Veterans Affairs. 38 U.S.C. 5101(a); see 38 C.F.R. 3.151(a). The Department of Veterans Affairs (VA) has accordingly prescribed a specific form (formerly Form 1-526, now Form 21-526) as the "formal" application form for disability benefits. Pet. App. B3. A claimant is not entitled to benefits "earlier than the date of receipt of application therefor." 38 U.S.C. 5110(a).

By regulation, the VA "may" treat certain communications that do not use the formal application form as constituting "an informal claim." 38 C.F.R. 3.155(a). "Upon receipt of an informal claim, if a formal claim has not been filed, an application form will be forwarded to the claimant for execution." *Ibid.* If that application form is returned "within 1 year from the date it was sent to the claimant," then the claim "will be considered filed as of the date of receipt of the informal claim." *Ibid.*

A parallel statutory procedure, described in 38 U.S.C. 5103, applies to benefits applications that are incomplete. At the time relevant to this case, Section 5103 provided that "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." 38 U.S.C. 5103(a) (1994). The statute further provided that "[i]f such evidence is not received within one year

from the date of such notification, no benefits may be paid or furnished by reason of such application." *Ibid.*

2. From April 1989 to May 1995, petitioner served on active duty in the United States Navy. Pet. App. B2-B3. In July 1995, she attempted to seek disability benefits without submitting a formal application form for such benefits. *Id.* at B3. It is undisputed that this constituted an informal, rather than a formal, application for benefits. *Id.* at B7.

In August 1995, the VA responded by letter to petitioner's informal application. Pet. App. B3. The VA's letter included multiple paragraphs of potentially applicable instructions and directed the reader to disregard any paragraph that was not marked with a check. *Id.* at B3, C12. The letter stated, in pertinent part:

> 1. The evidence requested below should be submitted as soon as possible, preferably within 60 days, and in any case it must be received in the VA within one year from the date of this letter; otherwise benefits, if entitlement is established, may not be paid prior to the date of its receipt.
>
> a. The enclosed form(s) should be completed and returned to this office so that further action may be taken on your claim.

Id. at B3. Although the main text of paragraph 1 was not checked, subparagraph 1a was. *Ibid.* The VA listed "1-526" as an enclosure, and the agency enclosed the formal benefits application form with the letter. *Id.* at B3-B4.

Petitioner did not act on the letter for more than six years. Pet. App. B4. In October 2001, she submitted a formal application for benefits. *Ibid.* In the

materials accompanying that application, she enclosed her original informal application from 1995, acknowledged that she had received the VA's responsive letter six years earlier, and asked the VA to "accept the attached material as an original application for benefits." *Id.* at B4-B5.

In July 2002, the VA granted petitioner certain disability benefits as of October 2001, the date she filed the formal application. Pet. App. B5. The Board of Veterans' Appeals affirmed. The Board concluded that, because petitioner had not returned the formal application form within one year of the VA's August 1995 letter, her formal claim could not relate back to the informal claim she had filed in July 1995. *Id.* at B6.

3. The Court of Appeals for Veterans Claims (Veterans Court) also affirmed. Pet. App. B1-B27. As an initial matter, the court held that the Secretary has authority to require a formal application form. *Id.* at B8-B10. The court observed that the Secretary is authorized to prescribe "the forms of application" under the veterans-benefit laws, *id.* at B8 (quoting 38 U.S.C. 501(a)(2)); that 38 U.S.C. 5101(a)(1) requires claims to be filed "in the form prescribed by the Secretary," Pet. App. B8 (quoting 38 U.S.C. 5101(a)(1)); and that the Secretary's "interpretation of those statutes as requiring a formal application form has long been accepted by the [Veterans] Court because the form contains particular features that informal claims typically do not," *ibid.* (citing *Fleshman* v. *Brown*, 9 Vet. App. 548, 551 (1996), aff'd, 138 F.3d 1429 (Fed. Cir.), cert. denied, 525 U.S. 947 (1998)).

The Veterans Court found it "eminently reasonable" for the Secretary to interpret the statutory term

"form"—"that is, the procedure for filing an application for benefits"—to include a time limit for filing a formal claim following the submission of an informal claim. Pet. App. B12. The Veterans Court found such a requirement "particularly" reasonable "in the context of the VA, where finality often plays a crucial role." *Ibid.* (citing authorities). The Veterans Court also found the particular one-year time limit in 38 C.F.R. 3.155(a) to be reasonable, noting that 38 U.S.C. 5103(a) (1994) contained the same time limit for responding to a request for additional evidence on an incomplete application. Pet. App. B14-B15.

The Veterans Court rejected petitioner's argument that, irrespective of the date on which petitioner filed the formal application form, the Secretary was obligated to calculate the amount of benefits from the date of the informal claim. Pet. App. B15-B20. The Veterans Court explained that 38 U.S.C. 5103(a) (1994) "expressly ruled out the possibility of an effective date as of the date VA received an informal (that is, incomplete) claim if the missing evidence was not received within one year of VA's request." Pet. App. B17-B18. Under the version of Section 5103(a) that was in effect in 1995, the VA was precluded from making payments "by reason of [an] application" that was incomplete, where the VA had requested additional "evidence" in writing and the claimant had failed to respond within a year. The Veterans Court explained that, under its decision in *Robinette* v. *Brown*, 8 Vet. App. 69, 77-79 (1995), the statutory term "evidence" included the information required by the formal application form (as well as additional information that might be necessary to adjudicate the claim). Pet. App. B18-B20.

The Veterans Court also rejected petitioner's contention, raised at oral argument, that she was entitled to benefits from the time of her informal claim because the August 1995 letter was (in her view) "misleading or confusing" about the deadline for returning the formal application form. Pet. App. B21-B22. The Veterans Court reasoned that, even "assum[ing] that VA had a duty to notify claimants of the timeframe" for submitting a formal claim, petitioner would not be entitled to an earlier effective date, because "there is nothing in the record that indicates that [petitioner] relied to her detriment on the purportedly misleading notice." *Id.* at B21. In particular, the court explained, petitioner had "offered no explanation on appeal for the 6-year delay in returning" the form. *Ibid.*

Finally, the Veterans Court rejected petitioner's argument that the VA's August 1995 letter was so deficient as to violate constitutional due-process requirements. Pet. App. B22-B27. The Veterans Court reasoned that the constitutional issue was "directly control[led]" by a prior Veterans Court decision, *Morris* v. *Derwinski*, 1 Vet. App. 260 (1991), which held that claimants are charged with knowledge of federal statutes and lawfully promulgated agency regulations. Pet. App. B25-B26. The Veterans Court additionally noted that, in any event, "there is no evidence that [petitioner] relied on VA's allegedly misleading notice to her detriment." *Id.* at B26.

4. The Veterans Court denied full-court review. Pet. App. C1-C27. Chief Judge Kasold dissented. *Id.* at C2-C12. He took the view that, notwithstanding 38 C.F.R. 3.155(a), a formal claim can relate back to an informal claim even if the claimant took more than a year to respond to a request for a formal application.

Pet. App. C6. Chief Judge Kasold also concluded that the August 1995 letter requesting that petitioner complete the formal application form was not a request for further "evidence" that would trigger the one-year statutory time limit under 38 U.S.C. 5103(a) (1994). Pet. App. C7-C8.

Judge Bartley also dissented. Pet. App. C13-C27. She agreed that the Secretary had lawfully limited the relation-back doctrine under 38 C.F.R. 3.155(a) to claimants who return formal applications within a year. Pet. App. C13-C14. She relied, however, on 38 C.F.R. 3.110(b)—a provision that petitioner had not invoked—to conclude that petitioner's time limit never began to run because the VA had not informed petitioner of that time limit. Pet. App. C15-C18. Judge Bartley also believed that detrimental reliance was not an element of a non-constitutional claim alleging denial of "fair process" and that petitioner should not be charged with knowledge of the law in the circumstances of this case. *Id.* at C19-C26.

5. The court of appeals affirmed without opinion in an unpublished per curiam order. Pet. App. A1-A2; see Fed. Cir. R. 36.

ARGUMENT

The court of appeals' summary affirmance is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is not warranted.

1. Petitioner no longer disputes the validity of 38 C.F.R. 3.155(a), which specifies the circumstances in which a formal claim for benefits may be deemed to have been filed (and a right to benefits to have accrued) at the time an earlier informal claim was submitted. See Pet. App. B11-B15 (rejecting petitioner's

challenge to the regulation). Under Section 3.155(a), a claimant who files an informal claim with the VA is entitled to receive an "application form" through which she can file a formal claim. If the application form is "received within 1 year from the date it was sent to the claimant, it will be considered filed as of the date of receipt of the informal claim." *Ibid.* The clear implication of Section 3.155(a) is that an application form returned *more* than a year later does *not* relate back to the date on which the informal claim was submitted.

There is no dispute that petitioner's July 1995 submission in this case was an informal claim. Pet. App. B7. There is also no dispute that, in August 1995, the VA responded to that informal claim by requesting that petitioner file a formal claim and providing the form by which she could do so. *Id.* at B3-B4. And there is no dispute that petitioner failed to file such a formal claim within one year, but instead waited more than six years. *Id.* at B4-B5. The Veterans Court therefore correctly rejected petitioner's argument that her formal claim should relate back to her earlier informal claim.[1]

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[1] Judge Bartley's dissent from the denial of full-court rehearing by the Veterans Court reasoned that the one-year time limit never started running in this case. Pet. App. C15-C18. In her view, the August 1995 letter did not notify petitioner of the time limit for filing the formal claim, and 38 C.F.R. 3.110(b) specifies that the time within which a claimant is required to act does not begin to run until the claimant is notified of both the action required and the time limit for taking that action. Pet. App. C15-C18. Petitioner, however, never raised a Section 3.110(b) argument to the Veterans Court, see *id.* at C14 n.1; the Veterans Court never passed on it; it was neither pressed nor passed on in the court of appeals; and the petition does not focus on it. The issue accordingly does

2. Petitioner contends (Pet. 23-33) that the Veterans Court misinterpreted the 1995 version of 38 U.S.C. 5103(a). That argument provides no sound basis for further review. Because 38 C.F.R. 3.155(a) in itself refutes petitioner's contention that the filing of her formal claim should relate back to the filing of her informal claim, the court of appeals had no need to consider the proper interpretation of 38 U.S.C. 5103(a) (1994) in order to affirm the Veterans Court's disposition of the case. In any event, assuming the 1995 version of Section 5103(a) were directly at issue, it provides an independently sufficient ground for the judgment below and does not present any issue that would warrant this Court's review.

In 1995, Section 5103(a) provided that, "[i]f a claimant's application for benefits under the laws administered by the Secretary is incomplete, the Secretary shall notify the claimant of the evidence necessary to complete the application." 38 U.S.C. 5103(a) (1994). By designating a request for additional "evidence" as the Secretary's appropriate response whenever an "incomplete" benefits application was filed, the provision used the term "evidence" as a catchall to refer to any required information that the claimant had failed to submit. Former Section 5103(a) further provided that, "[i]f such evidence is not received within one year from the date of such notification, no benefits may be paid or furnished by reason of such application." As the Veterans Court correctly explained (Pet. App. B14-B18), petitioner's informal application was "incomplete" by virtue of its failure to include the completed required form; the VA's request that peti-

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not warrant this Court's review. See *United States* v. *Williams*, 504 U.S. 36, 41 (1992).

tioner fill out the form was a request for additional "evidence" within the meaning of former Section 5103(a); and petitioner's failure to provide that evidence within a year precludes her from receiving benefits from the date of her informal claim.

Contrary to petitioner's contention (Pet. 23-28), the term "evidence" in 38 U.S.C. 5103(a) (1994) was most naturally understood—and was understood by the Veterans Court—to encompass whatever required information the claimant had failed to include on the benefits application form. See *Robinette* v. *Brown*, 8 Vet. App. 69, 79 (1995) ("[T]he Court reaffirms that section 5103(a) imposes *more* of an obligation on the Secretary than *merely* to advise of the need to 'complete' all blanks on the claim form.") (emphasis added); see also *Davis* v. *Shinseki*, 22 Vet. App. 352, 354 (2009) ("As interpreted by the Court, [the 1995 version of section 5103(a)] required the Secretary to both notify a claimant regarding information needed to complete an application for benefits and to specifically advise a claimant who refers to the existence of relevant evidence to submit that evidence."). That reading follows logically from the fact that, under the prior version of the statute, the filing of an "incomplete" application automatically triggered a VA obligation to "notify the claimant of the evidence necessary to complete the application." 38 U.S.C. 5103(a) (1994). That version of the statute did not contemplate the possibility of a VA benefits application that was "incomplete" for some reason *other than* a want of necessary "evidence." In any event, because Section 5103 has since been amended so that it addresses "information" and "evidence" separately, see Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, § 3(a), 114

Stat. 2096, the proper interpretation of the 1995 version of the statute has little prospective importance.

Petitioner contends (Pet. 28-33) that the Veterans Court "implicitly" interpreted the 1995 version of Section 5103 to require the VA only to provide notice of the need for additional evidence, and not to provide notice of the time limit for submitting such evidence. That argument likewise does not warrant this Court's review. First, the Veterans Court stated that it "need not reach" that issue and thus did not implicitly decide it. Pet. App. B21. Second, petitioner's interpretation of the 1995 version of the statute as requiring notification about time limits has no basis in the statutory text, which required notification of the "evidence necessary to complete the application," 38 U.S.C. 5103(a) (1994), but did not similarly require any notification as to time limits. Third, the current version of the statute explicitly directs the Secretary to promulgate regulations that require informing the claimant of the relevant time limits, 38 U.S.C. 5103(a)(2)(B)(iv), so the proper interpretation of the predecessor statute is of no continuing importance.[2]

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[2] Petitioner argued in the Veterans Court (but does not appear to argue in this Court) that, notwithstanding 38 C.F.R. 3.155(a) and 38 U.S.C. 5103(a) (1994), two other provisions—38 U.S.C. 5110(a) and 38 C.F.R. 3.1(p)—require that she receive benefits from the time she filed her informal claim. See Pet. App. B15. Section 5110(a) states that, "[u]nless specifically provided otherwise in this chapter, the effective date of an award based on an original claim * * * shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." Section 3.1(p) defines "[a]pplication" to mean "a formal or informal communication in writing" that seeks a benefit. Petitioner's reliance on those provisions is misplaced. First, petitioner's argument presupposes that the particular "claim" for

3. Petitioner separately contends (Pet. 33-46) that the Veterans Court erred in relying on the absence of evidence that she detrimentally relied on alleged deficiencies in the VA's August 1995 letter to reject a claim that such alleged deficiencies violated her non-constitutional right to "fair process." Under the fair-process doctrine, which was created by the Veterans Court, "before the Board [of Veterans Appeals] relies on any evidence developed or obtained subsequent to the issuance of the most recent Statement of the Case or Supplemental Statement of the Case, the Board must 'provide a claimant with reasonable notice of such evidence . . . and a reasonable opportunity for the claimant to respond to it.'" *Sprinkle* v. *Shinseki*, 733 F.3d 1180, 1185 (Fed. Cir. 2013) (quoting *Thurber* v. *Brown*, 5 Vet. App. 119, 126 (1993)). The Veterans Court, however, did not expressly pass on any fair-process argument in this case.

In any event, petitioner is wrong in asserting that detrimental-reliance principles are inapplicable to a claim raising non-constitutional fair-process concerns. The Veterans Court is required under 38 U.S.C. 7261(b)(2) to "take due account of the rule of prejudicial error" when "making the determinations" that are within its jurisdiction. See *Shinseki* v. *Sanders*, 556 U.S. 396, 406 (2009) ("We believe that the statute, in stating that the Veterans Court must 'take due ac-

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which petitioner was awarded benefits was the informal claim she filed in July 1995, rather than the formal claim she filed in October 2001. Second, although Section 5110(a) precludes an effective date "*earlier than*" the date on which the relevant application was filed (emphasis added), it does not preclude a *later* effective date. Third, even if Section 5110(a) were read to establish a default rule that benefits run from the date an initial application is filed, Section 5103(a) "provide[d] otherwise" from that default rule.

count of the rule of prejudicial error,' requires the Veterans Court to apply the same kind of 'harmless-error' rule that courts ordinarily apply in civil cases."); *Mlechick* v. *Mansfield*, 503 F.3d 1340, 1345 (Fed. Cir. 2007) ("Congress requires the Veterans Court to take due account of the rule of prejudicial error in cases coming before it."). Nothing in that statute suggests an exception in cases involving fair-process arguments. To the contrary, the Court in *Shinseki* v. *Sanders*, *supra*, rejected a rule under which the Veterans Court would presume a particular lack of notice to be prejudicial "unless the VA can show that the error did not affect the essential fairness of the adjudication." 556 U.S. at 404; see *id.* at 399. The Court emphasized that "mandatory presumptions" of harm would be inconsistent with the inquiry that Section 7261(b)(2) requires. *Id.* at 406-407.

None of the Veterans Court decisions cited by petitioner (Pet. 34-42) stands for the proposition that harmless-error principles are categorically inapplicable to fair-process arguments. Rather, in those decisions, the court either did not discuss the prejudicial-error doctrine or found that prejudice had been established in particular factual circumstances. See *Sanders*, 556 U.S. at 410 (noting that "[o]ften the circumstances of the case will make clear to the appellate judge that the ruling, if erroneous, was harmful and nothing further need be said"). If those decisions did create a categorical exception to Section 7261(b)(2), they would be incorrect. As the Federal Circuit explained in a case involving an issue of allegedly deficient notice, Section 7261(b)(2) "is plain on its face" and "applies to all Veteran's Court proceedings."

Conway v. *Principi*, 353 F.3d 1369, 1374 (2004); see *Sanders*, 556 U.S. at 406.

To the extent petitioner simply contends that a prejudicial fair-process error occurred in this particular case, such a fact-bound claim (regarding an alleged error that the Veterans Court did not address) does not warrant this Court's review. See Sup. Ct. R. 10. Indeed, it would be difficult for this Court to review such a contention in the absence of any finding below that the notice was, in fact, deficient. See *Mayfield* v. *Nicholson*, 444 F.3d 1328, 1335 (Fed. Cir. 2006) (explaining that whether a communication "satisfied the statutory and regulatory notification requirements was a substantially factual determination"); see also 38 U.S.C. 7292(d)(2) (prohibiting the court of appeals from reviewing factual findings).

4. Petitioner briefly asserts (Pet. 17-19) that her equal-protection and due-process rights were violated in this case because "the Secretary often provides benefits to veterans even though they fail to submit a formal request for said benefits." Because that argument was neither pressed nor passed on below, it does not warrant this Court's review. *United States* v. *Williams*, 504 U.S. 36, 41 (1992). In particular, because the argument was not developed below, the record lacks concrete information about the similarly situated claimants whom petitioner asserts received better treatment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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