No. _____

In The
Supreme Court of the United States

MARK H. BONNER,

Petitioner,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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May 27, 2022

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QUESTIONS PRESENTED

The U.S. Court of Appeals for Veterans Claims is an Article I court, and does not have the general equity jurisdiction of U.S. District Courts or other Article III courts. Where it does exercise equitable powers, it is pursuant to specific statutory grant.

Veterans claims alleging Clear and Unmistakable Error (CUE) are, by statute, exceptions to the doctrine of res judicata (claim preclusion).

The questions presented are:

(1) Whether it is within the jurisdiction of the U.S. Court of Appeals for Veterans Claims to decide a veteran's claim on the basis of the equitable remedy of collateral estoppel where no statute so provides.

(2) Whether it is within the jurisdiction of the U.S. Court of Appeals for Veterans Claims to deny a CUE claim on the basis of Collateral Estoppel (issue preclusion) where it is forbidden to do so on the basis of Res Judicata (claim preclusion).

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

Petitioner Mark H. Bonner was Claimant-Appellant in No. 21-1817.

Respondent Denis McDonough, Secretary of Veterans Affairs, was Respondent-Appellee in No. 21-1817.

There are no publicly held corporations involved in this proceeding.

The following are parties to the proceedings within the meaning of Rule 14.1(b)(i): the estate of Elizabeth H. Bonner, wife of veteran Emmett P. Bonner (deceased).

RELATED CASES

- *Bonner v. Nicholson*, No. 02-742, U.S. Court of Appeals for Veterans Claims. Judgment entered June 17, 2005.
- *Bonner v. Nicholson*, No. 2005-7190, U.S. Court of Appeals for the Federal Circuit. Judgment entered Aug. 16, 2007.
- *Bonner v. Wilkie,* No. 18-6927, U.S. Court of Appeals for Veterans Claims. Judgment entered Jan. 13, 2021.
- *Bonner v. McDonough,* No. 2021-1817, U.S. Court of Appeals for the Federal Circuit. Judgment entered Dec. 14, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Mark Healy Bonner, executor of the estate of the widow of deceased U.S. Navy veteran Rear Admiral Emmett P. Bonner, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Federal Circuit (*Bonner v. McDonough*) (App. 1-2) is unreported but is available at 2021 U.S. App. LEXIS 36893, *21, WL 5896532.

The opinion of the United States Court of Appeals for Veterans Claims (*Bonner v. Wilkie*) is reported at 33 Vet. App. 209 (2021) (App. 3-41).

The upstream opinion of the Federal Circuit (*Bonner v. Nicholson*) is reported at 497 F.3d 1323 (Fed. Cir. 2007) (App. 57-73).

The opinion of the United States Court of Appeals for Veterans Claims (*Bonner v. Nicholson*) is reported at 19 Vet. App. 188 (2005) (App. 74-93).

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). The judgment of the Federal Circuit

was entered on December 14, 2021 and the petition for rehearing and for rehearing en banc was denied on March 1, 2022.

STATUTORY PROVISIONS INVOLVED

Section 5110 of title 38 is titled "Effective dates of awards." Section 5110(a)(1) states:

> Unless specifically provided otherwise in this chapter, the effective date of an award based on an initial claim, or a supplemental claim, of compensation, dependency and indemnity compensation, or pension, shall be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor.

38 U.S.C. § 5110(a)(1).

Section 7111 of title 38 is titled "Revision of decisions on the grounds of clear and unmistakable error." Section 7111(a) states:

> A decision by the Board is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

38 U.S.C. § 7111(a).

Section 5109A of title 38 is titled "Revision of decisions on grounds of clear and unmistakable error." Section 5109A(a) states:

> A decision by the Secretary under this chapter [38 USC §§ 5100 et seq.] is subject to revision for clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised.

38 U.S.C. § 5109A(a)

REGULATORY PROVISIONS INVOLVED

Section 3.312 of title 38, Code of Federal Regulations, is titled "Cause of Death." Section 3.312(a) states:

> The death of a veteran will be considered a having been due to a service-connected disability when the evidence establishes that such disability was either the principal or a contributory cause of death. The issue involved will be determined by the exercise of sound judgment, without recourse to speculation, after a careful analysis has been made of all the facts and circumstances surrounding the death of the veteran, including, particularly, autopsy reports.

38 C.F.R. § 3.312(a)

Section 3.313, Code of Federal Regulations, is titled "Claims based on service in Vietnam." Section 3.313(b) states:

> Service in Vietnam during the Vietnam Era together with the development of non-Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

38 C.F.R. § 3.313(b)

INTRODUCTION

Our country provides financial protection for members of the armed forces who are killed or injured in service to our country. Besides being the right thing to do, it has the benefit of allowing, for example, a young man with a family to have a good conscience in voluntarily serving his country in war, knowing he may well be killed or seriously injured: he is assured that his widow and children will be taken care of by a grateful nation. The principal vehicle for providing this benefit is Dependency and Indemnity Compensation (DIC).

The veteran in this case fought in three of our nation's wars: WWII, Korea, and Vietnam. His death from non-Hodgkin's lymphoma is attributed to two particular events during his 37 years of service in the U.S. Navy: being an onsite participant at the atmospheric detonation in the Pacific of an H-bomb with its concomitant ionizing radiation, and commanding the U.S.

Naval Support Activity in Danang for a year, where he was exposed to a heavy dose of agent orange. He died of non-Hodgkin's lymphoma in 1975, a few years after leaving Vietnam. He was 56 when he began treatment, and 57 when he died.

His widow timely applied for DIC, and specified "cancer" as the cause of death. App. 94. Her claim was summarily denied because the VA at that time declined to recognize any form of cancerous lymphoma to be caused by service. Twenty years later, in the face of overwhelming evidence, the government amended its regulations to allow for service connection for NHL, and made payment of DIC retroactive to the date of the original claim even if previously denied. The widow then applied for DIC retroactive to her original claim. The Board of Veterans Appeals (Board) denied it because, they said, a claim for cancer did not state a claim for non-Hodgkin's lymphoma. App. 79-80. The Veterans Court agreed (with one judge, however, of the opinion that the adequacy of the claim should not have been reached). The Federal Circuit affirmed, stating that the proper procedure was for the widow to file a CUE motion. App. 64-66. Circuit Judge Newman dissented on the widow's behalf. App. 68-73.

The widow promptly filed her CUE motion. The Board denied it, and the Veterans Court affirmed in a precedential opinion. App. 3-41. The Veterans Court ruled on basis of alleged collateral estoppel flowing from the earlier Federal Circuit decision – a basis not forming part of the Board decision the Veterans Court was reviewing. App. 42-54. The majority of the Veterans Court panel felt bound by collateral estoppel and

stated that they may well have decided the case differently if collateral estoppel did not, in their view, bind their hands. App. 23. The dissenting Veterans Court Judge (Greenberg), quoting the earlier dissenting Circuit Judge, denominated the denial of the claim "a travesty." App. 40.

Upon appeal to the Federal Circuit, the court affirmed without opinion thus leaving the Veterans Court's precedential opinion as binding law.

STATEMENT OF THE CASE

This case is on a request from a Navy widow for DIC for her husband's death in 1975 from a service connected disease – non-Hodgkin's lymphoma – shortly after two tours of duty in Vietnam, retroactive to the date of her original claim filed that year. This claim is for 20 years of past-due DIC from September 9, 1975 when the VA received the widow's application for DIC until the VA commenced it on December 1, 1995.

This case should have been resolved in short order and was not particularly difficult: the veteran served two tours of duty in Vietnam and died a few years later in 1975 of non-Hodgkin's lymphoma. His widow sent a prompt claim for DIC to the VA, specifying cancer as cause of death.

The current state of the case is that the VA avoids review behind a theory of collateral estoppel wherein the Federal Circuit supposedly pretermitted the widow

from raising the nature of her claim in the very CUE motion that the Federal Circuit ruled in 2007 was the proper procedure for her to follow. If collateral estoppel does not apply, then the Federal Circuit's prescription to file a CUE motion makes sense. The Veterans Court's opinion that collateral estoppel does apply requires finding that the Federal Circuit sent the widow on the errand of making a motion the basis for which it had already precluded from consideration.

Birth, marriage, service, death. Emmett P. Bonner (hereinafter RADM Bonner, or the Veteran) was born in Macon, Georgia on February 27, 1918 and was appointed to the Naval Academy by Congressman Carl Vinson, and entered Annapolis on June 1, 1935. RADM Bonner graduated in 1939 and served and saw action in WWII, the Korean War, and the Vietnam War. He married Elizabeth H. Bonner (hereinafter the widow) in 1942. During his service he was Gunnery Officer on the USS St. Louis CL 49 (WWII), and was Commanding Officer of the following: the USS Cogswell DD 651 (Korea), CORTRON 12 a squadron of destroyers, the USS Norton Sound AVM 1, the USS Oklahoma City CLG 5 (Vietnam), Cruiser Destroyer Flotilla 6, the Atlantic Fleet Mine Force, and the U.S. Naval Support Activity Danang (Vietnam). He was the director of the Navy surface to air missile program, and participated in onsite H-bomb tests in the Pacific. He retired on May 1, 1972 and died on August 1, 1975 of non-Hodgkin's lymphoma at age 57 after he endured a year's unsuccessful treatment at the National Naval Medical Center. The NNMC unsuccessfully treated him for

what the NNMC mistakenly thought was Hodgkin's disease.

1975 DIC Claim. His widow made a claim for DIC on August 30, 1975 writing "cancer" in the box on the VA's form calling for cause of death. App. 94. On March 8, 1976 the VA denied DIC by means of a checked box on a form announcing "death not due to service." Every month thereafter for 20 years the VA failed to pay DIC to the widow, who was forced to make do without it.

DOJ, NIH, and non-Hodgkin's lymphoma. In 1995 the widow applied to the U.S. Department of Justice for an award under the Radiation Exposure Compensation Act, because RADM Bonner had been an onsite participant in some H-bomb tests in the Pacific and had died of cancer. While the NNMC's diagnosis in 1975 was Hodgkin's disease their autopsy report also contained much significant and specific exclusive evidence of non-Hodgkin's. The Justice Department decided that the NNMC autopsy report should be reviewed, and sent it to the National Institutes of Health (NIH) for such review. The NIH reported to the Justice Department that RADM Bonner had actually died of non-Hodgkin's lymphoma, and that the 1975 NNMC diagnosis was in error. The Justice Department awarded the widow RECA payment based on the NIH report and diagnosis of non-Hodgkin's lymphoma.

1995 Request for application of new, retroactive laws. In 1995 the widow also became aware of new VA

laws finding non-Hodgkin's lymphoma to be service connected and authorizing retroactive application with a retroactive effective date even to previously denied DIC claims. Her previously denied claim was for cancer. On October 31, 1995 the widow applied to the VA for DIC under these laws. On November 27, 1995 the VA issued a rating decision finding cause of death as Hodgkin's, and on July 1, 1996 the VA granted an effective date of December 1, 1994, without addressing the issue of date of original claim.

On August 15, 1996 appellant filed an appeal with the Board and moved the Board to advance the appeal on the docket because of the widow's old age**.** It was denied. On September 28, 2001, 1870 days later, the Board denied the appeal, fatally confusing what the claim was with why it was denied:

> "However, even assuming without deciding, that the appellant's reading of VAOPGCPREC 5-94 as providing 'benefits under 3.313(b) retroactively effective to the date of the original claim, regardless of whether the claim had previously been denied,' is correct, the board concludes that the previous denial in such a case must have been a denial of a claim for service connection for NHL, not a denial of service connection for another disease." App. 79-80.

The widow appealed to the Veterans Court, which affirmed the BVA decision denying the widow's November 1995 informal claim for DIC. App. 74-93. Judge Hagel parted from the panel majority on whether the

claim of cancer was sufficient to claim non-Hodgkin's lymphoma as cause of death:

> "Although I concur in the result of this opinion, I respectfully disagree with the reasoning employed by the majority in part III.B regarding Mrs. Bonner's claim for service connection for non-Hodgkin's lymphoma.
>
> * * *
>
> [T]he issue of the breadth of Mrs. Bonner's initial claim for benefits is not, in my view, properly before us at this time. Consequently, I believe that it was unnecessary for the majority in part III.B to reach the question of whether a previously denied application for service connection for "cancer" may include a claim for non-Hodgkin's lymphoma pursuant to G.C. Prec. 5-1994 and § 3.313 *Ante* at 8-10."

(Hagel, J., concurring). App. 91.

The widow appealed to the Federal Circuit, which affirmed the Veterans Court.[1] App. 57-73.

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[1] The majority panel in that case wrote: "Mrs. Bonner does not explain how the Veterans Court purportedly misinterpreted *Moody* [*v. Principi*]." App. 66. Our point was that a sympathetic (or even plain) reading of the claim of cancer could not rationally lead to the decision reached by the Veterans Court, to wit: that making a claim for cancer did not make a claim for NHL. Our argument was that therefore the Veterans Court, notwithstanding having recited the requirement of *Moody*, could not have been applying it, as shown by the impossible result they reached. That is, the result reached, assuming attempted application of *Moody* and not disregard of it, must have entailed a fatal misunderstanding

On the issue of cause of death, the Federal Circuit held:

> "The Veterans Court did not decide or rely on the cause of Admiral Bonner's death in affirming the Board's decision."

App. 67.

On the issue of adequacy of the 1975 claim, the Federal Circuit held:

> "Additionally, the Government contends that Mrs. Bonner failed to demonstrate how the VA erred in developing her 1975 claim and that even if Mrs. Bonner were able to show that she had reasonably raised a claim for NHL in 1975 that has not yet been adjudicated, such an error is to be corrected through a motion asserting the VA had committed clear and unmistakable error (CUE)."

App. 64.

After setting forth this invitation by the government this Court noted:

> "The only way the RO's unappealed 1976 decision can be collaterally attacked is through a claim of 'clear and unmistakable' error ('CUE'). At oral argument Mrs. Bonner conceded that

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of *Moody* by the Veterans Court and application by it of an erroneous ad hoc interpretation of *Moody* flatly inconsistent with it. It's one thing to shield application of law to the facts from review, but if the rule of law applied, as shown by the decision reached, is at odds with the law, then it is an issue of law and may be reviewed.

> a CUE claim was not at issue in the case. Therefore, the issue of the validity of the 1976 decision is not before us."

App. 65.

> "CUE is not simply a 'buzz word' as stated by the dissent. It is a statutorily created avenue for challenging a VA decision. See 38 U.S.C. § 5109A"

App. 66.

Dissenting from the panel majority's opinion, Circuit Judge Newman wrote:

> "The Department of Veterans Affairs relied on a plainly incorrect autopsy diagnosis to deny Mrs. Bonner the Dependency and Indemnity Compensation benefits to which she is entitled. From the panel majority's denial of these benefits and refusal to correct the concededly incorrect cause of death, I respectfully dissent.
>
> * * *
>
> It is not disputed that the second diagnosis is the correct one.
>
> * * *
>
> It is not an unreviewable factual question of whether the VA is required to recognize an undisputed error in the veteran's records, and to apply the correct cause of death to survivor's claims. Upon such recognition, Mrs. Bonner's claim would be subject to determination on the correct grounds, whether or not she

> used the buzz-words 'clear and unmistakable error (CUE)' in her petition (as the government argues). The obligatory veteran-friendly position of the law governing veterans' claims negates this hyper-technical reason whereby the Veterans Court refused to consider the merits of Mrs. Bonner's claim. From my colleagues' acceptance of this reasoning, I respectfully dissent."

App. 68-73.

Subsequent CUE Motion and appeal to Veterans Court. Following the guidance of the Federal Circuit, the widow filed her first and only CUE motion with the Board of Veterans Appeals and with the Regional Office on June 5, 2008. On November 2, 2018 the Board denied it, having taken over 10 years to do so. App. 42-54.

The 2021 Veterans Court decision. The Veterans Court affirmed the Board's denial of the widow's CUE motion, based in large part on the basis of purported collateral estoppel arising from the Federal Circuit's 2007 *Bonner v. Nicholson* decision, *supra*, the Veterans Court majority stating: "Therefore, applying the principles of collateral estoppel basically ends the matter," and "We are left with no choice but to, reluctantly, affirm." Judge Greenberg dissented based on application of the law of collateral estoppel and issues of equity and statutory interpretation.

More particularly, in its majority decision, the Veterans Court stated:

> "We will return to the judicial decisions in a moment because, as we explain, they are critical to the resolution of the appeal before us." App. 7.
>
> "But, in Mrs. Bonner's prior appeal both this Court *and* the Federal Circuit made determinations in the precedential decisions that impact the Court's decision here today." App. 13.
>
> "As we discuss below, the findings in these two decisions guide us today. Quite simply, the conclusions reached in connection with Mrs. Bonner's prior appeals leave us with little room to maneuver." App. 15.
>
> " . . . It does not go unnoticed that the principles of collateral estoppel, or issue preclusion, apply here." App. 15.
>
> "Therefore, applying the principles of collateral estoppel basically ends the matter." App. 16.
>
> "Those decisions make it difficult – effectively impossible – to find CUE in the February 1976 decision today on the basis argued by the appellant." App. 23.
>
> "Moreover, if we were writing on a blank slate, we might very well have reached the same conclusion as Judge Newman did in her dissent in Mrs. Bonner's earlier appeal." App. 23.

> "We are left with no choice but to, reluctantly, affirm." App. 24.

Thus, the Veterans Court made it clear that collateral estoppel was determinative of the Veterans Court's precedential decision. The Federal Circuit has affirmed without opinion.

REASONS FOR GRANTING THE PETITION

I. THE PRECEDENTIAL DECISION OF THE VETERANS COURT IS PALPABLY BAD LAW AND SHOULD BE REVERSED BEFORE IT CAN HARM OTHER VETERANS.

The VA does not pay any interest on claims later found to have been wrongly denied, nor does it provide any compensation for the harm that wrongful delays, often massive delays, have caused. The veterans and their families are thus *never* made whole for VA errors, even where the VA eventually corrects them or is ordered to correct them. Therefore there is a unique urgency in correcting VA errors as soon as possible.

II. COLLATERAL ESTOPPEL BY THE SECRETARY AGAINST VETERANS IS NOT AVAILABLE TO THE SECRETARY IN VETERANS CLAIMS CUE CASES FOR TWO INDEPENDENT AND INDIVIDUALLY-SUFFICIENT REASONS: 1) COLLATERAL ESTOPPEL IS AN EQUITABLE DOCTRINE, AND THE ARTICLE I VETERANS COURT DOES NOT HAVE EQUITY JURISDICTION, AND 2) CUE IS A STATUTORY EXCEPTION TO RES JUDICATA (CLAIM PRECLUSION) AND IS THEREFORE AN EXCEPTION TO COLLATERAL ESTOPPEL (ISSUE PRECLUSION).

A. Collateral estoppel is an equitable remedy. The Veterans Court lacks equitable power; thus the Veterans Court lacked the power to use collateral estoppel in its denial of the widow's benefits.

The Veterans Court below issued an opinion internally at odds with itself. On the one hand it raised the equitable affirmative defense of collateral estoppel sua sponte for the first time on appeal and used it to deny the veteran's claim, while at the same time failing to apply the equitable law of collateral estoppel concerning waiver and weighing the equities in favor of the veteran, apparently being of the opinion that it did not have equity jurisdiction. Judge Greenberg's dissent makes this clear.

The issue of the scope of the equity jurisdiction of the U.S. Court of Appeals for Veterans Claims is

currently before this Court in *Arellano v. McDonough*, 1 F.4th 1059 (Fed. Cir. 2021), cert. granted, 142 S. Ct. 1106 (Feb. 22, 2022) (No. 21-432). The question presented there is whether equitable tolling applies to 38 U.S.C. § 5001(b) regarding the effective date of veterans benefits awards. The government has argued that it does not. This Court's decision in *Arellano* will foreseeably affect the outcome of the instant case. If the Veterans Court has equitable jurisdiction, this case should be remanded to the Veterans Court for exercise of that jurisdiction, as argued by Judge Greenberg in his dissent below. If this Court rules that the Veterans Court lacks such jurisdiction, this case should be remanded to the Veterans Court with instructions that the equitable doctrine of collateral estoppel is not available in that court.

It is noted that the Federal Circuit has stayed proceedings in a veterans case pending this Court's decision in *Arellano*: *Taylor v. McDonough*, 4 F.4th 1381 (Fed. Cir. 2021) (No. 2019-2211) by its order therein entered the day certiorari was granted in *Arellano*. *Taylor* raises the issue of collateral estoppel against the government's asserting untimeliness where the government administered chemical warfare agents to the veteran in an experiment and threatened imprisonment if the veteran were to disclose this.

In ruling against the widow below, the Veterans Court panel majority below stated:

> " . . . the principles of collateral estoppel, or issue preclusion, apply here. . . . Therefore,

> applying the principles of collateral estoppel basically ends the matter."

Bonner v. Wilkie, at 216.

Moore's Federal Practice states:

> "Collateral estoppel (issue preclusion) is an equitable doctrine that should be applied only when the alignment of the parties and legal issue and factual issues raised warrant it. [citing] *CBF Industries v. AMCI Holdings*, 850 F.3d 58, 78 (2d Cir. 2017) (because issue preclusion is an equitable doctrine, litigant who invokes it must have clean hands, and court will not apply issue preclusion in favor of one who acted fraudulently or who has, by deceit or other means gained unfair advantage in previous tribunal.)"

Moore's Federal Practice, § 132.01[4][d].

The Veterans Court has held that it is not a court of equity and cannot provide equitable relief:

> "It is well established that this Court is a court of law, and not of equity, and we cannot provide equitable relief. *Taylor v. West*, 11 Vet. App. 436, 330 (1998)." *Smith v. Gober*, 14 Vet. App. 227, 231 (2000).

If the Veterans Court *does* have equitable power, appellant would respectfully urge this Court to rule on the basis of Judge Greenberg's dissent herein where he wrote:

> "If there was ever a case for the Court to set precedent of exercising its equitable powers

> bestowed upon it by Congress, it is this one. The veteran served the United States honorably for over four decades and multiple conflicts and wars, and left behind his wife and children after dying from cancer due to herbicide and radiation exposure. For the Court to ignore the 'obligatory veteran-friendly positions of the law' and deny a veteran, or his or her family, deserved benefits based on a 'hypertechnical reason whereby [our Court] refused to consider the merits of [the appellant's] claim of CUE is a travesty that plainly conflicts with Congressional intent in creating a veteran – friendly system.' (citing to *Bonner v. Nicholson*, 497 F.3d at 1331 (Newman, J., dissenting)." App. 40.

See also Title v. Immigration and Naturalization Service, 322 F.2d 21, 24 (9th Cir. 1963) ("It has been recognized that the doctrine should not be exercised in such a manner as to work an injustice." [citing] Scott, Collateral Estoppel by Judgment, 56 Harv.L.Rev. 1, 29 (1942); *U.S. v. LaFatch*, 656 F.2d 81, 83 (6th Cir. 1977) (application of res judicata would result in 'manifest injustice' and would violate overriding public policy); *Moch v. East Baton Rouge Parish School Bd.*, 548 F.2d 594, 597 (5th Cir. 1977).

> "[C]ollateral estoppel is an equitable doctrine – not a matter of absolute right. Its invocation is influenced by considerations of fairness in the individual case. *See Blonder-Tongue Labs., Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 334 (1971) ('In the end, the decision [on an

> issue of collateral estoppel] will necessarily rest on the trial courts' sense of justice and equity.'); *Conte v. Justice*, 996 F.2d 1398, 1400 (2d Cir. 1993) (doctrine 'is premised on notions of due process and fairness.'); *Nations v. Sun Oil Co. (Del.)*, 705 F.2d 742, 744 (5th Cir. 1983) ('Collateral estoppel is an equitable doctrine.')."

PenneCom B. V. v. Merrill Lynch & Co., 372 F.3d 488, 493 (2d Cir. 2004).

B. Using collateral estoppel against the veteran in a VA CUE case is contrary to statutory, regulatory, and caselaw.

The Veterans Court lacks jurisdiction to deploy collateral estoppel at all, and especially in the context of a CUE motion. The CUE statute prohibits its use in this context. The Federal Circuit has so held in *Cook v. Principi*, 381 F.3d 1334, 1337 (Fed. Cir. 2002). *Cook* confirms that CUE motions are an exception to the rule of finality of res judicata:

> "Principles of finality and *res judicata* apply to agency decisions that have not been appealed and have become final. . . . There are, however, two statutory exceptions to the rule of finality. . . . Second, a decision 'is subject to revision on the grounds of clear and unmistakable error.' 38 U.S.C. §§ 5109A (decision by the Secretary) & 7111 (decision by the Board).

> These are the only statutory exceptions to the finality of VA decisions." [footnote omitted]

Cook v. Principi, 381 F.3d 1334, 1337 (Fed. Cir. 2002).

Collateral estoppel does properly appear in the Federal Circuit's jurisprudence in cases from other tribunals within that Court's jurisdiction, but is problematic in veterans law for legal and policy reasons. The Veterans Court did not cite any precedent from this Court or the Federal Circuit allowing it.

In *Henderson v. Shinseki*, 562 U.S. 428, 438 (2011) this Court observed that rules of law appropriate before Article III tribunals such as U.S. District Courts did not necessarily apply to the Article I Veterans Court, in ruling that a notice of appeal was not jurisdictional in the latter court. Likewise, this doctrine appropriate for District Courts should not migrate into usage in the Veterans Court.

This Court has defined the doctrine as follows:

> "Under the judicially developed doctrine of collateral estoppel, once a court has decided an issue of fact or law necessary to its judgment, that decision is conclusive in a subsequent suit based on a different cause of action involving a party to the prior litigation. *Montana v. United States*, 440 U.S. 147, 153 (1979). Collateral estoppel, like the related doctrine of res judicata, serves to 'relieve parties of the cost and vexation of multiple lawsuits, conserve judicial resources, and, by preventing inconsistent decisions, encourage reliance on

> adjudication.' *Allen v. McCurry*, 449 U.S. 90, 94 (1980)."

United States v. Mendoza, 464 U.S. 154, 158 (1984).

The error below was in ascribing the equitable powers possessed by Article III tribunals to the Article I Veterans Court.

The Federal Circuit has held:

> "The Veterans Court, as an Article I tribunal, is a creature of statute by definition. See 38 U.S.C. § 7251. ('There is hereby established, under Article I of the Constitution of the United States, a court of record to be known as the United States Court of Appeals for Veterans Claims.') As such, the court can only act through an express grant of authority from Congress. *See Dixon v. McDonald*, 815 F.3d 799 (Fed. Cir. 2016) ('Courts created by statute can have no jurisdiction, but such the statute confers.' (quoting *Christianson v. Colt Indus. Operating Corp.*, 486 U.S. 800, 818 (1988)) To resolve Appellants' challenge, therefore, we must construe the Veterans Court's jurisdictional statute to determine whether it allows the court to provide the equitable relief they seek."

Burris v. Wilkie, 888 F.3d 1352, 1357 (2018).

The Federal Circuit in *Burris* continued as to whether "inherent" powers might apply:

> "It is clear that the Veterans Court has authority to grant certain forms of non-substantive

> equitable relief required to enable the court to carry out its statutory grant of jurisdiction. *See In re Bailey*, 812 F.3d 860, 864 n.4 (Fed. Cir. 1999) ('Like an Article III court, the Court of Appeals for Veterans Claims has a need to control court proceedings before it and a need to protect the exercise of its authority in connection with those proceedings.') (citing *Monk v. Shulkin*, 855 F.3d 1312, 1320 (Fed. Cir. 2017) . . .
>
> But the Veterans Court cannot invoke equity to *expand* the scope of its statutory jurisdiction. *See Comm'r v. Gooch Milling & Elevator Co*., 320 U.S. 418, 421 (1943) . . . "

Id. at 1261.

Res judicata is foreclosed by statutory provision, regulation, and judicial decision. Collateral estoppel comprises part of and is a necessary element of it, being administered piecemeal rather than all at once and having the effect of foreclosing CUE review. Both are in fatal tension with the CUE statute and purpose. And neither is "required to enable the court to carry out its statutory grant of jurisdiction." Neither this Court nor the Federal Circuit has never allowed it in a CUE context. The sole case allowing it is the Veterans Court's precedential opinion below that we are asking this Court to reverse.

In the instant case, the statutory jurisdiction of the Veterans Court is limited to reviewing decisions of the Board of Veterans Appeals. Here, the Board of

Veterans Appeals did not so much as mention the Federal Circuit decision said to give rise to collateral estoppel, nor did the Board even cite it. Therefore it was beyond the jurisdiction of the Veterans Court to do so. *See also Bowles v. Russell*, 551 U.S. 205, 214 (2007) (explaining that a court "has no authority to create equitable exceptions to jurisdictional requirements)."

Importation without analysis of whether veterans law permits it. The Veterans Court cites *Young v. Shinseki*, 25 Vet. App. 201, 204 (2012) (en banc) in footnote 33 of its opinion below for the proposition that "principles of collateral estoppel, or issue preclusion, apply here." App. 15. The Veterans Court in *Young*, without discussion of whether collateral estoppel applies in veterans claims appeals from the Board, proceeded simply to apply it, citing there to "*Mintzmyer v. Dep't of the Interior*, 84 F.3d 419, 423 (Fed. Cir. 1996)." *Young*, 25 Vet. App. at 204. *Mintzmyer*, an appeal from the Merit Systems Protection Board, was a suit on constructive discharge, "an issue that was fully litigated in the district court." *Mintzmyer*, 84 F.3d at 423. In dissent in *Young*, Judges Lance and Hagel, after observing "The infirmity of the majority opinion is simply breathtaking" stated:

> "However, collateral estoppel generally prevents any adjudication system from issuing decisions that reach inconsistent conclusions about the same factual issue. Hence, this Court has repeatedly modified decisions to avoid collateral estoppel issues when the Board has made unnecessary findings of

> finality unfavorable to a claimant. *See Juarez v. Peake*, 21 Vet. App. 537, 544 (2008); *Seri v. Nicholson*, 21 Vet. App. 441, 444-45 (2007). Rather than address *Cook* and the cases cited therein, the majority cites Federal Circuit precedent outside of veterans law pertaining to court litigation to assert that a different test would apply and then fails to explain its application."

Young, 25 Vet. App. at 209 (Lance, J., joined by Hagel, J., dissenting).

Using collateral estoppel is beyond the jurisdictional authority of the Veterans Court, and the court below erred in ruling based on it. The Federal Circuit precedent allowing the use of collateral estoppel in a Veterans claim case is ill-conceived and should be corrected.

C. The Veterans Court's precedential opinion suffers from additional chaotic application and reasoning and should be corrected.

1. Since the Board did not decide any issue of collateral estoppel, it was beyond the jurisdiction of the Veterans court to do so.

38 U.S.C. § 7104(d)(1) requires that the Board must decide "all material issues of fact and law presented on the record." The Board did not cite or refer or rely on *Bonner v. Nicholson*, 19 Vet. App. 188 (2005) and the subsequent decision on the widow's appeal to

the Federal Circuit, *Bonner v. Nicholson*, 497 F.3d 1323 (Fed. Cir. 2007). The Board made no mention of, nor applied, collateral estoppel, despite being aware of the opinions cited above. The time for the Secretary to raise collateral estoppel was when the case was before the Board: a time when facts are to be found, and where the veteran has the important protection that Board rulings in his favor are shielded from VA appeal. This is a unique privilege for the veteran, establishing an important right to a non-appealable judgment.

Board decisions are not appealable by the VA. 38 U.S.C. § 7252(a) provides: "The Court of Appeals for Veterans Claims shall have exclusive jurisdiction to review decisions of the Board of Veterans' Appeals. The Secretary may not seek review of any such decision." Thus any issue of collateral estoppel was not preserved for appeal by the VA, and allowing it conflicted with laws requiring decision by the Board.

Collateral estoppel in this case was raised for the first time on appellate review before the United States Court of Appeals for Veterans Claims. The affirmative defense of collateral estoppel is typically raised in the U.S. District Court where factfinding occurs and equitable principles exist. Importantly, no party is there clothed with the legal benefit of receiving a judgment that cannot be appealed by the other party (save in the case of a criminal acquittal). Not so in Veterans law for matters occurring before the Board of Veterans Appeals: if the Veteran prevails at the Board level on an issue or ruling, the VA may not appeal. 38 U.S.C. § 5107(a); *see generally Green v. Derwinski*, 1 Vet. App.

212 (1991). So, *where* the ruling on collateral estoppel is made can have outcome-determinative consequences. In the instant case, for the Secretary to raise for the first time on appeal to the Veterans Court an issue the Secretary's Board did not raise or consider or rule on, especially when it purports to effect a denial of compensation, is essentially to sandbag the veteran and deny to him an important right to a non-appealable favorable result on the issue. Here, the widow was wrongfully denied any opportunity to have this issue decided at the Board level.

If this Court finds that collateral estoppel against a veteran's claim is available, this Court should rule that it must be raised at the Board level or it is waived, and that where waived its usage on appeal by the Veterans Court exceeds the jurisdiction of the Veterans Court.

2. The Veterans Court did not conduct the required balancing of the equities, which weigh in favor of the widow.

It is black letter law that collateral estoppel is an equitable remedy, and is not mandatory, but rather subject to the discretion of the court, and requires a balancing of equities.

The Restatement of Judgments, 2nd states:

"§ **28 Exceptions to the General Rule of Issue Preclusion**

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances: . . .

(2) The issue is one of law and . . . (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws. . . .

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest . . . (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action. . . ."

"§ **29 Issue Preclusion in Subsequent Litigation with Others**

A party [is] precluded from relitigating an issue with an opposing party . . . unless . . . other circumstances justify affording him an opportunity to relitigate the issue. The circumstances

> to which considerations should be given include those enumerated in § 28 and also whether: . . . (8) [o]ther compelling circumstances make it appropriate that the party be permitted to relitigate the issue. . . . Comment j. *Other Circumstances*. . . . Important among such other circumstances is the disclosure that the prior determination was plainly wrong . . . ".

The fact that the veteran was given fatal cancer by U.S. Government action in spraying agent orange heavily on Danang and was subsequently misdiagnosed by the U.S. Government's Naval hospital and treated for a disease he did not have and died, should be considered in evaluating the equities of deploying a doctrine whose effect is to shield the government where the Government was the author of the injury.

The Veterans Court below erred by failing to balance the equities, a balancing the law requires it to do. The court below made it apparent that it did not feel it had any discretion or duty to do so. However, this balancing is essential to the law of collateral estoppel.

D. The Federal Circuit has exclusive appellate jurisdiction and has failed to correct the Veterans Court's erroneous precedent; precedent that will be used against veterans until corrected, but even when ultimately corrected will never make the veterans or their families whole. The issue is of great importance to veterans and their families.

The Federal Circuit has exclusive appellate jurisdiction. Specifically, 38 U.S.C. § 7292(c) gives the Federal Circuit "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" raised in an appeal from the Veterans Court. The Veterans Court, in turn, has exclusive jurisdiction to review decisions of the Board, which is part of the VA. *See* 38 U.S.C. § 7252(a). Because the VA is the sole agency charged with administering veterans' benefits statutes, *see* 38 U.S.C. § 301(b), this means the Federal Circuit has exclusive jurisdiction for reviewing any challenge to the interpretation of such statutes, including 38 U.S.C. § 5110(b)(1).

Given the Federal Circuit's unique subject matter jurisdiction, no other circuit is likely to address or critique the Federal Circuit's decision leaving intact the Veterans Court's precedent. In other words, this is not a situation where a majority view will eventually emerge among the circuits given enough time. The only circuit with jurisdiction to address this issue has spoken in allowing the Veterans Court's decision to stand.

Because the Federal Circuit has exclusive jurisdiction to review veterans' benefits statutes, *see* 38 U.S.C. § 7292(c), this rule of law is unlikely to be addressed or resolved by any other circuit court. Accordingly, this appeal is ripe for Supreme Court review. The issue presented here is important to tens of thousands of current and future military veterans.

Congress created the veterans' benefits system to compensate veterans for the sacrifices they make in service to our country. The system "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)); *see also United States v. Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veterans is of long standing.").

In the case at bar, the Veterans Court expressed the sentiment that if it were writing on a clean slate it's decision might well have been that of the Judge Newman in dissent. In Mr. Arellano's case, *supra*, the Veterans Court expressed a similar sentiment. "If we were writing on a blank slate, appellant's arguments would be worth exploring. But our slate is far from blank."

The CUE statute and regulation in fact do provide for clean slate in CUE motions, as does the limited jurisdiction of the Article I Veterans Court.

E. This case is a good vehicle to resolve the propriety of collateral estoppel used against veterans CUE claims.

In any event, the question of whether a remand is necessary is not a question that turns on disputed facts. Rather, it turns on a disputed principle of *jurisprudence*. *See SEC v. Chenery Corp.*, 332 U.S. 194, 196 (1947) ("[A] reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency. If those grounds are inadequate or improper, the court is powerless to affirm the administrative action by substituting what it considers to be a more adequate or proper basis."); *accord INS v. Orlando Ventura*, 537 U.S. 12, 16-17 (2002) ("Generally speaking, a court of appeals should remand a case to an agency for decision of a matter that statutes place primarily in agency hands.").

F. Whether or not collateral estoppel is available as a matter of law to the Veterans Court, this case must be remanded for further review because of the manifold errors and obvious confusion of the Veterans Court in applying the doctrine.

If the equitable affirmative defense of collateral estoppel is either not available to the Article I Veterans Court, or if it is, it is nevertheless not available in CUE cases, then the judgment of the Federal Circuit

affirming the judgment of the Veterans Court should be reversed.

If the Veterans Court is found to have equity jurisdiction sufficient to consider collateral estoppel in a veteran's CUE case, the Veterans Court should nevertheless be reversed and instructed that if that court is to use the equitable doctrine of collateral estoppel, that court has the simultaneous obligation to weigh the equities and has the authority to decline estoppel. In its precedential opinion, the Veterans Court makes it clear that it does not believe it has the authority to decline using collateral estoppel, nor the obligation to weigh the equities.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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