No.

IN THE

Supreme Court of the United States

KEVIN R. GEORGE,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In the veterans-benefits system, Congress has provided that an otherwise-final agency decision is subject to revision if that decision is based on "clear and unmistakable error." Here, the Federal Circuit held that the agency's application of a regulation that conflicts with the plain meaning of a statute cannot amount to "clear and unmistakable error." The Federal Circuit reasoned that a federal court's later invalidation of such a regulation is merely a change in interpretation of the law. But this Court has made clear that when a court interprets the plain meaning of a statute, it is not announcing a change but rather declaring what the statute has always meant. An agency regulation that departs from that plain meaning is—and always was—legally invalid. And if the agency relied on that unlawful regulation in an adjudication, that adjudication is infected with a legal error that is clear and unmistakable on the face of the ruling.

The question presented is: When the Department of Veterans Affairs (VA) denies a veteran's claim for benefits in reliance on an agency interpretation that is later deemed invalid under the plain text of the statutory provisions in effect at the time of the denial, is that the kind of "clear and unmistakable error" that the veteran may invoke to challenge VA's decision?

RELATED PROCEEDINGS

Kevin R. George v. Denis McDonough, Secretary of Veterans Affairs, No. 19-1916 (Fed. Cir. judgment entered Mar. 16, 2021)

Kevin R. George v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 16-2174 (Vet. App. judgment entered Mar. 18, 2019)

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INTRODUCTION

This case presents an important question of veterans law that arises repeatedly; that the Federal Circuit, which has exclusive jurisdiction over the issue, now has definitively resolved the wrong way; and that will, absent this Court's intervention, deprive untold numbers of veterans of the benefits that they undisputedly should have received under the plain text of the law.

In the strongly pro-claimant veterans-benefits system, otherwise final decisions by the Department of Veterans Affairs (VA) remain subject to revision on grounds of "clear and unmistakable error," typically dubbed "CUE." 38 U.S.C. §§ 5109A, 7111. CUE might occur, for example, if critical facts were not before the agency, or if the agency applied the wrong law. If a veteran demonstrates CUE, the original decision is corrected and the veteran receives the benefits he should have gotten all along.

It is difficult to imagine a clearer error than the one involved here. Petitioner Kevin George applied for disability benefits in the 1970s, after a mental health episode and a diagnosis of paranoid schizophrenia forced him to leave the U.S. Marine Corps soon after enlisting. Everyone agrees that the statute governing his disability claim required the government to rebut a presumption that Mr. George's condition was aggravated by his military service. But VA's implementing regulation at the time did not require a rebuttal, and the government did not make one. The agency denied Mr. George's claim.

Decades later, once direct judicial review became available for veterans, the Federal Circuit in an unrelated case held VA's regulation invalid because it was contrary to the unambiguous statutory text.

Mr. George asked for the denial of his claim to be revised in light of this clear and unmistakable legal error that infected VA's decision in his case. But the Federal Circuit held that Mr. George could not show CUE, reasoning that the Board deciding his claim had applied the law in existence at the time—that is, the defective VA regulation. In reaching this result, the court demoted a judicial opinion invalidating a regulation to a mere "change in interpretation" of the law, and thus elevated a contra-statutory regulation to the same legal status as the statute itself.

The Federal Circuit's decision cannot be squared with this Court's precedent explaining that, when a federal court interprets an unambiguous statute, it is declaring what the law has always meant, not announcing a change in meaning. An agency regulation that conflicts with that plain meaning is not a permissible "interpretation" of the law but a misapplication of the law. In light of the Federal Circuit's definitive rejection of that principle—and the importance of the question presented for veterans whose benefits are wrongly withheld—this Court should grant certiorari.

OPINIONS AND ORDERS BELOW

The decision of the Federal Circuit is reported at 991 F.3d 1227 and reproduced at Pet. App. 1a-24a. The decision of the Court of Appeals for Veterans Claims is reported at 30 Vet. App. 364 and reproduced

at Pet. App. 25a-65a. The 2016 decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 66a-80a. The 1977 decision of the Board of Veterans' Appeals is unreported and reproduced at Pet. App. 81a-87a.

JURISDICTION

The Federal Circuit entered judgment on March 16, 2021. Pet. App. 2a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant portions of 38 U.S.C. §§ 1111, 5109A, and 7111 are reproduced at Pet. App. 91a-94a. Relevant portions of 38 C.F.R. §§ 3.105 (1997), 3.105 (current), and 20.1403 (current) are reproduced at Pet. App. 95a-102a.

STATEMENT OF THE CASE

Consistent with the pro-veteran benefits system Congress has established, veterans can ask VA to revise decisions that erroneously deny a claim.

Since Congress first established it in 1930, VA has administered the federal program that provides benefits to veterans. *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). Under this program, veterans or their dependents can submit a claim for "any benefit under the laws administered by the Secretary." 38 U.S.C. § 5100; *see id.* § 101(13)-(15). These benefits include medical assistance, education benefits, pensions, and, most notably, compensation for veterans with disabilities linked to their military service—that is, "service-connected" disabilities. *Walters*, 473 U.S. at 309; *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011).

VA's process for administering those benefits is specifically "designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson*, 562 U.S. at 431 (quoting *Walters*, 473 U.S. at 311). To that end, a "veteran faces no time limit for filing a claim" for benefits. *Id.* Once a claim is filed, the process is "*ex parte* and nonadversarial." *Id.* In fact, VA is required to "assist veterans" in substantiating their claims and "must give veterans the 'benefit of the doubt' whenever … evidence on a material issue is roughly equal." *Id.* at 431-32.

Veterans enjoy generous appellate rights. If VA issues an initial decision denying a claim—usually by

an adjudicator within a regional office—veterans can appeal that decision to the Board of Veterans' Appeals (Board). 38 U.S.C. §§ 5104C(a)(1)(C), 7105.[1] If the veteran thinks the Board has erred, he can appeal to the specialized Veterans Court. *Id.* § 7252. These decisions are reviewable, in turn, by the Federal Circuit. *Id.* § 7292.

When a claim is denied and either the veteran does not appeal or the reviewing tribunals affirm the denial, the decision is "final" in one sense. But "[t]here is no true finality of a decision" in "[t]he VA claim system." H.R. Rep. No. 105-52, at 2 (1997); *see Walters*, 473 U.S. at 311 ("[D]enial of benefits has no formal res judicata effect."). Consistent with the pro-veteran nature of the benefits system, Congress has established two ways veterans can continue to pursue their claims, even after the normal appellate process has finished. *See Henderson*, 562 U.S. at 432.

First, a veteran can file a supplemental claim, which allows for readjudication based on "new and relevant evidence." 38 U.S.C. § 5108(a); *see id.* § 5104C(b). Barring special circumstances, a veteran who prevails on a supplemental claim is entitled to benefits only from the date of the supplemental claim, not the originally denied claim. *See id.* § 5110(a)(1), (3).

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[1] Under a procedure added in recent legislation and not relevant to this appeal, veterans now also have a choice to seek review by a higher-level adjudicator (typically within a regional office). 38 U.S.C. §§ 5104C(a)(1)(A), 5104B.

Second, and most relevant here, a veteran can challenge the original decision even without providing new evidence if he can show that the decision was based on "clear and unmistakable error," 38 U.S.C. §§ 5109A(d), 7111(d), typically abbreviated as "CUE." This path is available when the error was made by the regional office (*id.* § 5109A(a)) or by the Board (*id.* § 7111(a)). There is no time limit on bringing a CUE claim. *Id.* §§ 5109A(d), 7111(d). Under the CUE statutes, if the "evidence establishes the error, the prior decision shall be reversed or revised," *Id.* §§ 5109A(a), 7111(a). Because such a reversal or revision "has the same effect as if the decision had been made on the date of the prior decision," a successful CUE claim entitles the veteran to benefits from the date of the original claim. *Id.* §§ 5109A(b), 7111(b).

Although Congress did not codify CUE review until 1997, the concept is deeply rooted in the veterans-benefits system. CUE was available even before the modern VA was established. A regulation dating back to 1928 provided that "the rating board may reverse or amend a decision … where such reversal or amendment is obviously warranted by a clear and unmistakable error." Veterans' Bureau Reg. 187 § 7155 (1928). That regulation was revised over the following decades. *See Smith v. Brown*, 35 F.3d 1516, 1524-26 (Fed. Cir. 1994). In 1959, the regulation was imported into 38 C.F.R. § 3.105, which has been the regulation that governs CUE review ever since. *See id.* at 1525.

In response to a judicial ruling limiting the CUE regulation to regional office (not Board) decisions, Congress enacted statutes allowing for both forms of CUE challenge. *See* Pub. L. No. 105-111, 111 Stat.

2271 (1997). Congress codified 38 C.F.R. § 3.105 in 38 U.S.C. § 5109A, which authorizes CUE review of regional office decisions. Congress also expanded CUE review to Board decisions by enacting 38 U.S.C. § 7111.[2]

At the time, the CUE regulation Congress codified provided in relevant part that "[p]revious determinations which are final and binding …. will be accepted as correct in the absence of clear and unmistakable error." 38 C.F.R. § 3.105(a) (1997). But where "evidence establishes such error, the prior decision will be reversed or amended." *Id.* A preamble to the regulation also excluded circumstances where "there is a change in law or … a change in interpretation of law." *Id.* § 3.105.[3]

Mr. George brings a disability claim based on service-connected aggravation of his schizophrenia, and VA denies it.

Kevin George enlisted in the U.S. Marine Corps in June 1975. Pet. App. 6a, 26a. His medical entrance examination indicated no mental health disorders. Pet. App. 6a. But, one week into his service, Mr. George suffered a mental health episode requiring

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[2] The legislative history reflects Congress's intent. The House and Senate reports indicate that the purpose of the statutes was to codify the regulation and expand CUE review to Board decisions. H.R. Rep. No. 105-52, at 2; S. Rep. No. 105-157, at 4 (1997).

[3] After Congress enacted 38 U.S.C. § 7111, VA promulgated a regulation to govern CUE for Board decisions, 38 C.F.R. § 20.1403.

hospitalization and resulting in a diagnosis of paranoid schizophrenia. Pet. App. 6a. A military Medical Evaluation Board confirmed the diagnosis. Pet. App. 6a. The Medical Evaluation Board found that this condition preexisted service and was aggravated by service, and it recommended referral to the Central Physical Evaluation Board for discharge. Pet. App. 26a. The Physical Evaluation Board also found that Mr. George's condition preexisted service, although it disagreed with the Medical Evaluation Board regarding aggravation. Pet. App. 26a-27a. Mr. George was discharged in September 1975. Pet. App. 6a, 27a.

In December 1975, Mr. George filed a claim with VA seeking disability benefits for service-connected aggravation of his schizophrenia. Pet. App. 7a. Veterans are entitled to "compensation" for "disability resulting from … aggravation of a preexisting injury suffered or disease contracted in the line of duty." 38 U.S.C. § 1110; *see* 38 U.S.C. § 101(16) (defining a "service-connected" injury as a "disability [that] was incurred or aggravated … in line of duty").

The Board of Veterans' Appeals denied Mr. George's claim in 1977. Pet. App. 81a, 86a. The Board acknowledged that Mr. George's "induction examination reveal[ed] no psychiatric abnormality." Pet. App. 82a. Mr. George therefore should have been entitled to rely on the statutory presumption that veterans are in "sound condition when examined, accepted, and enrolled for service except as to defects, infirmities, or disorders" identified in their entrance examinations. 38 U.S.C. § 1111. By statute, the government can overcome this presumption of soundness only by offering "clear and unmistakable evidence"

demonstrating both "that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." *Id.* But, at the time the Board made its decision, VA's implementing regulation for § 1111 permitted the government to rebut the presumption of soundness solely with "clear and unmistakable (obvious or manifest) evidence" that "an injury or disease existed prior" to enrollment. 38 C.F.R. § 3.304(b) (1970). Despite the statutory text, the regulation did not require the same "clear and unmistakable" evidence establishing that "the injury … was not aggravated by such service." 38 U.S.C. § 1111. And the Board did not enforce that requirement, instead denying Mr. George's claim based on the bare showing that his "schizophrenia existed prior to military service" and an unelaborated conclusion that it "was not aggravated by his military service." Pet. App. 86a.

Mr. George seeks CUE review of the 1977 Board decision because the Board failed to correctly apply the governing statute.

Decades later, both VA and the Federal Circuit confirmed that the presumption of soundness regulation in place in 1977 was unlawful because it was inconsistent with the statutory presumption.

In 2003, the VA General Counsel issued an opinion explaining that VA's presumption-of-soundness regulation "conflicts with the language of section 1111," because "section 1111 requires VA to bear the burden of showing the absence of aggravation in order to rebut the presumption of sound condition." VA Gen. Counsel Prec. 3-2003, at 2, 5 (July 16, 2003) (2003

OGC opinion), https://www.va.gov/ogc/opinions/2003precedentopinions.asp. Because VA's regulation allowed the presumption to "be rebutted solely" with evidence "that a disease or injury existed prior to service," it was "invalid and should not be followed." *Id.* at 11.

The next year, the Federal Circuit confirmed VA's regulation was unlawful. *Wagner v. Principi*, 370 F.3d 1089, 1091-92, 1096-97 (Fed. Cir. 2004). The court held that "the government must show … both a preexisting condition and a lack of in-service aggravation to overcome the presumption of soundness … under section 1111." *Id.* at 1096. As the Federal Circuit explained, the agency was "compelled" to reject its prior regulation because "section 1111 is clear on its face" and thus "susceptible of interpretation without resort to *Chevron* deference." *Id.* at 1092-93.

After this clarification of the law, Mr. George filed a motion asking the Board to revise its 1977 decision on the theory that the Board had committed CUE (that is, clear and unmistakable error) when it applied a regulation that was plainly contrary to the statute. Pet. App. 103a-108a. The Board in 2016 denied that request, reasoning that "judicial decisions that formulate new interpretations of the law subsequent to a VA decision cannot be the basis of a valid CUE claim." Pet. App. 71a. The Board acknowledged that the 1977 decision had failed to cite the applicable statutory standard or "explain … how there was clear and unmistakable evidence that any such pre-existing disability was not aggravated in service." Pet. App. 77a. Rather, there was at best "conflicting lay and medical evidence as to whether [Mr. George's]

claimed psychiatric disability … was aggravated by service." Pet. App. 78a-79a. But, because the regulation in effect at the time did not require such a finding, the "failure of the [1977] Board to find that the moving party's condition was not clearly and unmistakably aggravated by service as part of its presumption of soundness analysis cannot be considered to be CUE." Pet. App. 71a.

The Veterans Court and Federal Circuit affirm the denial of Mr. George's CUE claim.

A divided panel of the Veterans Court affirmed. Pet. App. 25a-65a. The court's analysis began with *Disabled American Veterans v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000) (*DAV*). That case involved a challenge to the portion of the VA's regulation stating that CUE "does not include the otherwise correct application of a statute or regulation where … there has been a change in the interpretation of the statute or regulation." 38 C.F.R. § 20.1403(e). The Federal Circuit found that provision consistent with the CUE statute because a "new interpretation of a statute can only retroactively [a]ffect decisions still open on direct review, not those decisions that are final." *DAV*, 234 F.3d at 697-98.

The Veterans Court recognized, however, that two conflicting lines of Federal Circuit precedent emerged after *DAV*. Pet. App. 34a-39a, 44a-48a. The first is reflected in *Jordan v. Nicholson*, 401 F.3d 1296, 1298-99 (Fed. Cir. 2005). The Federal Circuit extended the *DAV* principle to include not just "change[s] in interpretation" but also "later-*invalidated*" regulations. *Id.* at 1298 (emphasis added). The

court reasoned that "the accuracy of the regulation as an interpretation of the governing legal standard does not negate the fact that the regulation … was … the initial interpretation" of the governing statute, and thus the subsequent invalidation amounted to a "change in interpretation of that statute" that fell within *DAV*'s exclusion. *Id.*

A second line of precedent allowed a CUE claim based on the subsequent invalidation of a regulation—in fact, the same invalidated regulation at issue here. *See Patrick v. Principi*, 103 F. App'x 383 (Fed. Cir. 2004); *Patrick v. Nicholson*, 242 F. App'x 695 (Fed. Cir. 2007)*; Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011). The Federal Circuit explained that CUE was available because *Wagner*'s "interpretation of § 1111 … did not *change* the law but explained what § 1111 ha[d] always meant." *Patrick*, 242 F. App'x at 698.

The Veterans Court majority here analyzed both sets of precedent, determined that *Jordan* was correct, and accordingly held that "[a]pplying a statute or regulation as it was interpreted and understood at the time a prior final decision is rendered does not become CUE by virtue of a subsequent interpretation of the statute." Pet. App. 42a. The majority thus concluded that it was appropriate for the 1977 Board to apply the version of the regulation in existence at the time, and it was irrelevant that the regulation was subsequently invalidated as contrary to the plain text

of the governing statute. Pet. App. 42a-50a.[4] The dissenting judge would have reversed the Board's decision, relying on *Patrick* and reasoning that *Wagner* provided an "authoritative statement" of what § 1111 has always meant. Pet. App. 53a-55a.

The Federal Circuit affirmed. Like the Veterans Court, the Federal Circuit acknowledged its two conflicting lines of precedent, which pointed in opposite directions on whether a ruling like *Wagner* can give rise to CUE. Pet. App. 8a, 18a-19a. And, like the Veterans Court majority, the panel below resolved this conflict in favor of *Jordan* and rejected Mr. George's contention that *Wagner*'s holding regarding the plain meaning of § 1111 could serve as the basis for CUE. Pet. App. 15a-17a.

The Federal Circuit started from the non-controversial premise that "CUE must be analyzed based on the law as it was *understood at the time of the original decision* and cannot arise from a subsequent change in the law or interpretation thereof to attack a final VA decision." Pet. App. 16a. But the Federal Circuit rejected Mr. George's argument that his CUE claim was "simply premised on the VA's purported failure to correctly apply the statute as written," instead characterizing his claim as a request to "retroactively apply a changed interpretation of the law." Pet. App. 14a. It had to be a change in law, reasoned the Federal

[4] The court reached that result notwithstanding the Secretary's concession that the Federal Circuit's decision in *Wagner* "supports an allegation of CUE based on the misapplication of the presumption of soundness." Pet. App. 44a; *see also* Pet. App 43a.

Circuit, because VA's regulation—although later determined to be inconsistent with the statute—"provided the initial interpretation of § 1111." Pet. App. 17a. The Federal Circuit thus gave a regulation that contradicts a statute the same legal status as the statute itself. According to the court, even when an agency's decision relies on such a regulation and defies the controlling statute, that cannot amount to a "clear and unmistakable" error. Pet. App. 17a-18a, 23a-24a.[5]

In short, the Federal Circuit now has conclusively resolved the question presented, by making clear that a CUE claim may not be based on VA's application of a rule that conflicts with an unambiguous statute.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Incorrect.

A. The statute encompasses any "clear and unmistakable error," which necessarily includes plainly erroneous agency interpretations of statutes.

The CUE statutes provide that decisions by the Board or regional office are "subject to revision on the

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[5] In the decision below, the Federal Circuit also addressed the related appeal of another veteran, Michael B. Martin. Mr. Martin sought CUE review of the regional office decision denying his claim for compensation, because (just as in Mr. George's case) that original decision applied the later-invalidated presumption-of-soundness regulation. The Federal Circuit ultimately affirmed the denial of his claim, and Mr. Martin has not elected to seek further review in this Court.

grounds of clear and unmistakable error." 38 U.S.C. §§ 7111(a), 5109A(a).

1. By their plain terms, the CUE provisions encompass the situation here: VA's erroneous application of the governing statute through its reliance on a regulation that was plainly in conflict with that statute.

This error unquestionably meets the only criteria required by the CUE statutes. This kind of "erroneous application or interpretation of statutes" is a quintessential "error[] of law." *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001); *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1071-72 (2020). And that legal defect was both "clear" and "unmistakable" to anyone looking at the 1977 Board decision and the VA regulation in force at the time. The statute then, as now, required the government to rebut the presumption of in-service aggravation. But the Board plainly did not impose that requirement, instead finding non-aggravation based on a showing by the government that left the sort of evidentiary conflict insufficient to overcome the presumption in the veteran's favor. The statute was clear, and the Board unmistakably did not follow it.

The Federal Circuit decision invalidating VA's regulation itself establishes the clarity of the error. The court explained that the governing statute "is clear on its face," such that the agency was "forbidden" from "reach[ing] a different result." *Wagner*, 370 F.3d at 1092-93 (quoting *SKF USA Inc. v. United States*, 254 F.3d 1022, 1029 (Fed. Cir. 2001)).

The fact that the Federal Circuit did not issue this definitive statutory interpretation until 2004 does not change the nature or clarity of the 1977 Board's legal error. When a court declares the unambiguous meaning of a statute, that "judicial construction … is an authoritative statement of what the statute meant *before* as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added); *see AT&T Corp. v. Hulteen*, 556 U.S. 701, 712 n.5 (2009).

This principle is a function of our separation of powers. Congress "has the power to decide when [a] statute will become effective." *Rivers*, 511 U.S. at 313 n.12. Courts, by contrast, have "no authority to depart from the congressional command setting the effective date of a law that [Congress] has enacted"; they can only "explain[] … what the statute has meant continuously since the date when it became law." *Id.* And where "the intent of Congress is clear, that is the end of the matter," because courts and agencies alike "must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

Accordingly, when a court definitively interprets one of VA's governing statutes and that understanding conflicts with how the Board (or regional office) applied that statute to a veteran's claim, the only possible conclusion is that the decision was legally erroneous at the time it was made, and a CUE claim is available to the veteran.

2. Congress intended CUE to have this scope. In enacting the CUE statutes, Congress meant to codify

the longstanding regulation that subjected regional office decisions to CUE. H.R. Rep. No. 105-52, at 2; S. Rep. No. 105-157, at 4. Nothing in that regulation, 38 C.F.R. § 3.105 (1997), shielded erroneous interpretations of a statute from CUE review. On the contrary, the enacting Congress approved of Veterans Court decisions interpreting the CUE regulation to encompass all sufficiently clear "error[s], of fact or of law." H.R. Rep. No. 105-52, at 3 (quoting *Fugo v. Brown*, 6 Vet. App. 40, 43 (1993)); *see* S. Rep. No. 105-157, at 6. And the enacting Congress singled out "the kind of error" over "which reasonable minds could not differ." H.R. Rep. No. 105-52, at 3 (quoting *Fugo*, 6 Vet. App. at 43). Where, as here, a court declares that an agency interpretation conflicts with the unambiguous meaning of a statute, that is precisely the sort of error over which there can be no reasonable disagreement.

The enacting Congress provided a further clue that CUE review was meant to encompass these kinds of errors of statutory interpretation. It expressly crafted the CUE statutes to "address[] errors similar to the kinds which are grounds for reopening Social Security claims." H.R. Rep. No. 105-52, at 3; *cf. Henderson*, 562 U.S. at 437 ("the Social Security and veterans-benefit review mechanisms share significant common attributes," and both are "'unusually protective' of claimants"). Then, as now, a Social Security claim could be reopened to correct errors on the "face of the evidence used when making the prior decision." H.R. Rep. No. 105-52, at 3; *see* 20 C.F.R. §§ 404.988(c)(8), 404.989(a)(3). That category of errors encompassed "the application of an incorrect legal standard or the misinterpretation of law existing at the time of the determination" because in such

cases "the evidence clearly shows on its face that an error was made." *Fox v. Bowen*, 835 F.2d 1159, 1163-64 (6th Cir. 1987); *accord Munsinger v. Schweiker*, 709 F.2d 1212, 1216 (8th Cir. 1983); *Mines v. Sullivan*, 981 F.2d 1068, 1071 (9th Cir. 1992); *Coulter v. Weinberger*, 527 F.2d 224, 231 (3d Cir. 1975).

Munsinger, the leading appellate decision on the issue, illustrates the type of interpretive error that Congress intended the CUE statutes to address. A statute, 42 U.S.C. § 424a(b), required offsetting a claimant's disability benefits by a lump-sum worker's compensation settlement award. 709 F.2d at 1214. An administrative law judge misread the statute and failed to impose the offset. In sustaining the Social Security Administration's reopening of the claim to correct that error, the Eighth Circuit emphasized that it made no "*change* of legal interpretation." *Id.* at 1216 (quoting 20 C.F.R. § 404.989(b) (1981)). It merely corrected the agency's "misinterpretation of law existing at the time of the determination," as § 424a(b) had always required offsets for lump-sum settlements. *Id.*; *see id.* at 1217. Congress intended the CUE statutes to permit the same type of correction.

3. For these reasons, the CUE provisions must encompass an agency's clearly erroneous interpretation of a governing statute. Even if there were any doubt, the pro-veteran canon requires resolving those doubts in Mr. George's favor. This Court "ha[s] long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441; *see Boone v. Lightner*, 319 U.S. 561, 575 (1943). This canon is among the "interpretive tools" a court must bring to

"bear before finding" genuine ambiguity. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019); *see Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("[D]eference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." (quoting *Chevron*, 467 U.S. at 843 n.9)). Accordingly, any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

B. The Federal Circuit imposed an atextual limitation on the scope of CUE.

The Federal Circuit's rejection of Mr. George's CUE claim proceeded in two steps. It began from the uncontroversial premise that "clear and unmistakable error"—that is, CUE—"cannot arise from a subsequent change in interpretation of law." Pet. App. 3a; *see* Pet. App. 16a. The court then rejected Mr. George's claim—which Mr. George framed as the 1977 Board's "failure to correctly apply the statute as written"—because it thought his claim required "retroactively apply[ing] a *changed* interpretation of the law." Pet. App. 14a (emphasis added).

1. The Federal Circuit did not locate any basis in the CUE statutes for treating the invalidation of an agency's unlawful regulation as a changed interpretation of law. *See* Pet. App. 21a-22a. Instead, it focused on "statutory history," which it interpreted to exclude all claims of CUE that arose from a subsequent "judicial interpretation of a statute," including the type of error urged by Mr. George in this case. Pet. App. 22a-23a. None of the "history" the Federal Circuit cited supports such a blanket carve-out.

The Federal Circuit first observed that Congress could not have "contemplated CUE would arise from a new judicial interpretation of a statute," because the CUE regulation being codified "predates the enactment of the Veterans' Judicial Review Act [VJRA], … which, for the first time, permitted judicial review of VA decisions." Pet. App. 22a. But judicial review *was* available prior to the VJRA—even if not directly from regional office or Board decisions—because veterans could bring direct challenges to VA regulations. *See Monk v. Shulkin*, 855 F.3d 1312, 1319 (Fed. Cir. 2017) (collecting cases). Accordingly, "new judicial interpretations of a statute" could arise even in the pre-VJRA world. And, of course, by the time Congress codified the CUE regulation, judicial review had been a feature of the veterans-benefits system for nearly a decade. The Federal Circuit erred in presuming that Congress would not have intended CUE to include an obvious type of clear legal error.

The Federal Circuit next referenced the "preamble" of the regulation that Congress codified—38 C.F.R. § 3.105 (1997)—which made CUE unavailable for "alleged error[s] … based on 'a change in law or … a *change in interpretation of law*.'" Pet. App. 23a (quoting 38 C.F.R. § 3.105 (1997)). The Federal Circuit thought this language showed that "Congress did not intend for CUE to go so far as to attack a final VA decision's correct application of a then-existing regulation that is subsequently changed or invalidated, whether by the agency or the judiciary." Pet. App. 23a-24a.

But the preamble at most shows that Congress meant to exclude genuine changes in law. The Federal

Circuit did not explain why a *change* in law (or a change in interpretation of law) should be equated with an *invalidation* of an agency rule, and there is no good reason to do so. A change in law occurs when Congress alters the governing statutory regime. And a "change in interpretation of law" embraces those circumstances where the VA adopts a new regulation (or reinterprets a regulation) by choosing among several "permissible construction[s]." *Chevron*, 467 U.S. at 843. It makes sense to exclude such changes from CUE because they would provide relief that was not previously required. But the same logic does not apply to situations like this case, where VA had denied relief to veterans solely because of an *invalid* regulation that from day one was contrary to law. *See Patrick*, 242 F. App'x at 698 ("unlike changes in regulations and statutes" or "new regulatory interpretation[s] of a statute," "which are prospective" only, a definitive "interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment"). Indeed, that very distinction—between a "change of legal interpretation" and a "misinterpretation of law"—is present in the Social Security context Congress looked to when codifying the CUE statutes. *See Fox*, 835 F.2d at 1163-64.

The same problem dooms the Federal Circuit's reliance on Veterans Court cases like *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc), which the enacting Congress had looked to for a definition of CUE when it imported the CUE regulation into statute. *See* H.R. Rep. No. 105-52, at 2-3. In that case, the Veterans Court observed that "changes in the law subsequent to the original adjudication … do not provide a basis for revising a finally decided case."

Russell, 3 Vet. App. at 313. But again, there is no change in law when an error present in the original adjudication is surfaced through a later judicial ruling. The judicial ruling simply reveals a legal error that was present all along. *Russell* did not suggest otherwise.

In short, nothing the enacting Congress relied on in codifying §§ 5109A and 7111 indicates that Congress meant to exclude from CUE review what its plain text requires—VA's erroneous interpretation of a governing statute.[6]

2. The Federal Circuit's other basis for rejecting Mr. George's CUE claim was that *Wagner* must have announced a "change in the law" because VA's then-existing regulation "provided the initial interpretation of § 1111, regardless of any inaccuracies subsequently reflected in *Wagner*." Pet. App. 17a; *see* Pet. App. 23a-24a.

As explained above (at 16), however, that is not how judicial review of agency interpretations works. When a court strikes down an agency's invalid interpretation of an unambiguous statute, it is not changing the law. It is settling what the statute always has meant, *see Rivers*, 511 U.S. at 313 & n.12, and declaring that there was no room for the agency to make another choice, *see Chevron*, 467 U.S. at 842-43; *Dixon*

[6] In fact, the Federal Circuit's sole support for this supposed exclusion was a 1994 VA General Counsel Opinion. *See* Pet. App. 24a n.7. Congress demonstrated no awareness of that opinion, instead relying on the plain text of 38 C.F.R. § 3.105 and on Veterans Court decisions interpreting that rule. H.R. Rep. No. 105-52, at 2-3; S. Rep. No. 105-157, at 3-4.

v. United States, 381 U.S. 68, 74 (1965) (regulation that "operates to create a rule out of harmony with the statute[] is a mere nullity"). Indeed, the upshot of *Wagner* was that § 1111 was "clear on its face" and thus "susceptible" only to a single "interpretation without resort to *Chevron* deference." 370 F.3d at 1093. VA's conflicting interpretation always was wrong. In circumstances like those, where an interpretation is compelled, it is "not accurate" to say the intervening "decision … 'changed' the law." *Rivers*, 511 U.S. at 313 n.12; *see Fiore v. White*, 531 U.S. 225, 228 (2001) (per curiam).

The decision below acknowledged the rule that a "judicial construction of a statute is an authoritative statement of what the statute" always meant, but it cabined that principle "to pending 'cases still open to direct review.'" Pet. App. 21a. The Federal Circuit went astray when reasoning that a different principle must govern "*final* decisions, such as the VA decisions at issue here." Pet. App. 21a. The court thought that decisions like *Wagner* amount to "new judicial pronouncement[s]"—that is, changes in law—that need not "retroactively appl[y]" in these circumstances. Pet. App. 20a.

The Federal Circuit's view is plainly wrong. Indeed, *Rivers* makes clear that no change in law occurs when a court construes an unambiguous statute, because the court "is explaining its understanding of what the statute has meant continuously since the date when it became law." 511 U.S. at 313 n.12. For that reason, courts must apply such interpretations retroactively. *Id.*; *see also DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 56 (2015) ("[J]udicial construction of a

statute ordinarily applies retroactively."); *Fiore*, 531 U.S. at 228 (judicial decision that "'merely clarified' the statute" is "not new law" and must be given effect in collateral proceedings); *Bunkley v. Florida*, 538 U.S. 835, 840-42 (2003) (per curiam) (same); *cf. Chazen v. Marske*, 938 F.3d 851, 864 n.2 (7th Cir. 2019) (Barrett, J., concurring) ("Statutory interpretations that narrow the range of conduct made criminal are always substantive and therefore retroactive."). Only "[i]n rare cases"—for example, some circumstances "where this Court overrules its own construction of a statute"—are "decisions construing federal statutes … denied full retroactive effect." *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970). If a judicial decision interprets a statute in a way that reveals an agency committed legal error, that agency's decision always has been wrong, regardless of whether it is final.

Of course, as the Federal Circuit noted, the "need for finality" often will prevent parties from taking advantage of judicial decisions declaring what the law has always meant. Pet. App. 20a (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991)); *see Jordan*, 401 F.3d at 1299. In the ordinary civil case, principles of "res judicata" will mean that no court can "reopen the door already closed," *Beam*, 501 U.S. at 541, and there often will be no way to remedy an agency (or court) error once the decision is final. It is thus unsurprising that this Court's cases emphasize that judicial pronouncements will be given "*full* retroactive effect"—that is, they will have the effect of not only clarifying the law but also applying in an individual case—only "in … cases still open on direct review." *Harper v. Virginia Dep't of Taxation*, 509

U.S. 86, 97 (1993) (emphasis added); *accord Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 758 (1995). These default finality rules do not somehow absolve the earlier decision of legal error; rather, they simply reflect that some errors cannot be corrected.

But errors in the veterans-benefits context *can* be corrected. Contrary to the Federal Circuit's conclusion, the generic "finality" principles applicable to civil litigation have no application where, as here, the "*final* decision[]" is "subject to a collateral attack." Pet. App. 20a-21a. The entire purpose of the CUE statutes is to create an exception to finality. As the enacting Congress explained, "[t]here is no true finality of a decision" in this context. H.R. Rep. No. 105-52, at 2. Indeed, this Court has long recognized that "a denial of [veterans] benefits has no formal res judicata effect" as a result of the opportunity to "resubmit" or seek revision. *Walters*, 473 U.S. at 311 (citing 38 C.F.R. §§ 3.104, 3.105 (1984)). If an error is "clear and unmistakable," it is not final in a way that bars correction on collateral review. And that is equally true when the error pertains to the meaning of a statute rather than some other legal or factual issue. In this way, collateral review under CUE is no different from other collateral-attack regimes where a judicial decision that "'merely clarified' the statute" must be applied as part of a challenge to an otherwise final decision. *See Fiore*, 531 U.S. at 228; *Bunkley*, 538 U.S. at 840-42; *Gonzalez v. Crosby*, 545 U.S. 524, 536 n.9 (2005).

II. The Question Presented Is Important And Recurring.

The Federal Circuit has now definitively rejected what the CUE statutes command—that VA's plainly incorrect interpretation of a statute is CUE. The scope of CUE is extremely important, and the Federal Circuit's improper limitation of the CUE statutes' scope will adversely affect significant numbers of veterans both now and in the future.

To start, the Federal Circuit's ruling reaches *all* VA benefits decisions, whether issued by the regional office or the Board. Moreover, the unfortunate reality is that VA interpretations are frequently at odds with the veterans-benefits statutes Congress enacts. Yet they often persist for years before being overturned, due largely to the fact that most veterans are ill-equipped to vindicate their appeal rights. Indeed, direct judicial review of VA claims denials did not even exist before 1988, when Congress passed the VJRA. *Brown*, 513 U.S. at 122. As this Court has recognized, "[m]any VA regulations" and interpretations "have aged nicely simply because Congress took so long to provide for judicial review." *Id.* (quoting *Gardner v. Brown*, 5 F.3d 1456, 1463 (Fed. Cir. 1993)). That means that many denials of benefits based on erroneous interpretations are final—often for years or decades—before the error is corrected. The availability of CUE claims is crucial for veterans saddled with final denials that are manifestly contrary to law. Under the Federal Circuit's rule, however, these veterans are out of luck.

1. The starting point for why incorrect interpretations plague the veterans-benefits system is that the vast majority of claims decisions are made without appellate review and without the involvement of counsel.

"[N]early all veteran benefits claims are resolved at the regional office stage." *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1380 (Fed. Cir. 2020) (en banc). The system is one in which "roughly 96%" of cases go unappealed. *Gray v. Sec'y of Veterans Affs.*, 875 F.3d 1102, 1114 (Fed. Cir. 2017) (Dyk, J., dissenting in part and concurring in the judgment). "[M]any veterans find themselves trapped … in a bureaucratic labyrinth," lacking the knowledge or wherewithal to pursue even first-level administrative appeals. *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring); *see* Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 Fed. Circuit B.J. 433, 440-41, 444 (2009); H.W. Cummins & Thomas J. Fisher, Jr., *Service Accepted, Compensation Denied*, 30 Gonz. L. Rev. 629, 644 (1995). In other words, most veterans' claims will be reviewed only by the regional office.

But the regional office is not equipped to provide legal interpretations. Regional offices are staffed "predominately [by] lay adjudicators" without formal legal training. Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 Veterans L. Rev. 208, 216-17 (2009); *see id.* at 218-19. Compounding the problem, nearly all veterans lack legal representation at this stage, as they are statutorily barred from paying an attorney to

represent them at the regional office regarding an initial decision on a claim. 38 U.S.C. § 5904(c)(1).

Moreover, VA—both at the regional office and the Board levels—has an astonishingly poor track record at reaching the right outcome. One indication is the alarming frequency with which veterans prevail in the Veterans Court. In both 2019 and 2020, veterans prevailed at least in part in over 92% of Veterans Court appeals decided on the merits. U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2020 Annual Report* at 3, https://bit.ly/3ws0P83; U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2019 Annual Report* at 3, https://bit.ly/3xz34Ic. That high rate of agency error is part of a pattern. *See Henderson*, 562 U.S. at 432 ("Statistics compiled by the Veterans Court show that [from 2000-2009], the court ordered some form of relief in around 79 percent of its 'merits decisions.'" (citing U.S. Court of Appeals for Veterans Claims, *Annual Reports 2000-2009*, https://bit.ly/2UCzF0M)).[7] And it reflects a significant number of serious interpretive errors by the agency.[8]

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[7] By comparison, a statistical analysis of appeals of Social Security Administration decisions denying benefits found that district courts on average "issued partial or full remands or reversals in 40% of cases." Harold J. Krent & Scott Morris, *Inconsistency and Angst in District Court Resolution of Social Security Disability Appeals*, 67 Hastings L.J. 367, 389 (2016).

[8] *See Wolfe v. Wilkie*, 32 Vet. App. 1, 11-12 (2019) (even after Veterans Court "authoritatively corrected VA's misunderstanding" of a statute, repudiating VA's "incorrect … interpretation," the agency "adopted a regulation that functionally creates a world indistinguishable from the world [the Veterans Court]

2. The few appeals that progress beyond the Veterans Court showcase the prevalence and significance of interpretive errors in veterans law. Congress has limited the Federal Circuit's review of Veterans Court decisions largely "to issues of statutory or regulatory interpretation." *Carpenter v. Gober*, 228 F.3d 1379, 1381 (Fed. Cir. 2000); *see* 38 U.S.C. § 7292. And the Federal Circuit has used that authority to correct numerous erroneous interpretations by the agency and the Veterans Court.

The erroneous agency interpretation in this case is a perfect example. As explained above (at 10, 15), in *Wagner*, the Federal Circuit invalidated the 40-year-old regulation VA had used to implement 38 U.S.C. § 1111, because the statute expressly and unambiguously required the government to make a showing that the regulation did not. 370 F.3d at 1097.

But *Wagner* is no isolated incident. In *Brown*, for example, a statute required VA to "compensate for 'an injury or an aggravation of an injury[]' that occur[ed] 'as the result of'" treatment at a VA facility, "so long

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authoritatively held impermissible under the statute"; remarking incredulously, "[i]t's difficult to conceive how [VA] could believe that adopting a regulation that mimics the result a Federal court held to be unlawful is somehow appropriate when the statute at issue has not changed"); *see also, e.g.*, *Lamb v. Wilkie*, No. 16-3211, 2018 WL 2171481, at *1-2 (Vet. App. May 11, 2018); *Wells v. Shulkin*, No. 15-4714, 2017 WL 3222571, at *5 (Vet. App. July 31, 2017); *Thomas v. McDonald*, No. 15-3017, 2016 WL 6706856, at *5-6 (Vet. App. Nov. 15, 2016); *Dawson v. McDonald*, No. 15-0517, 2016 WL 3055871, at *8 (Vet. App. May 31, 2016); *Schaible v. Shinseki*, No. 10-1876, 2011 WL 3586247, at *3 (Vet. App. Aug. 17, 2011); *Tropf v. Nicholson*, 20 Vet. App. 317, 321 (2006); *Servello v. Derwinski*, 3 Vet. App. 196, 199 (1992).

as the injury was 'not the result of such veteran's own willful misconduct.'" 513 U.S. at 116 (quoting 38 U.S.C. § 1151 (1988)). VA's implementing regulation grafted on a "fault-or-accident requirement" that limited compensation to situations involving VA negligence or an accident during treatment. *Id.* at 117. This Court, affirming the Federal Circuit, held that the regulation "fl[ew] against the plain language of the statutory text." *Id.* at 122; *see id.* at 118 ("Government [could not] plausibly" claim ambiguity). This untenable regulation had enjoyed "undisturbed endurance for 60 years." *Id.* at 122.

More recently, in *Saunders v. Wilkie*, the Federal Circuit addressed the primary veterans-benefits statute—38 U.S.C. § 1110—which awards compensation for "disability" resulting from "injury or disease" connected to service. *See* 886 F.3d 1356, 1358 (Fed. Cir. 2018). The Veterans Court had interpreted the statute to categorically exclude disabling pain—even when unquestionably connected to an in-service injury or disease—unless the veteran's pain was linked to a presently diagnosed disease or injury. *Id.* at 1358, 1361. The Federal Circuit rejected this interpretation as "illogical" and erroneous as a "matter of law." *Id.* at 1366, 1368. The Veterans Court's interpretation had been on the books for 19 years. *Id.* at 1359 (citing *Sanchez-Benitez v. West*, 13 Vet. App. 282, 285 (1999)).

Even though each of these decisions declared what the governing statutes had always clearly required, the Federal Circuit's ruling in this case precludes each of them from serving as a basis for a CUE claim. *See, e.g.*, *Steele v. McDonough*, No. 2020-1166,

2021 WL 1383263, at *3 (Fed. Cir. Apr. 13, 2021) (in light of *George*, rejecting *Saunders*'s corrected interpretation as a basis for CUE).

To make matters worse, the Federal Circuit itself is far from immune from succumbing to erroneous interpretations. The court can and does entrench misinterpretations that must be corrected years later. A recent example is *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc), where the full Federal Circuit reversed a decade-old panel precedent upholding VA's interpretation of the Agent Orange Act. The statute affords a favorable presumption to veterans who "served in the Republic of Vietnam." 38 U.S.C. § 1116. In violation of that plain text—as well as international law, legislative history, and past agency practice—a VA regulation added an extra-statutory "'foot-on-land' requirement," limiting the presumption to those whose service "involv[ed] duty or visitation on the landmass, including the inland waterways of the Republic of Vietnam." *Procopio*, 919 F.3d at 1373; *see id.* at 1375-76. Although a 2008 panel had applied *Chevron* deference, the en banc court ruled that "the unambiguous language" of the statute foreclosed VA's narrow interpretation and instead encompassed service within Vietnam's territorial waters. *Id.* at 1373; *see id.* at 1374-75. VA's overturned interpretation had lasted 22 years. *Id.* at 1373.

3. CUE claims are a critical safety valve in this context. Without CUE, a veteran is at best limited to compensation starting on the date he or she learns of the legal error and files a new or supplemental claim based on that development. *See supra* 5. The veteran has no way to recover benefits for the time it took the

agency and the courts to realize that the law had required compensation all along.

"The importance of the effective date in evaluating the options [to pursue after a final VA decision] cannot be overemphasized." 1 Veterans Benefits Manual 14.1 (2021). The earlier the effective date, the earlier VA should have been paying benefits, and thus the more past-due benefits are owed. The difference can be hundreds of thousands of dollars. *See, e.g.*, *id.* (citing example of a few years of benefits totaling more than $150,000); Angela K. Drake et al., *Review of Veterans Law Decisions of the Federal Circuit, 2020 Edition*, 70 Am. U. L. Rev. 1381, 1426 (2021) ("For veterans who wait five years for a decision, they may receive thousands of dollars in 'retro' benefits because it took VA so long to reach the correct result."). That money matters to disabled veterans, who—by definition—have limited ability to earn a living. *See Mansell v. Mansell*, 490 U.S. 581, 583 (1989) ("The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired.").

The sums at stake are particularly significant where changes in interpretation are at issue, as the wait for a correct result can be peculiarly long. For Mr. George, a successful CUE claim would entitle him to an effective date of December 1975, when he submitted his original claim. By contrast, a successful supplemental claim would entitle him only to an effective date of the filing of that second claim. 38 U.S.C. § 5110(a)(1), (3). If he filed a supplemental claim today, Mr. George would lose over 45.5 years of

benefits. That translates to a meaningful amount for a sick veteran who is 63 years old. *Cf.* VA, *2021 Veterans Disability Compensation Rates*, https://bit.ly/3xrAVCC (current monthly payment amounts, sorted by disability rating). In contrast, VA is only minimally affected. Because veterans can already pursue supplemental claims to challenge wrongful final denials, no additional administrative burden would be created by allowing access to the CUE path as Congress intended.

This Court's intervention is thus warranted. The question presented matters enormously, both to veterans' lives and to maintaining fidelity to the law.

III. This Case Is An Ideal Vehicle To Clarify The Scope Of Clear And Unmistakable Error.

This case provides an ideal opportunity for the Court to correct the Federal Circuit's misinterpretation of the statutory CUE standard. Because the Federal Circuit has now definitively resolved the previously existing conflict in its precedent, it is unlikely that future veteran claimants will contest the matter. The decision below presents the best opportunity for the Court to take up this important issue.

Moreover, because that decision addressed claims of error at both the regional office and Board, it authoritatively construed the meaning of "clear and unmistakable error" across both CUE statutes, 38 U.S.C. §§ 5109A and 7111. That is unusual. Virtually all CUE cases necessarily address only one of the statutes, depending on which one is at issue in the individual case. Here, the Court has a rare opportunity to

squarely resolve the meaning of "clear and unmistakable error" in all VA proceedings, under both §§ 5109A and 7111. And its decision on that point will determine whether the Federal Circuit's ruling stands. The Federal Circuit relied entirely on its narrow reading of the CUE statutes, offering no other grounds for rejecting Mr. George's (or Mr. Martin's) CUE claims.

This Court should not hesitate to grant certiorari because the Veterans Court purported to hold, in the alternative, that the 1977 Board's error did not change the outcome of Mr. George's proceeding. Pet. App. 50a-52a. The Federal Circuit declined to "reach th[at] alternative holding" precisely because it resolved the question presented against Mr. George. Pet. App. 10a n.3. The Court commonly grants certiorari where the court of appeals would need to address distinct issues on remand. *See, e.g.*, *McFadden v. United States*, 576 U.S. 186, 197 (2015); *Bailey v. United States*, 568 U.S. 186, 202 (2013).

That approach is particularly appropriate here, because the Veterans Court's alternative holding is plainly wrong and unlikely to survive scrutiny before the Federal Circuit. The Veterans Court conceded (as the Board found) that there was "conflicting evidence" regarding "aggravation" of Mr. George's condition. Pet. App. 51a. That is an understatement: the two boards responsible for evaluating Mr. George reached opposite conclusions about aggravation. Pet. App. 26a-27a; *see* Pet. App. 74a, 78a-79a. Such an evenly split government assessment plainly is not a "clear and unmistakable" showing that can rebut the presumption of aggravation. 38 U.S.C. § 1111. Had the

1977 Board correctly applied the statutory presumption, therefore, Mr. George's benefits claim would have succeeded. *See* Pet. App. 61a (Bartley, J., dissenting). Indeed, the 2016 Board acknowledged that the 1977 Board's non-aggravation finding was based on "how the evidence in the claims file at the time was weighed and evaluated," Pet. App. 79a—precisely what the correct application of § 1111 would have changed.

The Federal Circuit can make quick work of these issues on remand and award Mr. George the benefits wrongfully denied for decades. That simply confirms certiorari is warranted.

CONCLUSION

The Court should grant this petition for a writ of certiorari.

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