No. 21-234

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

BRIEF OF JEREMY C. DOERRE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Jeremy Cooper Doerre
Counsel of Record
Tillman Wright, PLLC
3440 Toringdon Way, Ste. 310
Charlotte, NC 28277
jdoerre@ti-law.com
(704) 248-4883
Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae Jeremy C. Doerre is an attorney who practices before the United States Court of Appeals for the Federal Circuit. Amicus has no stake in any party or in the outcome of this case. Amicus' only interest in this case is in bringing potentially relevant issues to the Court's attention.

---

[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae or amicus curiae's counsel made such a monetary contribution to the preparation or submission of this brief. Counsel for each of the parties provided written consent to the filing of this brief. A copy of this written consent was provided to the Clerk upon filing. Counsel of record for each of the parties received timely notice of intent to file this brief.

SUMMARY OF THE ARGUMENT

38 U.S.C. § 7111 provides that "[a] decision by the Board is subject to revision on the grounds of clear and unmistakable error."

38 CFR § 20.1403 provides a qualification that "[c]lear and unmistakable error does not include the otherwise correct application of a statute … where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute." 38 CFR § 20.1403(e).

However, this qualification cannot reasonably be construed to cover the situation where a plainly erroneous statutory interpretation represented clear and unmistakable error even before any "change in the interpretation of the statute." 38 CFR § 20.1403(e). Such a construction would lead to the absurd result that a Board decision based on a plainly erroneous VA statutory interpretation that initially represents "clear and unmistakable error" under 38 CFR § 20.1403 is only subject to revision for "clear and unmistakable error" prior to VA or court acknowledgment and correction of the erroneous interpretation.

Fortunately, the plain text of the regulation is readily susceptible to a reasonable construction which avoids this absurdity. In particular, the term "otherwise correct application of a statute" should be construed as encompassing an application that is "otherwise correct" but for the "change in the

interpretation of the statute," rather than "otherwise correct" but for the erroneous nature of the original interpretation. 38 CFR § 20.1403(e).

Thus, 38 CFR § 20.1403 should not be construed as excluding from clear and unmistakable error a plainly erroneous statutory interpretation which represented clear and unmistakable error even before any "change in the interpretation of the statute." 38 CFR § 20.1403(e).

Moreover, 38 U.S.C. § 7111 should not be construed as including a further atextual statutory exception not present in the VA's implementing regulation, as courts "may not engraft … exceptions onto the statutory text." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530, 531 (2019); see also *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) ("When the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest[, as] [o]nly the written word is the law, and all persons are entitled to its benefit.")

ARGUMENT

I. 38 CFR § 20.1403 cannot reasonably be construed as excluding from clear and unmistakable error an erroneous statutory interpretation which represented clear and unmistakable error before any 'change in the interpretation of the statute.'

38 U.S.C. § 7111 provides that "[a] decision by the Board is subject to revision on the grounds of clear and unmistakable error."

The Petition asks this Court to consider whether VA "reliance on an agency interpretation that is … invalid under the plain text of the statutory provisions in effect at the time … is … 'clear and unmistakable error'." Pet. at i.

The VA's own regulation makes plain that "[c]lear and unmistakable error" can be an "error… of law," such as where "the statutory … provisions extant at the time were incorrectly applied." 38 CFR § 20.1403.

This regulation provides a qualification that "[c]lear and unmistakable error does not include the otherwise correct application of a statute … where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute." 38 CFR § 20.1403(e).

However, this qualification cannot reasonably be construed to cover the situation where a plainly

erroneous statutory interpretation represented clear and unmistakable error even before any "change in the interpretation of the statute." 38 CFR § 20.1403(e).

In this regard, consider a hypothetical where the Board bases a decision on a plainly erroneous VA interpretation of a statute, and immediately thereafter it is universally agreed that the decision involved "[c]lear and unmistakable error" in that "the statutory … provisions extant at the time were incorrectly applied." 38 CFR § 20.1403. Subsequently, the VA recognizes this, and announces that its interpretation "conflicts with the statute and is therefore invalid." VA Gen. Counsel Prec. 3–2003 (July 16, 2003).

If the limitation of 38 CFR § 20.1403(e) was construed to cover this scenario, then this "change in the interpretation of the statute" would preclude the Board's error from continuing to be classified as clear and unmistakable error. Perversely, even though the Board's reliance on the erroneous interpretation originally qualified as "clear and unmistakable error," the VA's recognition and correction of its prior erroneous interpretation would operate to foreclose classification as "clear and unmistakable error." 38 CFR § 20.1403.

Such a construction would thus lead to the absurd result that a Board decision based on a plainly erroneous VA statutory interpretation that initially represents "clear and unmistakable error" under 38

CFR § 20.1403 is only subject to revision for "clear and unmistakable error" prior to VA or court acknowledgment and correction of the erroneous interpretation.

In this regard, "to construe statutes so as to avoid results glaringly absurd, has long been a judicial function." *Armstrong Co. v. Nu-Enamel Corp.*, 305 U.S. 315, 333 (1938).

Further, this *reductio ad absurdum* makes clear that such a construction is unreasonable, and thus not entitled to deference under *Auer v. Robbins*, 519 U.S. 452 (1997). See *Kisor v. Wilkie*, 139 S. Ct. 2400, 2416 (2019) ("Under *Auer*, … the agency's reading must fall 'within the bounds of reasonable interpretation.'" (quoting *Arlington v. FCC*, 569 U.S. 290, 296 (2013)).

Fortunately, the plain text of the regulation is readily susceptible to a reasonable construction which avoids this absurdity. In particular, the term "otherwise correct application of a statute" should be construed as encompassing an application that is "otherwise correct" but for the "change in the interpretation of the statute," rather than "otherwise correct" but for the erroneous nature of the original interpretation. 38 CFR § 20.1403(e).

The latter construction would lead to the absurd result outlined above, and would allow the VA to effectively insulate reliance on an erroneous statutory interpretation from review for clear and unmistakable error simply by issuing a new interpretation.

Construing the term as referencing an application that is "otherwise correct" but for the "change in the interpretation of the statute" avoids these absurd results.

Such an otherwise correct application might occur, for example, "where the VA adopts a new [interpretation] … by choosing among several 'permissible construction[s]'," and the new interpretation "would provide relief that was not previously required." Pet. at 21 (quoting *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council*, 467 U.S. 837, 843 (1984)). As the Petition observes, "[i]t makes sense to exclude such changes from [clear and unmistakable error] because they would provide relief that was not previously required." Pet. at 21.

In contrast, 38 CFR § 20.1403 cannot reasonably be construed as excluding from clear and unmistakable error a plainly erroneous statutory interpretation which represented clear and unmistakable error even before any "change in the interpretation of the statute." 38 CFR § 20.1403(e).

II. 38 U.S.C. § 7111 cannot reasonably be construed as including an atextual statutory exception not present in the VA's implementing regulation.

As noted above, 38 U.S.C. § 7111 provides that "[a] decision by the Board is subject to revision on the grounds of clear and unmistakable error," but the VA

has articulated a limitation on clear and unmistakable error in its implementing regulation. See 38 CFR § 20.1403(e).

However, 38 U.S.C. § 7111 cannot reasonably be construed as including some further atextual statutory exception not present in this implementing regulation, as courts "may not engraft … exceptions onto the statutory text." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S. Ct. 524, 530 (2019).

Indeed, this Court just recently confirmed that "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest," as "[o]nly the written word is the law, and all persons are entitled to its benefit." *Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020); see also *Caminetti v. United States*, 242 U.S. 470, 485 (1917) ("When the language of a statute is plain and does not lead to absurd or impracticable results, … the language must then be accepted by the courts as the sole evidence of the ultimate legislative intent, and the courts have no function but to apply and enforce the statute accordingly."); *Lamie v. U.S. Trustee*, 540 U.S. 526, 534 (2004) ("It is well established that 'when the statute's language is plain, the sole function of the courts — at least where the disposition required by the text is not absurd — is to enforce it according to its terms.'" (quoting *Hartford Underwriters Ins. Co. v. Union Planters Bank, N.A.*, 530 U.S. 1, 6 (2000)).

CONCLUSION

Amicus urges this Court to grant certiorari.

Respectfully submitted,

Jeremy Cooper Doerre
Counsel of Record
Tillman Wright, PLLC
3440 Toringdon Way,
Suite 310
Charlotte, NC 28277
jdoerre@ti-law.com
(704) 248-4883

Counsel for Amicus Curiae

September 2021