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 United States Court of Appeals for the Federal Circuit

BRIEF *AMICUS CURIAE* OF MILITARY-VETERANS ADVOCACY SUPPORTING PETITIONER

MICHAEL E. JOFFRE
Counsel of Record
WILLIAM H. MILLIKEN
STERNE, KESSLER, GOLDSTEIN & FOX, P.L.L.C.
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 772-8856
mjoffre@sternekessler.com

JOHN B. WELLS
MILITARY-VETERANS ADVOCACY, INC.
P.O. BOX 5235
Slidell, LA 70469-5235

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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, the 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 the VA's decision?

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INTEREST OF *AMICUS CURIAE* [1]

Military-Veterans Advocacy Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits.

The Federal Circuit's decision in *George v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021), adopts an atextual and anti-veteran interpretation of the "clear and unmistakable error" provisions of 38 U.S.C. §§ 5109A and 7111. According to the court of appeals, the VA's application of a regulation that is *inconsistent with the plain language of the enabling statute* is somehow not a clear and unmistakable error because the regulation—even when never blessed by a court—constituted the prevailing law at the time it was initially applied. This holding conflicts with fundamental principles of jurisprudence that trace back to *Marbury v. Madison*. When a court interprets the plain language of a statute as a matter

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[1] The parties were timely notified of MVA's intent to file this brief and have consented to the filing. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

of first judicial impression, it does not *change* the law; it declares what the law has always been. Pet. 16, 22–24 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)). And any agency decision that conflicts with that law has *always* been wrong—clearly and unmistakably so. Pet. 17, 21. Moreover, even if there were any doubt about whether CUE applies to this scenario (there is not), the pro-veteran canon would resolve it. Pet. 18–19. As this Court has long held, veterans-benefits statutes must "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Federal Circuit's cramped interpretation of CUE flies in the face of that admonition.

This stark departure from precedent would be bad enough. But, to make matters worse, the Federal Circuit's decision—if allowed to stand—threatens to significantly erode veterans' rights to the benefits that their service to our Nation has earned them.

Veterans attempting to navigate the disability-benefits system already face daunting obstacles. The process is complicated, slow, and inaccurate. Most veterans move through it without the aid of an attorney (indeed, attorneys are effectively *prohibited* at the beginning of the claims process). The result is that errors of the type at issue here often persist for years before a court finally steps in to correct them. Pet. 26, 29. This case provides an excellent illustration: the VA's erroneous interpretation of 38 U.S.C. § 1111 was in place for *four decades* before the Federal Circuit corrected it. While these errors

persist, untold numbers of veterans' cases will be incorrectly adjudicated and then allowed to become final. Under the Federal Circuit's interpretation of CUE, these veterans will have no recourse after the errors underlying their cases are at last set right.

That is an indefensible result. Congress enacted the CUE statutes for the express purpose of ensuring that clearly erroneous denials of benefits due to veterans are *never* truly final. Pet. 25.

As this case itself shows, the practical consequences of the Federal Circuit's decision are significant. Because benefits associated with a given claim are assessed from the date the claim was filed, many years' worth of disability benefits can turn on the veterans' ability to demonstrate CUE. *See* Pet. 32–33. For some veterans, those benefits can literally mean the difference between life and death.

The decision below is wrong, and the issue presented is critically important for veterans. This Court should grant the petition and reverse.

SUMMARY OF THE ARGUMENT

The Federal Circuit's erroneous interpretation of the CUE statutes injects serious problems into an administrative regime already riddled with them. The VA-benefits system is complicated, slow, and inaccurate, and most veterans must navigate it without the benefit of legal counsel. The result is that many veterans have their benefits improperly denied based on legal errors that may not surface until years or decades later. Congress enacted CUE to serve as a safety valve that suspends the usual consequences of

finality and ensures that veterans subjected to these sorts of errors are ultimately able to obtain the benefits to which their service has entitled them. If the decision below is permitted to stand, that safety valve is gone.

If the Federal Circuit's interpretation were compelled by the CUE statutes, that would be one thing. But it is not. On the contrary, application of an invalid agency regulation is plainly "clear and unmistakable error" even if the regulation has not yet been deemed invalid at the time of its application. And even if the matter were not so plain, the pro-veteran canon of statutory construction would compel the conclusion that the court of appeals' decision is wrong.

This Court should grant the petition for certiorari and reverse.

ARGUMENT

I. THE FEDERAL CIRCUIT'S INTERPRETATION OF THE CUE STANDARD PLACES INTOLERABLE BURDENS ON VETERANS SEEKING DISABILITY BENEFITS.

The VA claims process is extremely complex and difficult to navigate. It is also notoriously inaccurate. Veterans whose claims are erroneously denied—and there are many—are often unable to take advantage of their appeal rights (or are unaware of them altogether). After an erroneous denial becomes final, a CUE claim is the only means through which the

veteran can obtain relief for the error. That is precisely why the CUE statutes are so important. The Federal Circuit's cramped view of these statutes, if allowed to stand, will unjustly deprive many veterans of a route of relief that Congress expressly provided to them.

A. Veterans face massive hurdles in navigating the disability-benefits system.

"The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate." 106 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (statement of Sen. Rockefeller). Unfortunately, in practice, the system is both adversarial *and* tremendously complicated—not to mention incredibly slow. The veterans attempting to utilize it often lack the benefit of legal counsel. And the VA's track record of accurately adjudicating claims is abysmal. The result—a process that is complicated, slow, hostile to lawyers, and mistake-ridden—poses, at the risk of understatement, substantial problems for veterans seeking the benefits to which their service has entitled them.

1. David Shulkin, the former VA secretary, candidly acknowledged that the system as it currently functions is "adversarial." Krause, *Veterans Affairs Secretary Admits VA Is 'Adversarial' For Veterans*

(Nov. 8, 2017).[2] And it presents "daunting" challenges for veterans seeking disability benefits. Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C. L. REV. 223, 224 (2016); *see also* Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 FED. CIR. B.J. 433, 433–34 & n.5 (2009) ("Cases demonstrating the glacial pace of the VA in determining benefits, the difficulty of . . . navigating the bureaucracy, and VA blunders in general are legion.") (collecting cases). Indeed, "one of the most frequently cited barriers to veterans receiving—or even applying for—VA benefits is a veteran's inability to understand the system." Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 45–46 (2014).

Even a brief description of the system makes evident why veterans have so much difficulty understanding it.

The process begins when the veteran submits a request for benefits—i.e., a "claim"—to a VA Regional Office (RO). 38 U.S.C. § 5101(a); *see generally* Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are A*

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[2] *Available at* https://www.disabledveterans.org/2017/11/08/veterans-affairs-secretary-admits-va-adversarial-for-veterans/.

Failure, 19 WIDENER L.J. 57, 82–97 (2009) (describing the claims process). "Filing a claim involves a significant amount of paperwork. This is a daunting endeavor for those who lack focus and are unable to complete tasks, which is typical of veterans who return from engagements . . . ." Liang & Boyd, *PTSD in Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform*, 22 STAN. L. & POL'Y REV. 177, 182 (2011). The current edition of the form is 12 pages long and contains extensive and complex instructions. *See* VA Form 21-562EZ.[3] https://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf. And these VA "standardized forms pose questions that are ambiguous or even misleading." Pomerance & Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, 23 WIDENER L. REV. 1, 15 (2017).

Next, the RO gathers the veteran's service records and military medical records and schedules a "Compensation[] & Pension Examination," which is designed to assess the veteran's disabilities and determine whether and to what extent they are service-connected. Liang & Boyd, *supra*, at 182–83; Reed, *supra*, at 84–85. A "rating specialist" assesses the claim and recommends a rating decision. Reed, *supra*, at 85–86. The statutes contain no deadline for the RO to act on a claim, meaning claims sometimes

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[3] *Available at* https://www.vba.va.gov/pubs/forms/VBA-21-526EZ-ARE.pdf.

remain pending "for years." *Id.* at 109. And the ROs are staffed by lay adjudicators—not lawyers—and so are not equipped to reliably interpret the relevant statutes and regulations even when they do finally get around to deciding the veteran's claim. Pet. 27.

Until recently,[4] the remainder of the process operated as follows: If a claim were denied in whole or in part, the veteran could then submit a "Notice of Disagreement [NOD]." Liang & Boyd, *supra*, at 183. "[A] veteran who wished to contest an initial RO decision had to

> take six steps. First, the veteran must draft an application for benefits, with supporting medical documentation. Second, the veteran must adequately answer any VA requests for additional information . . . . Third, . . . the veteran must understand the [RO]'s decision

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[4] In 2017, Congress passed the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, which—despite its name—arguably makes the appeals process even more complicated than it was for Mr. George. The 2017 statute established "multiple pathways, each with very different processes and ends," that the veteran can choose if he or she is dissatisfied with an RO decision. *See* Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. Kan. L. Rev. 513, 549–51 (2019) (describing the new process). The complexity is worsened by the fact that the new system will proceed in parallel with the "legacy" system (which still applies to old claims) for the foreseeable future. *Id.* at 555–56. Even more troubling, the 2017 law eliminates the VA's duty to assist once the RO issues an initial decision on the veteran's claim. *Id.* at 556–58; *see* 38 U.S.C. § 5103A(e)(2).

> and the fact that the veteran has the right to an appeal. Fourth, the veteran must compile the evidence that the VA did not take into account in the initial decision . . . . Fifth, the veteran must draft an NOD explaining in clear, concise, complete, and precise language why the [RO]'s decision is incorrect and how the evidence that the veteran has compiled proves the [RO] decision to be incorrect; and he or she must request that the [RO] reconsider its decision. Sixth, the veteran must decide whether to have the NOD sent directly to a [Decision Review Officer] and, if so, whether to request a meeting with a DRO, or go directly to the BVA.

Wright, *supra*, at 444 (citations omitted). Calling this process "complex" would be an understatement. And it was made even more complex by the difficulty many veterans encountered in obtaining their medical records from the VA. *See* Pomerance & Eagle, *supra*, at 14 (noting that many "claimants end up waiting for unreasonably long periods of time to receive their [files] from the VA").

In view of these complexities, it is perhaps unsurprising that the vast majority of veterans whose claims are denied by the RO do not contest the denial—meaning the denial becomes final. Liang & Boyd, *supra*, at 183; *see* Pet. 27.

After submission of the NOD, the VA would then issue a "Statement of the Case" explaining the RO's

decision. After the Statement of the Case issued, the veteran had 60 days to file a formal appeal with the Board of Veterans Appeals. *See* Liang & Boyd, *supra*, at 184.

The BVA appeals process is "slow and highly inefficient," often taking years to complete. *Id.* at 184–85; *see also* Reed, *supra*, at 92–93, 100, 109. The average time a veteran waits to have an appeal favorably decided by the Board and implemented is over six years. Simcox (2019), *supra*, at 513, 532.

The veteran can appeal an adverse decision from the BVA to the Court of Appeals for Veterans Claims; the veteran may appeal from there to the Federal Circuit and then to this Court. Liang & Boyd, *supra*, at 185. These additional appeals can take many more years to complete—meaning that a disabled veteran may struggle through the appeals process for a decade or more, all the while "either receiving no compensation or lower compensation than that to which they are entitled because of an error by the VA." *Id.* at 185–86.[5]

The result is a system with "layers of procedural complexity" and "a process that can seem interminable" for veterans attempting to navigate it. Ridgway, *The Veterans' Judicial Review Act Twenty*

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[5] It is not uncommon for elderly claimants to die while attempting to navigate the claims process, in which case "the disability claim dies" as well "and the federal government does not pay the claim." O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 224 (2001).

Years Later: Confronting the New Complexities of the Veterans Benefits System, 66 N.Y.U. ANN. SURV. AM. L. 251, 295–96 (2010); *see also id.* at 296–97 (noting that "the National Veterans Legal Services Program's guide and reference materials for adjudication of veterans claims run 4000 pages"); Liang & Boyd, *supra*, at 177 (referring to the claims process as a "minefield"). Indeed, many veterans are simply "incapable of developing the factual record alone and . . . may not know the requisite language for recognition of benefits claims or the procedural rules for appeals." Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection Can Help*, 26 T.M. COOLEY L. REV. 113, 125 (2009).

"The procedure for claiming and appealing benefits has been likened to a hamster wheel because veterans' claims are developed, denied, appealed, and remanded *ad infinitum*." McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 283 (2019) (citing *Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting)). This "merry-go-round of appeals and remands . . . can take years to resolve," often leading veterans to "become discouraged and simply give up." Estrada, *supra*, at 128; *accord* Pomerance, *supra*, at 46. Hence the oft-repeated

"slogan for disabled American veterans": "Delay, Deny, Wait Till They Die." McClean, *supra*, at 277.[6]

2. The byzantine complexities of the VA benefits-application process make it a challenge for even experienced attorneys to navigate. But most veterans go at it alone. And nearly all claimants lack legal representation at the outset of the process because attorneys are statutorily barred from charging for legal services until after the RO's initial decision on the veteran's claim. *See* 38 U.S.C. § 5904(c)(1); Reiss & Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2, 3 & n.10 (2009). This proscription on retained attorneys dates back to the Civil War, when Congress passed a law prohibiting a claimant for paying an attorney more than $10 for representation in a VA benefits claim. *See* Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568, amended by Act of July 4, 1864, ch. 247, § 12, 13 Stat. 387, 389.

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[6] Elderly veterans "are particularly hindered by this extremely intricate system." Pomerance, *supra*, at 47. "For instance, veterans with vision impairments (the occurrence of which is greater in older adults) can have a tough time just reading through the pages and pages of detailed requirements, much less filling out all of the required forms." *Id.* Moreover, the evidence necessary to show service connection can become increasingly more difficult to find with the passage of time: records may be lost or destroyed, and memories fade. Kabatchnick, *Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process*, 12 MARQ. ELDER'S ADVISOR 185, 205–08 (2010). And many elderly veterans struggle with mental-health issues and may lack knowledge about the potential benefits to which they are entitled. *See id.* at 210–15.

The underlying rationale was that "the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). More generally speaking, the system has long displayed a hostility to attorney involvement—largely a product of lawmakers' desire to keep the system informal and non-adversarial. Simcox (2019), *supra*, at 519; *see also* Ridgway, *supra*, at 261.

Veterans may retain legal representation for proceedings that occur after an initial decision on a claim. *See* 38 U.S.C. § 5904(c)(1).[7] But few are in a position to afford it. Moreover, by that point, the hamster wheel has been set in motion, and even represented veterans may find themselves in a seemingly interminable cycle of appeals and remands—appeals and remands that might never have been necessary if the claim had been adjudicated properly in the first place. *See* Pomerance, *supra*, at 56 (noting that the beginning of the process is the most critical time because "the veteran need not enter the time-consuming thicket of the appellate process if the Regional Office approves his or her claim outright").

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[7] Under the legacy system, *see supra* note 4, veterans were not permitted to retain an attorney until after submission of the NOD. *See* Reiss & Tenner, *supra*, at 3 & n.10.

As one commentator colorfully put it:

> Imagine if our legal system were set up so that plaintiffs were forced to assemble, file, and argue their own lawsuits, and that attorneys could only be paid for their assistance after the initial case was lost (which, predictably, most would be). This unbelievable situation in reality is the state of veterans law today.

Kabatchnick, *After the Battles: The Veterans' Battle with the VA*, 35 A.B.A. HUM. RTS. 13, 13 (2008).

And lawyers make a difference. All the available data "indicates that legal representation may provide significant benefits to veterans." Liang & Boyd, *supra*, at 207–08; *see also* Wright, *supra*, at 447–48; Dowd, *No Claim Adjudication Without Representation: A Criticism of 38 U.S.C. S 5904(c)*, 16 FED. CIR. B.J. 53, 79 (2006) (noting that "several former judges of the CAVC have suggested that attorneys add value to the claims process"). The most recent annual BVA report indicates that attorneys achieve substantially better results for their clients than non-lawyer representatives from Veterans Service Organizations (VSOs). Department of Veterans Affairs (VA) Board of Veterans' Appeals Annual Report Fiscal Year (FY) 2020, at 36.[8]

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[8] *Available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2020AR.pdf.

3. Unfortunately—but perhaps unsurprisingly in view of the system's complexity and its hostility to attorney representation—the available evidence suggests that the VA frequently denies disability compensation to deserving veterans.

In 2020 (the most recent year for which statistics are available), the CAVC ruled for the veteran in more than 90% of cases decided on the merits. *See* Pet. 28; U.S. Court of Appeals for Veterans Claims Annual Report at 3 (2020).[9] This means that BVA denials of benefits are erroneous in nine out of every ten cases. Even worse, claimants were awarded Equal Access to Justice fees in nearly 80% of appeals. *See* U.S. Court of Appeals for Veterans Claims Annual Report at 4.[10] EAJA fees are available only if a court finds that the government's position is not "substantially justified." *See generally* 28 U.S.C. § 2412. This means that, in litigating with veterans, the government takes a position that is substantially unjustified *over three-quarters of the time*.[11]

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[9] *Available at* http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf. The percentage for 2019 was almost identical. *See* U.S. Court of Appeals for Veterans Claims Annual Report at 3 (2019), *available at* http://www.uscourts.cavc.gov/documents/ FY2019AnnualReport.pdf.

[10] 2020 was not an outlier. In 2019, almost 75% of claimants were awarded EAJA fees. *See* U.S. Court of Appeals for Veterans Claims Annual Report at 4 (2019).

[11] *See also* Oral Arg. Tr. 52, *Astrue v. Ratliff,* No. 08-1322 (2010) ("CHIEF JUSTICE ROBERTS: [T]hat's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified? MR.

The preceding figures are taken from CAVC appeals, which introduces a selection bias into the numbers. Even so, the available statistics suggest that the error rate across *all* RO determinations—appealed or not—may be as high as 33%. Pomerance, *supra*, at 52 & n.293; *see also* Ridgway, *supra*, at 270 (2000 GAO report "showed that initial RO decisions were correct only 68% of the time"). And other evidence suggests that the VA fails to discharge its statutory duty to assist veterans in developing their claims in a substantial fraction of cases. *See* Simcox (2019), *supra*, at 531. As one commentator put it, "[i]n terms of making timely and accurate compensation determinations, the VA sets low standards and consistently fails to meet them." Wright, *supra*, at 439; *see also* Liang & Boyd, *supra*, at 180 ("the VBA does not have a successful performance record").[12]

B. The Federal Circuit's decision exacerbates these difficulties.

All this adds up to a bleak picture for veterans seeking disability benefits. The system is complicated, interminable, and hard to navigate;

YANG [counsel for the United States]: It is an unfortunate number, Your Honor. And it is—it's accurate.").

[12] One former VA attorney has suggested that the high error rate in ROs is due to a perverse incentive structure: "because VA managers are evaluated in part on how many claims their offices adjudicate and how fast the claims are adjudicated, it is in the best interest of the VA managers to improperly deny claims quickly." Estrada, *supra*, at 127 (quoting Jablow, *Representing Veterans in the Battle for Benefits*, 42 TRIAL 30, 32 (2006)).

attorneys are discouraged (and virtually forbidden at the earliest and most crucial stages of the process); and the agency gets things wrong a substantial proportion of the time.

The Federal Circuit's erroneous interpretation of the CUE statutes magnifies these problems. As the statistics above demonstrate, untold numbers of veterans will labor unsuccessfully through the claims process for years and may ultimately have benefits denied based on demonstrably erroneous grounds. And—precisely *because* the process takes so long—the underlying errors may not be corrected for many years, during which time scores of claim denials will have become final and—under the Federal Circuit's cramped view of CUE—forever incapable of correction.

This case demonstrates that point in stark relief. The VA applied an anti-veteran and demonstrably unlawful regulation for *forty years* before the Federal Circuit finally corrected the mistake. Thousands upon thousands of veterans had their claims finally adjudicated under that rule—which, it bears emphasis, was later ruled to be *contrary to the unambiguous text* of § 1111. *See Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). According to the decision below, these veterans—who were denied years' worth of benefits for reasons that all parties agree were legally incorrect—have no recourse. That is an indefensible and lawless outcome.

II. THE DECISION BELOW CONFLICTS WITH THE PRO-VETERAN CANON.

The Federal Circuit's conclusion is particularly indefensible in view of the pro-veteran canon of statutory construction. "Congress's intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country," and consequently, the "entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (internal quotations omitted); *see also Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (Supreme Court and Federal Circuit "have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"). "[S]ystemic justice and fundamental considerations of procedural fairness carry great significance" in this regime. *Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999). Accordingly, this Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991)).

"[I]n light of this canon," the Federal Circuit's conclusion that Mr. George cannot obtain relief from application of a concededly unlawful regulation can be correct only if the CUE statutes contain a "clear indication" that Congress intended that result. *Id.* They do not. On the contrary, as the petition explains, the plain terms of the statute and basic principles of

jurisprudence compel the opposite conclusion: application of an agency regulation later deemed inconsistent with the plain text of the statute is clear and unmistakable error. Pet. 14–26. The Federal Circuit's decision otherwise flies in the face of this Court's admonition that veterans' statutes must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575.

III. THIS COURT'S REVIEW IS WARRANTED TO CORRECT THE FEDERAL CIRCUIT'S ERROR AND ENSURE THAT VETERANS RECEIVE THE BENEFITS TO WHICH THEIR SERVICE HAS ENTITLED THEM.

As explained in Mr. George's petition, the question presented here is recurring and important. Pet. 26–33. Millions of veterans are currently eligible for disability compensation, and—particularly in view of the extraordinarily high error rate in VA adjudication—the Federal Circuit's incorrect interpretation of the CUE statutes creates potential unfairness for every one of them.

Contrary to the Federal Circuit's conclusion, "basic principles of finality," Pet. App. 20a, do not compel this anomalous and unjust result. On the contrary, the Federal Circuit's reasoning "is plainly wrong." Pet. 23. In enacting the CUE statutes, Congress indisputably created an *exception* to finality for errors that are clear and unmistakable. Pet. 25; *see* Pet. App. 9a (agreeing that "CUE is a statutorily permitted collateral attack on final VA decisions"). And Congress had good reasons for creating an

exception: given the VA's error rate and the difficulty veterans have in navigating the claims process, application of traditional civil-litigation principles of finality would be deeply unjust.

The question presented thus is not about finality at all. The question is whether a decision resting on an admittedly unlawful regulation is somehow rendered correct (or, at least, not clearly and unmistakably wrong) simply because the courts had not yet had a chance to say the regulation was unlawful at the time the decision issued.

That question should answer itself. This Court's intervention is needed to correct the Federal Circuit's mistake and restore to afflicted veterans the disability benefits to which they are legally entitled.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MICHAEL E. JOFFRE
Counsel of Record
WILLIAM H. MILLIKEN
STERNE, KESSLER, GOLDSTEIN
& FOX, PLLC
1100 New York Avenue, N.W.
Washington, D.C. 20005
(202) 772-8856
mjoffre@sternekessler.com

JOHN B. WELLS
MILITARY-VETERANS
ADVOCACY, INC.
P.O. Box 5235
Slidell, LA 70469-5235

Counsel for Amicus Curiae