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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The Petition established that the Federal Circuit incorrectly decided an important and recurring question of law in a way that disadvantages veterans and defies Congress's intent. The Government does not dispute that the Federal Circuit's holding will prevent disabled veterans from recovering potentially life-changing compensation in numerous cases where the statute requires it. Instead, the Government argues that the decision below is right on the merits, BIO 11-19, and alternatively that this case is not a suitable vehicle for resolving the question presented, BIO 19-21. Neither contention is correct.

The Government acknowledges that, when VA misapplies a governing statute, its decision can be considered "clear and unmistakable error" (or "CUE") subject to collateral review under 38 U.S.C. §§ 5109A and 7111. But the Government—like the Federal Circuit—contends that VA's misapplication of an unambiguous governing statute is *not* CUE if the agency's erroneous view is codified in a regulation. In the Government's opinion, such a regulation is just as much governing "law" as the statute that the regulation defies. The Government's position fundamentally misunderstands the status of agency interpretations. A regulation that clearly conflicts with a governing statute is void from the start; it was never valid "law."

The Government also is wrong to suggest that this is not the right case in which to resolve the admittedly important question presented. To deny Mr. George's CUE claim, the Federal Circuit relied entirely on its narrow reading of the CUE statutes. The Government

speculates that Mr. George might not ultimately prevail on his CUE claim if this Court were to reverse the Federal Circuit's legal holding, but it offers no valid support for this suggestion. In any event, the Government does not dispute that this application question, which the Federal Circuit expressly declined to reach, would be best addressed on remand should Mr. George prevail in this Court. The Petition should be granted.

I. The Decision Below Is Incorrect.

A. The CUE statute "subject[s]" all decisions by the Board or regional office "to revision on the grounds of clear and unmistakable error." 38 U.S.C. §§ 7111(a), 5109A(a). As the Petition demonstrated, the text and legislative history of those provisions confirm that CUE encompasses VA decisions that rely on the agency's misinterpretation of an unambiguous governing statute. Pet. 15-19.

The agency's misinterpretation in this case is precisely the "rare kind of error" that is plain on the face of the record and subject to collateral correction, even decades later. BIO 15 (quoting 38 C.F.R. § 20.1403(a), (e)). As the Federal Circuit made clear in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), VA got the law wrong when it denied Mr. George's claim. VA's refusal to afford claimants like Mr. George the statutory presumption of aggravation was "forbidden" because it conflicted with an unambiguous "statute … susceptible of interpretation without resort to *Chevron* deference." *Id.* at 1092-93. In providing this "authoritative statement" of what the statute had "*always* meant," *Rivers v. Roadway Express, Inc.*, 511

U.S. 298, 312-313 & n.12 (1994), *Wagner* confirmed what was already plain on the face of the administrative record: VA rejected Mr. George's claim because it misread the governing statute in a clearly and unmistakably erroneous way. Accordingly, the agency was obligated to revisit this decision.

B. The Government concedes that an error generally is CUE if the agency "misapplied the governing statute as it was then written." BIO 18. But it contends that an agency's misinterpretation of a statute is immune from collateral challenge if the agency "correctly applied" a "regulation as it was then written." BIO 18. In the Government's view, even if the regulation was not "*itself* … correct," "all that is needed to defeat a claim of clear and unmistakable error is a showing that the agency's decision was consistent with [its own] prevailing interpretation of the relevant statute or rule at the time the decision was made." BIO 15. This atextual gloss on the CUE provision ascribes undue significance to an invalid regulation and should be rejected.

1. Nothing in the text or legislative history of the CUE provisions supports the view that Congress intended to immunize VA's unlawful statutory interpretation simply because the agency memorialized the error in a regulation. The statutory text, which embraces all "clear and unmistakable error[s]," 38 U.S.C. §§ 5109A(a), 7111(a), contains no exception for circumstances where the agency was following its own invalid regulation. If VA clearly and unmistakably gets the law wrong, the original source of that error—an erroneous regulation or the adjudicator misinter-

preting the statute in the first instance—does not matter.

With good reason. Under familiar administrative law principles, a regulation that "operates to create a rule out of harmony with the statute[]" enjoys no special solicitude; instead, it is "a mere nullity." *Dixon v. United States*, 381 U.S. 68, 74 (1965). And where, as here, a governing statute leaves no gap for the agency to fill, "the court, *as well as the agency*, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) (emphasis added). Given the central role the statute always must play, there would have been little reason for Congress to allow the agency to treat its "misappli[cation]" of "the governing statute" differently just because the agency memorialized its error in a regulation. BIO 18.

The Government's contrary approach not only undermines the primacy of congressional statutes over agency regulations. It also insulates from CUE review precisely those errors that are least defensible (because they conflict with the unambiguous will of Congress) and that are most likely to have affected large numbers of veteran claimants (because they are enshrined in regulations that agency adjudicators must follow). That approach makes little sense on its own terms. It certainly has no place in this "specific context," BIO 14, of a veterans benefits system "designed to function throughout with a high degree of informality and solicitude for the claimant," *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)); *see* Pet. 18-19 (discussing pro-veteran canon).

There is no indication that Congress abandoned that principle in a context where VA's intransigence makes assisting veterans most essential.

2. The Government offers three arguments for reading into the CUE statute an exception for an agency's "correct" application of an erroneous regulation. None has merit.

a. First, the Government emphasizes that frontline agency adjudicators are "bound" to apply even erroneous regulations. BIO 12 (quoting 38 U.S.C. § 4004(c) (1976)). It invokes the "familiar legal concept" that courts should not second-guess a government decision-maker's "'objective good faith' reliance" on a grant of authority that is only "later found to have been defective." BIO 15 (quoting *United States v. Leon*, 468 U.S. 897, 920-21 (1984)). The Government extracts that principle from this Court's precedent cabining the Fourth Amendment's exclusionary rule. BIO 15. In that context, it makes sense to withhold the exclusionary remedy when an officer acts in accordance with the law as it has been explained to him, given that the "sole purpose" of exclusion is to "deter future" errors by the police. *Davis v. United States*, 564 U.S. 229, 236-37 (2011).

But that principle has no place in the context of a collateral-review statute specifically intended to remedy past erroneous agency decisions. There is no need to exclude a decision-maker's good-faith error from a regime that is "calculated" not "to prevent" but "to repair." *See Elkins v. United States*, 364 U.S. 206, 217 (1960). That is exactly what CUE relief does. It is not a judgment about the propriety of an agency adjudi-

cator's conduct. Nor does it serve a deterrent purpose. It remedies damage already done to veterans erroneously denied benefits. *See* 38 U.S.C. §§ 5109A(a)-(b), (d); 7111(a)-(b), (d).

b. Second, the Government—echoing the Federal Circuit—relies on the well-established exclusion of CUE claims based on a "change in interpretation of law." BIO 16 (quoting 38 C.F.R. § 3.105); *see* BIO 12, 15-16. Petitioner does not dispute that "longstanding VA practice and regulations," BIO 11-12, 15-16, forbid a CUE claim based on "a subsequent change in interpretation of law," Pet 19 (quoting Pet. App. 3a). Nor does Petitioner dispute that this exclusion was in place when Congress enacted the CUE statutes. *See* BIO 12, 16 (citing preamble of 38 C.F.R. § 3.105 (1997), and *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc)). But this case does not involve a change in "interpretation"—indeed, that is exactly where the Federal Circuit went astray.

As the Petition explained, the VA practice that Congress codified excludes from CUE only *genuine* changes in the law or its interpretation—for example, where Congress alters the governing statutory regime or where the agency shifts from one permissible interpretation of a statutory ambiguity or delegation to another, still-permissible construction of that statute. Pet. 20-22. That exclusion makes good sense. CUE is meant for situations where the agency makes an error. If the agency acts lawfully at the time of its decision, this limited collateral relief Congress provided cannot be used by veterans seeking to benefit from genuine changes in law that occur after their claims are finally denied.

But here, the agency did *not* act lawfully in the first instance. The regulation the Board applied in 1977 was not a legitimate "interpretation" of law at all, because it ignored § 1111's unambiguous command that VA afford veterans a presumption of aggravation. *Wagner*, 370 F.3d at 1093-94, 1097. It was a legal "nullity," *Dixon*, 381 U.S. at 74. Likewise, the Federal Circuit's eventual invalidation of that regulation is not simply an alternative view of the law that could fairly be called a new "interpretation." *See Fiore v. White*, 531 U.S. 225, 228 (2001) (judicial decision that "properly interpret[s]" statute is "not new law"). This Court has squarely rejected the Government's contrary argument, that "a change from an impermissible or incorrect interpretation to a permissible or correct one is still a *change*." BIO 16-17. It is "not accurate to say" that correcting a "misinterpret[ation of] the will of the enacting Congress" "'change[s]' the law that previously prevailed." *Rivers*, 511 U.S. at 313 n.12. The Board's rejection of Mr. George's claim was just as wrong in 1977 as it is today; no intervening "change" had to happen to make that true.[1]

[1] The Government suggests that Petitioner's position is illogical because it "emphasizes … *Wagner*" but "does not assert that" an agency correcting its own erroneous interpretation would likewise support a CUE claim. BIO 17. The Government misunderstands Petitioner's argument. The agency's decision was CUE because the regulation it applied conflicts with the governing statute. That error is confirmed by the "later judicial ruling," but it "was present all along." Pet. 22. The agency opinion acknowledging that the regulation "reflected an impermissible interpretation of the statute," BIO 17, likewise surfaces an error that had been present all along.

The Government cannot escape this principle by suggesting that "a judicial construction of a statute can be both a statement about what the statute has always meant and a change in [its] interpretation." BIO 13. In the usual case, where a court does "not overrule any prior decision of this Court," there is no "change[]" in "prevail[ing]" law precisely because the later judicial decision explains what the statutory provision "always meant." *Rivers*, 511 U.S. at 312, 313 n.12. The sole example the Government musters does not help its argument, as it involves the highly unusual circumstance where this Court overcomes statutory stare decisis to overrule its own prior interpretation of a statute. BIO 13 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), and *Monroe v. Pape*, 365 U.S. 167 (1961)). Even assuming this scenario amounts to a change in interpretation, the distinct retroactivity considerations that apply "where this Court overrules its own construction of a statute" do not apply here. *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970); *see* Pet. 24.

The Government emphasizes Congress's codification of VA's pre-1997 CUE regulation and practice. BIO 11-12, 15-16. But none of the history it cites even addresses a CUE claim based on an unlawful agency regulation, let alone takes the unusual approach of treating such an error as falling within *Russell*'s or § 3.105's exclusion for changes in law.

On the contrary, as Petitioner showed, the available legislative history suggests the opposite. Pet. 17-18, 21. The distinction between a "change of legal interpretation" and a "misinterpretation of law" is present in the Social Security context, which Congress

looked to when codifying the CUE statutes. *Fox v. Bowen*, 835 F.2d 1159, 1163-64 (6th Cir. 1987). While "[r]eopening … is precluded" based on a mere change in interpretation, a "misinterpretation of law existing at the time of the determination … clearly shows on its face that an error was made" and therefore supports relief. *Id.*; *see also Mines v. Sullivan*, 981 F.2d 1068, 1071 (9th Cir. 1992); *Munsinger v. Schweiker*, 709 F.2d 1212, 1216 (8th Cir. 1983). The Government asserts that these cases confirm its view that collateral review is justified only where the adjudicator directly "misapplied the governing statute," not where he applied an unlawful regulation. BIO 18. But those decisions do not support this invented distinction. They explain, without qualification, that what matters is whether the agency's approach departed from "the Act." *Fox*, 835 F.2d at 1163-64; *Munsinger*, 709 F.2d at 1216-17.

In short, no change in interpretation of law occurs when a court invalidates an agency's unlawful regulation. And there is no reason to deny CUE relief to veterans harmed by VA's enforcement of such regulations. These veterans are not asking for a windfall based on a favorable change in law; they are asking VA to "conform" its initial decision "to the 'true' state of … the law that existed at the time of the original adjudication," *Russell*, 3 Vet. App. at 313.

c. Third, the Government contends that permitting veterans to obtain relief in these circumstances would convert the limited CUE remedy into a mechanism for setting aside "garden-variety error[s]." BIO 15. But an agency applying a regulation that unambiguously conflicts with a governing statute should

not be an every-day occurrence. And if VA is regularly disregarding Congress's command, the appropriate response is not to immunize that conduct simply because the agency makes so many obvious errors.

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

The Government cannot dispute that this case provides a unique vehicle to squarely address the meaning of both CUE statutes, or that future opportunities to address either statute will be rare. Pet. 33-34. So the Government is left to speculate that Mr. George might not ultimately prevail under a correct understanding of CUE—an issue the Federal Circuit expressly declined to reach. BIO 19; Pet. 34 (citing Pet. App. 10a n.3). Far from raising vehicle concerns, the merits of Mr. George's case underscore the need for this Court's intervention.

Repeating the 2016 Board's misguided critique, the Government emphasizes that Mr. George "has not claimed that any specific evidence was missing from the claims file" in 1977. BIO 21 (quoting Pet. App. 79a). Of course he hasn't. Mr. George's CUE claim is that the 1977 Board applied the wrong legal standard to the *existing* evidence, by failing to apply § 1111's presumption of aggravation and demand a "clear and unmistakable" rebuttal from VA. This is not an evidentiary error but a legal one—precisely the type of mistake that is "clear and unmistakable" decades later. *Supra* 2-3. This case does not involve the type of factual nitpicking (say, regarding a credibility judgment) that might be "inadequate" to state a CUE claim. BIO 21 (quoting Pet. App. 79a).

Perhaps recognizing as much, the Government separately contends that "reasonable minds could … differ" about whether the evidence before the 1977 Board overcame § 1111's presumption of aggravation. BIO 20 (quoting 38 C.F.R. § 20.1403(a)). As the Petition demonstrated, however, that is plainly wrong. Pet. 34-35. The record undisputedly contains "conflicting lay and medical evidence" on the key question. Pet. App. 78a-79a. In particular, two governmental boards examined Mr. George and reached opposing conclusions. The Medical Evaluation Board found that his condition was aggravated by service. Pet. 8. The Physical Evaluation Board disagreed. Pet. 8. That dispute falls far short of the "clear and unmistakable evidence" required to overcome the presumption that Mr. George's service aggravated his condition. There is thus no question that "the Board's 1977 decision would have been different" if the Board had adhered to § 1111. BIO 21.

The Government's only answer is a red herring. It notes that the concept of aggravation has two elements: A condition must have "worsened" during service, and that worsening must not be attributable solely to "the natural progress of the condition." BIO 20 (quoting Pet. App. 85a). The Government then asserts, without explanation, that this distinction somehow made it "possible" for the 1977 Board to find clear and unmistakable evidence of no aggravation. BIO 20. But dividing aggravation into its elements changes nothing. The Medical Evaluation Board found both elements satisfied: Mr. George's condition "progressed" during service, and "at a rate greater than is usual for such disorders" because of "conditions peculiar to his service." Record Before the Agency 1284. The Physical

Evaluation Board disagreed as to one or both elements. That is the same evidentiary conflict, just articulated in a more convoluted way.

The Federal Circuit should make short work of this issue on remand and rule in Mr. George's favor. There is no reason for this Court to delay review of the important question presented. *See McFadden v. United States*, 576 U.S. 186, 197 (2015) (granting certiorari where court of appeals would need to address a distinct dispute on remand); *Bailey v. United States*, 568 U.S. 186, 202 (2013) (same).

CONCLUSION

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

Respectfully submitted,

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