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

BRIEF FOR PETITIONER

Kenneth M. Carpenter
John Niles
CARPENTER CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601

Edmund Hirschfeld
Melanie R. Hallums
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Benjamin P. Chagnon
Robbie Manhas
Jonas Q. Wang
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Counsel for Petitioner

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.

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?

PARTIES TO PROCEEDINGS BELOW

Petitioner is Kevin R. George. Mr. George was the appellant in the court of appeals. Michael B. Martin, who has elected not to seek further review in this Court, also was an appellant in the court of appeals.

Respondent is Denis McDonough, in his official capacity as the Secretary of Veterans Affairs. Secretary McDonough was appellee in the court of appeals. Robert Wilkie, in his official capacity as then-Secretary of Veterans Affairs, and Dat Tran, in his official capacity as then-acting-Secretary of Veterans Affairs, also were appellees in the court of appeals.

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INTRODUCTION

The veterans-benefits system endeavors to do justice to those who have served our country. With that purpose in mind, Congress has relaxed the usual rules of finality of decisions to ensure that veterans can obtain all the benefits promised to them under the law. This case is about one exception to finality that Congress has established: revision of benefits decisions that are infected with "clear and unmistakable error" (typically called "CUE"). 38 U.S.C. §§ 5109A, 7111. If a veteran identifies CUE, the agency must correct its decision so that the veteran receives the benefits that he should have gotten all along. *Id.*

CUE review thus safeguards against bureaucratic mistakes that might otherwise deprive veterans of the benefits the law provides—and which they have unquestionably earned. A decision might contain CUE, for example, if the agency plainly ignored relevant facts in the record or applied the wrong law to the veteran's claim. And a quintessential example of CUE is where the decision fails to abide by an unambiguous statute. At issue here is whether there is an exception when the agency relies on its own invalid regulation to defy an unambiguous statute.

Such an exception is untenable. Nothing in the text of the CUE provisions indicates that it matters *why* a VA decision departed from Congress's unambiguous command. And there is otherwise no reason to graft onto the statutes an atextual exception simply because one component of the agency has effectively told another component to commit CUE by promulgating a manifestly unreasonable regulation. Rather,

the exception that the Federal Circuit found (and the Government defends) is flawed precisely because it elevates an unlawful regulation to the same status as Congress's unequivocal command.

Petitioner Kevin George's case illustrates the injustice of excluding an agency's erroneous reading of a statute from CUE. Mr. 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 VA to meet a heightened standard of proof 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 such a rebuttal, and VA did not find this presumption rebutted before it denied Mr. George's claim. Decades later, 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 original decision. But the Federal Circuit held that Mr. George could not show CUE, reasoning that the agency adjudicators deciding his claim had applied the law in existence at the time—that is, the defective VA regulation.

A clear statute does not stand on the same footing as an invalid regulation purporting to implement it. The statute is "law"; the regulation is not. This Court should reject the Federal Circuit's and the Government's demotion of congressional mandates as

irreconcilable with the text, history, and pro-veteran purpose of the CUE statutes.

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. A timely petition for writ of certiorari was filed on August 13, 2021, and granted on January 14, 2022. 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 App., *infra*, 16a-22a and Pet. App. 97a-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 U.S. military 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.* 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 (quoting 38 U.S.C. § 5107(b)).

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. If the veteran thinks the Board has erred, he can appeal to the specialized United States Court of Appeals for Veterans Claims, typically called the Veterans Court. *Id.* § 7252. Veterans Court 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 multiple ways veterans can continue to pursue their claims outside of the normal appellate process. The Board, for example, can invoke certain discretionary mechanisms to reconsider its decisions, including to "correct an obvious error in the record." 38 U.S.C. § 7103(c). A veteran can also file a supplemental claim, which allows for readjudication based on "new and relevant evidence." 38 U.S.C. § 5108(a); *see id.* § 5104C(b).

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 regardless of whether 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 based on the date of the original claim. *Id.* §§ 5109A(b), 7111(b); *compare id.* § 5110(a)(1), (3) (supplemental claim typically entitles veteran to benefits only from date of later claim).

CUE relief is a longstanding feature of the veterans-benefits system.

Although Congress did not codify CUE review until 1997, that form of review is deeply rooted in the veterans-benefits system. CUE was available even before the modern VA was established in 1930. A regulation promulgated in 1928 by a predecessor agency, the Veterans' Bureau, provided the same essential categories of revision that remain available to veterans today. It specified 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). Reversal or amendment also could be obtained (1) "upon new and material evidence"; or (2) where "obviously warranted by a change in law or by a definite change in interpretation thereof clearly contained in a bureau issue." *Id.* When a revision would entail breaking of service-connection—and therefore an end to benefits—the regulation provided special

procedural protections, except in cases where the change was due to "fraud," substance abuse, or "willful misconduct" by the veteran. *Id.* § 7156. In 1938, these procedural protections were also removed from cases where service-connection would cease due to "a change in law" or "in case of a change of interpretation of law specifically provided in a Veterans' Administration issue." 38 C.F.R. § 2.1009(d) (1938).

The regulation otherwise remained in substantially the same form until 1959. By that point, Congress had codified relief based on showing "new and material evidence." 38 U.S.C. § 3004(a) (1958). The regulations governing the submission of such evidence were therefore removed from the general review provision and codified in a separate regulation. *See* 38 C.F.R. § 3.1531(c)(8) (1959) (provisional regulation implementing 38 U.S.C. § 3004(a)); 38 C.F.R. § 3.156 (1961). The main regulation governing revision continued to provide for relief based on CUE, VA Reg. § 1005(A) (1959), and it continued to provide special protections where service-connection would be severed, *id.* § 1005(D). The regulation also incorporated the exceptions to those special protections that had previously been located in the severance of service connection provision, adapting them into a new preamble explaining that CUE does not apply "where there is fraud; a change in law; a change in interpretation of law specifically stated in a VA issue; or the evidence establishes that service connection was clearly illegal." *Id.* § 1005.

A few years later, Congress provided some "uniform[ity]" and "simplif[ication]" for the scenario where a decision is revised due to "a change in law" or

a change in "administrative issue." H.R. Rep. No. 87-2123, at 1-2 (1962). Among other things, Congress enacted provisions requiring that such a revision that benefitted the veteran would not take effect before the "effective date of the Act or administrative issue." 38 U.S.C. § 3010(g) (1962). When a statutory or regulatory change, or a "change in interpretation of a law or administrative issue," required a reduction of benefits, however, the effective date would be linked to when VA notified the veteran of the change. *Id.* § 3012(b)(6). VA adapted its regulatory structure to reflect these changes. In particular, VA for the first time established a specific regulation, 38 C.F.R. § 3.114, to govern revision of decisions based on changes in law, administrative issue, or interpretation thereof. Paralleling the new statutory provisions, this regulation linked the effective date of a change based on "liberalizing law" or "liberalizing [VA] issue" to "the effective date of the act or administrative issue." 38 C.F.R. § 3.114(a) (1962). It likewise linked the effective date of a reduction in benefits due to a "change in law or a [VA] issue" or "a change in interpretation of a law or [VA] issue" to the veteran's notice of the change. *Id.* § 3.114(b). At the same time, VA updated the preamble of the CUE regulation, § 3.105, to cross-reference § 3.114 and explain that its provisions applied in the event of a legal or interpretive change.

This regulatory landscape remained constant until 1997, when Congress codified CUE relief. Congress was prompted to do so in response to a judicial ruling limiting the relief provided by 38 C.F.R. § 3.105 to CUE contained in regional office (not Board) decisions. *See* Pub. L. No. 105-111, 111 Stat. 2271 (1997); *Smith v. Brown*, 35 F.3d 1516, 1517 (Fed. Cir. 1994).

Congress codified 38 C.F.R. § 3.105(a) in 38 U.S.C. § 5109A, which authorizes CUE review of regional office decisions. Congress also enacted 38 U.S.C. § 7111, which authorizes CUE review of Board decisions. Congress recognized that, in the pro-claimant VA benefits system, "[t]he appropriateness of" CUE revision "is manifest." H.R. Rep. No. 105-52, at 2 (quoting *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc)).[1]

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

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 1975, at the age of seventeen. Pet. App. 6a, 26a; *see* App., *infra*, 1a-2a. His medical entrance examination indicated no mental health disorders. Pet. App. 6a; Record Before the Agency (R.B.A.) 1274. But, one week into his service at the Recruit Depot in San

[1] The en banc Veterans Court in *Russell* consolidated two pro se cases to address the validity of 38 C.F.R. § 3.105 and the court's own jurisdiction to review the agency's resolution of CUE claims. 3 Vet. App. at 312. The decision also offered additional thoughts about the scope and "[p]arameters" of CUE, which the Veterans Court and Federal Circuit have often treated as authoritative. *Id.* at 312-14; *see, e.g.*, *Willsey v. Peake*, 535 F.3d 1368, 1371-72 (Fed. Cir. 2008). *Russell* is instructive in analyzing the bounds of CUE relief, though Congress did not formally codify the *Russell* "[p]arameters" into the statute.

Diego, Mr. George suffered a mental health episode requiring hospitalization, which was initially diagnosed as an "Acute Situational Reaction." R.B.A. 1289. Following treatment with psychotherapy and anti-psychotic drugs, military physicians revised Mr. George's diagnosis to an "Acute Schizophrenic Reaction" that occurred "[i]n line of duty." Pet. App. 6a; R.B.A. 1275. They discharged him from the Naval Regional Medical Center on July 11, 1975, with a recommendation that he be returned to the "Recruit Evaluation Unit" for separation from service. App., *infra*, 6a; R.B.A. 1275.

Instead, the Marine Corps returned Mr. George to a training platoon. App., *infra*, 7a. One month later, Mr. George sought medical attention, at which point he was again given supportive treatment and, belatedly, returned to the Recruit Evaluation Unit. *Id.* A military psychiatrist examined Mr. George and diagnosed him with "Paranoid Schizophrenia" that was "Aggravated By Service." App., *infra*, 3a. According to a Medical Board report, the psychiatrist opined that Mr. George "now appears in his pre-enlistment state complicated by service aggravated stress, both prior to initial hospitalization and certainly subsequent training attempts." App., *infra*, 7a. The Medical Board, which evaluated Mr. George and issued a detailed narrative report, "agree[d] with the [psychiatrist's] findings and diagnosis." App., *infra*, 8a; *see* Pet. App. 6a, 83a. The Medical Board found that Mr. George's condition preexisted service but, "as a result of conditions peculiar to the service, ha[d] progressed at a rate greater than is usual for such disorders and therefore, is considered to have been aggrav[a]ted by

a period of active duty." App., *infra*, 8a; *see* Pet. App. 74a.

The Medical Board recommended that Mr. George's case be referred to the Central Physical Evaluation Board in Arlington, Virginia, so that Mr. George could be discharged from service. Pet. App. 26a; App., *infra*, 4a. The Central Physical Evaluation Board reviewed Mr. George's file and issued a one-page form in which it endorsed the diagnosis of paranoid schizophrenia but, without explanation, indicated it was "not aggravated." R.B.A. 1294; *see* 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 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 did not require "clear and unmistakable" evidence establishing that "the injury … was not aggravated by such service." *Compare* 38 U.S.C. § 1111, *with* 38 C.F.R. § 3.304(b) (1970).

And the Board did not enforce that statutory 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. The Board made no effort to square that conclusion with the contrary opinion of the military psychiatrist who examined Mr. George or with the written report of the Medical Board confirming that opinion. *See id.* And, because the regulation did not state that it must do so, the Board made no attempt to explain how the bare conclusion of the Central Physical Evaluation Board—the only evidence the Board cited for its non-aggravation finding—could amount to clear and unmistakable evidence of non-aggravation in view of the full record.

Mr. George seeks CUE review of the 1977 Board decision, but the Board denies relief.

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 the early 2000s, veterans mounted challenges to 38 C.F.R. § 3.304(b) on the ground that it conflicted with 38 U.S.C. § 1111. The Secretary ultimately "joined" with the veterans in "urging that the [Veterans] Court invalidate" the regulation. *Cotant v. Principi*, 17 Vet. App. 116, 124 (2003). The court "decline[d] the Secretary's highly unusual invitation to invalidate in part his own regulation" and instead sent the "issue back to the Secretary to resolve." *Id.*

Shortly after that decision, 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 Op. Gen. Counsel Prec. 3-2003, ¶¶ 3, 9 (July 16, 2003), 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 that 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 these developments, Mr. George filed a motion asking the Board to revise its 1977 decision on the ground that the Board had committed CUE 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 [Mr. George's] preexisting disability was not aggravated in service." Pet. App. 77a. Rather, there was at most "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 [his] 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 majority held that "[a]pplying a statute or regulation as it was interpreted and understood" by the agency "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. 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. The dissenting judge would have reversed the Board's decision, reasoning that *Wagner* did not "contain[] a new understanding or interpretation" of § 1111 but provided an "authoritative statement" of what § 1111 has always meant. Pet. App. 53a-55a.

The Federal Circuit affirmed. Like the Veterans Court majority, the Federal Circuit 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 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. 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, the Federal Circuit reasoned, because VA's regulation—although later determined to be inconsistent with the unambiguous statute—"provided the initial interpretation of § 1111." Pet. App. 17a. According to the

court, even when an agency's decision relies on such a regulation and defies a clear controlling statute, that cannot amount to "clear and unmistakable" error. Pet. App. 17a-18a, 23a-24a.

SUMMARY OF ARGUMENT

I. The CUE statutes "subject" all Board and regional office decisions "to revision on the grounds of clear and unmistakable error." 38 U.S.C. §§ 7111(a), 5109A(a).

A. On its face, the term "clear and unmistakable error" encompasses the legal error of issuing a decision that is contrary to the terms of an unambiguous statute. Neither the Federal Circuit nor the Government disputes that principle. Instead, they reason that an exception applies where the agency decision faithfully applied an invalid regulation. This Court should reject that claimed exception.

Nothing in the statutory text distinguishes among categories of clear legal error based on the source of the agency adjudicator's mistake. Nor is there any basis to elevate a contra-statutory regulation to the same status as a statute. Such a regulation is not a true expression of the law, and a decision that departs from an unambiguous statute satisfies the CUE standard as it has long been understood.

B. The legislative history underscores the point. It embraces Veterans Court caselaw indicating that CUE review is available to conform prior erroneous rulings to the true state of the law, including by correcting the failure to apply unambiguous statutory

provisions. That understanding of CUE also accords with the treatment given to similar errors in the Social Security context—a context Congress looked to when codifying CUE.

C. Analogizing to other demanding standards of error further supports the conclusion that a failure to abide by an unambiguous statute falls within CUE.

II. Unable to locate a text-based justification for excluding from CUE an agency's application of a plainly invalid regulation, the Government urges this Court to read in an atextual limit on the statutory scope of CUE.

A. The atextual limit proposed by the Federal Circuit and the Government cannot be squared with the pro-veteran canon. The canon serves to resolve interpretive doubt about the meaning of a statute in the veteran's favor. As with other traditional canons, it can rebut the Government's attempt to claim statutory ambiguity as support for reading in an atextual exception. Here, the canon requires recognizing that Congress intended CUE to further the pro-claimant nature of the VA system.

B. The Government and Federal Circuit have offered three bases for their atextual reading of the statute. None has merit.

1. They first rely on a claimed exclusion from CUE for errors "based on 'a change in law or … a *change in interpretation of law*.'" Pet. App. 23a (quoting 38 C.F.R. § 3.105 (1997)). This language comes from the preamble of the agency's CUE regulation. The

Government's theory is that correcting an agency error requires applying a changed interpretation of law. The Court should reject that view.

First, Congress did not incorporate the regulatory preamble language into the statutory text.

Second, even if the CUE statute incorporated the regulation's preamble without saying so, judicial correction of a misinterpretation of an unambiguous statute is not a "change in law" or a "change in interpretation of law." A change in law occurs when Congress alters the governing statutory regime or courts create new rules. And a change in interpretation of law encompasses those circumstances where, for example, an agency adopts a new regulation by choosing another permissible alternative construction. There is no "change," however, when a court corrects an agency's disregard of the unambiguous command of a governing statute.

Neither the Federal Circuit nor the Government has identified any persuasive support for reading those phrases in an atypical way, to encompass judicial correction of an agency's misreading of an unambiguous statute. The regulatory history has long invoked the language at issue to refer to congressional changes and interpretive changes by the agency. And the Veterans Court has not applied that language to prevent correction of agency errors of statutory interpretation.

The sole affirmative support for equating a court's invalidation of a VA regulation with a change in interpretation is a 1994 VA General Counsel Opinion.

Congress showed no awareness of that position, and the opinion's reasoning does not withstand scrutiny.

2. The Federal Circuit and the Government also contend that following an invalid regulation cannot be CUE because the relevant adjudicators were bound to follow it. But an invalid regulation is not binding in any relevant sense; rather, it is a nullity.

Contrary to the Federal Circuit's suggestion, Congress fully expected that CUE would encompass the invalidation of agency regulations by judicial pronouncements. Judicial review of veterans-benefits decisions had been in place for nearly a decade at the time Congress codified CUE, as the legislative history recognizes.

The Government invokes the concept that courts should not second-guess a government decisionmaker's reliance on a grant of authority only later found to have been defective. That principle is best suited for those contexts where the reason for error correction is to deter future mistakes, and not—as here—to correct past ones. In any event, there is no solicitude granted for reliance on an objectively unreasonable position, like the invalid regulation here.

3. General finality concerns supply no reason to read in an atextual exception to CUE. The whole purpose of CUE is to make an exception to finality. And under either party's reading, CUE review is far narrower than direct appeal. There is no risk that this exception to finality would swallow the rule.

III. Under a correct understanding of CUE, Mr. George is entitled to have the 1977 Board decision in his case corrected. There can be no dispute that the Board incorrectly applied the law by defying § 1111. Mr. George is entitled to relief so long as correcting that error would change the outcome in his case. Although the 2016 Board and the Veterans Court concluded this standard would not be met, the Federal Circuit declined to reach the issue.

At a minimum, a remand is required for the Federal Circuit to address whether applying the correct legal standard to the undisputed facts compels the legal conclusion that the 1977 decision contained CUE.

ARGUMENT

I. VA's Defiance Of A Statute's Plain Terms Is "Clear And Unmistakable Error," Whether Or Not The Error Is Enshrined In A Regulation.

The CUE statutes "subject" all Board and regional office decisions "to revision on the grounds of clear and unmistakable error." 38 U.S.C. §§ 7111(a), 5109A(a). The term "clear and unmistakable error" encompasses misinterpretations of unambiguous statutes. § I.A. The legislative history, § I.B, and analogous standards of error, § I.C, support giving CUE that scope.

A. CUE includes misinterpretations of unambiguous statutes.

On its face, the term "clear and unmistakable error" encompasses the legal error of issuing a decision that is contrary to the plain terms of an unambiguous statute. Indeed, neither the Federal Circuit nor the Government disputes that essential conclusion. Nor could they. Flouting a plain statute by adopting an "[e]rroneous … interpretation" of that statute is a clear "error[] of law." *I.N.S. v. St. Cyr*, 533 U.S. 289, 302 (2001). Reflecting that uncontroversial proposition, VA and the courts have long applied a CUE standard that specifically encompasses a decision's failure "to conform to the 'true' state of … the law that existed at the time of the original adjudication," including where "statutory … provisions extant at the time" were "incorrectly applied." *Russell*, 3 Vet. App. at 313. And when Congress codified the CUE statutes, it acknowledged that the remedy would apply in those circumstances, reaching "error[s] … of law" as "to which reasonable minds could not differ." H.R. Rep. No. 105-52, at 2-3 (quoting *Fugo v. Brown*, 6 Vet. App. 40, 44 (1993)); *accord* S. Rep. No. 105-157, at 3, 6 (1997).[2]

That should be the end of this case. But the Federal Circuit and the Government both reason that an

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[2] The prevailing dictionary definitions from the time are in accord. *See* Black's Law Dictionary (7th ed. 1999) (defining "clear" as "[u]nambiguous"); Random House Webster's Unabridged Dictionary (2nd ed. 1998) (defining "unmistakable" as "not mistakable; clear; obvious"); Webster's II New Riverside Dictionary (Rev. ed. 1996) (defining "unmistakable" as "[c]learly evident").

exception applies where the challenged agency decision disregarded the statutory text because it faithfully applied an invalid regulation. *See* Pet. App. 15a (crediting the "significance" of "VA's [contrary-to-statute] regulation that existed at the time of the original decision"); BIO 15, 18. In other words, each would elevate a contra-statutory regulation to the same status as the statute itself. That view is fundamentally unsound. *Cf. PDR Network, LLC v. Carlton & Harris Chiropractic, Inc.*, 139 S. Ct. 2051, 2066 (2019) (Kavanaugh, J., concurring in the judgment) ("The effect is to transform the regulation into the equivalent of a statute."). An agency cannot erase its clear legal error of failing to follow Congress's command by enshrining it within a regulation that is itself invalid.

"Nothing in the statutory language suggests that this straightforward conclusion"—that a decision contains CUE whenever it fails to follow the statute—"should be any different" where the agency erred because it applied an invalid regulation, *Unicolors, Inc. v. H&M Hennes & Mauritz, L.P.*, 595 U.S. __ (2022) (slip op. at 5). The CUE provisions do not distinguish among categories of clear legal error based on the source of the agency adjudicator's mistake. They focus solely on the correctness of the agency's "decision" and encompass any "clear and unmistakable error[s]" in that decision. 38 U.S.C. §§ 5109A(a), 7111(a); *see id.* §§ 5109A(c), 7111(c) (referencing whether "error exists *in a case*" (emphasis added)). The text does not indicate that the assessment of the prior decision turns on why VA arrived at its error, as opposed to the clarity of the error itself.

Nor, contrary to the Government's position, BIO 12, 15, does a decision applying an invalid regulation reflect the true state of the law in any meaningful sense. A regulation has the "force and effect of law" only where it is "rooted in a grant of … power by the Congress" and abides by the "limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979); *cf. Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988) ("It is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress."); *La. Pub. Serv. Comm'n v. F.C.C.*, 476 U.S. 355, 374 (1986) ("[A]n agency literally has no power to act … unless and until Congress confers power upon it.").

VA's power is expressly limited in this way. Congress has granted the Secretary only the "authority to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department *and are consistent with those laws*." 38 U.S.C. § 501(a) (emphasis added). That "grant of rulemaking authority" is limited "[w]here a statute is clear" because the "agency must follow the statute." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 276 (2016); *see Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936) (power limited to "carry[ing] into effect the will of Congress as expressed by the statute"); *Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984) ("[T]he court, as well as the agency, must give effect to the unambiguously expressed intent of Congress."). The agency has no residual power to "create a rule out of harmony with the statute," because such a rule would be a "mere nullity" from the start. *Dixon v.*

United States, 381 U.S. 68, 74 (1965) (citation omitted). Rather than constituting valid "law," such regulations are "void and may be disregarded." *Utah Power & Light Co. v. United States*, 243 U.S. 389, 410 (1917).

Moreover, a decision based on a regulation that departs from an unambiguous statute satisfies the CUE standard as it had been articulated by the Veterans Court before CUE was codified. The words "clear and unmistakable error" include all errors "that are undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Russell*, 3 Vet. App. at 313-14. In promulgating a regulation that fails to follow the statute's "unmistakable command[]," *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1355, 1358 (2018), the agency makes an error of statutory interpretation that, by definition, reasonable minds could not dispute. This Court has said so expressly, making clear that "any agency interpretation contradicting what Congress has said would be unreasonable." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009). Correcting the improper application of such an unreasonable agency interpretation achieves the purpose of CUE relief: to bring a decision about a veteran's entitlement to statutory benefits in line with the "'true' state of … the law that existed at the time of the original adjudication." *Russell*, 3 Vet. App. at 313.

The Federal Circuit's decision in *Wagner*, 370 F.3d 1089, illustrates the point. When the court held VA's regulation invalid, it made clear that the agency's interpretation had been "forbidden" because

it conflicted with an unambiguous statute—that is, a "statute … susceptible of interpretation without resort to *Chevron* deference." *Id.* at 1092-93 (citation omitted). That ruling confirmed that VA's interpretation—as reflected in the regulation and followed in Mr. George's case—was categorically unreasonable.

B. The legislative history of the CUE provisions supports that scope.

The legislative history underscores that Congress intended to include within CUE the misapplication of an unambiguous statute, even if the error stemmed from an invalid regulation.

1. Congress codified CUE in 1997, formalizing a type of relief that had been available by regulation since 1928. As explained above (at 8-9), legislation was required because the Federal Circuit had interpreted the CUE regulation to apply only to errors committed at the regional office level. H.R. Rep. No. 105-52, at 2; S. Rep. No. 105-157, at 4.

The report of the House Committee on Veterans' Affairs emphasized the importance of CUE relief in this "pro-claimant" regime that is "unlike any other adjudicative process." H.R. Rep. No. 105-52, at 2, 4. And the legislative history confirms that Congress intended this remedy to reach the kind of legal error the agency made in Mr. George's case. The House and Senate reports endorsed the Veterans Court caselaw discussed above, H.R. Rep. No. 105-52, at 2-3; S. Rep. No. 105-157, at 3, which explained that CUE is meant to conform prior erroneous rulings to the true state of

the law, including by correcting the failure to apply unambiguous statutory provisions. *See supra* § I.A.

Beyond the opinions that Congress specifically cited, other contemporaneous Veterans Court authority confirms that applying a contrary-to-statute regulation could give rise to CUE. An example is *Berger v. Brown*, 10 Vet. App. 166 (1997), which issued shortly before Congress enacted the CUE legislation. In *Berger*, the Veterans Court rejected a CUE claim challenging a 1969 regional office decision that followed a then-applicable provision of VA's internally binding adjudication manual. *Id.* at 168-69. Although it rejected CUE in that case, the court's reasoning strongly suggests that it would have found CUE had there been an unambiguous conflict between the statute and the adjudication manual. The court explained that a "theory upon which CUE could be based" was that "the [regional office]'s interpretation of the plain meaning of the law was clearly and unmistakably erroneous." *Id.* at 170. And it rejected CUE because "[t]here simply [was] nothing in the plain language of the statute … that precluded the [regional office] in 1969" from reaching the result it had. *Id.* Rather, "[t]he statute was, and still is for that matter, susceptible of differing interpretations," such that "reasonable minds could differ concerning the 'correct' interpretation." *Id.*

Other pre-legislation Veterans Court opinions point in the same direction. For example, in *Look v. Derwinski*, 2 Vet. App. 157 (1992), the court found CUE in a Board decision that failed to consider the relevant portion of the governing statute, which allowed for benefits when VA medical personnel caused

or aggravated a veteran's disability. The Board instead had applied a regulation that was subsequently invalidated as contrary to the statute. "[T]his misapplication of law," the Veterans Court held, "constitutes clear and unmistakable error." *Id.* at 159, 163; *see id.* at 161 (explaining that "[t]h[e] statute controls the disposition of this case").[3] Likewise, in *Ko v. Brown*, the court held there was no CUE in an original decision that had "a rational basis" under instructions from the VA Administrator, but suggested the case would be different if the Administrator's instructions "exceeded his statutory authority." No. 90-1399, 1993 WL 426404, at *4-5 (Vet. App. Sept. 24, 1993).

Statements from the chief proponent of the CUE legislation, Representative Lane Evans, punctuate that Congress would have agreed with the upshot of *Berger*, *Look*, and *Ko*. He emphasized that CUE allowed for the correction of VA's failure to follow a statute even if the original decision adhered to a regulation. According to Representative Evans, "[t]he need for this legislation" came from a VA General Counsel Opinion suggesting that the absence of CUE review for Board decisions meant that "a [Board] decision … rendered based upon an erroneous interpretation of the law" would be "final and binding" absent the Board itself "reconsider[ing] the decision." 143 Cong. Rec. H1566-01, H1567-68 (Apr. 16, 1997) (citing VA Op. Gen. Counsel Prec. 2-97 (Jan. 16, 1997),

[3] The court also found a separate clear and unmistakable error because, even under the regulation that had existed at the time, the Board should have granted the veteran benefits. *Id.* at 164.

https://www.va.gov/ogc/opinions/1997precedentopinions.asp). That opinion responded to a Board decision that contradicted a statutory mandate and instead followed a regulation that failed to track the statute. VA Op. Gen. Counsel Prec. 2-97. The natural inference is that, by extending CUE to Board decisions, the legislation would now offer veterans relief to correct this kind of statutory-interpretation error.

To similar effect, Representative Evans stated that CUE review requires decisions to be "revised to conform to the true state of the law … as [it] existed at the time of the original decision." 143 Cong. Rec. at H1568. His repudiation of the aforementioned General Counsel opinion reflects that the "true" state of the law, according to Congress, is Congress's own command.

2. Congress also indicated that CUE includes VA's failure to follow an unambiguous statute by explaining that CUE review "addresses errors similar to the kinds which are grounds for reopening Social Security claims." H.R. Rep. No. 105-52, at 3. 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." *Id.*; *see* 20 C.F.R. §§ 404.988(c)(8), 404.989(a)(3). That category of errors encompasses misinterpretation of a statute: "[W]hen the application of an incorrect legal standard or the misinterpretation of law existing at the time of the determination is involved[,] the evidence clearly shows on its face that an error was made." *Fox v. Bowen*, 835 F.2d 1159, 1164 (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); *see also* 82 Fed. Reg. 12,270, 12,271 & n.6 (Mar. 1, 2017) (Social Security Administration citing *Munsinger* for the proposition that, "[u]nder our longstanding policy, a legal error may constitute an error on the face of the evidence").

C. Analogous standards of error include misinterpretations of unambiguous statutes.

Analogizing to other demanding standards of error further supports the conclusion that a failure to abide by an unambiguous statute must be included within CUE.

For example, "erroneous application or interpretation of statutes" is a quintessential "error[] of law" included within habeas review. *St. Cyr*, 533 U.S. at 302; *see Guerrero-Lasprilla v. Barr*, 140 S. Ct. 1062, 1071-72 (2020). Similarly, an executive official's "performance may be compelled by mandamus" where "construction or application" of a statute "plainly prescribe[s]" a duty. *Wilbur v. U.S. ex rel. Kadrie*, 281 U.S. 206, 218-19 (1930); *see Roberts v. U.S. ex rel. Valentine*, 176 U.S. 221, 230-31 (1900). So too can mandamus compel a court when the court misconstrues a plain statute. *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517-18, 1520-21 (2017) (reversing Federal Circuit's denial of mandamus for failure to properly construe patent-venue statute). Likewise, under the law-of-the-case doctrine, a court may depart from a prior holding if convinced that the holding was "clearly erroneous," including where a statute was misinterpreted or misapplied.

Christianson v. Colt Indus. Operating Corp., 486 U.S. 800, 819 (1988); *accord Sulik v. Taney County*, 393 F.3d 765, 766-67 (8th Cir. 2005); *Kennedy v. Lubar*, 273 F.3d 1293, 1299-300 (10th Cir. 2001). And, tracking the basic administrative-law principles discussed above (at 23-24), an agency "abuse[s] [its] discretion" when it defies "the plain language of [a] statute," *Rust v. Sullivan*, 500 U.S. 173, 184 (1991), as "the unambiguous terms of the statute … leave[] no room for agency discretion," *Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967, 982 (2005). There is no reason to construe the CUE standard to exclude the statutory-interpretation errors that these other standards readily include.

II. There Is No Basis For Reading Into CUE An Exclusion For Errors That Arise From VA's Application Of Its Own Invalid Regulations.

Neither the Federal Circuit nor the Government has offered a text-based justification for why the statutory phrase "clear and unmistakable error" should exclude an agency's application of a plainly invalid regulation. Nor could they do so, for the reasons discussed above. That leaves the Government to urge this Court to read in an atextual limit on the statutory scope of CUE, carving out an agency's faithful application of its invalid regulation. The pro-veteran canon counsels against resorting to any of these extra-textual rationales to limit the relief available to veterans under the plain terms of the statute. § II.A. Moreover, the three bases that the Federal Circuit and Government have identified to support this implied limitation are all meritless. § II.B.

A. The pro-veteran canon counsels against adopting an atextual reading of the CUE statutes that harms veterans.

In pressing the Court to embrace an unstated exception to CUE, the Government ignores the pro-veteran canon.

The pro-veteran canon provides that, in construing a statute concerning veterans, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *Henderson*, 562 U.S. at 441. This approach effectuates "[t]he solicitude of Congress for veterans," which "is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). It reminds courts (and agencies) that Congress intends to help veterans when it enacts legislation providing them benefits. The canon applies with full force in the CUE context, particularly given Congress's explanation that its CUE "legislation is necessary and desirable" to serve the "pro-claimant bias intended by Congress throughout the VA system." H.R. Rep. No. 105-52, at 4.

Like other "traditional canons,"[4] the pro-veteran canon can "supply an answer" resolving ambiguity that the Government otherwise might claim in

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[4] This Court has long recognized the pro-veteran canon. *See, e.g.*, *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (veterans legislation "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need.").

seeking deference for a reading that is not compelled by the statutory text. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *cf. Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (same rule for interpreting regulations). When the pro-veteran canon solves the "interpretive puzzle" presented by the text, deference is not due, and "*Chevron* leaves the stage." *Epic*, 138 S. Ct. at 1630 (quoting *Nat'l Labor Relations Bd. v. Alt. Ent., Inc.*, 858 F.3d 393, 417 (6th Cir. 2017) (opinion of Sutton, J.)).

Here, the canon is "more than up to the job," *id.* The text, read in light of Congress's pro-veteran purpose, provides sufficient reason to reject the Government's attempt to read into the statute a silent exception that would harm veterans by denying them benefits that the law guaranteed but which the agency improperly withheld. Congress enacted the CUE statutes to allow veterans to correct errors as to which no reasonable mind could differ, yet the Government's approach would preserve exactly that sort of error simply because the agency's unreasonable view took the form of an unlawful regulation. This would insulate 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). The pro-veteran canon checks against the "harsh consequences" of this anomaly, which would leave veterans like Mr. George unable to invoke CUE even in the face of the most obvious legal errors and deprive them of the benefits that they have long been legally entitled to. *Henderson*, 562 U.S. at 441.

B. Neither the Government nor the Federal Circuit has provided a sound justification for reading in an exclusion for errors that arise from VA's application of invalid regulations.

The Government and the Federal Circuit have offered three bases for reading into the CUE statutes their proposed atextual exclusion. None has merit.

1. Correcting VA's misapplication of an unambiguous statute involves no change in legal interpretation.

The Federal Circuit and the Government rely on a claimed exclusion from CUE for "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)). As explained above (at 6-9), this or similar language has appeared in the preamble of VA's CUE regulation for decades, including the version that Congress looked to in 1997. 38 C.F.R. § 3.105 (1997). The Federal Circuit found this preamble phrase dispositive because, it reasoned, a claim that the agency "fail[ed] to correctly apply the statute as written" is a request to apply "a changed interpretation of the law." Pet. App. 14a-15a, 18a, 23a-24a; *see also* BIO 16-17. That is wrong for several reasons.

a. To start, the regulatory preamble language—including the reference to "a change in interpretation of law"—never made its way into the text that Congress adopted. Where Congress "'transform[s] … a regulatory procedure to a statutory form of relief,'" this Court has declined to read into the statute

limitations present only in the regulation and not "codif[ied]" in the statutory text. *Kucana v. Holder*, 558 U.S. 233, 249-50 (2010) (citation omitted). Although the legislative history notes that the statutory CUE provisions would "effectively codify" the existing "regulation," the discussion focused only on the general contours of CUE set out in § 3.105(a) and made no mention of the preamble or an exclusion for changes in interpretation of law. H.R. Rep. No. 105-52, at 2-4; *accord* S. Rep. No. 105-157, at 3-4.

b. Even if the CUE statutes incorporated the prior regulation's preamble without saying so, correcting an agency's erroneous interpretation of an unambiguous governing statute does not amount to a "change in law" or a "change in interpretation of law."

The ordinary understanding of those phrases does not encompass judicial correction of an agency error. A "change in law" refers to those circumstances where Congress altered the governing statutory regime, *see, e.g.*, *Salazar v. Buono*, 559 U.S. 700, 720 (2010); *Robertson v. Seattle Audubon Soc.*, 503 U.S. 429, 438-39 (1992), or where there are new judge-made rules, *see, e.g.*, *Bobby v. Bies*, 556 U.S. 825, 836-37 (2009). Likewise, a "change in interpretation of law" encompasses those circumstances where an agency adopts a new regulation (or otherwise reinterprets the statute or reinterprets a regulation) by choosing among several "permissible construction[s]." *Chevron*, 467 U.S. at 843.

But there is no "change" when correcting an agency's disregard of the unambiguous command of a governing statute. In that circumstance, the "initial

interpretation" of the governing statute employed by the agency, Pet. App. 17a, is not a lawful or legitimate interpretation at all. An unambiguous statute leaves no room for any interpretation that departs from the statutory text. *See Cuozzo*, 579 U.S. at 276-77; *Chevron*, 467 U.S. at 842 ("If the intent of Congress is clear, that is the end of the matter…."). That is why such an interpretation is deemed a legal "nullity." *Dixon*, 381 U.S. at 74 (citation omitted). Accordingly, when the Federal Circuit's decision in *Wagner*—as well as the 2003 VA General Counsel opinion—provided the only legitimate interpretation of the governing statute here, they did not in any meaningful sense announce a "change in interpretation" of that statute. Rather, they surfaced a legal error that was present all along.

That characterization of judicial correction of invalid agency action is in harmony with this Court's precedent. When a court "interprets [statutory] text," "[o]ne would not normally say that a court 'amends' a statute." *Perez v. Mortg. Bankers Ass'n*, 575 U.S. 92, 103 (2015). Thus, a decision that "properly interpret[s]" a statute is "not new law." *Fiore v. White*, 531 U.S. 225, 228 (2001). 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 v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). There is no "change[]" in "prevail[ing]" law because the later judicial decision explains what the statute "*always* meant." *Id.* at 312, 313 n.12. In that sense, it is the "federal rule[] of law" itself—"not the actions of federal judges"—that "render[s]" a contrary agency interpretation "invalid." *Edgar v. MITE Corp.*, 457 U.S. 624, 654 n.7 (1982)

(Stevens, J., concurring) (addressing federal law nullifying state law).

A different characterization might apply when a court interpreting a statute "overrule[s] [a] prior [judicial] decision." *Rivers*, 511 U.S. at 312, 313 n.12; *see* BIO 13 (citing *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658 (1978), overruling *Monroe v. Pape*, 365 U.S. 167 (1961)). Distinct retroactivity considerations can apply "where this Court overrules its own construction of a statute." *United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970). But in the usual case, where a court merely invalidates an erroneous interpretation while explaining what the statute "*always* meant," there is no "change[]" in "prevail[ing]" law. *Rivers*, 511 U.S. at 312, 313 n.12.

c. Neither the Federal Circuit nor the Government has identified any persuasive support for reading the § 3.105 preamble to depart from this settled understanding of what constitutes a change in law or a change in interpretation of law. The regulatory history of the preamble, as well as the caselaw applying it, refute the argument that judicial correction of agency error would be considered either type of change.

As the above regulatory history (at 6-9) demonstrates, VA has long considered CUE revision distinct from revision based on "changes in law" or "changes in interpretation in law." Although these forms of relief were once provided for in the same regulation, Veterans' Bureau Reg. 187 § 7155 (1928), they were separated out in the 1960s, *see* § 3.105(a) (1962) (CUE), § 3.114 (1962) (changes in law and

interpretations of law). At that time, the CUE regulation's preamble was updated to provide a cross-reference to the rules now governing these other grounds for revision precisely because CUE was not expected to overlap with them. But the § 3.105 preamble does not act as an exclusion that immunizes decisions that would otherwise give rise to CUE relief simply because the agency might find a way to assert some "change" still was involved. *Contra* BIO 16-17; Pet. App. 23a.

The regulatory history shows that the category of revision based on CUE, which is meant to correct clear errors the agency made in the past, addresses a completely different problem than the category of revision reserved for updating benefits decisions in light of post-decision changes. As discussed above (§ I.A), CUE is meant to conform a prior agency decision to the true state of the law as it existed at the time. That is why CUE revision can provide retroactive benefits. But revisions based on changes in law or interpretation of law—those revisions now governed by § 3.114—do not correct an agency's past errors. They instead bring the veteran's current benefits into line with the new law or new agency interpretations that arise after an agency decision is made final, without making those revisions retroactive. *See* 38 C.F.R. § 3.114.

There is no suggestion in this history that VA (let alone Congress) equated judicial correction of a glaring error of statutory interpretation with a "change in law" or "change in interpretation of law." From the start, the agency was focused on "a change in law or … a definite change in interpretation thereof clearly

contained in a bureau issue." Veterans' Bureau Reg. 187, § 7155 (1928). For the next three decades, whenever changes in interpretation of law were mentioned, that text was accompanied by a like qualifier. *See, e.g.*, R-1009(A) (1936) ("specific change in interpretation thereof specifically provided for in a Veterans' Administration issue"); 38 C.F.R. § 2.1009(a) (1938) (same); 38 C.F.R. § 2.1009(d) (1938) ("specific change of interpretation of law specifically provided in a Veterans' Administration issue"); 38 C.F.R. § 3.9(a), (d) (1956) (same as 1938); 38 C.F.R. § 3.105 (1959) ("change in interpretation of law specifically stated in a VA issue"); 38 C.F.R. § 3.105 (1961) ("change in interpretation of law specifically stated in a Veterans Administration issue"). It was clear that the agency was narrowly focused on interpretive changes found in VA "issues." Its rules thus were in harmony with the notion that an agency may change from one valid interpretation of a statute (or regulation) to another, and that this might warrant an update to individual veterans' awards. But there is no suggestion that VA considered judicial correction of agency errors as amounting to a change in interpretation of law.

To be sure, in 1962, the preamble's language shifted to refer to "a change in interpretation of law" without the specific qualifier that the interpretation be "contained in," "specifically stated in," or "specifically provided for" by an agency "issue." *See* 38 C.F.R. §§ 3.105, 3.105(d) (1962). But there is no indication that this linguistic tweak was meant to work any substantive change. It was merely an organizational change responsive to Congress's revision of the effective-date statutes. *See* VA Transmittal Sheet 267 at i (Dec. 1, 1962); 38 U.S.C. § 3012(b)(6) (1962). Congress

intended that revision to "substantially follow[] administrative practice of some 30 years standing"—that is, the administrative practice described above. S. Rep. No. 87-2042, 1962 U.S.C.C.A.N. 3260, 3266-67 (1962); *see* H. Rep. No. 87-2123, at 8. Indeed, "[t]he change of arrangement which placed portions of what was originally a single section in two separated sections cannot be regarded as altering the scope and purpose of [an] enactment." *Anderson v. Pac. Coast S.S. Co.*, 225 U.S. 187, 198-99 (1912).

The continued focus on congressional changes and administrative interpretations also was reflected in the new § 3.114, which implemented Congress's revision, and to which the § 3.105 preamble refers. That provision was (and still is) titled "Change of law or [VA] issue." This nomenclature accords with the established understanding that the relevant changes in "interpretation" are those issued by the agency itself, in contrast to the genuine changes in "law" brought about by an Act of Congress. To that end, the regulation's first provision was (and still is) focused on "liberalizing law[s]" and "liberalizing [VA] issue[s]," 38 C.F.R. § 3.114(a) (1962), implementing a statute governing the effective dates of awards "pursuant to any Act or administrative issue." 38 U.S.C. § 3010(g) (1962). Nothing in § 3.114 even hints at the inclusion of post-decision judicial rulings.

Apart from the regulatory history, the available Veterans Court caselaw confirms that the § 3.105 preamble has not been understood to encompass judicial correction of agency errors. The preamble has been invoked to explain why CUE does not include changes in law brought on by congressional action, *see Green*

v. Brown, 10 Vet. App. 111, 118 (1997); *cf. Allin v. Brown*, 6 Vet. App. 207, 210 (1994), following the adoption of a judge-made rule, *see Damrel v. Brown*, 6 Vet. App. 242, 246 (1994), or where the agency itself has elected to follow a different, legitimate interpretation, *Berger*, 10 Vet. App. at 170. Those are the types of changes that have been distinguished from CUE from the outset, and which are now governed by § 3.114. And again, it makes sense to exclude these sets of changes from CUE. Doing otherwise would provide retroactive relief that was not previously required, rather than—as § 3.114 contemplates—prospective relief that takes effect at the time of the change. If the agency acts lawfully at the time of its decision, the decision already reflects the "'true' state of the … law." *Russell*, 3 Vet. App. at 313. The limited collateral relief of CUE is unavailable to veterans seeking to conform their decisions to a state of law that emerged only later. But the Veterans Court always has embraced a CUE standard that includes VA failures to properly apply an unambiguous statute. *See supra* § I.B.1.

The Social Security caselaw cited above (§ I.B.2) likewise distinguishes between a "change of legal interpretation" and a "misinterpretation of law." *Fox*, 835 F.2d at 1163-64. While "[r]eopening … is precluded" based on a mere change in interpretation, a "misinterpretation of law existing at the time of the determination" supports reopening. *Id.*

The Federal Circuit's sole affirmative support for equating a court's invalidation of a VA regulation with a "change in interpretation of law" is a 1994 VA General Counsel Opinion. Pet. App. 24a n.7 (citing VA

Op. Gen. Counsel Prec. 9-94 (Mar. 25, 1994), https://www.va.gov/ogc/opinions/1994precedentopinions.asp). The Government did not offer that opinion as supporting its rule. *See generally* BIO 11-21. Nor is there any "evidence to suggest that Congress was even aware of the VA's interpretive position." *Gardner*, 513 U.S. at 121-22.

Furthermore, the opinion does not withstand scrutiny. To embrace its aggressive reading of what constitutes a "change in interpretation of law," the opinion distorted the relevant pre-codification caselaw regarding CUE. For example, it first cited decisions where genuine changes of law had taken place. VA Op. Gen. Counsel Prec. 9-94, ¶ 4 (citing *Allin* and *Damrel*). Moreover, it erroneously suggested that the Veterans Court had "not specifically addressed" the situation where the court "invalidates a VA regulation or statutory interpretation." *Id.* That is untrue. The court in *Look* had held that a "decision … premised on a regulation that has been held invalid" was infected with "clear and unmistakable error" for its "failure to apply [the statute] properly." 2 Vet. App. at 161, 163. The General Counsel opinion rejected that caselaw only because the *Look* court had separately identified another way in which the agency "further erred" by misapplying the subsequently invalidated regulation on its own terms. *Id.* at 164; *see* VA Op. Gen. Counsel Prec. 9-94, ¶ 5. That disregard was unwarranted. It does not follow that, by reaching an additional basis for granting relief, *Look* somehow excluded from CUE a claim based on the agency's "reliance upon the invalidated regulation." VA Op. Gen. Counsel Prec. 9-94, ¶ 5. The agency's General Counsel should have understood that the Veterans Court had

recognized the availability of relief based on VA's application of an invalid regulation.

2. That VA adjudicators are bound to adhere to the agency's own unreasonable interpretations does not make those interpretations reasonable.

The Federal Circuit emphasized that "VA adjudicators, at the time of their original Board and [regional office] decisions, were bound" by a subsequently invalidated regulation. Pet. App. 17a (citing 38 U.S.C. § 7104(c)). The Government presses the same point, emphasizing that the now-invalidated regulation at issue here "was plainly 'law' at the time" because the Board was "bound in its decisions by the regulations of the Veterans' Administration." BIO 12 (quoting 38 U.S.C. § 4004(c) (1976)).

As explained above (at 23-24), that argument fails because an invalid regulation is not binding in any sense meaningful to the CUE standard. Regulations that do not properly implement a statute are "void and may be disregarded." *Utah Power & Light*, 243 U.S. at 410; *see Dixon*, 381 U.S. at 74. Given the focus of the CUE standard on the agency's faithfulness to Congress's command, it makes no difference for this purpose that a VA adjudicator got the law wrong because it was bound to repeat the interpretive error that VA had already made. Either way, the adjudicator's decision reflected a departure from the true state of the law as established by Congress. And either way, CUE is available to fix that error and provide the benefits Congress guaranteed. The CUE statutes leave no

room for one component of VA to launder its interpretive error by enshrining it in a regulation that it knows other parts of that same agency—adjudicators—will be bound to apply. The "intent" of CUE review is to "allow[] correction of [VA] decisions, no matter … which part of the VA made the error." H.R. Rep. No. 105-52, at 3-4.

The Federal Circuit resisted this conclusion on the theory that Congress could not have intended CUE relief to flow from judicial pronouncements invalidating an agency regulation, because CUE review predates Congress's creation of judicial review for veterans-benefits decisions. *See* Pet. App. 22a. But the Federal Circuit overlooked that judicial review had been in place for nearly a decade by the time Congress codified CUE. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, §§ 102, 301, 102 Stat. 4105, 4106, 4113 (1988). VA regulations were subject to direct pre-enforcement review in the Federal Circuit. 38 U.S.C. § 502; *see also* 38 U.S.C. § 223(c) (1988). And they could be reviewed by the Veterans Court and the Federal Circuit when applied in an individual veteran's case. 38 U.S.C. §§ 7261(a)(3), 7292(d)(1); *see* 38 U.S.C. §§ 4061(a)(3), 4092(d)(1) (1988). Congress generally is "presume[d]" to be "aware of existing law when it passes legislation." *Mississippi ex rel. Hood v. AU Optronics Corp.*, 571 U.S. 161, 169 (2014).

Here, the House and Senate reports confirm that presumption. They demonstrate full awareness of judicial review, noting that the statutes "would allow veterans to appeal [Board] decisions involving claims of clear and unmistakable error to [the Veterans Court] and other higher courts." H.R. Rep. No. 105-

52, at 5; S. Rep. No. 105-157, at 5; *see, e.g.*, H.R. Rep. No. 105-52, at 2 (bill would "[p]ermit appeal to the Court of Veterans Appeals … on the grounds of clear and unmistakable error"); *id.* at 3 (discussing CUE cases "brought before the Court of Veterans Appeals"); S. Rep. No. 105-157, at 3-4 (similar). In accord, the chief proponent of the CUE legislation said it further "expan[ded]" "the right to judicial review" precisely because doing so was necessary to address "error[s] in the original adjudication … to conform [the decision] to the true state of the law." 143 Cong. Rec. at H1568 (Rep. Evans).[5]

Contrary to the Government's suggestion, the Federal Circuit's understanding of CUE is not bolstered by the "familiar legal concept" that courts should not second-guess a government decisionmaker'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)). Even assuming that this "concept" should be imported to the CUE context, it would at most shield reliance that is not only in "good-faith" but also "objectively reasonable." *Leon*, 468 U.S. at 920-22. CUE already shields "objectively reasonable" decisions. As explained above (§ I.A), it is not

[5] Furthermore, judicial review of VA regulations occurred even before Congress expanded it through the Veterans' Judicial Review Act. The Administrative Procedure Act, for example, allowed for this review just as it did for other agencies' rulemakings. *See* 5 U.S.C. §§ 702, 706; *Monk v. Shulkin*, 855 F.3d 1312, 1319 (Fed. Cir. 2017) (collecting cases); *cf. Traynor v. Turnage*, 485 U.S. 535, 543, 544 n.9 (1988) (prior judicial-review bar did not encompass challenges to lawfulness of agency regulations).

objectively reasonable for the agency to disregard Congress's clear command.

Furthermore, the good-faith exception is justified only in a materially different context, where the "sole purpose" of correcting a decisionmaker's error is to "deter future" errors. *Davis v. United States*, 564 U.S. 229, 236-37 (2011). A determination that CUE infects a decision is not a judgment about the propriety of an agency adjudicator's conduct, nor is it aimed at deterrence. It remedies damage already done to veterans erroneously denied benefits. *See* 38 U.S.C. §§ 5109A(a)-(b), (d); 7111(a)-(b), (d); *see also* H.R. Rep. No. 105-52, at 4 ("[T]his legislation is necessary and desirable to ensure a just result in cases where such error has occurred.").

3. The CUE statutes expressly displace default finality principles.

To support its erroneous reading of CUE, the Federal Circuit also invoked the general res judicata principle that "new judicial pronouncements" do not apply to "final cases already closed." Pet. App. 20a (citing *Harper v. Virginia Dep't of Tax'n*, 509 U.S. 86, 96 (1993)). The Government has followed suit. BIO 15-16.

But default judicial rules of "res judicata" may be "displaced" by statute. *Banks v. Chicago Grain Trimmers Ass'n*, 390 U.S. 459, 461-65 (1968); *see Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005). That is the case here. The "whole purpose" of the CUE statutes "is to make an exception to finality." *Buck v. Davis*, 137 S. Ct. 759, 779 (2017) (quoting *Gonzalez*, 545 U.S. at

529). That is why this Court has previously recognized that "a denial of [veterans'] benefits has no formal res judicata effect." *Walters*, 473 U.S. at 311. If a judicial pronouncement surfaces CUE in VA's otherwise-final decision, the decision "shall be reversed or revised." 38 U.S.C. §§ 5109A(a), 7111(a). It is thus beside the point that, "once suit is barred by res judicata," a judicial ruling ordinarily "cannot reopen the door already closed." Pet. App. 20a (quoting *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 541 (1991)). Congress deliberately kept the door open here.

The Government's appeal to finality differs slightly from the Federal Circuit's reasoning, but it fares no better. The Government concedes that the CUE statutes displace conventional res judicata concepts by subjecting "final VA benefits decisions" to "reexamination." BIO 16. The Government merely contends that Congress still evinced some "concern for values of finality" by making CUE review narrower than "direct appeal," so that some questionable VA decisions would nevertheless fall outside its scope and retain their default finality. *Id.* That may be true. But it sheds no light on the question presented.

Under *either* party's reading, CUE review is far narrower than direct appeal and so leaves many questionable VA decisions untouched. Indeed, Congress addressed the Government's floodgates concern, noting that existing "clear guidance" on the scope of CUE would ensure that CUE claims would not become overly "burdensome." H.R. Rep. No. 105-52, at 3. Congress further observed that VA could "adopt procedural rules" to ensure that claimants cannot attack

final decisions "by merely averring that [CUE] has occurred." *Id.*; *see* 38 C.F.R. § 20.1404(b) (Board rules requiring specific allegations). As the House Report observes, there is no CUE where a veteran alleges only that the "previous adjudication[] had improperly weighed and evaluated the evidence." H.R. Rep. No. 105-52, at 3 (quoting *Fugo*, 6 Vet. App. at 44). Nor is there CUE based on "broad-brush allegations" amounting to a claim that the agency failed "to give due process," or the like. *Id.* CUE review likewise does not reach debatable errors, nor does it include errors that did not affect the outcome of the decision on review. *See id.*

There is no risk that CUE's "exception to finality would swallow the rule" absent the further narrowing the Government advocates. *United Student Aid Funds, Inc. v. Espinosa*, 559 U.S. 260, 270 (2010). Contrary to the Government's suggestion, an agency's application of a regulation that conflicts with an unambiguous statute is not a "garden-variety error." BIO 15. An agency's disregard of Congress's enactments should not be an everyday occurrence. And there can be no doubt that an agency's departure from the "'true' state of the … law" as a result of the "incorrect[] appli[cation]" of a statute falls within the heartland of CUE review. *Russell*, 3 Vet. App. at 313; *see supra* § I.A. For that reason, there would be no warrant to disregard the text of the CUE statutes and adopt the Government's position even if this kind of error were commonplace. "[T]he magnitude of a legal wrong is no reason to perpetuate it." *McGirt v. Oklahoma*, 140 S. Ct. 2452, 2480 (2020). VA cannot "force [this Court] to ignore a statutory promise" by making

obvious errors of statutory interpretation so often that CUE infects many agency decisions. *Id.*

The only question is whether, within its limited scope, CUE reaches an agency's misreading of an unambiguous statute. The "virtues of finality" carry "little weight" on that question of "interpretation," as this Court has emphasized when assessing comparably narrow disputes regarding the exceptions to finality found in Federal Rule of Civil Procedure 60. *Gonzalez*, 545 U.S. at 529; *see Buck*, 137 S. Ct. at 779. "The issue" is instead "whether the text of [the CUE standard] itself, or of some other provision of law, limits its application in a manner relevant to the case before us." *Gonzalez*, 545 U.S. at 529. Any invocation of finality as a shadow canon of construction would be "unpersuasive." *Id.*; *see Buck*, 137 S. Ct. at 779. The text governs. And, as demonstrated above, the text offers no grounding for the Government's restrictive reading.

III. Under A Proper Statutory Construction, Mr. George Is Entitled To CUE Relief.

Under a correct understanding of CUE, Mr. George is entitled to have the 1977 Board decision in his case revised to reflect a proper application of the presumption of soundness found in 38 U.S.C. § 1111.

There can be no dispute that the 1977 Board decision failed to reflect the "true" state of the statute at that time. Indeed, the 2016 Board acknowledged as much. Pet. App. 71a. It had to do so. The 1977 Board not only failed to find clear and unmistakable evidence that Mr. George's disability was not aggravated

by his service; it also appeared to place the burden on Mr. George to offer evidence that supported his "claim for aggravation." Pet. App. 86a. The 2016 Board excused this misapplication of the statutory standard by relying on the flawed legal rule that "the presumption of soundness interpretation articulated in *Wagner* … does not have retroactive application in a CUE case." Pet. App. 71a. The Veterans Court and the Federal Circuit then repeated that error. Pet. App. 44a; Pet. App. 3a, 18a. That legal holding is wrong for all the reasons set out above.

Accordingly, Mr. George should have been entitled to a finding of CUE so long as the 1977 Board's error changed the outcome of its decision. *See* 38 U.S.C. § 7111(a) ("If evidence establishes the error, the prior decision shall be reversed or revised."). The 2016 Board and the Veterans Court considered that question and concluded that the error would not have made a difference. Pet. App. 50a-53a, 78a-79a. But, because the Federal Circuit found no legal error, it declined to address whether proper application of the presumption of soundness to the undisputed facts required finding CUE as a matter of law. Pet. App. 10a n.3. At a minimum, therefore, a remand to the Federal Circuit is appropriate so that the court can determine whether, "in applying" the correct "legal standards discussed above to the undisputed" facts, it must "conclude as a matter of law that Mr. [George] is entitled to service connection." *Groves v. Peake*, 524 F.3d 1306, 1310 (Fed. Cir. 2008) (finding CUE as a matter of law after noting Veterans Court's "legal error"); *Cousin v. Wilkie*, 905 F.3d 1316, 1320-21 (Fed. Cir. 2018) (similar).

If the Federal Circuit were to apply the correct understanding of § 1111 to the undisputed factual record here, it would have to conclude that the 1977 Board's error met the CUE standard. The Government in 1977 did not—and could not—offer clear and unmistakable evidence that Mr. George's service did not aggravate his preexisting condition. The "clear and unmistakable evidence" standard is a more demanding burden of proof than "clear and convincing" evidence, and to satisfy it, the government needed evidence that was "undebatable." *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999). But here, the bulk of the evidence before the 1977 Board showed that there was aggravation. A military psychiatrist who examined Mr. George determined that his "pre-enlistment state" had been "complicated by service aggravated stress"—including when the Marine Corps ignored a medical recommendation and returned Mr. George to a training platoon after his initial hospitalization. App., *infra*, 7a. And in a careful, multi-page analysis, the Medical Board agreed that Mr. George's condition had "progressed" during service "at a rate greater than is usual for such disorders" because of "conditions peculiar to his service." App., *infra*, 8a. Against that support for aggravation, the 1977 Board cited only the supposedly "careful evaluation by [the] physical evaluation board," Pet. App. 86a; *see* Pet. App. 77a-78a, which differed from the Medical Board's conclusion. But that "evaluation" amounted to two words—"not aggravated"—on a single-page form, issued by a central board that did not speak to Mr. George, and which contained no medical (or other) reasoning. App., *infra*, 13a.

The Board offered no explanation, *see* Pet. App. 85a-86a, and there could be none, for finding that this "evidence of non-aggravation outweighed evidence of aggravation," let alone so overwhelmingly outweighed the aggravation evidence that it could "support a finding that the record contained clear and unmistakable evidence of non-aggravation," *Herron v. Shulkin*, No. 16-3110, 2017 WL 3224526, at *4 (Vet. App. July 31, 2017). The Veterans Court has found in similar circumstances that this is precisely the sort of evidentiary conflict that § 1111 resolves in the veteran's favor. *See, e.g.*, *Goldstein v. McDonald*, No. 15-1250, 2016 WL 1458490, at *5 (Vet. App. Apr. 14, 2016).

Had the 1977 Board applied the governing statute instead of VA's defective regulation, Mr. George would have been entitled to service-connection for the aggravation of his condition. The Board's legal error changed the outcome, and Mr. George is entitled to have the 1977 decision "reversed or revised." 38 U.S.C. § 7111(a).

CONCLUSION

The Court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

Kenneth M. Carpenter
John Niles
CARPENTER CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601

Edmund Hirschfeld
Melanie R. Hallums
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Benjamin P. Chagnon
Robbie Manhas
Jonas Q. Wang
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

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