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 OF AMICUS CURIAE THE NATIONAL LAW SCHOOL VETERANS CLINIC CONSORTIUM IN SUPPORT OF THE PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii

INTEREST OF AMICUS CURIAE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 5

I. To further their non-adversarial and claimant-friendly systems, both the Department of Veterans Affairs and the Social Security Administration provide that final decisions infected by legal error may be reopened and revised 5

A. Congress intended that VA and SSA claimants have similar standards governing collateral review of otherwise final decisions 7

B. The SSA allows for collateral review to correct its own legal error based on clearly erroneous application or interpretation of the law existing at the time of the determination or decision 8

II. Because principles of judicial construction establish that *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) simply stated what Section 1111 always meant, Mr. George's case involves a misapplication of a legal standard that CUE should correct 11

III. Habeas cases similarly inform the analysis and demonstrate why CUE must be found here 14

TABLE OF CONTENTS—Continued

Page

IV. Notions of fundamental fairness in the delay-filled and error-laden VA system support the application of CUE here. 17

CONCLUSION 21

TABLE OF AUTHORITIES

Page

CASES

Barrett v. Nicholson, 466 F.3d 1038 (Fed. Cir. 2006) 5, 17, 21

Boone v. Lightner, 319 U.S. 561 (1943) 18

Bousley v. United States, 523 U.S. 614 (1998) 13, 15

Bunkley v. Florida, 538 U.S. 835 (2003) 15

Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837 (1984) 12, 13

Coulter v. Weinberger, 527 F.2d 224 (3d Cir. 1975) 6, 8

Fiore v. White, 531 U.S. 225 (2001) 4, 15, 16

Fox v. Bowen, 835 F.2d 1159 (6th Cir. 1987) 4, 8, 9

Gonzales v. Crosby, 545 U.S. 524 (2005) 15

Heckler v. Day, 467 U.S. 104 (1984) 6

Henderson v. Shinseki, 562 U.S. 428 (2011) 5, 6, 19

Hodge v. West, 155 F.3d 1356 (Fed. Cir. 1998) 6, 11, 17

In re Neagle, 135 U.S. 1 (1890) 4, 14

Jones v. Cunningham, 371 U.S. 236 (1963) 14

Kendrick v. Dist. Att'y of Phila., 488 F.3d 217 (3d Cir. 2007) 14

Lauritzen v. Weinberger, 514 F.2d 561 (8th Cir. 1975) 8

Martin v. O'Rourke, 891 F.3d 1338 (Fed. Cir. 2018) 20

TABLE OF AUTHORITIES—Continued

Page

Mines v. Sullivan, 981 F.2d 1068 (9th Cir. 1992).........8

Munsinger v. Schweiker, 709 F.2d 1212 (8th Cir. 1983)...8, 9

Obergefell v. Hodges, 576 U.S. 644 (2015)..................10

Rivers v. Roadway Express, Inc., 511 U.S. 298 (1994)..*passim*

Schwartz v. State, 361 P.3d 1161 (Haw. 2015)...........13

United States v. City of Tacoma, 332 F.3d 574 (9th Cir. 2003)...13

United States v. Windsor, 570 U.S. 744 (2013)...........10

Wagner v. Principi, 370 F.3d 1089 (Fed. Cir. 2004)...*passim*

Walters v. Nat'l Ass'n of Radiation Survivors, 473 U.S. 305 (1985)...6

CONSTITUTIONAL PROVISIONS

U.S. CONST. art. I, § 9, cl. 2.....................................4, 14

STATUTES

28 U.S.C. § 2255...14

38 U.S.C. § 1111...*passim*

38 U.S.C. § 5103...6

38 U.S.C. § 5109...3, 7

38 U.S.C. § 7111...2, 3, 7

42 U.S.C. § 424a...8, 9

TABLE OF AUTHORITIES—Continued

Page

REGULATIONS

20 C.F.R. § 404.988 .... 4, 7, 9, 10

20 C.F.R. § 404.989 .... 4, 7, 9, 10

38 C.F.R. § 3.103 6

38 C.F.R. § 3.105 9

38 C.F.R. § 20.700 6

OTHER AUTHORITIES

1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND (T. Cooley 4th ed. 1884) 13

H.R. Rep. No. 105-52 (1997) 3, 7, 21

143 Cong. Rec. H1568 (daily ed. Apr. 16, 1997) 2, 7

POMS GN 04010.020 ....3, 7

POMS GN 04001.001C 8

SSR 17-1p, 2017 WL 3928299 (Mar. 1, 2017)............10

SSA, *The 2021 Ann. Rep. of the Bd. of Trs. of the Fed. Old-Age and Survivors Ins. and Fed. Disability Ins. Tr. Funds* (2021), https://www.ssa.gov/OACT/TR/2021/tr2021.pdf...........................6

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TABLE OF AUTHORITIES—Continued

Page

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TABLE OF AUTHORITIES—Continued

Page

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INTEREST OF AMICUS CURIAE[1]

The National Law School Veterans Clinic Consortium (NLSVCC) submits this brief in support of the position of Petitioner Kevin R. George. The filing of this brief was authorized by the Board of the NLSVCC, a 501(c)(3) organization.

NLSVCC is a collaborative effort of the nation's law school legal clinics dedicated to addressing the unique legal needs of U.S. military veterans on a pro bono basis. NLSVCC's mission is, working with like-minded stakeholders, to gain support and advance common interests with the Department of Veterans Affairs (VA), U.S. Congress, state and local veterans service organizations, court systems, educators, and all other entities for the benefit of veterans throughout the country.

NLSVCC exists to promote the fair treatment of veterans under the law. Clinics in the NLSVCC work daily with veterans, advancing benefits claims through the arduous VA appeals process. NLSVCC is keenly interested in this case in light of the important disability benefits issue presented. It respectfully submits that access to collateral view based on CUE where subsequent judicial review reveals an old agency error is

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

critical to protecting the interests of our nation's veterans.

SUMMARY OF THE ARGUMENT

In 1997, Congress empowered veterans with the right to request collateral review of erroneous VA decisions. 38 U.S.C. § 7111(a). Final VA decisions became "subject to revision on the grounds of clear and unmistakable error," now known as "CUE." *Id.* In creating CUE, Congress intended to provide "justice for veterans" erroneously denied disability benefits because of VA errors—errors that are neither isolated nor insignificant. 143 Cong. Rec. H1568 (daily ed. Apr. 16, 1997). VA's high overall error rates, coupled with long delays in the VA adjudicatory system, make collateral review necessary to maintaining a veteran-friendly benefits system that leads to just results for every veteran.

In this case, Mr. George seeks collateral review of VA's denial of his claim for disability benefits based on a VA regulation that erroneously applied the clear rebuttal requirements for the presumption of soundness under 38 U.S.C. § 1111. *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), uncovered this error, holding that "the correct standard for rebutting the presumption of soundness under section 1111" had always required clear and unmistakable evidence both that the "disability existed prior to service" and that the "disability was not aggravated during service."

The Secretary contends that because Mr. George's case pre-dated *Wagner*, VA did not apply an incorrect legal standard or misinterpret the law *existing at the time of the decision*. Thus, the Secretary argues VA's error cannot be corrected through CUE. The flaw in the Secretary's reasoning is that it treats the holding in *Wagner* as announcing a change in legal interpretation or new rule entirely. While the Federal Circuit did not discover VA's long-standing error in applying Section 1111 until years after VA denied Mr. George's original claim, its holding in *Wagner* was exactly that—a discovery of old error, not an announcement of new law. The Federal Circuit was recognizing what the clear meaning of Section 1111 had always been.

Recognizing that VA's misapplication of Section 1111 constitutes CUE would be consistent with principles of collateral review in both Social Security and habeas corpus contexts.

VA and the Social Security Administration (SSA), while separate and distinct government agencies, are intentionally similar in their approaches to collateral review. In fact, in enacting Section 7111, Congress specifically intended that CUE "address[] errors similar to the kind which are grounds for reopening Social Security claims." H.R. Rep. No. 105-52, at 3 (1997). Both agencies allow reopening of otherwise final determinations or decisions to correct certain erroneous applications of the law. *See* 20 C.F.R. §§ 404.988(c)(8), 404.989(a)(3) (2022); POMS GN 04010.020 (2021); 38 U.S.C. §§ 7111, 5109A (2020). Specifically, SSA allows for collateral review to correct its own errors involving

"the application of an incorrect legal standard or the misinterpretation of law existing at the time of the determination." *Fox v. Bowen*, 835 F.2d 1159, 1163-64 (6th Cir. 1987).

Finding CUE in this case would also be consistent with this Court's recognition that "judicial construction . . . is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994). Because *Wagner* recognized what the meaning of Section 1111 always was, VA clearly and unmistakably erred by applying an incorrect legal standard to Mr. George's case. Granting Mr. George collateral review here not only properly enforces Section 1111's plain meaning, but also provides the veteran with disability benefits he should have received four decades ago.

Collateral review in the habeas context supports this result as well. Habeas protects individuals from unjust confinement and punishment. *See* U.S. CONST. art. I, § 9, cl. 2; *In re Neagle*, 135 U.S. 1, 41 (1890). In the habeas context, this Court recognizes that a subsequent judicial decision that "merely clarifie[s] a statute *can* be given effect in collateral proceedings." *Fiore v. White*, 531 U.S. 225, 228 (2001) (emphasis added and citation omitted). Where a criminal statute is clarified to remove the defendant's conduct from the statute's scope, habeas is appropriate because the clarification merely explains what the statute has always meant.

Finally, based on principles of fundamental fairness in light of the error-laden labyrinth of the VA adjudicatory system, Mr. George asks that this Court recognize that VA's misapplication of Section 1111 is CUE. The decision below denying Mr. George the benefits he would have received more than four decades ago flies in the face of the government's interest that "all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). This Court, consistent with the principles of collateral review in both the SSA and habeas contexts, as well as fundamental fairness, should reverse the Federal Circuit's decision in this case.

ARGUMENT

I. To further their non-adversarial and claimant-friendly systems, both the Department of Veterans Affairs and the Social Security Administration provide that final decisions infected by legal error may be reopened and revised.

Both VA and SSA provide disability benefits for millions of claimants through non-adversarial and "unusually protective" systems.[2] *Henderson v. Shinseki*,

[2] In fiscal year 2020, the VA provided compensation benefits to over five million recipients. Veterans Benefits Admin., *Ann. Benefits Rep. Fiscal Year 2020*, at 71 (2021), https://www.benefits.va.gov/REPORTS/abr/docs/2020_ABR.pdf. In 2020, the SSA provided Old Age, Survivors, and Disability Insurance (OASDI) benefit payments to over 65 million retired workers and their

562 U.S. 428, 437 (2011) (citing *Heckler v. Day*, 467 U.S. 104, 106-107 (1984)). The agencies are similar because they both adjudicate claims informally, with claimants often navigating the system without counsel. *See* Pet. Br. 4 (citing *Henderson*, 562 U.S. at 431 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)); *Coulter v. Weinberger*, 527 F.2d 224, 228 (3d Cir. 1975). In fact, compared to the SSA system, the VA system is designed to offer an even greater degree of "solicitude for the claimant." *Walters*, 473 U.S. at 311.[3] For example, unlike the SSA system, there is no time limit for filing a VA claim. *Henderson*, 562 U.S. at 431-32 (citing 38 C.F.R. §§ 3.103(a), 20.700(c) (2010); 38 U.S.C. §§ 5103(a) (2006 ed., Supp. III), 5103A (2006 ed.)). VA also has a "statutory duty to assist veterans in developing the evidence necessary to substantiate their claims." *Id.*

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dependents, survivors of deceased workers, disabled workers and their dependents. SSA, *The 2021 Ann. Rep. of the Bd. of Trs. of the Fed. Old-Age and Survivors Ins. and Fed. Disability Ins. Tr. Funds*, at 2 (2021), https://www.ssa.gov/OACT/TR/2021/tr2021.pdf.

[3] The distinction is in degree, rather than in kind. *See Hodge v. West*, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998) (refusing to import definition from Social Security context because VA is more pro-claimant and there was no indication that Congress had intended for the VA to adopt the relevant Social Security standard at issue in that case).

A. Congress intended that VA and SSA claimants have similar standards governing collateral review of otherwise final decisions.

Both VA and SSA set regulatory standards that allow claimants to seek collateral review of final judgments under certain conditions. The standards—"clear and unmistakable error" (CUE) in VA cases and "error on the face of the evidence" in SSA cases—allow each agency to reopen otherwise final determinations or decisions to correct certain erroneous applications of the law. *See* 20 C.F.R. §§ 404.988(c)(8), 404.989(a)(3) (2022); POMS GN 04010.020 (2021); 38 U.S.C. §§ 7111, 5109A (2020). Despite the difference in labeling, Congress intended, through its enactment of the 1997 CUE statute, to "address [VA] errors similar to the kind which are grounds for reopening Social Security claims." Pet. Br. 28 (quoting H.R. Rep. No. 105-52, at 3). CUE in the VA system was designed to function similarly to SSA's "error on the face of the evidence" standard, providing veterans with recourse to correct clearly erroneous VA decisions.[4] H.R. Rep. No. 105-52, at 3; *see* 20 C.F.R. §§ 404.988(c)(8), 404.989(a)(3).

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[4] The Honorable Lane Evans (D. Il), who introduced the CUE legislation and served as its chief proponent, explained that "[t]he standard for claims of clear and unmistakable error is similar to the standard currently contained in [what is now 20 C.F.R. 404.988], for revision of a claim at any time due to error that appears on the face of the evidence considered when the determination was made. Veterans deserve the same right as Social Security beneficiaries to have manifest errors corrected." 143 Cong. Rec. H1568 (daily ed. Apr. 16, 1997).

B. The SSA allows for collateral review to correct its own legal error based on clearly erroneous application or interpretation of the law existing at the time of the determination or decision.

The SSA "error on the face of the evidence" standard allows claimants to reopen cases where an injustice has been done or where there is manifest error in the record. *Lauritzen v. Weinberger*, 514 F.2d 561, 563 (8th Cir. 1975). Consistent with SSA's policy that an "individual to whom [a] determination or decision applies should be able to rely on its correctness," the SSA system provides claims may be reopened based on errors involving "the application of an incorrect legal standard or the misinterpretation of law existing at the time of the determination." POMS GN 04001.001C (2021); *Fox v. Bowen*, 835 F.2d 1159, 1163-64 (6th Cir. 1987); *accord Munsinger v. Schweiker*, 709 F.2d 1212, 1216 (8th Cir. 1983); *Mines v. Sullivan*, 981 F.2d 1068, 1071 (9th Cir. 1992); *Coulter*, 527 F.2d at 231.

For example, in *Munsinger*, the Eighth Circuit held that an administrative law judge's (ALJ) misapplication of an offset required by 42 U.S.C. § 424a(b) constituted legal error sufficient to justify reopening the case. 709 F.2d at 1216. The ALJ failed to offset a lump sum Workers' Compensation award from the claimant's Social Security disability benefits. *Id.* at 1213-14. Once SSA became aware of the mistake, the agency reopened the claim to correct the error. *Id.* at 1214. Reasoning that it was merely correcting a "misinterpretation of law existing at the time of the

determination," the court emphasized that it made no "change of legal interpretation" by enforcing the plain terms of § 424a(b). *Id.* at 1216 (quoting 20 C.F.R. § 404.989(b) (1981)). Instead, it merely corrected the agency's error as to what § 424a(b) had always meant. *Id.*

SSA distinguishes clearly erroneous application or interpretation of law from mere *changes in interpretation* of law. *See* 20 C.F.R. §§ 404.988(c)(8), 404.989(b) (changes in interpretation of law alone are insufficient to establish error on the "face of the evidence."). VA's regulation uses similar language. *See* Pet. Br. 33; 38 C.F.R. § 3.105 (1997) (noting that CUE applies "except where . . . there is change in law or a [VA] issue or a change in interpretation of law or a [VA] issue"). These regulations provide that neither agency will reopen decisions simply because a subsequent change in legal interpretation of the relevant statute or regulation occurs.

In contrast, and relevant here, when a court declares *what the law has always been*, there has been no change in interpretation of the law that would bar revision of an earlier decision. Where the error involves "application of an incorrect legal standard or misinterpretation of law *existing at the time of the determination* . . . [and] the evidence clearly shows on its face that an error was made," the decision may be revised. *Fox*, 835 F.2d at 1164 (punctuation added). This distinction appropriately balances administrative finality with the need to protect claimants from erroneous applications of *existing* law.

In order to protect claimants, SSA reopens otherwise final decisions where the agency based its decision on a statute later found to be unconstitutional. After this Court's decisions in *United States v. Windsor*, 570 U.S. 744 (2013) (striking down Section 3 of the Defense of Marriage Act, which defined marriage for federal benefit purposes as a union between a man and a woman) and *Obergefell v. Hodges*, 576 U.S. 644 (2015) (holding that same-sex couples have a constitutional right to marry and to have their marriages recognized by all States), the SSA released the following Policy Interpretation:

> [When SSA makes a] determination or decision by applying a Federal or State law that the Supreme Court of the United States later determines to be unconstitutional, and we find that application of that law was material to our determination or decision, we may reopen the determination or decision within the time frames specified in [SSA] regulations based on an error on the face of the evidence under 20 CFR 404.988(b), 404.988(c)(8), 404.989(a)(3), 416.1488(b), and 416.1489(a)(3).

SSR 17-1p, 2017 WL 3928299 (Mar. 1, 2017). In this guidance, SSA explains that when the agency has "made a determination or decision by applying a Federal or State law that the Supreme Court of the United States later determines to be unconstitutional, the application of that law *would not have been correct and reasonable when made*." *Id* (emphasis added). Despite the SSA's good faith reliance on the law it believed to

be correct at the time, SSA directs reopening is proper where the agency relied on statutes later deemed unconstitutional.

CUE, which is operationally similar to SSA's "error on the face of the evidence" standard applies in the "uniquely pro-claimant" VA system. *Hodge*, 155 F.3d at 1363. As a result, CUE should provide similar or greater access to collateral review as SSA provides for disabled Americans. If subsequent judicial decisions by this Court are sufficient grounds for reopening decisions in the SSA system, as discussed above, then the more strongly pro-claimant VA's CUE standard should be applied more liberally to the final and binding, precedential decision by the Federal Circuit in *Wagner*. In a case where everyone agrees that the VA regulation used to deny Mr. George's claim was inconsistent with Section 1111, this Court should reverse the decision below and acknowledge that the VA's regulatory misapplication of Section 1111 constitutes CUE.

II. Because principles of judicial construction establish that *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004) simply stated what Section 1111 always meant, Mr. George's case involves a misapplication of a legal standard that CUE should correct.

Wagner did not announce a new interpretation of Section 1111; it uncovered an old agency error. To overcome the presumption of soundness, Section 1111

requires a showing of "clear and unmistakable evidence demonstrat[ing] that the injury or disease existed before acceptance and enrollment [into the military] *and* was not aggravated by such service." 38 U.S.C. § 1111 (2000) (emphasis added). After concluding that Section 1111 was "clear on its face" and that *Chevron* deference was not appropriate,[5] the Federal Circuit in *Wagner* held that, despite the long-standing VA policy to the contrary, "the correct standard for rebutting the presumption of soundness under Section 1111 requires the government to show by clear and unmistakable evidence that (1) the veteran's disability existed prior to service and (2) that the pre-existing disability was not aggravated during service." 370 F.3d at 1093, 1097. The Federal Circuit remanded the case because "both the [Board of Veterans' Appeals] and the Court of Appeals for Veterans Claims applied the incorrect legal standard for rebutting the presumption of soundness." *Id.*

This Court recognizes that "judicial construction . . . is an authoritative statement of what the statute meant before as well as after the decision of the case

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[5] Consistent with the mandate to "give effect to the unambiguously expressed intent of Congress" in *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 843 (1984) the *Wagner* court agreed that Section 1111 was "clear on its face" and could be construed "without resort to Chevron deference." 370 F.3d at 1097. Only where a statute is ambiguous does *Chevron* deference to an agency's reasonable interpretation of the statute apply. 467 U.S. at 843. Here, because the court recognized that Section 1111 was "clear on its face," the VA was not entitled to *Chevron* deference. *Wagner*, 370 F.3d at 1093.

giving rise to that construction." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994); *see also Bousley v. United States*, 523 U.S. 614, 625-26 (1998); *United States v. City of Tacoma*, 332 F.3d 574, 580 (9th Cir. 2003) ("The theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception, and does not merely give an interpretation to be used from the date of the decision."); *Schwartz v. State*, 361 P.3d 1161, 1180 (Haw. 2015) (noting that when a court "announces a legal principle grounded in its understanding of a particular statute, it merely expresses in definitive terms what the statute has always meant, both before and after that decision is handed down"). In fact, this principle can be traced back to Judge Blackstone, who noted that when judges overturn prior rulings, they "do not pretend to make a new law, but to vindicate an old one from misrepresentation. For if it be found that the former decision is manifestly absurd or unjust, it is declared, not that such a sentence was bad law, but that it was *not law*." 1 W. BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 70 (T. Cooley 4th ed. 1884).

Consistent with *Rivers*, the *Wagner* court's construction of Section 1111 should be understood as an authoritative statement "of what the statute meant before as well as after the decision." 511 U.S. at 312-13. Because the "incorrect legal standard for rebutting the presumption of soundness" always demanded by Section 1111 was applied in Mr. George's case, the VA's misapplication of the law amounts to the exact kind of legal error the CUE statute was meant to correct.

Wagner, 370 F.3d at 1097. Accordingly, because the denial of Mr. George's disability benefits was based on an incorrect legal standard of the law existing at the time of the initial denial, Mr. George should have access to collateral review under CUE. *Id.*

III. Habeas cases similarly inform the analysis and demonstrate why CUE must be found here.

Habeas corpus, the mechanism by which a prisoner in custody may collaterally challenge his or her detention, has long protected individuals from unjust confinement. *See* U.S. CONST. art. I, § 9, cl. 2; *In re Neagle*, 135 U.S. 1, 41 (1890) ("[I]f he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged."). The purpose of habeas corpus is, as Justice Black once described it, to protect "the individual against erosion of their right to be free from wrongful restraints upon their liberty." *Jones v. Cunningham*, 371 U.S. 236, 243 (1963). A successful petition for writ of habeas corpus "may move the court which imposed the sentence to vacate, set aside or correct the sentence." 28 U.S.C. § 2255(a) (2020).

Habeas relief is appropriate where a subsequent judicial clarification of a statute's plain meaning removes the defendant's conduct from the statute's scope. *See, e.g.*, *Kendrick v. Dist. Att'y of Phila.*, 488 F.3d 217, 221 (3d Cir. 2007) (vacating a District Court's

denial of writ of habeas corpus after a subsequent judicial clarification of the state statute defendant was convicted under made the statue inapplicable to defendant's conduct). As discussed above, this Court acknowledges that a "judicial construction . . . is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-13; *see Bousley*, 523 U.S. at 625-26. In the habeas context, this Court recognizes that a judicial decision that "'merely clarifie[s]' a statute *can* be given effect in collateral proceedings." *Fiore v. White*, 531 U.S. 225, 228 (2001) (emphasis added and citation omitted); *see also Bunkley v. Florida*, 538 U.S. 835, 840-42 (2003) (per curiam); *Gonzales v. Crosby*, 545 U.S. 524, 536 n.9 (2005).

In *Fiore*, this Court granted habeas after finding that the conviction was based on conduct that the state statute, *as it was subsequently clarified*, did not prohibit. 531 U.S. at 228-29. Defendant Fiore, and a co-defendant, were convicted under a state statute that prohibited operating a hazardous waste facility without a permit. *Id.* at 226-27. While Mr. Fiore did have a permit, the trial court found his behavior deviated so dramatically from the permit's terms that he violated the statute. *Id.* at 227. Years later, after Mr. Fiore's case was final, the Pennsylvania Supreme Court "clarified the plain language of the statute" in Mr. Fiore's co-defendant's appeal and found that the statute did not prohibit the conduct for which Mr. Fiore was convicted. *Id.* Mr. Fiore then brought a federal habeas corpus

action. *Id.* After the district court granted the writ, the Third Circuit reversed.[6] *Id.*

When this Court received the appeal, it directed a question to the Pennsylvania Supreme Court, requesting that the court clarify whether "its decision interpreting the statute not to apply to conduct like Mr. Fiore's was a new interpretation, or whether it was, instead, a correct statement of the law when Fiore's conviction became final." *Id.* at 226. The Pennsylvania Supreme Court responded by stating it "merely clarified the plain language of the statute" applicable "at the date Fiore's conviction became final." *Id.* at 228. As a result, this Court found that Pennsylvania could not convict Fiore for conduct that the criminal statute, as properly understood, never criminalized. *Id.* at 229. Reasoning that the Pennsylvania Supreme Court's clarification of the statute announced what the statute had always meant, this Court reversed the Third Circuit's decision and remanded for further proceedings consistent with the opinion. *Id.*

As in *Fiore*, Mr. George was deprived of benefits (as Mr. Fiore was deprived of liberty) contrary to the clear meaning of the law. Based on the application of an incorrect legal standard, which was later clarified by the Federal Circuit in *Wagner*, Mr. George was denied more than four decades worth of benefits. If collateral review is available to correct errors after a

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[6] The Third Circuit "believed that the Pennsylvania Supreme Court, in [the co-defendant's] case, had announced a new rule of law, inapplicable to Fiore's already final conviction." *Fiore*, 531 U.S. at 227.

subsequent "clarification" of a relevant statute in the criminal context, then it should also apply to a final precedential Federal Circuit decision like *Wagner* in the non-adversarial, pro-veteran VA system within which Mr. George's case is found.

IV. Notions of fundamental fairness in the delay-filled and error-laden VA system support the application of CUE here.

When the application of an incorrect legal standard is considered part and parcel with the established pro-claimant nature of veterans benefits law, the argument for using CUE to correct agency misinterpretations of the law is solidified. In cases involving benefits for our nation's military veterans, the "government's interest . . . is not that it shall win, but rather that justice will be done." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006); *see also Hodge*, 155 F.3d at 1363 ("[I]n the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight."). Neither justice nor fairness are served by refusing to rectify VA's error in Mr. George's case.

Ultimately, VA should bear the burden of correcting its errors where it improperly promulgated regulations to bar veterans like Mr. George from disability benefits. This error occurred in a system built to "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up

the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

From a fundamental fairness perspective, recognizing that CUE can correct earlier erroneous decisions such as that in Mr. George's case is even more critical in light of VA's error rates and the long delays veterans experience in the system. During the time period surrounding the appeal of Mr. George's CUE claim at the Board, veterans waited up to seven years for a decision on appeal. U.S. GOV'T ACCOUNTABILITY OFF., GAO-21-105305, VA DISABILITY BENEFITS: ACTIONS NEEDED TO BETTER MANAGE APPEALS WORKLOAD RISKS, PERFORMANCE, AND INFORMATION TECHNOLOGY 1 (2021), https://www.gao.gov/assets/gao-21-105305.pdf ("Prior to 2018, veterans who appealed decisions on their initial claims for benefits often experienced long waits for resolution of their appeals—up to 7 years on average. These long waits are one reason GAO designated VA's disability workloads as a high risk issue."). Living long enough to appeal an adverse decision to the Veterans Court is not a panacea, as only 8 percent of veterans appeal to the Veterans Court. U.S. Dep't of Veterans Affairs, *Ann. Rep. Fiscal Year (FY) 2021,* Bd. of Veterans' Appeals 22 (2021), https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf. Indeed, the high Board error rate is reflected in the low number of times the Veterans Court affirms Board decisions. Over the past five years, less than 10 percent of Board decisions were affirmed by the Veterans Court. U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2020 Ann. Rep., Oct. 1, 2019, to Sept. 30, 2020* (2020),

http://www.uscourts.cavc.gov/documents/FY2020AnnualReport.pdf. This Court's observation in *Henderson*, that the Veterans Judicial Review Act gave rise to a "remarkable record of success" for veterans, as the Veterans Court ordered relief in approximately 79 percent of its "merits decisions," remains true for those few who persevere, but also demonstrates how error-ridden the system truly is. 562 U.S. at 432.

VA's error rates are troubling based on the Government's own audit reports. For spine conditions, which account for two of the top 10 claimed disabilities, VA incorrectly processed more than half of audited claims, as revealed in a 2019 OIG Report. VA OIG, *Accuracy of Claims Decisions Involving Conditions of the Spine*, Rep. No. 18-05663-189, page i (Sept. 5, 2019), https://www.va.gov/oig/pubs/VAOIG-18-05663-189.pdf. For Gulf War claims, which will only grow exponentially as time marches on, a GAO audit covering a five-year period found that the approval rate for Gulf War Illness medical issues was 17 percent—three times lower than all other claims. VA attributed this low rate to the "complexity" of the process for these claims. U.S. GOV'T ACCOUNTABILITY OFF., GAO-17-511, GULF WAR ILLNESS: IMPROVEMENTS NEEDED FOR VA TO BETTER UNDERSTAND, PROCESS, AND COMMUNICATE DECISIONS ON CLAIMS 18 (2017), https://www.gao.gov/assets/gao-17-511.pdf. For Military Sexual Trauma (MST) cases, the situation is equally dismal. A 2018 OIG report found a 49 percent error rate in MST claims. *Even after VA agreed to take corrective action*, the most recent OIG

audit revealed that the error rate for MST claims *increased* by almost 10 percent: 57 percent of denied MST cases were not processed correctly. VA OIG, *Improvements Still Needed in Processing Military Sexual Trauma Claims*, Rep. No. 20-00041-163, page ii (Aug. 5, 2021), https://www.va.gov/oig/ pubs/VAOIG-20-00041-163.pdf.

Whether the recent Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (2017) fixes the delay problems remains to be seen. *See*, *e.g.*, *Martin v. O'Rourke*, 891 F.3d 1338, 1346 n.8 (Fed. Cir. 2018). The Act was designed to provide appeal options; it was not designed to fix adjudicatory errors such as those described above. U.S. Dep't of Veterans Affairs, *Appeals Modernization*, https://benefits.va.gov/benefits/appeals.asp (last visited Mar. 2, 2022). Collateral review is fundamental to fulfilling our nation's commitment to veterans in this error-laden, labyrinth-like, benefits system.[7] *Martin*, 891 F.3d at 1349.

[7] As Judge Moore colorfully explained in concurrence, "[e]stablished with the intent of serving those who have served their country, the veterans' disability benefits system is meant to support veterans by providing what are often life-sustaining funds. Instead, many veterans find themselves trapped for years in a bureaucratic labyrinth, plagued by delays and inaction." *Martin*, 891 F.3d at 1349.

CONCLUSION

Congress provided that veterans may reopen cases after they have been denied disability benefits. A plain misapplication of law is a reason to reopen a case. To—in the name of finality—deny Mr. George the benefits he would have received in 1977 but for the application of the wrong legal standard flies in the face of the government's interest that "all veterans so entitled receive the benefits due to them." *Barrett*, 466 F.3d at 1044. Mr. George, and those like him, are being punished because the error relied on by the VA in their cases was not discovered until well after their claims became "final." In a system with "no true finality," the mere time lapse of *Wagner*'s announcement should not prevent this Court from recognizing as CUE the misapplication of Section 1111's plain meaning and granting Mr. George collateral review. H.R. Rep. No. 105-52, at 2. The decision of the Federal Circuit should be reversed.

Respectfully submitted,

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