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 UNITED STATES SENATORS TED CRUZ AND MIKE LEE AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are two members of the United States Senate: Senators Ted Cruz and Mike Lee. Both *amici* sit on the United States Senate Committee on the Judiciary. *Amici* have a clear interest in preserving the legislative powers that Article I of the federal Constitution vests in the United States Congress. *See* U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). In their exercise of those enumerated congressional powers, *amici* have a strong interest in the proper and effective administration of veterans' benefits and the correct interpretation of federal statutes.

[1] No counsel for any party has authored this brief in whole or in part, and no entity or person, aside from *amici curiae* and their counsel, made any monetary contribution intended to fund the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

Congress has expressly authorized the U.S. Department of Veterans Affairs ("VA") to reopen veteran disability benefits denials where the VA committed a "clear and unmistakable error" applying the then-existing law. In 1977, Petitioner's benefits claim was denied pursuant to a 1974 VA regulation that the Federal Circuit and the VA itself later agreed was an indefensible interpretation of the underlying benefits statute's unambiguous text.

Because an invalid regulation is a nullity, the 1974 regulation could not have been "the law" or an "interpretation" of the law at the time of Petitioner's benefits denial. The clear statutory text instead was the law. Petitioner therefore demonstrated clear and unmistakable error related to his 1977 benefits denial.

The Federal Circuit decision below incorrectly concluded that Petitioner is stuck with his old denial because the 1974 regulation represented what the VA *believed* the law to be at that time. The Federal Circuit held that its own 2004 opinion invalidating the 1974 regulation therefore represented a post-denial *change* in the law or interpretation of the law. This was incorrect. Because the regulation was a nullity, it could never have been the law or an interpretation of the law in the first place, meaning the opinion recognizing its invalidity was no subsequent change. That conclusion is buttressed by this Court's longstanding rule that when a court interprets a statute (as the Federal Circuit did in declaring that the underlying statute prohibited the 1974

regulation), that interpretive decision applies retrospectively as it simply announces what the statute has always meant.

The Federal Circuit erred by allowing an invalid regulation to overtake the proper place of the unambiguous statute by treating the regulation as "the law" as of 1977. Under the Federal Circuit's position that an agency's then-understanding of the law controls in this context, "no one is able to argue in court that the regulation is inconsistent with the statute—no matter how wrong the agency's interpretation might be," even when the agency itself subsequently *agrees* the regulation was wrong, as here. *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," *id.*, a situation made even more unpalatable by the fact that the 1974 regulation is *incompatible* with the actual underlying statute passed by Congress and signed by the President. In effect, the government asks this Court to "afford the agency['s regulation] not mere *Skidmore* deference or *Chevron* deference, but absolute deference." *Id.* "Not *Chevron* deference or *Skidmore* deference, but [*George*] abdication." *Id.*

This Court should enforce the separation of powers and reject the government's theory of autocratic agency law, under which an Article II agency's regulation is treated as both an Article I law and an Article III declaration of the meaning of that law. The court below improperly credited an impermissible

regulation as law, when it should have determined instead that the VA's reliance on the unlawful regulation in denial of a benefits claim was "clear and unmistakable error." This Court thus should reverse the decision below.

ARGUMENT

I. An Invalid and Vacated Regulation Is Not "the Law" and Cannot Retrospectively Constitute an "Interpretation of the Law."

Generally, once a case has been adjudicated through all appeals, it is not subject to subsequent reopening on the basis "that the judgment may have been wrong." *Federated Dep't Stores v. Moitie*, 452 U.S. 394, 398 (1981). But in the context of veteran disability benefits adjudications, Congress has made several exceptions to that general rule of finality. *First*, a veteran may seek to reopen a previously denied claim at any time "[i]f new and relevant evidence is presented or secured with respect to a supplemental claim." 38 U.S.C. § 5108(a). *Second*, and as relevant here, a decision by a regional office or the Board of Veterans' Appeals can be challenged at any time "on the grounds of clear and unmistakable error." 38 U.S.C. §§ 5109A(a), 7111(a).[2]

A clear and unmistakable error can be of either the factual or legal variety. *See Cook v. Principi*, 318 F.3d 1334, 1343 (Fed. Cir. 2002) (*en banc*). Although *amici*

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[2] "If evidence establishes the error, the prior decision shall be reversed or revised," which "has the same effect as if the decision had been made on the date of the prior decision." 38 U.S.C. §§ 5109A(a)–(b), 7111(a)–(b).

take no position on the matter, Petitioner and the government agree that the Federal Circuit has concluded that veterans cases "'codif[ied]'" by 38 U.S.C. § 7111 require that any alleged clear and unmistakable error of law "be based on … the law that existed at the time of the prior" denial of benefits. *Russell v. Principi*, 3 Vet. App. 310, 314 (1992); *see* BIO4–5; Pet.Cert.Rep.6.

The question in this case thus turns on what "the law" was in 1977 when Petitioner's benefits claim was originally denied.

Both the VA (in a 2003 General Counsel opinion) and the Federal Circuit (in a 2004 decision) have concluded that the 1974 regulation was an impermissible interpretation of the underlying unambiguous statute, 38 U.S.C. § 1111, because the regulation omitted a statutory requirement of clear and unmistakable evidence to rebut a presumption that a claimed injury or disease was aggravated by military service. *Compare* 38 U.S.C. § 1111, *with* 38 C.F.R. § 3.304(b) (1974); *see Wagner v. Principi*, 370 F.3d 1089, 1092–93 (Fed. Cir. 2004) (holding that section 1111 "is clear on its face" and thus the VA was "forbidden … to reach a different result"); BIO6–7 (acknowledging that the VA itself concluded the regulation was an "impermissible interpretation" of section 1111).[3]

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[3] The 1974 regulation was originally issued in 1961 and revised in 1966 and 1974, but the provision at issue in this case—§ 3.304(b)—remained the same during this period. *See* 26 Fed. Reg. 1561, 1580 (Feb. 24, 1961); 31 Fed. Reg. 4680, 4680 (Mar.

This Court has long held that a "regulation which … operates to create a rule out of harmony with the statute, is a mere nullity." *Dixon v. United States*, 381 U.S. 68, 74 (1965) (quoting *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936)). This is because the "only authority conferred, or which could be conferred, by the statute is to make regulations to carry out the purposes of the act—not to amend it." *Miller v. United States*, 294 U.S. 435, 440 (1935). *Chevron* re-affirmed this rule: an "agency … must give effect to the unambiguously expressed intent of Congress." *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842–43 (1984).

Because an agency's regulations have "only such force as Congress chooses to give them," *Dixon*, 381 U.S. at 73, the 1974 VA regulation was a "nullity" and void *ab initio*. It therefore could not have been "the law" at the time of Petitioner's 1977 benefits denial. Rather, the unambiguous text of 38 U.S.C. § 1111 was the law. Because all parties agree the 1974 regulation was invalid, the regulation was a nullity, and Petitioner thus demonstrated a clear and unmistakable error in his benefits denial, as measured against the law as it existed at the time of his 1977 denial.

The Federal Circuit, however, held below that the acknowledgment of the now-recognized invalidity of the 1974 regulation amounted to a "'change[] in the law'" or a "change in the interpretation of the law,"

19, 1966); *Increase of Disability Compensation and Dependency and Indemnity Compensation Rates*, 39 Fed. Reg. 34,529, 34,530 (Sept. 26, 1974).

Pet.App.14a–15a, rendering it ineligible for clear and unmistakable error, which (as noted above) requires an error in the law as it existed at the time of the original denial.

There are several flaws with the Federal Circuit's reasoning. *First*, the 1974 regulation could never have been "*the law*" in the first place, as the regulation was a nullity. Accordingly, there has been no change in the law. It is "not accurate to say" that correcting a "misinterpret[ation of] the will of the enacting Congress" amounts to a "'change[]' [in] the law that previously prevailed." *Rivers v. Roadway Express*, 511 U.S. 298, 313 n.12 (1994).

Second, even assuming the VA's "interpretation of the law" is relevant, *see* Pet.Br.33–34 (arguing there is no valid "exception" for changes in "interpretations of the law"), there was also no change in "the interpretation" of the law. An invalid regulation is not a legal interpretation of any kind—it is *void* agency action and a nullity. The government's position is that even a void document amounts to an "interpretation" of the law, but under that position taken to its logical end, even cursory non-binding statements like VA litigation positions or social media posts could be labeled "interpretations" with the status of unchallengeable law.

This Court's decision in *Rivers* bolsters these conclusions. Under the principle of interpretation derived from *Rivers*, the 2004 Federal Circuit *Wagner* opinion—holding that 38 U.S.C. § 1111 is unambiguous and the 1974 regulation is invalid—"operate[s] retrospectively." *Rivers*, 511 U.S. at 311.

That is, the Federal Circuit's 2004 "judicial construction of [the] statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Id.* at 311, 312–13; *see also Kuhn v. Fairmont Coal Co.*, 215 U.S. 349, 372 (1910) (Holmes, J., dissenting) ("Judicial decisions have had retrospective operation for near a thousand years.").

Thus, "when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law," and "the Court has no authority to depart from the congressional command." *Rivers*, 511 U.S. at 313 n.12. In such cases, the Court did not "change" the law or its interpretation but instead "decided what [the statute] had *always* meant." *Id.* (emphasis in original).

Retrospective application is often limited in practice by the general rule of decisional finality, but—as noted above—Congress has expressly authorized collateral attacks on final decisions in this benefits context. Thus, when the Federal Circuit held in *Wagner* in 2004 that 38 U.S.C. § 1111 unambiguously required clear and unmistakable evidence to rebut the presumption that military service caused the relevant harm, the Federal Circuit was merely announcing what § 1111 had always meant. There was no "change" in the law from the time of the original denial of Petitioner's claim in 1977.

As demonstrated next, by allowing an indefensible regulation to trump an unambiguous statute, the

Federal Circuit gave the VA's erroneous regulation not just deference but *absolute* deference, amounting to an abdication of judicial review and resulting in significant separation of powers concerns.

II. The Government Seeks Not Mere Judicial Deference—but Judicial Abdication.

"The allocation of powers in the Constitution is absolute." *Dep't of Transp. v. Ass'n of Am. R.Rs.*, 575 U.S. 43, 69 (2015) (Thomas, J., concurring). Article I vests the "legislative Powers" in Congress, Article II vests the "executive Power" in a President, and Article III vests "[t]he judicial Power of the United States" in the federal courts. U.S. CONST. art. I; *id.*, art. II; *id.*, art. III. The "judicial power, as originally understood, requires a court to exercise its independent judgment in interpreting and expounding upon the laws." *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 119 (2015) (Thomas, J., concurring in judgment).

But when agency interpretations are treated as "the law," the agency has essentially exercised "[t]he judicial Power of the United States," as well as "the legislative Powers" reserved to Congress. *See id.* That is what the government seeks here: an agency with the power not only to declare the law but to insulate that declaration from any judicial review, no matter how erroneous the agency's interpretation may be.

Concerns about agencies making law in violation of the Constitution's separation of powers arise most frequently in the context of *Chevron* deference, *see Nat'l Cable & Telecomms. Ass'n v. Brand-X Internet Servs.*, 545 U.S. 967, 980–85 (2005), which has been

the subject of widespread and justified criticism.[4] But *Chevron* deference pales in comparison to what the VA seeks here, which is not judicial deference but rather judicial "abdication." *PDR Network*, 139 S. Ct. at 2066 (Kavanaugh, J., concurring in the judgment).

Unlike *Chevron*, this "*George* abdication"—if accepted by the Court—would:

- apply even when the underlying statute is unambiguous;[5]
- apply even beyond agency proceedings of the level of formality typically required for the application of *Chevron* deference;[6]

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[4] *See Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); *Michigan v. E.P.A.,* 576 U.S. 743, 760 (2015) (Thomas, J., concurring) (noting "serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes"); Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2150 (2016) (noting that *Chevron* caused a "judicially orchestrated shift of power").

[5] *See Chevron*, 467 U.S. at 842–43 (an "agency … must give effect to the unambiguously expressed intent of Congress").

[6] *See United States v. Mead Corp.*, 533 U.S. 218, 230 (2001) ("It is fair to assume generally that Congress contemplates administrative action with the effect of law when it provides for a relatively formal administrative procedure tending to foster the fairness and deliberation that should underlie a pronouncement of such force.").

- apply even when the agency itself abandons its interpretation or refuses to defend its regulation;[7]
- prevent any court from saying the agency's interpretation is an unreasonable construction of the underlying statute;[8]
- effectively be irreversible, because the agency's interpretation of a statute is permanently locked in as "the law" for that point in time, and neither a court nor the VA itself can change that crystallization.[9]

The "general liberty of the people can never be endangered … so long as the judiciary remains truly distinct from both the legislative and executive." *The Federalist* No. 78 (A. Hamilton). But "requir[ing] courts to treat [VA] interpretations of [§ 1111] as authoritative"—as the government seeks here—"would trench upon Article III's vesting of the 'judicial Power' in the courts," with serious consequences for the liberty safeguarded by the separation of powers. *PDR Network*, 139 S. Ct. at 2057 (Thomas, J., concurring in the judgment) (internal quotation marks omitted). The judicial power "necessarily

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[7] *See Guedes v. Bureau of Alcohol, Tobacco, Firearms, and Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J.) (collecting authorities demonstrating that "[t]his Court has often declined to apply *Chevron* deference when the government fails to invoke it"); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

[8] *See City of Arlington, Tex. v. FCC*, 569 U.S. 290, 296 (2013).

[9] *See Brand-X*, 545 U.S. at 980–85.

entails identifying and applying the governing law," and thus to the extent a doctrine "purports to prevent courts from applying the governing statute to a case or controversy within its jurisdiction," the doctrine would "conflict[] with the 'province and duty of the judicial department to say what the law is.'" *Id.* (quoting *Marbury v. Madison*, 5 U.S. 137 (1803)); *see also Michigan*, 576 U.S. at 762 (Thomas, J., concurring) ("Such a transfer is in tension with Article III's Vesting Clause, which vests the judicial power exclusively in Article III courts, not administrative agencies.").

Nor is Article III the only casualty of such a regime. Where a doctrine "requires courts to 'give the force of law to agency pronouncements," "without regard to the text of the governing statute," it would violate Article I, as well, because no "body other than Congress" can "exercise the legislative power." *PDR Network*, 139 S. Ct. at 2057 (Thomas, J., concurring in the judgment). In fact, it would violate Article I twice over because Congress itself has made clear that it is the Court's duty, not an agency's, to "interpret … statutory provisions." 5 U.S.C. § 706; *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2434 (2019) (Gorsuch, J., concurring).

The government therefore seeks not just deference to the VA's interpretation of § 1111, but absolute deference, in violation of Articles I and III of the Constitution. The government says the courts must accept the VA's 1974 regulation, no matter that it is flatly inconsistent with the statutory text, no matter that Congress expressly authorized reopenings of prior denials for clear errors of law, and no matter

that Congress and Article III both require this Court (not an agency) to determine what "the law" is. *See PDR Network*, 139 S. Ct. at 2057 (Thomas, J., concurring in the judgment); *id.* at 2066 (Kavanaugh, J., concurring in the judgment).

The claimed power to establish "the law" contrary to Congress's clear text and then insulate that "law" from judicial review invokes James Madison's warning in *The Federalist* No. 47: "The accumulation of all powers, legislative, executive, and judiciary, in the same hands, ... may justly be pronounced the very definition of tyranny." *The Federalist* No. 47 (J. Madison).

Given the serious separation of powers concerns presented by the government's view, "[a]t a minimum," as Justice Thomas aptly noted in *PDR Network*, "our constitutional-avoidance precedents would militate against" adopting the government's argument. 139 S. Ct. at 2057 (Thomas, J., concurring in the judgment).

More, if adopted, the government's position would create perverse agency incentives that would exacerbate the constitutional concerns identified above. Rather than take the care and time needed to promulgate accurate regulations, the VA would have an incentive to rush the issuance of purported regulations that claim to provide the "initial interpretation" of a statute before any Court could do so. Pet.App.17a.

These "regulations" might reduce, expand, or otherwise drastically alter the statutory scope of covered disabilities, the scope of covered

servicemembers, the dates of covered military conflicts, or the procedural and substantive burdens and requirements (as occurred here). But under the government's view, those purported regulations must be deemed the unchallengeable "law" until a court invalidates them or the agency itself withdraws them. And even after a regulation's invalidity is openly acknowledged, all claims previously denied pursuant to that regulation would still be permanently barred, despite Congress's express authorization to provide benefits to soldiers whose denials were premised on clear and unmistakable legal errors.

As a result, more veterans would find themselves in the illogical situation Petitioner faces: Congress expressly authorized reopening for clear errors, everyone agrees the relevant regulation here was subsequently interpreted to be based on an impermissible reading of the statute, and yet somehow the request for reopening is barred.

The Court can avoid the constitutional concerns and potential absurdities addressed above by reversing and holding that the clear and unmistakable error standard is satisfied where a denial of benefits was based on a regulation that was void *ab initio* and thus was a "nullity," not "the law" or an "interpretation of the law" at all. The Court could also rely on the fact that the regulation here was not just void but was expressly declared as such by both the Federal Circuit and by the agency itself. If this is not enough to demonstrate clear and unmistakable legal error, it is difficult to imagine what would suffice.

The government contends that adopting this view would result in reopenings for "garden-variety" errors "of the sort regularly encountered in administrative law." BIO15. But presumably, regulations directly contrary to the unambiguous text of a statute are not "regularly encountered" at the VA, nor at any other administrative agency, for that matter. And if they are, an insistence on adherence to them as declarations of the state of "the law" would seem a seriously problematic disincentive for agencies to regulate lawfully. The errors of the kind at issue in the agency's 1974 regulation should be the "rare kind of error … to which reasonable minds could not differ." 38 C.F.R. § 20.1403(a). And indeed, here, the Federal Circuit and the VA both agree the 1974 regulation was impermissible.

* * *

A decision in favor of Petitioner would avoid significant constitutional concerns while enforcing Congress's clear text in three different statutory provisions: 38 U.S.C. § 1111 (for service-aggravated injuries) and §§ 5109A and 7111 (for reopening prior denials for clear and unmistakable error). The Court should enforce the separation of powers between legislative, executive, and judicial—and decline the government's request for agency lawmaking insulated from any judicial review. *See PDR Network*, 139 S. Ct. at 2057 (Thomas, J., concurring in the judgment); *id.* at 2066 (Kavanaugh, J., concurring in the judgment).

CONCLUSION

For the foregoing reasons, *amici* urge the Court to reverse the judgment of the United States Court of Appeals for the Federal Circuit.

Respectfully submitted,

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March 7, 2022