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 *AMICUS CURIAE* OF MILITARY-VETERANS ADVOCACY AND LEGAL AID FOUNDATION OF LOS ANGELES SUPPORTING PETITIONER

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QUESTION PRESENTED

In the veterans-benefits system, Congress has provided that an otherwise-final agency decision is subject to revision if that decision is based on "clear and unmistakable error." Here, the Federal Circuit held that the agency's application of a regulation that conflicts with the plain meaning of a statute cannot amount to "clear and unmistakable error." The Federal Circuit reasoned that a federal court's later invalidation of such a regulation is merely a change in interpretation of the law. But this Court has made clear that when a court interprets the plain meaning of a statute, it is not announcing a change but rather declaring what the statute has always meant. An agency regulation that departs from that plain meaning is—and always was—legally invalid. And if the agency relied on that unlawful regulation in an adjudication, the adjudication is infected with a legal error that is clear and unmistakable on the face of the ruling.

The question presented is: When the Department of Veterans Affairs (VA) denies a veteran's claim for benefits in reliance on an agency interpretation that is later deemed invalid under the plain text of the statutory provisions in effect at the time of the denial, is that the kind of "clear and unmistakable error" that the veteran may invoke to challenge the VA's decision?

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INTEREST OF *AMICI CURIAE* [1]

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

The Legal Aid Foundation of Los Angeles (LAFLA) is a nonprofit law firm that protects and advances the rights of the most underserved. Established in 2013, LAFLA's Veterans Justice Center is the oldest free legal services program for Veterans in Los Angeles County. The Veterans Justice Center's advocates provide representation to veterans and their families on a variety of legal issues including VA benefits and advocate for legislation aimed at protecting our most vulnerable veterans.

In the decision below, the Federal Circuit adopted an atextual and anti-veteran interpretation of the "clear and unmistakable error" provisions of 38 U.S.C.

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

§§ 5109A and 7111. According to the court of appeals, the VA's application of a regulation that is *inconsistent with the plain language of the enabling statute* is somehow not a clear and unmistakable error because the regulation—even when never blessed by a court—constituted the prevailing law at the time it was initially applied. This holding conflicts with fundamental principles of jurisprudence that trace back to *Marbury v. Madison*. When a court interprets the plain language of a statute as a matter of first judicial impression, it does not *change* the law; it declares what the law has always been. Pet'r Br. 35 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312–13 (1994)). And any agency decision that conflicts with that law has *always* been wrong—clearly and unmistakably so. *Id.* at 21–25, 33–36. Moreover, even if there were any doubts about whether CUE applies to this scenario (there is not), the pro-veteran canon would resolve it. *Id.* at 30–32. As this Court has long held, veterans-benefits statutes must "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). The Federal Circuit's cramped interpretation of CUE flies in the face of that admonition.

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

Veterans attempting to navigate the disability-benefits system already face daunting obstacles. The

process is complicated, slow, and inaccurate. Most veterans move through it without the aid of an attorney (indeed, attorneys are effectively *prohibited* at the beginning of the claims process). The result is that errors of the type at issue here often persist for years before a court finally steps in to correct them. This case provides an excellent illustration: the VA's erroneous interpretation of 38 U.S.C. § 1111 was in place in a binding regulation for *four decades* before the Federal Circuit corrected it. While these errors persist, untold numbers of veterans' cases will be incorrectly adjudicated and then allowed to become final. Under the Federal Circuit's interpretation of CUE, these veterans will have no recourse after the errors underlying their cases are at last set right. Indeed, as Petitioner observes, the Federal Circuit's approach "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)." Pet'r Br. 32.

That is an unconscionable result. Congress enacted the CUE statutes for the express purpose of ensuring that clearly erroneous denials of benefits due to veterans are *never* truly final. *Id.* at 45–48.

As this case itself shows, the practical consequences of the Federal Circuit's decision are significant. Because benefits associated with a given claim are assessed from the date the claim was filed, many years' worth of disability benefits can turn on the veterans' ability to demonstrate CUE. *See id.* at

14. For some veterans, those benefits can literally mean the difference between life and death.

The decision below is wrong, and the court of appeals' error will have major negative repercussions for veterans if left uncorrected. This Court should reverse.

SUMMARY OF THE ARGUMENT

The Federal Circuit's erroneous interpretation of the CUE statutes injects serious problems into an administrative regime already riddled with them. The VA-benefits system is complicated, slow, and inaccurate, and most veterans must navigate it without the benefit of legal counsel. The result is that many veterans have their benefits improperly denied based on legal errors that may not surface until years or decades later. Congress enacted CUE to serve as a safety valve that suspends the usual consequences of finality and ensures that veterans subjected to these sorts of errors are ultimately able to obtain the benefits to which their service has entitled them. If the decision below is permitted to stand, that safety valve is gone.

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

the conclusion that the court of appeals' decision is wrong.

This Court should reverse.

ARGUMENT

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

The VA claims process is extremely complex and difficult to navigate. It is also notoriously inaccurate. Veterans whose claims are erroneously denied—and there are many—are often unable to take advantage of their appeal rights (or are unaware of them altogether). After an erroneous denial becomes final, a CUE claim is the only means through which the veteran can obtain relief for the error. That is precisely why the CUE statutes are so important. The Federal Circuit's cramped view of these statutes, if allowed to stand, will unjustly deprive many veterans of a route of relief that Congress expressly provided to them.

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

"The system to provide benefits to veterans was never intended to be adversarial or difficult for the veteran to navigate." 106 Cong. Rec. S9211, S9212 (daily ed. Sept. 25, 2000) (statement of Sen.

Rockefeller). Unfortunately, in practice, the system is both adversarial *and* tremendously complicated—not to mention incredibly slow. The veterans attempting to utilize it often lack the benefit of legal counsel. And the VA's track record of accurately adjudicating claims is abysmal. The result—a process that is complicated, slow, hostile to lawyers, and mistake-ridden—poses, at the risk of understatement, substantial problems for veterans seeking the benefits to which their service has entitled them.

For veterans navigating through the disability-benefits system, moreover, the stakes are often high. Many low-income veterans suffer from significant mental and physical disabilities stemming from their military service. Due to these disabilities, veterans often struggle to find stable employment, and so must rely on government benefits to survive. As one court noted, "many recipients of such benefits are totally or primarily dependent upon that compensation for their financial support and support of their families." *Veterans for Common Sense v. Shinseki*, 644 F.3d 845, 884 (9th Cir. 2011).

1. David Shulkin, the former VA secretary, candidly acknowledged that the system as it currently functions is "adversarial." Krause, *Veterans Affairs Secretary Admits VA Is 'Adversarial' For Veterans* (Nov. 8, 2017).[2] And it presents "daunting" challenges

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

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

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

The process begins when the veteran submits a request for benefits—i.e., a "claim"—to a VA Regional Office (RO). 38 U.S.C. § 5101(a); *see generally* Reed, *Parallel Lines Never Meet: Why the Military Disability Retirement and Veterans Affairs Department Claim Adjudication Systems Are A Failure*, 19 WIDENER L.J. 57, 82–97 (2009) (describing the claims process). "Filing a claim involves a significant amount of paperwork. This is a daunting endeavor for those who lack focus and are unable to complete tasks, which is typical of veterans who return from engagements . . . ." Liang & Boyd, *PTSD*

in Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform, 22 STAN. L. & POL'Y REV. 177, 182 (2011). The current edition of the form is 12 pages long and contains extensive and complex instructions. *See* VA Form 21-562EZ.[3] And these VA "standardized forms pose questions that are ambiguous or even misleading." Pomerance & Eagle, *The Pro-Claimant Paradox: How the United States Department of Veterans Affairs Contradicts Its Own Mission*, 23 WIDENER L. REV. 1, 15 (2017).

Next, the RO gathers the veteran's service records and military medical records and schedules a "Compensation[] & Pension Examination," which is designed to assess the veteran's disabilities and determine whether and to what extent they are service-connected. Liang & Boyd, *supra*, at 182–83; Reed, *supra*, at 84–85. A "rating specialist" assesses the claim and recommends a rating decision. Reed, *supra*, at 85–86. The statutes contain no deadline for the RO to act on a claim, meaning claims sometimes remain pending "for years." *Id.* at 109. And the ROs are staffed by lay adjudicators—not lawyers—and so are not equipped to reliably interpret the relevant statutes and regulations even when they do finally get around to deciding the veteran's claim. Pet. for Cert. 27.

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

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

> take six steps. First, the veteran must draft an application for benefits, with supporting medical documentation. Second, the veteran must adequately answer any VA requests for additional information . . . . Third, . . . the veteran must understand the [RO]'s decision and the fact that the veteran has the right to an appeal. Fourth, the veteran must compile the evidence that the VA did not take into account in the initial decision . . . . Fifth, the veteran must

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

> draft an NOD explaining in clear, concise, complete, and precise language why the [RO]'s decision is incorrect and how the evidence that the veteran has compiled proves the [RO] decision to be incorrect; and he or she must request that the [RO] reconsider its decision. Sixth, the veteran must decide whether to have the NOD sent directly to a [Decision Review Officer] and, if so, whether to request a meeting with a DRO, or go directly to the BVA.

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

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

After submission of the NOD, the VA would then issue a "Statement of the Case" explaining the RO's decision. After the Statement of the Case issued, the veteran had 60 days to file a formal appeal with the Board of Veterans Appeals. *See* Liang & Boyd, *supra*, at 184.

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

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

The result is a system with "layers of procedural complexity" and "a process that can seem interminable" for veterans attempting to navigate it. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. ANN. SURV. AM. L. 251, 295–96 (2010); *see also id.* at 296–97 (noting that "the National Veterans Legal Services Program's

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

guide and reference materials for adjudication of veterans claims run 4000 pages"); Liang & Boyd, *supra*, at 177 (referring to the claims process as a "minefield"). Indeed, many veterans are simply "incapable of developing the factual record alone and . . . may not know the requisite language for recognition of benefits claims or the procedural rules for appeals." Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection Can Help*, 26 T.M. COOLEY L. REV. 113, 125 (2009).

"The procedure for claiming and appealing benefits has been likened to a hamster wheel because veterans' claims are developed, denied, appealed, and remanded *ad infinitum*." McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277, 283 (2019) (citing *Coburn v. Nicholson*, 19 Vet. App. 427, 434 (2006) (Lance, J., dissenting)). This "merry-go-round of appeals and remands . . . can take years to resolve," often leading veterans to "become discouraged and simply give up." Estrada, *supra*, at 128; *accord* Pomerance, *supra*, at 46. Hence the oft-repeated "slogan for disabled American veterans": "Delay, Deny, Wait Till They Die." McClean, *supra*, at 277.[6]

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[6] Elderly veterans "are particularly hindered by this extremely intricate system." Pomerance, *supra*, at 47. "For instance, veterans with vision impairments (the occurrence of which is greater in older adults) can have a tough time just reading through the pages and pages of detailed requirements,

The claims process can be maddeningly difficult for veterans of sound mind to comprehend. But an additional and obvious layer to consider is that veterans filing claims often have mental impairments that affect their ability to do so. Common symptoms "such as lack of concentration[] exacerbate the complexities faced by wounded warriors and prevent some veterans from successfully completing a claim for disability." Liang & Boyd, *supra*, at 178. These difficulties are even more acute for homeless veterans, of which the population has ballooned to nearly 40,000 nationwide.[7] In addition to a high prevalence of mental disorders in the population, homeless veterans face other complications when dealing with the claims process, as exemplified by amicus LAFLA's clients:[8]

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much less filling out all of the required forms." *Id.* Moreover, the evidence necessary to show service connection can become increasingly more difficult to find with the passage of time: records may be lost or destroyed, and memories fade. Kabatchnick, *Obstacles Faced by the Elderly Veteran in the VA Claims Adjudication Process*, 12 MARQ. ELDER'S ADVISOR 185, 205–08 (2010). And many elderly veterans struggle with mental-health issues and may lack knowledge about the potential benefits to which they are entitled. *See id.* at 210–15.

[7] U.S. Dep't of Veterans Aff., *Point-in-Time (PIT) Count* (Jan. 6, 2022), *available at* https://www.va.gov/homeless/pit_count. asp.

[8] All case anecdotes come from current and former clients of amici. Upon request, counsel can provide the Secretary or the Court with VA case numbers for the veterans whose stories are recounted here.

- K.T. lost his housing shortly after applying for compensation benefits. Because he was unable to receive VA correspondence, K.T. never received a decision letter. He still does not know why his claim was denied. He gave up on his claim for several years, unable to obtain the benefits that may have kept him housed. He is now working with LAFLA to re-open his claim.
- D.B. was eligible for total disability benefits when her claim was granted in 2019. Her struggle with homelessness, however, made it difficult to navigate the claims process because she did not have reliable access to mail, her records, or the internet. In 2022—*three years* after her claim was granted—D.B. retained LAFLA to finally obtain the benefits to which she is entitled.

The case of Alfred Procopio, Jr., presents another telling example. Mr. Procopio was exposed to Agent Orange during his service in Vietnam. *See Procopio v. Wilkie*, 913 F.3d 1371, 1373 (Fed. Cir. 2019) (en banc). He sought disability benefits for diabetes and prostate cancer in 2006 and 2007, relying on a statute (the Agent Orange Act) that created a presumption of service connection for those conditions for veterans who "served in the Republic of Vietnam" during the Vietnam War. *Id.* at 1373–74 (citing 28 U.S.C. § 1116(a)). His claims were denied on the basis that the phase "served in the Republic of Vietnam" did not apply to veterans like Mr. Procopio who had served in the waters offshore of Vietnam but had not actually set foot on land. *Id.* at 1374. After litigating his claim in the VA, the BVA, the CAVC, and the Federal

Circuit for 13 years, Mr. Procopio finally prevailed in the Federal Circuit, which held that the plain language of the Agent Orange Act foreclosed the VA's interpretation. *Id.* at 1380–81. Mr. Procopio finally began receiving benefits in 2020, 14 years after he filed a claim. He died of kidney failure in 2021.

2. The byzantine complexities of the VA benefits-application process make it a challenge for even experienced attorneys to navigate. But most veterans go at it alone. And nearly all claimants lack legal representation at the outset of the process because attorneys are statutorily barred from charging for legal services until after the RO's initial decision on the veteran's claim. *See* 38 U.S.C. § 5904(c)(1); Reiss & Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism"*, 1 VETERANS L. REV. 2, 3 & n.10 (2009). This proscription on retained attorneys dates back to the Civil War, when Congress passed a law prohibiting a claimant for paying an attorney more than $10 for representation in a VA benefits claim. *See* Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568, amended by Act of July 4, 1864, ch. 247, § 12, 13 Stat. 387, 389. The underlying rationale was that "the system for administering benefits should be managed in a sufficiently informal way that there should be no need for the employment of an attorney to obtain benefits to which a claimant was entitled, so that the claimant would receive the entirety of the award without having to divide it with a lawyer." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 321 (1985). More generally speaking, the system has long displayed a hostility to attorney involvement—largely

a product of lawmakers' desire to keep the system informal and non-adversarial. Simcox (2019), *supra*, at 519; *see also* Ridgway, *supra*, at 261.

Veterans may retain legal representation for proceedings that occur after an initial decision on a claim. *See* 38 U.S.C. § 5904(c)(1).[9] But finding representation itself can be a challenge.[10] Moreover, by that point, the hamster wheel has been set in motion, and even represented veterans may find themselves in a seemingly interminable cycle of appeals and remands—appeals and remands that might never have been necessary if the claim had been adjudicated properly in the first place. *See* Pomerance, *supra*, at 56 (noting that the beginning of the process is the most critical time because "the veteran need not enter the time-consuming thicket of

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

[10] For veterans unable to obtain a private attorney, there are few options. Take the example of Los Angeles County, home to one of the largest veteran populations in the country and where amicus LAFLA operates. According to an older study, only nine VSOs were employed at the local RO, which had a caseload of approximately 9,000 claimants. *See Turf War Over Vets–Lawyers Gripe at Being Kept Away from V.A. Work*, 26 NAT'L L. J. 29 (2003). That works out to a ratio of one representative for every thousand veterans. While more resources have since been deployed, veterans continue to be underserved in the region. For example, there are only four legal service providers (approximately 12 attorneys in total) in Los Angeles County providing free legal services to low-income and homeless veterans.

the appellate process if the Regional Office approves his or her claim outright").

As one commentator colorfully put it:

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

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

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

Annual Report Fiscal Year (FY) 2021, at 39.[11] The Federal Circuit itself has recognized that representation by a VSO aide "is not equivalent to representation by a licensed attorney." *Comer v. Peake*, 552 F.3d 1362, 1368–69 (Fed. Cir. 2009). Because "the function of aides [from VSOs] is to cooperate with the VA in obtaining benefits for veterans, their role is fundamentally different from attorneys who represent clients in adversarial proceedings." *Id.* at 1370–71.

The data reflects the experiences of amicus LAFLA's clients:

- L.F. applied for compensation for post-traumatic stress disorder five times over three years with representation through a VSO. The VA denied his claim each time despite evidence of in-service trauma. In the meantime, L.F. was unable to work and struggled to support his young son on a limited income. After retaining amici as counsel, the VA finally granted L.F.'s claim and awarded him 100% disability compensation.
- After 15 years of homelessness, K.G. was diagnosed with post-traumatic stress disorder and applied for service-connected compensation in 2014. The VA denied his claim, pointing to his exemplary service record as evidence that he did not experience trauma

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[11] *Available at* https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf.

> during his military service. He appealed, was denied, re-filed his claim, and was denied again over the course of six years. K.G. retained amici as counsel and the VA finally granted compensation benefits with back pay to his original claim in 2014.

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

In 2020 (the most recent year for which statistics are available), the CAVC ruled for the veteran in more than 90% of cases decided on the merits. *See* U.S. Court of Appeals for Veterans Claims Annual Report at 3 (2020).[12] This means that BVA denials of benefits are erroneous in nine out of every ten cases. Even worse, claimants were awarded Equal Access to Justice fees in nearly 80% of appeals. *See* U.S. Court of Appeals for Veterans Claims Annual Report at 4.[13] EAJA fees are available only if a court finds that the government's position is not "substantially justified."

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

[13] 2020 was not an outlier. In 2019, almost 75% of claimants were awarded EAJA fees. *See* U.S. Court of Appeals for Veterans Claims Annual Report at 4 (2019).

See generally 28 U.S.C. § 2412. This means that, in litigating with veterans, the government takes a position that is substantially unjustified *over three-quarters of the time*.[14]

The preceding figures are taken from CAVC appeals, which introduces a selection bias into the numbers. Even so, the available statistics suggest that the error rate across *all* RO determinations—appealed or not—may be as high as 33%. Pomerance, *supra*, at 52 & n.293; *see also* Ridgway, *supra*, at 270 (2000 GAO report "showed that initial RO decisions were correct only 68% of the time"). As one commentator put it, "[i]n terms of making timely and accurate compensation determinations, the VA sets low standards and consistently fails to meet them." Wright, *supra*, at 439; *see also* Liang & Boyd, *supra*, at 180 ("the VBA does not have a successful performance record").[15]

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[14] *See also* Oral Arg. Tr. 52, *Astrue v. Ratliff*, No. 08-1322 (2010) ("CHIEF JUSTICE ROBERTS: [T]hat's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified? MR. YANG [counsel for the United States]: It is an unfortunate number, Your Honor. And it is—it's accurate.").

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

All the evidence points towards the VA's propensity for error as not a bug, but rather, an inherent feature of the disability-benefits system. Because the system is designed for veterans to go it alone—and because they often lack the knowledge and experience necessary to navigate through the claims process—the VA is often unchallenged in its decision-making. The result is that the VA is effectively allowed to ignore or misapply its own rules and regulations.

Take the example of a claim for Gulf War Illness (GWI). In 2017, the Government Accountability Office (GAO) found that the VA approved only 17 percent of disability claims for the condition. 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). The GAO found that the incorrect decisions were often the result of VA staff "failing to obtain medical exams when they were necessary to properly evaluate a veteran's claim." *Id.* at 20. Additionally, few examiners had adequate training to perform the exam—the GAO found that only 10 percent of examiners had taken the VA's training course. *Id.* at 22.

4. These errors are particularly egregious in light of the VA's duty to assist the veteran during the claims process, statutorily mandated under the Veterans Claims Assistance Act. Veterans Claims Assistance Act of 2000, Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000). The duty to assist is one of the pillars of the VA's non-adversarial system. Among

other things, it obligates the VA to request records related to a veteran's claim and provide the veteran with a medical examination. *See* Simcox (2019), *supra*, at 534. Evidence suggests that the VA fails to discharge its statutory duty to assist veterans in developing their claims in a substantial fraction of cases. *Id.* at 531.

This is perhaps best viewed in the context of claims for post-traumatic stress disorder (PTSD). Although the VA has a statutory obligation to provide a reasonable effort to assist veterans in obtaining federally held records that may corroborate a veteran's in-service stressor, the VA often refuses to verify a stressor it deems too vague. *See* Dubyak, *Close, But No Cigar: Recent Changes to the Stressor Verification Process for Veterans with Post-Traumatic Stress Disorder and Why the System Remains Insufficient*, 21 FED. CIR. B.J. 655, 673 (2012). Even after the VA verifies the stressor, the medical examination is often inadequate due to incomplete findings and insufficient supporting rationale. Simcox (2016), *supra*, at 229–30. This leads to absurd results: the VA will often ignore years of medical treatment—even treatment through a VA facility—in denying a claim based on an inadequate medical examination that may last no more than 30 minutes. *See* McClean, *supra*, at 292. Recent examples from amici's clients include the following:

- In between the time V.J. filed his claim for PTSD and the VA granted his claim on appeal over two years later, he was hospitalized four times due to his symptoms, including a 5150

hold (involuntary hospitalization) due to uncontrollable suicidal ideation. V.J. had been dealing with years of alcoholism and homelessness that exacerbated his PTSD. His symptoms emerged following his deployment to Haiti assisting humanitarian relief efforts following the major earthquake in 2010. Yet in 2016, the VA denied his claim because it was unable to corroborate his stressor. The VA refused to conduct a search of records because V.J. apparently failed to provide sufficient information to the VA to do so. However, V.J. explicitly discussed his Haiti experience in his claim, and his military records clearly indicated that he was deployed there for a relief operation. V.J. was ultimately granted service-connection, but the VA evaluated him at a 70% disability rating despite the severity of his symptoms. V.J. would have to wait several more months before the VA increased his rating to 100%.

- S.G. began developing severe PTSD symptoms during his second term of service. He turned to alcohol to cope with his symptoms, which ultimately led to his divorce and his decades-long struggle with homelessness. He was eventually diagnosed and treated for the condition in 2013. The VA denied his initial PTSD claim in 2015 because he had no diagnosed disability based on a C&P examination. The examiner concluded that despite S.G.'s severe symptoms, he did not have a valid diagnosis under the Diagnostic

> and Statistical Manual of Mental Disorders, Fifth Edition (DSM-5). The examiner found that S.G.'s reported stressors (witnessing of an assault and having been a victim of a personal assault) did not meet DSM-5 Criterion A for PTSD. That finding was unequivocally wrong. *See* Am. Psychiatric Ass'n, *Diagnostic and Statistical Manual of Mental Disorders, 5th Edition*, at 271–72 (2013) (providing that Criterion A can be satisfied when an individual experiences "[e]xposure to actual or threatened death, serious injury, or sexual violence" through "[d]irectly experiencing the traumatic event" and/or [w]itnessing, in person the event as it occurred to others").

These examples are unfortunately not atypical for veterans. In a 2018 report, the Office of the Inspector General ("OIG") found that claims for PTSD related to military sexual trauma were frequently denied because the VA improperly did not request a medical examination, failed to request and obtain records related to the claim, and decided claims "based on contradictory or otherwise insufficient medical opinions." U.S. Dep't of Veterans Aff., Off. of Inspector Gen., 17-05248-241, *Denied Posttraumatic Stress Disorder Claims Related to Military Sexual Trauma* 6 (2018).

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

All this adds up to a bleak picture for veterans seeking disability benefits. The system is

complicated, interminable, and hard to navigate; attorneys are discouraged (and virtually forbidden at the earliest and most crucial stages of the process); the adjudicator gets things wrong a substantial proportion of the time; and the agency routinely fails to discharge its statutory duty to assist.

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

This case demonstrates that point in stark relief. The VA applied an anti-veteran and demonstrably unlawful regulation for *forty years* before the Federal Circuit finally corrected the mistake. Thousands upon thousands of veterans had their claims finally adjudicated under that rule—which, it bears emphasis, was later ruled to be *contrary to the unambiguous text* of § 1111. *See Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004). According to the decision below, these veterans—who were denied years' worth of benefits for reasons that all parties agree were legally incorrect—have no recourse. That is an indefensible and lawless outcome. *See* Pet'r Br. 32.

The Federal Circuit's decision is emblematic of the problems that plague the VA disability-benefits system. As one scholar wrote, "[t]he problem with the non-adversarial process is that the VA often ignores or misapplies its regulations. When this happens, veterans have limited remedies to challenge VA errors." McClean, *supra*, at 280. CUE—one of the few remedies veterans have at their disposal—is thus a critical check on the VA. Regardless of how long an error that wrongfully denies often-vital benefits may persist, a veteran may eventually hold the VA accountable and obtain some semblance of justice. The Federal Circuit's decision to limit the scope of CUE not only prevents justice for veterans whose claims were denied under an unlawful regulation, but also the countless veterans who filed disability claims but were incorrectly denied and may be discouraged from filing again.

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

The Federal Circuit's conclusion is particularly indefensible in view of the pro-veteran canon of statutory construction. "Congress's intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country," and consequently, the "entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (internal quotations omitted); *see also Gambill v. Shinseki*, 576 F.3d 1307, 1316 (Fed. Cir. 2009) (Bryson, J., concurring) (Supreme Court and Federal

Circuit "have long recognized that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant"). By design, the system favors the veteran at every turn. *See Harris v. Shinseki*, 704 F.3d 946, 948 (Fed. Cir. 2013) (discussing "the uniquely pro-claimant character of the veterans' benefits system" and noting that the VA is required "to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits"). "[S]ystemic justice and fundamental considerations of procedural fairness carry great significance" in this regime. *Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999).

Accordingly, this Court has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21 n.9 (1991)). The pro-veteran canon is a longstanding rule of statutory construction, dating back to the Court's decision eight decades ago in *Boone v. Lightner*. Like the analogous canon of construction favoring Native Americans in view of "the unique trust relationship between the United States" and its native people, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985), the canon is a critical "tool" for discerning congressional intent that typically "trumps" other standard rules of statutory construction. *Procopio*, 913 F.3d at 1383, 1386–87 (O'Malley, J., concurring); *cf. Montana*, 471 U.S. at 766 (noting that "standard principles of statutory construction do not have their usual force"

when weighed against the pro-Native American canon).

Under the pro-veteran canon, to the extent a veterans-benefits statute contains "interpretative doubt," that doubt must be resolved in favor of the veteran "because that is precisely what Congress intended when it enacted the [statute] against the backdrop of *Boone*." *Procopio*, 913 F.3d at 1383–84 (O'Malley, J., concurring) (citing *King*, 502 U.S. at 220 n.9). And that is particularly so for statutes—like the one at issue in this case—that "embody a veteran-friendly purpose." *Id.* at 1383.

"[I]n light of this canon," the Federal Circuit's conclusion that Mr. George cannot obtain relief from application of a concededly unlawful regulation can be correct only if the CUE statutes contain a "clear indication" that Congress intended that result. *Henderson*, 562 U.S. at 441. They do not. On the contrary, as Mr. George's brief explains, the plain terms of the statute, its legislative history, and basic principles of jurisprudence compel the opposite conclusion: application of an agency regulation later deemed inconsistent with the plain text of the statute is clear and unmistakable error. *See generally* Pet'r Br. The Federal Circuit's decision otherwise flies in the face of this Court's admonition that veterans' statutes must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575.

Indeed, the Federal Circuit's construction affirmatively *harms* veterans: it "insulate[s] 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)." Pet'r Br. 32. A Congress legislating "against the backdrop of *Boone*," *Procopio*, 913 F.3d at 1383–84 (O'Malley, J., concurring), could not possibly have intended that perverse result.

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

Correct resolution of this case is critically important for the veteran community. Pet. for Cert. 26–33. Millions of veterans are currently eligible for disability compensation, and—particularly in view of the extraordinarily high error rate in VA adjudication—the Federal Circuit's incorrect interpretation of the CUE statutes creates potential unfairness for every one of them.

Contrary to the Federal Circuit's conclusion, "basic principles of finality," Pet. for Cert. App. 20a, do not compel this anomalous and unjust result. In enacting the CUE statutes, Congress indisputably created an *exception* to finality for errors that are clear and unmistakable. Pet'r Br. 45–48; *see* Pet. for Cert. App. 9a (agreeing that "CUE is a statutorily permitted collateral attack on final VA decisions").

And Congress had good reasons for creating an exception: given the VA's error rate and the difficulty veterans have in navigating the claims process, application of traditional civil-litigation principles of finality would be deeply unjust. Indeed, Congress intentionally made the veterans-benefits system the antithesis of adversarial civil litigation. *See Henderson*, 562 U.S. at 440. It is instead a "uniquely claimant friendly system of awarding compensation" in which "systemic justice and fundamental considerations of procedural fairness carry great significance." *Hayre*, 188 F.3d at 1334.

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

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

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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