No. _____

In The

Supreme Court of the United States

YVONNE CREWS,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

KENNETH M. CARPENTER
Counsel of Record
KENNETH H. DOJAQUEZ
CARPENTER CHARTERED
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601
(785) 357-5251
carpgh@mindspring.com

Counsel for Petitioner

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

When a veteran with a pending benefits claim dies, Congress expressly allows a surviving spouse to be "substituted as the claimant." 38 U.S.C. § 5121A. Mrs. Crews was granted permission by VA to substitute under this statute when her husband passed away. But the VA refused to allow her to pursue the claim as her husband would have been able to, and the Federal Circuit affirmed.

When Congress has directly spoken to the precise question at issue if the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.

The question presented is: When Congress enacted 38 U.S.C. § 5121A to authorize for the substitution of a deceased claimant was its intent clear that a substituted appellant could take any action that the deceased claimant could have taken prior to his or her death?

RELATED PROCEEDINGS

Yvonne Crews v. Denis McDonough, Secretary of Veterans Affairs, No. 2021-2030 (Fed. Cir. judgment entered March 16, 2023)

Yvonne Crews v. Denis McDonough, Secretary of Veterans Affairs, No. 2021-2030, petition for panel rehearing is denied. (Fed. Cir. judgment entered May 15, 2023)

Yvonne Crews v. Denis McDonough, Secretary of Veterans Affairs, No. 19-6298 (Vet. App. judgment entered March 25, 2021)

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INTRODUCTION

This case involves the interpretation of the provisions of 38 U.S.C. § 5121A(a) which permit for the substitution of a living person who would be eligible to receive accrued benefits due to the claimant under the provisions of 38 U.S.C. § 5121(a). In October of 2008, Congress, for the first time, permitted eligible survivors of claimants to be substituted as the claimant in a pending claim or appeal before Department of Veterans Affairs ("VA") for the purposes of processing the claim to its completion. Before 2008, a veteran's claim died with the veteran.

In March 2010, Yvonne Crews's late husband, Sylvester D. Crews, received a VA decision that increased his disability rating for his service-connected schizophrenic reaction, undifferentiated type, from 70 percent to 100 percent, effective September 29, 2009.

Mr. Crews died on October 5, 2010, prior to initiating an appeal of the September 2009 effective date that VA had assigned for the 100 percent rating. On March 24, 2011, within one year of Mr. Crews's death, his surviving spouse, Yvonne Crews, filed a motion with the VA to be substituted as the appellant in the case. Also on March 24, 2011, Mrs. Crews filed a timely notice of disagreement with the effective date assigned for her late husband's 100 percent rating. Her argument for the earlier effective date was based on an allegation of clear and unmistakable error in the VA's

November 1960 rating decision that had reduced the 100 percent rating.

On January 23, 2012, the VA denied Mrs. Crews's request for substitution. On September 21, 2012, Mrs. Crews filed a Notice of Disagreement with this decision. Nearly one year later, on September 16, 2013, Mrs. Crews submitted a demand to the Veterans Service Center at the Philadelphia VA Regional Office to issue a Statement of the Case, as required in response to her 2012 Notice of Disagreement. On October 18, 2013, the VA advised Mrs. Crews that it could not accept her correspondence as a valid Notice of Disagreement because no decision was made in regard to the appeal for Mr. Crews.

In light of the VA's refusal to issue a Statement of the Case, on June 16, 2014, Mrs. Crews filed with the Veterans Court a Petition for Extraordinary Relief in the form of a writ of mandamus. This resulted in the VA issuing a Statement of the Case dated September 10, 2014, without the need for any further judicial intervention. On September 10, 2014, Mrs. Crews responded to the Statement of the Case by perfecting her appeal of the VA's decision to deny her substitution under the provisions of 38 U.S.C. § 5121A to the Board of Veterans' Appeals.

On December 5, 2014, the Board issued a decision which concluded that the criteria for Mrs. Crews to be substituted as the appellant in place of her deceased husband had been met. The Board remanded the matter to VA with instructions that it issue a

Statement of the Case in response to Mrs. Crews's notice of disagreement that challenged the effective date assigned for her husband's 100 percent rating. On March 25, 2015, the VA issued the Statement of the Case which confirmed and continued its determination that she was not "eligible to seek benefits [as a substituted appellant] on past decisions that have been finalized." Mrs. Crews then completed her appeal as the substituted appellant for her deceased husband. In this capacity she continued her challenge to the effective date assigned for his 100 percent rating, reasserting that January 1961 was the correct effective date because the November 1960 rating decision that had reduced this rating was based on clear and unmistakable error.

On June 6, 2019, the Board issued its final decision to deny Mrs. Crews entitlement to an effective date earlier than September 29, 2009 for the grant of a 100 percent rating for her late husband's service-connected schizophrenia, to include an earlier effective date based upon clear and unmistakable error in VA's November 1960 rating decision. The Veterans Court then issued its single-judge Memorandum Decision of March 31, 2021, which affirmed the Board's adverse decision. Mrs. Crews timely appealed to the Federal Circuit.

The Federal Circuit concluded that Mrs. Crews's allegation of a clear and unmistakable error as a substituted appellant was not part of a "pending" claim for which she could be substituted under § 5121A, and affirmed the Veterans Court. This conclusion is not

supported by the language used by Congress in the text of § 5121A.

Congress explicitly provided that if a claimant died while a claim or an appeal of denial of any benefit under a law administered by the Secretary, that claim or an appeal was pending. Congress unambiguously permitted an eligible survivor of the claimant to be substituted for the purpose of completing the processing of the claim or appeal to its completion. Any other reading of the language used by Congress is atextual.

The Federal Circuit's decision imposes limitations on a substituted appellant's ability, under § 5121A, to raise all legal arguments that would have been available to the veteran, had he or she not died. These limitations do not exist in the statute. As a result of the importance of the question presented for the survivors of veterans to be permitted as intended by Congress to be unrestricted in the completion of the processing of the veteran's claim following his or her death, this Court should grant certiorari.

OPINIONS AND ORDERS BELOW

The decision of the Federal Circuit is reported at 63 F.4th 37 and reproduced at App. 1-9. The decision of the Court of Appeals for Veterans Claims is reported at 2021 WL 799961 and reproduced at App. 10-22. The 2019 decision of the Board of Veterans' Appeals is unreported and reproduced at App. 23-29. The 2010

VA rating decision is unreported and reproduced at App. 30-44. The 1960 VA rating decision is unreported and reproduced at App. 45-48.

JURISDICTION

The Federal Circuit denied Mrs. Crew's petition for panel rehearing on May 15, 2023. App. 49-50. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

TEXT OF 38 U.S.C. § 5121A

(a) Substitution.—

(1) If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion.

(2) Any person seeking to be substituted for the claimant shall present evidence of the right to claim such status within such time as prescribed by the Secretary in regulations.

(3) Substitution under this subsection shall be in accordance with such regulations as the Secretary may prescribe.

(b) Limitation.—

Those who are eligible to make a claim under this section shall be determined in accordance with section 5121 of this title.

STATEMENT OF THE CASE

The unambiguous language used by Congress in 38 U.S.C. § 5121A does not restrict a substituted appellant from seeking revision of a final decision based upon an allegation of clear and unmistakable error for the purpose of processing a claim to completion.

In October of 2008, Congress, for the first time, permitted eligible survivors of claimants to be substituted as the claimant in a pending claim or appeal before VA for the purpose of processing the claim to its completion. This was a fundamental change in the VA adjudicatory scheme because a pending claim or appeal no longer terminated at the time of the claimant's death.

Congress clearly intended that when a claimant died while a claim or an appeal of denial of any benefit was pending, an eligible survivor of the claimant would step into the deceased claimant's shoes to take any action that the clamant could have taken in order to complete the pending claim or appeal. This would

include appealing for an earlier effective date based on an allegation of clear and unmistakable error made in a prior VA decision.

The Veterans Court had concluded that the overall statutory scheme created by Congress regarding a Chapter 11 disability compensation benefit did not survive the eligible veteran's death. *See Landicho v. Brown*, 7 Vet. App. 42 (1994). The Federal Circuit in *Zevalkink v. Brown* expressly upheld the view in *Landicho* that a claim for service connection does not survive a veteran's death and that substitution was not appropriate because the accrued-benefits claimant lacked standing to pursue the appeal. 102 F.3d 1236, 1243-44 (Fed. Cir. 1996).

The Federal Circuit also rejected a later challenge to the principle that a claim for service connection does not survive a veteran's death. *See also Haines v. West*, 154 F.3d 1298, 1300-02 (Fed. Cir. 1998) (holding that the provision regarding clear and unmistakable error in section 5109A "cannot be read as providing a procedure for adjudication or payment of veterans benefits to survivors. The only statutory basis providing such a remedy is section 5121.").

The enactment by Congress of § 5121A unambiguously permitted eligible survivors of claimants to be substituted as the claimant in a pending claim or appeal before VA to complete the processing of a pending claim or appeal.

Until Congress enacted § 5121A, pending claims before VA and the Board of Veterans Appeals died with

the veteran or claimant. With the enactment of § 5121A, Congress fundamentally altered the previously legislated distinction between a veteran's disability benefits claim and an accrued-benefits claim discussed and analyzed in the cases referenced above. Congress did so by recognizing that an accrued-benefits claimant may pursue to completion a veteran's claim pending at death. In other words, the claim no longer died when the veteran died.

Congress unambiguously decided to change the distinction that had been previously gleaned as being congressional intent from the statutory schemes of chapter 11 and chapter 51. As this Court did in *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197 (2011) that the VA's process for administering those benefits is specifically "designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson*, 131 S. Ct. 1200 (quoting *Walters*, 473 U.S. at 311). To that end, a "veteran faces no time limit for filing a claim" for benefits. *Id.* Once a claim is filed, the process is "*ex parte* and nonadversarial." *Id.* In fact, the VA is required to assist veterans" and in substantiating their claims "must give veterans the 'benefit of the doubt' whenever . . . evidence on a material issue is roughly equal." *Id.* at 431-32.

By expressly allowing substitution throughout the administrative process, including the substantive appeal of a veteran's claim within VA, Congress explicitly made substitution available to those individuals specified as eligible survivors under 38

U.S.C. § 5121(a). Moreover, Congress imposed no limitation on the types of arguments that can be raised by substituted appellants.

Mrs. Crews is eligible to be substituted for her late husband to appeal the effective date for the 100 percent rating assigned by VA in the March 2010 decision.

In October of 2008, Congress intended that a substituted claimant be substituted as the claimant in a pending claim or appeal before VA for the purposes of processing the claim to its completion. An appeal for an earlier effective date based on an allegation of clear and unmistakable error made in a prior VA decision would have been one of those things which would complete the processing of the pending claim. Congress did not, as the Federal Circuit did, limit the types of legal arguments a substituted claimant could raise.

It is undebatable that the surviving spouse of a veteran who dies after an award of VA benefits has been made, is an eligible individual under 38 U.S.C. § 5121A to be substituted to complete the processing of his claim to determine whether the correct effective date has been assigned. On December 5, 2014, the Board issued a decision which concluded that the criteria for Mrs. Crews to be substituted as the appellant in place of her deceased husband had been met. Therefore, as a matter of law, Mrs. Crews was the substituted appellant for her deceased husband in his pending appeal of the March 2010 decision—and, as

such, she is entitled to challenge the effective date for the 100 percent rating assigned in that decision.

As a substituted appellant, Mrs. Crews is entitled to raise all legal arguments that would have been available to her deceased husband, including a legal argument for an earlier effective date based on clear and unmistakable error in a prior decision.

The Federal Circuit erroneously concluded that Mrs. Crews's allegation of a clear and unmistakable error as a substituted appellant was not part of a "pending" claim for which she could be substituted under § 5121A, and affirmed the Veterans Court. Had Mr. Crews not died, there is no question that he would have been able to raise this legal argument in support of an appeal for an earlier effective date for the 100 percent rating. Nothing in the language used by Congress in § 5121A supports the interpretation made by the Federal Circuit.

Congress imposed no limitations upon the individual substituted by VA to complete the processing of a claim or appeal pending at the time of a claimant's or appellant's death. When read in its entirety § 5121A must be understood to allow a substituted appellant to take any action which the claimant or appellant could have taken in completing the processing of a claim or an appeal. This includes making a collateral attack on any prior VA decision based upon an allegation of clear and unmistakable

error. The Federal Circuit's holding relies upon a misinterpretation of § 5121A that improperly limits the scope of a substituted appellant's ability to raise arguments that the deceased claimant would have been able to raise.

REASONS FOR GRANTING THE WRIT

I. The Decision Below Is Incorrect.

A. Nothing in the plain language of 38 U.S.C. § 5121A or Congressional intent behind the statute precludes a substituted appellant from raising a legal argument based on clear and unmistakable error in a prior decision in order to complete the processing of a deceased veteran's appeal for an earlier effective date.

1. The substitution statute, enacted by Congress in 2008, states:

> If a claimant dies while a claim for any benefit under a law administered by the Secretary, or an appeal of a decision with respect to such a claim, is pending, a living person who would be eligible to receive accrued benefits due to the claimant under section 5121(a) of this title may, not later than one year after the date of the death of such claimant, file a request to be substituted as the claimant for the purposes of processing the claim to completion.

38 U.S.C. § 5121A. The only limitation in this statute is that eligibility is determined in accordance with 38 U.S.C. § 5121.

Section 5121 identifies living persons who would be eligible for accrued benefits, defined as benefits that were "due and unpaid" at the time of the veteran's death. 38 U.S.C. § 5121(a). This statute expressly limits the evidence to that which was on file at the time of the veteran's death. 38 U.S.C. § 5121(a).

Since 2008, eligible survivors of claimants have been permitted to be substituted as the claimant in a pending claim or appeal before VA for the purpose of processing the claim to its completion—and, unlike § 5121(a), were not limited to the evidence in the file at the date of the veteran's death. Congress imposed no limitation on the types of evidence a substituted appellant could submit or the types of arguments a substituted appellant could raise in the completion of a deceased veteran's pending claim or appeal. 38 U.S.C. § 5121A.

2. Statutory construction is limited to construing the words Congress used; it does not involve adding words. In the United States' tripartite government, the legislative branch writes the law, the executive branch executes it, and courts such as this one provide independent judicial review. *See*, *e.g.*, *Mistretta v. United States*, 488 U.S. 361, 371 (1989) ("[T]he principle of separation of powers . . . underlies our tripartite system of Government."); *see also In re Triton Chem. Corp.*, 46 F. Supp. 326, 330 (D. Del. 1942) ("In

view of the 'trinitarian categories' of our government, it is too late now to talk about the lack of authority in courts to indulge in efforts to effect judicial legislation.").

The judicial function is only "to apply statutes on the basis of what Congress has written, not what Congress might have written." *United States v. Great N. Ry. Co.*, 343 U.S. 562, 575 (1952). And "[i]t is a fundamental principle of statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (quoting Antonin Scalia & Bryan A. Garner, Reading Law: The Interpretation Of Legal Texts 94 (2012)). A "proper construction frequently requires consideration of [a statute's] wording against the background of its legislative history and in the light of the general objectives Congress sought to achieve." *Wirtz v. Bottle Blowers Ass'n*, 389 U.S. 463, 468 (1968). The Federal Circuit's decision in *Crews* is contrary to the plain language of the statute and the Congressional intent behind it.

3. By their plain terms, the substitution provisions encompass the situation here: Mrs. Crews is an eligible substitute and, as such, properly appealed the March 2010 VA decision that assigned a 2009 effective date for her late husband's 100 percent rating. An argument for an earlier effective date based on clear and unmistakable error in a prior decision, under 38 U.S.C. § 5109A, is a procedural device that would have been available to Mr. Crews had he not died—and is, therefore, available to his eligible survivor to

complete the appeal of the effective date assigned in the March 2010 decision.

The denial of Mrs. Crews's statutory right to complete her husband's appeal because Mr. Crews did not raise an allegation of a clear and unmistakable error prior to his death, is not supported by the plain language used by Congress in the substitution statute.

Reading § 5121A as imposing a restriction upon a substituted appellant to complete only clear and unmistakable error allegations that had previously been raised by the claimant prior to death, misinterprets the context of the plain language used by Congress to explicitly allow for unrestricted substitution.

The error made by the Federal Circuit was to interpret the term "pending" as used in § 5121A in the context and based upon the understanding of that term prior to the enactment of § 5121A. This term can only be correctly interpreted in the context of Congress's explicit departure from the notion that a veteran's claim dies with the veteran.

4. This understanding of the scope of the authority to act as the claimant is consistent with Congressional intent. Congress meant to codify the right of certain individuals to be substituted to act as the deceased veteran would have acted had he or she lived. *See* Legislative Hearing on H.R. 1137, H.R. 3047, H.R. 3249, H.R. 3286, H.R. 3415, H.R. 3954, and H.R. 4084, Before the Subcomm. on Disability Assistance and Memorial Affairs of the H. Comm. on Veterans'

Affairs; 110th Cong. 31 (2007) (statement of Bradley G. Mayes, Director, Compensation and Pension Service, Veterans Benefits Administration, U.S. Department of Veterans Affairs) (discussing substitution, which would allow a survivor to "step into the shoes of a claimant who has passed away" and would entail VA processing the claim as if it were the claimant's).

The enactment of § 5121A unambiguously provided for substitution that would allow an eligible substitute to complete the pending claim or appeal utilizing all the arguments that would have been available to the claimant had he or she not died. In this case, that included an argument for an earlier effective date based on clear and unmistakable error in a prior decision.

The object of Congress in enacting § 5121A was to permit the unrestricted substitution of a veteran who died before a claim or appeal could be completed—and to allow that substitute to complete the processing of the claim or appeal just as the deceased veteran would have been able to do had he or she not died. This was a fundamental change from the judicially perceived view that Congress wanted a claim to die with the veteran. Regardless of whether the perception of the Veterans Court and the Federal Circuit was accurate, the enactment of § 5121A represented a very different Congressional intent.

5. For all these reasons, the language used by Congress in § 5121A is without restriction or limitation upon the types of arguments a substituted

appellant can raise on appeal, contrary to the interpretation made by the Veterans Court and the Federal Circuit. Even if there were any doubt, the pro-veteran canon requires resolving those doubts in Mrs. Crews's favor.

This Court "ha[s] long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441; *see Boone v. Lightner*, 319 U.S. 561, 575 (1943) (provisions benefiting veterans must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"). This canon is among the "interpretive tools" a court must bring to "bear before finding" genuine ambiguity. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2423 (2019); *see Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity."); *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837, 843 n.9 (1984). Accordingly, any "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994).

B. The Federal Circuit imposed an atextual limitation on a substituted appellant's authority to act.

1. The Federal Circuit's misinterpretation of § 5121A is evident from the start of its analysis when

it noted, "As a general rule, when a veteran dies, the veteran's claim for benefits also terminates." *Crews*, 63 F.4th 39 (citing *Phillips v. Shinseki*, 581 F.3d 1358, 1363 (Fed. Cir. 2009)). This "general" rule was vitiated by Congress's 2008 enactment of § 5121A, which authorized a process for the substitution of an individual to complete the deceased claimant's pending claim or appeal.

The opening phrase of the statute sets the context in which the statute is to be understood when Congress explicitly provides, "**If a claimant dies while a claim for any benefit** under a law administered by the Secretary, or an appeal of a decision **with respect to such a claim**, is pending, ..." 38 U.S.C. § 5121A (emphases added). The only thing that must be "pending" is a "claim." The statute does not require the existence of pending arguments or allegations—and does not restrict the substituted claimant to the evidence of record at the time of the veteran's death or the arguments that were previously raise. The statute only requires a pending claim.

The Federal Circuit was correct in its acknowledgment that, "Given the statutory language, Mrs. Crews may have been entitled to substitute on the September 2009 claim to process that claim to completion." *Crews*, 63 F.4th 40. Mrs. Crews was entitled to be and was in fact substituted to process Mr. Crews's September 2009 claim to completion. This occurred on December 5, 2014 when Board of Veterans' Appeals concluded that the criteria for Mrs. Crews to be substituted as the appellant in place of her deceased

husband had been met. As such, under the correct interpretation of § 5121A, Mrs. Crews was able to take any action to process Mr. Crews's claim to completion—including raising a legal argument for an earlier effective date based on an allegation of clear and unmistakable error in a prior decision.

The Federal Circuit relied upon the following misinterpretation of the statute that, "But nothing in § 5121A allows Mrs. Crews to file a new claim, which is what she did by alleging clear and unmistakable error in the November 1960 decision and seeking a new effective date back to that decision." The correct interpretation of § 5121A is that once substituted, Mrs. Crews had the statutory authority to take any action that her husband could have taken had he lived to complete his claim, including raising an allegation of clear and unmistakable error in a prior decision to support an appeal for an earlier effective date for the assignment of the 100 percent rating.

2. The key statutory question is whether a substituted appellant has the authority to raise an allegation of clear and unmistakable error in the context of appealing for an earlier effective date. The Federal Circuit erroneously determined that "Mrs. Crews' clear and unmistakable error allegation constitutes a new claim. This new clear and unmistakable error claim is not allowed by the plain language of § 5121A." *Crews*, 63 F.4th 40. The Federal Circuit's determination is inconsistent with its own precedent.

The Federal Circuit has recognized that an allegation of clear and unmistakable error is a collateral attack on a final RO or Board decision. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 696-98 (Fed. Cir. 2000). It is not a claim for benefits. In *Livesay v. Principi*, the Veterans Court held that "clear and unmistakable error provides a procedural device that allows for a final RO or Board decision to be reversed or revised. A litigant alleging clear and unmistakable error is not pursuing a claim for benefits . . . but rather is collaterally attacking a final decision. . . ." *Livesay*, 15 Vet. App. 165, 179 (2001) (en banc). The underlying premise of the Federal Circuit's interpretation of § 5121A—that Mrs. Crews's allegation of clear and unmistakable error constituted "a new claim"—was wrong as a matter of law.

The Federal Circuit relied upon its previous precedent in *Rusick v. Gibson*, 760 F.3d 1342 (Fed. Cir. 2014) and in *Haines v. West*, 154 F.3d 1298, 1301 (Fed. Cir. 1998). To the extent that these decisions hold that § 5121A only allows a survivor to substitute as a claimant for a previously raised allegation of clear and unmistakable error and that it does not allow a survivor to raise an allegation of clear and unmistakable error that was not previously raised, these decisions were wrongly decided under the correct interpretation of § 5121A.

Haines was decided prior to the enactment of § 5121A—and its analysis was based upon the proposition that a claim dies with the veteran. This

was a correct statement of the general rule prior to the enactment of § 5121A.

The analysis made in *Rusick* was based on a conclusion that the legislative history of § 5121A confirmed that Congress did not enact that statute under the impression that survivors had a preexisting right to pursue **freestanding** clear and unmistakable error claims under § 5121. It was not, as here, in the context of a widow who had in fact been substituted under § 5121A to complete the processing of her husband's pending claim—and was raising an allegation of clear and unmistakable error in a prior decision as an argument for an earlier effective date. *Rusick* is readily distinguished from Mrs. Crews's case because there was **no pending claim or appeal** for which Mrs. Rusick could be substituted.

The Federal Circuit conflated the right of a widow to pursue **a freestanding clear and unmistakable error claim** under § 5121(a) with the authority of a substituted appellant under § 5121A to take any action that her deceased husband could have taken had he survived in the context of pursing an appeal of a VA decision—which would include an argument or an earlier effective date based on clear and unmistakable error in a prior VA decision. Neither *Haines* nor *Rusick* support the interpretation of § 5121A made by the Federal Circuit in this matter.

II. The Question Presented Is Important And Recurring.

The Federal Circuit has now definitively rejected what Congress commanded in § 5121A which is to permit a substituted appellant take any action that the deceased claimant could have taken had he or she survived to complete the processing of a claim or appeal pending at death.

The scope of the authority of a substituted appellant under § 5121A is extremely important to the survivors of claimants and veterans who die while waiting for VA to complete the processing of their claims. The Federal Circuit's improper limitation of the authority of a substituted appellant to take any action that the claimant or the veteran could have taken had he or she survived, adversely affects significant numbers of veterans both now and in the future. The Federal Circuit's ruling reaches *all* substituted appellants preventing them from completing the processing of the claim pending at death. Congress's public policy decision to permit substitution ended the tragic legacy of the proposition that when the veteran dies his or her claim died with them.

The unfortunate reality is that both VA and judicial interpretations are frequently at odds with the veterans-benefits statutes Congress enacts. Yet they often persist for years before being overturned or before Congress intervenes with corrective legislative action. The notion that it is the policy of the United

States that when the veteran dies his or her claim dies with them is antithetical to the veterans' benefits system designed by Congress which this Court has affirmed has always been pro-claimant. *See*, *e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 131 S. Ct. 1197, 1205 (2011) ("The solicitude of Congress for veterans is of long standing.") (quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)). The statutes governing veterans' benefits are "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998). Congress designed the veterans' benefits adjudication process to be "a nonadversarial, ex parte, paternalistic system." *Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998).

As this Court knows, judicial review of VA denials did not even exist before 1988, when Congress passed the Veterans' Judicial Review Act of 1988 ("VJRA"). After the enactment of the VJRA, this Court has recognized, "[m]any VA regulations" and interpretations "have aged nicely simply because Congress took so long to provide for judicial review." *Brown v. Gardner*, 513 U.S. 115, 122 (1994). That means that many denials of benefits based on erroneous interpretations are final—often for years or decades—before the error is acknowledged and corrected. The availability of clear and unmistakable error as a legal argument to correct a clear and unmistakable error is crucial for veterans saddled with final denials that are manifestly contrary to law. Under the Federal Circuit's rule, however, these veterans and their survivors are out of luck.

1. The starting point for why incorrect interpretations plague the veterans' benefits system is that the vast majority of claims decisions are made without the check of appellate review and without the involvement of any lawyer.

"[N]early all veteran benefits claims are resolved at the regional office stage." *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360, 1380 (Fed. Cir. 2020) (en banc). The system is one in which "roughly 96%" of cases go unappealed. *Gray v. Sec'y of Veterans Affs.*, 875 F.3d 1102, 1114 (Fed. Cir. 2017) (op. of Dyk, J., dissenting in part and concurring in judgment). "[M]any veterans find themselves trapped . . . in a bureaucratic labyrinth," lacking the knowledge or wherewithal to pursue even first-level administrative appeals within the agency. *Martin v. O'Rourke*, 891 F.3d 1338, 1349 (Fed. Cir. 2018) (Moore, J., concurring); *see* Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 Fed. Cir. B.J. 433, 440-41, 444 (2009); H.W. Cummins et al., *Service Accepted, Compensation Denied*, 30 Gonz. L. Rev. 629, 644 (1995).

Although the RO is all that most veterans have got, it is not the place to go looking for rigorous statutory or regulatory interpretation. ROs are staffed "predominately by lay adjudicators" without legal training. Jeffrey Parker, *Two Perspectives on Legal Authority Within the Department of Veterans Affairs Adjudication*, 1 Veterans L. Rev. 208, 216-17 (2009). Compounding the problem, nearly all veterans lack legal representation at this stage, as they are

statutorily barred from paying an attorney to represent them at the RO with regard to an initial decision on a claim. 38 U.S.C. § 5904(c)(1).

To make matters worse, VA—both at the RO and the Board levels—has an astonishingly poor track record at reaching the right outcome. One indication is the alarming frequency with which veterans prevail in appealing Board decisions to the Veterans Court. In both 2019 and 2020, for example, veterans prevailed at least in part in over 92% of Veterans Court appeals decided on the merits. U.S. Court of Appeals for Veterans Claims, Fiscal Year 2020 Annual Report at 3, available at https://bit.ly/3ws0P83; U.S. Court of Appeals for Veterans Claims, Fiscal Year 2019 Annual Report at 3, available at https://bit.ly/3xz34Ic. That uniquely high rate of agency error is part of a pattern. S*ee Henderson*, 562 U.S. at 432 ("Statistics compiled by the Veterans Court show that [from 2000-2009], the court ordered some form of relief in around 79 percent of its 'merits decisions.'" (citing U.S. Court of Appeals for Veterans Claims, Annual Reports 2000-2009, available at https://bit.ly/2UCzF0M)).[1] And it reflects a

[1] By comparison, a statistical analysis of appeals of Social Security Administration decisions denying benefits found that district courts on average "issued partial or full remands or reversal in 40% of cases." Harold J. Krent & Scott Morris, *Inconsistency and Angst in District Court Resolution of Security Disability Appeals*, 67 Hastings L.J. 367, 389 (2016).

significant number of serious interpretive errors by the agency.[2]

2. The few appeals that progress beyond the Veterans Court showcase the prevalence and significance of interpretive errors in veterans law. Congress has limited the Federal Circuit's review of Veterans Court's decisions largely "to issues of statutory or regulatory interpretation." *Carpenter v. Gober*, 228 F.3d 1379, 1381 (Fed. Cir. 2000); *see* 38 U.S.C. § 7292. And the Federal Circuit has used that authority to correct numerous erroneous interpretations by the agency and the Veterans Court. Examples abound:

- ***Brown v. Gardner***, 513 U.S. 115 (1994). A statute required VA to "compensate for 'an injury or an aggravation of an injury,'

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[2] *See Wolfe v. Wilkie*, 32 Vet. App. 1, 11-12 (2019) (even after the Veterans Court "authoritatively corrected VA's misunderstanding" of a statute, repudiating VA's "incorrect . . . interpretation," the agency "adopted a regulation that functionally creates a world indistinguishable from the world [the Veterans Court] *authoritatively held impermissible under the statute*"; remarking incredulously, "[i]t's difficult to conceive how [VA] could believe that adopting a regulation that mimics the result a Federal court held to be unlawful is somehow appropriate when the statute at issue has not changed"); *see also*, *e.g.*, *Dixon v. McDonough*, 2021 WL 1182326, at *3 (Vet. App. Mar. 30, 2021); *Lamb v. Wilkie*, 2018 WL 2171481, at *1-2 (Vet. App. May 11, 2018); *Wells v. Shulkin*, 2017 WL 3222571, at *5 (Vet. App. July 31, 2017); *Thomas v. McDonald*, 2016 WL 6706856, at *5-6 (Vet. App. Nov. 15, 2016); *Dawson v. McDonald*, 2016 WL 3055871, at *8 (Vet. App. May 31, 2016); *Schaible v. Shinseki*, 2011 WL 3586247, at *3 (Vet. App. Aug. 17, 2011); *Tropf v. Nicholson*, 20 Vet. App. 317, 321 (2006); *Servello v. Derwinski*, 3 Vet. App. 196, 199 (1992).

that occur[ed] 'as the result of'" treatment at a VA facility, "so long as the injury was 'not the result of such veteran's own willful misconduct.'" *Id.* at 116. VA's implementing regulation grafted on a "fault-or-accident requirement" that limited compensation to situations involving VA negligence or an accident during treatment. *Id.* at 117. This Court, affirming the Federal Circuit, held that the regulation "fl[ew] against the plain language of the statutory text." *Id.* at 122; *see id.* at 117 ("Government [could not] plausibly" claim ambiguity). Notably, this untenable regulation had enjoyed "undisturbed endurance for 60 years." *Id.* at 122.

- ***Saunders v. Wilkie*, 886 F.3d 1356 (Fed. Cir. 2018).** The primary veterans-benefits statute awards compensation for "disability" resulting from "injury or disease" connected to a veteran's military service. 38 U.S.C § 1110. The Veterans Court interpreted the statute to categorically exclude disabling pain—even when unquestionably linked to an in-service injury or disease—unless the veteran's pain was also linked to a presently diagnosed disease or injury. Disabling pain lingering decades after an in-service injury, the Veterans Court held, did not count. *Id.* at 1358. The Federal Circuit rejected this interpretation as "illogical" and erroneous as a "matter of law." *Id.* at 1366, 1368. Notably, the

Veterans Court's interpretation had been on the books for 19 years. *Id.* at 1359 (citing *Sanchez–Benitez v. West*, 13 Vet. App. 282, 285 (1999)).

- ***Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004).** As explained above (at ___), the Federal Circuit reversed the Veteran Court's application of the implementing regulation for the presumption-of-sound-condition statute, 38 U.S.C. § 1111. To rebut the presumption, the regulation required VA to show only that a condition pre-existed service. The Federal Circuit held that this regulatory interpretation was incorrect, given that the statute expressly and unambiguously required the government to show that "the pre-existing disability was not aggravated during service." *Id.* at 1097; *see id.* at 1093-94 (explaining that "it is clear that Congress intended" the additional requirement, such that the statute was construed "without resort to *Chevron* deference"). Notably, the contrary regulation had persisted for 40 years. *See* 38 C.F.R. § 3.304(b) (1974).

Even though each of these rulings declared what the governing statutes had always required—that is, what had clearly and unmistakably been the law—the Federal Circuit's ruling in this case precludes each of them from serving as a basis for a clear and unmistakable error argument raised by a lawfully substituted appellant. The veteran would be able to

raise the clear and unmistakable error allegation at any time—but not the surviving substitute. *See*, *e.g.*, *Steele v. McDonough*, 2021 WL 1383263, at *3 (Fed. Cir. Apr. 13, 2021) (in light of *George*, rejecting *Saunders*'s corrected interpretation as a basis for clear and unmistakable error).[3]

To make matters worse, the Federal Circuit itself is far from immune from succumbing to erroneous interpretations. The court can and does entrench misinterpretations that must be corrected years down the line.

A recent example is *Procopio v. Wilkie*, 913 F.3d 1371 (Fed. Cir. 2019) (en banc), where the full Federal Circuit reversed a decade-old panel precedent upholding VA's interpretation of the Agent Orange Act. The statute affords a favorable presumption to all veterans who "served in the Republic of Vietnam" during the Vietnam War. 38 U.S.C. § 1116. In violation of that plain text—as well as international law, legislative history, and the agency's own past

[3] The question presented has also arisen in contexts other than final denials of benefits. It has arisen in pre-enforcement review, as in the challenge to VA's promulgation of the Board-level clear and unmistakable error regulation in *DAV*. *See* 234 F.3d at 697-98. The question has also been presented in multiple challenges to VA's promulgation of the RO-level regulation in implementing the Veteran Appeals Improvement and Modernization Act of 2017. *See Military-Veterans Advocacy v. Sec'y of Veterans Affairs*, No. 19-1600 (Fed. Cir.); *Haisley v. Sec'y of Veterans Affairs*, No. 19-1687 (Fed. Cir.). And it has arisen in the consideration of adjacent issues, such as the EAJA question in *Patrick III*. *v. Shinseki*, 668 F.3d 1325 1328-29, 1332-34 & n.6. (Fed. Cir. 2011).

practice—a VA regulation added an extra-statutory "foot-on-land requirement," limiting the presumption to those whose service "involv[ed] duty or visitation on the landmass, including the inland waterways of the Republic of Vietnam." *Id.* at 1373. Although a 2008 panel had applied *Chevron* deference, the en banc court ruled that "the unambiguous language" of the statute foreclosed VA's narrow interpretation and instead encompassed service within the Republic's territorial waters. *Id.* at 1373; *see*, *e.g.*, *id.* at 1375, 1378 (explaining that Congress "had spoken directly to the question" and that there was "no merit to the government's argument that § 1116 is ambiguous"). VA's overturned interpretation had existed for 22 years. *Id.* at 1978.

3. Revision based upon an allegation of a clear and unmistakable error is a critical safety valve in this context, where final denials are often infected by erroneous legal interpretations that are corrected only years—or decades—after the fact. Without the clear and unmistakable error device, a veteran is at best limited to recovering compensation starting on the date he or she learns of the legal error and files a new or supplemental claim based on that development. The veteran has no way to recover benefits for the time it took the agency and the courts to realize that the law had actually entitled that veteran to compensation all along. The earlier the effective date, the sooner the veteran receives long-overdue benefits to which he or she was entitled to have received.

"The importance of the effective date in evaluating the options [to pursue after a final VA decision] cannot be overemphasized." 1 Veterans Benefits Manual 14.1 (2020). The better the effective date, the earlier VA should have been paying benefits, and thus the more past-due benefits are owed. The difference can be hundreds of thousands of dollars. *See*, *e.g.*, *id.* (giving an example of losing out on three years of benefits costing more than $150,000); Angela K. Drake et al., *Review of Veterans Law Decisions of the Federal Circuit, 2020 Edition*, 70 Am. U. L. Rev. 1381, 1426 (2021) ("For veterans who wait five years for a decision, they may receive thousands of dollars in 'retro' benefits because it took VA so long to reach the correct result.").

That money matters to disabled veterans, who—by definition—are limited in their ability to earn a living. *See Mansell v. Mansell*, 490 U.S. 581, 583 (1989) ("The amount of disability benefits a veteran is eligible to receive is calculated according to the seriousness of the disability and the degree to which the veteran's ability to earn a living has been impaired."); *Saunders*, 886 F.3d at 1363 ("the purpose of veterans compensation" is "to compensate for impairment to a veteran's earning capacity").

In contrast to the substantial significance of clear and unmistakable error availability to veterans, VA is only minimally affected. Because veterans can already pursue supplemental claims to challenge wrongful final denials, no administrative burden would be created by allowing them access to the clear and unmistakable error path as Congress intended. No

additional claims would be generated or adjudicated; all that would occur is a shift in the *type* of claim that is filed.

This Court's intervention is thus warranted on the scope of a substituted appellant's authority to use clear and unmistakable error just as the deceased claimant could have done so to complete the processing of Mr. Crews's claim. It matters enormously to veterans to know that their pending claims will not die with them because a court improperly limited the scope of their survivor's authority to raise all the legal arguments that would have been available to them had they not died.

No additional "claims" would be generated or adjudicated; all that would occur is a proper review of a prior denial based on the evidence of record at the time of that denial. Allowing a lawfully substituted appellant to raise the same arguments that a veteran would be allowed to raise had he or she lived simply does not add any additional burden to the agency.

III. This Case Is An Ideal Vehicle To Clarify The Scope Of The Authority Of A Substituted Appellant Under 38 U.S.C. § 5121A.

This case provides an ideal opportunity for the Court to correct the Federal Circuit's misinterpretation of the scope of a substituted appellant's authority to act in pursuit of the completion of the processing to a claim pending at death to include a collateral attack

using a clear and unmistakable error request for revision.

The Federal Circuit relied entirely on its narrow reading of § 5121A based upon the false premise that the general rule that when a veteran dies, the veteran's claim for benefits also terminates was not extinguished by the public policy decision that substitution would be available going forward to complete the processing of a claim or an appeal in order that a claim does not die with the veteran.

The Federal Circuit relied entirely on its narrow reading of § 5121A based upon the false premise that the general rule—that a veteran's claim or appeal terminates with the veteran's death—was not extinguished by the public policy decision that substitution would be available going forward to complete the processing of a claim or an appeal to prevent the inherent injustice in this "general rule."

To allow the Federal Circuit's decision to stand is contrary to the letter and spirit of § 5121A and would potentially yield absurd results. If a substituted claimant cannot raise an allegation of clear and unmistakable error to support an argument for an earlier effective date, what next? Say VA denies a veteran's claim for disability benefits for his ischemic heart disease because the veteran is not entitled to the legal presumption—but VA fails to address a "direct" theory of entitlement. The veteran dies. The surviving spouse substitutes to pursue an appeal of this decision—and argues that VA failed to consider

entitlement to benefits on a "direct" basis. Under the Federal Circuit's decision in *Crew*s, VA could deny the substitute's appeal . . . simply because the veteran did not raise this argument prior to his death. This makes no sense. How is the veteran to know the reason for VA's decision before VA issues its decision? The Federal Circuit's decision requires veterans to be clairvoyant and punishes their survivors in a manner that defies the purpose behind the enactment of § 5121A.

CONCLUSION

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

Respectfully submitted,

KENNETH M. CARPENTER
Counsel of Record
KENNETH H. DOJAQUEZ
CARPENTER CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601
(785) 357-5251
carpgh@mindspring.com

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