No. _____

In The
Supreme Court of the United States

DARYL R. BLANTON,

Petitioner,

v.

DENIS 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

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QUESTION PRESENTED

The Department of Veterans Affairs ("VA") long has strained to keep pace with the claims of our country's former military service members and their dependents and survivors (collectively, "veterans"). VA makes mistakes. Congress understands this, and it protects veterans from VA error.

One beneficial, remedial protection that Congress affords to veterans is against VA "clear and unmistakable" error ("CUE"). Through 38 U.S.C. § 5109A, Congress requires VA to reverse or revise a prior decision whenever evidence establishes CUE.

The U.S. Court of Appeals for the Federal Circuit has adopted a severely restrictive interpretation of section 5109A. The standard forecloses relief from CUE unless a veteran establishes, based on the challenged decision's extant agency record and law, that the error "compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." *Cook v. Principi*, 318 F.3d 1334, 1345 (2002) (en banc).

The petitioner contends that *Cook*'s standard is erroneous. In the proceedings below, the Federal Circuit made plain that it will not be revisiting *Cook*.

With the Federal Circuit refusing to revisit *Cook*, and its strict standard harming our country's veterans, the petitioner asks this Court to intervene. The question presented: Is the *Cook* standard to establish CUE in a VA decision erroneously restrictive?

RELATED PROCEEDINGS

Daryl R. Blanton v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 19-2009 (Fed. Cir. judgment entered Aug. 3, 2020)

Daryl R. Blanton v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 17-3138 (Vet. App. judgment entered Apr. 9, 2019)

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INTRODUCTION

Congress specially favors our country's veterans. It has created an entire system of entitlements, and procedures for claiming those entitlements, specifically for them. Congress has suffused this entire system with a beneficent, pro-claimant paternalism that stands unique in American law.

Congress' solicitude toward veterans manifests both in the substantive entitlements that it affords them and in the procedures that it has installed to govern their entitlement claims. One part of this concerns VA error. Congress has codified protections for not only garden-variety VA error but, as of 1997, specifically for VA error that is "clear and unmistakable." *See* Pub. L. No. 105–111, 111 Stat. 2271–72 (Nov. 21, 1997), codified at 38 U.S.C. §§ 5109A, 7111.

Through section 5109A, Congress codified a procedural device requiring that, if evidence establishes that a Veterans Benefits Administration ("VBA") decision contains CUE, that "decision shall be reversed or revised." 38 U.S.C. § 5109A(a). A request for such review "may be made at any time." *Id.* § 5109A(d). A reversal or revision on the basis of CUE wipes away the erroneous decision *ab initio*, having "the same effect as if . . . made on the date of the prior decision." *Id.* § 5109A(b).

Many of our veterans invoke section 5109A's remedial provisions. Since 2002, however, they have faced a monumental hurdle to doing so successfully. In *Cook*, the en banc Federal Circuit engrafted onto section

5109A a set of formidable restrictions that reduce the statute's availability to, "always," a "very specific and rare kind of 'error.'" *Cook*, 318 F.3d at 1345 (quoting H.R. Rep. No. 105–52, at 3). "It is the kind of error, of fact or law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." *Id.* (quoting H.R. Rep. No. 105–52, at 3). "Thus," under *Cook*, "even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto*, clear and unmistakable." *Id.* (quoting H.R. Rep. No. 105–52, at 3).

As the foregoing citations show, *Cook* did not take this meaning from section 5109A's text, its place in the overall statutory scheme for veterans' entitlements, or any of the traditional canons of statutory construction. *Cook* instead rendered section 5109A's protection nearly illusory largely on the basis of legislative committee reports—and, in turn, prior lower-court case law restrictively interpreting a CUE regulation from which section 5109A drew its text. *See id.*

In other circumstances, that general mode of analysis might make sense. Here, the petitioner respectfully submits, it does not. Given the uniquely beneficent, paternalistic, pro-claimant nature of the statutory scheme of entitlements for our veterans, the pedestal on which *Cook* placed the committee reports and lower-court rulings was so high as to contravene Congress' intent. Congress did not ultimately incorporate those materials' restrictive language into the text

of section 5109A. It instead crafted the remedial statute more broadly, to require reversal or revision of a prior VA decision when the evidence shows it to contain CUE.

That more permissive text, and its context within this most unique of statutory schemes, better reflects Congress' intent for this remedial statute. It should carry the day over mere committee-report remarks and dubious lower-court rulings' references to adversarial, non-veteran concepts that do not belong in the statutory scheme that Congress has crafted to benefit our country's veterans.

Accordingly, and for the further reasons that follow, the petitioner requests that the Court grant a writ of certiorari in this case to overturn *Cook*'s erroneously restrictive interpretation of section 5109A.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is not reported in West's Federal Reporter but appears at 823 Fed. Appx. 958. Pet. App. 1–6. The order of the Court of Appeals denying rehearing and rehearing en banc is not officially reported. Pet. App. 36–37. The opinion of the U.S. Court of Appeals for Veterans Claims ("Veterans Court") is not officially reported but appears at 2019 WL 1177988. Pet. App. 7–20. The opinion of the Board of Veterans' Appeals ("Board") is not officially

reported but appears at 2017 WL 2907668. Pet. App. 21–35.

JURISDICTION

The Federal Circuit entered judgment on August 3, 2020, Pet. App. 1–6, and denied a timely petition for rehearing en banc on October 13, 2020, Pet. App. 36–37. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves 38 U.S.C. § 1111 (1997) and 38 U.S.C. § 5109A (2020). Relevant portions of these statutes are reproduced at Pet. App. 38–39. This case also involves 38 C.F.R. § 3.304(b) (1996) and 38 C.F.R. § 3.105(a) (2020). Relevant portions of these regulations are reproduced at Pet. App. 40–44. A complete understanding of this petition also involves 38 U.S.C. § 7105(c) (2020), which states in full as follows:

> If no notice of disagreement is filed in accordance with this chapter within the prescribed period, the action or decision of the agency of original jurisdiction shall become final and the claim shall not thereafter be readjudicated or allowed, except—
>
> > (1) in the case of a readjudication or allowance pursuant to a higher-level

> review that was requested in accordance with section 5104B of this title;
>
> (2) as may otherwise be provided by section 5108 of this title; or
>
> (3) as may otherwise be provided in such regulations as are consistent with this title.

STATEMENT OF THE CASE

Mr. Blanton experiences psychiatric symptoms during his military service.

The petitioner, Daryl R. Blanton, served honorably in the U.S. Army from May 1990 to May 1994. Pet. App. 7. The military examined him on entry to service and did not note any psychiatric disability. Pet. App. 26. In March 1994, he received a medical examination and completed a self-report of medical history. *See id.* The examination showed Mr. Blanton's psychiatric condition as "normal." *Id.* Mr. Blanton reported frequent trouble sleeping and depression or excessive worry. Pet. App. 26–27.

In April 1994, Mr. Blanton was treated for a self-induced laceration to his right arm. Pet. App. 8; Pet. App. 27. He stated that he was trying to commit suicide. Pet. App. 8; Pet. App. 27. He also reported that he had tried to commit suicide two weeks prior. Pet. App. 27. Mr. Blanton was diagnosed with a suicide attempt and a laceration to the right arm. *Id.* An undated health assessment shows that he reported that in the

prior year he sometimes experienced repeated or long periods of depression. *Id.*

VA denies Mr. Blanton's original claim for service-connected compensation of a psychiatric condition, concluding that it had pre-existed his military service.

"Service connection" is a determination that a disabling condition was suffered, contracted, or aggravated while in line of duty, typically entitling a U.S. military veteran to monthly disability compensation. *See, e.g.*, 38 U.S.C. § 1110; *Saunders v. Wilkie*, 886 F.3d 1356, 1361 (Fed. Cir. 2018). A claim of service connection has three *prima facie* elements: "(1) the existence of a present disability; (2) in-service incurrence or aggravation of a disease or injury; and (3) a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *E.g.*, *Saunders*, 886 F.3d at 1361.

In October 1996, Mr. Blanton applied with VA for service-connected disability compensation for a psychiatric condition. *See* Pet. App. 8. In connection with his claim, VA obtained medical records. *See id.* Those records included VA treatment records that noted his in-service suicide attempt, and others noting that Mr. Blanton had experienced suicidal ideation and hallucinations before entering military service, while in high school. *See id.*

In February 1997, VA denied service connection for a nervous condition. Pet. App. 8. It did so on the

basis of a finding that Mr. Blanton's condition "existed prior to service" and that there was "no evidence that the condition permanently worsened as a result of service." *Id.*

Mr. Blanton did not timely perfect a direct appeal. *See id.*

VA denies Mr. Blanton's later pleadings for service-connected compensation, and the lower courts affirm under the Federal Circuit's standard that governs CUE relief.

Among the pro-veteran features of the VA claims system, a claimant may at any time submit new and material evidence to "reopen" a previously denied claim. *See* 38 C.F.R. § 3.156(a). The previous denial remains on the books, but reopening a claim permits merits proceedings through which the claimant may secure VA entitlements effective from as early as the date of the application to reopen. *See id.* § 3.400(q)(2).

In April 1998, Mr. Blanton applied to reopen his claim for service connection for a psychiatric condition. Pet. App. 8. After six years of proceedings, in July 2004 the VA granted service connection for a schizoaffective disorder. Pet. App. 8–9. VA made this favorable decision on the basis of a VA examiner's opinion that Mr. Blanton's military service had exacerbated his condition. Pet. App. 9. VA made its award effective April 14, 1998, granting back pay in disability compensation retroactive to that date. *See id.*

Another pro-veteran feature of the VA claims system permits relief from an adverse VA decision, at any time, without a timely direct appeal or reopening. It requires VA to revise its decisions for clear and unmistakable error ("CUE"). *See* 38 U.S.C. § 5109A; 38 C.F.R. § 3.105(a); *see also* 38 U.SC. § 7111 (CUE in Board decision).

In March 2006, Mr. Blanton moved to reverse or revise, due to CUE, VA's February 1997 denial of service connection for a psychiatric condition. Pet. App. 9. The specific basis for Mr. Blanton's motion to revise the February 1997 denial of service connection was, as pertinent here, that VA clearly and unmistakably erred with respect to service connection's second *prima facie* element, "in-service incurrence."

In particular, a VA claimant typically must prove each *prima facie* claim element to the standard of approximately at least as likely as not, with the claimant receiving the benefit of doubt. *See* 38 U.S.C. § 5107. Congress, however, long has eased claimants' burdens by providing them with several statutory presumptions. The presumption pertinent to this petition is that, extant in 1997, of sound condition. *See* 38 U.S.C. § 1111 (1997).

The presumption of sound condition, as extant in 1997, requires VA to deem the U.S. military to have accepted each service member in sound health except as to defects, infirmities, or disorders noted at the examination, acceptance, and enrollment for service, "or where clear and unmistakable evidence demonstrates

that the injury or disease existed before acceptance and enrollment and was not aggravated by such service." 38 U.S.C. § 1111 (1997).

This presumption aids VA claimants in meeting service connection's second *prima facie* claim element, cabining when VA may consider a claimant who has a clear military entrance medical examination, and evidence of suffering a health condition during service, to have incurred that health condition. *See, e.g.*, *Simmons v. Wilkie*, 30 Vet. App. 267, 275 (2018).

Mr. Blanton asserted that VA's February 1997 contains CUE because it deprived Mr. Blanton of the benefit of the presumption of sound condition (and also of a separate presumption, that of line of duty, *see* 38 U.S.C. § 105(a) (1997)[1]). *See* Pet. App. 24.

VA's front-line adjudicator denied CUE relief. *See* Pet. App. 22. On timely perfected appeal, so did VA's highest appellate tribunal, the Board. *See* Pet. App. 35. So, in turn, did the Veterans Court, exercising jurisdiction under 38 U.S.C. § 7252(a) on timely further appeal. *See* Pet. App. 20. The Federal Circuit, exercising jurisdiction under 38 U.S.C. § 7292(a), (c) on timely appeal of the Veterans Court's decision, also affirmed. *See* Pet. App. 6.

Along Mr. Blanton's trek through VA, the Veterans Court, and the Federal Circuit, the scope of his request

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[1] Mr. Blanton is no longer pursuing his argument that the February 1997 Rating Decision contains CUE on the basis that it deprived him of the benefit of the line of duty presumption.

for relief from CUE has narrowed to the single issue for which he seeks this Court's intervention: that the law of the Federal Circuit as to what standard a veteran must meet to establish CUE in a VA decision is erroneously restrictive. He acknowledges that, if the Federal Circuit's existing standard for establishing CUE survives, he loses.

Accordingly, the pertinent part of the decisions below is the legal standard pursuant to which the tribunals denied Mr. Blanton relief from CUE.

The Board denied Mr. Blanton's motion for revision under the law of the Federal Circuit for how to establish a VA decision's CUE. Under that standard, the Board wrote, "CUE is a very specific and rare kind of error." Pet. App. 25. "It is the kind of error of fact or of law that when called to the attention of later reviewers compels the conclusion to which reasonable minds could not differ that the result would have been manifestly different but for the error." *Id.* "Even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be CUE." *Id.*

As the Board described, a claimant must satisfy the following elements "to determine whether a prior decision was based on CUE" under the Federal Circuit's prevailing standard. *Id.* at 25–26. First, "either the correct facts, as the facts were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied." *Id.* at 25. Second, "the error must be

'undebatable' and of the sort which, had the error not been made, the outcome would have changed." *Id.* "[A] determination that there was CUE must," it continued, "be based on the record and law that existed at the time of the prior adjudication." *Id.* at 25–26.

The Veterans Court affirmed under the same, restrictive Federal Circuit law for establishing CUE. *See* Pet. App. 11–12, 20.

The Federal Circuit did the same. *See* Pet. App. 4, 6. Mr. Blanton, at that point proceeding before a court with authority to change the restrictive standard, asked the Federal Circuit to do so. *See* Pet. App. 4. A three-judge panel of the Federal Circuit acknowledged that, "[a]s a panel, we could recommend that course of action." *Id.* The panel "decline[d] to do so, however." *Id.* It reasoned that *Cook* had not come from nowhere—the Federal Circuit had adopted *Cook*'s standard from the Veterans Court's decision in *Russell v. Principi*, 3 Vet. App. 310, 313–14 (1992) (en banc). *See* Pet. App. at 1–2, 4. And, "[i]n *Cook*, we expressly stated that we did not think a change with respect to the requirements for establishing CUE was 'warranted.' " Pet. App. 4.

That was about it for that. Mr. Blanton timely sought panel rehearing or rehearing en banc, which the Federal Circuit denied. *See* Pet. App. 36–37. With no other apparent recourse for reviewing what standard Congress intends to govern veterans' assertions of CUE under section 5109A, Mr. Blanton now petitions this Court to intervene and correct what, he respectfully submits, is an overly restrictive threshold in *Cook*

that stymies Congress' intent to protect our country's veterans from obvious VA error.

REASONS FOR GRANTING THE PETITION

The Federal Circuit sent a clear message in the proceedings below. It will not be revisiting *Cook*. Mr. Blanton asks that this Court do so because, with the greatest respect to the Federal Circuit, the standard that *Cook* sets forth to govern requests for relief from CUE is erroneously restrictive. That too-restrictive standard deprives many of our country's veterans important protection that Congress intended to afford them against obvious VA error.

For the reasons below, the Court should grant this petition to align the law of the Federal Circuit—the exclusive Article III Court of Appeals with jurisdiction over veterans' claims—with Congress' intent to protect our country's veterans from obvious VA error. *See infra* Part I. Given the standard's importance to our country's veterans, overturning *Cook*'s too-restrictive view in favor of the more permissive standard that Congress intends warrants the Court's intervention. *See infra* Part II. Mr. Blanton asks that the Court use this case to do so. *See infra* Part III.

I. THE COURT SHOULD GRANT THE WRIT TO ALIGN FEDERAL CIRCUIT LAW GOVERNING RELIEF FROM CLEAR AND UNMISTAKABLE ERROR WITH CONGRESS' PRO-VETERAN INTENT.

It will be useful to begin with the historical context in which the Federal Circuit decided *Cook*. *See infra* Part I.A. An overview of *Cook* then follows. *See infra* Part I.B. Mr. Blanton then will address why the standard that *Cook* sets forth for establishing CUE is erroneously restrictive. *See infra* Part I.C.

A. *Cook*'s Historical Context

Congress, as a grateful sovereign, has created a comprehensive statutory scheme specifically to benefit our country's military veterans—a special class of citizens, who risked and all too often have incurred harm to serve and defend our country. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440–41, 131 S. Ct. 1197, 1206, 179 L. Ed. 2d 159 (2011); *Shinseki v. Sanders*, 556 U.S. 396, 412, 129 S. Ct. 1696, 1707, 173 L. Ed. 3d 532 (2009) ("Congress has expressed special solicitude for the veterans' cause."); *United States v. Oregon*, 366 U.S. 643, 647, 81 S. Ct. 1278, 1280, 6 L. Ed. 2d 575 (1961) ("The solicitude of Congress for veterans is of long standing."); *see also*, *e.g.*, *Sanders*, 556 U.S. at 416 (Souter, J., dissenting) (noting "Congress' understandable decision to place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions"); *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[T]he

veterans benefit system is designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their [our] country. This entire scheme is imbued with special beneficence from a grateful sovereign.' ").

Federal regulations under this scheme long have protected veterans against CUE in their claim decisions. *See, e.g.*, 38 C.F.R. § 2.1009(1) (1938) (permitting a rating board to reverse or amend a prior decision "where such reversal or amendment is obviously warranted by a clear and unmistakable error shown by the evidence in file at the time the prior decision was rendered"). Even so, until 1988, there was little judicial review of VA decisions. *See, e.g.*, *Johnson v. Robison*, 415 U.S. 361, 369–70, 94 S. Ct. 1160, 1167, 39 L. Ed. 2d 389 (1974) (addressing the "no-review" statutory clause and its purposes; Veterans' Judicial Review Act ("VJRA"), Pub. L. No. 100–687, 102 Stat. 4105, 4105 (1988) (describing the VJRA's purpose as including "to establish a Court of Veterans' Appeals and to provide for judicial review of certain final decisions of the Board of Veterans' Appeals").

When Congress enacted the VJRA, it did not intend that either administrative or judicial review of VA decisions suddenly would become adversarial. *See, e.g.*, *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) ("Congress intended to preserve the historic, pro-claimant system."). Rather, Congress through the VJRA was crafting additional procedural protections to ensure that VA timely and accurately determines veterans' claims to the substantive entitlements that

Congress has afforded them. Congress thus intended for the introduction of judicial review of VA error to reinforce—not to change—the system's beneficent, uniquely pro-claimant nature.

In 1990, the still-new Court of Veterans' Appeals (now known as the U.S. Court of Appeals for Veterans Claims) began issuing precedential decisions. The first in which the Veterans Court addressed CUE was *Bentley v. Derwinski*, 1 Vet. App. 28 (1990). The court considered whether there was CUE in either of two VA rating decisions, one from February 1960 and one from April 1960. *See id.* at 29. The veteran had requested the February 1960 rating decision's review for CUE. *See id.* at 30. It is not clear from *Bentley* how the request for relief of the April 1960 rating decision for CUE originated—including whether it was the veteran or VA *sua sponte* that raised it. *See id.* at 30–31. However that request originated, it is clear that the Veterans Court approached CUE's protection permissively. *See id.* at 31 (not interpreting the CUE regulation, section 3.105(a), to impose any particular pleading requirement; revising the February 1960 and April 1960 rating decisions because they plainly were wrong).

The Veterans Court continued to receive cases under the CUE regulation. In 1992, it issued an en banc decision on whether the Veterans Court had jurisdiction to review Board decisions regarding CUE in a prior decision. *See Russell v. Principi*, 3 Vet. App. 310, 312 (1992). The Veterans Court held that 38 C.F.R. § 3.105(a) is a valid regulation and that the Veterans Court may review Board decisions as to CUE. *Id.*

In a development that would become significant, the Veterans Court did not stop there. Although the issue was not necessary for it to reach, the Veterans Court articulated a framework for establishing CUE. *See id.* at 313–14. The Veterans Court concluded that a claimant must satisfy three requirements to establish CUE. First, either the facts known at the time were not before the adjudicator or the law then in effect was incorrectly applied. Second, an error occurred based on the record and the law that existed at the time the decision was made. Third, had the error not been made, the outcome would have been manifestly different. *Id.*

Aside from section 3.105(a) itself, the Veterans Court cited no authority for this standard that it conjured. *See id.* Even so, as an en banc decision of a young court, *Russell* had immediate and profound effects on the Veterans Court's CUE jurisprudence.

In *Fugo v. Brown*, for example, a three-judge Veterans Court panel recited *Russell*'s framework and added the gloss that "[i]t must always be remembered that CUE is a very specific and rare kind of 'error.'" 6 Vet. App. 40, 43–44 (1993). *Fugo* also "refined and elaborated on" *Russell*'s "test by holding that, if an appellant wishes to reasonably raise CUE," the appellant must allege with specificity the error and reason "why the result would have been *manifestly* different but for the alleged error." *Damrel v. Brown*, 6 Vet. App. 242, 245 (1994) (quoting *Fugo*, 6 Vet. App. at 44). *Damrel*, in turn, announced a further rule that merely disagreeing with how the facts were weighed

or evaluated is not enough to substantiate a CUE request. *See id.*

In this manner, the Veterans Court's rules of law regarding CUE thus strayed increasingly from the protective regulation's text.

The increasingly restrictive view of the CUE regulation began to percolate up to the Federal Circuit. In *Smith v. Brown*, the Secretary appealed a Veterans Court decision that section 3.105(a) permits revision of Board decisions that contain CUE. *See* 35 F.3d 1516, 1517 (Fed. Cir. 1994). The Federal Circuit parsed the regulation finely enough to hold that, although permitting VA to reverse or revise *VBA* [that is, front-line adjudicator] decisions for CUE, it did not permit VA to do the same for *Board* decisions. *See id.* at 1522.

That decision caught Congress' attention, which set to work on codifying CUE protections into statute. The result was 38 U.S.C. § 5109A (relief from VBA decisions with CUE) and 38 U.S.C. § 7111 (relief from Board decisions with CUE). *See* 111 Stat. at 2271–72.

Congress' resistance to this tide of increasingly restrictive decisions did not prevent more from coming. In 1999, the Federal Circuit affirmed the requirement that in order to establish CUE under the relevant regulation, section 3.105(a), a claimant must show that the error made by VA would have resulted in a manifestly changed outcome. *See Bustos v. West*, 179 F.3d 1378, 1380–81 (Fed. Cir. 1999). In 2001, it extended the interpretation of section 3.105(a) to encompass the statute, 38 U.S.C. § 5109A, as well. *See Pierce v.*

Principi, 240 F.3d 1348, 1354 (2001). That set the stage for *Cook*.

B. The Federal Circuit's Decision in *Cook*

In 2002, the Federal Circuit convened en banc to determine whether the panel decision in *Hayre v. West*, 188 F.3d 1327 (Fed. Cir. 1999), should be overruled insofar as that case held that the existence of "grave procedural error" renders a decision of VA non-final. *See Cook*, 318 F.3d at 1335–36. It answered that question in the affirmative. *See id.* at 1341.

The en banc court also asked the parties to brief whether, if *Hayre* fell, "a failure of the Secretary to assist the veteran under the law and regulations applicable at the time . . . can constitute [CUE]." *Id.* at 1336. After overruling *Hayre*, the Federal Circuit turned to that question. *See id.* at 1342.

From the start, this Article III court framed this matter in connection with concepts of adversarial practice, beginning its analysis by characterizing CUE relief as "provid[ing] a means for collateral attack on a final decision." *Id.* at 1342. The Federal Circuit then adopted unblinkingly the framework of *Russell*, *Fugo*, *Bustos*, *Pierce*, and similar cases. *See id.* at 1343.

The Federal Circuit reasoned further that "[t]he legislative history of section 5109A also supports" this framework, on the basis that the House and Senate Reports on the CUE bill cited the same line of court decisions. *See id.* at 1344–45 (discussing H.R. Rep. No.

105–52, at 2–3, and S. Rep. No. 105–157, at 3). Based on all of these considerations, the Federal Circuit adopted the *Russell* test and held that a failure of the Secretary to assist the veteran cannot constitute CUE. *See id.* at 1345–46.

Accordingly, the law of the Federal Circuit restricts section 5109A relief from CUE to the "very specific and rare kind of 'error' . . . that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." *Id.* at 1345. "Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto*, clear and unmistakable." *Id.*

C. Why *Cook*'s Standard for Establishing CUE Is Erroneously Restrictive

Cook's restrictive framework for establishing CUE is antithetical to Congress' intent. It is inconsistent with section 5109A's text, is contrary to the pro-claimant principles with which Congress has imbued the entire statutory scheme, and erroneously incorporates adversarial concepts into this non-adversarial system. In so doing, it forecloses relief to many among this most favored class, veterans, from VA error. None of the requirements that the Federal Circuit engrafted upon section 5109A in *Cook* can be supported.

In *Cook*, as noted, the Federal Circuit erroneously relied upon the adversarial concept of a collateral

attack to a final decision as a key rationale for ratcheting up the requirements for establishing CUE to be so high. Congress has made plain that CUE is different. Congress addresses "finality" in 38 U.S.C. § 7105(c), providing when a VBA decision for which the veteran does not file a timely appeal "shall become final." Once a claim has "become final," it "shall not thereafter be readjudicated or allowed, except" for circumstances that do not touch section 5109A. *See id.*

In section 5109A, by contrast, Congress does not speak in terms of any "final" decision. It instead has subjected a VBA "decision" to "revision" for CUE. *Id.* § 5109A(a). Contrary to the adversarial concept of a "collateral attack on a final decision" that infects *Cook*'s analysis, the plain text of section 5109A does not contemplate a VA decision containing CUE ever to become final at all. *See id.* This is *exactly* the kind of unique, non-adversarial approach that Congress has crafted throughout the statutory scheme benefiting our country's veterans. So long as the veteran lives, no VA decision with CUE becomes final.

The distinction matters. Ridding *Cook* of the adversarial rationale on which it relied leaves no valid basis on which to ratchet up section 5109A's plain-language standard for veterans to establish CUE.

It is true, to be sure, that the CUE bill's committee reports refer to the early line of erroneous court decisions. Even so, it is the plain text of the statute itself that means exactly what Congress intended to say here. In turn, it is section 3.105(a)'s plain regulatory

text, not the additional requirements that *Russell* or any other decision had ascribed to the regulation, that Congress adopted into the text of section 5109A. *Compare* 38 U.S.C. § 5109A(a) *with Russell*, 3 Vet. App. at 312–13 ("Previous determinations on which an action was predicated, including decisions of service connection . . . will be accepted as correct in the absence of clear and unmistakable error. Where evidence establishes such error, the prior decision will be reversed or amended. . . ." (quoting 38 C.F.R. § 3.105(a))). That plain text requires VA to reverse or amend a prior decision where evidence establishes that the prior decision contains CUE. *See* 38 U.S.C. § 5109A(a).

The Federal Circuit's imprecision in *Cook*, and the Veterans Court's imprecision in *Russell*, is perhaps understandable. The legal standard that a veteran must meet to show CUE was not actually at issue in either case. In *Russell*, the most relevant issue at bar was simply whether 38 C.F.R. § 3.105(a) is a valid regulation. *See* 3 Vet. App. at 312. In *Cook*, the issue brought to the court involved a different basis of non-finality. *See* 318 F.3d at 1335–36. The courts' errors in addressing this issue that neither court had to reach should not now bar CUE relief to all but the "very specific and rare."

For all of these reasons, Mr. Blanton asks that, with the Federal Circuit refusing to revisit *Cook*'s *dicta*, the Court grant this petition and overturn *Cook* in favor of the more permissive standard for relief from CUE that Congress intends.

II. GRANTING THE WRIT IS WARRANTED DUE TO THE QUESTION PRESENTED'S RECURRENCE AND IMPORTANCE.

VA makes mistakes. Just as indisputably, it makes mistakes that are obvious. The problem that Mr. Blanton asks this Court to correct is the Federal Circuit's very substantial restrictions on the availability of relief that Congress intends for our veterans from CUE.

Each year, many veterans seek relief from VA decisions that they contend contain CUE. *Cook*'s overly restrictive standard governs every single such proceeding.

Cook's error in imposing such formidable restrictions to accessing section 5109A relief thus presents an important and frequently arising issue. With the Federal Circuit making plain that it will not self-correct on this issue, Mr. Blanton respectfully requests, for all of our country's veterans regarding whose claim(s) VA has committed or will commit CUE, that the Court grant this petition and replace *Cook*'s error with the more permissive standard for establishing CUE that Congress intends.

III. THIS CASE IS AN IDEAL VEHICLE TO CORRECT THE FEDERAL CIRCUIT'S ERRONEOUSLY STRINGENT STANDARD.

This case squarely presents what Congress intends to require for a veteran to establish a right to relief from clear and unmistakable VA error under

section 5109A, and whether the Federal Circuit erred in *Cook* by requiring more.

Indeed, this case presents the legal issue—the legal standard for revision for CUE and whether the principle of finality informs it—as a stand-alone question of law, without any need to address complicating factual considerations. When the Veterans Court created its requirements for establishing CUE, and when the Federal Circuit relied upon the principle of finality to stray from section 5109A's plain text, both courts undermined the unambiguous intent of Congress. With the Federal Circuit now having made plain that it will not be revisiting *Cook*, Mr. Blanton asks that the Court grant this petition and overturn *Cook*'s erroneously restrictive framework for CUE relief under section 5109A.

CONCLUSION

This case presents a deep disconnect between the Federal Circuit's reliance on adversarial concepts to define an important legal standard for a system that Congress plainly intends to be the opposite. Our veterans comprise a unique class of citizens, whom Congress protects uniquely. Congress has never intended VA to be just another federal agency. By design, its beneficent and pro-claimant proceedings stand apart.

There is no role in this unique system for *Cook*'s formidable requirements to change obvious errors. Congress created it to ensure that every veteran and

every family member is awarded the maximum benefit available under law. Mr. Blanton respectfully requests that the Court safeguard that intent by granting the petition for a writ of certiorari and overturning *Cook*'s erroneous restriction of 38 U.S.C. § 5109A's protection of our veterans against clear and unmistakable VA error.

Respectfully submitted,

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