No. 21-234

IN THE

Supreme Court of the United States

KEVIN R. GEORGE,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE DISABLED AMERICAN VETERANS SUPPORTING PETITIONER

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INTEREST OF AMICUS CURIAE[1]

DAV is a federally chartered veterans service organization, founded to serve the interests of the nation's disabled veterans. 36 U.S.C. § 50301 *et seq.* DAV has more than a million members, all of whom are service-connected disabled veterans. Although DAV operates a number of charitable programs that serve the interests of its constituency, its marquee program, and the one for which it is best known, is the National Service Program. Through that program, and from approximately one hundred locations around the United States and Puerto Rico, DAV service officers provide free assistance to veterans with their claims for benefits from the United States Department of Veterans Affairs. In 2021, DAV assisted veterans and their families in filing over 151,000 claims for benefits, and DAV-represented veterans received more than $25 billion in earned benefits.

This case presents a question that is important to the Nation's disabled veterans and their families. VA claimants often seek assistance from DAV representatives in requesting VA revise prior decisions based on clear and unmistakable error. The Federal Circuit's decision in *George v. McDonough*, 991 F.3d 1227 (Fed. Cir. 2021) foreclosed the possibility of revision based on CUE when there is no question VA misinterpreted the plain language of a statute. DAV believes

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

that this decision is based on principles of finality and res judicata that are inapplicable to the VA's non-adversarial adjudication system and ignores Congress's clear intent.

INTRODUCTION AND SUMMARY OF ARGUMENT

VA's system of adjudicating benefits claims is non-adversarial and traditional concepts of finality and res judicata do not apply. But in holding that VA did not commit clear and unmistakable error in applying its erroneous interpretation of the plain language of 38 U.S.C. § 1111 in Mr. George's claim, the Federal Circuit wrongly imposed these traditional concepts. And as applied here, ordinary civil litigation concepts of finality and res judicata conflict with Congress's clear and deliberate choice that veterans benefits claimants have a pathway to correction of VA's clear and unmistakable errors.

Additionally, the Veterans Court's speculation that enforcing Congress's intent that VA correct prior errors that are clear and unmistakable—like a decades-long erroneous interpretation of plain statutory language—would lead to a "deluge" of CUE claims was unfounded. Statistics from the Board of Veterans' Appeals do not reveal any significant decrease in CUE decisions following the Veterans Court's decision in this case, demonstrating that few CUE claims based on VA's misinterpretation of the plain language of a statute. What is more, speculation as to whether the agency may have to reallocate resources is not a valid reason to thwart Congress's clear intent.

Accordingly, DAV supports Mr. George's argument that this Court should reverse the Federal Circuit's holding foreclosing Mr. George's CUE claim.

ARGUMENT

I. The Federal Circuit improperly imposed finality and res judicata principles of ordinary civil litigation on the pro-claimant, paternalistic system of VA claims adjudication.

This Court has long recognized that Congress has "'place[d] a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.'" *Henderson v. Henderson*, 562 U.S. 428, 440 (2011) (quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)). And "[t]he contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Id*.

Ordinary civil litigation is adversarial in nature, but the VA system is not. *Henderson*, 562 U.S. at 440. VA has a statutory duty to assist the claimant in gathering evidence necessary to substantiate the claim, 38 U.S.C. § 5103A, and the benefit of the doubt goes to the claimant when there is an "approximate balance" of evidence, 38 U.S.C. § 5107(b), *Lynch v. McDonough*, 21 F.4th 776, 781 (Fed. Cir. 2021). *See also Henderson*, 562 U.S. at 440-41. And, critically, unlike in most civil litigation, "[d]enial of [VA] benefits has no formal res judicata effect." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). A claimant

may reopen a claim by presenting new and relevant evidence, 38 U.S.C. § 5108(a), and a prior decision may be revised upon a showing of CUE, 38 U.S.C. §§ 5109A, 7111.

But in holding that VA's erroneous interpretation of 38 U.S.C. § 1111 shielded its 1977 decision on Mr. George's claim from collateral attack based on CUE, the Federal Circuit imposed principles of finality that, while inherent in ordinary civil litigation, do not exist in the non-adversarial veterans' law system. It agreed that "*Rivers* [*v. Roadway Exp.*] states that '[a] judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction.'" *George*, 991 F.3d at 1237 (quoting *Rivers*, 511 U.S. 298, 312-13 (1994)). Still, it found that this rule did not apply "to *final* decisions, even those subject to a collateral attack, such as a request to revise a final Board or RO decision for CUE." *Id.* at 1236 (emphasis added).

According to the Federal Circuit, this rule is consistent with this Court's line of cases holding that, "new judicial pronouncements are to be given 'full retroactive effect in all cases *still open on direct review*' but not in final cases already closed." *Id.* at 1236-37 (emphasis in original) (citing *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529 (1991); *Harper v. Virginia Dep't of Taxation*, 509 U.S. 86, 96 (1993); *Reynoldsville Casket v. Hyde*, 514 U.S. 749, 758 (1995)). But these cases all involved ordinary civil litigation. They do not address the effect of a court's interpretation of a statute's plain language on otherwise final decisions when Congress has provided

a mechanism for collateral attack, as it has in veterans' cases. At best, they state that a court's interpretation cannot by itself *create* a cause of action to attack a final decision where one did not previously exist. *See Beam*, 501 U.S. at 541 (holding that once a suit is barred, "a new rule cannot reopen the door already closed."); *see also Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 376 (1940) (holding that a court's decisions based on a later-invalidated statute "may not be assailed collaterally").

Mr. George does not argue that the Federal Circuit's announcement of the correct interpretation of a law creates a path to attack an otherwise final decision of the Secretary. Rather, Congress has provided a specific statutory mechanism for curing instances where the Secretary has incorrectly applied or interpreted the law: the collateral attack mechanism provided by clear and unmistakable error challenges. *See* 38 U.S.C. §§ 5109A(a); 7111(a); *see also Cook v. Principi*, 318 F.3d 1334, 1342 (Fed. Cir. 2002) (discussing Congress's codification of CUE as a "means for collateral attack on a final [VA] decision.")

"[W]hen the Court has applied a rule of law to the litigants in one case it must do so with respect to all others not barred by procedural requirements or res judicata." *Beam*, 501 U.S. at 344. The CUE statues eliminate res judicata as a bar in the VA system. *See* 38 U.S.C. §§ 5109A, 7111(a). And far from creating a procedural requirement barring the application of a rule of law, the CUE statutes *promote* retroactivity of a rulings like *Wagner v. Principi*, 370 F.3d 1089, 1096 (Fed. Cir. 2004).

In *Wagner*, the Federal Circuit held that VA misinterpreted the plain language of 38 U.S.C. § 1111 for *decades*, and largely during a time when judicial review was unavailable. *See Requirements for Rebutting the Presumption of Sound Condition Under 38 U.S.C. § 1111*, VAOGCPREC 3-2003, 2003 WL 25767459 (July 16, 2003) (noting that the legally erroneous regulation existed since 1961); *Brown v. Gardner*, 513 U.S. 115, 122 (1994) ("Congress established no judicial review for VA decisions until 1988, only then removing VA from . . . splendid isolation.") (internal quotations removed). In holding that "*Wagner* cannot serve as the basis for [Mr. George's] CUE claims," *George*, 991 F.3d at 1237, the Federal Circuit wrongly imposed ordinary civil litigation principles of finality and res judicata instead of Congress's deliberate and clear choice to provide claimants with a mechanism for collaterally attacking decisions based on CUE.

VA decisions are never truly final. VA statutes explicitly allow a claimant to bring a collateral challenge to an otherwise final decision "at any time after that decision is made." 38 U.S.C. §§ 5109A(a); 7111(a); *see also Cook*, 318 F.3d at 1342. Indeed, in enacting 38 U.S.C. § 5109A, the House recognized that there is "no true finality of a decision since the veteran can reopen a claim at any time." H.R. Rep. No. 105-52, at 2 (1997). More recently, when implementing the Appeals Modernization Act, VA recognized that the Act's provisions could "operate to prevent finality" because veterans could continually file supplemental claims after receiving adverse decisions. *See* VA Claims and Appeals Modernization, 84

Fed. Reg. 138, 161 (Jan. 18, 2019) (codified at 38 C.F.R. pts. 3, 8, 14, 19, 20, and 21).

What is more, Congress's intent in enacting 38 U.S.C. § 5109A was to "ensure that the system errs on behalf of a deserving veteran rather than the Federal Government." 143 Cong. Rec. S12487, S12488 (1997) (statement of Sen. Murray). In support of that legislation, Senator Murray argued that to "deny a veteran a legally entitled benefit due to bureaucratic error or other mistake is beyond comprehension." *Id.* at S12487. She urged Congress and the President to "make available every opportunity to right a wrong on behalf of a veteran." *Id.* at S12488.

The Federal Circuit's holding that VA's legally erroneous regulation shields the agency from having to go back and correct its error is antithetical to this stated intent. *See George*, 991 F.3d at 1235. The Federal Circuit's holding rested in part on the version of 38 C.F.R. § 3.105 that was effective when Congress codified it. *Id.* at 1237-38. The Court seized on language in the regulatory preamble that CUE could not exist where there was "a change in law" or a "change in interpretation of law." *Id.* at 1237 (quoting 38 C.F.R. § 3.105 (1997)). But, as this Court has held and the Federal Circuit agreed, "A judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction." *Rivers*, 511 U.S. at 312-13; *see also George*, 991 F.3d at 1237. It does not represent a change in law or an interpretation of a law. The regulatory preamble the Federal Circuit relied on, then, is not evidence that Congress intended to preclude CUE in circumstances where, as

here, VA failed for decades to "give effect to the unambiguously expressed intent of Congress." *Chevron v. Nat'l Res. Def. Council*, 467 U.S. 837, 842-43 (1984).

II. Enforcing Congress's intent allowing claimants a pathway to correct a prior administrative decision that violates the plain language of a statute will not result in a deluge of CUE appeals.

Like the Federal Circuit, the Veterans Court believed that principles of finality and res judicata foreclosed Mr. George's CUE claim. *See George v. Wilkie*, 30 Vet.App. 364, 373 (2019). But the Veterans Court also raised concerns that "[t]he impact of allowing judicial decisions interpreting statutory provisions issued after final VA decisions to support allegations of CUE would cause a tremendous hardship on an already overburdened VA system of administering veterans benefits." *Id.* at 376. According to the Veterans Court, this would lead to a "deluge of CUE motions" that would "require VA to divert its resources "from processing claims and hearing appeals to evaluating allegations of CUE based on new statutory interpretations." *Id.*

The Veterans Court's concerns mirror those advanced by the Board at the time that the CUE statutes were enacted. See H.R. Rep 105-52, at 4. But the Congressional Budget Office determined that the legislation would "not require additional resources for the VA or take needed resources from other VA programs or benefits." 143 Cong. Rec. at S12488 (statement of Sen. Murray).

The scope of CUE claims at issue here is considerably smaller than those that were debated by Congress; claims such as Mr. George's involve applying the judicial interpretation of plain statutory language to claims previously denied based on VA's obviously erroneous interpretation of that statute. If allowing for any CUE claims in the first instance would not negatively affect VA's resources, allowing them to continue in this narrow context will not either. *But see George*, 30 Vet.App. at 375-76.

Indeed, the number of CUE claims that come before the Board of Veterans' Appeals at all is small. In Fiscal Years 2017 and 2018—before the Veterans Court's *George* decision—the Board decided 137,949 appeals. *See* Department of Veterans Affairs (VA) Board of Veterans' Appeals Annual Report Fiscal year (FY) 2017, at 30; Department of Veterans Affairs (VA) Board of Veterans' Appeals Annual Report Fiscal year (FY) 2018, at 32.[2] Yet a search of decisions for the term "clear and unmistakable error" dated in 2017 and 2018 reveals only 4,686 decisions.[3] Thus, even before the Veterans Court foreclosed CUE claims based on VA's failure to enforce the plain language of statute, fewer than four percent of the total appeals

[2] Available at https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/BVA2021AR.pdf (last accessed Feb. 15, 2022).

[3] *See* https://search.usa.gov/search/docs?affiliate=bvadecisions&sort_by=&dc=9161&query=%22clear+and+unmistakable+error%22 (last accessed Feb. 15, 2022).

decided—both *George*-type arguments and all others—involved CUE.[4]

That number has remained virtually unchanged. In Fiscal Year 2021, the Board of Veterans' Appeals decided 99,271 appeals. Department of Veterans Affairs (VA) Board of Veterans' Appeals Annual Report Fiscal year (FY) 2021, at 38. And a search of decisions for the term "clear and unmistakable error" dated in 2021 yields 3,039 results, or a little over three percent. That there was not a significant decrease in CUE Board decisions following the Veterans Court's *George* decision proves that its concern about a "deluge of CUE motions" was unfounded. 30 Vet.App. at 376.

Moreover, speculation that VA may have to redirect resources is not a sufficient reason to "deny a veteran a legally entitled benefit due to a bureaucratic error or other mistake." 143 Cong. Rec. at S12487. Allowing the agency's egregious and systemic mistakes—like the decades-long erroneous interpretation of a statute that was clear on its face that is at issue here—to evade Congressionally-mandated correction is not a sound or just solution to solving the claims

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[4] Prior to its decision in *George*, the Veterans Court routinely remanded Board decisions for incorrectly applying the aggravation prong of 38 U.S.C. § 1111 in VA decisions that predated *Wagner*. *See e.g.*, *Vacaneri v. Shulkin*, Vet.App. No. 16-1161, 2017 WL 4387284 (Sept. 29, 2017); *Thompson v. Shinseki*, Vet.App. No. 10-4009, 2012 WL 3091072 (July 31, 2012); *Lerman v. Shinseki*, Vet.App. No. 08-2097, 2010 WL 4236511 (Oct. 26, 2010); *Rainey v. Shinseki*, Vet.App. No. 07-3835, 2010 WL 2102004 (May 26, 2010); *Rose v. Nicholson*, Vet.App. No. 05-271, 2007 WL 2849113 (Aug. 27, 2007).

backlog. *But see George*, 30 Vet.App. at 375-76. "The government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett v. Nicholson,* 466 F.3d 1038, 1044 (Fed. Cir. 2006).

CONCLUSION

The VA claims adjudication system is unique in that formal principles of res judicata and finality are inapplicable. Congress's creation of a statutory mechanism for revision of prior decisions based on CUE is proof of this. The Federal Circuit ignored this basic tenet of VA's adjudication system when it held that a prior VA denial of benefits based on VA's erroneous interpretation of plain statutory language cannot constitute CUE. This holding runs counter to the pro-claimant, paternalistic nature of VA's system. And requiring VA to enforce Congress's will would not unduly burden the system. This Court, then, should reverse the Federal Circuit.

Respectfully submitted,

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