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 *AMICI CURIAE* SWORDS TO PLOWSHARES AND VIETNAM VETERANS OF AMERICA IN SUPPORT OF PETITIONER

AMY ROSE
Counsel of Record
TYRONE COLLIER
MAUREEN SIEDOR
SWORDS TO PLOWSHARES
1060 Howard Street
San Francisco, CA 94103
(415) 252-4788
amy.rose@stp-sf.org

Counsel for Amici Curiae

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STATEMENT OF IDENTITY, INTEREST, AND AUTHORITY OF *AMICI CURIAE*

Swords to Plowshares

In 1974, Swords to Plowshares ("Swords") was founded in San Francisco by six returning Vietnam veterans concerned with the unmet needs of their peers by the community, veteran service organizations (VSOs), and the Department of Veterans Affairs (VA).[1] Many returned home from this divisive war to a society that had difficulty disentangling their negative feelings about the United States' involvement in Vietnam from the warriors fighting on its behalf. Swords' doors opened to them, providing employment and educational training, discharge upgrade assistance, and working with those who were incarcerated. By 1978, Swords became the first organization in 32 years to be certified by the VA to represent veterans seeking benefits. Within a year, Swords won one of the first service-connection claims for "post-Vietnam Syndrome," the condition that would later be recognized as Post-Traumatic Stress Disorder (PTSD).

Today, Swords continues the mission it set out in 1974—to heal the wounds of war, restore dignity, hope, and self-sufficiency to all veterans in need, and prevent and end homelessness and poverty among veterans. As a community-based non-profit organization, today Swords provides housing, case management, employment and training, and legal assistance to thousands of veterans annually in the San Francisco

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[1] Pursuant to S. Ct. Rule 37.6, Swords certifies that no counsel for a party authored this brief in whole or in part and no person or entity other than amici, its members, or counsel made a monetary contribution to its preparation or submission. Counsel for all parties have consented to the filing of this brief.

Bay Area. Swords also promotes and protects the rights of veterans through policy advocacy, public education, and partnerships with local, state, and national entities. Although most of their clients today are post-9/11 veterans, about 20% of Swords' clients served during the Vietnam War. The Legal Services Unit within Swords targets its services to homeless and other low-income veterans seeking assistance with VA disability benefits and discharge upgrades. Swords regularly represents clients with VA claims that were previously denied years (and sometimes decades) ago, hoping to have them successfully re-adjudicated today. Thus, Swords has a strong interest in the matter before the Court in this case.

Vietnam Veterans of America

Vietnam Veterans of America (VVA) is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. As the Vietnam war came to an end and years passed, it became clear established veterans service organizations had failed to make a priority of the issues of concern for Vietnam veterans. In response, in January 1978, VVA began its journey to put Vietnam veteran issues at the forefront. In 1983, VVA took a significant step by founding Vietnam Veterans of America Legal Services (VVALS) to assist veterans seeking benefits and services from the government. By working under the theory that a veteran's representative should be an advocate rather than simply a facilitator, VVALS established itself as a highly competent and aggressive legal assistance program available to veterans. VVA also played a leading role in advocating for the creation of judicial review, championing the rights of veterans to challenge VA benefits decisions in court. In the 1990s,

VVALS evolved into the current VVA Service Representative program that continues to represent and advocate for veterans today.

VVA offers a unique and important perspective on issues faced by Vietnam veterans, specifically regarding the importance of judicial oversight of VA decisions and the ability of Vietnam veterans to remedy past wrongs through the "Clear and Unmistakable Error" rule. This rule has allowed countless Vietnam era veterans to correct VA errors that were made on their benefits cases long before a system of VA oversight existed, and to finally receive the benefits to which they were entitled. Therefore, VVA has a strong interest in this case before the Court, as the correct application of the Clear and Unmistakable Error rule is critical to many Vietnam veterans who are seeking to correct legal errors made by the VA in processing their benefits claims.

SUMMARY OF ARGUMENT

Transitioning out of the military can be a challenging time for any veteran. For Vietnam veterans this difficult time was made worse by significant barriers not encountered by other war veterans. Vietnam veterans faced a lack of social support, rejection from the veteran community, and, for many, debilitating mental health symptoms from their combat experience. Worse, many Vietnam veterans were forced into military service by a draft that disproportionately conscripted lower and middle-class men who were relatively undereducated. When these veterans sought help from the VA's benefits system, many had to navigate the complex process without assistance, and when they were denied benefits, they had almost no judicial recourse. Additionally, at this point in history,

the only lawyers involved in benefits claims were those working for the VA, not for the veterans.

All of these disadvantages together make the "Clear and Unmistakable Error" (CUE) rule indispensable to Vietnam veterans in securing their entitlement to benefits. Here, the VA is attempting to circumvent this vital CUE rule. Mr. George's CUE claim is based on the VA's application of its unlawful regulation regarding the presumption of soundness in service-connection claims. The regulation applied in Mr. George's claim adjudication was always erroneous as it violated Congress's unambiguous statutory mandate. Now that the VA has amended this flawed regulation, it is attempting to hide behind an exception to the application of CUE when there has been a "change in *interpretation* of law." 38 C.F.R. § 3.105 (emphasis added). However, it is impossible to interpret the underlying statute to mean what the VA regulation stated. The VA corrected a regulatory drafting error; it never changed its interpretation of the statute.

The VA's application of the law in this case raises significant separation of powers concerns. The VA fundamentally altering (and easing) its obligations in 38 C.F.R. § 3.304(b) (1977) to rebut the presumption of soundness without congressional authorization is tantamount to creating its own law. The VA's determination to misclassify its mistake as a "change in interpretation" to exempt itself from responsibility under CUE interferes with the congressional mandate to provide a collateral attack mechanism for veterans.

If the Federal Circuit decision stands it will lead to absurd results: a valid, unambiguous statute will have had no effect for decades and the VA will be allowed to ignore a second statutory mandate that requires it to provide veterans redress for VA errors. While we

respect the VA's authority to carve out exceptions from the CUE rule, we respectfully disagree that the exception applies in this case.

ARGUMENT

I. VIETNAM VETERANS FACED SIGNIFICANT ECONOMIC AND SOCIAL BARRIERS, AND A VA SYSTEM PLAGUED WITH DIFFICULTIES.

Vietnam veterans returned to a country disinclined to provide them with support. What followed was decades of societal neglect. "[S]ociety as a whole was certainly unable and unwilling to receive [Vietnam veterans] with the support and understanding they needed." Christian G. Appy, *Working Class War: American Combat Soldiers & Vietnam* 306 (1993). Veterans returning from Vietnam "faced an often muted or hostile reception, and the figure of the troubled Vietnam veteran became a cultural trope that symbolized the toll that participation and defeat in that war had wrought on American society." David Fitzgerald, *Coming Home: Soldier Homecomings and the All-Volunteer Force in American Society and Culture*, *in Not Even Past: How the United States Ends Wars* 230, 231 (David Fitzgerald, David Ryan & John M. Thompson, eds., 2020). While veterans of previous wars came home to parades and celebrations of their service, Vietnam veterans had no fanfare and were not recognized for their sacrifices. *Id.* "Descriptions of disoriented soldiers arriving home and feeling alienated from broader US society, particularly the antiwar movement—are common in both oral histories and memoirs of the war." *Id.*

These individuals were unpopular veterans of an unpopular war. In addition to the lack of societal

acceptance, many Vietnam veterans were dealing with combat related mental health issues and struggled with homelessness. Jonathan Shay, *Achilles in Vietnam: Combat Trauma and the Undoing of Character* 178-9 (1994).

Inherent disadvantages for many Vietnam veterans made matters worse. Project 100,000, implemented by the Department of Defense in 1966, lowered the requirements for military enlistment "in an effort to recruit from the inner cities and poor rural areas 100,000 men per year who otherwise would have been ineligible for military service." Robert N. Strassfeld, *Article: Robert McNamara and the Art and Law of Confession: "A Simple Desultory Philippic (or How I Was Robert McNamara'd into Submission),"* 47 Duke L.J. 491, 540-54 (1997). This led to fewer enlistees with high school diplomas and generally lower reading ability. Assistant Sec'y of Def. (Manpower & Rsrv. Aff.), Off. of the Sec'y of Def., *Project One Hundred Thousand: Characteristics and Performance of 'New Standards' Men* 10, 13 (1969).[2] As Colin Powell, a career Army officer with two tours in Vietnam who later became the Chairman of the Joint Chiefs of Staff, wrote: "Of the many tragedies of Vietnam, this raw class discrimination strikes me as the most damaging to the ideal that all Americans are created equal and owe equal allegiance to their country." Colin Powell, *My American Journey* 148 (1995).

Because Vietnam veterans were economically and educationally disadvantaged, many were in profound need of support in pressing their claims for service-connected compensation—a benefit that exists to replace lost wages due to disabilities sustained from

[2] https://apps.dtic.mil/sti/pdfs/AD0784582.pdf.

military service. *See* 38 C.F.R. § 4.1 (establishing that disability compensation amounts are based on impairment in earning capacity and loss of working time). Yet, opportunities to obtain support were few, due in no small part to veteran service organization (VSO) neglect. In addition, at this point in history the VA benefit system did not yet have the crucial benefit of attorney advocacy or judicial review. Consequently, this generation of veterans was at a significant disadvantage in navigating this complex benefits system, and without much recourse when the VA failed to properly adjudicate their claims.

A. After the war, Vietnam veterans lacked support from traditional VSOs that provided essential benefits assistance to other veterans, and attorney advocacy was not yet available.

VSOs are the most common type of lay advocate authorized by the VA to represent veterans in the claims process. Barton F. Stichman, Ronald B. Abrams, Richard V. Spataro & Stacy A. Tromble, *Veterans Benefits Manual* 1618 (2021). They employ representatives, who are accredited by the VA, to help veterans navigate the complex claims process and prepare the paperwork and evidence needed to support their applications for VA benefits at no cost to the claimant. *Id.* According to Vietnam Veterans of America, "[b]y the late 1970s, it was clear the established veterans' groups had failed to make the issues of concern to Vietnam veterans a priority. Without these groups' essential advocacy, a vacuum existed within the nation's legislative and public

agenda."[3] "Traditional [VSOs]—the [Veterans of Foreign Wars] and American Legion—were dominated in the 1960s and 1970s by World War II veterans and gave scant attention to the needs of returning Vietnam veterans." Appy, *supra*, at 315. "Many veterans returned from Vietnam and found themselves outcast and humiliated in American Legion and Veterans of Foreign Wars posts where they had assumed that they would be welcomed, supported, and understood." Shay, *supra*, at 7.

One major casualty of VSOs' neglect was support for Vietnam veterans seeking monetary disability benefits from the VA. VSOs played "an indispensable role" in the administration of veterans' claims cases. Robert L. Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits: A Preliminary Analysis*, 27 Stan. L. Rev. 905, 914 (1975). Unlike the options available to veterans today, during the Vietnam era "[t]he disability claimant either represent[ed] himself or [sought] assistance from a service representative." *Id.* at 915. Due to societal neglect and the lack of support from VSOs, many Vietnam veterans were left to navigate the complicated claims process on their own.

In addition to a lack of support from VSOs, Vietnam veterans also lacked support from lawyers. Attorneys' fees for VA benefits claims were statutorily capped at just $10 starting in 1864, and this cap remained unchanged until 1988. Stichman et al., *supra*, at 1771-72. As U.S. Supreme Court Associate Justice John Paul Stevens noted in a 1985 dissent, this fee cap "effectively denies today's veteran access to all lawyers

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[3] Vietnam Veterans of America, *History*, https://vva.org/who-we-are/history.

who charge reasonable fees for their services." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 362 (1985) (Stevens, J., dissenting). The effect of excluding attorney advocacy insulated decision making by the VA and thus created a higher risk of error.

B. The veterans' benefits system was becoming increasingly complex.

Making matters more difficult for Vietnam era veterans was the increasing complexity of the veterans' benefits system. In 1956, the President's Commission on Veterans' Pensions noted "the extremely numerous and complex veterans' laws and regulations." The President's Commission on Veterans' Pensions, *Veterans' Benefits in the United States* 230 (1956). Even in the Court's own estimation, the administration and adjudication of veterans' benefits in the Vietnam era was "technical and complex." *Johnson v. Robison*, 415 U.S. 361, 370 (1974). It was these extremely numerous, technical, and complex veterans' laws and regulations that Vietnam veterans had to confront on their own.

Economic and educational disadvantages and lack of assistance from VSOs and lawyers left Vietnam veterans on their own to work through a veterans' benefits system that was increasingly complicated, which in turn likely contributed to VA errors.

C. When many Vietnam veterans initially applied for VA benefits, there was a lack of judicial review of VA benefits decisions, leaving many without legal recourse to correct VA error.

Making matters worse was the lack of availability of judicial review. Until the Veterans Judicial Review

Act of 1988, judicial review for veterans' benefits claims was largely unavailable to veterans. Amid the emergencies of the Depression, Congress passed the Economy Act of 1933, which first established that VA decisions were to be "final and conclusive" and not subject to judicial review. Act of Mar. 20, 1933, Pub. L. No. 73-2, tit. I, § 5, 48 Stat. 8, 9. (It was also in 1933 that President Franklin Delano Roosevelt established the Board of Veterans Appeals, set up to make final decisions on veterans' benefits claims. Exec. Order No. 6230 (Jul. 28, 1933).) In the words of this Court, the "no-review clause" remained "substantially unaltered" into the Vietnam era. *Johnson*, 415 U.S. at 368 n.9. Thus, it became appropriate for a law scholar to observe, in 1975, that "[t]he Veterans Administration stands in splendid isolation as the single federal administrative agency whose major functions are explicitly insulated from judicial review." Rabin, *supra*, at 905.

Together with other barriers, the lack of judicial review of veterans' benefits claims most profoundly impacted veterans of the Vietnam era. For those whose benefits claims VA erroneously denied in decisions that reached finality, revision based on CUE was the only available remedy.

II. VA'S DETERMINATION TO EXEMPT ITS MISTAKE FROM CUE ABROGATES THE PURPOSE OF CUE IN VIOLATION OF THE SEPARATION OF POWERS.

Despite this importance of CUE to veterans, especially Vietnam era veterans, the VA now endeavors to deny veterans their rights under these statutes. Congress mandated veterans have access to a mechanism to collaterally attack "clear and unmistakable" errors in veterans claims decisions. These CUE

statutes require the VA to reverse or revise an otherwise final decision when the VA Regional Office or the Board of Veterans Appeals makes a "clear and unmistakable error" in deciding a veteran's claim. 38 U.S.C. § 5109A; 38 U.S.C § 7111.

Here, the VA committed a "clear and unmistakable" error when it created a regulation that was directly contrary to statute and then proceeded to decide an untold number of veterans' claims under the erroneous regulation. There is no dispute that 38 C.F.R. § 3.304(b) (1977) ignored the mandates of the statute it purported to implement. Both the court in *Wagner v. Principi* and the VA Office of General Counsel agreed that 38 U.S.C. § 1111 is unequivocal in its mandates and requires clear and unmistakable evidence of a preexisting disability *and* lack of aggravation during service to rebut the presumption of soundness. 370 F.3d 1089, 1092-93 (Fed. Cir. 2004); VA Gen. Counsel Prec. 3-2003, at 2, 5 (July 16, 2003) (2003) OGC opinion), https://www.va.gov/ogc/opinions/2003precedentopinions.asp. Both agreed that, despite this clear language, the VA's implementing regulation, 38 C.F.R. § 3.304(b) (1977), did not include the crucial requirement that the VA prove by clear and unmistakable evidence that a pre-existing disability was *not* aggravated by service.

However, notwithstanding this consensus that the 1977 regulation did not comport with section 1111, the VA is attempting to evade its responsibility to veterans for this error by now claiming it is exempt from CUE.

A. The VA rectifying its previously erroneous regulation was not a change in interpretation of the underlying statute.

The VA argues that its legally erroneous regulation was simply a change in interpretation. BIO 12-14. And, as such, Mr. George and other veterans like him have no recourse to amend their final decisions. Although the CUE statute does exempt "a change in interpretation of law" from CUE claims, that exception is simply not applicable here for several reasons. 38 C.F.R. § 3.105.

First, the VA did not engage in any actual interpretation of section 1111 when it implemented the statute because the plain statutory language needed no interpretation. The *Wagner* court recognized that the statute was so clear the VA had no choice but to implement it as written. *Wagner*, 370 F.3d at 1093 (finding that section 1111 is "clear on its face," and as such the court need not resort to *Chevron* deference); *see Brown v. Gardner*, 513 U.S. 115, 122 (1994)("[T]he fact [that the VA regulation at issue] flies against the plain language of the statutory text exempts courts from any obligation to defer to it.")(abrogated in part by statute); *see also Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837, 842-3 (1984) ("When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether 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 statute should have been implemented by the VA as it

was written by Congress, given that the mandate was unambiguous and there was nothing within it to interpret. Yet, the VA did not implement the statute as written, and is now mischaracterizing its error as a "change in interpretation" of section 1111.

The VA claims that CUE is not available to Mr. George because "a change from an impermissible or incorrect interpretation to a permissible or correct one is still a *change*." BIO 16-17. This argument is not persuasive. The crux of whether CUE is available here is not whether there has been a *change* but rather whether there has been an *interpretation*. Section 1111 required the VA to engage in a two-step analysis to overcome the presumption of soundness. The VA's implementing regulation only required one. It is absurd for the VA to claim that its failure to follow the clear and express mandates of a statute is an "interpretation." There is no room to "interpret" the unambiguous two-factor requirement in section 1111 to require only one factor.

Importantly, 38 C.F.R. § 3.304(b) (1977) was invalidated not because the VA changed its interpretation of the statute but rather, because the VA's implementing regulation was directly contrary to the plain language of the statute—it omitted an entire element that materially changed the outcome for potentially thousands of disabled veterans. This change in regulation corrected a clear legal error the VA committed in promulgating an unlawful regulation.

Second, the history of 38 C.F.R. § 3.304(b) (1977) strongly implies that the error present in the regulation was simply a drafting error, and not an erroneous interpretation. As the Veterans Court explained in *Cotant v. Principi*, "[t]he implementing regulation for the forerunner of section 1111 . . . specifically

included the 'not aggravated' clause," consistent with the statute. 17 Vet. App. 116, 127 (2003). That regulation read:

> [E]very person employed in active service shall be taken to have been in sound condition when examined, accepted and enrolled for service except as to defects, infirmities or disorders noted at the time of the examination or where clear and unmistakable evidence demonstrates that the injury or disease existed prior to acceptance and enrollment *and was not aggravated by such service*.

Id. at 127-28 (emphasis added).

Thus, the initial regulation implementing the presumption of soundness statute correctly followed the statute's mandates. However, in February 1961 "VA promulgated a mammoth recodification of title 38 of the C.F.R. Inexplicably, the language 'and was not aggravated by service' disappeared from the then-new § 3.304." *Id.* at 128. There is no explanation for this omission in the Federal Register. However, the Veterans Court noted that a VA document described the new § 3.304(b) as a "Restatement of VA Regulation 1063 (B)." *Id.* This regulatory history indicates that the VA's omission of the "not aggravated" element was not intentional, but a mistake. The VA should not be allowed to refuse benefits to veterans—that Congress intended for them to receive—because of a regulatory drafting error.

Both the plain language of section 1111 and the history of 38 C.F.R. § 3.304(b) demonstrate that the VA cannot plausibly argue that it changed its "interpretation" of section 1111, because this is not an instance of interpretation. Instead, the Court must

conclude that the VA either ignored the plain language of the statute, or simply made an error in its implementing regulation. Whether it is either, or both, veterans affected by the erroneous regulation must be able to seek recourse through CUE.

B. The VA's invalid regulation presents a separation of powers issue, as it was tantamount to creating law.

These multiple mistakes by the VA raise significant separation of powers concerns. First, the VA's erroneous regulation is tantamount to writing law itself; and second, the VA's determination to shoehorn its mistake into a CUE exemption interferes with the congressional mandate to provide a collateral attack mechanism for veterans and ultimately leads to unjust results for veterans.

On its most basic level

> the doctrine of separation of powers is concerned with the allocation of official power among the three co-equal branches of our Government. The Framers "built into the tripartite Federal Government . . . a self-executing safeguard against the encroachment or aggrandizement of one branch at the expense of the other."

Clinton v. Jones, 520 U.S. 681, 699 (1997) (quoting *Buckley v. Valeo*, 424 U.S. 1, 122 (1976) (per curiam) (superseded by statute on other grounds)). The underlying purpose of the separation of powers doctrine is to prevent the concentration of executive, legislative, and judicial power within a single branch of government. *See, e.g.*, The Federalist No. 47, at 326 (James Madison) (Jacob Cooke ed., 1982).

To be sure, "[t]he Constitution does not establish three branches with precisely defined boundaries." *INS v. Chadha*, 462 U.S. 919, 962 (1983). And although the Constitution diffuses power between the three branches, "it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring).

In analyzing the separation of powers between the legislative branch and executive agency rulemaking authority "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp*., 488 U.S. 204, 208 (1988). Agency actions "must always be grounded in a valid grant of authority from Congress." *FDA v. Brown & Williamson Tobacco Corp*., 529 U.S. 120, 161 (2000). An administrative agency "literally has no power to act . . . unless and until Congress confers power upon it." *Louisiana Pub. Serv. Comm'n v. FCC*, 476 U.S. 355, 374 (1986).

The separation of powers doctrine may be violated when one branch assumes power constitutionally allocated to another branch. *INS*, 462 U.S. at 963 (Powell, J., concurring); *see also Buckley*, 424 U.S. at 121-24 (discussing the purpose of the separation of powers and how the Court has enforced the division). The VA's promulgation of 38 C.F.R.§ 3.304(b) (1977) violated the separation of powers doctrine because it fundamentally altered (and eased) its obligations to rebut the presumption of soundness without congressional authorization—an act tantamount to creating its own law. Section 1111 "is clear on its face,"

such that the VA is "forbidden" from "reach[ing] a different result." *Wagner*, 370 F.3d at 1092-93. Yet, the VA did exactly that. The VA created a regulation that ignored the express mandate of Congress. And it did so to the detriment of disabled veterans.

Moreover, the VA's determination to fit its mistake into a CUE exemption interferes with the congressional mandate to provide a collateral attack mechanism for veterans in exactly these types of circumstances. To be sure, the CUE regulations and the regulatory exemptions themselves are not problematic nor at issue here—rather the issue is the VA's attempt to abuse its interpretative authority to evade responsibility for its egregious regulatory mistake.

C. Refusing veterans access to CUE violates the separation of powers by ignoring congressional mandate and allowing VA to avoid a statutory requirement without consequence.

If CUE is not available to veterans in this circumstance then the following absurd scenario will have occurred: The VA created a regulation that is directly contrary to statute and disadvantages veterans; the VA enforced the erroneous statute for decades without incident (in part because of the lack of judicial review available to veterans); the egregious mistake is corrected only after litigation is initiated in federal court; the VA amends the erroneous regulation but the veterans whose claims were denied for decades because of the erroneous regulation are given no recourse. This nonsensical outcome occurs despite the clear mandate from Congress that these veterans should have an avenue for redress when the VA commits exactly these types of errors.

This Court must not allow the VA to evade responsibility for its error. If CUE is not allowed in this circumstance, the VA will be able to repeat a pattern of writing and then enforcing their own rules in contravention of statute without consequence—as long as it claims an eventual fix is a new "interpretation." This violates the fundamental tenets of the Constitution's separation of powers because it makes Congress's intent to provide an avenue for collateral attack meaningless for veterans like Mr. George. The Federal Circuit decision encourages the VA to "interpret" laws by passing implementing regulations that are inconsistent with statute.

The controlling statute must have meaning in the adjudication of a veteran's claim. To uphold the Federal Circuit's decision here will gut section 1111 of any authority, supplanting that authority with an invalid regulation. The Court should not allow the VA to evade Congress's mandate twice—first by creating law outside of its constitutional authority, and then again by misusing the CUE statute to hide its first mistake.

It is also important to note this factual situation is extremely rare. Allowing a CUE claim to proceed in this instance will not open the floodgates. As the dissenting opinion at the Veterans Court identified, "the circumstances of *Wagner* and this case are relatively narrow—both cases involve application of a plain language judicial interpretation of a statute to a claim that was denied on the basis of a VA regulation that clearly conflicted with that statute." *George v. Wilkie*, 30 Vet. App. 364, 380 (2019). The VA argues that siding with Petitioner would change CUE from "a rare kind of error" to a "garden-variety error". BIO 15. The VA is correct here only if it continues to enact

regulations that are directly contrary to unambiguous statutory language.

The Federal Circuit decision allows the VA to effectively amend clear statutory requirements without consequence. This result cannot stand. The only remedy available to Mr. George and similarly situated veterans is to collaterally attack the decisions that were made under the invalidated regulation. This overreach of regulatory authority must find a remedy through the application of CUE.

III. CUE RULES PROVIDE VETERANS WITH THE ABILITY TO CORRECT THE VA'S LEGAL ERRORS, A TOOL ESPECIALLY NEEDED BY VIETNAM VETERANS.

In passing the CUE statute, Congress sought to establish CUE review within the VA and at the Veterans Court as a "statutory right." *Veterans' Benefits Act of 1994*, 140 Cong. Rec. H. 7088, 7088 (Aug. 8, 1994). Failure to allow CUE claims in this situation is especially egregious because, as discussed above, veterans lacked proper advocacy and any judicial review of their claims for decades. The only attorneys involved were those working for the VA—not for veteran claimants. Courts had no oversight of these kinds of legal errors. "Many VA regulations have aged nicely simply because Congress took so long to provide for judicial review," leaving the VA regulations to an "unscrutinized and unscrutinizable existence." *Brown v. Gardner*, 513 U.S. 115, 122 (1994) (abrogated in part by statute).

This is especially true for the veterans who returned from Vietnam, many of whom were turned away from even basic claims assistance from VSOs and had no ability to hire an attorney to help them through this

process. When Congress created judicial oversight of the VA benefits system, it mandated that veterans have a very important tool—the CUE claim. It is essential to ensuring these veterans are given the benefits they have earned and deserve.

Take for example the Federal Circuit's *George v. McDonough* companion case of Michael Martin. 991 F.3d 1227 (Fed. Cir. 2021). Mr. Martin served in the U.S. Army from August 1965 to February 1966 and June 1968 to August 1969, with further service in the Kentucky National Guard. *Martin v. Wilkie*, No. 18-0124, 2019 U.S. App. Vet. Claims LEXIS 1357, *1 (U.S. App. Vet. Cl., Jul. 31, 2019). Immediately after discharge, Mr. Martin sought service-connection for asthma but, in 1970, was denied. *Id*. at *2. VA found his respiratory condition predated service. *Id*. at *2-3. However, per VA's erroneous regulation—but against the applicable statute—VA did not correctly determine whether his service in fact aggravated his condition. In 2013, Mr. Martin requested revision of the 1970 decision based on CUE. *Id*. at *3. Just as in Mr. George's case, the Board, the Veterans Court, and the Federal Circuit all decided against him. However, unlike Mr. George, he gave up. Mr. Martin exemplifies the Vietnam era veterans whose lives could change with the outcome of this case.

CONCLUSION

The judgment of the Federal Circuit should be reversed.

Respectfully submitted,

AMY ROSE
Counsel of Record
TYRONE COLLIER
MAUREEN SIEDOR
SWORDS TO PLOWSHARES
1060 Howard Street
San Francisco, CA 94103
(415) 252-4788
amy.rose@stp-sf.org

Counsel for Amici Curiae

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