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

REPLY BRIEF FOR PETITIONER

Kenneth M. Carpenter
John Niles
CARPENTER CHARTERED
1525 SW Topeka Blvd., Suite D
Topeka, KS 66601

Edmund Hirschfeld
Melanie R. Hallums
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Benjamin P. Chagnon
Robbie Manhas
Jonas Q. Wang
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Rules and Regulations

Other Authorities

INTRODUCTION

When Marine Corps veteran Kevin George applied for disability benefits in 1975, the law entitled him to a presumption of soundness unless VA produced clear and unmistakable evidence that his condition "existed before acceptance and enrollment and was not aggravated by [his] service." But VA's regulation incorporated only half of this statutory requirement, deeming the presumption rebutted merely upon a showing that a condition not noted upon entry to service "existed prior thereto." Consistent with that regulation, VA in 1977 treated the presumption as overcome upon finding that Mr. George's condition existed before his service. It put the burden on Mr. George to provide affirmative evidence of aggravation, and it denied him benefits for supposedly failing to meet that burden—notwithstanding two military medical opinions in his favor.

Looking at the 1977 Board's decision today, the legal error is clear. It is unmistakable. One need only look at the words the Board wrote and the statutory and regulatory provisions it cited to know that it erred. As VA has since recognized and the Federal Circuit has since confirmed, the agency's regulatory scheme at the time violated the plain statutory requirement that obligated VA, not Mr. George, to produce clear and unmistakable evidence to show that his condition was *not* aggravated by service. And because VA, as a federal agency, has authority to promulgate regulations only to the extent they are consistent with the laws that Congress enacts, the

regulation that dictated the outcome in Mr. George's case was not law but a legal nullity.

VA's reliance on that regulation was a "clear and unmistakable error" under the plain meaning of those words, under the law that Congress looked to when codifying them, and under the pro-veteran purpose that pervades this area of law. The Government's primary response is to say that VA's error was excusable because the Board was bound to follow the regulation. That is irrelevant. Whether a clear and unmistakable error (CUE) exists does not turn on whether the agency adjudicator was somehow at fault, but simply on the clarity of the error under the law as it existed at the time. The error here is clear. The Court should reverse.

ARGUMENT

I. VA's Defiance Of A Plain Statute Is CUE, Whether Or Not The Error Is Enshrined In A Regulation.

A. The CUE statutes contain no exception for VA's adherence to an unlawful regulation.

This much is undisputed: CUE review corrects failures "to conform to the 'true' state of … the law," including when "statutory or regulatory provisions extant at the time were incorrectly applied." *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc); Pet. Br. 21. The Government argues, however, that the CUE statutes contain a silent exception, forgiving statutory errors when VA followed its "then-

existing [regulatory] provisions." Gov't Br. 23-24. The Government is wrong.

1. The text permits no such exception. It focuses solely on the correctness of the agency's "decision" and encompasses any "clear and unmistakable error[s]" within it, regardless of why they were made. 38 U.S.C. §§ 5109A(a), 7111(a); Pet. Br. 22. To fill the textual gap, the Government contends that "clear and unmistakable error" is a "term of art" with an established meaning. Gov't Br. 33-34, 36. But the pre-legislation caselaw the Government cites confirms that applying a regulation that defies an unambiguous statute is CUE. Pet. Br. 23-25.

a. The Government never acknowledges *Russell*'s articulation of the purpose of CUE review: to "revise[]" an original decision "to conform to the 'true' state of the facts or the law that existed at the time of the original adjudication." 3 Vet. App. at 313. The true state of the law is Congress's command, not a contrary regulation. Pet. Br. 23-24; *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984) (when "Congress ha[s] an intention on [a] precise question at issue, that intention is the law and must be given effect").

This conclusion is dictated by "the fundamental constitutional principle that the power to make the necessary laws is in Congress." *Medellín v. Texas*, 552 U.S. 491, 526 (2008) (internal quotation marks and brackets omitted). Because "Congress makes [the] laws," agencies "do[] not" have the "power to revise clear statutory terms." *Util. Air Regul. Grp. v. E.P.A.*, 573 U.S. 302, 327 (2014). The Government is

correct that "[t]he term 'law'" can include "regulations." Gov't Br. 30. But a regulation has the "force and effect of law" only when it is "rooted in a grant of … power by the Congress" and abides by the "limitations which that body imposes." *Chrysler Corp. v. Brown*, 441 U.S. 281, 302 (1979). If an agency "create[s] a rule out of harmony with the statute," that regulation is a "mere nullity." *Manhattan Gen. Equip. Co. v. Comm'r*, 297 U.S. 129, 134 (1936); *see* Pet. Br. 23-24. *Russell* reflects that principle, explaining that a quintessential "clear and unmistakable error" occurs where a decision incorrectly applies either "the statutory or regulatory provisions extant at the time." 3 Vet. App. at 313; Pet. Br. 21.

b. The Government's position is also at odds with *Russell*'s statement that CUE arises when "reasonable minds" cannot differ. 3 Vet. App. at 313-14; Pet. Br. 24.

The interpretation of an unambiguous statute is not something about which "reasonable minds may differ." *Presley v. Etowah Cnty. Comm'n*, 502 U.S. 491, 509 (1992). An "agency interpretation contradicting what Congress has said" therefore is "unreasonable." *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 218 n.4 (2009). By holding 38 U.S.C. § 1111 so clear as to not warrant *Chevron* deference, the Federal Circuit determined that reasonable minds could not disagree that the regulation contradicted the plain statute. *Wagner v. Principi*, 370 F.3d 1089, 1092-94 (Fed. Cir. 2004).

2. The Government does not seriously grapple with this prevailing understanding of CUE. It in-

stead offers its own CUE standard, under which an agency's misinterpretation of an unambiguous statute is not CUE if uncovering that lack of ambiguity involves analytical work.

a. The Government first argues that, even though *Wagner* found § 1111's meaning so plain that *Chevron* deference did not apply, the agency's misreading was not clear or unmistakable because the Federal Circuit "observed that Section 1111's language was 'somewhat difficult to parse.'" Gov't Br. 10 (quoting *Wagner*, 370 F.3d at 1093); *see id.* 27-28. That remark does nothing to detract from the clarity of VA's error, as the Federal Circuit otherwise concluded that "section 1111 is clear on its face." 370 F.3d at 1093. A judicial determination that a statute is "not ambiguous" means that there is "'only [one] possible interpretation.'" *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 707 (1991) (Scalia, J., dissenting)). It is irrelevant that "'discerning the only possible interpretation [might] require[] a taxing inquiry.'" *Id.*

CUE review encompasses errors of statutory construction, so long as the error is now undebatably evident. That is the case for VA's now-invalidated version of 38 C.F.R. § 3.304, as *Wagner* held and VA's own General Counsel conceded. VA Op. Gen. Counsel Prec. 3-2003, ¶¶ 4, 12-13, 15 (July 16, 2003), https://bit.ly/3xiVKTN (invalidating regulation as contrary to statute's "plain language" and "plain meaning").

b. The Government more generally argues (at 27) that an agency's *Chevron* step-one failures avoid CUE because "Members of this Court [can] disagree about whether a statute unambiguously resolves a question." Such disagreement does not make dissenting readings reasonable in the relevant sense—namely, in the sense of reflecting the true state of the law. After all, a dissent cannot create ambiguity solely by offering an alternative interpretation of a provision; otherwise, in the cases the Government cites (at 27 n.3), it would have been impossible for the Court to hold the statutes unambiguous. *See supra* 3-5.

c. Finally, the Government mistakenly suggests (at 27) that it is not "clear and unmistakable error" for an agency to misapply an unambiguous statute because, under the Equal Access to Justice Act (EAJA), the Government's position can be legally incorrect but still "substantially justified."

The Government identifies nothing in this Court's precedent suggesting that an agency's adherence to a regulatory misinterpretation would be "substantially justified" under EAJA. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Nor does the Government adduce any consensus among the lower courts on that question. Indeed, in evaluating the propriety of EAJA fees with respect to VA's adherence to the same faulty regulation at issue here, the Federal Circuit opined that, "[w]here … the government interprets a statute in a manner that is contrary to its plain language and unsupported by its legislative history, it will prove difficult to establish substantial justification." *Patrick v. Shinseki*, 668

F.3d 1325, 1330-31 (Fed. Cir. 2011) (collecting cases).

Even the case the Government cites (at 27) did not purport to categorically preclude EAJA fees where the agency followed an invalid regulation. *Halverson v. Slater*, 206 F.3d 1205, 1211-12 (D.C. Cir. 2000). Indeed, the D.C. Circuit awarded fees in that case, relying heavily on the fact that the statute was unambiguous. *Id.* at 1211. The court merely explained that it did "not rel[y] solely" on this fact, because EAJA—unlike CUE—is concerned with more than just an "evaluation of the merits." *Id.* (internal quotation marks omitted). Even if EAJA were relevant, therefore, it would not lead to the result the Government advocates.

But EAJA's "substantially justified" standard cannot be equated with the "clear and unmistakable error" standard. The overriding concern for CUE purposes is the true state of the law at the time of the original decision. In contrast, this Court has rejected attempts to convert EAJA's "substantially justified" standard into a "substantially *correct*" standard, because "a position can be justified even though it is not correct." *Pierce*, 487 U.S. at 566 n.2. EAJA fees deter the agency from pursuing baseless litigation and encourage litigants to "secure[] vindication of their rights." H.R. Rep. No. 99-120, at 4, 1985 U.S.C.C.A.N. 132, 132-33 (1985). The CUE statutes, by contrast, do not seek to punish or deter agency conduct; they provide a remedy for veterans. Pet. Br. 45. The better analogies are those that Petitioner identified and which the Government does not address. Pet. Br. 29-30.

B. The legislative history confirms that there is no exception for following a regulatory misinterpretation.

The legislative history shows that the CUE statutes track preexisting Veterans Court caselaw as well as error correction in the Social Security reopening context, both of which support giving CUE the scope Petitioner urges. Pet. Br. 25-30. The Government does not disagree that this caselaw is incorporated. But it fails to reckon with the result. *See* Gov't Br. 12-13, 35-39, 42.

1. Petitioner discussed several pre-legislation Veterans Court cases supporting his position. Pet. Br. 26-27. The Government does not even address one of those cases, which suggested that CUE can arise from VA's adherence to directives from the Secretary in "exce[ss] [of] his statutory authority." *Ko v. Brown*, No. 90-1399, 1993 WL 426404, at *4-5 (Vet. App. Sept. 24, 1993); Pet. Br. 27. The Government misapprehends the other cases.

In *Berger v. Brown*, the Veterans Court indicated that VA's adherence to its internally binding adjudication manual could constitute CUE if the manual contradicts an unambiguous statute. 10 Vet. App. 166, 168-70 (1997); Pet. Br. 26. Rather than disagree, the Government observes that *Berger* found no such conflict in that case, instead deeming the manual provision "a '*plausible* interpretation' of the law." Gov't Br. 37 (quoting 10 Vet. App. at 170). That is true, but it does not undercut the court's explanation that CUE might lie if "the plain language of the

statute" had "precluded" VA's interpretation. *Berger*, 10 Vet. App. at 170.

In *Look v. Derwinski*, the Veterans Court held that VA committed CUE by applying a regulation (later invalidated) that imposed a fault requirement which the statute plainly did not. 2 Vet. App. 157, 159, 161, 163 (1992); *see* Pet. Br. 26-27, 41-42. The Government says the court "did not have occasion to consider whether faithful application" of the invalid regulation would forgive this CUE, because in that case VA had "further erred" by misapplying a different aspect of the invalid regulation. Gov't Br. 38 (quoting 2 Vet. App. at 164). But the fact that *Look* called the regulatory misapplication "further error" underscores Petitioner's point: The court found two independent errors, deeming VA's "failure to apply [the statute] properly" to be CUE without first inquiring whether the regulation was properly applied. 2 Vet. App. at 163.

Finally, the Government (at 37-38) invokes *Damrel v. Brown*, 6 Vet. App. 242 (1994), but that case is irrelevant. It did not involve VA's misapplication of a statute predating an original decision, but an actual change in law: a judge-made rule formulated after an original decision. 6 Vet. App. at 246; Pet. Br. 40.

2. Social Security reopening also allows for correction of the misapplication of an unambiguous statute. Pet. Br. 28-29. The Government agrees; it merely responds that, here, "the 1977 Board *correctly* applied the regulation in effect at that time." Gov't Br. 42. The Government appears to be asserting an

exception to reopening that it has not proven; it cites no case where reopening was denied because a regulation required flouting a plain statute.

II. The Government Offers No Persuasive Basis To Narrow CUE's Scope.

A. That VA adjudicators are bound is irrelevant.

The Government relies heavily on the argument that, because VA adjudicators are bound to apply the agency's regulations, they cannot "naturally [be] said to commit a 'clear and unmistakable error'" for doing something they are "*required* to do." Gov't Br. 23-24.

The Government's argument is insufficient to resolve this case, because VA adjudicators must also follow the laws that Congress enacts. Pet. Br. 22-23, 42. That requirement follows not just from this Court's cases, *see supra* § I.A, but also from the very statute the Government cites. Decisions of the Board "shall be based" upon consideration of "applicable provisions of law and regulation." 38 U.S.C. § 7104(a); *see* 38 U.S.C. § 4004(a) (1958) (granting Board jurisdiction to review claims "under the laws administered by [VA]"). Agency adjudicators may be unable in the first instance to resolve a conflict between Congress's command and a contra-statutory regulation. But despite this administrative dilemma, it remains the case that "Congress, not the [Secretary], prescribes the [veterans] laws." *Dixon v. United States*, 381 U.S. 68, 73 (1965); *see United States v. Grimaud*, 220 U.S. 506, 519 (1911) (agency cannot "put[] the regulations above the statute"); 38 U.S.C.

§ 501(a); Pet. Br. 23-24. And there is no dilemma for VA or a court confronting a CUE claim; the primacy of Congress's unambiguous commands can and must be upheld.

It would make little sense for Congress to provide a CUE remedy that allows for correction of clear legal errors, except when the error is enshrined in a regulation. Pet. Br. 42-43. The Government has no answer.[1] Nor does it meaningfully respond to Petitioner's showing that the Government's position "elevate[s] a contra-statutory regulation to the same status as the statute itself." Pet. Br. 22. Instead, the Government observes that Congress has supplied other avenues, apart from CUE, for veterans "to challenge the Board's application of a regulation that may be invalid," including "appeal to the Veterans Court," direct challenges under 38 U.S.C. § 502, and in connection with a supplemental claim. Gov't Br. 24-26 & n.2.

But Congress saw fit to codify CUE (over VA's objection) even against the backdrop of these other avenues. Pet. Br. 43; *see* S. Rep. No. 105-157, at 8

[1] The Government narrowly focuses on one citation to the legislative history, *see* Gov't Br. 26 (citing Pet. Br. 43), but otherwise misses the point on why laundering agency error through rulemaking does not relieve the agency of correction under CUE. Furthermore, the legislative history is replete with support for Congress's intended scope of CUE to include the misapplication of an unambiguous statute, even if the error stemmed from an invalid regulation. Pet. Br. 25-28; *supra* § I.B.

(1997) (reciting VA's view that codifying CUE "is, as a matter of law, unnecessary"). CUE provides a crucial safety valve for veterans, often acting pro se, who face serious obstacles and inefficiencies in pursuing their claims. *See* MVA Br. 5-26; NVLSP Br. 15-18; STP Br. 5-10. And of course, neither direct appeal nor § 502 was available to Mr. George or the many other veterans subject to VA error during the long and "splendid isolation" when judicial review was unavailable. *Brown v. Gardner*, 513 U.S. 115, 122 (1994).

Furthermore, the fact that veterans on direct appeal can challenge VA's "faithful application of a regulation [it] was legally required to follow," Gov't Br. 25-26, cuts against the Government's argument. In a direct appeal, a veteran may challenge all kinds of errors, including the legal error that the agency faithfully applied a regulation "in excess of statutory … authority." 38 U.S.C. § 7261(a)(3)(C). Plainly, Congress does not view the supposedly "binding" nature of an agency regulation as sacrosanct. Although CUE encompasses a narrower set of errors, it still comfortably includes the agency's failure to properly apply the governing statute.

The Government (at 24) cites *Agostini v. Felton*, 521 U.S. 203 (1997). But *Agostini* shows that collateral error-correction in the face of binding authority should work exactly as Petitioner urges. Petitioner's position is not that the Board should have gone rogue and disregarded a regulation, just as the lower federal courts should not fail to apply this Court's precedent unless and until it is set aside. *See id.* at 237-38. But as the Government concedes (at 24),

Agostini makes clear that a lower court nonetheless has "erred" if the law it relied on is "subsequently invalidated." Moreover, *Agostini* shows that an otherwise-final decision relying on a binding rule can be corrected on collateral review—there, under Federal Rule of Civil Procedure 60(b)(5)—once the binding authority is set aside. 521 U.S. at 237-39. Likewise, once the legal error in a VA regulation is identified, veterans can use CUE review to challenge final decisions that turn on that clear and unmistakable error.

B. Correcting VA's misapplication of an unambiguous statute involves no change in law or interpretation.

The Government contends that the 1977 Board's legal error is not CUE because "'[c]lear and unmistakable error' … cannot be based on 'a change in law or a Department of Veterans Affairs issue' or 'a change in interpretation of law or a Department of Veterans Affairs issue.'" Gov't Br. 29 (quoting 38 C.F.R. § 3.105). But as Petitioner showed (Pet. Br. § II.B.1), this snippet of the regulatory preamble does not preclude Mr. George's CUE claim.

1. The Government's first problem is that this regulatory preamble language never made its way into the statutory text. Pet. Br. 33-34.

The Government responds that Congress meant to bake in these references to changes in law (or their interpretation), because "clear and unmistakable error" is a "term of art," and thus Congress would have intended to "'adopt[] the cluster of ideas' reflected in the preexisting VA regulation." Gov't Br.

39 (alteration in original) (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012)). But the Government has not established this intent. As Petitioner showed, the preamble language is a cross-reference to a different remedial mechanism altogether, not a concept that is intrinsically "attached" to the term CUE, *Cooper*, 566 U.S. at 292 (citation omitted). Pet. Br. 36-37.

The Government argues that, at the very least, a "provision[] that" generally "incorporate[s]" a "preexisting regulatory term cannot reasonably be read to *preclude* the VA from continuing to apply its prior standards." Gov't Br. 39 (citing *Kucana v. Holder*, 558 U.S. 233, 249-50 (2010)). But when Congress has enacted a statute, this Court has declined to read in further limits based on uncodified regulatory provisions. *See Kucana*, 558 U.S. at 249-50. "Had Congress" wanted to "insulate" CUE review from changes in law or changes of interpretation of law, "it could have so specified together with its codification of" any other aspects of the regulation. *Id.* at 250. Here, where the "record of congressional discussion preceding" enactment makes "no reference" to an aspect of the "VA regulation," and there is "no other evidence to suggest that Congress was even aware of VA's interpretive position," then there is no basis to conclude Congress imported it silently. *Gardner*, 513 U.S. at 121.

2. More fundamentally, correcting an agency's erroneous interpretation of an unambiguous statute is not a "change in law" or a "change in interpretation of law." Pet. Br. 34-40. The Government cannot show that judicial correction of an agency error is either. Gov't Br. 30-33.

a. The Government cites no case referring to judicial correction of an invalid regulation as a "change in law or a [VA] issue." Gov't Br. 30. Instead, it notes that the terms "law" and "issue" can encompass "binding regulations," and then asserts that the regulation's "invalidation in 2003 and 2004, and the 2005 amendment to that rule, therefore reflect" a "post-decision 'change in law.'" *Id.*

This would be true if the original regulation had been valid. But here, *Wagner* and VA's actions corrected a "misinterpret[ation of] the will of the enacting Congress" and explained what the law "*always* meant." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 313 n.12 (1994). Correcting an agency error in this way does not "'change[]' the law that previously prevailed." *Id.*

b. The Government likewise fails to establish any change in interpretation of law. The Government contends that there must have been such a change because the invalidated regulation reflected an initial interpretation and the "subsequent decisions that displace[d] that regulation" did so based on "a different interpretation." Gov't Br. 31.

Petitioner addressed this argument directly. Pet. Br. 34-35. Because § 1111 is unambiguous, it could be interpreted in only one way, such that VA's contrary initial interpretation was not a legitimate interpretation but "unambiguously foreclose[d]." *Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017); *cf. Kisor*, 139 S. Ct. at 2415. The correcting court described what the law "always meant," so it is

"not accurate" for the Government "to say" any change was involved. *Rivers*, 511 U.S. at 313 n.12.

The Government nowhere responds. Nor can it square these cases with its claim that a "new judicial construction of a statute can both establish what the statute has always meant and change the prevailing interpretation of the statute." Gov't Br. 32. This assertion is inconsistent with *Rivers*, which rejected the notion that an authoritative judicial construction "changed" the legal interpretation "that had previously prevailed" in the court of appeals. 511 U.S. at 313 n.12.

The Government cites nothing to support its contrary assertion that correcting a misinterpretation of a statute is a "change in interpretation." Instead, it references *Monell v. Department of Social Services*, 436 U.S. 658, 695-701 (1978), which overruled the construction of 42 U.S.C. § 1983 set out in *Monroe v. Pape*, 365 U.S. 167 (1961), and asserts that *Monell* "surely changed the prevailing 'interpretation' of that provision." Gov't Br. 32. On the contrary, members of this Court have described it as correcting a prior interpretive error. *Chapman v. Houston Welfare Rts. Org.*, 441 U.S. 600, 645 (1979) (Powell, J., concurring) (referring to *Monell* as correcting an error); *Guardians Ass'n v. Civ. Serv. Comm'n of New York*, 463 U.S. 582, 642 n.12 (1983) (Stevens, J. dissenting) (same). The Government identifies nothing in *Monell*—or since—characterizing the decision as announcing a change in interpretation.

c. Rather than affirmatively supporting its reading of the preamble language, the Government pri-

marily attacks Petitioner's. The Government reads the preamble language as carving out from CUE certain errors that might otherwise qualify, then complains that under Petitioner's reading the term "change in interpretation" does "no meaningful work" because it is "limited to circumstances where there was no error to begin with." Gov't Br. 32.

That is exactly how the preamble is meant to be limited. Petitioner demonstrated how, for decades, VA regulations have distinguished between revising a decision based on "clear and unmistakable error" and providing prospective relief based on a "change" in law or interpretation. Pet. Br. 36-39. Revision of decisions based on these "change[s]" is governed by 38 C.F.R. § 3.114, which is why the preamble of § 3.105 refers to that section when it talks about "change[s]." These mechanisms for revision were formerly contained in the same rule; the preamble language and the cross-reference were added when the "change[s]" were separated out. Pet. Br. 6-8, 36-39. Given this longstanding distinction, the absence of overlap between the category of "error" and the category of "change" is no surprise—it is by design.

The Government ignores the structure of § 3.105 (including its cross-reference to § 3.114) as well as its history. Instead, it contends that Petitioner's position "depends on the proposition that the VA's current … regulations reflect an impermissible construction" of the CUE statutes. Gov't Br. 33. That is true only if one has already accepted the Government's atextual, ahistorical argument that the regulatory reference to "change[s] in interpretation" necessarily encompasses the kind of error at issue

here. Under Petitioner's view, the current regulations adhere to VA's longstanding distinction between "errors"—which, if they are clear and unmistakable, are remediable under §§ 3.105 and 20.1403—and "change[s]" that may warrant prospective revision of a decision under § 3.114.

C. Petitioner's argument is consistent with finality principles and the broader statutory context.

The Government next suggests that if CUE review encompassed applications of plainly erroneous regulations, it would somehow be out of "balance" with other "paths" for revisiting VA decisions, such as direct judicial appeals and supplemental claims. Gov't Br. 39-42. But the Government does not identify any specific "balance" it believes askew, let alone tether this concern to any statutory language, regulation, legislative history, or historical practice. *Id.* It simply asserts that Congress intended CUE to cover a more "narrow scope" of errors than those other options, to accommodate administrative "finality" and related "policy interests." *Id.* at 40-41.

These vaguely defined considerations shed little light on the question presented. Petitioner agrees that the grounds for CUE review are far narrower than those for direct appeal or supplemental claims. Pet. Br. 46-48. CUE excludes all sorts of errors subject to direct appeal, such as those implicating the weighing of evidence or "broad-brush" due-process complaints. Pet. Br. 47 (quoting H.R. Rep. No. 105-52, at 3 (1997)). And, unlike supplemental readjudi-

cation, CUE cannot be based on "new and relevant evidence." Gov't Br. 40 (quoting 38 U.S.C. § 5108(a)).

But for all that it excludes, CUE review generally includes agency misreadings of unambiguous statutes. The only question is whether that holds true for misreadings codified in regulations. This Court has confronted comparably narrow disputes about the scope of another exception to finality, Federal Rule of Civil Procedure 60. Pet. Br. 48 (citing *Buck v. Davis*, 137 S. Ct. 759, 779 (2017), and *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005)). Those decisions confirm that the statutory "text" decides the question. *Gonzalez*, 545 U.S. at 529. Here, the statutory text imposes no "relevant" "limits" on the form VA's legal error must take. *Id.* The Government is left to repeat the conclusory assertion that its reading is nonetheless more "natural." *E.g.*, Gov't Br. 17, 22, 23. But there is nothing natural about an atextual restriction that would preclude veterans from receiving the benefits that were due under the true state of the law.

Nor is the Government helped by invoking finality concerns. Gov't Br. 41. In this context, the "virtues of finality" carry "little weight." Pet. Br. 48 (quoting *Gonzalez*, 545 U.S. at 529). After all, the "whole purpose" of the CUE statutes—like Rule 60—"is to make an exception to finality." Pet. Br. 45 (quoting *Buck*, 137 S. Ct. at 779). Petitioner's understanding of that exception is appropriately narrow.

But while the Government's preferred definition of CUE certainly reaches fewer otherwise-final decisions, it does so at the cost of not faithfully effectuat-

ing Congress's intent. The Government asks this Court to ignore entirely a directly relevant interpretive rule: the pro-veteran canon. That canon would resolve any arguable "interpretive doubt" about the scope of CUE "in the veteran's favor"—and therefore in favor of Petitioner. *Gardner*, 513 U.S. at 118; *see* Pet. Br. 31-32. Once more, the Government has no answer. Its renewed appeal to a vague sense of "balance," Gov't Br. 43, is equally unpersuasive the second time around. And its argument that applying the canon would "negate Congress's choice to use a longstanding term of art," *id.* at 43-44, simply assumes that Petitioner's reading of "clear and unmistakable error" is wrong. For all the reasons discussed above, it is the Government's atextual exception that is contrary to that term's longstanding meaning.

III. The Error In Mr. George's Case Was Outcome Determinative.

The undisputed factual record shows both that the 1977 Board decision failed to properly apply § 1111 and that, had it correctly applied that presumption-of-soundness statute, the Board could not have found the presumption rebutted. Pet. Br. 49-51. Both a military psychiatrist who examined Mr. George and a Medical Board that met with him found that Mr. George's condition was aggravated by his service. App. 7a-8a. The psychiatrist deemed Mr. George's condition "complicated by service aggravated stress." App. 7a. The Medical Board likewise found that Mr. George's condition both progressed during his service and that it did so "at a rate greater than is usual for such disorders." App. 8a. The only countervailing evidence—and the exclusive basis

for the 1977 Board's finding of non-aggravation—was a single "not aggravated" box checked on a one-page form issued by a Physical Evaluation Board that did not meet with Mr. George and did not explain the basis for this finding. Pet. App. 86a; App. 13a.

That single, unelaborated finding falls far short of supplying "clear and unmistakable evidence" that Mr. George's service did not aggravate his condition, as § 1111 requires. Pet. Br. 50. That exacting standard demands that VA make an "undebatable" showing of no aggravation. *Vanerson v. West*, 12 Vet. App. 254, 258-59 (1999); Pet. Br. 50. The well-reasoned aggravation findings by the psychiatrist and the Medical Board plainly rendered the question at least "debatable." *Goldstein v. McDonald*, No. 15-1250, 2016 WL 1458490, at *5 (Vet. App. Apr. 14, 2016). Indeed, even when the *only* record evidence regarding aggravation is "an unexplained 'X' on a form," that does not constitute "clear and unmistakable evidence" of non-aggravation. *Horn v. Shinseki*, 25 Vet. App. 231, 240, 242 (2012); *see also Miller v. West*, 11 Vet. App. 345, 347-48 (1998). The "unexplained 'X'" on the Physical Evaluation Board's form here certainly could not meet that standard when it was contradicted by other, more expansive medical findings in the record.

The Government nevertheless urges that Mr. George "cannot make [a] showing" that the 1977 Board's error was outcome determinative "and did not attempt to do so in the courts below." Gov't Br. 44. The Government is wrong on both counts.

a. The Government first defends the 1977 Board's decision by pointing out that it relied on the two-part test for aggravation found in 38 C.F.R. § 3.306(b). Gov't Br. 45. But that is precisely the problem. That regulation implements a different statute—38 U.S.C. § 1153 (numbered § 353 in 1977)—that applies when a veteran is not subject to the presumption of soundness in § 1111. *Wagner*, 370 F.3d at 1096; VA Op. Gen. Counsel Prec. 3-2003, ¶ 17. Veterans whose conditions are noted upon their entry to service may recover benefits for any aggravation caused by service, but only if they satisfy a more demanding sequence of inquiries. The veteran shoulders the initial burden to show that there was "an increase in disability" during service. 38 U.S.C. § 1153; 38 C.F.R. § 3.306(a). Only then does the burden shift to VA to rebut aggravation" with "[c]lear and unmistakable evidence" that the increase was "due to the natural progress of the condition." 38 C.F.R. § 3.306(b).

This was undisputedly the wrong standard for Mr. George, whose condition was not noted upon entry. But it is the one the 1977 Board applied. It faulted Mr. George for "fail[ing] to provide" sufficient "information" regarding aggravation, while demanding nothing more from VA than a conclusory checked box on the Physical Evaluation Board form. Pet. App. 86a. The 1977 Board was plainly—and improperly—assessing the aggravation of his condition without regard to the presumption of soundness.

The Government nonetheless seems to suggest that the Board might have skipped to the second prong of § 3.306(b) and found clear and unmistaka-

ble evidence that any increase in disability was due to the natural progress of the disease. Gov't Br. 45-46. Because that is one way of rebutting the § 1111 presumption that should have applied, the Government suggests, any error was harmless. But the Government cannot point to a single word in the Board's analysis that suggests this is what it was doing. Nor was there any basis for such a finding. The Physical Evaluation Board's unexplained decision to check the "not aggravated" box does not undebatably outweigh the psychiatrist's and Medical Board's findings that "conditions peculiar to the service" caused Mr. George's increased disability. App. 7a-8a.

The Government nonetheless offers a theory that might have been behind a hypothetical, unstated finding that natural causes drove the progress of Mr. George's condition. According to the Government, "the Board might have declined to credit the medical board's conclusion as to the strength of petitioner's claim," because the Medical Board supposedly "had not fully apprehended the scope of petitioner's preexisting illness." Gov't Br. 46. This conjecture is based on the Medical Board's understanding that Mr. George first experienced symptoms of schizophrenia in May 1975, App. 5a-6a, whereas a treating physician (who was not assessing aggravation) recorded that he first heard voices in "approximately … April 1975," R.B.A. 1289-90. Gov't Br. 46.

Nothing about that slight discrepancy in the onset date of symptoms reasonably would have led the 1977 Board to disregard the Medical Board's medical analysis, let alone the military psychiatrist's opinion as to the aggravation that took place in June, July,

and August 1975. It is no surprise that the Board's decision does not even hint at this rationale.

Perhaps recognizing as much, the Government (at 46) resorts to citing additional evidence that was not before the 1977 Board: a report from April 26, 1975, when Mr. George's father brought him to the emergency room and a physician diagnosed an "Acute Schizophrenic Reaction." R.B.A. 552-53. Mr. George's representatives submitted it on his behalf, along with his other medical records from the University of Kansas Medical Center, in a 1984 claim seeking reopening based on new and material evidence. R.B.A. 1108-09; R.B.A. 1078 (representative explaining that Mr. George's condition progressed from acute to chronic during service period). It therefore cannot shed light on what the 1977 Board may have been thinking.

b. The Government's last resort is to renew its argument that Mr. George failed to "establish[] that he was prejudiced by the flaw in the prior regulation." Gov't Br. 46. To begin with, the Government made this same argument to the Federal Circuit, urging the court to affirm on that basis regardless of how it interpreted the proper scope of CUE. CAFC Gov't Br. 39-40. The Federal Circuit declined to do so.

The argument is also wrong. Mr. George has consistently cited the evidence of aggravation that was before the Board in 1977 and maintained that the record did not contain "clear and unmistakable evidence to rebut the presumption of soundness." CAVC Op. Br. 10, 1; *see* CAVC Reply Br. 4; R.B.A.

593, 595. The Government has never shown otherwise. At a minimum, remand is necessary for the Federal Circuit to address the question.

CONCLUSION

The Court should reverse the judgment of the Federal Circuit.

Respectfully submitted,

Kenneth M. Carpenter
John Niles
CARPENTER CHARTERED
1525 SW Topeka Blvd.,
Suite D
Topeka, KS 66601

Edmund Hirschfeld
Melanie R. Hallums
ORRICK, HERRINGTON &
SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Melanie L. Bostwick
Counsel of Record
Thomas M. Bondy
Benjamin P. Chagnon
Robbie Manhas
Jonas Q. Wang
ORRICK, HERRINGTON &
SUTCLIFFE LLP
1152 15th Street, NW
Washington, DC 20005
(202) 339-8400
mbostwick@orrick.com

April 8, 2022