No. 25-609

IN THE

# Supreme Court of the United States

CLINTON SIPLES,

*Petitioner*,

*v.*

DOUGLAS A. COLLINS, SECRETARY OF VETERANS AFFAIRS,

*Respondent.*

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

## BRIEF FOR THE FEDERAL CIRCUIT BAR ASSOCIATION AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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**TABLE OF CONTENTS**

## TABLE OF AUTHORITIES

### CASES

**TABLE OF AUTHORITIES—Continued**

## TABLE OF AUTHORITIES—Continued

**TABLE OF AUTHORITIES—Continued**



**LEGISLATIVE MATERIALS**



**OTHER AUTHORITIES**

**TABLE OF AUTHORITIES—Continued**

## INTEREST OF AMICUS CURIAE[1]

The Federal Circuit Bar Association ("FCBA") is a national organization for the bar of the U.S. Court of Appeals for the Federal Circuit ("Federal Circuit"). Organized in 1985, the FCBA represents the interests of those who are involved with the subject matter of the Federal Circuit.

The FCBA provides a forum for common concerns and dialogue between the bar and judges of the federal courts. One of FCBA's purposes is to offer assistance and advice to the federal courts, including amicus curiae briefs, on matters affecting practice before this Court, the Federal Circuit, and other tribunals addressing comparable subject matter.

The FCBA has a substantial interest in this case due to the subject matter and the views of FBCA bar members familiar with practice before the Federal Circuit. Clear and unmistakable error review is a vital avenue for rectifying the VA's wrongful denial of veterans' benefits, particularly when many initial determinations were not subject to any judicial review. In this context, the FCBA seeks to avoid supplanting the Federal Circuit's critical role in reviewing the VA's legal errors de novo, with a deferential historical inquiry into whether such errors were debatable. This submission seeks to underscore the need for review of the decision below and to assist the Court in interpreting the clear and unmistakable error standard in the manner consistent with the

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[1] No counsel for a party authored this brief in whole or in part, and no entity or person, other than amicus curiae, its members, and its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

language of the statute, its implementing regulation, and judicial precedent.

Because the Respondent in this case is part of the federal government, FCBA members and leaders who are employees of the federal government have not participated in the FCBA's decision-making regarding whether to participate as an amicus in this litigation, developing the content of this brief, or the decision to file this brief.

## SUMMARY OF ARGUMENT

Since the creation of the Department of Veterans Affairs (VA), "Congress has made clear that the VA is not an ordinary agency." *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009). Although the VA adjudicates contested claims for benefits, the proceedings are non-adversarial, *see Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 440 (2011), the agency must assist the veteran in gathering supportive evidence, 38 U.S.C. § 5103A, and, when the evidence is in equipoise, the benefit of the doubt goes to the veteran. 38 U.S.C. § 5107(b). Consistent with Congress's "special solicitude for the veterans' cause," *Shinseki*, 556 U.S. at 412, the VA's "denial of benefits has no formal res judicata effect," *Walters* v. *National Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985). Instead, final decisions may be reopened and reexamined through several avenues, including a process known as clear and unmistakable error (CUE) review. *See* 38 U.S.C. §§ 5109A, 7111.

True to its name, CUE requires a veteran to show an error that is both clear and unmistakable. The relevant error for CUE purposes is the VA's final determination of benefits. To assess whether a benefits determination is erroneous, a CUE adjudicator must ask a

threshold question: whether there was any factual or legal error that led to the VA's improper benefits determination. 38 C.F.R. §§ 3.105(a)(1)(i), 20.1403(a), (c). For claims of legal error, the CUE adjudicator looks to the law at the time of the decision. *Id.* Binding agency or judicial interpretations contemporaneous with the decision can establish the then-prevailing law. But absent controlling authority, a CUE adjudicator must interpret the law at the time of the decision de novo. The purpose of CUE review is to correct patently erroneous benefits determinations. So the CUE adjudicator independently assesses whether erroneous inputs went into the decision—errors of fact or law—and then assesses whether those bad inputs clearly affected the output—the final benefits determination.

The Federal Circuit collapsed these two distinct steps of the CUE inquiry, requiring veterans to prove not only that the VA's determination was clearly erroneous, but that the law at the time of the decision was itself "undebatably" clear. Pet.App.16a. As a matter of text, the decision engrafts a modifier from the end of a sentence in the CUE regulation to its beginning to reach its strained interpretation. As a matter of context, the decision cannot be squared with the legal constraints placed on veterans in benefits claims. As a matter of history, the decision finds no foothold in the decades of agency practice that Congress codified into law. As a matter of precedent, the decision is irreconcilable with this Court's recent pronouncements in *George* v. *McDonough*, 596 U.S. 740 (2022). And, as a matter of practice, the decision's capricious rule of legal clarity is as likely to vex reviewing tribunals as it is to imperil veterans with meritorious claims. In short, the decision below is clearly and unmistakably wrong. This Court should grant review and reverse.

## ARGUMENT

The Federal Circuit required veterans seeking to correct fundamentally flawed benefits determinations to show that the law at the time of decision was "so clear on its face" that is "undebatably require[d]" an application different than the one applied by the VA. Pet.App.15a. That holding was mistaken. CUE asks whether the results of a VA adjudication were clearly and unmistakably erroneous. An erroneous result can arise from the misapplication of fact or law to a given case. Whether or not the VA misapplied the law is a question that a CUE adjudicator reviews de novo "based on … the law that existed at the time of the prior VA decision." *George* v. *McDonough*, 596 U.S. 740, 747 (2022) (cleaned up). A binding agency or judicial decision constitutes the law at the time of the decision, even if that decision is later reversed. *Id.* at 748-749. But in the absence of such authority, a CUE adjudicator must decide for itself what the law was, using all the ordinary tools of statutory interpretation to arrive at the "single, best meaning" of the law. *Loper Bright Enters.* v. *Raimondo*, 603 U.S. 369, 398 (2024). That single, best meaning is "not new law" simply because it is the first time an authoritative body "properly interpret[s]" the law. *Fiore* v. *White*, 531 U.S. 225, 228 (2001) (per curiam); *accord Linkletter* v. *Walker*, 381 U.S. 618, 622-623 (1965) (same). In the absence of controlling authority, a CUE adjudicator's de novo interpretation is simply a recitation of what the law "*always* meant." *Rivers* v. *Roadway Exp., Inc.*, 511 U.S. 298, 313 n.12 (1994).

Yet rather than employ any of the ordinary tools of interpretation, the Federal Circuit asked whether there was more than one single, possible meaning of the law. Pet.App.16a. Because it believed there was, the court ended its review without determining (1) whether the

VA misapplied the law at the time of the decision; or (2) whether the resulting benefits determination was clearly and unmistakably erroneous. That holding was error. The court transformed CUE from a requirement that error clearly affect the *results* to a requirement that error be clearly present in the *reasoning*. CUE, however, focuses on ends, not means. It asks for (1) evidence of an error in fact or law that (2) clearly affected the VA's benefits determination. The clarity of the law at the time of the decision does not matter. Congress's focus was on veterans and their benefits, not the clarity of the VA's error in reasoning.

## I. THE DECISION BELOW RESTS ON A MISAPPLICATION OF CUE'S CLARITY REQUIREMENT TO THE STATE OF THE LAW RATHER THAN THE ERROR IN BENEFITS

### A. The CUE Statute And Regulation Require Clear Evidence Of An Improper Result, Not Clear Legal Error

The CUE statute provides that decisions by the VA's regional office (RO) or Board of Veterans' Appeals (Board) are "subject to revision on the grounds of clear and unmistakable error." 38 U.S.C. §§ 5109A (regional office), 7111 (Board). Although the statute does not define CUE, this Court recognized that Congress "used an unusual term that had a long regulatory history," which "fills in the details" of the term of art. *George*, 596 U.S. at 746. The relevant history is the "CUE doctrine as it had developed under 38 C.F.R. § 3.105" and was interpreted by the Veterans Court in decisions such as *Russell* and *Fugo*, which Congress understood as "setting forth the current state of the law which was to be codified by § 5109A." *Cook* v. *Principi*, 318 F.3d 1334, 1344 (Fed. Cir. 2002) (en banc) (cleaned up); *see* H.R. Rep. No. 105-52, at 3 (1997) (relying on *Russell* and *Fugo* as an

authoritative source of CUE law); S. Rep. No. 105-157, at 3 (1997) (same).

In *Russell*, the en banc Veterans Court held that CUE is "the sort of error which, had it not been made, would have manifestly changed the outcome at the time it was made." *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992) (en banc). The court added that such errors are "undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed at the time it was made." *Id.* at 313-314. As understood by *Russell*, and in turn the enacting Congress, CUE required an error that unambiguously affected the outcome of a benefits determination.

Shortly after *Russell*, the Veterans Court slightly reworded its standard to again emphasize that what must be "absolutely clear" is "that a different *result* would have ensued." *Fugo* v. *Brown*, 6 Vet. App. 40, 43-44 (1993) (emphasis added). *Fugo*'s definition of CUE now appears, *haec verba*, in the VA's binding CUE regulations. The relevant governing regulations define CUE as:

> [T]he 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. If it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable.

38 C.F.R. §§ 3.105(a)(1)(i), 20.1403(a), (c) (CUE for Board errors); *Fugo*, 6 Vet. App. at 43. Properly construed, § 3.105(a)(1)(i) requires an independent assessment of legal error coupled with clear evidence that the identified error altered the final benefits determination.

In other words, a CUE adjudicator must first ask whether there were any erroneous inputs and, if so, whether those erroneous inputs clearly led to an erroneous output. That conclusion follows from the text, context, history, and structure of CUE review.

***First***, the plain text of § 3.105(a)(1)(i) asks whether there was (1) an error that (2) clearly affected the initial benefits determination. Clarity goes to the error in results, not the error in legal reasoning. The Federal Circuit concluded otherwise by misassigning the regulatory modifier.

Section 3.105(a)(1)(i) contains two conditions and a modifier. There must be: (1) an "error, of fact or of law" that (2) "compels [a] conclusion"—the conditions—to which (3) "reasonable minds could not differ"—the modifier. *Id.* § 3105(a)(1)(i). As a "sensible … matter of grammar," the modifier "modif[ies] only the noun or phrase that it immediately follows," *i.e.*, the conclusion. *Barnhart* v. *Thomas*, 540 U.S. 20, 21 (2003). The relevant "conclusion" is "that the result would have been manifestly different but for the error." 38 C.F.R. § 3.105(a)(1)(i).

The regulation provides a clear two-step framework. First, a CUE adjudicator independently decides whether the initial decision was infected with error "'based on the record and the law *that existed at the time of the prior VA decision*.'" *George*, 596 U.S. at 747. The text imposes no rule of clarity or deference at this threshold step. Second, the adjudicator decides whether the error clearly caused a manifestly different result. The issue as to which "reasonable minds could not differ" is not the legal error but the impact of that error on the final determination. 38 C.F.R. § 3.105(a)(1)(i).

The next sentence of the regulation confirms that plain text reading. An error cannot be CUE "[i]f it is not absolutely clear that a different *result* would have ensued." 38 C.F.R. § 3.105(a)(1)(i) (emphasis added). The clarity requirement attaches to the result, not the error that occurred in reaching the result. Indeed, the entire CUE statute applies only to "[a] decision by the Secretary." 38 U.S.C. § 5109A. It is decisions—the results of the VA process—that are subject to challenge "on the grounds of clear and unmistakable error." *Id.* Whether or not the VA properly applied the law in reaching that decision is a question as to which the statute and regulation are silent, and for which the default standard of review for legal questions, de novo, applies. *See Loper Bright*, 603 U.S. at 392 & n.4.

Notwithstanding its position below, the government's own regulatory guidance confirms what the plain text states: CUE's clarity requirement speaks to outcomes, not the state of the law. *Compare* Pet.App.10a *with* Dep't of Veterans Affs., M21-1, Part X, Subpart ii, Ch. 5, § A – Revision Due to Clear and Unmistakable Error (CUE). As the VA explains, "[i]f it is not absolutely clear that a different *outcome* would have resulted, the error complained of cannot be [CUE]." *Id.* at X.ii.5.A.1.a note (emphasis added). But if a legal error "would have by necessity changed the original rating decision," then that error is CUE. *Id.* at X.ii.5.A.3.a; *see also id.* at X.ii.5.A.1.b. note. To identify an outcome-determinative legal error, a CUE adjudicator asks if "the decision maker failed to apply or incorrectly applied the appropriate laws of regulations." *Id.* X.ii.5.A.1.c. The word "clear" appears nowhere at this step, and for good reason: at no point does a CUE adjudicator ask how clearly the original decision maker misapplied or failed to apply the law. Instead, the adjudicator (1) independently

assesses legal error and (2) asks if the identified errors would clearly lead to a different result.

***Second***, the broader statutory context accords with the plain text. Congress's "whole purpose" in enacting CUE was to displace the ordinary rules of finality in solicitude to "our veterans … in recognition of their service to the Nation." *George*, 596 U.S. at 762 (Gorsuch, J., dissenting); *see also Walters*, 473 U.S. at 311. To that end, CUE allows a veteran to collaterally bring her benefits in line with the "true state of … the law that existed at the time of the original adjudication." *Russell*, 3 Vet. App. at 313 (quotations omitted). That is why the "decision"—the bottom-line benefits determination—is what must be clearly and unmistakably erroneous, not the VA's understanding of the law at the time of the decision. 38 U.S.C. § 5109A. The clarity of prior law has no bearing on whether a subsequent reviewer should modify a veteran's benefits.

Nor is there any basis to believe that Congress enacted such a convoluted scheme. It would make little sense to force a veteran who can successfully show that the VA clearly misawarded her benefits due to legal error to separately show that the legal error was itself unmistakably clear at the time of the decision. And attempting to impose such a requirement, as the court below held, would have been unworkable at the time of enactment. CUE review began as early as 1928, a time before judicial review, when any search for "a settled interpretation" of law would have sent a veteran to till a barren precedential field. Pet.App.16a. Indeed, "[m]any VA regulations have aged nicely simply because Congress took so long to provide for judicial review," leaving the VA's regulations to an "unscrutinized and unscrutinizable existence." *Brown* v. *Gardner*, 513 U.S. 115, 122 (1994).

This problem would have been no less salient by the time of CUE's statutory codification. Because CUE may be raised "at any time after th[e] decision is made," 38 U.S.C. § 5109A(d), veterans would be sent spelunking through potentially decades-old agency records in search of an unquestionable interpretive consensus. Even if veterans could get their hands on authoritative agency legal pronouncements—no small feat—such evidence would likely prove fleeting. The VA's Office of General Counsel does not appear to have released any precedential opinions until 1988, and only first discussed benefits in 1989. *See* Vet. Aff. Op. Gen. Couns. Prec. 6-87 (1987); Vet. Aff. Op. Gen. Couns. Prec. 7-89 (1989). The body of authoritative opinions continues to remain threadbare, underscoring the impracticability of the Federal Circuit's understanding of the scope of CUE review.[2]

Additionally, at the time of CUE's enactment, veterans were subject to a unique restriction on their ability to press meritorious legal claims: Congress prohibited veterans from using paid counsel to assist in benefits claims. Against that backdrop, Congress did not intend to foreclose veterans from obtaining relief where they could show a clearly erroneous outcome based on a better-developed legal argument.

Beginning in 1862, Congress effectively prohibited paid counsel from representing veterans in benefits disputes.[3] That restriction remained until 1988, when

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[2] For a full list of opinions from the VA's General Counsel, *see* https://www.va.gov/ogc/precedentopinions.asp.

[3] Congress imposed a $5 limit, raised to $10 two years later, on the fees that lawyers could charge veterans for benefits claims. *See* Act of July 14, 1862, ch. 166, § 6, 12 Stat. 566, 568; Act of July 4, 1864, ch. 247, § 12, 13. Stat. 387, 389. That fee cap was not adjusted for

Congress created the modern system of judicial review. *See* Veterans' Judicial Review Act (VJRA), Pub. L. No. 100-687, 102 Stat. 4105 (1988). Commensurate with the new judicial role, Congress relaxed restrictions on paid counsel, but only after a final Board decision. *Id.* § 104, 102 Stat. at 4108-4109. During the initial agency adjudicatory process, veterans remain unable to use paid attorneys, which curtails their ability to press meritorious legal arguments or exercise their appellate rights. *See* 38 U.S.C. § 5904(c)(1). Indeed, "nearly all veteran benefits claims are resolved at the regional office stage." *National Org. of Veterans' Advocs., Inc.* v. *Secretary of Veterans Affs.*, 981 F.3d 1360, 1380 (Fed. Cir. 2020) (en banc). Therefore, CUE will often be the first time that there will be any review of the RO's legal determinations. The evidence suggests that review matters. For cases that the Veterans Court heard in the most recent fiscal year, it reversed the RO in whole or in part in nearly 95% of the cases decided on the merits. *See* U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2024 Annual Report* 3, https://www.uscourts.cavc.gov/documents/FY2024AnnualReport.pdf; *see also Henderson*, 562 U.S. at 432 (noting veterans' "remarkable record of success" in overturning RO decisions on further review).

In that unique context, it is understandable why Congress drew the lines that it did. Where it is not unmistakably clear that a legal error affected the case, Congress placed a premium on finality. But where a veteran can show that her case was clearly affected by an improper application of the law at the time of the

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over a century, with violators subject to criminal prosecution. *See Walters*, 473 U.S. at 308, 321-322 (discussing the history).

decision (often, thanks to the benefit of newly obtained counsel), Congress sought to provide a pathway for relief.

***Third***, the history of CUE is consistent with a focus on erroneous benefits determinations. Congress enacted CUE against the backdrop of a well-established body of caselaw from the Veterans Court. *See George*, 596 U.S. at 746 (explaining that Congress codified CUE as "developed under prior agency practice") (quotations omitted). That caselaw draws the precise distinction between error in reasoning and error in outcome suggested by the text and context.

For example, in *Fugo*, the Veterans Court confirmed that what must be "absolutely clear" is "that a different result would have ensued" even accepting "the premise of error." 6 Vet. App. at 44. And in the seminal *Russell* decision, the en banc Veterans Court underscored that the focus of CUE is on the outcome of the decision, not the obviousness of the error.[4] *Russell*, 3 Vet. App. at 313. To show CUE, *Russell* explained, there must first be "an error in the prior adjudication of the claim." *Id.* Next, that error must be of the sort that it "would have manifestly changed the outcome." *Id.* And that change in outcome must be "undebatable, so that it can be said that reasonable minds could only conclude that the original decision was fatally flawed." *Id.* at 313-314. As *Russell* makes plain, the assessment of legal error turns on its existence, not its clarity. What

[4] Both this Court and the Federal Circuit have looked to *Russell* as an authoritative source of CUE law around the time of Congress's codification. *See George*, 596 U.S. at 747; *Willsey* v. *Peake*, 535 F.3d 1368, 1371-1372 (Fed. Cir. 2008). And both houses of Congress expressly referenced *Russell* in their reports on the law. *See* H.R. Rep. No. 105-52, at 2-3 (1997); S. Rep. No. 105-157, at 3 (1997).

must be "clear and unmistakable" is that the legal error altered the final benefits determination.

The text, context, and history of CUE indicate that Congress did not require veterans (or CUE adjudicators) to undertake a historical quest for legal clarity. The statutory focus is the veteran and her benefits, not the VA and its error. Put another way, CUE does not ask how clearly the VA erred but how clearly the veteran was affected. CUE adjudicators must ask, de novo, what the law was at the time of the decision. Only then do they ask whether the law was misapplied in a way that clearly and unmistakably affected the resulting benefits determination.

### B. The Federal Circuit Erroneously Required Veterans to Prove the Law's Clarity Rather Than its Applicability

The Federal Circuit began and ended its analysis by asking the wrong question: whether the law at the time of the initial decision was "undebatabl[e]." Pet.App.2a; *see id.* at 16a (concluding that the court need not "determine the correct interpretation of" the relevant regulation because it "did not undebatably apply" to the case). That demand for legal clarity contorts the CUE inquiry. On collateral review, a CUE adjudicator must ask whether the benefits determination was clearly erroneous, not whether the law at the time of the decision was clear. 38 C.F.R. § 3.105(a)(1)(i). In other words, the salient "error" that must be "clear and unmistakable" is the bottom-line result, not the RO's understanding of the state of the law. 38 U.S.C. § 5109A.

The Federal Circuit erred by conflating these two distinct forms of error. A decisional error—the error relevant to CUE—requires a clear showing "that the result would have been manifestly different but for" a legal

error. 38 C.F.R. § 3.105(a)(1)(i). There is no comparable clarity requirement as to the legal error. At step one, a CUE adjudicator must independently assess the law at the time of the VA's decision. But rather than undertaking that inquiry, the Federal Circuit went hunting through the corpus in search of ambiguity in the law. And because it could hypothesize how reasonable minds might reach differing interpretations of the relevant regulation, the court abandoned its duty to "say what the law [was]" at the time of the decision. *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). That approach conflicts with *George*, the old CUE soil, and basic principles of judicial administrability.

***First***, the Federal Circuit's holding rests on a misreading of this Court's decision in *George*. *George* held that the VA's proper application of a binding regulation cannot establish CUE if the regulation is later deemed invalid. 596 U.S. at 747-748. From *George*, the Federal Circuit drew the mistaken proposition that a court can never authoritatively declare what the law was, at least not when it contains even a wisp of ambiguity. But that is not at all what this Court held.

*George* involved a unique confluence of factors that cut against the decision below. First, the VA properly applied one of its regulations to a veteran's claim for benefits. 596 U.S. at 744-745. Decades later, the Federal Circuit held that the regulation was contrary to law. *Id.* After yet another decade, the veteran brought a CUE claim on the grounds that his original adjudication was clearly and unmistakably wrong for relying on the unlawful but then-binding regulation. *Id.* In that limited circumstance, *George* held that the VA's reliance on a subsequently invalidated regulation cannot be used to collaterally attack the decision. Authorities dating back to 1928 explained that CUE did not apply to "a

subsequent change in law or a change in interpretation of law," and the "historical agency practice" treated "[t]he invalidation of a prior regulation" as a changed interpretation of law. *Id.* at 747. Therefore, *George* held, a court's holding that *conflicts with* a regulation does not prove CUE in an earlier adjudication that relied on the then-valid regulation. But nothing in *George* supports the logical leap that a court's holding on the *meaning of* an ambiguous regulation cannot prove CUE in an earlier adjudication that misapplied the regulation. Put another way, *George* teaches that conflicts with prior law cannot create CUE. But a mere confirmation of prior law can support a CUE claim when that law was misapplied. Indeed, this Court's paradigmatic example of CUE was "the VA's failure to apply an existing regulation to undisputed record evidence." *Id.*

***Second***, the Federal Circuit's holding is irreconcilable with the longstanding agency practice that Congress imported into the CUE statute. CUE review originated as early as 1928, well before the advent of judicial review or the proceduralizing of agency rulemaking in the Administrative Procedure Act (APA).[5] *See* Veterans' Bureau Reg. No. 187, pt. 1, § 7155 (1928) (allowing for reversal or amendment of a final decision when "obviously warranted by a clear and unmistakable error"). In that environment, a veteran alleging CUE based on an erroneous interpretation of law could not have feasibly shown "a settled interpretation" of the law. Pet.App.16a. No such settlement was possible. Instead,

[5] Even after congressional enactment of the APA, the VA "was effectively insulated from the APA's requirements." H.R. Rep. No. 100-963, at 10 (1988) (quoting Rabin, *Preclusion of Judicial Review in the Processing of Claims for Veterans' Benefits*, 27 Stan. L. Rev. 905, 905 (1975)).

a CUE adjudicator would have undertaken an independent assessment of whether the prior VA decision was consistent with the governing law as construed by the adjudicator.

Following enactment of the VJRA, the newly formed Veterans Court necessarily undertook de novo legal review given the dearth of extant precedent. Its cases confirm as much. When the Veterans Court undertook CUE review, it did not ask whether the law was "undebatabl[e]," Pet.App.16a, but what was "the 'true' state of … the law that existed at the time of the original adjudication." *Russell*, 3 Vet. App. at 313. When the VA failed "to apply or observe the requirements of a regulation or statute," it committed legal error—full stop. *Myler* v. *Derwinski*, 1 Vet. App. 571, 574 (1991). And where that failure was clearly "prejudicial to the veteran," the legal error was CUE. *Id.*

***Third***, the Federal Circuit's contrary standard is judicially unmanageable and will deprive countless veterans of their statutory entitlement. By asking whether the law at the time of the decision could be subject to reasonable dispute, the court below indulged a new flavor of the now discredited *Chevron* framework. As long as there is even a glimmer of legal ambiguity, a court can throw up its hands, defer to the agency, and excuse itself from the quintessential judicial function of interpreting the law. As this Court's fraught experience with *Chevron* lays bare, there is no principled way to apply such a nebulous standard. Veterans must simply "guess whether the [law] will be declared 'ambiguous' (courts often disagree on what qualifies)," *Gutierrez-Brizuela* v. *Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring), as "different judges have wildly different conceptions of whether [the law] is clear or ambiguous," Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv.

L. Rev. 2118, 2152 (2016). Indeed, in *George* the government urged the Court to avoid hitching CUE to whether a law is clear or ambiguous, as "reasonable adjudicators—including Members of this Court—often disagree about such matters." No. 21-234 Resp. Br. 17-18 (Mar. 30, 2022).

The missteps of the decision below are even more consequential when paired with *George*. Under *George*, an agency's authoritative interpretation of the law is conclusive, even if it is later held to be wrong. And under the decision below, an agency's interpretive silence is preclusive to legal clarity and CUE relief. That heads-I-win-tails-you-lose strategy is not what Congress intended. The entire thrust of its efforts was to expand the "pro-claimant [features] … throughout the VA system." H.R. Rep. No. 105-52, at 4 (1997). In the absence of any authoritative agency or judicial decision, the Federal Circuit's role was to decide, de novo, what was "the law that existed at the time of the prior" VA decision. *George*, 596 U.S. at 747.

## II. THE DECISION BELOW IS OF EXCEPTIONAL IMPORTANCE AND WARRANTS THIS COURT'S REVIEW

The Federal Circuit's interpretation of CUE removes a vital remedial pathway for veterans seeking to correct unmistakable errors in their benefits. The VA system is notoriously byzantine, glacial, and inaccurate.[6]

[6] *See, e.g.*, *Wiggins* v. *Collins*, 38 Vet. App. 341, 356 (2025) (noting that "systemic delays" are "[e]ndemic to the VA[]") (per curiam); *Speckmaier* v. *McDonough*, No. 24-0627, 2024 WL 5198580, at *1 (Vet. App. Dec. 23, 2024) (describing "a shameful multiyear process plagued by inaction, delay and VA determinations" that were "blatantly incorrect" and indicative of "an overwhelmed and poorly designed system"); *Booker* v. *McDonough*, No. 24-1589, 2024 WL 2721566, at *6 (Vet. App. May 28, 2024) ("[E]very claimant suffers through long delays at VA"); *Brown* v. *McDonough*, No. 20-

Veterans navigating this procedural minefield must do so without the aid of counsel. *See* 38 U.S.C. § 5904(c)(1). That is, claimants must file, prepare the record for, and argue their own cases, with legal support unavailable until after their claim is denied. By that point, most veterans whose claims are denied—often improperly—do not appeal the RO's decision. *See National Org. of Veterans' Advocs.*, 981 F.3d at 1380-1381. In reality, it is estimated that hundreds of thousands of veterans who are otherwise eligible for disability benefits do not receive them. *See* Pomerance, *Fighting on Too Many Fronts*, 37 Hamline L. Rev. 19, 46 (2014). With these barriers standing between veterans and their earned benefits, CUE serves as a backstop for correcting egregious errors.

CUE is also the only mechanism for veterans to obtain benefits retroactive to the date of the original erroneous decision. *See* 38 U.S.C. §§ 5109A(b), 7111(b). Many veterans have fought for decades to correct the VA's clearly erroneous benefits determination. *See, e.g.*, *Cegelnik* v. *Wilkie*, No. 18-4319, 2019 WL 4120415, at *1-3 (Vet. App. Aug. 30, 2019) (finding of CUE in 2019 based on benefits claim from 1987); *Redacted*, No. 10-45 920, Bd. Vet. App. 1334737, 2013 WL 6575774, at *2-4 (Oct. 30, 2013) (CUE in 2013 for claim raised in 1971); *Griego* v. *Shinseki*, No. 07-3470, 2010 WL 227704, at *2 (Vet. App. Jan. 22, 2010) (CUE remand in 2010 for claim first brought in 1979). These veterans "are severely

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3068, 2021 WL 1306122, at *3 (Vet. App. Apr. 8, 2021) ("[T]he VA benefits process is complex and can be confusing to veterans"); *Bonner* v. *Wilkie*, 33 Vet. App. 209, 227 (2021) (Greenberg, J., dissenting) (noting the VA's "systemic, bureaucratic disorder"); *Military-Veterans Advoc.* v. *Secretary of Veterans Affs.*, 7 F.4th 1110, 1118 (Fed. Cir. 2021) (describing the VA's administrative appeals system as "'broken', marked by lengthy delays, and plagued with a formidable backlog of cases").

burdened by the seemingly interminable delays they face in the processing of claims for disability benefits." *Vuksich* v. *McDonough*, No. 2024-1049, 2024 WL 2180231, at *2 (Fed. Cir. May 15, 2024) (per curiam); *see Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 n.* (1792) ("many unfortunate and meritorious [veterans], whom Congress have justly thought properly objects of immediate relief, may suffer great distress, even by a short delay, and may be utterly ruined, by a long one"). The systemic delays and errors that plague the VA make it all the more important that veterans have a viable path to retroactive benefits once their claims are eventually, correctly resolved. Yet if the decision below stands, CUE will be foreclosed in all but the most egregious cases of the VA disregarding crystal-clear law.

Clarifying the proper scope of CUE review is also of exceptional importance to the broader *corpus juris*. In 2023, the year immediately following *George*, the Board issued 3,867 decisions referencing "clear and unmistakable error." In 2024, that number increased to 7,294, and for 2025, the number is already approaching 7,000.[7] Yet even as the volume of cases rises, much of the pipeline consists of benefits claims stretching back multiple decades. The law at the time of those decisions often "aged nicely simply because Congress took so long to provide for judicial review," leaving VA's regulations "unscrutinized and unscrutinizable." *Brown*, 513 U.S. at 122. If no authoritative body could declare the law at the time of the decision, and a reviewing tribunal cannot now declare the meaning of that law, then an entire generation

[7] Figures were compiled through a search for decisions using the term "clear and unmistakable error" in 2023, 2024, and 2025. *See* U.S. Dep't of Veterans Affairs, *Search Results*, https://search.usa.gov/search/docs?affiliate=bvadecisions&dc=10280&query=%22clear+and+unmistakable+error%22 (visited Dec. 22, 2025).

of veterans will be stripped of their statutory entitlement to CUE and their benefits.

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The decision below erdoes a vital safety valve for veterans by moving the focal point of review from the error of the decision to the clarity of the law at the time of the decision. That latter inquiry has no bearing on CUE's remedial purposes or Congress's intent in providing an additional avenue for relief. The Federal Circuit's holding conflicts with the text, context, history, and structure of CUE review, and with this Court's decision in *George*. It creates an unmanageable standard under which a veteran's right to relief will be in the eye of the beholder.

## CONCLUSION

The Court should grant certiorari.

Respectfully submitted.

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