No. 25-609

In the Supreme Court of the United States

CLINTON SIPLES, PETITIONER

v.

DOUGLAS A. COLLINS,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

In 1997, Congress provided that an otherwise final veteran's-benefits decision by the Department of Veterans Affairs is subject to collateral review at any time, but only on grounds of "clear and unmistakable error." 38 U.S.C. 5109A(a) and (d). The question presented is as follows:

Whether "clear and unmistakable error" under 38 U.S.C. 5109A includes error of any degree of clarity, including a debatable error, so long as the error clearly altered the outcome of the original decision.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-18a) is reported at 127 F.4th 1325. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 19a-28a) is not published in the Veterans Claims Reporter but is available at 2021 WL 5919626. The order of the Board of Veterans' Appeals (Pet. App. 29a-56a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on February 7, 2025. A petition for rehearing was denied on August 21, 2025 (Pet. App. 67a-68a). The petition for a writ of certiorari was filed on November 19, 2025. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In November 1997, Congress enacted 38 U.S.C. 5109A, which authorizes the revision at any time of an otherwise final veteran's-benefits decision made by the

Department of Veterans Affairs (VA), but only on grounds of "clear and unmistakable error." 38 U.S.C. 5109A(a) and (d). That provision "codified" a "form of collateral review * * * first adopted by regulation roughly 100 years ago" that applies only in "exceptional circumstances" involving a "narrow category" of error known as "'clear and unmistakable error.'" *George* v. *McDonough*, 596 U.S. 740, 744, 746 (2022) (citation omitted).

In *George*, this Court held that Congress had "'adopted the clear-and-unmistakable-error doctrine as it had developed under' prior agency practice," thereby incorporating in 1997 the "'prevailing understanding'" of "clear and unmistakable error" as a "term of art" that was reflected in "'preexisting Veterans Court case law' and other agency practice." *George*, 596 U.S. at 746, 752 (brackets and citations omitted). The question presented in this case is whether (as the court of appeals understood) "clear and unmistakable error" under the 1997 statute is limited to errors that are "undebatable," or whether (as petitioner contends) the statute encompasses a debatable error so long as the error clearly altered the outcome of the original decision, Pet. i, 2, 16.

a. "Since at least 1928, the VA and its predecessor agencies have allowed revision of an otherwise final decision when 'obviously warranted by a clear and unmistakable error.'" *George*, 596 U.S. at 744 (quoting Veterans' Bureau Reg. No. 187, Pt. 1, § 7155 (1928)). By the 1950s, VA regulations distinguished between errors that were "clear and unmistakable" and those that reflected a "difference of opinion." See, *e.g.*, 38 C.F.R. 3.9(b) (1956). Those regulations provided that a "clear and unmistakable error" would be revised "as if the corrected decision had been made on the date of the re-

versed decision." 38 C.F.R. 3.105(a) (1956 Cum. Supp. 1963); see 38 C.F.R. 3.400(k) (1956 Cum. Supp. 1963). But if the relevant error reflected "a difference of opinion * * * rather than a clear and unmistakable error," 38 C.F.R. 3.105(b) (1956 Cum. Supp. 1963), the award's effective date would be the date that the VA authorizes the new "favorable decision," 38 C.F.R. 3.400(h)(2) (1956 Cum. Supp. 1963).

Since the 1950s, VA regulations have also authorized the agency to revise for "clear and unmistakable error" only those previous "determinations on which an action was predicated." 38 C.F.R. 3.105(a) (1991); 38 C.F.R. 3.105(a) (1956 Cum. Supp. 1963) (same); cf. 38 C.F.R. 3.105(a) (1997) (listing "[p]revious determinations" that may be revised). In 1992, the en banc Veterans Court in *Russell* v. *Principi*, 3 Vet. App. 310, interpreted those two quoted phrases in Section 3.105(a) as embodying two distinct elements of the clear-and-unmistakable-error doctrine.

First, the en banc Veterans Court concluded that "[t]he words 'clear and unmistakable error' are self-defining" and refer only to "errors that are undebatable." *Russell*, 3 Vet. App. at 313. In other words, the court stated, no "'clear and unmistakable error'" exists unless "reasonable minds could only conclude that the original decision was fatally flawed." *Ibid.*

Second, the en banc Veterans Court determined that, because the regulatory text referred to "'determinations on which an action was predicated,'" the relevant error must "be the sort of error which, had it not been made, would have manifestly changed the outcome." *Russell*, 3 Vet. App. at 313 (quoting 38 C.F.R. 3.105(a) (1991)). Otherwise, the court stated, the error

would be "harmless" and could "not give rise to the need for revising the previous decision." *Ibid.*

b. In November 1997, Congress enacted Section 5109A, which authorizes the revision of an otherwise final VA decision (typically made by a VA regional office) on grounds of "clear and unmistakable error." Act of Nov. 21, 1997, Pub. L. No. 105-111, § 1(a)(1), 111 Stat. 2271 (38 U.S.C. 5109A(a)); see *George*, 596 U.S. at 746, 752. In the same statute, Congress also enacted 38 U.S.C. 7111, which extended the clear-and-unmistakable-error doctrine beyond the VA's own decisions. Cf. *Smith* v. *Brown*, 35 F.3d 1516, 1527 (Fed. Cir. 1994) (holding that 38 C.F.R. 3.105(a) applied "only to review of [VA] decisions"). Section 7111 provides that otherwise final decisions of the Board of Veterans' Appeals (Board)—the administrative tribunal that reviews VA benefits decisions, 38 U.S.C. 7104(a)—may be revised at any time for "clear and unmistakable error." Act of Nov. 21, 1997, § 1(b)(1), 111 Stat. 2271-2272 (38 U.S.C. 7111(a) and (d)).

c. After Congress enacted Sections 5109A and 7111, the VA twice revised its regulations to address clear and unmistakable error in ways that are material to petitioner's current arguments. See, *e.g.*, Pet. 8, 17-18, 23 (relying on text from 38 C.F.R. 3.105(a) and 20.1403(a), which were first promulgated in 2019 and 1999 respectively).

First, in 1999, the VA amended the Board's rules of practice to define "procedures and establish decision standards based on case law" for the Board's then-new authority to revise its prior decisions for clear and unmistakable error. 64 Fed. Reg. 2134, 2134 (Jan. 13, 1999). The VA stated that it had "based [its] definition of [clear and unmistakable error] on rulings by the [Veterans Court]" because "Congress intended that VA

adopt the [Veterans Court's] interpretation of the term 'clear and unmistakable error'" under "38 CFR 3.105(a)." *Id.* at 2135-2136.

As promulgated in 1999, Rule 1403 of the Board's Rules of Practice states that "[c]lear and unmistakable error is a very specific and rare kind of error." 38 C.F.R. 20.1403(a). The rule adds that "[i]t is the kind of error, of fact or of law, that when called to the attention of later reviewers compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." *Ibid.*

Second, in 2019, the VA amended Section 3.105(a) "for the purpose of conforming [it] with [Section 20.1403's] existing regulations applicable to [clear and unmistakable error] in finally adjudicated Board decisions." 84 Fed. Reg. 138, 142 (Jan. 18, 2019). As revised in 2019, Section 3.105(a)(1)(i) sets forth a regulatory definition of "clear and unmistakable error" that is materially similar to Section 20.1403's. See 38 C.F.R. 3.105(a)(1)(i). Section 3.105(a)(1)(i) further states that "[i]f it is not absolutely clear that a different result would have ensued, the error complained of cannot be clear and unmistakable." *Ibid.*

2. a. Petitioner served in the Air Force from 1978 to 2003. Pet. App. 6a. He applied for VA disability benefits, and in 2004 a VA regional office granted benefits based on its conclusion that petitioner had a service-connected bilateral shoulder-subluxation disorder that warranted a 10% disability rating. *Ibid.*; see *id.* at 57a-66a (VA decision). Petitioner did not appeal, and the regional office's decision became final. *Id.* at 6a.

b. In 2017, petitioner moved the VA to revise its 2004 rating decision with a retroactive effective date, alleging that the decision rested on a clear and unmistakable

error that, if corrected, would result in a 20% rating. Pet. App. 6a. The VA denied that request for retroactive revision because it found "no clear and unmistakable error" in the 2004 decision, but it granted the requested 20% rating with a January 2017 effective date. Veterans Court Record of Proceedings 717 (Jan. 27, 2021) (Aug. 2017 VA regional office decision).

c. The Board also found no clear and unmistakable error in the VA's 2004 decision. Pet. App. 29a-56a. The Board explained that, in order to qualify as a clear and unmistakable error, an "error must be [1] 'undebatable' and [2] of the sort which, if it had not been made, would have manifestly changed the outcome at the time it was made." *Id.* at 36a (citing *Damrel* v. *Brown*, 6 Vet. App. 242, 245 (1994), which cites *Russell*, 3 Vet. App. at 313-314). The Board stated that the VA's 2004 decision to "rate by analogy" to a listed code "was reasonable," given that no listed "diagnostic code directly reflect[ed] [petitioner's] shoulder subluxation disorder." *Id.* at 41a-42a. The Board then determined that the decision was "not clear and unmistakable error" because "reasonable minds could differ" as to the propriety of the VA's approach, such that it was "not undebatable that the decision * * * was incorrect." *Ibid.* The Board rejected petitioner's reliance on 38 C.F.R. 4.59 (2004), because until 2011 the VA had applied that provision only "in cases of arthritis." Pet. App. 43a-44a.

d. The Veterans Court affirmed. Pet. App. 19a-28a. Like the Board, the Veterans Court explained that clear and unmistakable error can be established only by showing both (1) that "the alleged error was undebatable, not merely a disagreement as to how * * * the law was applied"; and (2) that "the alleged error, at the time

it was made, manifestly changed the outcome of the decision." *Id.* at 22a.

As relevant here, the Veterans Court held that petitioner's reliance on 38 C.F.R. 4.59 was misplaced. Pet. App. 24a-27a; see *id.* at 21a-22a. The court recognized that its 2011 decision in *Burton* v. *Shinseki*, 25 Vet. App. 1, had rejected the VA's earlier view that Section 4.59 "appl[ied] solely to cases of arthritis." Pet. App. 22a; see *id.* at 24a-25a. But it understood *Burton* to confirm that "[Section] 4.59 was [not] undebatably understood to apply to non-arthritis claims [like petitioner's] in 2004," so that the VA's failure to apply Section 4.59 in 2004 was not a clear and unmistakable error. *Id.* at 25a; see *id.* at 27a.

3. The Federal Circuit affirmed. Pet. App. 1a-18a. The court observed that an error must be both "'undebatable'" and "outcome determinative" to qualify as a clear and unmistakable error. *Id.* at 9a (citation omitted). As relevant here, the court "agree[d] with the Veterans Court that the understanding of [Secton] 4.59 in July 2004 did not undebatably require the [VA] to assign a higher rating to [petitioner's] nonarthritic shoulder disability." *Id.* at 15a; see *id.* at 15a-18a.

The court of appeals recognized that "a regulation's meaning may be so clear on its face as to compel the existence of [clear and unmistakable error] in a VA decision that was contrary to that meaning." Pet. App. 15a (citing *Perciavalle* v. *McDonough*, 74 F.4th 1374, 1382 (Fed. Cir. 2023)); see *id.* at 12a. But the court concluded that, "given the regulation's express references to arthritis," "the plain language of [Section] 4.59 as a whole [did not] clearly appl[y] to cases" like petitioner's that do not "involv[e] arthritic painful motion." *Id.* at 16a. The court of appeals further explained that because the

regulation, "on its face, did not undebatably apply to non-arthritic conditions," the court could reject petitioner's clear-and-unmistakable-error claim without "conclusively determin[ing] the correct interpretation of § 4.59." *Ibid.*

The court of appeals additionally emphasized that "a later-in-time interpretation of a regulation cannot itself establish" that clear and unmistakable error was committed in an earlier VA decision. Pet. App. 15a; see *id.* at 11a-13a. The court of appeals therefore concluded that the Veterans Court had "correctly noted the apparent lack of a settled interpretation of [Section] 4.59 prior to [the Veterans Court's 2011 decision in] *Burton*." *Id.* at 16a; see *id.* at 17a.

ARGUMENT

Petitioner contends (Pet. 16-29) that the "clear and unmistakable error" doctrine that Congress codified in 38 U.S.C. 5109A authorizes the revision at any time of an otherwise final VA benefits decision if that decision contains (1) an "error" of any kind so long as (2) the error "undebatably altered the outcome of the original decision," Pet. 2, 16. The Federal Circuit correctly held that the error itself must be "undebatable" in order to qualify as "clear and unmistakable error." The court's decision does not conflict with any decision of this Court, another court of appeals, or the Federal Circuit itself. Moreover, the Federal Circuit did not analyze the specific contention that petitioner advances in this Court because petitioner did not properly present it on appeal. The Court should therefore deny certiorari.

1. A "clear and unmistakable error" under Section 5109A is, as the phrase suggests, an error that is "undebatable." To provide a basis for relief under Section 5109A, that undebatable error must *also* be clearly prej-

udicial, such that it manifestly changed the outcome of the relevant decision. Petitioner focuses only on the second requirement, disregarding the core requirement that the error itself must be "clear and unmistakable." Petitioner's argument is contrary to the regulatory text and practice that Congress codified when it enacted Section 5109A in 1997.

a. As a textual matter, "[t]he modifiers 'clear' and 'unmistakable' indicate that [clear and unmistakable error] is a narrow category" of error. *George* v. *McDonough*, 596 U.S. 740, 746 (2022). When the regulatory phrase was used in the 1920s, the ordinary meaning of the adjective "clear" was—as it still is—"clearly perceptible or discernable" or "plain." *Webster's New International Dictionary* 413 (1923) (*Webster's*) (def. 5); see *Webster's Third New International Dictionary* 419 (1996) (*Webster's Third*) ("easy to perceive or determine with certainty" and "readily recognized") (def. 3a); *Webster's New International Dictionary* 499 (2d ed. 1949) (*Webster's Second*) ("readily perceptible" or "plain") (def. 5). The adjective "unmistakable" similarly meant (and continues to mean) "[n]ot capable of being mistaken or misunderstood; clear; plain; obvious; evident." *Webster's* 2246; see *Webster's Second* 2785 (same); *Webster's Third* 2504 ("not capable of being mistaken or misunderstood: clear, plain, obvious, manifest").

The phrase "clear and unmistakable error" thus has long been most naturally understood to refer to an error that is so plain and obvious that its erroneous character cannot plausibly be disputed. As the en banc Veterans Court explained before Congress codified the term, "[t]he words 'clear and unmistakable error' are self-defining": They refer only to "errors that are undebatable." *Russell* v. *Principi*, 3 Vet. App. 310, 313 (1992).

Indeed, as a textual matter, the adjectives "clear and unmistakable" in the phrase "clear and unmistakable error" plainly modify the noun "error." The text thus requires that the error itself—not any prejudicial effect that it might have on a benefits decision—be undebatable.

"[S]tatutory structure similarly suggests" that clear and unmistakable error is "a narrow category [of error]." *George*, 596 U.S. at 746. Congress has directed that, once the opportunity for review on direct appeal has passed, a VA "benefits decision generally becomes 'final and conclusive and may not be reviewed by any other official or by any court.'" *Id.* at 744 (quoting 38 U.S.C. 511(a) and citing 38 U.S.C. 7104(a)). The "form of [collateral] review" that Congress codified for clear and unmistakable error therefore "functions as a limited exception to [that] finality." *Id.* at 746. "Here as elsewhere, litigants must overcome a 'strong' 'presumption of validity' when 'otherwise final decisions . . . are collaterally attacked.'" *Id.* at 751-752 (brackets and citation omitted). Allowing VA decisions to be revised years or even decades after the fact whenever debatable error can be shown to have affected the outcome of a veteran's-benefits proceeding would severely undermine the strong interest in finality.

b. The regulatory history confirms that an error must be "undebatable" in order to constitute "clear and unmistakable error." This Court in *George* held that "the historical meaning" of clear and unmistakable error reflected in "'preexisting Veterans Court case law' and other agency practice" will "control[]" "[t]o the extent" that "'the plain meaning of the words' clear and unmistakable error" diverges from that "'prevailing understanding' of this term of art." *George*, 596 U.S. at

752 (brackets and citations omitted). The applicable regulations have long reflected two core criteria, each of which must be satisfied before an otherwise final VA decision may be corrected with an effective date of the original decision. First, an error in that decision must be "clear and unmistakable." Second, the error must be an obviously prejudicial one that changed the outcome and therefore warrants the extraordinary step of revising that decision.

With respect to the first of those requirements, the VA's regulations have long distinguished between errors that were "clear and unmistakable" and those that reflected a "difference of opinion." See, *e.g.*, 38 C.F.R. 3.9(b) (1956). A "clear and unmistakable error" was corrected "as if the corrected decision had been made on the date of the reversed decision." 38 C.F.R. 3.105(a) (1956 Cum. Supp. 1963); see 38 C.F.R. 3.400(k) (1956 Cum. Supp. 1963). But if the error reflected "a difference of opinion * * * rather than a clear and unmistakable error," 38 C.F.R. 3.105(b) (1956 Cum. Supp. 1963), the effective date was the date the VA authorized the new "favorable decision," 38 C.F.R. 3.400(h)(2) (1956 Cum. Supp. 1963). See also, *e.g.*, 38 C.F.R. 3.9(b) (1956) (same). The current regulations continue to draw that distinction. Compare 38 C.F.R. 3.105(a)(1)(ii), with 38 C.F.R. 3.105(b), 3.400(h)(2) and (3).

Shortly after Congress established the Veterans Court in 1988 to review decisions of the Board, see 38 U.S.C. 7251 *et seq*. (enacted 1988), the Veterans Court confirmed the nature of a "clear and unmistakable error." In 1992, the en banc court in *Russell* v. *Principi* interpreted the pertinent regulation, 38 C.F.R. 3.105(a) (1991), by holding that "[t]he words 'clear and unmistakable error' are self-defining" and refer only to "er-

rors that are undebatable." *Russell*, 3 Vet. App. at 313. The court in *Russell* explained that "errors * * * are undebatable" where "reasonable minds could only conclude that the original decision was fatally flawed." *Ibid.* The court further observed that "an error either undebatably exists or there was no error within the meaning of § 3.105(a)." *Id.* at 314.

The court in *Russell* additionally determined that even an undebatably clear error was by itself an insufficient ground for providing relief from a prior adverse benefits determination. The court held that, because the clear-and-unmistakable-error regulation referred specifically to "'determinations on which an action was predicated,'" the regulation "necessarily" required that the relevant error be "the sort of error which, had it not been made, would have manifestly changed the outcome." *Russell*, 3 Vet. App. at 313 (quoting 38 C.F.R. 3.105(a) (1991)); cf. 38 C.F.R. 3.105(a) (1956 Cum. Supp. 1963) (same regulatory text). In other words, a clear showing must be made that the error was not "harmless," since even an obvious non-prejudicial error could "not give rise to the need for revising the previous decision." *Russell*, 3 Vet. App. at 313.[1]

The *Russell* court applied both elements of that test. First, the court held that the VA had "undebatably committed error" by "failing to follow an applicable regulation" and by making an "undebatably incorrect" finding of fact. *Russell*, 3 Vet. App. at 319. Second, the court

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[1] The 1928 regulation similarly reflected this second requirement by authorizing the revision of a final VA decision only when it was "[1] *obviously warranted* [2] *by* a *clear and unmistakable error* shown by the evidence in file at the time the prior decision was rendered." Veterans' Bureau Reg. No. 187, Pt. 1, § 7155 (emphases added); see 38 C.F.R. 3.9(a) (1956) (same).

explained that its finding of the requisite "error does not end the matter" because the claimant was also required to "establish[] manifestly that the correction of the error would have changed the outcome." *Id.* at 320. The *Russell* court remanded for the Board to address the latter requirement "in the first instance." *Ibid.*

Section 5109A's legislative history reflects Congress's understanding that, under *Russell*, "'clear and unmistakable error' is error that is obvious *and* was outcome-determinative with respect to the decision under review." S. Rep. No. 157, 105th Cong., 1st Sess. 3 (1997) (citing *Russell*, *supra*) (emphasis added).[2] This Court in *George* similarly determined the scope of the clear-and-unmistakable-error doctrine by examining *Russell* and three other Veterans Court decisions, including *Damrel* v. *Brown*, 6 Vet. App. 242 (1994), and *Berger* v. *Brown*, 10 Vet. App. 166 (1997). See *George*, 596 U.S. at 747. Like *Russell*, *Damrel* and *Berger* confirm that clear and unmistakable error exists only when the error itself—and not merely its outcome-determinative effect—is so clear as to be undebatable.

The Veterans Court in *Damrel* stated that a purported error under the clear-and-unmistakable-error doctrine "must be [1] 'undebatable' and [2] of the sort 'which, had it not been made, would have manifestly changed the outcome.'" *Damrel*, 6 Vet. App. at 245 (quoting *Russell*, 3 Vet. App. at 313). Applying the first

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[2] See H.R. Rep. No. 52, 105th Cong., 1st Sess. 3 (1997) (noting VA testimony that "no substantive difference [exists] between the Board's [preexisting discretionary] authority to correct 'obvious error' [under 38 U.S.C. 7103(c)] and the [VA's] authority to correct clear and unmistakable error"); 143 Cong. Rec. 5668 (1997) (statement of Rep. Evans) ("The kind of errors which this bill will rectify are those which are egregious and undebatable.").

requirement, the *Damrel* court concluded that claims of "improperly weighed and evaluated evidence[] 'can never rise to the stringent definition of [clear-and-unmistakable error]' under 38 C.F.R. § 3.105(a)" because they simply ask a later-in-time adjudicator "to reweigh the evidence." *Id.* at 246 (quoting *Fugo* v. *Brown*, 6 Vet. App. 40, 44 (1993)).

The court in *Berger* likewise focused on whether the error itself—rather than its effect on the outcome—was clear and unmistakable. The claimant in *Berger* asserted in 1990 that an otherwise final 1969 decision by a VA Regional Office was tainted by clear and unmistakable error in the form of an erroneous statutory and regulatory interpretation. See *Berger*, 10 Vet. App. at 167-168. The court observed that "a valid * * * claim" of clear and unmistakable error exists only "[i]f the [VA's] interpretation of the plain meaning of the [governing] law was clearly and unmistakably erroneous" when the agency rendered its original decision. *Id.* at 170. The court held that "no basis for such a claim" exists "if [the VA's reading] was a plausible interpretation, in the context of the body of law that existed in 1969." *Ibid.* The court rejected the veteran's clear-and-unmistakable-error claim because "the plain language of the statute" and "its implementing regulation" showed that, in 1969, "[t]he statute was * * * susceptible of differing interpretations." *Ibid.*[3]

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[3] Other pre-codification Veterans Court decisions are to the same effect. See, *e.g.*, *Crippen* v. *Brown*, 9 Vet. App. 412, 422 (1996) (denying claim of clear and unmistakable error on the independent grounds that (1) the asserted errors were "garden-variety erro[rs]" that failed to meet the clear-and-unmistakable standard and, "[a]lternatively," (2) "even if there had been an undebatable error," the claim failed to satisfy "the *Russell* requirement" that the relevant error

2. Petitioner does not dispute that the purported error in the VA's relevant 2004 decision is a debatable one. See Pet. 22-23, 35. He instead disputes that an error in an otherwise final benefits decision must be undebatable in order to warrant its revision on collateral review. Pet. 16, 23. In petitioner's view, Congress authorized the revision of such a decision for clear and unmistakable error "where (1) [the] benefits decision was erroneous, and (2) that error undebatably altered the outcome of the original decision." Pet. 16; see Pet. i, 2, 17-18, 23. That position is wrong and lacks support in the relevant statutory and regulatory framework.

a. Petitioner acknowledges (Pet. 19) that Congress's 1997 codification of the clear-and-unmistakable-error doctrine "incorporated contemporaneous VA caselaw articulating [that] standard." But petitioner identifies no basis for concluding that the "mainstream of agency practice," *George*, 596 U.S. at 750, reflects his understanding of the term "clear and unmistakable error."

Petitioner describes (Pet. 19, 25) *Berger* as requiring claimants to show that "the result would have been 'clearly and unmistakably' different" "but for the error." *Berger*, 10 Vet. App. at 169. But that passage in *Berger* simply addressed the doctrine's second require-

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"'*manifestly* changed the outcome'") (citation omitted); *Eddy* v. *Brown*, 9 Vet. App. 52, 58 (1996) (concluding that "'a disagreement as to how the facts were weighed or evaluated'"—"no matter how compelling"—cannot establish clear and unmistakable error) (citation omitted); *Johnson* v. *Brown*, 4 Vet. App. 508, 511 (1993) (explaining that the clear-and-unmistakable-error standard is satisfied "only where it appears 'undebatably' that '[e]ither the correct facts, as they were known at the time, were not before the adjudicator or the statutory or regulatory provisions extant at the time were incorrectly applied'") (quoting *Russell*, 3 Vet. App. at 313) (brackets in original).

ment of prejudicial, outcome-determinative error. *Berger* confirmed that a claimant has "no basis" for a claim of "clear and unmistakable error" under the doctrine's primary requirement where, as in *Berger*, the VA's original decision rested on a "plausible interpretation" of the law. *Id.* at 170; see *ibid.* ("[W]here reasonable minds could differ concerning the 'correct' interpretation," it follows "[a] fortiori" that "the error, if any, * * * [i]s neither clear nor [i]s it unmistakable."); p. 14, *supra*.

Petitioner's reliance (Pet. 19-20, 24-25) on *Fugo* is also unavailing. As petitioner notes, the court in *Fugo* recognized that a claimant must make a "compelling case that the result would have been manifestly different" but for the alleged error. *Fugo*, 6 Vet. App. at 44. But petitioner's partial quotation from *Fugo* again speaks only to the second requirement of harmful error. See *ibid*. (requiring an "absolutely clear [showing] that a different result would have ensued" without the error). The full quotation reveals that a claimant asserting such an error "must state [1] why it is [clear and unmistakable error] *and* [2] present a compelling case that the result would have been manifestly different." *Ibid*. (emphasis added). The *Fugo* court observed that "[t]he only matter raised by [the claimant there] that could [have] conceivably be[en] considered [clear and unmistakable error]" was the VA's failure "to consider [a regulation]," but the court determined (without deciding whether the error was sufficiently clear) that this failure could not justify relief because it was, "at the most, debatable whether consideration of th[e] regulation would have had any effect on [the decision]." *Ibid*.

Petitioner states that "[t]his Court in *George* highlighted 'VA's failure to apply an existing regulation to undisputed record evidence' as an exemplar of [clear

and unmistakable error]." Pet. 20 (quoting *George*, 596 U.S. at 747). But in support of that proposition, the Court cited (*George*, 596 U.S. at 747) a Veterans Court decision in which the "application of the governing regulation to the[] agreed-upon facts" was entirely clear *and* the VA's non-compliance with the rule had prejudiced the claimant by producing a 10% disability rating instead of the 30% rating that the regulations required. See *Myler* v. *Derwinski*, 1 Vet. App. 571, 574-575 (1991).

Finally, petitioner briefly suggests (Pet. 20, 24) that under *Look* v. *Derwinski*, 2 Vet. App. 157, 160 (1992), "the failure to apply governing law" can establish clear and unmistakable error. But petitioner relies (Pet. 24) on a passage from that decision that described the contested issue as "whether the Board erred in determining that [Look] was not entitled to disability benefits" under a particular statutory provision, *Look*, 2 Vet. App. at 160, without addressing how clear and unmistakable error must be analyzed. Moreover, this Court in *George* determined that *Look*'s analysis of clear and unmistakable error is "ambiguous" and, in any event, that *Look* constitutes "an outlier" decision that does not "capture[] 'the state of [the relevant] body of law.'" *George*, 596 U.S. at 749-750 (citation omitted). Petitioner thus identifies no support for his position in the "mainstream of agency practice" that Congress codified in 1997. *Id.* at 750.

b. Petitioner relies (Pet. 8, 17-18, 23-24) on text in 38 C.F.R. 20.1403(a) that the VA adopted in 1999, and materially similar text in 38 C.F.R. 3.105(a) that the agency adopted in 2019. See pp. 4-5, *supra*. But because that regulatory language postdates Congress's 1997 enactment of Section 5109A, it cannot alter the meaning of that statutory provision.

Section 3.105(a) now states that "[i]f 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). Section 20.1403 contains identical language. See 38 C.F.R. 20.1403(c). That language makes clear that the VA may grant relief based on "clear and unmistakable error" only if the error's outcome-determinative effect is indisputable. But the language does not reject the prior understanding that the error itself must be clear and unmistakable (*i.e.*, undebatable). Indeed, Section 3.105 continues to distinguish between "clear and unmistakable error" and an error reflecting "a difference of opinion." 38 C.F.R. 3.105(b); see p. 11, *supra*.

Petitioner relies (Pet. 17, 23) on post-codification regulatory language indicating that a clear and unmistakable error is "the kind of error" that "compels the conclusion, to which reasonable minds could not differ, that the result would have been manifestly different but for the error." 38 C.F.R. 3.105(a)(1)(i); accord 38 C.F.R. 20.1403(a). But that language likewise does not reflect a VA determination that an error's prejudicial effect is the *only* criterion that must be clear and unambiguous. To the contrary, the agency stated when promulgating that text that there are "three elements" of a clear-and-unmistakable-error claim, the latter two of which are that "(2) the *error must be* '*undebatable*,' and (3) the error must undebatably be outcome-determinative, meaning that the error would have 'manifestly changed the outcome' at the time it was made." 83 Fed. Reg. 39,818, 39,821 (Aug. 10, 2018) (quoting decision that quotes *Russell*, 3 Vet. App. at 313-314) (emphasis added). The VA further observed that "[a]n error is undebatable" where "'reasonable minds could only conclude that the

original decision was fatally flawed.'" *Ibid.* (quoting *Russell*, 3 Vet. App. at 313). The VA also explained that its regulation merely "incorporate[d] judicial standards" and made "[n]o substantive changes * * * to the existing law." *Id.* at 39,820; see 64 Fed. Reg. 2134, 2136-2137 (Jan. 13, 1999) (stating that Section 20.1403 is also based on "on rulings by the [Veterans Court]" reflecting that a final VA decision may be revised only if it "denied the [relevant] claim in such a fundamentally erroneous way that any reasonable person would have granted the claim").

In any event, petitioner does not contend that the VA's post-codification regulatory language in Section 3.105(a) or 20.1403 could alter the statutory meaning of "clear and unmistakable error." "Congress 'codified and adopted the clear-and-unmistakable-error doctrine as it had [already] developed under' prior agency practice." *George*, 596 U.S. at 746 (citation and brackets omitted). That "longstanding VA practice" embodied in "'preexisting Veterans Court case law'" controls the meaning of "clear and unmistakable error" in the 1997 statute. *Id.* at 746, 752 (citation omitted).

3. Petitioner contends (Pet. 26-29, 30-32) that the decision below conflicts with this Court's decision in *Loper Bright Enterprises* v. *Raimondo*, 603 U.S. 369 (2024), and with the Federal Circuit's own prior decision in *Perciavalle* v. *McDonough*, 74 F.4th 1374, 1382 (2023). Neither contention has merit.

In the proceedings below, petitioner's claim of clear and unmistakable error rested on his contention that the VA in the original 2004 proceeding had misconstrued 38 C.F.R. 4.59 (2004) as limited to cases involving arthritis. See pp. 6-8, *supra*. In rejecting that claim, the court of appeals observed that it need not "conclu-

sively determine the correct interpretation of [38 C.F.R.] 4.59" in order to decide that the VA's interpretation, if error, was not "undebatably" erroneous. Pet. App. 16a. Contrary to petitioner's submission (Pet. 26-29), that conclusion does not conflict with *Loper Bright*'s instruction that courts interpretating a statute must determine its "single, best meaning" rather than defer to an agency's "'reasonable'" interpretation, 603 U.S. at 383, 400 (citation omitted).

The underlying dispute here involves the interpretation of a regulation (Section 4.59), not a statute, and deference has played no role in the analysis. Just as an appellate court conducting plain-error review need not determine whether a lower court's statutory interpretation is correct in order to conclude that it is not plainly erroneous, a reviewing court may conclude that an otherwise final VA decision is not "undebatably" erroneous without definitively interpreting the regulation on which the decision was based. This Court followed a similar approach in *George*. See *George*, 596 U.S. at 749 (expressing "no view on the merits of" an intervening regulatory change, while concluding that "the correct application of a binding regulation does not constitute 'clear and unmistakable error' at the time a decision is rendered, even if the regulation is subsequently invalidated").

Petitioner also contends that the decision below "flouts *Perciavalle*'s holding that 'a legal error may be clear for the purpose of CUE despite the fact that there was no preceding court or agency decision on the precise legal question.'" Pet. 30 (quoting *Perciavalle*, 74 F.4th at 1382). The Federal Circuit in *Perciavalle* recognized that "the language of [a] regulation itself can establish the existence of [clear and unmistakable er-

ror]." 74 F.4th at 1382. Nothing in the decision below is inconsistent with that proposition. To the contrary, the court of appeals here recognized that "a regulation's meaning may be so clear on its face as to compel the existence of [clear and unmistakable error] in a VA decision that was contrary to that meaning," even though no such error had yet been "'identified * * * by a court decision or VA publication'" when the VA rendered its decision. Pet. App. 12a, 15a (quoting *Perciavalle*, 74 F.4th at 1382).

Petitioner notes (Pet. 31) the *Perciavalle* court's statement that this "Court's [then-]recent decision in *George*" reflects that the clear-and-unmistakable-error doctrine asks "whether the original [VA] decision was a 'correct application of a binding regulation' or law, regardless of later changes in the law or later decisions by the agency or a court," *Perciavalle*, 74 F.4th at 1382 (quoting *George*, 596 U.S. at 749). But that statement simply reflects that clear and unmistakable error is evaluated based on the state of the law "at the time [the original] decision [wa]s rendered," such that subsequent events like the "invalidat[ion]" of a regulation that a benefits decision otherwise properly applied cannot establish such an error. *George*, 596 U.S. at 749. It does not diminish the longstanding requirement that "a legal error * * * be clear" to constitute a clear and unmistakable error. *Perciavalle*, 74 F.4th at 1382.

That limit on the collateral review of final benefits decisions functions in tandem with other procedures that are available to veterans seeking benefits. A veteran "who disagrees with a prior VA decision may file a supplemental claim" that asks the agency to "readjudicate the claim" based on "new and relevant evidence." 38 C.F.R. 3.2501; see 38 U.S.C. 5108(a). To do so, the

veteran must merely submit new evidence that "tends to prove or disprove a matter at issue in [that] claim." 38 C.F.R. 3.2501(a)(1). And in this case, although the VA's decision denied petitioner's request for a retroactive 20% rating for his shoulder-subluxation disorder based on clear and unmistakable error, the same decision granted him that 20% rating with a January 2017 effective date. See Veterans Court Record of Proceedings 717 (Jan. 27, 2021) (Aug. 2017 VA regional office decision); cf. Pet. App. 44a-45a (Board remand for consideration of an even earlier effective date).

If a supplemental claim is filed more than a year after an earlier decision on the same matter, the effective date of benefits that may be awarded on the supplemental claim will be no earlier than the date on which the supplemental claim was received. 38 C.F.R. 3.2500(h)(2). But that timing rule reflects the "strong presumption of validity" afforded the VA's decisions where, as here, they have become final after a full opportunity for administrative and judicial review. *George*, 596 U.S. at 752 (brackets, citation, and internal quotation marks omitted). Petitioner never sought direct review of the VA's original 2004 decision, and he did not ask the agency to revise it until 13 years later. Congress has permissibly determined—consistent with longstanding regulatory practice—that in order for retroactive benefits to be awarded with the same effective date as the 2004 decision, petitioner must identify an error in that 2004 decision that is so clear as to be undebatable.

4. Finally, this case would be a poor vehicle for the Court to consider the question presented in the certiorari petition because petitioner did not properly present that contention below and the court of appeals therefore did not address it.

In the Federal Circuit, petitioner did not dispute the established principle—applied by the Board and the Veterans Court in his case—that the erroneous nature of a VA determination must be "undebatable" in order for the determination to constitute "clear and unmistakable error." Cf. pp. 6-7, *supra*. To the contrary, petitioner acknowledged below that he was required to demonstrate "an 'undebatable' error that would have 'manifestly changed the outcome at the time it was made.'" Pet. C.A. Br. 9 (quoting *Willsey* v. *Peake*, 535 F.3d 1368, 1371 (Fed. Cir. 2008)). Petitioner further acknowledged the Federal Circuit's holding in *Willsey* that, at least when factfinding is involved, "'an "undebatable" error'" is one that "'no reasonable adjudicator'" could have made. Pet. C.A. Reply Br. 7 (quoting *Willsey*, 535 F.3d at 1373).

Rather than dispute the need for undebatable error, petitioner argued below that the Veterans Court had erred by concluding that its 2011 decision in *Burton* v. *Shinseki*, 25 Vet. App. 1, could not be used to establish clear and unmistakable error in "decisions made by VA prior to [*Burton*]." Pet. C.A. Br. 15. Petitioner argued that "the first time a regulation is interpreted, whether by the Courts or the VA, this is the law that applies when assessing [clear-and-unmistakable error]." *Id.* at 11. Thus, after explaining that "*Burton* was the very first time any binding authority interpreted [38 C.F.R.] 4.59 with respect to th[e] question" in his case, petitioner argued that when "a regulation is interpreted by an authority that binds the VA," "that interpretation controls how the law should have been applied in *all prior* [*VA*] *decisions*." *Id.* at 10, 16 (emphasis added); see Pet. C.A. Reply Br. 4, 6 (arguing that "the first,

binding interpretation of the regulation tells us what the law has always required").

Consistent with petitioner's own arguments below, the Federal Circuit took as given the established understanding that a clear and unmistakable error must be both "'undebatable'" and "outcome determinative." Pet. App. 9a (quoting *Willsey*, 535 F.3d at 1371). The court therefore never addressed why the error must be undebatable and instead simply determined that the VA's 2004 decision was not "undebatably erroneous" in light of Section 4.59. *Id.* at 15a-17a. Although petitioner's rehearing petition argued that no "'undebatability' requirement" exists with respect to "the interpretation of the applicable law," Pet. C.A. Reh'g Pet. 2, see *id.* at 9-11, that argument came too late to preserve the issue for review by this Court. See *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005) ("[W]e are a court of review, not of first view.").

CONCLUSION

The petition for writ of certiorari should be denied.

Respectfully submitted.

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