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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

All agree that clear and unmistakable error is a "narrow category" of error, *George v. McDonough*, 596 U.S. 740, 746 (2022), and that a challenged benefits determination must be "undebatably erroneous" to qualify for CUE revision. BIO 24; *see* BIO 9-10. The question presented concerns what it means for a benefits determination to have that undebatably erroneous quality.

The Federal Circuit gave an extreme answer, which the government now endorses. The Federal Circuit held that even if a veteran correctly identifies a legal error in his earlier benefits determination based on the law as it existed at that time, he cannot obtain CUE revision if there is any room for disagreement about the meaning of the then-prevailing law. For the Federal Circuit and the government, what must be clear and unmistakable is not just the error itself, but the meaning of the law.

The traditional tools of statutory interpretation, explicit regulatory definition of CUE, indicia of congressional intent, and longstanding VA practice all give a different answer. They are in accord that CUE requires a veteran to establish an error that drove the resolution of his benefits claim in a way that undebatably changed the outcome.

This issue should be resolved by this Court. The government does not dispute that this case presents a legal question of critical importance to the nation's veterans, a reality underscored by the fact that six leading veterans' advocacy organizations support

certiorari. The decision below stands in stark tension with *Loper Bright Enterprises v. Raimondo*, 603 U.S. 369 (2024), which the government addresses in only two paragraphs. The decision below has inserted confusion into the Federal Circuit's caselaw, confirmed by the Federal Circuit Bar Association's amicus brief. And this case is an ideal vehicle.

The Court should grant the petition and reverse.

I. The Decision Below Fundamentally Transforms The CUE Standard.

A. The Federal Circuit added a new requirement for CUE revision without justification.

Above and beyond ordinary review for "garden-variety 'error'" or "error *simpliciter*," *George*, 596 U.S. at 746-47, a CUE adjudicator must perform a two-step analysis. At step one, the adjudicator asks whether, based "on the record and the law that existed at the time of the prior VA decision," *id.* at 747 (citation modified), the original decision was infected with legal or factual error. 38 C.F.R. § 3.105(a)(1)(i), (iii). At step two, the adjudicator asks whether an error identified at step one undebatably changed the outcome of the veteran's benefits determination. 38 C.F.R. §§ 3.105(a)(1)(i), 20.1403(a), (c).

Thus, if the original adjudicator misinterpreted the law, but reasonable minds could differ as to whether that mistake affected the final benefits determination, CUE revision is not available. But where the original adjudicator misinterpreted the

law in a manner that conclusively drove the outcome of a veteran's case—say, by flatly precluding the possibility of benefits at a level the veteran otherwise plainly merited, or here, by declaring that benefits under 38 C.F.R. § 4.59 were categorically unavailable for disabilities other than arthritis—a CUE adjudicator has not just the power but the mandate to revise the original decision. An objective mistake of legal interpretation that undebatably drove the outcome of a benefits determination to a veteran's detriment is CUE. Pet. 16-21.

The Federal Circuit's holding—that in evaluating whether the original decision is infected with legal error, the veteran must establish not just that the original adjudicator incorrectly interpreted the law, but that no reasonable person could agree with that adjudicator—inserts an additional requirement that does not appear in the statute or regulatory definition and raises the bar far above where Congress placed it. Pet. 21-26. Because correct legal interpretations can seldom be described as truly "undebatable," the Federal Circuit's decision means CUE revision is effectively out of reach for many veterans with objectively meritorious claims. *See* Pet. 3, 32-34.

B. The government's regulatory and statutory arguments miss the mark.

The government argues that the Court should ignore the regulatory definition of CUE because the current version of the regulation post-dates the CUE statute. BIO 17. But the language from the current regulation that the government tries to avoid is ex-

actly what Congress was consulting when it enacted the CUE statute in 1999. *See* Pet. 19-20. Directly tracking the current regulatory definition, the 1997 House Report reads:

> clear and unmistakable error … 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. Thus even where the premise of error is accepted, if it is not absolutely clear that a different result would have ensued, the error complained of cannot be, *ipso facto*, clear and unmistakable.

H.R. Rep. No. 105-52, at 2 (1997) (quoting *Russell v. Principi*, 3 Vet. App. 310, 313 (1992) (en banc)). Thus, the regulations do not merely encode the "longstanding practice" that "inform[ed]" Congress's legislation and thus the meaning of the statute; they encode the exact phraseology Congress had in mind when it enacted the CUE statute.

The government also points out that commentary on the regulations notes that a clear and unmistakable error "must be undebatable." Pet. 18. But that is not disputed: of course a clear and unmistakable error must be clear and unmistakable. The question here is what it means for an error to have that characteristic. As the petition explains, consistent with longstanding VA practice, a benefits decision is undebatably erroneous if it is infected with

a legal error that unquestionably drove an incorrect resolution of a veteran's claim. Pet. 16-21.

The government also claims that CUE should be read narrowly because it is a "limited exception to … finality." BIO 10. But the Federal Circuit's decision limits the CUE exception far more than Congress did. *See* Pet. 29. CUE is a critical element of the "informal[]" "adjudicatory 'process'" Congress selected for benefits claims, under which veterans are afforded special "solicitude" as part of Congress's policy of ensuring that they actually receive the benefits they earned. *Henderson v. Shinseki*, 562 U.S. 428, 431 (2011).

C. VA caselaw does not support the Federal Circuit's double-undebatability requirement.

The government hinges its defense of the Federal Circuit almost entirely on its strained interpretations of pre-codification Veterans Court cases.

The government first characterizes *Russell*, 3 Vet. App. 310, as imposing a double-undebatability requirement on the CUE standard. BIO 11-12. But *Russell* nowhere suggested that the possibility for disagreement as to a matter of legal interpretation ends the CUE inquiry. On the contrary, in discussing whether the CUE regulation reflected a lawful exercise of rulemaking authority, *Russell* explained that what it means for an error of law to be "undebatable" is that the mistaken legal determination "would have manifestly changed the outcome at the time it was made." 3 Vet. App. at 313-14.

Furthermore, when *Russell* applied the CUE standard to the specific case before it, it expressly followed Petitioner's view of the CUE standard, not the government's. It first determined that VA committed legal error, without applying any "undebatable" requirement to that question. *Id.* at 319. The court then asked "whether the error was a 'clear and unmistakable error' under 38 C.F.R. § 3.105(a); i.e., whether, on the full record before the RO in 1972, the evidence establishes manifestly that the correction of the error would have changed the outcome." *Id.* at 320. *Russell*, like Petitioner, recognized that what makes a legal error "unmistakable" is its effect on outcome. Nothing in *Russell* maps onto the Federal Circuit's novel double-undebatability standard.

Nor do the government's other cases. *Damrel v. Brown* (BIO 13-14) noted only that claims of "improperly weighed and evaluated evidence" do not meet the "stringent definition" of CUE. 6 Vet. App. 242, 246 (1994). *Damrel* did not address a claim of legal error at all. And by definition, if a future adjudicator must "reweigh the evidence" to assess a claim, *id.*, the asserted error did not *undebatably* change the outcome. Requiring undebatability as to an error's effect prevents CUE adjudicators from performing such reweighing, while authorizing revision of decisions where an error's effect is self-evident. *See* Pet. 21.

Berger v. Brown, 10 Vet. App. 166, 169 (1997) (discussed at BIO 14-16), endorsed this same distinction: CUE does not permit the reweighing of the facts, but permits correcting errors that manifestly changed the outcome of a veteran's case. The Veter-

ans Court explained, "[t]o the extent that the attack on a final decision is based on a disagreement with how the adjudicator weighed the facts, then it cannot constitute CUE." *Id.* at 169. Instead, "[t]he error must be such that the appellant is able to demonstrate, bearing in mind the extra burden of persuasion there is to do so, that but for the error the result would have been 'clearly and unmistakably' different." *Id.*

The government claims that *Berger* "focused on whether the error itself—rather than its effect on the outcome—was clear and unmistakable." BIO 14. But *Berger* denied CUE relief because there was no error at all; the veteran relied on legal developments that post-dated the challenged decision. 10 Vet. App. at 170. Moreover, the court noted that it was "by no means certain" that the new legal interpretation "would be dispositive when applied to the peculiar facts of this case"; the original decision would only "possibly be error." *Id.* The court did not simply "reject[] the veteran's clear-and-unmistakable-error claim because … in 1969, '[t]he statute was … susceptible of differing interpretations.'" BIO 14 (quoting *Berger*, 10 Vet. App. at 170).

Fugo v. Brown, contrary to the BIO's strained characterization (at 16), repeatedly spells out this correct two-step CUE analysis. The veteran must first explain "what the alleged error is" and then "persuasive reasons must be given as to why the result would have been *manifestly* different but for the alleged error." 6 Vet. App. 40, 44 (1993); *see also id.* at 43. The government notes that *Fugo* denied a CUE claim based on the alleged failure to follow a

regulation where "it was, 'at the most, debatable whether consideration of th[e] regulation would have had any effect on [the decision].'" BIO 16 (quoting 6 Vet. App. at 44). But that simply follows the correct CUE analysis as Petitioner has stated it.

II. The Federal Circuit's Decision Is Contrary To *Loper Bright*.

The Federal Circuit's decision suggests that it is not legal "error" for an agency to misapply the law, so long as there is room for debate about the meaning of the law's text. That is contrary to *Loper Bright*'s premise that law has a "single, best meaning," 603 U.S. at 383, 400, and analogous to how the *Chevron* regime denied litigants judicial review if a challenged agency interpretation was debatable even if it was incorrect, Pet. 28.

The government brushes off the tension with *Loper Bright* in two paragraphs that misapprehend Petitioner's argument. BIO 19-20. The government first asserts that *Loper Bright* is inapplicable because "[t]he underlying dispute here involves the interpretation of a regulation (Section 4.59), not a statute." BIO 20. But *Loper Bright*'s instruction that the law has a "single, best meaning" that adjudicators charged with identifying legal error must pursue is not limited to statutes alone. 603 U.S. at 400. Likewise, the Federal Circuit's holding is not limited to regulatory interpretations but applies to CUE challenges involving statutes as well. *See* Pet. 18a ("CUE must be based on [how] the law at the time of the decision" was "undebatably understood.").

The government next suggests that denying CUE because the governing law appears debatable is no different from an "appellate court conducting plain-error review," which "need not determine whether a lower court's statutory interpretation is correct in order to conclude that it is not plainly erroneous." BIO 20. To begin, plain-error review is quite different from CUE, a generous mechanism for adjusting benefits determinations in a non-adversarial system. Pet. 5-6.

Regardless, an appellate court exercising its discretion to correct an unpreserved claim of error might decide that an error is not appropriate for correction for multiple reasons—for example, that it does not "affect substantial rights" or appear plain from the face of the decision. *United States v. Olano*, 507 U.S. 725, 734 (1993). Similarly, consistent with the CUE standard, a CUE adjudicator may decline to ascertain the best meaning of the law if the error would not change the result. But under *Loper Bright*, a CUE adjudicator cannot do what the Federal Circuit directed here: throw up his hands and deny relief just because there is room for disagreement about a legal interpretation.

The government claims the Court did something similar in *George*, BIO 20, but there the Court determined that there could be no error at all in the original benefits adjudication because the assessment of error was limited to the law then in effect, including the text of a regulation that agency adjudicators were "statutorily obligated" to follow. *George*, 596 U.S. at 748-49. Certiorari is needed because the Federal Circuit went far beyond this Court's reason-

ing in *George*, demanding that CUE claimants not only demonstrate legal error based on the law as it existed at the time of the original decision, but also demonstrate that the meaning of that existing law was not subject to reasonable dispute. *Loper Bright* precludes that additional layer.

III. This Case Is A Good Vehicle.

The government's effort to cast this case as a poor vehicle is unavailing. The government does not dispute that VA's refusal to apply § 4.59 in 2004 was outcome-determinative. Pet. 36. Further, in contending that Mr. Siples failed to preserve his argument on the question presented, the government ignores his argument below that the "CUE standard does not require asking 'how a law could have been understood; rather, CUE is an assessment of what the law actually required.'" Pet. 34 (quoting CAFC Opening Br. 2). And, contrary to the government's contention (BIO 24), the Federal Circuit directly addressed that argument in holding that "CUE is about whether the 'understanding' of the law was undebatable." Pet. 35 (citing Pet. App. 9a, 11a, 14a, 15a, 17a, 18a). Because the Federal Circuit passed upon that issue, this Court can and should grant review.

In contending otherwise, the government selectively quotes from Mr. Siples's briefing below. For example, it points to Mr. Siples's "acknowledge[ment] … that he was required to demonstrate an undebatable error that would have manifestly changed the outcome at the time it was made." BIO 23 (quoting CAFC Opening Br. 9) (citation modified). That misses the point entirely. All

agree there has to be an "undebatable" error; the question is what that requirement means.

The government similarly misreads Mr. Siples's arguments below regarding *Burton v. Shinseki*, 25 Vet. App. 1 (2011), and *Willsey v. Peake*, 535 F.3d 1368 (Fed. Cir. 2008). It selectively quotes (BIO 23) Mr. Siples's discussion of *Willsey*, but Mr. Siples was distinguishing that case as involving an "error … of fact, and not law." CAFC Reply Br. 7. Nothing in *Willsey* requires a veteran to show that the understanding of the *law* was undebatable. As for *Burton*, Mr. Siples was clear that the decision articulated "what the law has always required." BIO 23-24 (quoting CAFC Reply Br. 4, 6).

IV. This Is An Important And Recurring Question.

The government does not dispute the importance of the question presented. Pet. 32-34. As Petitioner explained, many veterans start and end the benefits-claim process without the help of legal counsel and walk away with erroneous benefits denials. Pet. 32-33; *see also* Swords to Plowshares Amicus Br. 11; FCBA Amicus Br. 18. CUE relief is thus critical to correcting those errors. And for many veterans—those whose claims were denied before judicial review became available in 1988—CUE is the *only* way to obtain judicial scrutiny of their original benefits denial. Pet. 33.

Unable to deny any of this, the government defends its stringent view of CUE by suggesting that the supplemental-claim process provides an ade-

quate backstop. BIO 22. It does not. "CUE is … the only mechanism for veterans to obtain benefits retroactive to the date of the original erroneous decision." FCBA Amicus Br. 18. In some instances, veterans have missed out on decades of benefits they were owed. *Id.*

The government also fails to reconcile the decision here with *Perciavalle v. McDonough*, 74 F.4th 1374 (Fed. Cir. 2023). The government acknowledges *Perciavalle*'s conclusion that "the language of [a] regulation itself can establish the existence" of CUE. BIO 20-21 (quoting 74 F.4th at 1382). That is at least in tension with the decision below, which precludes a finding of CUE if there is any room for disagreement about the meaning of such language. The government also sidesteps *Perciavalle*'s holding that the CUE inquiry at step-one hinges on "whether the original decision was a 'correct application of a binding regulation' or law." BIO 21 (quoting 74 F.4th at 1382). That holding does not merely signal that the inquiry is limited to the body of law as it existed then (*contra* BIO 21)—all agree on that. It also correctly states that the step-one inquiry focuses on whether the original decision was wrong, not whether the meaning of the law was beyond debate.

Relying on the "'strong presumption of validity' afforded the VA's decisions," BIO 22, the government would all but eviscerate CUE relief for legal errors, turning that "strong presumption" into an insurmountable hurdle requiring claimants to show that the understanding of the law was undebatable at the time of the original benefits decision. In this case, the mere existence of a few unpublished decisions

"diverg[ing]" over whether § 4.59 applies to non-arthritis claims—with none confronting the question directly—was enough to sink Petitioner's claim. Pet. 22 (quoting Pet. App. 17a). In elevating such indicia of debatability over the correct meaning of then-prevailing law, the Federal Circuit's decision raises the bar for CUE far higher than Congress intended.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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