No. 21-234

In the Supreme Court of the United States

KEVIN R. GEORGE,

Petitioner,

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, PARALYZED VETERANS OF AMERICA, AND SERVICE WOMEN'S ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

LIAM J. MONTGOMERY
Counsel of Record
ANDREW P. LEMENS
ASHWIN G. SHANDILYA*
PERRY F. AUSTIN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, D.C. 20005
(202) 434-5000
lmontgomery@wc.com

*Admitted in Virginia. Practice in the District of Columbia supervised by members of the D.C. Bar as required by D.C. App. R. 49(c)(8).

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

Page

Cases—continued:

Statutes and Regulations:

Page

Statutes and Regulations—continued:

Page

Statutes and Regulations—continued:

Other Authorities:

Page

Other Authorities—continued:

Page

Other Authorities—continued:

In the Supreme Court of the United States

KEVIN R. GEORGE,

Petitioner,

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR NATIONAL VETERANS LEGAL SERVICES PROGRAM, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES PARALYZED VETERANS OF AMERICA, AND SERVICE WOMEN'S ACTION NETWORK AS AMICI CURIAE IN SUPPORT OF PETITIONER

INTEREST OF AMICI CURIAE

Amici curiae are four national veterans organizations.[*] Founded in 1981, the National Veterans Legal Services Program (NVLSP) is a nonprofit organization that works to ensure that the government honors its commitment to our nation's 22 million veterans

[*] Pursuant to Rule 37.6, amici affirm that no counsel for a party authored this brief in whole or in part and that no person other than amici or their counsel has made any monetary contributions intended to fund the preparation or submission of this brief. Petitioner and Respondent have consented to the filing of this brief.

and to active-duty service members. NVLSP prepares, presents, and prosecutes veterans' benefits claims before the Department of Veterans Affairs (VA), pursues veterans' rights legislation, and advocates before this Court and others, seeking to provide assistance in cases that present issues of importance to veterans. NVLSP also recruits, trains, and assists thousands of volunteer lawyers and veterans' advocates and publishes the 1,900-page *Veterans Benefits Manual*, the leading practice guide in the field.

The National Organization of Veterans' Advocates (NOVA) is a not-for-profit educational membership organization that was incorporated in 1993. Its members are more than 700 individual attorneys and agents who represent our nation's military veterans, their families, and their survivors before the VA and federal courts. NOVA is committed to developing veterans' law and procedure through research, discussion, education, and participation as an amicus before this Court.

Paralyzed Veterans of America (PVA) is a national, congressionally-chartered veterans service organization headquartered in Washington, D.C. PVA's mission is to employ its expertise, developed since its founding in 1946, on behalf of veterans of the armed forces who have experienced a spinal cord injury or disorder (SCI/D). PVA seeks to improve the quality of life for veterans and all people with SCI/D through its medical services, benefits, legal advocacy, sports and recreation, architecture, and other programs. PVA advocates for quality health care, research and education addressing SCI/D, benefits based on its members' military service, and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and citizens with disabilities. PVA has nearly 16,000 members, all of whom are military veterans living with

catastrophic disabilities, and provides representation to its members and other veterans throughout the VA claims process and in the federal courts, including the United States Supreme Court.

The Service Women's Action Network (SWAN) is a national, nonpartisan, not-for-profit, member-driven community advocating for the individual and collective needs of currently serving women and women veterans. SWAN has played a major role in opening all military jobs to qualified women; holding military offenders accountable for sexual misconduct; supporting survivors of Military Sexual Trauma (MST); bringing about changes in the VA's disability claims system to better help MST survivors; and expanding access to a broader range of primary, reproductive, and mental wellness services for military women.

Amici appear in support of petitioner to explain the unique and essential role that claims for clear and unmistakable error have played for nearly a century in this country's pro-veteran system of adjudicating benefits.

SUMMARY OF THE ARGUMENT

I. Congress designed the veterans' benefits system to favor veterans. But mistakes are all too common. For that reason, for a century, there has been a means by which veterans can revise an otherwise final decision by showing clear and unmistakable error (CUE) in a prior benefits decision. A successful CUE claim entitles the veteran to retroactive benefits from the date of her original claim. This critical backstop places the veteran in the same position she would have occupied but for the VA's error.

II. Throughout numerous reforms to the veterans' benefits system in the last century, CUE has endured as a means of ensuring that the VA provides benefits in accordance with Congress's pro-veteran scheme. CUE survived historical efforts to restrict veterans' benefits, and it remained available after Congress allowed for judicial review of VA decisions. Over time, CUE's importance has only grown due to the ever increasing complexity of the VA's implementing statutes and regulations.

III. The VA's history of errors further underscores the need for CUE to address legal and factual error in veterans' benefits adjudications. Time and again, war and conflict flood the veterans' claims system and overwhelm the VA's administrative processes. This incentivizes agency decision makers to prioritize speed over accuracy. Faced with applying labyrinthine statutes, regulations, and agency guidance, these non-attorney adjudicators struggle to make accurate benefits determinations. The decisions must then be corrected through appeals and remands, resulting in an unfortunate cycle veterans have come to know as "the hamster wheel." CUE is one important means of correcting errors that for various reasons have become final.

IV. The atextual limitation that the Federal Circuit layered onto CUE in this case threatens CUE's ability to protect against these dangers. CUE is one of the few tools available to veterans to correct longstanding errors. Whereas the VA has numerous tools by which to correct many types of error, absent CUE, veterans would have almost none. If allowed to stand, the Federal Circuit's decision would also create the wrong incentives by allowing an agency to insulate itself from Congress's express statutory directives. The agency would be able to

issue and apply an incorrect regulation for years before a veteran successfully challenged it.

That is precisely what happened to Mr. George: In the 1970s, before Congress made judicial review available to veterans and before attorneys were widely available to veterans, the VA passed a regulation that was aligned with the agency's policy preferences, but contrary to an existing and unambiguous statute. Decades later, the VA admitted that the regulation did not follow Congress's explicit direction. The Federal Circuit's gloss on CUE means that no veteran can obtain relief from application of that unlawful regulation, if her claim became final prior to the VA correcting the regulation. Given the system's pro-veteran disposition, there is no way to justify such a scheme. For these reasons, the judgment of the Federal Circuit should be reversed.

ARGUMENT

I. Congress Designed the Veterans' Benefits System to Favor Veterans

This country has a long-standing policy of putting a "thumb on the scale in the veteran's favor" when reviewing the VA's benefits determinations. *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (quoting *Shinseki v. Sanders*, 566 U.S. 396, 416 (2009) (Souter, J., dissenting)). This is part of a stated goal to "fulfill President Lincoln's promise" that the United States would care for those who "have borne the battle." U.S. Dep't of Veterans Affs., *Mission, Vision, Core Values & Goals*, http://www.va.gov/about_va/mission.asp; *see United States v. Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veterans is . . . long standing.").

In order to achieve this goal, Congress and the VA designed a system for adjudicating benefits claims that is

intended to be dramatically different from almost every American adjudicatory regime. *See Henderson*, 562 U.S. at 440. This pro-veteran policy pervades the veterans' benefits process: Standard notions of timeliness, finality, and litigant adversity in veterans cases differ from any other type of benefits administration or civil litigation. *Id.*

A. To start, Congress placed no statute of limitations, or other fixed time period after a veteran's separation from service or the onset of a disability in which a veteran must file a claim. *Id.* at 441. Congress designed the initial proceeding—which one of the VA's 58 regional offices handles—to be non-adversarial and "ex parte in nature." 38 C.F.R. § 3.103(a); *see Henderson*, 562 U.S. at 441. Since before World War II, the agency has had to assist veterans with developing their claims. *See* Adm'r Veterans Affs., *Annual Report for the Fiscal Year Ended June 30, 1936*, at 3 (1937) (reiterating a policy "to foster the development of claims to the fullest possible extent"); 38 C.F.R. § 3.103(a) ("[I]t is the obligation of VA to assist a claimant in developing the facts pertinent to the claim . . . ."). Veterans are entitled to a hearing on their claim. 38 C.F.R. § 3.103(d). The VA must also give veterans "the benefit of the doubt" if there is an "approximate balance of positive and negative evidence," 38 U.S.C. § 5107(b), a standard that is unique in American jurisprudence, *Wise v. Shinseki*, 26 Vet. App. 517, 531 (2014) (citation omitted).

B. If a veteran disagrees with the agency's initial determination, she has one year to seek *de novo* review before a more senior officer at the regional office or before the VA's Board of Veterans' Appeals (BVA). 38 C.F.R. § 3.2500(a). At this stage, the veteran is again entitled to a hearing conducted in an "ex parte" and "nonadversarial" manner, meaning that the VA has no right to oppose the veteran's appeal. *Id.* § 20.700(c). A decision favorable to

the veteran at this stage binds the VA in the absence of clear and unmistakable error. *Id.* § 3.104(c).

C. Although it has not always been the case, *see* Part II, *infra*, veterans today can seek judicial review of an adverse BVA decision in the U.S. Court of Appeals for Veterans Claims (CAVC), the U.S. Court of Appeals for the Federal Circuit, and this Court by writ of certiorari. *Henderson*, 562 U.S. at 428. Starting at the CAVC, the proceedings become adversarial, *id.*, with the VA for the first time being able to oppose the relief requested within the strictures Congress has established, *e.g.*, 38 U.S.C. § 7261.

D. But even after veterans exhaust direct administrative and judicial review, they retain two mechanisms for revisiting their claim.

First, veterans can apply to reopen a claim that was denied prior to the passage of the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105, by submitting "new and material" evidence, 38 C.F.R. § 3.156(b). Or, if the claim was denied under VA's modernized appeals regime, they can file a supplemental claim for benefits if they identify "new and relevant evidence." 38 U.S.C. § 5108(a); 38 C.F.R. § 3.156(d). Although this constitutes an important exception to finality, any benefits awarded will only be effective as of the date of the supplemental claim. 38 U.S.C. § 5110(a).

Second, veterans can challenge an adverse decision by showing "clear and unmistakable error" either in the regional VA office's initial decision, 38 U.S.C. § 5109A, or in the BVA appellate process, *id.* § 7111. This avenue for relief—referred to as "CUE"—extends to errors of law or fact, including legal errors where the "statutory or regulatory provisions in effect at the time of the decision

were incorrectly applied." *Cushman v. Shinseki*, 576 F.3d 1290, 1301 (Fed. Cir. 2009). If established, CUE allows the veteran to receive retroactive benefits from the date of her original claim, no matter how long ago the initial incorrect adjudication occurred. 38 U.S.C. §§ 5109A(b), 7111(b).

For decades, the VA has recognized that CUE returns veterans to "the same status as nearly as possible as [they] would have occupied had such decision not been made." Adm'r Decision, Veterans' Admin., No. 873 (Apr. 9, 1951). Although the standard to achieve CUE is exacting, the opportunity for retroactive relief makes CUE a powerful remedy. And over the last century, it has developed into a critically important remedy, as well.

II. CUE Has Been a Feature of this Country's Veterans' Benefits System for a Century

A. Prior to World War I, the United States Lacked a Comprehensive Approach to Veterans' Benefits

Since the founding, the United States has sought to compensate and support disabled veterans. This practice dates back to the ancient empires of Rome and Egypt, was adopted in France, England, and other European nations, and then was used in early American colonies at Plymouth Rock, in Virginia, and elsewhere. *See* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 Vet. L. Rev. 135, 137-38 (2011) (hereinafter Ridgway 2011); William H. Glasson, *Federal Military Pensions in the United States* 12-14 (David Kinley ed., 1918). Within weeks of signing the Declaration of Independence, the Founders continued this policy by passing the first law authorizing pensions for those injured during the Revolutionary War. 5 *Journals of the Continental*

Congress, 1774-1789, at 702-05 (Worthington C. Ford et al. eds., U.S. GPO 1904-37); Glasson, *supra*, at 20.

Although such benefits remained available during the 1800s, they tended to be available on a conflict-by-conflict basis. James D. Ridgway, *Recovering an Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 Vet. L. Rev. 1, 4, 7 (2013) (hereinafter Ridgway 2013). Separate appropriations were made to those who served in the War of 1812, the Civil War, and the Spanish-American War. President's Comm'n on Veterans' Pensions, *Findings and Recommendations, Veterans' Benefits in the United States, A Report to the President* 37-40 (1956). Over time, this ad hoc system became expensive, inefficient, and highly politicized. Ridgway 2013, at 6-7; Ridgway 2011, at 152-68.

B. CUE Was an Original Feature of the Modern System of Veterans' Benefits Established After World War I

In the 1920s, thousands of returning World War I veterans and continued administrative problems prompted a renewed effort to streamline the benefits administration process. This laid the foundation for today's system of veterans' benefits. Ridgway 2013, at 4, 7-11.

CUE emerged during this same period as an important tool to revisit prior benefits decisions. Ridgway 2013, at 53-54. As early as 1920, retroactive awards were available "[i]n exceptional and unusual cases wherein there is clear and unmistakable proof that a glaring error . . . has occurred, or a gross injustice done . . . ." Bureau War Risk Ins. Regul. 57 § A.I(c) (1920); *see also* Veterans' Bureau Regul. 4 § A.I(c) (1921). Although the examples of such errors initially only included such things as "confusion of name" or "a misfiling of report,"

Veterans' Bureau Regul. 35 § 3065(c) (1923), the Veterans' Bureau empowered initial decision makers in 1928 to "reverse or amend a decision by the same or any other rating board where such reversal or amendment is obviously warranted by a clear and unmistakable error shown by the evidence in file at the time the prior decision was rendered," Veterans' Bureau Regul. 187 § 7155 (1928); *see also* Ridgway 2013, at 53-54 (summarizing the history of CUE regulations).

Thus, nearly a century ago, the concept of "CUE" as we know it today was born. *See Smith v. Brown*, 35 F.3d 1516, 1524-25 (Fed. Cir. 1994) (summarizing CUE's regulatory history from 1928 to 1994). Although much has changed about the administration of benefits in the intervening years, CUE's lineage has remained unbroken.

C. The Roosevelt Administration Retained CUE When It Rebuilt the VA in the 1930s

In 1930, Congress consolidated all veterans programs into a single agency, which was then known as the Veterans' Administration. Act of July 3, 1930, Pub. L. No. 71-536, 46 Stat. 1016; *see* Ridgway 2013, at 11. When President Roosevelt assumed office three years later, Congress authorized him to rebuild that agency. Ridgway 2011, at 179.

Congress did so by authorizing the Roosevelt Administration to develop a new regulatory framework to define both the benefits available to veterans and the procedure for obtaining those benefits. Economy Act of 1933, Pub. L. No. 7302, 48 Stat. 8 (codified as amended at 38 U.S.C. §§ 700-723 (1934)). As it worked to remake the administrative state in numerous respects, the Roosevelt Administration set out to reform the VA by promulgating numerous new policies and procedures. *Id.* Critical to the

question currently before this Court, Congress also shielded this construct from judicial review, declaring that all decisions and regulations "shall be final and conclusive on all questions of law and fact, and no other official or court of the United States shall have jurisdiction to review . . . any such decision," *id.* § 705, a limitation that would endure for more than half a century.

Even as this administrative edifice calcified free of judicial oversight, veterans and the VA retained the crucial ability to revisit and correct prior decisions for clear and unmistakable error. Veterans' Admin. Regul. 1009(A), 1 Fed. Reg. 756 (July 9, 1936). The VA incorporated this regulation—which adopted verbatim the CUE language from the 1928 Veterans' Bureau regulation—into the first edition of the Code of Federal Regulations in 1939, and it remained substantially the same for nearly 20 years. *Compare* Veterans' Bureau Regul. 187 § 7155 (1928), *with* 38 C.F.R. § 2.1009(a) (1939), *and* 38 C.F.R. § 3.9 (1956).

D. CUE Endured Through Post-World War II Reforms

As might be expected, the Second World War prompted Congress to reexamine benefits for returning soldiers. This included enacting the G.I. Bill, which for the first time provided veterans with educational benefits and access to favorable home and business loans. Ridgway 2011, at 182-85. Congress also authorized the VA to nearly triple the capacity of its medical system by building new hospitals and clinics across the country. *Id.* at 186-88. Many of these changes also benefited Korean War veterans as they returned home in the 1950s. Ridgway 2013, at 13-14.

Elected on a promise to reduce federal spending, including veterans' benefits, Ridgway 2011, at 189-90, President Eisenhower focused on reports exposing

inconsistency and unreliability in disability decisions and abuses within the VA's hospitals, Ridgway 2013, at 14-15. To reform this system, President Eisenhower appointed General Omar Bradley to lead a commission to recommend reforms to the VA system. Exec. Order No. 10,588, 20 Fed. Reg. 361 (Jan. 15, 1955). The Commission's 1956 report proposed considerable reforms. Many became law, but Congress prevented efforts to curtail veterans benefits, in part by codifying large swaths of then-existing veterans' benefits regulations. Ridgway 2011, at 191-93.

During this period, the VA made a series of amendments to the CUE regulations. *E.g.*, 20 Fed. Reg. 2378 (Apr. 12, 1955); 38 C.F.R. § 3.9 (1956); 26 Fed. Reg. 1569 (Feb. 24, 1961); 27 Fed. Reg. 11,186 (Dec. 1, 1962); 38 C.F.R. § 3.105 (1963). These amendments aligned with the VA's broader effort to clarify and simplify what had become a regulatory morass, which both the Bradley Commission and the VA had identified as issues. President's Comm'n on Veterans' Pensions, *Veterans' Benefits in the United States: A Report to the President* 409 (1956) ("This body of law is not coordinated beyond the general codification of the United States Code. The quantity of regulatory and advisory materials implementing and interpreting these laws is tremendous."); Adm'r Veterans Affs., *Annual Report for Fiscal Year Ending June 30, 1954*, at 68 (1955) ("During the year a complete revision was effected . . . with the purpose of clarifying . . . ."); Adm'r Veterans Affs., *Annual Report: 1959*, at 97-98 (1960) ("In its review of all types of claims, the board constantly analyzes sufficiency of VA regulations, procedures, and practices, and participates in identification and formulation of any changes needed to insure equitable determination."). Thus, although CUE changed in form during this period,

its fundamental substance as a tool for retroactive relief from error endured.

E. After Congress Empowered Veterans to Seek Judicial Review in 1988, CUE Remained an Important Tool for Correcting Errors that Pre- and Post-Dated this New Right

As with preceding postwar generations, Vietnam veterans returned home to a VA system ill-equipped to handle an influx of applicants. But unlike the World War II generation, they did so with considerably less political and public support. Ridgway 2011, at 195-97. They also encountered resistance from World War II veterans who perceived this new class of veterans as a threat to their benefits and faced growing pressure from a war-exhausted public and politicians to cut spending across the board. *Id.*

This meant that Vietnam veterans struggled for years to get the VA to recognize disability claims unique to their experience—for example, the conditions associated with exposure to Agent Orange. *See* Laurence R. Helfer, *The Politics of Judicial Structure: Creating the United States Court of Veterans Appeals*, 25 Conn. L. Rev. 155, 161-65 (1992). They confronted these challenges by pressing for reforms to the VA's adjudication process and advocating for judicial review of the VA's decisions. *Id.* at 162-67. Their fight resulted in one of the most significant changes in the veterans' benefits system with Congress's passage of the Veterans Judicial Review Act of 1988, which, among other things, created the Court of Appeals for Veterans Claims (CAVC), an Article I tribunal with exclusive national jurisdiction to review BVA decisions. *Id.*; *see* 102 Stat. 4105.

Notwithstanding these radical alterations to the veterans' benefits process, Congress left in place

retroactive review of disability claims for clear and unmistakable error. That tool, which had at this point been available for more than 60 years, remained available for veterans seeking to correct clear errors of fact or law that affected the outcome of their claims. *See* 38 C.F.R. § 3.105 (1990).

Indeed, in some respects, CUE has become more important as a means to correct the disparity between veterans (like Mr. George) whose claims were decided before judicial review became widely available, and those who can now avail themselves of that important right. When the VA denies a veteran benefits based on an unlawful regulation that contradicts an unambiguous statute, that veteran can now seek judicial review to successfully challenge the VA's application of the unlawful regulation. But earlier generations of veterans, who faced this same unlawful regulation before judicial review became widely available, lacked that same opportunity. Once judicial review exposes obvious, structural legal error, these earlier generations of veterans should be able to invoke CUE to obtain benefits to which they were always entitled.

F. Congress Reaffirmed CUE's Importance in the 1990s

Several years after the Veterans Judicial Review Act, Congress reaffirmed and even extended CUE's important place within the veterans' benefits scheme. In *Smith v. Brown*, the Federal Circuit weighed in for the first time on collateral review for CUE. 35 F.3d 1516, 1517 (Fed. Cir. 1994). The court held that the then-existing CUE regulation, 38 C.F.R. § 3.105 (1993), applied only to initial decisions in the regional offices and was unavailable with respect to BVA decisions. *Smith*, 35 F.3d at 1527.

Congress responded by enacting legislation to correct the limitations *Smith* created, ensuring CUE was available as to both (1) initial decisions at regional offices

and (2) the BVA's review of those decisions. *See* Pub. L. No. 105-111, 111 Stat. 2271 (1997) (codified at 38 U.S.C. §§ 5109A, 7111). Congress recognized that, in doing so, the statute "would effectively codify [the existing CUE] regulation, and extend the principle underlying it to BVA decisions." H.R. Rep. No. 105-52, at 2 (1997); S. Rep. No. 105-157, at 4 (1997). And it explained that CUE was important to "ensure a just result in cases where such error has occurred," H.R. Rep. No. 105-52, at 4; *see* Cong. Rec. S12487 (daily ed. Nov. 10, 1997) (statement of Sen. Murray) ("To deny a veteran a legally entitled benefit due to a bureaucratic error or other mistake is beyond comprehension in my mind.").

Congress's action codified nearly 70 years of longstanding VA regulations and processes, thereby reaffirming CUE's importance within the broader veterans' benefits scheme. It remains just as important today, more than 20 years after Congress acted. Once again, a new generation of veterans from the Gulf War and the Global War on Terror face an overtaxed benefits system that is ill-equipped to accurately adjudicate their claims. Thus, now as in 1920, 1945, 1953, 1975, and every year in between, CUE continues to allow veterans to correct "glaring error[s]" or "gross injustice" in benefits administration process. *See* Bureau War Risk Ins. Reg. 57 § A.I(c) (1920).

III. CUE Is a Critical Tool for Helping Veterans Affected by the VA's Continuous Struggle with Delay and Error

A. Delay and Error Have Often Plagued the VA's Adjudication of Benefits Claims

For virtually its entire existence, the VA has imposed on veterans frequent errors, which concomitant long delays only exacerbate. These upend what is supposed to be a "uniquely pro-claimant" and veteran-friendly

benefits system, subjecting veterans in many cases to years of inadequate benefits and delayed justice. *Jaquay v. Principi*, 304 F.3d 1276, 1286 (Fed. Cir. 2002) (en banc), *overruled on other grounds*, *Henderson v. Shinseki*, 589 F.3d 1201 (Fed. Cir. 2009) (en banc). Although judicial review helps alleviate this problem, CUE remains a critical corrective remedy that affords retroactive relief when the VA's legal error rises to the level of CUE.

Systemic error—often accompanied by long delays—is not a new phenomenon. To the contrary, it is an enduring norm for veterans. As far back as the 1920s and 1930s, calls for reform were driven, in part, by the administration's inability to handle the needs of veterans returning from World War I. Ridgway 2013, at 7-11; *see also* Part II.B, *supra*. Throughout the second half of the twentieth century, each armed conflict exerted renewed pressure on the VA.

This has led to a cycle of large influxes of claims over short time periods, followed by years of agency efforts to dig out from a backlog of claims. As the VA administrator explained in a report to Congress at the end of World War II: "The ending of hostilities, the speeding up of demobilization, and the granting of additional benefits to veterans, all combined to throw upon the [VA] during fiscal year 1946 an unprecedented workload." Adm'r Veterans Affs., *Annual Report for Fiscal Year Ending June 30, 1946*, at 1 (1947).

This remains true today, as the United States unwinds from an unprecedented two decades of armed conflict. The VA continues to report "increase[s] in compensation claims" following more recent armed conflicts, "including the conflicts in Iraq and Afghanistan," to explain an enormous backlog of claims. U.S. Gov't Accountability Off., GAO-10-213, *Veterans' Disability Benefits: Further Evaluation of Ongoing*

Initiatives Could Help Identify Effective Approaches for Improving Claims Processing 11 (Jan. 2010). As of February 12, 2022, there were more than 609,000 pending claims at the agency, with more than 256,000 that had been pending for more than four months. U.S. Dep't of Veterans Affs., *Veterans Benefits Administration Reports*, https://www.benefits.va.gov/reports/detailed_claims_data.asp.

Such a claims deluge would be concerning in any circumstance. But this system demands that non-attorney adjudicators at VA regional offices untangle a decades-old skein of statutes and regulations in order to render decisions. James D. Ridgway, *The Veterans' Judicial Review Act Twenty Years Later: Confronting the New Complexities of the Veterans Benefits System*, 66 N.Y.U. Ann. Surv. Am. L. 251, 283-84 (2010). This warps what is meant to be a veteran-friendly system into one that incentivizes VA decision makers to favor speed over accuracy. And this relentless push for quantity, at the expense of quality, impacts not only the processing of claims by VA regional offices, but also appeals decided by the BVA.

This is not mere theory: In a recent survey of 395 BVA attorneys, most reported that caseload pressures were causing "a decrease in the quality of decisions for veterans." *See* David Ames et al., *Due Process and Mass Adjudication: Crisis and Reform*, 72 Stan. L. Rev. 1, 18-19 (2020). Given that veterans do not seek further review in "roughly 96%" of cases, *Gray v. Sec'y of Veterans Aff.*, 875 F.3d 1102, 1114 (Fed. Cir. 2017) (Dyk, J., dissenting in part and concurring in the judgment), the VA's struggle to render an accurate determination in the first instance is all the more concerning.

B. Data Have Long Demonstrated the Scope and Scale of the VA's Accuracy Issues

This ongoing struggle for accuracy echoes back decades. In the 1950s, after a government report criticized the VA's adjudication process, the VA reviewed approximately 1.7 million cases in which veterans were receiving benefits. Ridgway 2013, at 14-15. The VA had to adjust benefits in approximately 10% of cases, including for 20,700 veterans who were entitled to additional benefits. Adm'r Veterans Affs., *Annual Report: 1962*, at 53-54 (1963).

Fifty years later, problems endure. The VA reported that almost one-third of its initial benefits decisions in fiscal year 1999 were inaccurate. *See* U.S. Gov't Accountability Off., *Veterans Benefits Administration: Problems and Challenges Facing Disability Claims Processing* 2, 4-5 (2000) (noting "large backlogs of pending claims, lengthy processing times for initial claims, [and] high error rates in claims processing"). And from 2003 to 2016, the CAVC remanded or reversed more than half of the BVA decisions it considered. *See* Ames, *supra*, at 45.

Of course, most of these errors would not rise to the level of CUE. But they underscore that the VA is plagued by systemic backlog and mistakes, as adjudicators value speed over accuracy. Although the appellate system Congress established in 1988 addresses many of these errors, it cannot address all of them. For errors that are clear and unmistakable, CUE can intervene.

C. CUE is a Critical Tool for Veterans to Challenge Erroneous Final Benefits Decisions

In the narrow set of circumstances where the VA commits obvious legal or factual errors, it becomes all the more important that veterans can challenge and receive

retroactive relief from otherwise final decisions. They have one means to do so: CUE. *Pirkl v. Shinseki*, 718 F.3d 1379, 1380-83 (Fed. Cir. 2013).

Mr. George's case provides a striking example of what CUE should remedy but, because of the Federal Circuit's decision, cannot. But he is not the only one. Other cases demonstrate what the Federal Circuit threatens to abrogate: "the fundamental principle of corrective remedies that is used throughout the law," that "[t]he injured party is to be placed, as near as may be, in the situation he would have occupied if the wrong had not been committed." *Pirkl v. Wilkie*, 906 F.3d 1371, 1378 (Fed. Cir. 2018) (citation omitted).

Given the century-long evolution of the VA benefits system described above, the "wrongs" that VA's errors create can take years, if not decades, to identify and correct. This imposes unique burdens on veterans, who lacked judicial review until only relatively recently. Without the ability to get retroactive relief through CUE, veterans would lose years of benefits to which they were clearly entitled. For these veterans, including Mr. George, CUE functions as a vital safety valve.

Consider the case of Marine Corps veteran John Gettler. Several years after serving in Vietnam, Mr. Gettler applied for benefits based on post-traumatic stress disorder (PTSD) arising from his combat experience. *Gettler v. Shinseki*, No. 09-2257, 2011 WL 1625092, at *1 (Vet. App. Apr. 29, 2011). Mr. Gettler presented his PTSD diagnosis, military records regarding his service in Vietnam, and a personal statement as to his combat experience. *Id.* The VA denied Mr. Gettler's initial claim in 1987, claiming he had not shown a connection between his service in Vietnam and his PTSD. *Id.*

Ten years later, while Mr. Gettler's claim was on appeal to the BVA, he submitted additional evidence: statements that he had gathered from others he had served with in combat. *Id.* at *2. The VA granted benefits as of the 1997 date of the newly submitted evidence. *Id.* But Mr. Gettler also sought retroactive CUE relief, arguing that the VA had incorrectly applied the statute governing service connection. *Id.* The CAVC agreed that there was CUE because the VA had incorrectly applied both the statute and regulations that were in place in 1987. *Id.* at *5. This decision entitled Mr. Gettler to receive roughly a decade of withheld benefits, which he would not have been able to recover but for CUE.

Navy veteran Robert Pirkl saw the VA steadily reduce his disability rating from 100% in 1952 to 30% in 1966, based on an incorrect application of its own regulation. The VA corrected its error and restored Mr. Pirkl's 100% disability rating in 1991. *Pirkl*, 906 F.3d at 1373. Mr. Pirkl then used CUE to request the benefits he had been denied over the course of nearly 40 years. *Id.* at 1373. After numerous appeals spanning 17 years, the Federal Circuit finally granted some relief in 2018—to Mr. Pirkl's widow. *Id.* at 1375. Mr. Pirkl had died a few years before.

In June 1948, the VA denied benefits to a World War II veteran and Purple Heart recipient for a psychiatric disorder, despite a VA examiner previously finding that the veteran's "military service, particularly combat duty, were the precipitating factors." *Redacted*, No. 07-39 467, Bd. Vet. App. 0820697, 2008 WL 3586083, at *1 (June 24, 2008). After numerous appeals, the BVA finally found in 2008—*60 years later*—that the 1948 decision contained CUE and granted benefits to the veteran effective January 1948. *Id.* at *3-4.

In August 1987, the VA denied benefits to Vietnam veteran Norman Cegelnik, who was previously hospitalized for psychiatric issues and diagnosed with PTSD. *Cegelnik v. Wilkie*, No. 18-4319, 2019 WL 4120415, at *1-3 (Vet. App. Aug. 30, 2019). The VA ignored service records attesting to Mr. Cegelnik's "undebatable" combat status and improperly disregarded his PTSD diagnosis. *Id.* at *3-4. In 2019, the CAVC found CUE in the VA's decision and granted relief. *Id.*

In May 1989, the VA decided that a Vietnam veteran and Purple Heart recipient, who had received "massive, severe injuries" from a mine explosion, no longer needed monthly compensation based on the need for regular home care by another—a benefit that the veteran had received in some form *since 1969*. *Redacted*, No. 01-02 686A, Bd. Vet. App. 0900838, 2009 WL 680540, at *3-5 (Jan. 8, 2009). In 2009 — 20 years later — the BVA found that the 1989 decision contained CUE. *Id.* at *7.

In May 1971, the VA denied a Vietnam veteran and Purple Heart recipient compensation for a back injury, improperly ignoring evidence that the injury could be service-connected. *Redacted*, No. 10-45 920, Bd. Vet. App. 1334737, 2013 WL 6575774, at *2-4 (Oct. 30, 2013). In 2013, more than 40 years later, the BVA found CUE and set aside this 1971 decision. *Id.* at *5.

These and other examples demonstrate that CUE represents a critical safety valve. In each case, the veteran used CUE to correct a critical and obvious error—that often had stood for decades—and won. Mr. George's case is functionally indistinguishable: Just as in these examples, the VA imposed on Mr. George an error entirely of the VA's own making and then turned around and made Mr. George bear the consequences of *the VA's error*. CUE exists to correct precisely such a

circumstance. It should be available to Mr. George just as it was available to these veterans.

IV. The Federal Circuit's Decision Robs Veterans of CUE's Fundamental Purpose

A. CUE Helps to Correct Systemic Imbalances Between Veterans and the VA

Although CUE is available to both veterans and the VA, it is critically important to veterans given the agency's many systemic advantages and incentives.

For example, the VA has several other (and arguably more powerful) tools that it can employ to address structural legal errors. It could promulgate new or amended regulations or change its interpretation of an existing regulation (provided that interpretation was legally permissible). Additionally, if new legislation is needed, the VA benefits from a veritable army of personnel with regular access to Congress.

The VA is also less impacted by the financial consequences associated with a retroactive error. Aside from the Department of Defense, the VA is the second largest modern administrative agency. *See* U.S. Off. of Pers. Mgmt., *Sizing Up the Executive Branch: Fiscal Year 2017*, at 6 (2018). Although efficient management of its resources is, of course, important, the impact of a retroactive correction for an individual veteran would not even amount to a rounding error. By contrast, those same retroactive benefits (to which the veteran should have been entitled all along) can be life changing or even life*saving* for an individual veteran and his family.

B. The Federal Circuit's Decision Rewards the VA for Committing Obvious, Structural Legal Error

CUE plays a critical affirmative role in correcting error in favor of veterans. But equally critical are the

negative incentives it helps police. Mr. George's case makes the point: The VA passed a regulation that for decades was contrary to the plain language of the governing statute. That atextual regulation stood for decades, a period during which the VA undoubtedly benefited by denying scores of veterans like Mr. George payments Congress intended them to receive. The Federal Circuit's decision would permit the VA to retain those wrongfully withheld payments, at the expense of the veterans the VA is supposed to serve.

The incentives such a regime creates are obvious: The Federal Circuit's decision allows the VA to pass incorrect regulations and then reap the benefits of such regulations until some veteran has the wherewithal and means to challenge and overturn those regulations. To be sure, modern notice and comment practice, buttressed by an increasingly active veterans' bar and judicial review, help police such incentives. But that does not obviate CUE's important role in further reducing such perverse incentives, especially given how few veterans directly appeal the VA's initial decisions, *see* Part III, *supra*.

The Federal Circuit's decision also threatens Congress's primary Constitutional role under the Appropriations Clause. Here again, Mr. George's case is illustrative. Congress spoke clearly on the law applicable to his claim. When the Executive passed a regulation contrary to Congress's express will, it overrode Congress's appropriation of benefits. At the time, an individual veteran could not realistically petition the Article III judiciary to correct that separation of powers violation. Although she could do so now, that does nothing for veterans like Mr. George absent CUE, which can both correct individual injustice and incentivize the VA away from such regulations in the first place, potentially saving veterans years of hardship.

C. The History of the Presumption of Soundness Regulation Demonstrates the Flaws in the Federal Circuit's Decision

The history of the presumption of soundness regulation at issue in Mr. George's case demonstrates these concerns. Before the VA passed its atextual regulation in 1961—which stood for 42 years until the Federal Circuit overturned it in 2004—the Executive repeatedly attempted to deprive veterans of the rebuttable presumption of soundness on entry into active service, from which Mr. George should have benefited.

This started decades earlier when, in the 1930s, the Roosevelt Administration's regulations would have allowed the government to rebut the presumption of soundness with evidence that the disability existed prior to service. *Wagner v. Principi*, 370 F.3d 1089, 1094 (Fed. Cir. 2004) (discussing Veterans' Regul. No. 1(a), pt. I, ¶ I(b) (Exec. Order No. 6,156)). Congress disagreed and overrode this regulatory fiat. *Id.* (citing Independent Offices Appropriations Act of 1935, ch. 102, § 27, 48 Stat. 509, 524). This was the genesis of the rebuttable presumption that exists today. *Wagner*, 370 F.3d at 1094-95; *see* 38 U.S.C. § 1111.

After the start of World War II Congress proposed legislation that included a blanket presumption of soundness for new veterans. *Wagner*, 370 F.3d at 1095 (discussing 89 Cong. Rec. 7,386 (1943) (statement of Rep. Rankin); H.R. 2703, 78th Cong. (1943)). The Administration disagreed and again proposed an exception for disabilities that existed prior to service. *Id.* (citing S. Rep. No. 78-403, at 6 (1943)). Although Congress adopted that exception, it again placed the burden on the VA to show that preexisting injuries were not aggravated by military service. *Id.*; *see also* 89 Cong. Rec. 7,387 (statement of Rep. Rankin) ("It places the

burden of proof on the Veterans' Administration to show by unmistakable evidence that the injury or disease existed prior to acceptance and enrollment and was not aggravated by such military or naval service."); *Wagner*, 370 F.3d at 1095-96. The VA complied with Congress's dictate through the 1950s. 11 Fed. Reg. 8730 (Aug. 13, 1946); 38 C.F.R. § 3.63(b) (1949); 38 C.F.R. § 3.63(b) (1956).

Even after Congress reaffirmed this scheme in 1957 and 1958, Veterans Benefit Act of 1957, Pub. L. No. 85-56, § 312, 71 Stat. 83; Veterans Benefit Act of 1958, Pub. L. No. 85-857, § 311, 72 Stat. 1105, 1120 (codified at 38 U.S.C. § 311), the Executive once again used regulatory fiat to overcome Congress's intent. In 1961, the VA promulgated an entirely new set of regulations for adjudicating benefits claims. 26 Fed. Reg. 1561 (Feb. 24, 1961). The new regulations allowed for an exception to the presumption of soundness where "clear and unmistakable (obvious or manifest) evidence demonstrates that an injury or disease existed prior thereto," but the new regulation did away with Congress's express requirement to disprove aggravation. *See id.* at 1580. The VA never explained how this about face could be consistent with the statute. Its reasoning is lost to history, but the end result was that between 1961 and 2004, the VA benefited from a standard of proof Congress expressly prohibited—at Mr. George's expense, and at the expense of veterans like him.

Especially when set against this troubling historical context, the case for CUE seems obvious. One might even expect the VA, out of decency alone, to agree. But rather than do so, it has doubled down on this decades-long error, arguing to the Veterans Court and the Federal Circuit that the law "required" the VA to deny veterans like Mr. George benefits for 43 years, notwithstanding Congress's

clearly expressed intent through a statutory scheme dating back to the 1930s. *E.g.*, *James v. McDonough*, No. 20-0318, 2021 WL 5001748, at *3 (Vet. App. Oct. 28, 2021) (recognizing that the "plain text of section 1111 has not changed" but that the "second prong . . . was not recognized in 1994"); *Cohen v. McDonough*, No. 19-2329, 2021 WL 3878976, at *3 (Vet. App. Aug. 31, 2021) ("[I]n March 2003 rebuttal of the presumption of soundness required clear and unmistakable evidence only as to the first prong."); *Baskin v. McDonough*, No. 20-1217, 2021 WL 1707139, at *7 (Vet. App. Apr. 30, 2021) ("At the time of the 1986 decision, rebutting the presumption of soundness only required a showing of clear and unmistakable evidence that the condition existed prior to service.").

The Federal Circuit's decision below reinforces and rewards these tactics, harming Mr. George and veterans like him and incentivizing further such efforts going forward. In essence, the Federal Circuit's decision places more value on a changing regulation than it does on an unambiguous and unchanging statute. This upends Constitutional separation of powers and disparately treats veterans who sought benefits between 1961 and 2004 as compared to every veteran who did so before 1961 or after 2004.

In fact, if allowed to stand, the Federal Circuit's decision could further erode principled VA decision making. For example, the CAVC recently relied on the Federal Circuit's decision in this case to affirm the VA's denial of a CUE claim. *Sierra v. McDonough*, No. 18-4509, 2022 WL 277274, at *4 (Vet. App. Jan. 31, 2022). In *Sierra*, the VA had previously denied a compensable rating to a veteran in 2006 based on its interpretation at the time of a decades-old VA regulation—29 Fed. Reg. 6718 (May 22, 1964). *Sierra*, 2022 WL 277274, at *4. In

2013, Mr. Sierra applied for CUE, contending that the VA had incorrectly applied its own regulation. *Id.* at *1. In a separate case in 2015, the CAVC interpreted the "plain language" of the regulation in question in a manner consistent with Mr. Sierra's argument. *Id.* at *4 (citing *Petitti v. McDonald*, 27 Vet. App. 415, 424-25 (2015)).

But relying on the Federal Circuit's decision in the case now before this Court, the CAVC held that "*Petitti* cannot be applied retroactively to render the [2006] rating decision a product of CUE when that decision was faithful to the regulations as they were understood at that time." *Id.* (citing *George v. McDonough*, 991 F.3d 1227, 1234-35 (Fed. Cir. 2021)). It then went on, "That is true even if the later interpretation set forth *what the regulation always meant*." *Id.* (emphasis added). Thus, *George* is already rippling outward to shield the VA not only when it incorrectly applies unchanging and unambiguous statutes, but also when it ignores the plain language of *its own regulations*.

Such results cannot stand in any regulatory scheme, much less one that is meant to strongly favor veterans. If allowed to stand, the Federal Circuit's decision rewards the VA with a windfall, encourages it to similarly shield itself from Congress's will in other circumstances, and carves out a generation of veterans for unfair disparate treatment.

CONCLUSION

For nearly a century, CUE has been a critical tool for veterans seeking retroactive relief from erroneous VA decisions. It protects veterans from systemic errors within the system, and—particularly in cases like Mr. George's—it incentivizes the VA to ensure that the agency follows Congress's direction. Precluding CUE where the VA ignores an express statutory instruction

rewards the VA for obvious legal error and leaves veterans without the ability to obtain complete relief. This cannot be the correct result in this country's pro-veteran system. The judgment of the court of appeals should therefore be reversed.

Respectfully Submitted,

LIAM J. MONTGOMERY
Counsel of Record
ANDREW P. LEMENS
ASHWIN G. SHANDILYA*
PERRY F. AUSTIN*
WILLIAMS & CONNOLLY LLP
725 Twelfth Street, NW
Washington, D.C. 20005
(202) 434-5000
lmontgomery@wc.com

MARCH 7, 2022

*Admitted in Virginia. Practice in the District of Columbia supervised by members of the D.C. Bar as required by D.C. App. R. 49(c)(8).