2019-1600

IN THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

MILITARY-VETERANS ADVOCACY,
Petitioner,

v.

SECRETARY OF VETERANS AFFAIRS,
Respondent.

On Petition For Review Pursuant To 38 U.S.C. § 502

BRIEF FOR RESPONDENT

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent's counsel states that he is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title.

Counsel states that this case is related to the following three cases raising challenges under 38 U.S.C. § 502, which the Court has designated as companion cases: (1) *Haisley v. Secretary of Veterans Affairs,* No. 19-1687 (Fed. Cir.); (2) *National Organization of Veterans' Advocates v. Secretary of Veterans Affairs,* No. 19-1680 (Fed. Cir.); and (3) *Carpenter Chartered v. Secretary of Veterans Affairs,* No. 19-1685 (Fed. Cir.). These cases have been assigned to the same merits panel for oral argument.

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STATEMENT OF THE ISSUES

1. Whether 38 C.F.R. § 3.105(a)(1)(iv), which provides that new interpretations of law do not constitute clear and unmistakable error (CUE) in a final agency of original jurisdiction (AOJ) decision on a claim for benefits, is not in accordance with law.

2. Whether 38 C.F.R. § 14.636(c)(1)(ii), which governs when agents and attorneys can charge fees to veterans seeking benefits, is arbitrary and capricious, an abuse of discretion, or otherwise not in accordance with law.

3. Whether VA adequately explained its reasons for promulgating 38 C.F.R. § 20.202(c)(2), which governs requests to switch appeal dockets at the Board of Veterans' Appeals (board).

STATEMENT OF THE CASE SETTING FORTH THE RELEVANT FACTS

I. The Regulations

Petitioner, Military-Veterans Advocacy (MVA), challenges three regulations under 38 U.S.C. § 502.

First, MVA challenges section 3.105(a)(1)(iv), which conformed the regulation governing revision of final decisions by a VA AOJ based on CUE with the regulation governing revision of final decisions by the board based on CUE at 38 C.F.R. § 20.1403(e):

> *Changes in interpretation.* Clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the decision being challenged, there has been a change in the interpretation of the statute or regulation.

Second, MVA challenges 38 C.F.R. § 14.636(c)(1)(i), which does not allow agents and attorneys to charge fees to claimants seeking readjudication of finally-decided claims based on new evidence:

> Agents and attorneys may charge claimants or appellants for representation provided after an [AOJ] has issued notice of an initial decision on the claim or claims if the notice of the initial decision was issued on or after the effective date of the modernized review system as provided in § 19.2(a) of this chapter, and the agency or attorney has complied with the power of attorney requirements in § 14.631 and the fee agreement requirements in paragraph (g) of this section. For purposes of this paragraph, (c)(1)(i), an initial decision would include an initial decision on an initial claim for an increase in rate of benefit, an initial decision on a request to revise a prior decision based on clear and unmistakable error (unless fees are

> permitted at an earlier point pursuant to paragraph (c)(1)(ii) or paragraph (c)(2)(ii) of this section), and an initial decision on a supplemental claim that was presented after the final adjudication of an earlier claim. However, a supplemental claim will be considered part of the earlier claim if the claimant has continuously pursued the earlier claim by filing any of the following, either alone or in succession: A request for higher-level review, on or before one year after the date on which the agency of original jurisdiction issued a decision; a Notice of Disagreement, on or before one year after the date on which the agency of original jurisdiction issued a decision; a supplemental claim, on or before one year after the date on which the [board] issued a decision; or a supplemental claim, on or before one year after the date on which the Court of Appeals for Veterans Claims issued a decision.

Third, MVA challenges 38 C.F.R. § 20.202(c)(2), which permits claimants to change board dockets unless they have already submitted new evidence or testimony to the board:

> A claimant may modify the information identified in the Notice of Disagreement for the purpose of selecting a different evidentiary record option as described in paragraph (b) of this section. Requests to modify a Notice of Disagreement must be made by completing a new Notice of Disagreement on a form prescribed by the Secretary, and must be received at the Board within one year from the date that the agency of original jurisdiction mails notice of the decision on appeal, or within 60 days of the date that the Board receives the Notice of Disagreement, whichever is later. Requests to modify a Notice of Disagreement will not be granted if the appellant has submitted evidence or testimony as described in §§ 20.302 and 20.303.[1]

[1] MVA's petition also sought review of 38 C.F.R. § 3.103(c)(2). ECF No. 1-2 at 9-10. Because MVA did not address this regulation in its brief, however, this issue is waived. *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 688 n.3 (Fed. Cir. 2000) (*DAV*).

II. The Appeals Modernization Act Of 2017

On August 23, 2017, Congress enacted Pub. L. No. 115-55, 131 Stat. 1105 (2017), entitled the "Veterans Appeals Improvement and Modernization Act of 2017" (AMA). The AMA was the culmination of a lengthy legislative initiative by VA, in collaboration with stakeholders including veterans service organizations, congressional staff, and state and local government officials, to reform the VA administrative appeals system. H.R. Rep. No. 115-135, at 3 (2017); Appx77.

VA undertook this legislative initiative to fix an appeals system that was, by all accounts, "inefficient, ineffective, and confusing." Appx119. This "broken" system resulted in part from its once-size-fits-all-claims decision and review processes, which mandated re-adjudication of every claim by VBA before review by the board on appeal. *See* 38 U.S.C. § 7105 (2016). More problematic, however, was the continuous gathering and introduction of new evidence built into these processes. Appx119. Not only was VA required to continue assisting claimants in developing evidence to support a claim before the board, 38 U.S.C. § 5103A (2016), *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008), but claimants were permitted to submit new evidence at virtually any time prior to a final board decision. *See* 38 C.F.R. §§ 20.1304(a), (b), 20.903 (2016). The development and introduction of such evidence would often result in a remand to the AOJ for consideration of the evidence (and any further evidentiary

development that evidence might have triggered) and readjudication of the claim, thereby starting the claims and appeal process all over again. *See Disabled Am. Veterans v. Sec'y of Veterans Affairs*, 327 F.3d 1339, 1346-48 (Fed. Cir. 2003) (requiring remand from the board to the AOJ for consideration of new evidence absent a waiver from the claimant); 38 C.F.R. § 20.1304(c) (2016); Appx95.

This "continuous evidence gathering and re-adjudication of the same matters" was referred to as "churn," and resulted in veterans waiting "much too long for final resolution of their appeals." Appx78; Appx95 ("One of the reasons legislative reform of the current VA appeals process is needed is that appeals churn in the system"). Reflecting the churn, a 2017 GAO report noted that the board was remanding nearly half of the claims it disposed of each year to VBA for additional development and readjudication. *See* Appx118 (noting that the board remanded "about 46 percent of appeals to VBA for additional development" in Fiscal year 2015); *see also* Appx95 (showing similar statistics for other years).

Exacerbating these systemic problems, the number of appeals to the board was markedly increasing. Appx87-99; Appx113; Appx190-201. Congress noted that in January 2015, there were approximately 375,000 pending board appeals, but that as of March 31, 2017, there were approximately 470,000 such appeals, a nearly 20 percent increase in only two years. H.R. Rep. No. 115-135, at 5. Given

these numbers, VA projected that claimants could wait as long as ten years for a final board decision by the end of 2027. *Id.*

In response to these, and other concerns, VA's initiative and the resulting draft legislation was designed to increase the appeals system's efficiency while ensuring a timely and fair process for claimants. Appx77-78; Appx117-23. The bill that eventually became the AMA, H.R. 2288, was passed by the House on May 23, 2017. 163 Cong. Rec. H4457-4463 (daily ed. May 23, 2017). The Senate passed H.R. 2288 on August 1, 2017 with amendments that were subsequently agreed to by the House. 163 Cong. Rec. S4687 (daily ed. Aug. 1, 2017). On August 23, 2017, the President signed H.R. 2288 into law.

Although the AMA maintained the overall functional structure of VA's benefits claims and appeals system, whereby an AOJ (typically VBA) is responsible for the general administration of benefits, including the intake of applications, initial claims decisions, and fulfilling VA's duty to assist, and the board is the highest-level appeals body within VA, the AMA eliminated the one-size-fits-all-claims appeal process of the legacy system. *See generally* 38 U.S.C. §§ 7701 (VBA); 7104 (board). Instead, claimants may now choose between three procedural options, referred to as "lanes," for obtaining additional consideration of

their claim within one year of the initial decision.[2] 38 U.S.C. § 5104C(a)(1). And, if the attempt in one "lane" proves unsuccessful, claimants may successively pursue another "lane." *Id.* § 5104C(a)(2). Claimants maintain the potential effective date of a claim as long as they "continuously pursue" the claim by selecting an available lane within one year of an adverse VA or Veterans Court decision. 38 U.S.C. § 5110(a).

The first lane is a supplemental claim. If a claimant wishes to submit additional evidence to an AOJ, they can ask for a "readjudication" by filing a supplemental claim. 38 U.S.C. §§ 5104C(a)(1), 5108. If the evidence is "new and relevant," the Secretary "shall readjudicate the claim, taking into consideration all of the evidence of record." *Id.* VA has a limited duty to assist a claimant in obtaining "new and relevant" records that the claimant "reasonably identifies." 38 U.S.C. § 5108(a), (b). Unlike legacy claims to reopen under section 5108, the

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[2] The AMA also amended the statutes governing the contents of VBA decisions to ensure VBA provides more detailed information to claimants, 38 U.S.C. § 5104(b), and established a rule that VA findings favorable to claimants in VBA decisions are binding on subsequent VA adjudicators, including the board, absent clear and convincing evidence to the contrary, *id.* § 5104A.

The AMA applies to claims in which VA issues a decision on or after February 19, 2019, the date 30 days after the Secretary certified to Congress that VA has the resources necessary to carry out the new system in a timely manner while still addressing legacy clams in a timely manner. AMA § 2(x)(1); *see* Appx747 (notification of effective date)). The AMA provides opportunities for claimants in the old system to opt-into the new system. *See, e.g.*, AMA § 2(x)(5).

potential effective date for a successful supplemental claim is the date of the initial claim if continuously pursued. 38 U.S.C. § 5110(a)(1). Otherwise the effective date is tied to the date of the supplemental claim. *Id.* § 5110(a)(3).

The second lane is a request within one year of an AOJ decision for review within VBA, called a "higher-level review," based on the same evidentiary record. 38 U.S.C. §§ 5104B(b)(1)(B), 5104C(a)(1)(A). Higher-level review is conducted *de novo*, and claimants can request that an adjudicator from a different AOJ office perform the review. *Id.* § 5104B(b)(2), (e). VA has no duty to assist during a higher-level review.[3] *Id.* §§ 5103A(e), 5104B(d).

The third lane is a direct appeal to the board, which a claimant initiates by filing a Notice of Disagreement (NOD) with the board within one year of the AOJ decision. 38 U.S.C. § 5104C(a)(1)(C). Claimants must specify in the NOD whether they want a board hearing and whether they want to submit additional evidence.[4] 38 U.S.C. § 7105(b)(3). If a claimant chooses to submit additional evidence, they must do so either within 90 days of filing the NOD (if they have

[3] A higher-level adjudicator or the board may remand a case to the AOJ for correction of a duty-to-assist error. 38 U.S.C. § 5103A(f).

[4] Based on this specification, VA places the case on one of the board's three dockets. 38 U.S.C. § 7107(a)(4); 38 C.F.R. § 20.800. Cases before the board are to be decided in the order in which they are received according to their respective places on the docket to which they are assigned. *Id.*

chosen not to have a board hearing) or within 90 days of their board hearing. 38 U.S.C. §§ 7113(b)(2)(B), (c)(2)(B).[5] Congress directed the Secretary to develop a policy governing requests from claimants to modify the information in NODs and authorized the Secretary to "develop and implement a policy allowing a claimant to move the claimant's case from one docket to another." *Id.* §§ 7105(b)(4), 7107(e).

In an important departure from the legacy system, in which VA's duty to assist continued while a claim was on appeal to the board, VA has no duty to assist during a board appeal. *Id.* § 5103A(e). The board also no longer has authority to develop the record if it finds that an independent medical expert opinion is required, *see* 38 U.S.C. § 7109 (2016); the board must, instead, remand claims to the AOJ when it determines that VA's duty to assist required such an opinion. *Id.* § 5109(d).

In recognition of the new procedural options, Congress amended the statute governing when agents and attorneys can charge fees. Prior to the AMA, an agent and attorney could not charge fees until the claimant filed an NOD with VBA. 38 U.S.C. § 5904(c)(1) (2017). Now, agents and attorneys can charge fees to veterans from the time that "a claimant is provided notice of the [AOJ's] initial decision

[5] If a claimant wishes to submit new evidence outside of these 90-day windows, they may file a supplemental claim with the AOJ after withdrawing their board appeal. 38 U.S.C. § 5104C(a)(2).

under section 5104 of this title with respect to the case." 38 U.S.C. § 5904(c)(1).

Finally, as relevant to MVA's petition, the AMA replaced motions to reopen finally-decided claims based on "new and material" evidence under section 5108 with supplemental claims based on "new and relevant" evidence under 38 U.S.C. § 5104C(b). As with section 5108 claims, if VA grants a section 5104C(b) claim, the earliest possible effective date is the date of the supplemental claim. *Id.* § 5110(a)(3).

Overall, these statutory changes reflect Congress's concern with the appeals system, and its shared goal of streamlining the system while maintaining a fair process for claimants. As Congress explained in the AMA's legislative history:

> Unfortunately, VA's current appeals process is broken. In the last few years, the quantity of undecided appeals at VA has risen significantly over the past few years. In January 2015, there were approximately 375,000 pending appeals at VA. This number increased to approximately 470,000 as of March 31, 2017 – a 20% increase in little more than 2 years.
>
> Furthermore, veterans currently wait an average of three years for their appeal to be resolved at the [regional office] level. Veterans who file an appeal with the Board wait an average five years for a final decision, inclusive of the time at both VBA and [the board]. Even worse, VA projects that, if the current appeals process is not changed, claimants will wait an average ten years for a final appeals decision by the end of 2027.
>
> To help ensure that veterans receive timely appeals decisions in the future, VA negotiated with VSOs and other veterans advocates to craft a proposal that would streamline VA's appeals process while protecting veterans' due process rights. The resulting appeals . . . procedures created by this bill would

> reduce VA's appeals workload and help ensure that the process is both timely and fair.

H.R. Rep. No. 115-135, at 5; *see also* S. Rep. No. 115-126, at 27 (2017) (Congressional Budget Office statement that "[t]he proposed changes are intended to significantly streamline the appeal process, which would allow appeals to be finalized in a shorter period of time with fewer employees."). Congress thus intended the AMA to allow the appeals process to proceed in an orderly and predictable manner, reducing inefficiencies in the system. *See* H.R. Rep. No. 115-135, at 5 (the appeals process, developed by VA and veterans advocates, is designed to "help ensure that veterans receive timely appeals decisions" and to "reduce VA's appeals workload"); S. Rep. No. 115-126, at 3.

III. VA Rulemaking To Implement The AMA

VA again collaborated with stakeholders in developing proposed regulations to implement the law. VA held an initial engagement meeting with stakeholders in late 2017, during which VA provided an overview of the planned regulatory structure and answered questions. Appx203; Appx204-24; Appx225-29. Shortly thereafter, VA shared an early draft of proposed regulations and provided an opportunity for informal comment from stakeholders. *See* Appx230-324; Appx346-368. VA published the Notice of Proposed Rulemaking on August 10, 2018. Appx384-435 (Proposed Rule).

VA explained in the Proposed Rule that it was proposing to add section 3.105(a)(1)(iv) to "conform regulations with respect to revision of final decisions by the agency of original jurisdiction with similar regulatory changes previously promulgated with respect to revision of final Board decisions based on CUE under 38 U.S.C. 7111." Appx386. VA explained that, in light of this Court's holding in *DAV*, which affirmed the same CUE principles underlying the proposed rule, the rule would not make a "substantive change . . . to the existing law." *Id.*

VA also explained that it was proposing to clarify in section 14.636 "whether a decision on a supplemental claim is considered a new initial decision, or whether it is part of the original adjudication string based on the effective date." Appx394. VA intended the rule to "make[] clear that a decision by an [AOJ] adjudicating a supplemental claim will be considered an initial decision on a claim unless the decision is made while the claimant continuously pursued the claim by choosing one of the three procedural options available under [the AMA]." *Id.*

VA explained finally that it was adding section 20.202(c)(2), as permitted in 38 U.S.C. § 7107(e), to allow claimants to switch board dockets. Appx397-98. "In crafting this policy, VA sought to provide appellants with an opportunity to change their initial election if their circumstances or preference changed." *Id.* VA explained, however, that it "also wanted to prevent an appellant from unfairly gaining the advantage of two dockets" by, for example, taking advantage of the

"faster direct review docket" after the appellant "has already submitted evidence or testified at a Board hearing." *Id.* Under the proposed rule, a request to modify an NOD to change dockets would be denied if an appellant has already submitted evidence or testimony to the board. *Id.*

VA published the Notice of Final Rulemaking on January 18, 2019. Appx1-57 (Final Rule). As reflected in the Final Rule, VA received 31 sets of comments to the Proposed Rule, Appx453-699, many of which resulted in VA changing its proposed rules.

VA received two comments on section 3.105(a)(1)(iv). *See* Appx5. VA disagreed with the commenters' contention that the rule is contrary to established case law, and explained how restricting retroactive application of new interpretations of law in the CUE context is consistent with this Court's decisions in *DAV* and *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005). *Id.* VA also explained why it does not agree that these cases were, or could have been, overruled by a later panel decision in *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011). *Id.*

VA received three comments objecting to section 14.636(c)(1)(i). Appx12. The commenters "advocated for an interpretation that would allow for agents and attorneys to receive fees for representation on all supplemental claims regardless of whether they are being continuously pursued by the claimant." Appx13. VA

explained that section 14.636(c)(1)(i), which allows fees when a claimant continuously pursues a claim as provided in section 5104C(a), but not when a claimant requests readjudication of a finally-decided claim based on new evidence under section 5104C(b), is consistent with section 5904(c)(1) and VA's long-standing view of congressional intent that VA "have an opportunity to decide a matter before paid representation is available." *Id.* (quoting 73 Fed. Reg. 29,852, 29,868 (May 22, 2008)).

Finally, VA received several comments concerning section 20.202(c)(2), including one from MVA. Appx460-66. MVA argued that nothing in the AMA authorized VA to adopt a policy that veterans could not switch board dockets once they have submitted evidence or testimony. Appx461; Appx16. In response, VA explained that section 7107(e) authorized VA, in its discretion, to "develop and implement a policy allowing an appellant to move the appellant's case from one docket to another docket." Appx16. VA also explained why the limitation in section 20.202(c)(2) makes sense in light of the purposes of the AMA – "[a]llowing appellants to switch lanes at any time would mimic" the "current legacy system," in which "appellants may add evidence, request a hearing, or withdraw a hearing request at any time" and thereby "preclude the efficiencies built into the new system[.]" *Id.* VA explained further that "[a]llowing some veterans to switch dockets at any time in the process will make it difficult for VA

to provide accurate data to all veterans, effectively taking away their ability to choose the best path." *Id.* Given these concerns, VA emphasized the need to "carefully balance[]" the desire of veterans to change dockets "against the needs of all the other veterans waiting for the Board to decide their appeals." *Id.* VA's policy thus "provides an opportunity for a veteran to switch dockets without creating an unfair disadvantage to other veterans who wish to continue with their initial choice, but might experience longer wait times as a result of others switching dockets." *Id.*

On February 7, 2019, VA published notice that the Secretary had certified to Congress that VA was ready to implement the AMA. Appx747. On February 15, 2019, and October 9, 2019, VA published technical corrections to the Final Rule. Appx58-60; 84 Fed. Reg. 54,033 (Oct. 9, 2019). The AMA and its implementing regulations became effective February 19, 2019. This petition for review followed.

SUMMARY OF THE ARGUMENT

This Court should deny the petition and hold that the challenged rules are not arbitrary, capricious, an abuse of discretion, or otherwise contrary to law.

Section 3.105(a)(1)(iv) is consistent with this Court's precedent and should be sustained. Adding section 3.105(a)(1)(iv) conformed the regulation governing CUE in AOJ decisions to the regulation governing CUE in board decisions, thereby incorporating established CUE principles recognized in this Court's CUE

jurisprudence into section 3.105 without making a substantive change to the regulation. As VA explained correctly in the Final Rule, this Court held in *DAV* and *Jordan* that CUE does not provide an exception to finality based on new interpretations of law. Section 3.105(a)(1)(iv) does nothing more, therefore, than clarify what this Court has already said is the law.

In its brief, MVA concedes that the rule is valid as to new *agency* interpretations of law, and only challenges the rule as applied to new *judicial* interpretations of law. This constitutes an as-applied challenge, however, which is not permitted under section 502. Petitioner's concession also means that it cannot satisfy its burden of establishing that there is no set of circumstances in which the rule is valid.

MVA's challenge is also meritless because it relies on disregarding the precedential decisions in *DAV* and *Jordan* in favor of the nonprecedential decision in *Patrick v. Nicholson*, 242 F. App'x 695 (Fed. Cir. 2007). Even if *Patrick* were precedential, it would not compel petitioner's desired result because it was incorrectly decided and directly conflicts with this Court's earlier-in-time, binding decisions in *DAV* and *Jordan*. These decisions establish that CUE is to be measured against the law as it was understood at the time of the challenged decision, not as it is understood at the time of the CUE challenge. Petitioner's

arguments to the contrary do not undermine this fundamental holding, which is fatal to its rule challenge.

MVA's challenge to section 14.646(c)(1)(i) likewise fails because the rule is consistent with the AMA and congressional intent, and is reasonable. Paid representation has never been available without limit for claimants pursuing readjudication of finally-decided claims based on new evidence. Although the AMA changed when agents and attorneys can charge fees—from the filing of an NOD to VBA's issuance of an initial decision in a case—it did not amend the statute to overrule VA's long-standing rule defining requests for readjudication of finally-decided claims as separate "cases" for which fees may not be charged under section 5904(c) prior to a new triggering event, nor is there any indication that Congress intended to do so. When VA promulgated rules to implement the AMA, therefore, it maintained the same fee rule for such post-decision claims, which are now known as section 5104C(b) supplemental claims. VA's rule is thus consistent with section 5904(c)(1) and the AMA, and should be sustained.

MVA finally argues that VA failed to explain why it placed restrictions on claimants seeking to switch board dockets in section 20.202(c)(2). In the same breath, however, MVA argues that the Secretary's explanation was inadequate. Both arguments fail because VA adequately explained its reasons for restricting claimants from changing dockets after having submitted evidence or testimony to

the board. MVA may not agree with these reasons, but that does not render the explanation inadequate or the rule unreasonable. To the contrary, the rule is reasonably calculated to provide claimants with as much flexibility as possible to change dockets without permitting them to gain unfair advantage at the expense of other veterans and the appeals system. The rule should be sustained.

ARGUMENT

I. Standard Of Review

Section 502 grants this Court exclusive jurisdiction to review certain rulemaking actions by the Secretary of Veterans Affairs. 38 U.S.C. § 502. This Court reviews petitions under section 502 in accordance with the standard set forth in the Administrative Procedure Act (APA), 5 U.S.C. §§ 701-706. *See Nyeholt v. Sec'y of Veterans Affairs*, 298 F.3d 1350, 1355 (Fed. Cir. 2002) (citing *DAV*, 234 F.3d at 691). Under this standard, this Court reviews rulemaking to determine whether it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *see Paralyzed Veterans of Am., Inc. v. Sec'y of Veterans Affairs,* 345 F.3d 1334, 1339 (Fed. Cir. 2003).

The scope of review under the "arbitrary and capricious" standard is narrow, and "a court is not to substitute its judgment for that of the agency." *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983). This Court has stated that review under the "arbitrary and capricious" standard is "highly

deferential to the actions of the agency." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1372 (Fed. Cir. 2001). A regulation is not arbitrary and capricious if there is a "rational connection between the facts found and the choice made." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 669 F.3d 1340, 1348 (Fed. Cir. 2012).

II. Section 3.105(a)(1)(iv) Is Valid

MVA argues that section 3.105(a)(1)(iv) is invalid to the extent it applies to changes in judicial interpretations of law, and that CUE must be measured by the law as understood now, not at the time of the final decision alleged to contain CUE. Pet. Br. 20-47. The Court should reject this challenge because it is insufficient to satisfy petitioner's burden in this facial challenge, and because it is meritless.

A. MVA Cannot Satisfy Its Burden To Invalidate Section 3.105(a)(1)(iv)

MVA's rule challenge fails because MVA contends that section 3.105(a)(1)(v) is invalid only to the extent that it excludes changes in *judicial* interpretations of law from CUE. MVA does not dispute that the rule is valid insofar as it excludes changes in *agency* interpretations of law from CUE. Pet. Br. 26. MVA's petition is brought under section 502, however, which permits only facial challenges to VA's regulations. *Preminger v. Sec'y of Veterans Affairs*, 517 F.3d 1299, 1308 n.5 (Fed. Cir. 2008). "To prevail in such a facial challenge,

[petitioners] 'must establish that no set of circumstances exists under which the [regulation] would be valid.'" *Reno v. Flores*, 507 U.S. 292, 301 (1993) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)); *see also Assoc. of Private Sector Colleges & Universities v. Duncan*, 681 F.3d 427, 442 (D.C. Cir. 2012) (applying the "no set of circumstances" test to a facial regulatory challenge). Because MVA concedes that section 3.105(a)(1)(iv) is valid as to new agency interpretations of law, it cannot establish that there are no set of circumstances under which the rule would be valid. *See George v. Wilkie*, 30 Vet. App. 364 (2019) (denying an as-applied challenge to section 3.105(a)).

B. Section 3.105(a)(1)(iv) Is Consistent With This Court's Binding Precedent

MVA's petition also fails because section 3.105(a)(1)(iv) is consistent with this Court's binding precedent. In *DAV*, this Court sustained 38 C.F.R. § 20.1403(a), which is substantively identical to section 3.105(a)(1)(iv) and excludes "change[s] in the interpretation of a statute or regulation" from the definition of CUE at the board. 234 F.3d at 697-98. The Court characterized the rule as addressing "whether a change in the interpretation of a statue or regulation may support a claim of CUE when the prior Board decision represents a correct application of the statute or regulation *as it was interpreted at the time of the decision*." *Id.* (emphasis added). VA's answer to this question was no, and the Court agreed.

The Court began by exploring Congress's intent when it enacted the CUE statutes at 38 U.S.C. §§ 5109A (AOJ) and 7111 (board) in 1997, concluding that Congress "intended to codify 38 C.F.R. § 3.105(a) and the Court of Appeals for Veterans Claims' interpretation of CUE." *Id.*; *see Cook v. Principi*, 318 F.3d 1334, 1344-45 (Fed. Cir. 2002) (*en banc*) (reaffirming the holding in *DAV* that "Congress' intent in drafting section 5109A was to codify and adopt the CUE doctrine as it had developed under 38 C.F.R. § 3.105" and that "Congress explicitly endorsed the *Russell* [*v. Principi*, 3 Vet. App. 310 (1992)] interpretation of CUE"); *Bustos v. West*, 179 F.3d 1378, 1381 (Fed. Cir. 1999) (holding that Congress intended the CUE statutes to codify "the Court of Appeals for Veterans Claims' long standing interpretation of CUE"); *Donovan v. West*, 158 F.3d 1377, 1382 (Fed. Cir. 1998) (holding that the CUE statutes "made no change in the substantive standards in the regulation governing modifications of a regional office decision because of 'clear and unmistakable error'"); *see* H.R. Rep. No. 105-52, at 1-4 (1997); S. Rep. No. 105-157, at 3-6 (1997). *DAV* thus held that Congress intended to extend "the principles underlying § 3.105(a) to § 7111, which governs CUE review of Board decisions." *DAV*, 234 F.3d at 693.

VA appropriately turned to section 3.105(a) and Veterans Court precedent when it promulgated section 20.1403(e), *see* 63 Fed. Reg. 27,534 (May 19, 1998), explaining that CUE cannot be based on a changed "interpretation of a statute or

regulation . . . whether by the General Counsel *or a court*." *Id.* at 27,537 (emphasis added); *see also* 64 Fed. Reg. 2,134, 2,139 (Jan. 13, 1999) (explaining that, in the view of the Veterans Court, CUE under section 3.105(a) could not be based on a change in the interpretation of a statute or regulation). As *DAV* would confirm, VA was correct.

As of its codification, section 3.105(a) provided that revision of final AOJ decisions based on CUE was not available where the error alleged was based on "a change in law . . . or a change in interpretation of law." 38 C.F.R. § 3.105 (1996) (introductory language). The *en banc* Veterans Court concluded in 1993 that a "determination that there was a 'clear and unmistakable error' must be based on the record and the law that existed at the time of the prior" decision. *Russell*, 3 Vet. App. at 313-14 ("New or recently developed facts or changes in the law subsequent to the original adjudication may provide grounds for reopening a case or for a de novo review but they do not provide a basis for revising a finally decided case."); *see also Berger v. Brown,* 10 Vet. App. 166, 170 (1997) ("we are only concerned with the law as it existed in 1969 and whether the [AOJ's] interpretation of *that* body of law was clearly and unmistakably erroneous . . . . opinions from this Court that formulate new interpretations of the law subsequent to an [AOJ] decision cannot be the basis of a valid CUE claim.").

DAV agreed with VA's reading of section 3.105(a) and *Russell*. *DAV*, 234 F.3d at 697-98. The Court held that VA properly incorporated the limit on CUE in section 3.105(a) addressed in *Russell* – that "changes in the law subsequent to the original adjudication . . . do not provide a basis for revising a finally decided case" – into section 20.1403(e). *Id*. The Court reasoned that *Russell's* understanding of CUE, and by extension section 20.1403(e), is "consistent with the concept that a claim of CUE is a collateral attack on a final [regional office] or Board decision" and with the general rule that new interpretations of law only have retroactive effect on decisions still open for review, not decisions closed to direct review. *Id.* at 698 (citing H.R. Rep. No. 105-52, at 3 and *Harper v. Virginia Department of Taxation*, 509 U.S. 86, 97 (1993)).

Five years later, this Court revisited the issue of retroactive application of new interpretations of law as applied to CUE in *Jordan*, where the Court rejected the argument that CUE can be based on a subsequent judicial invalidation of a regulation that had been lawfully binding at the time of the final decision. *Jordan*, 401 F.3d at 1297. Appellant argued that, following this Court's construction of 38 U.S.C. § 1111 in *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004), which invalidated 38 C.F.R § 3.304, the regulation was void *ab initio* and was not the correct law at the time of the initial decision. *Jordan*, 401 F.3d at 1297-98. He argued that CUE should be measured against the understanding of the law

following invalidation of the regulation, not against the understanding of the law at the time of the challenged decision, when the regulation was lawfully binding. *Id.* Citing *DAV,* this Court rejected appellant's theory, explaining that "the accuracy of the regulation as an interpretation of the governing legal standard does not negate the fact that the regulation did provide the first commentary on [section 1111], and was therefore the initial interpretation of § 1111." *Id.* at 1298. The Court noted that the "void *ab initio* argument does not give adequate weight to the finality of judgments. The Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements or decisions finding statutes unconstitutional." *Id.* at 1299 (citations omitted). *Jordan* thus applied the rule enunciated in *DAV*, concluding that "CUE does not arise from a change in the interpretation of a statute[.]" *Id.* at 1297; *see Joyce v. Nicholson*, 443 F.3d 845, 848 (Fed. Cir. 2006) (noting that *Jordan* held the Court's statutory interpretation, which invalidated a regulation, cannot give rise to CUE because "the regulations in existence at the time of the original decision imposed a different rule.").

Between *DAV* and *Jordan*, this Court's binding precedent firmly establishes that Congress did not intend CUE to be based on changed interpretations of law when it enacted sections 5109A and 7111. For that reason, *DAV* held section 20.1403(e) was consistent with section 7111, and this Court should hold that section 3.105(a)(1)(iv) is consistent with section 5109A.

C. Section 3.105(a)(1)(iv) Does Not Conflict With Binding Precedent

Petitioners argue that the Court should disregard its binding precedent in *DAV* and *Jordan* in favor of the later-in-time, nonprecedential decision in *Patrick* (as later referenced in a footnote to a precedential opinion concerning attorney fees in *Patrick*, 668 F.3d at 1333 n.6) because *Patrick* distinguished between the retroactive effect of (1) a change in regulatory interpretation of a statute and (2) the Court's construction of a statute.[6] *Patrick*, 242 F. App'x at 698. This argument lacks merit.

1. *Patrick* Does Not Control

Patrick does not control the outcome of this petition because it is not precedential. *See* Fed. Cir. R. 32.1. Even if it were precedential, however, *DAV* would still bind this panel because it was the "first in time" decision. *Snyder v. Sec'y of Veterans Affairs*, 858 F.3d 1410, 1413 (Fed. Cir. 2017) ("Whenever two

[6] MVA's citation to the later decision in the *Patrick* line of cases appears to be an attempt to transform the earlier, nonprecedential decision in *Patrick* into binding precedent. *See* ECF No. 26, *Patrick v. Shinseki*, No. 06-7254 (Fed. Cir. Aug. 21, 2007) (denying request for reissuance of the nonprecedential opinion as precedential). The precedential *Patrick* decision concerns whether attorney fees were warranted, not whether a subsequent judicial decision can ground a CUE claim. *Patrick*, 668 F.3d at 1332-34. The footnote MVA cites describes the earlier *Patrick* decision in the context of assessing whether the Veteran's Court considered all relevant factors in its EAJA analysis. *Id.*, n.6. To the extent that this description can be construed as an endorsement, as MVA suggests, it is dicta. *See McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981) ("[D]ictum unnecessary to the decision in [a] case . . . [is] not controlling in this case.").

cases decided by our court are in apparent conflict, we adopt the first in time and follow it."). As explained above, *DAV* compels the conclusion that section 3.105(a)(1)(iv) is valid.

Patrick also should not control because it was incorrectly decided. The *Patrick* panel's distinction between the retroactive effect of a change in regulatory interpretation of a statute and the Court's construction of a statute was based on a misconstruction of the Supreme Court decision in *Rivers v. Roadway Express, Inc.*, 511 U.S. 298 (1994). Citing *Rivers*, the Court held that its interpretation of a statute could be given retroactive effect via CUE because when the Court interprets a statute, it does not change the law, but explains what it has always meant. *Patrick*, 242 F. App'x 695 at *3. However, *Rivers* did not hold that the judicial construction of a statute should be applied retroactively to *final decisions*. Indeed, *Rivers* cited the holding from *Harper*, which expressly limits retroactivity to pending cases: "When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect *in all cases still open on direct review* . . . ." *Rivers*, 511 U.S. at 312 (quoting *Harper*, 509 U.S. at 97 (emphasis added)).

The Veterans Court recently addressed the apparent conflict between *DAV/ Jordan* and the *Patrick* line of cases, and correctly rejected the arguments MVA advances here. In *George*, appellant relied on the *Patrick* cases to argue that

Wagner, which stated what section 1111 has always meant, rendered a 1977 board decision that applied a contrary regulatory interpretation clearly and unmistakably erroneous. *George*, 30 Vet. App. at 367. The court disagreed, first noting that *Patrick* is non-precedential and, despite its holding, relied on *Rivers*, which "noted that judicial decisions generally apply retroactively only to cases open on direct review." *Id.* at 375. Instead of *Patrick*, the court followed *DAV* and *Jordan* in concluding that, consistent with *Russell*, CUE is to be measured against "how the law was interpreted or understood" at the time of the challenged decision. *Id.* at 376. Because *Wagner* did not change how the relevant statute was interpreted and understood at the time of the 1977 decision, the court concluded that *Wagner* could not form the basis for a CUE claim. *Id.* at 375 (citing *Joyce*, 443 F.3d at 848).

In its capacity as a specialized court, the Veterans Court also explained why excluding new interpretations of law from CUE makes sense:

> The impact of allowing judicial decisions interpreting statutory provisions issued after final VA decisions to support allegations of CUE would cause a tremendous hardship on an already overburdened VA system of administering veterans benefits. Each judicial interpretation of a statute which changes a previously accepted meaning of the statute could spawn hundreds of allegations of CUE in prior final decisions. As a result of a deluge of CUE motions, VA's limited resources would be diverted from processing claims and hearing appeals to evaluating allegations of CUE based on new statutory interpretations.

George, 30 Vet. App. at 376 (citing *Exxon Corp. v. U.S. Dept' of Energy*, 744 F.2d 98, 114 (Fed. Cir. 1984) (considering the "substantial and impossible burdens on the administration of justice" when deciding whether a rule should be retroactive); *Cook*, 318 F.3d at 1342 (noting that the "principles of finality and res judicata apply to agency decisions that have not been appealed and have become final")). The court also explained that it would "defy reason" to hold that an agency's changed interpretation of a then-applicable regulation cannot form the basis for CUE, but that a judicial statement of statutory construction can because it says the law has "'always meant' something different than the then-prevailing interpretation." *Id.* at 375. For these reasons, *Patrick* does not control this petition.

2. *Jordan* Conflicts With *Patrick*

MVA also argues that *Patrick* should control because it is the only decision directly on point. Pet. Br. 25-35. MVA argues first that *Jordan* did not address changed *judicial* interpretations, but was limited to whether changed *agency* interpretations can constitute CUE. *Id.* at 26-28. MVA's reading of *Jordan* is incorrect.

Jordan held that a changed interpretation of law is not grounds for a CUE finding where VA correctly decided the claim under the laws as they were understood at the time of the final decision. *Jordan*, 401 F.3d at 1298-99. The Court did not differentiate between new agency and judicial interpretations, as

MVA contends. To be sure, the Court referenced the VA General Counsel opinion concerning section 3.304 and section 1111, issued during briefing in *Wagner*, but it also referenced *Wagner's* invalidation of section 3.304, and did not disentangle the two. *Jordan*, 401 F.3d at 1297-98; *Wagner*, 370 F.3d at 1092; VAOGCPRECOP 3-2003 (July 16, 2003). That the Court addressed both interpretations as the possible basis for the CUE claim, and rejected the claim, strongly suggests that the distinction MVA draws between agency and judicial interpretations is not relevant to the definition of CUE. *See Jordan*, 401 F.3d at 1299 (stating that "the interpretation of the regulation has indeed changed."). What is relevant, in contrast, is that the understanding of the law at the time of the challenged decision governs the CUE analysis.

Further confirming this reading of *Jordan*, the Court relied on section 20.1403(e)'s plain language as sustained in *DAV:* "[t]he new interpretation of a statute can only retroactively [a]ffect decisions still open on direct review, not those decisions that are final." 401 F.3d at 1297-98 (citing *DAV*, 234 F.3d at 698). Nothing in section 20.1403(e) or *DAV* distinguishes between agency and judicial interpretations. *Jordan* also discussed the finality of judgments as reflected in Supreme Court precedent concerning "attempts to reopen final decisions in the face of *new judicial pronouncements or decisions* finding statutes unconstitutional." *Id.* at 1299 (emphasis added) (citing *Reynoldsville Casket Co. v.*

Hyde, 514 U.S. 749 (1995) and *Chicot County Drainage Dist. v. Baxter State Bank*, 308 U.S. 371 (1940)). This discussion confirms that *Jordan* addressed the "new judicial pronouncement" in *Wagner*, even if it also addressed the General Counsel opinion.

Jordan thus stands for the proposition, directly contrary to *Patrick*, that new judicial interpretations of law cannot support a CUE claim because CUE is based on the law as it was understood at the time of the final decision. Because *Jordan*, unlike *Patrick*, is precedential, it controls.

Grasping at straws, MVA argues that *Jordan*'s discussion of finality, and the Supreme Court precedent it cited concerning new judicial pronouncements, is dicta or inapposite. Pet. Br. 28-33. MVA's dicta contention is circular, however, because the finality discussion is dicta only if the Court in *Jordan* was deciding the narrow question of CUE based on new agency interpretations. As explained above, the Court was considering both agency *and* judicial interpretations when it held that CUE is to be measured against the law as it was understood at the time of the decision. The Court's discussion of finality in the face of new judicial pronouncements directly supported that holding, and was not dicta. Indeed, a year after *Jordan*, the Court in *Joyce* characterized *Jordan* as holding not that agency interpretations cannot support CUE claims, but that "where the regulations in

existence at the time of the original decision imposed a different rule, *Wagner* cannot be the basis for a CUE claim." 443 F.3d at 848.

MVA also argues that the Supreme Court cases cited in *Jordan* only address a default rule against retroactivity that does not apply to CUE. Pet. Br. 29-33. MVA thus distinguishes the rule in *Reynoldsville* that "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." Pet. Br. 29-30 (quoting *Reynoldsville*, 514 U.S. at 758). But *Jordan* did not cite page 758 of the *Reynoldsville* decision; *Jordan* cited page 752 of *Reynoldsville*, where the Supreme Court summarized the general retroactivity rule from *Harper*—new legal pronouncements apply to open and pending civil cases but not to civil cases closed to direct review. *See Jordan*, 401 F.3d at 1299 (citing *Reynoldsville*, 514 U.S. at 752). As a result, it is MVA's discussion of *Reynoldsville* that is inapposite.

MVA goes on to suggest that the Supreme Court has endorsed retroactive application of judicial decisions that explain what a law has always meant "in collateral review of decisions closed to direct review." Pet. Br. 30-31. MVA's only examples of this are collateral challenges to state court criminal convictions under the Federal habeas statutes, which MVA itself contends have long been interpreted as permitting retroactive application of certain rules to criminal cases on collateral review. Pet. Br. 30-32 (citing *Fiore v. White*, 531 U.S. 225 (2001) and *Teague v. Lane*, 489 U.S. 288 (1989)). The same is not true of CUE, which

has never been so interpreted. *See Russell*, 3 Vet. App. at 313-14. Indeed, the Supreme Court has never addressed the question of retroactivity in CUE, and its habeas jurisprudence does not reflect a rule of retroactivity broadly applicable to the CUE context.[7]

MVA argues finally that imposing any finality on the VA benefits system "offends the spirit in which the CUE exception to finality was adopted." Pet. Br. 33. But Congress codified section 3.105(a) and *Russell*, both of which reflect clearly that CUE is a limited exception to finality. *See also Cook*, 318 F.3d at 1336. The AMA is designed, moreover, to reduce strain on VA's administration of the benefits system, thereby reducing claim backlogs and increasing the timeliness of decisions. Requiring VA to grant CUE claims based on new interpretations of law would undermine that goal, as the Veterans Court recognized in *George*, 30 Vet. App. at 376, by eroding finality and redirecting resources from the efficient processing of claims and appeals. Interpreting CUE in a manner that maintains

[7] To the extent criminal jurisprudence is instructive, *see Shinseki v. Sanders*, 556 U.S. 369, 410-11 (2009) (rejecting efforts to interpret veterans' benefits law through criminal jurisprudence), new judicial pronouncements generally apply retroactively only to criminal cases open to direct review, and not to those subject to collateral attack. *See George*, 30 Vet. App. at 372 n.4 (comparing *Griffith v. Kentucky*, 479 U.S. 314 (1987) (applying new rules retroactively to criminal cases on direct review) *with Teague*, 489 U.S. at 310 (holding that new rules will not relate back to criminal convictions challenged on habeas grounds unless they fall within one of two narrow exceptions)).

general principles of finality is, therefore, consistent with general congressional intent and the AMA.

3. *DAV* Conflicts With *Patrick*

MVA also argues that *Patrick* should control because *DAV* "says nothing more than the default rule" against retroactivity. Pet. Br. 33-35. MVA tries to dismiss *DAV* as "irrelevant" on this basis, suggesting further that *DAV's* holding on retroactivity in the CUE context amounts to nothing more than a "stray statement that '[t]he new interpretations of a statute can only retroactively effect decisions still open on direct review, not those decisions that are final.'" Pet. Br. 34 (quoting *DAV*, 234 F.3d at 698).

As established above, however, *DAV* sustained VA's exclusion of new interpretations of law from the board's CUE regulation based on Congress's intent to codify section 3.105(a) as interpreted in *Russell*. *DAV*, 234 F.3d at 697-98. The extant version of section 3.105(a) plainly excluded new interpretations of law from CUE. *See* 38 C.F.R. § 3.105 (1996) (stating that "[t]he provisions of this section apply *except where . . . there is* a change in law or a Department of Veterans Affairs issue, or *a change in interpretation of law* or a Department of Veterans Affairs issue . . . ." (emphasis added)). *Russell*, in turn, held that "changes in the law subsequent to the original adjudication . . . do not provide a basis for revising a finally decided case." *DAV*, 234 F.3d at 697-98 (quoting *Russell*, 3 Vet. App. at

313). This was the basis for the *DAV* decision, and its analysis applies with equal force to the same rule at issue in this case.

DAV also explained that *Russell's* understanding of CUE was consistent with (1) "the concept that a claim of CUE is a collateral attack on a final [regional office] or Board decision[,]" as well as (2) Supreme Court precedent that "[t]he new interpretation of a statute can only retroactively effect decisions still open on direct review, not those decisions that are final." *Id.* (citing H.R. Rep. No. 105-52, at 3 and *Harper*, 509 U.S. at 97). But this "stray statement" was the not the sum total of the *DAV* analysis, as petitioner contends.

This "stray statement" was also correct. *Harper* adopted a rule consistent with the majority view in *Beam Distilling Co. v. Georgia* that new judicial pronouncements are to be given full retroactive effect in civil cases that are not yet final at the time of the pronouncement, but not in cases closed to direct review. *Harper*, 509 U.S. at 96 (citing *Beam*, 501 U.S. 529 (1991)). Although MVA contends that *DAV's* citation to *Harper* is meaningless because CUE is an exception to the default rule, Pet. Br. 35, this assumes that Congress intended the CUE exception to include new judicial pronouncements. Simply because CUE is a limited exception to finality does not mean that it is an exception to all default rules against retroactivity. Indeed, *DAV* found there was no clear intent from Congress to deviate from the *Harper* rule when it enacted the CUE statutes.

Rather, *DAV* held that Congress intended the opposite when it codified the understanding of CUE set forth in *Russell*, which excluded new interpretations of law, consistent with the default rule. *DAV*, 324 F.3d 697-98. Although it is true, as petitioner states, that *Harper* "never excluded retroactive application to cases closed to direct review," *DAV* did not cite *Harper* for that proposition.

D. Petitioner's Remaining Arguments Lack Merit

Petitioners conclude by contending that "VA's position violates the regulation and the governing statute." Pet. Br. 36-47.

MVA argues first that VA's "position" – new judicial interpretations of law are excluded from the definition of CUE – violates section 3.105(a)(1)(iv)'s plain meaning. Pet. Br. 36-39. Even if this contention was not an improper as-applied challenge that cannot satisfy MVA's burden in this facial challenge, as explained above, it is incorrect. MVA contends that section 3.105 defines CUE as including the incorrect application of "statutory and regulatory *provisions* extant at the time," but not "*interpretations of* statutory and regulatory provisions extant at the time." Pet. Br. 38 (citing 38 C.F.R. § 3.105(a)(1)(i)). But MVA overlooks section 3.105's introductory passage, which states that "[t]he provisions of this section apply *except where . . . there is* a change in law or a Department of Veterans Affairs issue, or *a change in interpretation of law* or a Department of Veterans Affairs issue[.]" 38 C.F.R. § 3.105 (emphasis added). As MVA contends, "the inquiry

ends with the plain meaning," Pet. Br. 38; the plain meaning of section 3.105 has always excluded "a change in interpretation of law[.]"[8] *See Russell*, 3 Vet. App. at 313.

MVA argues next that section 5109A's plain language leaves "no room" for "VA's position." Pet. Br. 43-47. This argument is foreclosed by *DAV*, among others. Aside from applying to different parts of VA, sections 5109A and 7111 are identical. In *DAV*, this Court held that section 20.1403(e) is consistent with section 7111. *DAV*, 234 F.3d at 697-98. It must also be true, therefore, that the identical rule in section 3.105(a)(1)(iv) is consistent with the identical statutory language in section 5109A.

Contrary to MVA's reading of the statute, moreover, this Court has repeatedly recognized that title 38 does not define CUE, holding that Congress, in enacting the CUE statutes in 1997, intended instead that VA apply the definition provided in case law pursuant to section 3.105(a) as it was then understood. *Willsey v. Peake*, 535 F.3d 1368, 1371-72 (Fed. Cir. 2008) ("§ 5109A does not set out the test for when CUE is present. That is set out by the Veterans Court in *Russell* and by this court in *Cook,* which . . . provide the rule of law") (citations

[8] Because the regulation excludes changes in interpretations of law, we need not respond to MVA's discussion of agency deference. Pet. Br. 36-42. Even if the regulation is ambiguous, arguments concerning agency deference are misplaced in a facial challenge, and should await an as-applied challenge, where VA's interpretation may be reviewed in relation to a concrete set of facts.

omitted); *DAV,* 234 F.3d at 697. MVA's contention that section 5019A supports no exclusions to what may constitute CUE aside from errors that are "clear and unmistakable" has, accordingly, been thoroughly discredited. Pet. Br. 43-45; *see Cook*, 318 F.3d at 1343 (holding that CUE errors must be outcome determinative even though that is not required by the plain statutory language).

MVA also misreads the statutory provision permitting a CUE request "at any time after [a] decision is made," arguing that it "plainly allows a change in judicial interpretation of a statute or regulation to undergird a CUE claim." Pet. Br. 43. This provision says nothing about the standards governing VA's consideration of a CUE claim; it simply allows veterans to request revision of a finally-decided claim at any time "after that decision is made." 38 U.S.C. § 5109A(d).

MVA's reliance on section 5109A's legislative history also falls short. Pet. Br. 45-46. MVA posits that the regulation codified in 1997 did not contain an exclusion for changes in interpretation of law, *id.*, but section 3.105 provided in 1997 (as it still does today) in its introductory passage that CUE cannot arise from "a change in interpretation of law." 38 C.F.R. § 3.105 (1996). The Veterans Court in *Russell* and *Berger* likewise interpreted section 3.105(a) as applying only to the state of the law as it was understood at the time of a challenged decision, not to a subsequent interpretation of law. *See Russell*, 3 Vet. App. at 313-14; *Berger*, 10 Vet. App. at 170. MVA's suggestion that Congress did not know it was excluding

new interpretations of law from CUE when it enacted the CUE statutes is therefore meritless.[9] Section 3.105(a)(1)(iv) should be sustained.

III. Section 14.636(c)(1)(i) Should Be Sustained

The Final Rule limits when agents and attorneys can charge fees for services rendered to claimants following an adverse decision. As explained below, this fee limit is consistent with long-standing administrative and judicial interpretations of section 5904, which governs when fees can be charged, and should be sustained.

A. Background To The Fee Rule

Neither Congress nor VA has ever permitted unrestricted paid representation for claimants pursuing readjudication of finally-decided claims based on new evidence, previously termed "reopening" and governed by section 5108. *See Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 307 (1985) (upholding the constitutionality of a statutory ten dollar limit on fees that may be paid to an attorney or agent who represents a veteran seeking benefits). Although the Veterans Judicial Review Act of 1988, Pub. L. No. 100-687, 102 Stat. 4105 (1988) (VJRA), permitted fees above ten dollars for the first time, it only allowed

[9] We note that the hypothetical veteran MVA describes at page 45 of its brief, whose claim is denied because VA incorrectly interprets a statute, may appeal the denial of the claim to the board, Veterans Court, and this Court if necessary to vindicate their statutory rights. That a claimant may choose not to pursue an appeal does not justify ignoring clear congressional intent to adopt VA's exclusion of new interpretations of law from CUE.

paid representation after the board first made "a final decision in the case." 38 U.S.C. § 5904(c)(1) (1998). This limitation was intended "to preserve much of the informal and efficient means of claim adjudication as possible," and to "protect claimant's benefits [from diminishment by fees] without prejudicing the claimant's ability to obtain effective legal representation at a later point." H.R. Rep. No. 100-963, at 28 (1988).

When VA implemented the VJRA, it treated requests for readjudication of finally-decided claims based on "new and material evidence" under section 5108 as "separate cases," for which there was "no compelling reason to allow the payment of fees before a veteran has exhausted administrative procedures in a reopened claim." 57 Fed. Reg. 4,088, 4,098, 4,117 (Feb. 3, 1992). VA explained that Congress did not intend paid representation to be available for veterans who wait "years without any action, and then retain an attorney to request a reopening and pursuit of the claim at the regional office level." *Id.* (citations omitted).

This Court has agreed with the basic principle that a reopening proceeding is separate from the original case. *See Stanley v. Principi*, 283 F.3d 1350, 1355-59 (Fed. Cir. 2002); *Sears v. Principi,* 349 F.3d 1326, 1329 (Fed. Cir. 2003) (affirming VA's regulatory treatment of "a claim reopened for new and material evidence as a *new* claim" based on its different potential effective date); *Jackson v. Nicholson,* 449 F.3d 1204, 1208 (Fed. Cir. 2006) (treating claims based on

different evidence as jurisdictionally-distinct cases); *Paralyzed Veterans of America*, 345 F.3d at 1342 (rejecting challenge to a duty-to-assist regulation that treated initial claims and claims to reopen as distinct); *Pellerin v. Brown*, 5 Vet. App. 360, 361-62 (1993) ("The attempt to reopen the claim below is necessarily a new case by virtue of the fact that if it were reopened it would be on the basis of 'new and material evidence' which was not considered prior to reopening."); *Spencer v. Brown*, 4 Vet. App. 283, 293 (1993) (same).[10]

In 2006, Congress amended section 5904(c) to allow paid representation earlier in the adjudicative process. Veterans Benefits, Health Care, and Information Technology Act of 2006, Pub. L. No. 109-461, § 101(c)(1), 120 Stat. 3403, 3407 (2006) (replacing "before the date on which the [board] made a final decision in a case" with "before the date on which a[n NOD] is filed with respect to a case"). After this change, VA continued to treat section 5108 claims like new cases. *See* 38 C.F.R. § 14.636(c)(1) (2016) (applying section 5904(c)(1)'s limit

[10] MVA relies on *Jackson v. Shinseki*, 587 F.3d 1106 (Fed. Cir. 2009) and *Carpenter v. Nicholson*, 452 F.3d 1379 (Fed. Cir. 2006), but neither case holds that requests to readjudicate finally-decided claims based on new evidence are part of the same "case" as the original claim simply because they relate to the same underlying benefit. *Carpenter* held that a CUE claim was not a separate case because it is essentially a "procedural burden." 452 F.3d at 1384-85. And although *Jackson* noted that "case" under section 5904(c) encompasses "all potential claims *raised by the evidence*," that does not help MVA because a request to readjudicate based on new evidence cannot constitute a claim raised by the evidence originally submitted, unlike the contention in *Jackson* of an implicitly raised total disability claim. 587 F.3d at 1109.

until "after an agency of original jurisdiction has issued a decision on a claim or claims, *including any claim to reopen* . . . ." (emphasis added)); *see also* 73 Fed. Reg. at 29,868. VA explained that a request to reopen is based on evidence that "was not considered in any prior [AOJ] decision[,]" and that, according to Congress, AOJs "must be allowed to initially decide a matter before a claimant seeks paid representation." *Id*.

In the AMA, Congress again changed when fees may be charged, this time to "the date on which a claimant is provided notice of the [AOJ's] initial decision under section 5104 . . . with respect to the case." *Id.* § 5904(c)(1); *see* AMA § 2(n). And VA again proposed to treat requests for readjudication of finally-decided claims based on new evidence, now provided in section 5104C(b), as separate "cases" for purposes of fees under section 5904(c)(1). 38 C.F.R. § 14.636(c)(1)(i); *see* Appx394, Appx416.[11] Because nothing in the AMA or its legislative history indicates that Congress intended for VA to deviate from its long-standing interpretation of section 5904(c), VA's decision constitutes a permissible and reasonable construction of the statute and should be sustained.

[11] VA also maintained existing provisions applying the fee limitation to claims for an increased rating, but not to CUE motions. 38 C.F.R. §§ 14.636(c)(1)(i), (ii); Appx12-13; Appx38.

B. MVA's Challenge Is Unsupported

As relevant to MVA's rule challenge, the AMA provides for three "continuous pursuit" actions a claimant may take within one year of an adverse AOJ decision, including filing a supplemental claim based on new evidence. 38 U.S.C. § 5104C(a)(1)(B). If VA grants such a claim, the effective date can relate back to the filing of the original application. *See* 38 U.S.C. § 5110(a)(2); 38 U.S.C. § 5104C(a). VA has no duty to notify claimants who file section 5104C(a) supplemental claims of the information or evidence necessary to substantiate the claims. 38 U.S.C. § 5103; AMA § 2(b).

Separately, the AMA allows claimants to file supplemental claims for readjudication of finally-decided claims based on new evidence. *Id.* § 5104C(b). Like motions to reopen under section 5108, which were replaced in the AMA by these post-final decision supplemental claims, the potential effective date of a section 5104C(b) claim is tied to the date of the supplemental claim, not the original application. 38 U.S.C. § 5110(a)(3). And VA *is* required to notify claimants who file a section 5104C(b) supplemental claim of the information or evidence necessary to substantiate the claim. 38 U.S.C. § 5103; AMA § 2(b).

In implementing the AMA, VA had to decide whether to depart from its long-standing interpretation of section 5904(c) and allow, for the first time, paid representation without temporal limitation for claimants requesting readjudication

of final decisions based on new evidence. As VA explained in the Final Rule, Congress has long intended to restrict paid representation in the early stages of VA's claims adjudication, and the AMA reflects congressional intent only to extend permissible paid representation to consideration of the "expanded options" made available in section 5104C(a). Appx13. VA thus determined that continuing to limit fees on post-final decision supplemental claims was consistent with long-standing congressional intent and did not conflict with the AMA.

MVA argues that VA's fee rule is irreconcilable with the AMA because "a supplemental claim seeks review of a decision on an earlier claim[,]" and Congress intended to permit paid representation for all forms of review under the AMA. Pet. Br. 51. But nothing in the statute characterizes supplemental claims as a form of "review." Rather, Congress identified "supplemental claims," by their name, as "claims," and defined them as "readjudications" based on new evidence. 38 U.S.C. §§ 101(36), 5108. In contrast, Congress used the term "review" to characterize the other two options under section 5104C(a), which accords with Congress's choice not to define a supplemental claim as a form of review. 38 U.S.C. §§ 5103A(e)(2), 5104B, 7105(a) (using the word "review" to describe the higher-level VBA and appellate options). In concert with this approach, Congress referred to the three section 5104C options as "actions," not "review options." 38

U.S.C. 5104C(a).[12]

MVA also argues that VA's rule conflicts with the AMA because it treats supplemental claims "unequally based on the timing of the pursuit of review, bifurcating [supplemental claims] in a way the AMA does not allow." Pet. Br. 53. But the AMA itself treats supplemental claims differently depending on when they are filed, and attaches significance to the timing of the claim. *See* 38 U.S.C. §§ 5110 (providing different effective dates depending on when a supplemental claim is filed), 5103 (limiting VA's duty to notify claimants of information necessary to substantiate a claim to those pursuing section 5104C(b) supplemental claims). Indeed, only section 5104C(*a*) supplemental claims are like normal appeals or motions for reconsideration in that they are permitted before a decision becomes final. *See* Pet. Br. 54. Section 5104C(*b*) claims, in contrast, are permitted only after an initial decision becomes final. MVA's effort to analogize both forms of supplemental claim to regular appeals or motions for consideration thus reflects its failure to grasp the differences between sections 5104C(a) and (b).

[12] Although VA regulations use the term "review options" to refer to the three continuous pursuit actions under section 5104C(a), *see* 38 C.F.R. § 3.2500, VA used this term as a simplifying generic label without substantive consequence beyond what is set forth in the AMA. VA's label does not speak to the congressional intent that MVA seeks to extract from section 5104C. Moreover, section 3.2500 only addresses section 5104C(a) supplemental claims, which share the characteristic of the other listed actions as being part of continuous pursuit. The implementing regulations do not refer to section 5104C(b) supplemental claims, filed outside of continuous pursuit, as a "review option" or an "appeal."

MVA's textual arguments fare no better. Pet. Br. 53-57. MVA contends that "case" in section 5904(c) includes all supplemental claims because they seek review of the initial decision in that "case." Pet. Br. 54. In support, MVA argues that section 5104C "describes the options including filing a supplemental claim, as part of the same 'case' as the claim for which review is sought." Pet. Br. 55. This argument again mischaracterizes supplemental claims as forms of review. And, although the introductory phrase in section 5104C(b) provides that a post-final decision supplemental claim can be filed more than one year after a decision "in any case," it does not specify that such a claim, once filed, becomes part of the same case as the original application.

It is, moreover, a step too far to suggest that Congress clearly intended to define "case" in section 5904(c) as including all supplemental claims based on introductory language in an ancillary statutory provision. *See Cyan, Inc. v. Beaver City Employees Ret. Fund*., 138 S. Ct. 1061, 1070-71 (2018) (refusing to derive clear Congressional intent from ancillary statutory provisions where Congress easily could have made itself clear in the provision on point); *Whitman v. Am. Trucking Ass'ns,* 531 U.S. 457, 468 (2001) (Congress "does not alter the fundamental details of a regulatory scheme in vague terms or ancillary provisions"). Indeed, Congress did not change the relevant statutory language in section 5904(c) when it enacted the AMA; the provision still limits paid

representation to actions taken in the same "case" following an initial decision, without further clarification or definition of "case." *See Pierce v. Underwood,* 487 U.S. 552, 567 (1988) ("reenacting precisely the same language would be a strange way to make a change"); *Procter & Gamble Co. v. Kraft Foods Global, Inc.,* 549 F.3d 842, 848-49 (Fed. Cir. 2008) (improper to find that Congress intended to alter existing law *sub silentio*, without "mention of that effect"). Nor did Congress otherwise suggest in any way that it was attempting to correct or overrule VA's long-standing interpretation of section 5904(c). *See Lorillard v. Pons*, 434 U.S. 575, 580-81 (1978) (presuming that Congress is aware of administrative or judicial interpretations of statutes when it re-enacts statutes without change or "adopts a new law incorporating sections of a prior law . . . insofar as it affects the new statute").

Indeed, Congress has now amended section 5904(c) twice and has not overruled VA's statutory interpretation. *See Sears*, 349 F.3d at 1330 (holding that it is "difficult to find" that a VA regulation is "inconsistent with congressional intent" where VA's statutory interpretation had been in place for many years and Congress had repeatedly passed veterans' benefits legislation overruling judicial and agency interpretations of veterans' benefits statutes without overruling the interpretation at issue"). As the Court held in *Sears*, if VA's construction of section 5904(c) was "inconsistent with the statutory scheme intended by Congress .

. . Congress likely would have taken steps to clarify the statute so that it unambiguously called for appellant's preferred result." *Id.* Because Congress did not take such steps here, there is no basis to conclude that Congress intended to preclude VA from continuing to apply the temporal limit in section 5904 to post-final decision claims based on new evidence, for which unrestricted paid representation has never been available, while allowing paid representation for the "expanded options for seeking review of an initial decision on a claim." Appx13.

The AMA's legislative history is no more helpful in demonstrating congressional intent to overrule VA's statutory interpretation. The Committee reports only state that "current law allows attorneys and accredited agents to charge a fee for services rendered after the veteran files a notice of disagreement," and that "the bill would allow veterans to retain the services of attorneys and accredited agents who charge a fee when the [AOJ] provides notice of the original decision." H.R. Rep. No. 105-52, at 3, 11; S. Rep. No. 105-157, at 11. Although petitioner suggests the phrase "original decision" in the House report is significant, Pet. Br. at 58, the report also uses the term "initial decision," as does the statute. H.R. Rep. No 105-52, at 2, 5; *see also* S. Rep. No. 115-126, at 11 (using the term "initial decision"). None of this language shows that Congress clearly intended to define "case" in section 5904(c) to include all subsequent supplemental claims in direct contradiction to VA's long-standing statutory construction.

There is, consequently, no support for requiring VA to abandon its long-standing interpretation of section 5904(c) in favor of permitting unrestricted paid representation for requests to readjudicate finally-decided claims based on new evidence. To the contrary, Congress has long expressed its desire to shield the early stages of VA's informal claims process from paid representation.

C. The Fee Rule Is Consistent With The AMA And Deserves Deference

The doctrine of legislative reenactment not only provides a strong indication that VA's interpretation of section 5904 is not inconsistent with the AMA or congressional intent, but also strengthens the deference due VA's interpretation. *See Commodity Futures Trading Com'n v. Schor*, 478 U.S. 833, 845-46 (1985) (finding that *Chevron* deference was "especially warranted" where Congress had twice amended a statute without overruling an agency's regulatory interpretation); *Cuozzo Speed Techs., LLC v. Lee,* 136 S. Ct. 2131, 2144-45 (2016) (finding that, where a statute left ambiguity for an agency to resolve, continuation of an agency's past practice was one factor supporting the reasonableness of an implementing regulation); *see also Suprema, Inc. v. ITC*, 796 F.3d 1338, 1350-51 (Fed. Cir. 2015) (explaining that an agency's statutory construction is in harmony with congressional intent when Congress has acted against the backdrop of "consistent agency and judicial interpretation" but has not "upset the [agency's] consistent interpretation"). As explained above, the fee rule maintains the agency's long-

standing treatment of requests for readjudication based on new evidence as new "cases" under section 5904(c) and is, for that reason, reasonable. *See Suprema*, 796 F.3d at 1350-51 (holding that an agency's "consistency supports the reasonableness of its interpretation" (citations omitted)).

As VA explained, in addition, the rule is consistent with the AMA's expanded options for continuous pursuit because it permits paid representation at the point in time when claimants must make the more complex decision of which action to take after an initial decision. Appx13. The AMA did not similarly increase claimant choice following a *final* VA decision; the basic choices remain a request for revision based on CUE or readjudication based on new evidence. The structure of the new appeal system thus supports different fee treatment for the two types of supplemental claims.

As VA also explained, the fee rule reasonably reflects Congress's continuing concern with unnecessarily diminishing veteran's benefits during the non-adversarial claims adjudication processes at VA as demonstrated by its decision to maintain the temporal fee limit in section 5904(c) in the AMA. *See* Appx13. In addition, Congress's decision to reset the effective date of section 5104C(b) claims, as well to require VA to provide notice to a claimant pursuing such a claim under section 5103, reflects a measure of disconnect between initial proceedings that have terminated in a final decision and subsequent supplemental claims. *See*

Appx13. And, whereas section 5104C(a) supplemental claims seek benefits for the same time period as the initial claim, and therefore "relate back" to the earlier claim and continue that claim, a section 5104C(b) supplemental claim seeks benefits for a different time period and is, therefore, akin in the statutory scheme to a new claim. Appx13; *see Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997) (discussing the present disability requirement). Finally, VA reasonably considered its long-standing interpretation of section 5904(c) and the lack of a clear signal from Congress to VA to change course. Appx13.

In sum, the fee rule is consistent with the AMA and the statutory scheme. Despite the disagreement reflected in comments from MVA and others, VA "is legally free to accept or reject such policy arguments on the basis of its own reasoned analysis," and it is not the role of the judiciary to "decide whether there is a better alternative as a policy matter." *Cuozzo,* 136 S. Ct. at 2146. The Court should sustain section 14.636(c)(1)(i) as a valid and reasonable exercise of VA's rulemaking authority.

IV. VA Adequately Explained Its Reasons For Adopting Section 20.202(c)(2)

A key feature of the AMA is that claimants appealing to the board may now choose among three different dockets depending on whether they want to submit new evidence or participate in a board hearing: (1) a "direct" docket without additional evidence or a hearing; (2) an "evidence" docket allowing for the

submission of evidence; and (3) a "hearing" docket allowing for both the submission of evidence and a hearing. 38 C.F.R. § 20.202(b); 38 U.S.C. § 7107(a).[13] The AMA requires claimants to select a docket when appealing to the board, but explicitly confers discretion on VA to implement a policy allowing claimants to subsequently switch dockets. *Id.* §§ 7105(b)(3), 7107(e).

VA implemented a docket-switching policy in section 20.202 that carefully delineates claimants' opportunities for changing dockets while an appeal is pending at the board. MVA contends that VA did not provide a rationale for one aspect of that policy – a restriction in section 20.202(c)(2) on claimants switching dockets after submitting evidence or testimony to the board. As explained below, however, VA's explanation of its policy adequately addressed that restriction.

A. VA's Docket-Switching Policy

Unlike most appellate proceedings, claimants before the board may submit new written evidence and testimony. Prior to the AMA, claimants could submit such evidence at almost any time before a final board decision, creating inefficiencies and contributing to long wait times for claimants. *See* Appx17-18;

[13] The AMA requires the board to maintain separate dockets for claimants electing a hearing and permits the board to maintain other separate dockets. 38 U.S.C. §§ 7107(a)(2), (3). VA responded to stakeholder concerns by creating separate dockets for claimants submitting evidence without a hearing and claimants proceeding on the record as is, with a goal to process the latter type of case in an average of 365 days. 38 C.F.R. § 20.800; Appx402; Appx16.

Appx95; Appx179.

As part of the solution to this problem, the AMA restructured proceedings at the board. *See* H.R. Rep. No. 115-135, at 5, 8; S. Rep. No. 115-126, at 27. The AMA requires claimants to make a choice at the beginning of the appeal process, when filing the NOD, whether they want to proceed on the record as is, submit new documentary evidence, or present testimony at a hearing, and imposes strict time limits on the submission of new evidence. 38 U.S.C. §§ 7105(b)(3), 7113(b)(2), (c)(2); AMA § 2(q). The AMA also: (1) provides for multiple board dockets according to the evidence option a claimant selects, 38 U.S.C. § 7107(a)(2); (2) requires VA to publish on its website average wait times for each docket, AMA § 5(1)(E); and, (3) generally requires appeals to be heard in docket order on each respective docket, 38 U.S.C. § 7107(a)(4).

Each board docket is expected to entail significantly different processing times. *See* H.R. Rep. No. 115-135 at 3 (veteran can select an "expedited review" by selecting a lane without a hearing option); S. Rep. No. 115-126 at 14-15 (responding to stakeholder concerns that separate dockets should be maintained for submission of new evidence with a hearing and without a hearing because otherwise "veterans who submit new evidence, but do not request a hearing, could be forced to wait months or even years behind veterans who request a hearing"). The AMA thus provides claimants with the opportunity to weigh the potential

advantage of submitting new evidence or requesting a board hearing against the expected wait time for each docket.

Although claimants must select a docket when filing an NOD, the AMA provides that VA "may develop and implement a policy allowing a claimant to move the claimant's case from one docket to another docket." 38 U.S.C. § 7107(e).[14] VA proposed such a policy in the Proposed Rule, providing appellants with carefully proscribed opportunities to change dockets through submission of a new NOD. Appx421-22. Essentially, claimants would be permitted to change dockets up to one year from the mailing of the AOJ's decision or 30 days from VA's receipt of the NOD, whichever is later. 20 C.F.R. § 20.202(c)(2) (proposed). An appeal that is moved from one docket to another would, however, retain its original docket date, such that an appellant would not be "penalized" for changing dockets. 38 C.F.R. § 20.800(a)(2). Appellants would not, however, be permitted to change dockets once they submit evidence or testimony to the board. *Id*. at § 20.202(c)(2).

The Final Rule made liberalizing changes to the proposed rule based on public comments. First, VA added 38 C.F.R. § 20.203(c), allowing the time limit

[14] The Senate bill contained language that would have required VA to allow docket changing, but that proposal was not accepted. S. Rep. No. 115-126 at 16, 48.

for switching board lanes to be extended for good cause shown. *See* Appx16. Second, VA extended the time to change dockets from 30 to 60 days following an NOD to address the situation where a claimant waits until the end of the appeal period to file an NOD *pro se*, then seeks representation. *See* Appx17.

B. VA Adequately Explained Its Policy

With respect to the limitation at issue in this petition – restricting claimants from changing dockets after submitting evidence or presenting testimony to the board – VA received comments suggesting that VA remove or modify this limitation. *See* Appx366-67; Appx471; Appx515; Appx688-90. MVA contends that VA failed to respond to these comments and therefore failed to provide a reasoned explanation for its policy. *See Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) ("Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action."). But, in the Final Rule, VA directly addressed the comments recommending a more liberal policy for docket-switching. Appx16-17. VA explained that its policy balanced the needs of veterans desiring more flexibility to switch dockets with the needs of other veterans, including veterans already waiting in line for a board decision, and all veterans' interest in the efficient and timely functioning of the system as a whole. Appx16. VA understood "that circumstances may change to the extent that a different option is preferable to the one initially chosen" and recognized that those

allowed to change dockets would benefit by maintaining "their original docket date, based on VA's receipt of the [NOD]." *Id.* However, VA recognized the competing policy concern of avoiding unfairness to veterans waiting in a docket line who would be disadvantaged if those from other dockets could "enter ahead" of them. *Id.* In addition, VA explained that excessive docket-switching "will make it difficult for VA to provide accurate data to all veterans, effectively taking away their ability to choose the best path," and would "preclude the efficiencies built into the new system" by "mimic[ing]" the features of the legacy system whereby "appellants may add evidence, request a hearing, or withdraw a hearing request an any time." *Id.*

MVA's contention that VA discussed these concerns only with respect to comments seeking an expanded timeframe for docket-switching, and not in response to comments objecting to the restriction on switching after submission of evidence or testimony, misreads the Final Rule. Pet. Br. 63-64. Although VA first detailed these considerations in addressing the timeframe comments, VA referred back to this discussion when addressing the countervailing concerns with open-ended docket switching, stating:

> *As noted above*, however, VA has carefully balanced the needs of a veteran wishing to switch dockets against the needs of all the *other veterans* waiting for the Board to decide their appeals. The proposed policy provides an opportunity for a veteran to switch dockets without creating an unfair disadvantage to other

> veterans who wish to continue with their initial choice, but might experience longer wait times as a result of others switching dockets.

Id. (emphasis added). VA thus signaled that the same policy concerns animated the limits on docket-switching in VA's policy. Nothing more is required to satisfy VA's obligation under the APA.

To the extent MVA also challenges the underlying rationale VA provided for the docket-switching policy, that challenge should be rejected. Although MVA argues that there is "no apparent reason why allowing a claimant to switch options after submission [of evidence] would necessarily create any delay or other meaningful inefficiency or unfairness[,]" Pet. Br. 64, this ignores the impact of docket-switching on other veterans and the system as a whole, as explained in the Final Rule. VA explained that whenever a claimant switches dockets and maintains their docket priority date, other veterans waiting for a decision in the destination docket could be adversely impacted. Appx16-17. VA also explained that its ability to publicize accurate wait times by docket type could be adversely impacted. *Id.* VA emphasized, moreover, that these concerns are implicated by docket-switching after submission of evidence or testimony, and they are clearly valid concerns in terms of maintaining an appeals system that benefits all veterans. *Id.*

Although there are many ways VA could have struck a reasonable balance in allowing docket switching, its decision to restrict switching after a claimant has submitted evidence or testimony is an eminently reasonable facet of the overall policy VA crafted for the reasons that VA articulated in the Final Rule. Although, as VA recognized, there will undoubtedly be claimants disadvantaged by this restriction, VA's policy is not arbitrary and capricious simply because it does not "account for the unique facts of every single case." *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,* 927 F.3d 1263, 1270-71 (Fed. Cir. 2019). This is particularly true where, as here, the statute's purpose is to enhance systemic efficiency, lending import to agency rules that are drafted in view of the ease and consistency with which the system can be administered. *See Holder v. Martinez Gutierrez*, 566 U.S. 583, 591 (2012) (regulation must be upheld "if it is a reasonable construction of the statute, whether or not it is the only possible interpretation or even the one a court might think best"). In light of the AMA's purpose, VA has considered the relevant factors in crafting a reasonable policy for allowing claimants to switch board dockets, and the rule should be sustained.

CONCLUSION

For these reasons, this Court should deny petitioner's challenge to 38 C.F.R. §§ 3.105(a)(1)(iv), 14.636(c)(1)(i), and 20.202(c)(2), and hold that the rules are valid.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 13th day of January, 2020, a copy of the foregoing "BRIEF FOR RESPONDENT" was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

/s/Eric P. Bruskin

CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, respondent's counsel certifies that this brief complies with the Court's type-volume limitation rules. According the word count calculated by the word processing system with which this brief was prepared, the brief contains a total of 13,994 words.

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