No. 19-1600

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

OPENING BRIEF OF PETITIONER

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FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Military-Veterans Advocacy **v.** Secretary of Veterans Affairs

Case No. 19-1600

CERTIFICATE OF INTEREST

Counsel for the:
■ (petitioner) ☐ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

Military-Veterans Advocacy

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Military-Veterans Advocacy, Inc.	Not Applicable	None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Not Applicable

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

National Organization of Veterans Advocates, Inc. v. Secretary of Veterans Affairs, No. 19-1680 (Fed. Cir.)
Carpenter Chartered v. Secretary of Veterans Affairs, No. 19-1685 (Fed. Cir.)
Phillip Boyd Haisley, National Veterans Legal Services Program v. Secretary of Veterans Affairs, No. 19-1687 (Fed. Cir.)

8/19/2019
Date

/s/ Robbie Manhas
Signature of counsel

Please Note: All questions must be answered

Robbie Manhas
Printed name of counsel

cc: Counsel of Record

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TABLE OF ABBREVIATIONS

AMA	Veterans Appeals Improvement and Modernization Act of 2017
AOJ	Agency of original jurisdiction
CUE	Clear and unmistakable error
MVA	Military-Veterans Advocacy
RO	Regional Office
VA	Department of Veterans Affairs

STATEMENT OF RELATED CASES

No appeal originating from the same Department of Veterans Affairs final rule was previously before this or any other appellate court.

The following three cases, which are companions to this one, may directly affect or be directly affected by this Court's decision in the pending appeal: (1) *National Organization of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, No. 19-1680 (Fed. Cir.); (2) *Carpenter Chartered v. Secretary of Veterans Affairs*, No. 19-1685 (Fed. Cir.); and (3) *Haisley v. Secretary of Veterans Affairs*, No. 19-1687 (Fed. Cir.).

JURISDICTIONAL STATEMENT

This is a petition for review of a final rule entitled "VA Claims and Appeals Modernization," issued by the Department of Veterans Affairs on January 18, 2019. Appx1-60. Military-Veterans Advocacy timely petitioned for this Court's review on February 27, 2019. Dkt. 1; *see* Fed. Cir. R. 47.12(a). This Court has jurisdiction under 38 U.S.C. § 502.

INTRODUCTION

This Court is no stranger to the inefficiencies that plague the veterans-benefits system. Particularly problematic has been the administrative-review process for challenging claims determinations by the Department of Veterans Affairs (VA).

Congress, after observing that veterans wait years for decisions on administrative appeals and that the VA had accumulated hundreds of thousands of undecided appeals without any sign of reversing course, decided to intervene. It passed the Veterans Appeals Improvement and Modernization Act of 2017 (AMA), Pub. L. No. 115-55, 131 Stat. 1105. The AMA created a new set of procedural options for veterans seeking review of VA claims determinations. Congress's goal was to speed up the review process while protecting the rights of veterans.

The VA's implementation of the AMA, however, falls far short of that goal. It regresses on clear and unmistakable error (CUE), adopting an exclusion to CUE that this Court has twice rejected, and that is contrary to the governing regulation and statute. It prohibits a veteran's representative from charging fees for a broad swath of work under one of the AMA's new forms of review, a supplemental claim, defying the AMA's text and thwarting Congress's desire to permit paid representation for all the AMA's review routes—an important factor in enabling veterans to secure adequate representation after their claims have been denied. As to another form of review, an appeal to the Board of Veterans' Appeals, the VA has created a significant limitation that undermines the flexibility of the system the AMA created. And it has done so without explaining why.

Military-Veterans Advocacy (MVA) challenges the VA's final rule on each of these bases. To deliver veterans the AMA that Congress intended, this Court should grant MVA's challenges and declare the relevant aspects of the VA's final rule unlawful.

STATEMENT OF THE ISSUES

I. Whether 38 C.F.R. § 3.105(a)(1)(iv)—which the VA concludes in its final rule prevents CUE claims from being based on changes in judicial interpretation of a statute or regulation—should be held unlawful and set aside.

II. Whether 38 C.F.R. § 14.636(c)(1)(i)—which prohibits a veteran's representative from charging fees for certain work on supplemental claims—should be held unlawful and set aside.

III. Whether 38 C.F.R. § 20.202(c)(2)—which bars a claimant from amending a notice of disagreement upon the submission of evidence or testimony—should be held unlawful and set aside.

STATEMENT OF THE CASE

Congress passed the AMA to improve administrative review of VA claims adjudications, providing veterans three agency-review options: requesting higher-level review, filing a supplemental claim, and appealing to the Board via a notice of disagreement.

On August 23, 2017, Congress passed the AMA. The goal: "to expedite [the] VA's appeals process while protecting veterans' due process rights." H.R. Rep. No. 115-135, at 2 (2017); *see* Appx1. The reason: The VA's "appeals process [was] broken." H.R. Rep. No. 115-135, at 5. Congress lamented both the "significant[]" increase in "the

quantity of undecided appeals at [the] VA" and the long waits veterans had to endure to appeal their claims. *Id.* The AMA addressed these problems by "amend[ing] the procedures applicable to administrative review and appeal of VA decisions on claims for benefits, creating a new modernized review system." Appx1; *see* H.R. Rep. No. 115-135, at 2-5.

The old system had a single track, which led to the Board. *See* Appx69; *see also* Appx13. "If a veteran disagree[d]" with a claims determination by the VA, he could "file a notice of disagreement" with "the regional office (RO)" of the Veterans Benefits Administration. H.R. Rep. No. 115-135, at 4. If the veteran was dissatisfied with the RO's resolution, he could "file a substantive appeal," which would cause the RO to certify the claim to the Board for review. *Id.* at 5.

In contrast, the new system gives "three procedural options" to veterans "who file an appeal" within one year. H.R. Rep. No. 115-135, at 2; *see* 38 U.S.C. § 5104C; Appx1. Claimants may switch between these review options and pursue different options on different claims or issues within a claim. *See* 38 U.S.C. § 5104C(a). The first option, "higher-level review," is a review on the same evidence that informed the initial decision, by a higher-level adjudicator in the same "agency of

original jurisdiction," *id.* §§ 5104C(a)(1)(A), 5104B, typically the Veterans Benefits Administration, *see* Appx6; 38 U.S.C. § 101(34); 38 C.F.R. § 20.3(a). The second option, a "supplemental claim," is a review in which new evidence is submitted to the agency of original jurisdiction. 38 U.S.C. §§ 5104C(a)(1)(B), 5108; *see infra* II.A. The third option, triggered by filing "a notice of disagreement," is a Board appeal. 38 U.S.C. §§ 5104C(a)(1)(C), 7105. Based on the information in the notice of disagreement, that appeal can take one of three forms: (1) review on the existing record without a hearing; (2) review with additional evidence but without a hearing; or (3) review with additional evidence and a hearing. *Id.* §§ 7105(b)(3), 7113.

Outside the one-year window, the claimant has only one review option available: "[T]he claimant may file a supplemental claim." *Id.* § 5104C(b).

To ensure that representation with respect to all forms of review under the AMA's new three-option system be compensable, Congress allowed that fees may be charged after "the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision under section 5104 of this title *with respect to the case*." *Id.* § 5904(c)(1)

(emphasis added); *see* H.R. Rep. No. 115-135, at 3 (fees allowed after the AOJ's "notice of the original decision"). The VA's final rule itself notes that Congress intended "to permit paid representation *regardless of the form of review*." Appx13 (emphasis added); *see infra* § II.C.

Over the objection of commenters, the VA's final rule implementing the AMA adopted an exclusion to CUE, a bar on charging fees for work on supplemental claims, and limitations on amending notices of disagreement.

After Congress passed the AMA, the VA issued a notice of proposed rulemaking. Appx384-435. Various stakeholders commented, including MVA. *See, e.g.*, Appx460-466 (MVA comments). After receiving these comments, the VA adopted its final rule. Appx1-60. The final rule took effect on February 19, 2019. Appx1.

Three aspects of the VA's rulemaking are relevant here.

1. An exclusion to CUE. The VA "propose[d] to amend [38 C.F.R.] § 3.105(a) to incorporate existing legal standards recognized in judicial decisions applicable to revision of final decisions under 38 U.S.C. 5109A," the statute allowing final decisions of *the Secretary* to be challenged for CUE. Appx386. The VA's proposal was to copy over pre-existing language from the regulation allowing final decisions of *the Board* to be challenged for CUE, 38 C.F.R. § 20.1403. *See* 38 U.S.C.

§ 7111. Specifically, the VA proposed adopting an exclusion to CUE drawn from that Board-level regulation: that "[c]lear 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." Appx409; *see* Appx5; Appx386; 38 C.F.R. § 20.1403(e).

This exclusion first appeared in the Board-level CUE regulation in 1999, after the statutes codifying CUE at the Secretary and Board level had been enacted. *See* 64 Fed. Reg. 2134, 2136, 2139 (Jan. 13, 1999) (final rule); H.R. Rep. No. 105-52 (1997) (House Committee Report for prior legislation codifying CUE). The AMA, for its part, did not address the exclusion. The VA stated that, by importing the exclusion into the Secretary-level CUE regulation, "[n]o substantive changes are intended to the existing law governing revision of final agency of original jurisdiction decisions." Appx386.

Commenters expressed concern that the VA intended the regulation to bar CUE claims from being based on changes in judicial interpretation. *See, e.g.*, Appx507-508. They argued that would be contrary to law, because when a court interprets a statute or regulation,

the court "articulates what a statute or regulation has always meant," including at the time of the decision challenged for CUE. *Id.*; *see* Appx675; *see also infra* § I.

In its final rule, the VA adopted the exclusion it had proposed, and explained that, as commenters feared, it does understand the exclusion to bar CUE claims from being based on changes in judicial interpretation. Appx5; *see infra* § I. The VA reached this conclusion based on its parsing of precedent. *See* Appx5; *see infra* § I. The VA reasoned that "[t]he Federal Circuit explicitly rejected the premise of retroactive application of judicial interpretations of law in the CUE context in *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005), and *Disabled Am. Veterans (DAV) v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000)." Appx5; *see infra* § I. Addressing one of this Court's decisions raised by commenters, the VA noted that it "d[id] not agree with the argument" that *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011), forecloses its position. Appx5; *see infra* § I.

2. A bar on fees for work on supplemental claims. To implement the AMA's allowance that fees can be charged for representation after "the date on which a claimant is provided notice of

the agency of original jurisdiction's initial decision … with respect to the case," 38 U.S.C. § 5904(c)(1), the VA proposed to allow fees to be "charged by an accredited agent or attorney upon VA's issuance of notice of an initial decision on a claim," Appx394. With regard to supplemental claims, however, the VA wanted to "make clear" that, as a general matter, the relevant "initial decision" allowing fees to be chargeable was the decision on the supplemental claim itself, rather than the decision on the earlier claim. *Id.* The only exception would be when "the claimant [had] continuously pursued the claim by choosing one of the [AMA's] three procedural options" for review—that is, pursued review of the earlier claim within a year of the decision on it, and then continued to pursue review within a year of any subsequent decision, including and up to the filing of the supplemental claim. *Id.*; *see infra* § II.A. Only then would the VA's issuance of notice of an initial decision on the original claim enable fees for work on a supplemental claim.

Commenters objected that the VA's proposal violated the AMA's "unambiguous[] identif[ication] [of] the circumstances or event after which an attorney or agent may lawfully charge a fee, i.e., when a

'claimant is provided notice of the agency of original jurisdiction's initial decision … with respect to the case.'" Appx512 (quoting 38 U.S.C. § 5904(c)(1)); *see* Appx682-683; *see also infra* § II.B. One commenter argued that the VA's proposal represented "an effective denial of professional services" to veterans. Appx698; *see infra* § II.C.

In its final rule, the VA rejected objections to its fee proposal and adopted its previously proposed language with minor changes. Appx12-14; *see* 38 C.F.R. § 14.636(c)(1)(i); *infra* § II.A. The VA "acknowledge[d] that [its] approach treats supplemental claims differently based on whether they were filed within one year of a prior decision." Appx13. "If a supplemental claim is filed within one year of a prior decision, the supplemental claim relates back" to the earlier claim for which review is sought, such that the issuance of the notice of an initial decision on the earlier claim allows fees. *Id.* In contrast, if "[a] supplemental claim [is] filed more than one year after a prior decision," the claim does not relate back, and fees can be charged only for work done after the VA has issued notice of a decision on the supplemental claim itself. *Id.*

The VA based its bifurcation of supplemental claims on two features of the AMA. First, that a supplemental claim retains the

effective date of the earlier claim upon which it is based only if the earlier claim has been continuously pursued by AMA review within one-year intervals. Appx13; *see* 38 U.S.C. § 5110(a)(2)-(3). Second, that when a supplemental claim is filed within one year of "an AOJ decision or a Board decision," the VA "does not have a duty to notify the claimant … of the information or evidence necessary to substantiate the claim," whereas the VA "does have this obligation" if the supplemental claim is filed later. Appx13; *see* 38 U.S.C. § 5103(a)(3). The VA acknowledged that the statute allows fees to be charged after notice of the "initial decision … with respect to the case," 38 U.S.C. § 5904(c)(1); *see* Appx11-12, but expressed that it "d[id] not believe that it [was] necessary" to define the term "case" "to explain under what circumstances an agent or attorney may charge fees." Appx12; *see supra* 5-6. Nor did the VA attempt an analysis of the term or how it is used in the AMA. *See* Appx12-14; *infra* § II.B.

3. Prohibitions on amendment of notices of disagreement. The AMA provides that "[t]he Secretary shall develop a policy to permit a claimant to modify the information identified in the notice of disagreement … pursuant to such requirements as the Secretary may

prescribe." 38 U.S.C. § 7105(b)(4). The VA proposed language to 38 C.F.R. § 20.202(c)(2) that would require a "request to modify [to] be made within one year of the agency of original jurisdiction decision on appeal, or 30 days after the Notice of Disagreement is received by the Board, whichever is later. The request will be denied if the appellant has already submitted evidence or testimony." Appx398; *see* Appx 421.

Commenters objected to both the time limit and the bar to amendment after the submission of evidence and testimony. In doing so, they explained that many claimants are likely to change their minds about which form of Board appeal within the AMA's brand-new system is in their best interests. *See, e.g.*, Appx362; Appx366-367; Appx471; Appx514-515; Appx520-521; Appx636; Appx688-690. A number of commenters argued that, in particular, the bar based on the submission of evidence and testimony would deny claimants choice without any benefit in efficiency or fairness. *See* Appx366-367; Appx471; Appx515.

In its final rule, the VA extended the time limit to allow amendment 60 days after the Board receives the notice of disagreement and created a good-cause exception to the time limit, but otherwise implemented its proposal unchanged. *See* Appx16; Appx44; 38 C.F.R.

§§ 20.202(c)(2); 20.203(c). On the time bar, the VA stated that "[a]llowing the veteran unlimited time" would "preclude the efficiencies built into the new system," potentially creating unfairness to other claimants. Appx16; *see infra* 63. The VA did not, however, explain its reasons for imposing a bar to amendment based on the submission of evidence or testimony. *See* Appx16; *infra* III. The VA did acknowledge a commenter's objection that it "should consider allowing veterans who had already submitted evidence to subsequently request a hearing." Appx16. The VA stated: "[T]he commenter expressed [that] this change would not provide an unfair advantage to the veteran, but would allow a veteran whose circumstances had changed to" modify his appeal accordingly. *Id.* After this observation, however, the VA did not offer any response to the concern. *See id.*; *infra* III.

MVA and others filed petitions for review.

After the VA issued the final rule, MVA and other organizations filed petitions for review, raising challenges with some overlap. This Court designated the petitions companion cases. Dkt. 12.

SUMMARY OF ARGUMENT

Three parts of the VA's final rule must be invalidated.

I. This Court should hold unlawful the VA's position—which is based entirely on the agency's incorrect parsing of this Court's precedent—that changes in judicial interpretation of a statute or regulation are barred from giving rise to a CUE claim against a decision by the Secretary. That is for three independent reasons.

First, this Court has already rejected the VA's position. In the context of an essentially identical regulation governing CUE claims against decisions by the Board, this Court has twice explained that CUE can be based on changes in judicial interpretation. That is because, when a court says what a statutory or regulatory provision means, it does not change the law—it explains what the provision has always meant, including at the time of the decision challenged for CUE.

The VA tries to avoid this rule by invoking other decisions by this Court. But they are not to the contrary. The VA simply misreads them.

The only relevant holding in the decisions the VA cites is that changes in an *agency's* interpretation of a statute or regulation cannot underlie CUE. But that is entirely consistent with a change in judicial interpretation underlying a CUE claim: Unlike a court, when an agency says what a statute or regulation means, the agency is saying

only what it takes the provision to mean from that point forward, so any contrary application that occurred beforehand is not error.

The VA ignores that holding and relies on dictum. But the dictum merely refers to a default rule that new legal principles do not apply to cases already closed. That rule is inapplicable here, because a change in judicial interpretation does not create a new legal principle—the court's interpretation does not change the law but rather clarifies what the law has always been. Moreover, the default rule does not apply when a statute or regulation provides otherwise. Here, both do.

Second, the VA's position is contrary to the regulation, which is clear, foreclosing *Auer* deference. What the regulation says is that "[CUE] 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." 38 C.F.R. § 3.105(a)(1)(iv) (emphasis added). Because a change in judicial interpretation explains what a provision has meant continuously since the date the provision became law, when a decision contravenes a court's subsequent interpretation of a statute or regulation, there is no "otherwise correct application" that can exclude CUE. Other

regulatory language confirms this conclusion. And if that were not enough, the pro-veterans canon applies to allow changes in judicial interpretation to undergird a CUE claim.

Moreover, even if this Court were to conclude that the regulation is genuinely ambiguous, *Auer* deference still would not apply. An agency is entitled to such deference in interpreting its regulations, not a court's caselaw. All the VA has interpreted is the latter. Additionally, the interpretative issues involved—the scope and effect of judicial interpretations of law, and the finality of judgments—fall well outside the VA's expertise. But they are right in this Court's wheelhouse.

Third, the VA's position is contrary to the plain statute. The text erects no exclusions on CUE aside from the error needing to be "clear" and "unmistakable," which is what the incorrect application of a statutory or regulatory provision is when it defies the actual meaning of the provision. The legislative history reinforces this understanding by explaining that the statute was intended to codify a regulation that did not contain the VA's now-claimed change-in-interpretation exclusion. Indeed, the legislative history cites a decision of the Veterans Court

that indicates that changes in judicial interpretation do constitute CUE. And to the extent more is needed, the pro-veterans canon provides it.

II. This Court should hold unlawful the VA's regulation on fees for work on supplemental claims. As the VA acknowledges, Congress's intent was "to permit paid representation *regardless of the form of review*" taken under the AMA. Appx13 (emphasis added). Filing a supplemental claim is one of the AMA's forms of review. Yet the VA's regulation generally requires notice to issue on the denial of the supplemental claim, rather than on the denial of the earlier claim for which the supplemental claims seeks review, before work on the supplemental claim can be compensated. That thwarts Congress's goal.

It also violates the clear statute. The statute allows fees to be charged on and after "the date on which a claimant is provided notice of the agency of original jurisdiction's initial decision … *with respect to the case*," 38 U.S.C. § 5904(c)(1) (emphasis added), not a specific claim. Because a supplemental claim seeks review of an earlier claim, it is plainly part of the same case as the earlier claim, and thus the notice of the decision on the earlier claim allows fees to be charged for work on the supplemental claim. Indeed, the provision setting forth the three

AMA review options describes all three, including the filing of a supplemental claim, as part of the same "case" as the claim for which review is sought. 38 U.S.C. § 5104C(a), (b).

The legislative history is in accord, stating that "the bill would allow veterans to retain the services of attorneys and accredited agents who charge a fee when the agency of original jurisdiction (AOJ) provides notice of *the original decision*," H.R. Rep. No. 115-135, at 3 (emphasis added), referring to notice of the decision on the claim for which review is sought. And that makes sense: Allowing fees to be charged then, at the stage review becomes an option, ties fees to Congress's goal of ensuring that veterans can get adequate representation as they seek review of claims that have been denied.

III. This Court should hold unlawful the VA's regulation prohibiting amendment of a notice of disagreement after evidence or testimony has been submitted. The VA acknowledged only one comment objecting to this bar, and it never provided a response. That violated the VA's duty to engage in reasoned decisionmaking.

The only explanations the VA provided with respect to restricting amendment of notices of disagreement concerned the time limit. The

VA never connected those explanations to its decision to bar amendment on the basis of the submission of evidence or testimony.

Nor could the VA's time-limit explanations justify disallowing amendment once a claimant has submitted evidence or testimony. The VA stated that an unlimited time to amend would create unfairness and inefficiency by increasing the average processing time of Board review. The VA provided no reason to believe, however, that any such unfairness or inefficiency would occur if amendment were allowed at least after evidence has been submitted.

The VA's failure to explain denied claimants choice and flexibility in seeking Board review without offering any justification for that negative impact. That is not enough. This Court should vacate the VA's prohibition on amendment and remand for the agency to consider and explain whether and why such a prohibition is justified.

STANDARD OF REVIEW

This Court must "hold unlawful and set aside agency action, findings, and conclusions found to be … arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or "without observance of procedure required by law." 5 U.S.C. § 706(2)(A), (D).

ARGUMENT

I. Section 3.105(a)(1)(iv), An Exclusion To CUE, Should Be Invalidated To The Extent It Applies To Changes In Judicial Interpretation.

Section 3.105(a)(1) concerns "[e]rror in final decisions." It allows a final decision to be "reversed or amended" upon a determination that "there was a clear and unmistakable error in the decision." 38 C.F.R. § 3.105(a)(1). Subsection (iv) bars certain "change[s] in interpretation" from qualifying, stating that "[c]lear 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." *Id.* § 3.105(a)(1)(iv). The VA claims that this regulatory exclusion includes changes in *judicial* interpretation of a statute or regulation, rather than merely to changes in an *agency's* interpretation. The reason: Because "[t]he Federal Circuit explicitly rejected the premise of retroactive application of judicial interpretations in the CUE context in *Jordan v. Nicholson*, 401 F.3d 1296 (Fed. Cir. 2005), and *Disabled Am. Veterans* (*DAV*) *v. Gober*, 234 F.3d 682, 698 (Fed. Cir. 2000)." Appx5.

The VA is wrong, and this Court should declare the VA's understanding unlawful. To start, in the context of an essentially identical regulatory exclusion, this Court has twice repudiated the VA's position that CUE cannot be based on a change in judicial interpretation of a statute or regulation. *See Patrick v. Nicholson*, 242 F. App'x 695 (Fed. Cir. 2007) (*Patrick II*); *Patrick v. Shinseki*, 668 F.3d 1325 (Fed. Cir. 2011) (*Patrick III*); *infra* § I.A.1. *Jordan* and *DAV* are not to the contrary—the VA misreads these decisions. *Infra* § I.A.2-3. That should be the end of the matter, because the VA bases its position only upon its reading of this Court's precedent. *See* Appx5. Even beyond this Court's previous rulings on the issue, however, the VA's attempt to limit CUE's scope should be held invalid because it violates the regulation and the governing statute. *Infra* § I.B.

A. This Court has already rejected the VA's position.

1. The *Patrick* decisions control.

This Court has in two instances rejected the VA's position that there is an exclusion to CUE based on changes in judicial interpretation. First, *Patrick II* recognized that a change in judicial interpretation "can serve as the basis for grounding a CUE claim." 242

F. App'x at 698. Second, *Patrick III* reaffirmed this principle in considering whether the VA should have to pay attorney fees under the Equal Access to Justice Act, in part for taking its flawed position on the nature of CUE. 668 F.3d at 1328-29, 1333 n.6.

The *Patrick* rulings considered the regulatory exclusion to CUE in 38 C.F.R. § 20.1403(e). That provision provides—in text essentially identical to the exclusion challenged here, 38 C.F.R. § 3.105(a)(1)(iv)—that "clear and unmistakable error does not include the otherwise correct application of a statute or regulation where, subsequent to the Board decision challenged, there has been a change in the interpretation of the statute or regulation." *See* Appx5 (acknowledging that "the language" of the two exclusions "track[]").[1]

Patrick II and *III* concerned CUE in the context of interpreting of 38 U.S.C. § 1111. That statute creates a presumption that a veteran was in sound condition when he or she entered service, save for any

[1] The only difference between the exclusion considered in *Patrick II* and *III* and the exclusion here is the tribunal rendering the decision challenged for CUE. *See supra* 6-7. The exclusion in the *Patrick* decisions applies to final Board decisions, *see* 38 C.F.R. § 20.1403; 38 U.S.C. § 7111, whereas the exclusion here applies to final decisions of the Secretary on issues not decided on appeal by the Board or a court of competent jurisdiction, *see* 38 C.F.R. § 3.105(a)(1)(v); 38 U.S.C. § 5109A.

existing issues noted on service-intake records (or if sufficient evidence exists to rebut the presumption). In an earlier appeal of a CUE claim to this Court, a veteran's widow seeking benefits for his heart condition had argued that the Veterans Court had misapplied the presumption by rejecting her claim solely on the basis that the heart condition pre-dated service. *Patrick II*, 242 F. App'x at 696-97; *see Patrick III*, 668 F.3d at 1327-28; *Patrick v. Principi*, 103 F. App'x 383, 383-84 (Fed. Cir. 2004) (*Patrick I*). This Court agreed, invoking *Wagner v. Principi*, 370 F.3d 1089 (Fed. Cir. 2004)—a decision which had issued *after* the denial of the widow's original (pre-CUE) claim became final—and which "construe[d] 38 U.S.C. § 1111 as requiring clear and unmistakable evidence of both the preexistence of a condition *and* no in-service aggravation" to rebut the presumption. *Patrick II*, 242 F. App'x at 697 (emphasis added); *see Patrick III*, 668 F.3d at 1328; *Patrick I*, 103 F. App'x at 384-85. This Court vacated and remanded "for further consideration of [the] CUE claim using the correct standard articulated in *Wagner*." *Patrick II*, 242 F. App'x at 697; *see Patrick III*, 668 F.3d at 1328; *Patrick I*, 103 F. App'x at 384-85.

On remand, however, the Veterans Court declined to revisit its denial in light of the interpretation provided by *Wagner*. *Patrick II*, 242 F. App'x at 697; *see Patrick III*, 668 F.3d at 1328. Instead, relying on the exclusion to CUE in 38 C.F.R. § 20.1403(e), it affirmed the Board "on the alternative ground that *Wagner* was not retroactive." *Patrick II*, 242 F. App'x at 697; *see Patrick III*, 668 F.3d at 1328.

This Court rejected that approach. It criticized the Veterans Court's refusal to apply *Wagner*'s interpretation as "neither in accordance with the law nor with our previous remand instructions." *Patrick II*, 242 F. App'x at 698; *see Patrick III*, 668 F.3d at 1329. It explained that *Wagner*'s interpretation must be applied in evaluating CUE, notwithstanding that the interpretation issued after the original claim became final, because this Court's "interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment." *Patrick II*, 242 F. App'x at 698 (citing *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994)); *see Patrick III*, 668 F.3d at 1329, 1333 n.6. In other words, this Court's "interpretation of § 1111 in *Wagner* did not change the law but explained what § 1111 has

always meant"—including when the original claim was decided. *Patrick II*, 242 F. App'x at 698; *see Patrick III*, 668 F.3d at 1329, 1333 n.6.

The VA's regulatory exclusion to CUE here must be treated the same. The text of the exclusion here, 38 C.F.R. § 3.105(a)(1)(iv), is in all relevant respects identical to the text of the exclusion considered in *Patrick II* and *III*, 38 C.F.R. § 20.1403(e). *See supra* 6-7, 22 & n.1. Under that text, as the *Patrick* decisions explain, when there has been a change in judicial interpretation, "[t]here [i]s no 'otherwise correct application'" of the so-interpreted statute or regulation that triggers an exclusion to CUE. *Patrick II*, 242 F. App'x at 698; *see Patrick III*, 668 F.3d at 1329, 1333 n.6. The standing judicial interpretation is the *only* correct application, and failure to adhere to the interpretation "can serve as the basis for grounding a CUE claim." *Patrick II*, 242 F. App'x at 698; *see Patrick III*, 668 F.3d at 1329, 1333 n.6. This Court should declare the VA's exclusion to CUE invalid to the extent it attempts to contravene this principle.

2. *Jordan* does not contradict the *Patrick* decisions.

The only basis the VA offered to salvage its position that a change in judicial interpretation cannot underlie a CUE claim is that its

position is dictated by other precedent of this Court. *See* Appx5. The VA first points to this Court's decision in *Jordan*. *Id.* But the *Patrick* decisions explained how they are consistent with *Jordan*: *Jordan* held only that a change in an *agency's* interpretation cannot underlie CUE, not a change in *judicial* interpretation. *Infra* § I.A.2.i. Rather than address this issue, the VA's final rule invokes dictum from *Jordan*. But that reliance is misplaced. The dictum is irrelevant not only because it has no precedential weight, but because it concerns something fundamentally different than what is at issue here. *Infra* § I.A.2.ii.

i. *Jordan* addressed only a change in an agency's interpretation.

As an initial matter, *Jordan* addressed something very different than the *Patrick* decisions: It held only that "CUE does not arise from a new *regulatory* interpretation of a statute." 401 F.3d at 1289-99 (emphasis added); *see id.* at 1298 (noting that "there was a change in [the VA's] interpretation of [a statute] with the issuance of the opinion by the VA's General Counsel stating that [the relevant implementing regulation] conflicted with the language of [the statute]"). MVA does not dispute that holding. It contends instead that a change in *judicial*

interpretation of a statute or regulation that post-dates a final decision can form the basis of a CUE claim.

The *Patrick* decisions make the point: "*Jordan* addressed whether a change in the regulatory interpretation of a statute had retroactive effect on CUE claims, not whether our interpretation of the statute in *Wagner* had retroactive effect on CUE claims." *Patrick II*, 242 F. App'x at 697; *see Patrick III*, 668 F.3d at 1328. And there is a key temporal distinction between the two: "Unlike changes in regulations and statutes, which are prospective, our interpretation of a statute is retrospective in that it explains what the statute has meant since the date of enactment." *Patrick II*, 242 F. App'x at 698; *see Patrick III*, 668 F.3d at 1329. Thus, the former cannot form the basis of a CUE claim, but the latter can.

The *Patrick* decisions were right to rely on this distinction, which has been recognized time and again by the Supreme Court. The Court has explained, for example, that "[t]he principle that statutes operate only prospectively, while judicial decisions operate retrospectively, is familiar to every law student." *Rivers*, 511 U.S. at 311-12 (quotation marks omitted); *see SKF USA, Inc. v. United States*, 512 F.3d 1326,

1330 (Fed. Cir. 2008) (citing cases). And it has held that "a judicial construction of a statute is an authoritative statement of what the statute meant before as well as after the decision of the case giving rise to that construction," because "[w]hen this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law." *Rivers*, 511 U.S. at 312-13 & n.12. The VA's final rule does not even attempt to grapple with this principle. *See* Appx5.

ii. The VA invokes inapplicable dictum.

Rather than address the distinction between changes in an agency's interpretation and changes in judicial interpretation, the VA's final rule instead clings to dictum from *Jordan* regarding a tangential situation—namely, *Jordan*'s statement that "[t]he Supreme Court has repeatedly denied attempts to reopen final decisions in the face of new judicial pronouncements or decisions finding statutes unconstitutional." 401 F.3d at 1299 (citing *Reynoldsville Casket Co. v. Hyde*, 514 U.S. 749, 752 (1995); *Chicot Cty. Drainage Dist. v. Baxter State Bank*, 308 U.S. 371, 374-75 (1940)); *see* Appx5. Of course, "[d]ictum settles nothing, even in the court that utters it." *Jama v. Immigration & Customs Enf't*,

543 U.S. 335, 351 n.12 (2005). *Jordan* did not involve a "new judicial pronouncement[] or decision[] finding [a] statute[] unconstitutional." 401 F.3d at 1299. It involved an agency's revised interpretation of a statute's meaning. *See id.* at 1297-99; *supra* § I.A.2.i.

Moreover, the *Jordan* dictum and the Supreme Court precedent it cites are inapposite. The Supreme Court has never said that a change in judicial interpretation cannot, in any circumstance, be applied to a case closed to direct review. Instead, the decisions *Jordan* references suggest a default rule that applies when no law says otherwise: that "[n]ew legal principles, even when applied retroactively, do not apply to cases already closed." *Reynoldsville*, 514 U.S. at 758.[2] That default is inapplicable here for two reasons.

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[2] Notwithstanding this statement, and contrary to *Jordan*'s suggestion, *Reynoldsville* did not deny an attempt to reopen a final decision in the face of a new judicial pronouncement or decision. Rather, *Reynoldsville* held that the Ohio Supreme Court was required to apply a U.S. Supreme Court decision that issued while suit was pending. 514 U.S. at 750-52. The other decision *Jordan* cites, *Chicot*, did hold that a final judgment based on a jurisdictional statute later found to be unconstitutional had res judicata effect. 308 U.S. at 374-78. But it did not make a sweeping statement on the subject: It "confine[d]" itself "to the question of res judicata" that was then before it, noting that "[t]he past cannot *always* be erased by a new judicial declaration," explaining that "an all-inclusive statement of a principle of absolute retroactive

First, "new legal principles" are not at issue. What are at issue are post-decision judicial interpretations of statutes and regulations that, as discussed, "d[o] not change the law but explain[] what [the relevant provision] has always meant," including at the time of decision. *Patrick II*, 242 F. App'x at 698; *see, e.g.*, *AT & T Corp. v. Hulteen*, 556 U.S. 701, 712 n.5 (2009); *Rivers*, 511 U.S. at 312-13 & n.12.

The Supreme Court has recognized that such judicial interpretations apply in collateral review of decisions closed to direct review. Take, for instance, a habeas action involving a state court's interpretation of a criminal-law statute, where the interpretation issued after a defendant's conviction under the statute became final. Where the state court's interpretation "merely clarifie[s] the statute and was the law …—as properly interpreted—at the time of [the] conviction," the interpretation "[i]s not new law" and must be applied in the collateral proceedings. *Fiore v. White*, 531 U.S. 225, 228-29 (2001) (per curiam) (quotation marks omitted); *see Bunkley v. Florida*, 538 U.S. 835, 840-42 (2003) (per curiam) (habeas action, remanding for

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invalidity" of a statute held to be unconstitutional "cannot be justified." 308 U.S. at 374-75 (emphasis added).

consideration of whether unapplied post-conviction interpretation of a criminal-law statute was the law at the time the defendant's conviction became final, and thus should have been applied on collateral review).

Second, even if "new legal principles" were in some sense at issue, here a regulation and statute, 38 C.F.R. § 3.105 and 38 U.S.C. § 5109A, confirm that they can be applied collaterally through a CUE claim. *See infra* I.B. This Court has observed that the statute is an "exception[] to the rule of finality" that was "once solely grounded in regulation." *Cook v. Principi*, 318 F.3d 1334, 1339, 1342 (Fed. Cir. 2002) (en banc); *see also id.* at 1336-37 ("Principles of finality and res judicata apply to agency decisions that have not been appealed and have become final…. *[u]nless otherwise provided by law*." (emphasis added; quoting *Routen v. West*, 142 F.3d 1434, 1438 (Fed. Cir. 1998))).

Put another way, the default rule mentioned above is the default because of general finality concerns, which can be overridden. Whatever those concerns might ordinarily suggest, a provision such as "a statute may defeat ordinary res judicata concepts, directly or by implication." 18 Fed. Prac. & Proc. Juris. § 4403 (3d ed.). As the Supreme Court has remarked: An "appeal to the virtues of finality….

is unpersuasive in the interpretation of a provision whose whole purpose is to make an exception to finality." *Gonzalez v. Crosby*, 545 U.S. 524, 529 (2005); *see id.* at 531 (Federal Rule of Civil Procedure 60(b)(6) might sanction relief from a final judgment based on "a subsequent change in substantive law"); *Agostini v. Felton*, 521 U.S. 203, 215, 237-39 (1997) (Rule 60(b)(5) allows vacatur of a final order based on "subsequent changes in either statutory or decisional law").

The habeas context again provides an illustration. The habeas statute allows a claim to be made based "on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." 28 U.S.C. § 2244(b)(2)(A). And the Supreme Court has long recognized that certain new rules can be applied retroactively to criminal cases on collateral review. *See Teague v. Lane*, 489 U.S. 288, 310-11 (1989) (holding that a new rule may be applied retroactively on collateral review if it "places certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe" or is a "watershed rule[] of criminal procedure" (quotation marks and alterations omitted)); *see also, e.g.*, *Welch v. United States*, 136 S. Ct. 1257, 1265 (2016) (holding

that *Johnson v. United States*, 135 S. Ct. 2551 (2015), "has retroactive effect under *Teague* in cases on collateral review").

Such a principle is even more appropriate in the veterans context. The veterans-benefits system endeavors to do justice to those who have served our country, and Congress with that goal has made the finality of decisions more fluid in veterans law than elsewhere. As the House Committee Report for the bill enacting the CUE statutes explained:

> The VA claim system is unlike any other adjudicative process. It is specifically designed to be claimant friendly. It is non-adversarial…. There is no true finality of a decision since the veteran can reopen a claim at any time merely by the presentation of new and material evidence. … The appropriateness of … a provision [allowing collateral attack of a final decision based on CUE] is manifest.

H.R. Rep. No. 105-52, at 2 (quotation marks omitted). In short, the VA's position that CUE cannot be based on changes in judicial interpretation not only contravenes this Court's caselaw, it offends the spirit in which the CUE exception to finality was adopted. *Jordan* does not suggest otherwise.

3. *DAV* does not contradict the *Patrick* decisions.

The only other decision that the VA offers for its position is *DAV*, which rejected challenges to 38 C.F.R. § 20.1403(e), the same regulatory

exclusion later addressed by the *Patrick* decisions and *Jordan*. Appx5. *DAV* says nothing more than the default rule explained above, however, and is irrelevant for the same reasons. *See supra* 29-33.

It is true that *DAV* contains a stray statement that "[t]he new interpretation of a statute can only retroactively effect decisions still open on direct review, not those decisions that are final." 234 F.3d at 698. But this statement should not be overread—context is important. *See, e.g.*, *Perez v. Dep't of Justice*, 480 F.3d 1309, 1312 (Fed. Cir. 2007); *see also Bristol-Myers Squibb Co. v. Teva Pharm. USA, Inc.*, 769 F.3d 1339, 1353 (Fed. Cir. 2014) (Taranto, J., dissenting from denial of rehearing en banc) ("It is a well-recognized principle, and one essential to our system of precedent, that statements in opinions must be read in context, considering their role in the decision and the facts of the case." (collecting cases)). Context reveals nothing more than an endorsement of the default rule discussed above.

To begin with, *DAV* cited only one decision in support: *Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993). But *Harper* did not address a change in judicial interpretation of the meaning of a statute (or regulation); it concerned the retroactive application of a decision

holding a certain kind of taxing practice unconstitutional. *See id.* at 89-90, 97-99. More importantly, *Harper* never excluded retroactive application to cases closed to direct review. It simply held that, "[w]hen 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 and as to all events, regardless of whether such events predate or postdate our announcement of the rule." *Id.* at 97. *Harper*, in other words, is of a piece with the precedent discussed above. *See supra* 29-33.

If that were not enough, the VA did not argue in *DAV* that new legal principles can be applied *only* to cases open on direct review: As *DAV* noted, "the VA state[d] that [the exclusion there] [was] consistent with *the general rule* that the retroactive effect of a court decision on a statutory or regulatory issue only applies to cases still open on direct review." 234 F.3d at 696 (emphasis added). *DAV*'s acknowledgement of that fact punctuates that *DAV* did nothing more than confirm the default rule, which is inapplicable here. *See supra* 29-33. The *Patrick* decisions control, and the VA's contrary position should be rejected.

B. The VA's position violates the regulation and the governing statute.

To reject the VA's position that CUE cannot be based on a change in judicial interpretation, this Court need go no further than the above analysis of its precedent. After all, the VA has predicated its position on nothing more than a misreading of this Court's caselaw. *See* Appx5.

If this Court is inclined to go beyond its prior precedent to reject the VA's stance, however, there are two bases on which to do so. First, the VA's position contravenes the regulation at issue, 38 C.F.R. § 3.105. Second, it violates the statute that the regulation is supposed to implement, 38 U.S.C. § 5109A.

1. The VA's position violates the regulation.

As an initial matter, the VA's position contradicts its regulation, 38 C.F.R. § 3.105. Under *Auer* deference, courts "often defer[] to agencies' reasonable readings of genuinely ambiguous regulations." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2408 (2019); *see Auer v. Robbins*, 519 U.S. 452 (1997); *Bowles v. Seminole Rock & Sand Co.*, 325 U.S. 410 (1945). But "*Auer* deference is not the answer to every question of interpreting an agency's rules. Far from it." *Kisor*, 139 S. Ct. at 2414.

Such is the case here, for three reasons.

First, the VA's position contravenes the clear meaning of the regulation. That defeats any appeal to *Auer*: "[T]he possibility of deference can arise only if a regulation is genuinely ambiguous." *Kisor*, 139 S. Ct. at 2414.

"[B]efore concluding that a rule is genuinely ambiguous, a court must exhaust all the traditional tools of construction." *Kisor*, 139 S. Ct. at 2415. "[O]nly when th[e] legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that" *Auer* deference is warranted. *Id.* at 2415. And using all interpretative tools "will resolve many seeming ambiguities out of the box, without resort to *Auer* deference." *Id.* So too here.

The text is unambiguous. The regulatory exclusion states that "[c]lear 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." 38 C.F.R. § 3.105(a)(1)(iv) (emphasis added). Because a change in judicial interpretation states what a provision "has meant continuously since the date when it became law," *Rivers*, 511 U.S. at 313 n.12, there is no "otherwise correct application" that can

exclude CUE. An application of a law that defies what the law actually is cannot be correct.

The regulation's definition of CUE is in accord. It explicitly includes instances where "statutory and regulatory *provisions* extant at the time [of the challenged decision] were incorrectly applied," 38 C.F.R. § 3.105(a)(1)(i) (emphasis added), rather than instances where "*interpretations of* statutory and regulatory provisions extant at the time of the challenged decision were incorrectly applied." A provision applied contrary to its meaning is a provision incorrectly applied.

Given the clear text and context, "the inquiry ends with the plain meaning." *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006); *see, e.g.*, *Christensen v. Harris Cty.*, 529 U.S. 576, 588 (2000); *Norfolk S. Ry. Co. v. Shanklin*, 529 U.S. 344, 355-56 (2000). The result is the dividing line explained in the *Patrick* decisions. A change in judicial interpretation can underlie a CUE claim, because such a change says what a statute or regulation has always meant, meaning that a statute or regulation cannot have been applied correctly any other way. What the exclusion prohibits is a CUE claim based on a change in an agency's interpretation, because such a change does not say what a

statute or regulation has always meant, just what the agency now takes it to mean. *See Patrick II*, 242 F. App'x at 697-98; *Patrick III*, 668 F.3d at 1328-29; *see also supra* § I.A.

Moreover, even if this Court were to conclude that the regulatory language does not plainly convey this meaning, genuine ambiguity would still not result. Instead, the pro-veterans canon would apply to allow a change in judicial interpretation to undergird a CUE claim. The Supreme Court "ha[s] long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21, n.9 (1991)); *see, e.g.*, *Boone v. Lightner*, 319 U.S. 561, 575 (1943) (provisions benefiting veterans must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation"). When considering a regulation like the one here, therefore, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see, e.g.*, *Kirkendall v. Dep't of Army*, 479 F.3d 830, 843 (Fed. Cir. 2007) (en banc); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365,

1378 (Fed. Cir. 2001); *cf. Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017) (en banc) (plurality op.) ("We use the same interpretive rules to construe regulations as we do statutes[.]").

Whatever uncertainty may have previously existed regarding the pro-veterans canon's role with respect to agency deference, *see Kisor v. Shulkin*, 880 F.3d 1378, 1379-82 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of rehearing en banc), the Supreme Court has made clear that the canon must be applied before deeming a provision genuinely ambiguous so as to warrant deference, *see supra* 37. The canon is a longstanding, traditional tool of interpretation. *See supra* 39. As such, it is part of "th[e] legal toolkit" that must be "empt[ied]" to "resolve … seeming ambiguities" before resorting to *Auer*. *Kisor*, 139 S. Ct. at 2415; *see Procopio v. Wilkie*, 913 F.3d 1371, 1382-87 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring). The Supreme Court has, after all, "insisted that a court bring *all* its interpretive tools to bear before finding" genuine ambiguity. *Kisor*, 139 S. Ct. at 2423 (emphasis added). And bringing the pro-veterans canon to bear favors allowing veterans to bring CUE claims based on changes in judicial interpretation.

Second, even if the regulation were genuinely ambiguous after employing all interpretative tools, *Auer* deference would still not apply, because the VA has not truly offered an interpretation of its regulation. Instead, it has offered an interpretation of this Court's precedent, which it says requires that its regulation operate in a certain way. *See* Appx5. The only basis that the VA's final rule offers for its attempt to exclude changes in judicial interpretation from giving rise to a CUE claim is that "[t]he Federal Circuit explicitly rejected the premise of retroactive application of judicial interpretations of law in the CUE context" (citing *Jordan* and *DAV*), and that the "VA does not agree" that this Court's *Patrick* decisions stand to the contrary. Appx5. The VA is owed "no deference" in interpreting caselaw. *Reno v. Bossier Par. Sch. Bd.*, 528 U.S. 320, 336 n.5 (2000); *see, e.g.*, *N.Y. N.Y., LLC v. NLRB*, 313 F.3d 585, 590 (D.C. Cir. 2002).

Third, even if the regulation were genuinely ambiguous and the VA had offered an interpretation that would otherwise be entitled to deference, there should be no deference here because the matter at hand does not "implicate [the agency's] substantive expertise." *Kisor*, 139 S. Ct. at 2417. "Administrative knowledge and experience largely

account for the presumption that Congress delegates interpretive lawmaking power to the agency." *Id.* (quotation marks and brackets omitted). "When the agency has no comparative expertise in resolving a regulatory ambiguity, Congress presumably would not grant it that authority." *Id.*

This "idea holds good as between agencies and the courts," as "[s]ome interpretive issues may fall more naturally into a judge's bailiwick," such as "the elucidation of a simple common-law property term," "the award of an attorney's fee," or "a judicial-review provision." *Kisor*, 139 S. Ct. at 2417 (collecting cases). That is precisely the nature of the interpretative issue here, which deals squarely with matters within the judiciary's province—namely, the scope and effect of judicial interpretations of law, *see Rivers*, 511 U.S. at 312-13 & n.12; *Bankers Tr. New York Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)), and the finality of judgments, *see Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 218-19 (1995); *cf. Stanley v. Principi*, 283 F.3d 1350, 1355 (Fed. Cir. 2002). *See also supra* § I.A. *Auer* deference is not warranted when it comes to such matters.

2. The VA's position violates the statute.

The VA's position is also invalid because it contravenes the clear statute, 38 U.S.C. § 5109A. Relevant here is *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984), which sets forth a two-step framework for "review[ing] an agency's construction of the statute which it administers." *Id.* at 842; *see, e.g.*, *Procopio*, 913 F.3d at 1375.

"First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43. Like the inquiry under *Auer*, ascertaining whether Congress has directly spoken involves "employing traditional tools of statutory construction"—including the text, legislative history, and canons of interpretation—"to determine Congress's intent." *Id.* at 843 n.9; *see supra* 37, 40. The second step comes into play only if, "after employing traditional tools of statutory construction, [the court] find[s] [itself] unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quotation marks omitted).

Here, there is no room for the VA's position, as the statute is clear.

Starting with the text: It provides that "[a] decision by the Secretary under this chapter is subject to revision on the grounds of clear and unmistakable error. If evidence establishes the error, the prior decision shall be reversed or revised." 38 U.S.C. § 5109A(a). The text also provides that "[a] request for revision of a decision of the Secretary based on clear and unmistakable error may be made *at any time after* that decision is made." *Id.* § 5109A(d) (emphasis added). This language plainly allows a change in judicial interpretation of a statute or regulation to undergird a CUE claim.

Aside from denominating the relevant class of errors as those that are "clear and unmistakable," the statute's language erects no exclusions regarding the errors that qualify. The plain meaning of "clear" and "unmistakable" requires that such errors include a decision's application of a statutory or regulatory provision that is clearly and unmistakably erroneous under proper interpretation of the provision—even if the proper interpretation was announced after the decision, and even if the proper interpretation corrected an incorrect interpretation that existed at the time the decision was rendered. *See supra* 24-25, 27-28, 30-31.

Consider a hypothetical. A statute provides benefits to "all veterans who served on a carrier," full stop. The Veterans Court interprets this statute, wrongly, to apply only to veterans who served in the Navy. This interpretation persists for some time, however, before the question of the statute's interpretation reaches this Court. When this Court is finally presented with the question, it holds that the Veterans Court's interpretation is incorrect, and that the statute means what it says—that all veterans who served on a carrier, regardless of whether they served in the Navy, are entitled to the benefits the statute provides. Prior decisions by the Secretary under the Veterans Court's incorrect interpretation are clearly and unmistakably wrong, and the CUE statute here allows them to be challenged even if final.

The legislative history confirms this conclusion. The House Committee Report for the relevant bill explains that Congress's intent was to codify a predecessor VA regulation requiring decisions by the Secretary be reversed for CUE (by enacting the statute here, 38 U.S.C. § 5109A), as well as to "extend the principle underlying it to [Board] decisions" (by enacting 38 U.S.C. § 7111), given the lack of any VA regulation on that front at the time. H.R. Rep. No. 105-52, at 2; *see id.*

at 1-2, 4-5; *DAV*, 234 F.3d at 686-87. That predecessor regulation, however, did not contain the exclusion that the current regulation does—it made no exception to CUE for when "there has been a change in the interpretation of the statute or regulation." *See* 38 C.F.R. § 3.105 (1997). This should come as no surprise, given that the exclusion was added to the regulation by the final rule being challenged here. *See* Appx5; *supra* 6-7. Congress thus would not have understood itself to be adopting the exclusion to CUE that the VA now claims exists.

Indeed, the House Committee Report discusses three decisions regarding CUE, none of which mention any change-in-interpretation exclusion. *See generally Smith v. Brown*, 35 F.3d. 1516 (Fed. Cir. 1994); *Fugo v. Brown*, 6 Vet. App. 40 (1993); *Russell v. Principi*, 3 Vet. App. 310 (1992) (en banc). If anything, one of the decisions indicates that changes in judicial interpretation do constitute CUE. *See Russell*, 3 Vet. App. at 313 (a decision corrected for CUE "is being revised to conform to the true state of the facts or the law that existed at the time of the original adjudication" (quotation marks omitted)); *id.* (one purpose of CUE is to correct for when "the statutory or regulatory provisions extant at the time were incorrectly applied").

If more were needed, the pro-veterans canon supplies it. Just as with *Auer*, resort to *Chevron* deference is predicated on finding genuine ambiguity after exhausting all interpretative tools, including canons of construction. *See, e.g.*, *Chevron*, 467 U.S. at 843 n.9; *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *SAS*, 138 S. Ct. at 1358; *INS v. St. Cyr*, 533 U.S. 289, 315-16, 320 & n.45 (2001); *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132-33, 160-61 (2000); *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); *see also supra* 37, 40. The text and legislative history already make clear that the statute allows veterans to raise CUE claims based on changes in judicial interpretation, but the pro-veterans canon confirms it.

* * *

The VA's contrary position cannot be countenanced. Whether based on this Court's precedent, the regulation, the statute, or some combination of these rationales, this Court should reject the VA's view that CUE cannot be grounded in changes in judicial interpretation.

II. Section 14.636(c)(1)(i), Which Prohibits A Veteran's Representative From Charging Fees For Certain Work On Supplemental Claims, Should Be Invalidated.

Section 14.636 concerns the "Payment of fees for representation by agents and attorneys in proceedings before Agencies of Original Jurisdiction and before the Board of Veterans' Appeals." 38 C.F.R. § 14.636 (title). Subsection (c) lays out the "[c]ircumstances under which fees may be charged." *Id.* § 14.636(c). Subsection (c)(1)(i) generally provides that fees may be charged for work "after an agency of original jurisdiction has issued notice of an initial decision on the claim or claims." *Id.* § 14.636(c)(1)(i). But it carves out unequal treatment for supplemental claims: It allows fees to be charged for post-initial-decision work on some such claims, but not others. That singles out supplemental claims as the only one of the three new AMA review options for which all work is not chargeable as a blanket matter.

The Court should invalidate the VA's treatment of fees for work on supplemental claims as contrary to the governing statute and the statutory scheme more generally. As explained below, the VA's regulation generally requires a supplemental claim to be *denied* before work on the claim can be compensated. *Infra* § II.A. But a

supplemental claim is a review of an earlier claim, and thus it is the notice of the denial of the earlier claim that should trigger the allowance of fees. The VA's refusal to allow all work on supplemental claims to be chargeable after issuance of notice of the decision on the earlier claim for which review is sought runs headlong against the text of the AMA—which allows all such review work to be compensated—flouting ordinary understandings of review along the way. *Infra* § II.B. And as the legislative history reveals, the VA's approach also defies Congress's purpose in allowing fees to be charged after issuance of notice of an initial decision—to ensure that all representation for review under the AMA, no matter the form, be chargeable. *Infra* § II.C. This Court should thus set aside subsection (c)(1)(i) as unlawful, as the AMA unambiguously requires that all work on supplemental claims be capable of compensation.

A. A supplemental claim is one of the three forms of review created by the AMA, and the only one for which the VA prohibits some fees.

The VA's treatment of fees for work on supplemental claims is irreconcilable with the AMA. Before the VA's treatment can be

adequately explained, however, it is necessary to understand the nature of a supplemental claim—specifically, that it is a form of review.

The AMA defines a supplemental claim as "a claim for benefits under laws administered by the Secretary filed by a claimant who had previously filed a claim for the same or similar benefits on the same or similar basis." 38 U.S.C. § 101(36). The AMA provides that filing a supplemental claim is one of the ways a claimant can seek review of the VA's decision on a claim. *Id.* §§ 5104C, 5108; *see, e.g.*, H.R. Rep. No. 115-135, at 2 (the AMA "gives veterans who file an appeal three procedural options," one of which is filing a supplemental claim); Appx1 (describing how the AMA "amended the procedures applicable to administrative review and appeal of VA decisions on claims for benefits, creating a new, modernized review system," including by allowing supplemental claims); Appx13 ("Congress shifted from a single-option appellate system to a multi-option appellate system involving … three options," including "a supplemental claim"); Appx766-778 (the VA's forms for the AMA's three "review options," each of which, including a filing supplemental claim, is described as a "decision review request").

The VA's fee regulation ignores that a supplemental claim seeks review of a decision on an earlier claim. Congress's intent, as the VA itself acknowledges, was to allow all forms of representation for review under the AMA to be capable of compensation. *See* Appx13; *infra* § II.C. And in keeping with that intent, the VA allows all work on the other two forms of review created by the AMA—higher-level review within the agency of original jurisdiction and Board review triggered by filing a notice of disagreement—to be compensated. But the VA changes course when it comes to supplemental claims. Although the regulation provides that fees can be charged for work performed after "notice of an initial decision on the claim or claims" has issued, it does not, as a general matter, consider the initial decision on the earlier claim for which the supplemental claim seeks review the initial decision for purposes of allowing fees to be charged for work on the supplemental claim. 38 C.F.R. § 14.636(c)(1)(i). Instead, the regulation generally requires an initial decision to issue on *the supplemental claim itself* before fees can be charged for work on the supplemental claim. As the regulation states, "[f]or purposes of this paragraph (c)(1)(i), an initial decision on a claim would include … an initial decision *on a*

supplemental claim that was presented after the final adjudication of an earlier claim." *Id.* (emphasis added).

In other words, when it comes to supplemental claims—and only supplemental claims—the regulation generally requires review *to be denied* before work on review can be compensated, contrary to the principle that all forms of review representation should be compensable. That is like allowing, where a statute requires that *all* federal-court appellate representation be compensable, compensation only for representation at the rehearing stage and at the Supreme Court. Such an allowance is none at all.

From this starting point of excluding fees for work on supplemental claims, the regulation creates a limited exception that allows fees for work on a certain type of supplemental claim even if notice of an initial decision has issued on only the earlier claim for which the supplemental claim seeks review. The regulation does so where review of the earlier claim has been "continuously pursued" within one-year intervals via one of the AMA's three review lanes (higher-level review, supplemental claim, or notice of disagreement). In that instance, the regulation considers the supplemental claim "part of

the earlier claim," thus allowing fees to be charged for work post-dating issuance of notice of the initial decision on the earlier claim:

> [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 supplemental claim, 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 of Veterans' Appeals 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.

38 C.F.R. § 14.636(c)(1)(i); *see* Appx12-14.

In short, supplemental claims are treated unequally based on the timing of the pursuit of review, bifurcating them in a way the AMA does not allow. *See* Appx13 ("VA acknowledges that this approach treats supplemental claims differently based on whether they were filed within one year of a prior decision.").

B. The VA's refusal to allow fees to be charged for all work on supplemental claims violates the AMA's text.

The VA's unequal treatment of supplemental claims finds no home in the AMA's text, which allows fees to be charged for all work on

supplemental claims, just as the VA allows fees for all work on higher-level review and a Board appeal.

The statute allows fees to be charged for any representation after "notice of the agency of original jurisdiction's initial decision under section 5104 of this title *with respect to the case*," rather than a specific claim. 38 U.S.C. § 5904(c)(1) (emphasis added). Because it seeks review of a decision on an earlier claim, *see supra* 4-5, 50, a supplemental claim is plainly part of the same "case" as the earlier claim, regardless of when and in what order review is pursued. That is the ordinary understanding of review—such as by appeal, a motion for reconsideration, and a motion for judgment notwithstanding the verdict. *See, e.g.*, *Samsung Elecs. Co. v. Infobridge Pte. Ltd.*, 929 F.3d 1363, 1368 (Fed. Cir. 2019) (an appeal is a "stage of a case"); *Wi-LAN USA, Inc. v. Apple Inc.*, 830 F.3d 1374, 1380-81 (Fed. Cir. 2016) ("reconsideration of summary judgment" part of a "phase of the case"). For that reason, issuance of notice of the initial decision on an earlier claim is issuance of notice of the initial decision "with respect to the

case" of which the supplemental claim is part. This allows fees to be charged for work on the supplemental claim, the vehicle for review.[3]

The provision setting forth the AMA's three review options makes this particularly clear. In line with a commonsense understanding of ordinary review procedures, that provision describes the options, including the filing a supplemental claim, as part of the same "case" as the claim for which review is sought. *See* 38 U.S.C. § 5104C(a), (b). It first states: "[I]n any *case* in which the Secretary renders a decision on a claim, the claimant may take any of the following actions"—requesting higher-level review, filing a supplemental claim, or filing a notice of disagreement—"on or before the date that is one year after the date on which the agency of original jurisdiction issues a decision with respect to that claim." *Id.* § 5104C(a) (emphasis added). It then adds

[3] Notably, reinforcing the above, this Court has indicated that the word "case" in this context should be read liberally: "This court has explained that a 'case' within the meaning of [a predecessor] Section 5904(c) encompasses all potential claims raised by the evidence, applying all relevant laws and regulations, regardless of whether the claim is specifically labeled.'" *Jackson v. Shinseki*, 587 F.3d 1106, 1109 (Fed. Cir. 2009) (emphasis and some quotation marks omitted); *see Carpenter v. Nicholson*, 452 F.3d 1379, 1384 (Fed. Cir. 2006) ("[A] veteran's claim based on a specified disability does not become a different 'case' at each stage of the often lengthy and complex proceedings, including remands as well as reopening[.]").

that a supplemental claim can be filed past the one-year mark, using the same "case" language: "In any *case* in which the Secretary renders a decision on a claim and more than one year has passed since the date on which the agency of original jurisdiction issues a decision with respect to that claim, the claimant may file a supplemental claim under section 5108 of this title." *Id.* § 5104C(b) (emphasis added).

Given this latter provision in particular, there is no sound basis on which the VA can contend that seeking review via a supplemental claim more than one year from a given decision somehow shuttles the supplemental claim into a different case, such that fees for representation cannot be charged. Nor is there any ordinary conception of review whereby waiting a certain amount of time to request review of a judgment jettisons the requested review from the case in which the judgment was entered. The VA has simply invented a temporal case-transferring line—and one that contradicts the AMA.

The VA ignores all this clear statutory language, latching onto two immaterial aspects of the AMA instead. First, that a supplemental claim retains the effective date of the earlier claim for which it seeks review only if the earlier claim has been continuously pursued by AMA

review within one-year intervals. Appx13; *see* 38 U.S.C. § 5110(a)(2)-(3). Second, that when a supplemental claim is filed within one year of "an AOJ decision or a Board decision," the VA "does not have a duty to notify the claimant … of the information or evidence necessary to substantiate the claim," whereas the VA "does have this obligation" if the supplemental claim is filed later. Appx13; *see* 38 U.S.C. § 5103(a)(3). Neither thing takes away from the plain text above: Neither says or suggests that a supplemental claim—whenever filed—is not part of the same case as the earlier claim for which review is sought. *See, e.g.*, 38 U.S.C. § 5104C(b) (supplemental claim filed "more than one year" after decision on the earlier claim for which review is sought is part of the same "case").

Because the AMA's text unambiguously contradicts the VA's regulation, *Chevron* deference is inapplicable, and this Court should hold the regulation unlawful. "[D]eference is appropriate only where Congress has not directly addressed the precise question at issue through the statutory text." *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 665 (2007) (quotation marks omitted); *see, e.g.*, *Gingery v. Dep't of Def.*, 550 F.3d 1347, 1353 (Fed. Cir. 2008).

C. The VA's refusal to allow fees to be charged for all work on supplemental claims contradicts the purpose of the fee statute, as the legislative history highlights.

The legislative history corroborates that all work on supplemental claims is chargeable under the statute, contrary to the VA's regulation. The House Committee Report for the bill from which the AMA derives explains that "the bill would allow veterans to retain the services of attorneys and accredited agents who charge a fee when the agency of original jurisdiction (AOJ) provides notice of *the original decision*. Current law allows attorneys and accredited agent to charge a fee for services rendered after the veteran files a notice of disagreement." H.R. Rep. No. 115-135, at 3 (emphasis added). This statement confirms that, after the VA issues notice of the decision on the earlier claim (the "original decision" opening the door to a supplemental claim or other review), representatives can charge fees for work on the supplemental claim (or other review) seeking a different result.

Important here is context—namely, the purpose of the change referenced in the House Committee Report. That purpose was to allow paid representation for all forms of AMA review. The VA concedes that the change was intended "to allow paid representation with respect to

the claimant's expanded options for seeking review of an initial decision on a claim." Appx13. Before the AMA, the only way to seek review was through the Board, which required filing a notice of disagreement; that filing was thus "the logical entry point for ensuring that paid representation was available with respect to review of AOJ decisions." *Id.* The AMA, however, expanded review options beyond a Board appeal. It allowed review to "be obtained by choosing from [the] three differentiated lanes—filing a Notice of Disagreement, filing a request for higher-level review, and filing a supplemental review." *Id.* "As a result, to permit paid representation *regardless of the form of review*, Congress necessarily had to shift the entry point for paid representation to the AOJ decision itself." *Id.* (emphasis added).

This context explains why, contrary to the regulation, there need be no notice of a decision on a supplemental claim, just notice of a decision on an earlier claim for which review is sought, before work on the supplemental claim is chargeable: Congress wished to allow all review representation to be compensated; a supplemental claim seeks review on an earlier claim; thus, all work on supplemental claims should be chargeable, and the AMA's fee provision mandated this result

through the change referred to the House Committee Report, which made the VA's issuance of notice of the decision on the earlier claim—"the original decision" for which a supplemental claim seeks review—the event allowing fees to be charged. H.R. Rep. No. 115-135, at 3; *see id.* at 2, 10; *supra* 4-6, 50-51.

This Court should not allow Congress's will to be thwarted by the VA's regulation. Allowing fees to be charged for all post-original-decision work on supplemental claims helps ensure that veterans can obtain quality representation after their claims have been denied. Both Congress and this Court have recognized that the availability of fees plays an important role in enabling veterans to secure competent and much-needed assistance in challenging earlier denials of benefits, particularly given the greater complexity of post-denial stages of proceedings. *See, e.g.*, *Carpenter*, 452 F.3d at 1383-84 (noting with respect to earlier legislation "the congressional purpose [of] support[ing] attorney representation after the veteran has first presented his claim unsuccessfully" (citing *Stanley*, 283 F.3d at 1356)); *cf. Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002); *Maggitt v. West*, 202 F.3d 1370, 1378 (Fed. Cir. 2000).

Taking the legislative history into account thus only drives home that the VA's treatment of fees for supplemental claims is contrary to the statutory scheme. The VA's regulation must be set aside.

III. Section 20.202(c)(2), Which Bars A Claimant From Amending A Notice Of Disagreement Upon The Submission Of Evidence Or Testimony, Should Be Invalidated

Section 20.202 governs the filing of a notice of disagreement, the method by which a claimant appeals to the Board. 38 C.F.R. § 20.202; *see* 38 U.S.C. § 7105. The information in the notice governs the form that the appeal takes. 38 C.F.R. § 20.202(c)(1). There are three options: (1) "[d]irect review by the Board" on the record below, without additional evidence or a hearing; (2) "[a] Board hearing," with the "opportunity to submit additional evidence"; and (3) "[a]n opportunity to submit additional evidence without a Board hearing." *Id.* § 20.202(b). Subsection (c)(2) provides that "[a] claimant may modify the information" in the notice to select between these options, but only within a limited timeframe. *Id.* § 20.202(c)(2). It then goes a step further and prohibits amendment when "the appellant has submitted evidence or testimony as described in §§ 20.302 [the provision for an

appeal by Board hearing] and 20.303 [the provision for an appeal with additional evidence but no hearing]." *Id.*

This latter limitation should be set aside because the VA has failed to explain it. Agencies "must examine the relevant data and articulate a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" *Motor Vehicle Mfrs. Ass'n of U.S., Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (quoting *Burlington Truck Lines, Inc. v. United States*, 371 U.S. 156, 168 (1962)); *see Dep't of Commerce v. New York*, 139 S. Ct. 2551, 2576 (2019) ("[A]gencies must pursue their goals reasonably. Reasoned decisionmaking under the Administrative Procedure Act calls for an explanation for agency action."); *see also SKF USA Inc. v. United States*, 630 F.3d 1365, 1373-75 (Fed. Cir. 2011).

The VA did not abide by these dictates. The cutoff for amendment triggered by the submission of evidence and testimony was challenged by commenters, who argued that it would hurt claimants by restricting their ability to switch between options for Board review without having any offsetting virtue. Appx366-367; Appx471; Appx515; *see supra* 12. The VA acknowledged only one of these comments, noting that a

"commenter expressed concern with the policy of disallowing a change in dockets if the veteran had already submitted evidence with the Notice of Disagreement." Appx16. The VA continued: "The commenter expressed that this change would not provide an unfair advantage to the veteran, but would allow a veteran whose circumstances had changed to request a hearing before the Board." *Id.* The VA then left the comment hanging without response.

The VA instead responded to comments on its proposed *time limitation* on amendment, stating that requests for an unlimited amount of time to amend would "mimic … the legacy system" and thereby "preclude the efficiencies built into the new system." Appx16. The VA identified two specific issues. First, an unlimited time to amend "would create an unfair result for other veterans," who might have to wait "if some veterans are able to enter the direct docket ahead of other veterans who have been waiting on that docket." *Id.* Second, an unlimited time to amend would "make it difficult for [the] VA to provide accurate data [about average processing time on the three dockets] to all veterans, effectively taking away their ability to choose the best path." *Id.* At no point did the VA explain how either rationale

could, let alone did, factor into its decision to bar amendment once a claimant has submitted evidence or testimony.

What the VA did say provides no adequate explanation of its decision to bar amendment upon submission of evidence or testimony. At least where the submission of evidence is concerned, there is no apparent reason why allowing a claimant to switch options after submission would necessarily create any delay or other meaningful inefficiency or unfairness. For example, if a claimant originally opted to submit additional evidence without a Board hearing, subsequently submitted evidence, then decided he would prefer a Board hearing instead so that he could also submit testimony, allowing him to switch after submission should be unproblematic—both new evidence and testimony are considered in appeals with a hearing. *See* 38 U.S.C. § 7113(b); 38 C.F.R. § 20.302(a). Similarly, if a claimant originally opted to submit additional evidence without a Board hearing, subsequently submitted evidence, then decided he would prefer his appeal decided without the additional evidence so that he could secure a faster disposition, his prior submission of evidence could simply be ignored. *See* 38 U.S.C. § 7113(a); 38 C.F.R. § 20.301.

The VA had an obligation to the public—and this Court—to explain why these sorts of amendments should not be permissible. "The reasoned explanation requirement of administrative law, after all, is meant to ensure that agencies offer genuine justifications for important decisions, reasons that can be scrutinized by courts and the interested public." *New York*, 139 S. Ct. at 2575-76; *see State Farm*, 463 U.S. 29 at 43 ("Normally, an agency rule would be arbitrary and capricious if the agency has … entirely failed to consider an important aspect of the problem[.]"); *id.* at 48 ("There are no findings and no analysis here to justify the choice made, no indication of the basis on which the agency exercised its expert discretion. We are not prepared to and the Administrative Procedure Act will not permit us to accept such practice." (alterations and quotation marks omitted)).

All one can do here is speculate why the VA decided to prohibit amendment after the submission of evidence and testimony. That is not enough. To ensure that the agency engaged in reasoned decisionmaking, this Court should invalidate the VA's bar to amendment and remand for consideration and explanation of whether and how the bar should be imposed. *See, e.g.*, *Kidney Ctr. of Hollywood*

v. Shalala, 133 F.3d 78, 80, 88 (D.C. Cir. 1998) (vacating rule and remanding for more adequate explanation).

CONCLUSION

This Court should hold unlawful and set aside: (1) 38 C.F.R. 3.105(a)(1)(iv), to the extent it excludes CUE claims based on changes in judicial interpretation, as the VA's final rule claims; (2) 38 C.F.R. § 14.636(c)(1)(i)'s failure to provide that all work on a supplemental claims is chargeable after the issuance of notice of the decision on the underlying claim; and (3) 38 C.F.R. § 20.202(c)(2)'s bar to amendment of a notice of disagreement based on submission of evidence or testimony.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on August 19, 2019.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Fed. Cir. R. 32(a) because this brief contains 13,542 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

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