No. 2020-1479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS H. BUFFINGTON,

Plaintiff-Appellant,

v.

ROBERT L. WILKIE,
Secretary of Veterans Affairs,

Defendant-Appellee.

Appeal from the U.S. Court of Appeals for Veterans Claims
Case No. 17-4382; Judge William S. Greenberg (dissenting),
Judge Amanda L. Meredith, Judge Joseph L. Falvey, Jr.

BRIEF OF THE NEW CIVIL LIBERTIES ALLIANCE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANT, URGING REVERSAL

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July 13, 2020

CERTIFICATE OF INTEREST

Counsel for *amicus curiae* New Civil Liberties Alliance certifies the following:

1. **The full name of every party or amicus represented by me is:**

   New Civil Liberties Alliance

2. **The name of the real party in interest represented by me is:**

   New Civil Liberties Alliance

3. **All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties or *amicus curiae* represented by me are listed below:**

   None

4. **The name of all law firms and the partners and 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 are:**

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INTERESTS OF *AMICUS CURIAE*

The New Civil Liberties Alliance (NCLA) is a nonpartisan, nonprofit organization devoted to defending constitutional freedoms from violations by the administrative state.[1] The "civil liberties" of the organization's name include rights at least as old as the U.S. Constitution itself, such as jury trial, due process of law, the right to be tried in front of an impartial and independent judge, and the right to live under laws made by the nation's elected lawmakers through constitutionally prescribed channels. Yet these self-same rights are also very contemporary—and in dire need of renewed vindication—precisely because legislatures, executive branch officials, administrative agencies, and even sometimes the courts have neglected them for so long.

NCLA aims to defend civil liberties—primarily by asserting constitutional constraints on the administrative state. Although Americans still enjoy the shell of their Republic, there has developed within it a very different sort of government—a type, in fact, that the U.S. Constitution was designed to prevent. This unconstitutional administrative state within federal and state governments is the focus of NCLA's concern.

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[1] NCLA states that no counsel for a party authored this brief in whole or in part; and that no person or entity, other than NCLA and its counsel, made a monetary contribution intended to fund the preparation and submission of this brief. All parties have consented to the filing of the brief.

NCLA is particularly disturbed by the lower court's decision not to exercise its independent judgment regarding the best reading of the statutes at issue in this case but rather to defer to the interpretation espoused by the U.S. Department of Veterans Affairs (VA)—one of the parties to this proceeding. The decision effectively nullifies the pro-veteran canon, a well-established statutory-construction rule that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). By deferring to the VA's interpretation under *Chevron, U.S.A., Inc. v. Natural Resources Defense Council*, 467 U.S. 837 (1984), the lower court abandoned its duty of independent judgment and biased its ruling in favor of one of the parties—the most powerful of parties—in violation of the Fifth Amendment's Due Process Clause.

Appellant Thomas Buffington argues that he should prevail under *Chevron* Step One: 38 U.S.C. §§ 5304(c) & 1110 unambiguously entitle him to reinstatement of benefits effective June 2004. NCLA fully agrees with that argument. NCLA writes separately to focus on *Chevron* "Step Zero": the determination of *Chevron*'s applicability. NCLA submits that *Chevron* is inapplicable when, as here, the pro-veteran canon pulls in the opposite direction. More fundamentally, NCLA believes that *Chevron* deference is inconsistent with basic separation-of-powers principles. It urges the Court to use this case as an

opportunity to fulfill its duty "to say what the law is" and abjure deference to agency interpretation of statutes—except to the extent that it deems such interpretations to be persuasive.

STATEMENT OF THE CASE

Buffington served on active duty in the U.S. Air Force from September 1992 to May 2000 and in the Air National Guard during three additional periods: July 2003 to June 2004; November 2004 to July 2005; and February to May 2016. In March 2002, the VA determined that he suffered from a service-connected disability (tinnitus), with a 10% disability rating. The VA has never disputed that from 2002 onward, Buffington continued to suffer from his service-connected disability and that the proper disability rating was and is 10%.

A federal statute states that a veteran may not be paid disability benefits "for any period for which such person receives active service pay." 38 U.S.C. § 5304(c). In light of that provision, Buffington informed the VA in July 2003 of his decision to return to active duty and his election to receive active-duty pay in lieu of disability benefits. In January 2009, he applied for reinstatement of his disability benefits effective June 2004—excepting his period of active-duty service in the Air National Guard between November 2004 and July 2005.

In August 2009, the VA reinstated Buffington's benefits, finding that he continued to suffer a 10% disability. But the VA established a reinstatement date of February 1, 2008—nearly four years after the date requested by Buffington. The VA supported its delayed reinstatement date by pointing to a VA regulation (38 C.F.R. § 3.654(b)(2)) that precludes payment resumption for any period more than one year before a veteran files a claim for reinstatement.

Following affirmance of that decision by the Board of Veterans' Appeals, Buffington appealed to the U.S. Court of Appeals for Veterans Claims (the "Veterans Court"). He contended that federal law requires that veterans be paid compensation for service-connected disabilities at all times other than when they are on active service and thus that the payment limitations imposed by § 3.654(b)(2) are inconsistent with federal law. The Veterans Court rejected that contention, applying the *Chevron*-deference regime to the federal statutes in question.

Under *Chevron* Step One, the Court held that the statutes were ambiguous regarding the question at issue: "[w]hether the [VA] may predicate the effective date for the recommencement of benefits on the date of the veteran's claim." *Buffington v. Wilkie*, 31 Vet. App. 293, 301 (2019), slip op. at 8. In light of that holding, the Court proceeded to *Chevron* Step Two and ruled that deference to the

VA's statutory interpretation was warranted because that interpretation was not "'arbitrary, capricious, or manifestly contrary to' section 5304(c)." Slip op. at 12 (quoting *Chevron*, 467 U.S. at 844). The Court devoted little or no attention to *Chevron* Step Zero: a determination of whether an agency's interpretation is the sort of administrative pronouncement for which *Chevron* provides the governing framework. *See United States v. Mead Corp.*, 533 U.S. 218 (2001).

Judge Greenberg dissented, stating, "I would stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford [the veteran] its best independent judgment of the law's meaning." Slip op. at 17 (quoting *Kisor v. Wilkie*, 139 S. Ct. 2400, 2426 (2019) (Gorsuch, J., concurring in the judgment)). Applying his independent judgment without resort to any deference doctrines, Judge Greenberg concluded that the VA exceeded its statutory authority when it adopted a rule that limits veterans' rights to collect disability benefits for which they are otherwise eligible. *Ibid*.

SUMMARY OF ARGUMENT

NCLA agrees with Buffington that federal law *requires* the VA to pay disability benefits to veterans for any post-discharge period during which they are not in active service (subject to limited exceptions not applicable here). 38 U.S.C.

§ 1110. The Veterans Court should thus have ended its analysis of Buffington's claims no later than at *Chevron* Step One. As Judge Greenberg explained in his dissenting opinion, federal law unambiguously requires the VA to reinstate Buffington's service-connected disability benefits effective June 2004—when he left active service with the Air National Guard. Slip op. at 17.

But there is no reason for this Court to proceed even that far with a *Chevron* analysis. As the Supreme Court recently explained, courts must initially consider whether the reasons for deference exist and whether "countervailing reasons outweigh them." *Kisor*, 139 S. Ct. at 2414. The Court stated that deference doctrines are based on a presumption that, in many instances, Congress intends to delegate interpretive authority to administrative agencies. *Id.* at 2417. But that presumption "often" is unwarranted—as when the agency's interpretation does not "implicate its substantive expertise"—and in those instances the *Chevron* deference regime is wholly inapplicable. *Id.* at 2417, 2418; *Mead*, 533 U.S. at 236.[2]

There is simply no reason to "presume" that Congress intended to delegate to the VA authority to adopt a rule withholding otherwise-available disability

[2] This preliminary analysis of whether *Chevron* applies is often referred to as *Chevron* Step Zero. *See, e.g.,* Cass R. Sunstein, Chevron *Step Zero*, 92 U. Va. L. Rev. 187 (2006).

benefits depending on the date on which a veteran seeks reinstatement of benefits. On the contrary, there is a well established canon of statutory construction that ambiguous federal statutes are to be interpreted in favor of veterans—a canon based on a "presum[ption]" that Congress intends that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hospital*, 502 U.S. 215, 221-22 n.9 (1991).

Congress cannot be presumed to have intended courts *both* to construe such statutes in favor of veterans *and* to defer to an agency interpretation that disfavors veterans. The Court need not give preference to the pro-veteran canon over *Chevron* deference in order to reverse the judgment below. It need only determine that the reasons for granting *Chevron* deference do not exist when, as here, there is no reason to presume Congress intended such deference—and then to hold (as Judge Greenberg urged in dissent below) that a court should "afford [a veteran seeking disability benefits] its best independent judgment of the law's meaning." Slip op. at 17.

In *Procopio v. Wilkie*, 913 F.3d 1371, 1380 (Fed. Cir. 2019) (*en banc*), the Court stated that it had "no reason" to address the interplay between the pro-veteran canon and the *Chevron* deference doctrine. The Court explained that the meaning of the disputed statute was "clear" (and ran against the VA's proffered

interpretation) and thus that the case could be decided in the veteran's favor under *Chevron* Step One. *Procopio* thus demonstrates that the Court considers the issue of how to resolve the tension between these conflicting canons to be an open question—notwithstanding statements bearing on the issue from numerous panel decisions over the past several decades. NCLA submits that this case provides an excellent vehicle for addressing the issue it avoided in *Procopio*.

Quite apart from the pro-veteran canon, there are sound reasons for declining to apply *Chevron* deference in this or any other case. The *Chevron* doctrine has been subject to increasing criticism in recent years from both judges and legal commentators. They have pointed out that *Chevron* deference compels judges to abandon their duty of independent judgment, thereby undermining separation-of-powers principles. *See, e.g., Baldwin v. United States*, 140 S. Ct. 690 (2020) (Thomas, J., dissenting from denial of *certiorari*); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1153 (10th Cir. 2016) (Gorsuch, J., concurring). It has been more than four years since the Supreme Court has relied on *Chevron* deference to uphold an agency's interpretation of a federal statute.

Moreover, when (as is always true in veterans' disability-claims cases) the government is a party to the case, *Chevron* requires judges to favor the government's interpretation. That is, it asks judges to be systematically biased in

favor of one of the parties—the most powerful of parties. Such systematic bias in court proceedings violates the Fifth Amendment's Due Process Clause.

The Court should overturn the decision below. The Veterans Court's invocation of *Chevron* deference was unwarranted in light of the conflicting presumption that Congress intends any ambiguities in §§ 1110 and 5304(c) to be resolved in favor of Buffington, the veteran. NCLA urges the Court to go farther and, in the course of its opinion rejecting *Chevron* deference, to note the constitutionally problematic nature of that doctrine. NCLA urges the Court to join with Judge Greenberg in calling for an end to "this business of making up excuses for judges to abdicate their job of interpreting the law." Slip op. at 17.

ARGUMENT

I. THE LOWER COURT'S APPLICATION OF *CHEVRON* DEFERENCE IS INCONSISTENT WITH THE PRO-VETERAN CANON, WHICH PROVIDES THAT INTERPRETIVE DOUBT IS TO BE RESOLVED IN THE VETERAN'S FAVOR

Rather than exercising its own independent judgment about the meaning of the federal statutes at issue in this case, the Veterans Court deferred to the interpretation espoused by the VA, a party to these proceedings. The Veterans Court engaged in its *Chevron* analysis without first pausing to consider whether the *Chevron*-deference regime even applies here, despite the Supreme Court's recent admonition that it "often" does not apply to agency pronouncements.

Kisor, 139 S. Ct. at 2418. The court also failed to consider the pro-veteran canon of statutory interpretation, which requires ambiguous veterans-benefits statutes to be interpreted in favor of veterans. *Brown v. Gardner*, 513 U.S. at 118. In light of that canon, which in this case counsels against the VA's statutory interpretation, the Veterans Court should not have engaged in a *Chevron* analysis but instead should have employed traditional rules of statutory interpretation to discern the meaning of the relevant statutes.

A. *Chevron* Is Based on a Presumed Congressional Intent to Delegate Interpretive Authority to Federal Agencies

Chevron premises its deference doctrine on a presumption that Congress, when it delegates to an agency authority to administer a statute, also often intends to delegate authority to interpret ambiguous statutory provisions. For example, *Mead* explained that *Chevron* deference is appropriate "when it appears that Congress delegated authority to the agency generally to make rules carrying the force of law, and that the agency interpretation claiming deference was promulgated in the exercise of that authority." *Mead*, 533 U.S. at 226-27. In other words, *Chevron* is based on presumed delegated interpretive authority, not on a delegation of authority for the agency to make its own laws.

Agencies charged with administering a statute necessarily make all sorts of interpretative choices. But not all those choices are the types of decisions to which the *Chevron* deference regime applies. Under current law, the first question that a reviewing court must answer is: did Congress intend *Chevron* deference to apply to the interpretive decision at issue? *Mead* supplies a nonexclusive list of factors that courts can consider in resolving this foundational, "Step Zero" question. *Mead*, 533 U.S. at 230-32.

If an agency interpretation is the sort to which *Chevron* applies, the Supreme Court has established a two-step process for determining whether to defer to that interpretation:

> First, applying the ordinary tools of statutory construction, the court must determine "whether Congress has directly spoken to the precise question at issue. If the intent 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 842-843. But "if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute." *Id.*, at 843.

City of Arlington v. FCC, 569 U.S. 290, 296 (2013).

The Veterans Court skipped the initial inquiry entirely—whether the VA's interpretation of 38 U.S.C. §§ 5304(c) & 1110 is of the sort to which Congress intended the courts to defer. It began by determining that the statutes were

ambiguous regarding whether a veteran who is indisputably qualified to receive disability benefits may nonetheless be denied a portion of those benefits based on his delay in seeking their reinstatement. Then it held that 38 C.F.R. § 3.654(b)(2)'s resolution of the ambiguity—a "decision to predicate the effective date of recommencement of benefits on the date of application therefor"—was not arbitrary or capricious. Slip op. at 12.[3]

[3] NCLA's brief focuses primarily on why *Chevron* deference is not even applicable to this case. NCLA nonetheless agrees with Buffington that he should prevail at *Chevron* Step One. Section 1110 speaks of veterans' "entitlement" to benefits for service-connected disabilities: "the United States *will* pay to any veteran thus disabled ... compensation as provided in this subchapter." (Emphasis added.) Section 5304(c) creates an exception: no compensation will be paid to a veteran "for any period for which [the veteran] receives active service pay." The Veterans Court noted that the word "only" does not appear in § 5304 and inferred from that omission that § 5304(c) could be interpreted as authorizing nonpayment of benefits for periods other than while the veteran is receiving active service pay. Slip op. 8. That argument makes little sense. Section 1110 creates a mandatory-payment rule, and both it and § 5304(c) list several very specific exceptions to the mandatory rule. There is only one plausible interpretation of the two sections when read together: the enumerated exceptions are the *only* exceptions to the payment mandate. The VA cannot be expected to recommence payment of benefits until a veteran requests that it do so. But once Buffington submitted his request in 2009 and the VA conceded that Buffington's disability rating for tinnitus remained 10% at all times, federal law unambiguously required the VA to recommence disability payments effective June 2004 (when Buffington left active service).

Had the Veterans Court undertaken the requisite *Chevron* Step Zero analysis, it would have realized that the interpretive decision at issue here is not the sort of decision to which Congress intends that federal courts should defer.

B. *Chevron* Is Inapplicable Whenever, as Here, Other Canons Undermine the Presumption of Congressional Intent

In determining *Chevron*'s applicability, the Supreme Court frequently has simply *presumed* that Congress has delegated interpretive authority to the agency that administers a federal statute (and thus that agency interpretations are entitled to judicial deference)—regardless whether there is evidence to support that presumption. But the Court recently stressed in *Kisor* that the presumption of interpretive authority and judicial deference "often" are not warranted. *Kisor*, 139 S. Ct. at 2418. For example, to warrant deference, "the agency's interpretation must in some way implicate its substantive expertise." *Id.* at 2417. That admonition significantly undercuts the VA's deference claim, because § 3.654(b)(2) is unrelated to the VA's "substantive expertise."[4] More importantly

[4] The only apparent purpose of the regulation is to give veterans an incentive to apply for reinstatement in a more timely manner. But that purpose is hardly one that implicates the VA's "substantive expertise." The regulation cannot be justified as a means of weeding out questionable reinstatement claims because there is no reason to believe that late-filed claims are inherently questionable. Nor has the VA ever questioned Buffington's disability. The VA admits that Buffington has maintained the 10% disability rating he was first awarded in 2002 and that he would have received a June 2004 effective date had he applied for

for purposes of this case, a presumption that Congress intended that the VA's interpretations should receive deference from the courts is undercut by a conflicting presumption: the pro-veteran canon.

1. The Pro-Veteran Canon Is Applicable Here and Eliminates Any Presumption that Congress Intended that the VA's Statutory Interpretations Should Receive Judicial Deference

The Supreme Court has recognized a pro-veteran canon of statutory construction for nearly 80 years. It originated as an expression of solicitude toward military personnel who "drop their own affairs to take up the burden of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

Under the pro-veteran canon, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). In 2011, the Supreme Court said that it had "long applied" the canon, which states that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011).[5]

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reinstatement of his disability benefits by June 2005.

[5] *Henderson* involved a statute that required a notice of appeal to the Veterans Court be filed within 120 days of an adverse decision from the Board of Veterans' Appeals. The Court overturned a VA determination that the statute was jurisdictional and thus barred the veteran's appeal as untimely. *Henderson* held that the pro-veteran canon precluded that harsh interpretation of the appeal statute. 562 U.S. at 441.

Importantly, the Court has explicitly tied its recognition of the pro-veteran canon to congressional intent. It explained in *King* that because Congress is aware of the pro-veteran canon, the Court "presum[es]" that Congress drafts veterans-specific statutes with the canon in mind—and thus that Congress intends the canon to be applied when courts interpret those statutes. *King*, 502 U.S. at 221-22 n.9. The pro-veteran canon is thus on equal footing with *Chevron* deference; both are based on a presumption that Congress intends them to apply in specified situations, even in the absence of evidence that Congress actually harbored such an intent.[6]

The pro-veteran canon does not apply to every lawsuit involving a veteran's claim for benefits. Adopting an interpretation of an ambiguous statute for the purpose of benefitting the litigant before the court might well end up hurting

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[6] There is, in fact, considerable evidence of congressional solicitude toward veterans, evidence that supports the presumption that Congress intends that veterans-benefits statutes be liberally construed in favor of veterans. As *Henderson* explained, veterans (unlike most civil litigants) do not face statutes of limitations, and the first rounds of adjudication with the VA are "informal and nonadversarial." 562 U.S. at 440. The VA is required to assist veterans in collecting evidence to support their claims, and "must give the veteran the benefit of any doubt" when weighing evidence. *Id.* While a veteran who loses before the Board of Veterans Appeals may appeal to the Veterans Court and then into the federal court system, a victory by the veteran before the Board is final. *Id.* at 440-41. And even after exhausting the appeals process, veterans are entitled to reopen their claim by presenting "new and material evidence." *Id.* at 441.

veterans or their dependents in other cases. *See, e.g., Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013). So the canon only applies when the construction favored by the veteran before the court is likely also to assist veterans in the vast majority of cases in which similar issues may arise. But that limitation is inapplicable here. Construing 38 U.S.C. §§ 1101 and 5304(c) in the manner advocated by Buffington will favor all veterans by ensuring that they can recover all past-due amounts after seeking reinstatement of benefits.

There is a strong argument that the pro-veteran canon trumps *Chevron* deference—that is, in a case in which the pro-veteran canon applies, courts should resolve any statutory ambiguities by adopting a plausible interpretation that favors the veteran and never defer to an agency interpretation that cuts the other way. *See, e.g.*, Chadwick J. Harper, *Give Veterans the Benefit of the Doubt:* Chevron, Auer, *and the Veteran's Canon*, 42 Harv. J. of Law and Pub. Pol. 931 (2019).[7]

[7] The Supreme Court, in describing Step One of the *Chevron* framework, stated, "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Given its lengthy pedigree, the pro-veterans canon fits within *Chevron*'s definition of a "traditional tool of statutory construction." And if the pro-veteran canon is applied at *Chevron* Step One to resolve a statutory ambiguity, courts would never have occasion to defer to a contrary agency interpretation of that statute. *See* Harper at 954-61. Harper also notes that *Gardner* appears to confirm the supremacy of the pro-veteran canon over *Chevron*. *Gardner* cited the pro-veteran canon to strike down a VA regulation interpreting the statute at issue; the Court rejected the

In any event, the Court should overturn the Veterans Court's application of *Chevron* deference *regardless* whether it accepts the veteran-trumps-*Chevron* argument. Once one realizes that both the pro-veteran canon and *Chevron* are seemingly applicable here and pull in opposite directions, and yet both are based on *presumptions* regarding what Congress intended when it adopted the disputed statute (without any need for evidence regarding Congress's *actual* intent), the most plausible solution is to apply neither interpretive rule and instead to afford the parties the Court's best independent judgment of the meaning of §§ 5304(c) & 1110. Congress cannot be presumed to have intended courts *both* to construe such statutes in favor of veterans *and* to defer to an agency interpretation that disfavors veterans. In the absence of *actual* evidence that Congress intended to delegate to the VA authority to interpret ambiguities in those statutes, the reasons for granting *Chevron* deference do not exist in this case.

2. The Pro-Veteran Canon Is Akin to the Indian Canon and the Rule of Lenity, Two Rules of Statutory Construction that also Supersede *Chevron* Deference

The pro-veteran canon is similar to other traditional rules of statutory construction that courts have invoked as exceptions to *Chevron* deference. That

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government's effort to apply *Chevron* deference, apparently on the theory that no ambiguity remained in the statute following application of the pro-veteran canon at *Chevron* Step One. Harper at 946-47.

similarity provides additional support for a holding that *Chevron* deference is inapplicable to this case.

As Judge O'Malley has noted, the pro-veteran canon is "analogous to the substantive canon of construction applied in the context of Indian law, which instructs that 'statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit.'" *Procopio*, 913 F.3d at 1386 (O'Malley, J., concurring). Several appeals courts have determined that "the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1462 (10th Cir. 1997); *accord, Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001). Both the Indian canon and the pro-veteran canon reflect the unique relationships between particular groups and the government and the duties owed by the government to those groups.

Similarly, the Supreme Court has rejected application of *Chevron* deference to disputes over the interpretation of criminal statutes. *See Abramski v. United States*, 573 U.S. 169, 191 (2014) (stating that "criminal laws are for the courts, not for the Government, to construe"); *United States v. Apel*, 571 U.S. 359, 369 (2014) (stating that "we have never held that the government's reading of a criminal statue is entitled to any deference"). That rejection is grounded in the rule of

lenity, a canon of statutory construction (based on presumptions regarding congressional intent) holding that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Skilling v. United States*, 561 U.S. 358, 410 (2010). Rule-of-lenity case law provides additional support for the proposition that *Chevron* is inapplicable when, as here, competing canons undercut the congressional-intent presumption undergirding *Chevron*.

C. How to Resolve the Conflict Between the Pro-Veteran Canon and *Chevron* Deference Is an Open Question in this Court

The Court recently issued an *en banc* decision indicating that the question of how to resolve the tension between the pro-veteran canon and *Chevron* deference is an open question within the circuit. NCLA submits that this case provides an excellent vehicle for addressing and finally resolving the question.

Procopio v. Wilkie, 913 F.3d 1371 (Fed. Cir. 2019) (*en banc*), involved a claim for disability benefits filed by Alfred Procopio, a "blue Navy" veteran who served on a ship off the coast of Vietnam during the Vietnam War. He asserted that his prostate cancer was service-connected: it was caused by exposure to the herbicide Agent Orange during his Vietnam service. A federal statute, 38 U.S.C. § 1116, creates a presumption of service-connection for prostate cancer and other specified diseases incurred by veterans who "served in the Republic of Vietnam."

The VA issued a regulation that interpreted § 1116 in a manner that denied Procopio the presumption of service-connection. It responded to Procopio's claim by invoking *Chevron* deference. The Court *sua sponte* ordered that the case be heard *en banc* and directed the parties to address, "What role, if any, does the pro-claimant canon play in this analysis?" 913 F.3d at 1374.

The Court ultimately held, at *Chevron* Step One, that § 1116 unambiguously includes "blue Navy" veterans within the definition of those entitled to the service-connection presumption. *Id.* at 1381. It added, "The parties and amici have differing views on the role the pro-veteran canon should play in this analysis. ... Given our conclusion that the intent of Congress is clear from the text of § 1116—and that clear intent favors veterans—we have no reason to reach this issue." *Id.* at 1380.

The Court's decision to request briefing on the issue and its disposition of *Procopio* make clear that it considers the relative strengths of the pro-veteran canon and *Chevron* deference to be an open issue within the Circuit. True, several older panel decisions include language suggesting that *Chevron* deference takes precedence over the pro-veteran canon.[8] But Federal Circuit decisions in this area have been all over the board; many panels have invoked either *Chevron* deference

[8] *See, e.g., Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003).

(to rule in favor of the VA's statutory interpretation) or the pro-veteran canon (to rule against that interpretation) without even mentioning the clearly relevant competing canon. *See* James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. Mass. L. Rev. 388, 399-402 (2014). *Procopio* demonstrates that the *en banc* Court deems the issue unresolved and in need of resolution.

II. CHEVRON DEFERENCE SHOULD BE ABANDONED ALTOGETHER BECAUSE IT RAISES SERIOUS CONSTITUTIONAL CONCERNS

Quite apart from the pro-veteran canon, there are sound reasons for declining to apply *Chevron* deference in this or any other case. The *Chevron* doctrine has been subject to increasing criticism in recent years from both judges and legal commentators. Those criticisms are well founded; *Chevron* is inconsistent with separation-of-powers and due-process principles embedded in the Constitution.

A. Agency Deference Violates Article III by Requiring Judges to Abandon Their Duty of Independent Judgment

Chief Justice John Marshall famously stated that it "emphatically" is the constitutional "duty" of federal judges "to say what the law is." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177 (1803). But judges who apply *Chevron*

deference are abandoning that duty by issuing judgments that assign controlling weight to a non-judicial entity's interpretation of a statute.

To be clear, there is nothing wrong or constitutionally problematic when a court considers an agency's interpretation and gives it weight according to its persuasiveness. *See, e.g., Tetra Tech EC, Inc. v. Wisconsin Dep't of Revenue*, 914 N.W.2d 21, 53 (Wis. 2018) (noting that "administrative agencies can sometimes bring unique insights to the matters for which they are responsible" but that "does not mean we should defer to them"). "'[D]ue weight' means 'respectful, appropriate consideration to the agency's views' while the court exercises its independent judgment in deciding questions of law"—due weight "is a matter of persuasion, not deference." *Id.*

But here, the Veterans Court held that the VA's interpretation of § 5304(c) is controlling unless the statute has spoken to "the precise question" at issue or the VA's interpretation is "arbitrary [or] capricious"—regardless whether the court arrives at a different interpretation. Several state Supreme Courts have concluded that such abdication of the judicial power violates separation-of-powers provisions in their state constitutions. *Tetra Tech*, 914 N.W.2d at 50 (concluding that granting deference to an administrative agency's statutory interpretation "deprives the non-government party of an independent and impartial tribunal," as required

by the Wisconsin Constitution); *King v. Mississippi Military Dep't*, 245 So.3d 404, 408 (Miss. 2018) (stating, "[I]n deciding no longer to give deference to agency interpretations, we step fully into the role the Constitution of 1890 provides for the courts and the courts alone, to interpret statutes.").

B. Agency Deference Violates Due Process by Requiring Judges to Bias Their Decisions in Favor of One Party

A related and more serious problem with agency deference is that it requires the judiciary to display systematic bias in favor of agencies whenever they appear as litigants. *See generally* Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016). It is bad enough that a court would abandon its duty of independent judgment by deferring to a non-judicial entity's interpretation of a statute. But for a court to abandon its independent judgment in a manner that favors an actual *litigant* before the court violates due process.

The Supreme Court has held that even the *appearance* of potential bias toward a litigant violates the Due Process Clause. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 886-87 (2009). *See also Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1734 (2018) (holding that agency and judicial proceedings are required to provide "neutral and respectful consideration" of a litigant's views free from hostility or bias); *id*. at 1734 (Kagan,

J., concurring) (agreeing that the Constitution forbids agency or judicial proceedings that are "infected by ... bias").

Whenever *Chevron* is applied in a case in which the government is a party, the courts are denying due process by showing favoritism to the government's interpretation of the law. *See Tetra Tech*, 914 N.W.2d at 50 (prohibiting *Chevron* deference in the Wisconsin state courts because its "systematic favor deprives the non-governmental party of an independent and impartial tribunal."). Nonetheless, under agency-deference doctrines, otherwise scrupulous judges who are sworn to administer justice impartially somehow feel compelled to remove the judicial blindfold and tip the scales in favor of the government's position. This practice must stop.

The bias displayed by the Veterans Court in this case is particularly problematic because it its an Article I court—that is, it is part of the Executive Branch. The effective result: Buffington's interpretation of applicable law was rejected because one agency within the Executive Branch determined that deference must be accorded to the conflicting interpretation of another agency within the Executive Branch. This Court should not become complicit in biased decision-making of that nature.

Of course, *Chevron* might be defended on the ground that there are other canons of construction that purport to stack the deck in favor of a litigant appearing in court *against* the government—*e.g.*, the pro-veteran canon, the rule of lenity, and the Indian canon. But in each of those instances, the opposing litigant is simply asking the court to resolve an ambiguous statute against the party that drafted it. By resolving ambiguities against government drafters, these canons of construction seek to encourage clear and precise drafting of veterans-benefits statutes, criminal laws, and treaties/statutes affecting Indians and tribes. They therefore cannot explain or excuse a practice that weights the scales *in favor* of a government litigant—the most powerful of all parties to appear before a court—and that commends systematic bias in favor of the government's preferred interpretations of federal statutes.

C. The Propriety of *Chevron* Deference Is Being Questioned with Increasing Frequency by Federal Courts

The U.S. Supreme Court has not formally abandoned its commitment to the *Chevron* deference regime. But the Court's recent actions as well as statements by several Supreme Court justices suggests that its commitment to *Chevron* is waning.

Most notably, the number of decisions in which the Court has relied on *Chevron* deference to uphold an agency's interpretation of a federal statute has declined dramatically in the past decade. It has issued no such decision in more than four years.

Moreover, the most recent such decision, *Cuozzo Speed Technologies, LLC v. Lee*, 136 S. Ct. 2131 (2016), involved a statute that expressly delegated to an administrative agency authority to interpret the relevant statute. *See* 136 S. Ct. at 2142 (noting that the statute "expressly" authorized the Patent Office to issue regulations "governing inter partes review" and that the challenged Patent Office rule was "a rule that governs inter partes review"). In other recent cases in which an administrative agency's interpretation of a federal statute was at issue, the Court interpreted the statute using traditional tools of statutory construction—and rejected the agency's interpretation without ever citing *Chevron*. *See, e.g., Babb v. Wilkie*, 140 S. Ct. 1168 (2020).

Individual Supreme Court justices have not hesitated to criticize deference doctrines. Justice Thomas has opined that "*Chevron* compels judges to abdicate the judicial power without constitutional sanction." *Baldwin*, 140 S. Ct. at 691 (Thomas, J., dissenting from the denial of certiorari). He warned that "this apparent abdication by the Judiciary and usurpation by the Executive is not a

harmless transfer of power," noting that "*Chevron* deference undermines the ability of the Judiciary to perform its checking function on the other branches." *Id.* at 691-92.

Then-Judge Gorsuch described *Chevron* as "no less than a judge-made doctrine for the abdication of the judicial duty." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1152 (10th Cir. 2016) (Gorsuch, J., concurring). He stated that *Chevron* concentrates excessive power in the Executive Branch, and cited James Madison's warning that "The accumulation of all powers, legislative, executive, and judiciary, in the same hands ... may justly be pronounced the very definition of tyranny." *Id.* at 1155 (quoting *The Federalist* No. 47 (James Madison)).

Last year, the Court cut back considerably on the scope of a related deference doctrine known as *Auer* deference, which sometimes requires courts to defer to an administrative agency's interpretation of its own regulations. *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), vacating and remanding *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017). Four concurring justices would have gone even farther and overruled *Auer* deference altogether. *Id.* at 2425 (Gorsuch, J., concurring in the judgment).

NCLA urges the Court to go beyond simply overturning the Veterans Court's invocation of *Chevron* deference. NCLA urges the Court, in the course of

its opinion, to note the constitutionally problematic nature of the *Chevron* doctrine. NCLA urges the Court to join with Judge Greenberg in calling for an end to "this business of making up excuses for judges to abdicate their job of interpreting the law." Slip op. at 17 (quoting *Kisor*, 139 S. Ct. at 2426).

CONCLUSION

The decision below should be reversed.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I am an attorney for *amicus curiae* New Civil Liberties Alliance. Pursuant to Fed.R.App.P. 32(a)(7)(C), I hereby certify that the foregoing brief of NCLA is in 14-point, proportionately spaced Times New Roman type. According to the word processing system used to prepare this brief (WordPerfect X8), the word count of the brief is 6,243, not including the certificate of interest, table of contents, table of authorities, certificate of service, and this certificate of compliance.

/s/ Richard A. Samp
Richard A. Samp

CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July, 2020, I electronically filed the brief of *amicus curiae* New Civil Liberties Alliance with the Clerk of the Court for the U.S. Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/CF users and that service will be accomplished by the appellate CM/ECF system.

/s/ Richard A. Samp
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