No. 21-972

IN THE

Supreme Court of the United States

THOMAS H. BUFFINGTON,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF MILITARY-VETERANS ADVOCACY, NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, PARALYZED VETERANS OF AMERICA, THE VETERANS OF FOREIGN WARS, AND VIETNAM VETERANS OF AMERICA AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTERESTS OF AMICI CURIAE[1]

Amici curiae are five organizations dedicated to protecting and advancing the rights of our nation's veterans. The ruling below, which declined even to consider the pro-veteran canon before deferring to an agency's statutory interpretation, runs contrary to this Court's precedent and Congress's intent in enacting veterans-benefits laws. Amici are invested in restoring the canon to its rightful place among the traditional tools of statutory interpretation.

Military-Veterans Advocacy, Inc. (MVA) is a nonprofit organization that litigates and advocates on behalf of servicemembers and veterans. MVA educates and trains servicemembers and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand servicemembers' and veterans' rights and benefits.

The National Organization of Veterans' Advocates, Inc. (NOVA) is a nonprofit educational membership organization comprising hundreds of attorneys and other qualified members who represent veterans and their families before the Department of Veterans Affairs (VA) and federal courts. NOVA works to develop high standards of service and representation for all persons seeking veterans' benefits.

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amicus curiae and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

Paralyzed Veterans of America (PVA) is a congressionally chartered veterans service organization whose mission is to employ its expertise on behalf of veterans who have experienced a spinal cord injury or disorder (SCI/D). PVA provides representation to its members and other veterans throughout the VA claims process and in federal court. PVA also seeks to improve the quality of life for veterans and all people with SCI/D by advocating for quality healthcare, research, and education addressing SCI/D; for benefits based on its members' military service; and for civil rights, accessibility, and opportunities that maximize independence for its members and all veterans and nonveterans with disabilities.

The Veterans of Foreign Wars of the United States (VFW) is a congressionally chartered veterans service organization that represents over 1.7 million members. The VFW was instrumental in establishing VA, creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system. The VFW works to ensure that veterans are respected for their service, receive their earned entitlements, and are recognized for the sacrifices they and their loved ones have made for our country.

Vietnam Veterans of America (VVA) is a national nonprofit organization and is the only national veterans service organization congressionally chartered and exclusively dedicated to Vietnam-era veterans and their families. In January 1978, VVA began its journey to put Vietnam veteran issues at the forefront. In 1983, VVA took a significant step by founding Vietnam Veterans of America Legal Services (VVALS) to assist veterans seeking benefits and

services from the government. By working under the theory that a veteran's representative should be an advocate rather than simply a facilitator, VVALS established itself as a highly competent and aggressive legal assistance program available to veterans. VVA also played a leading role in advocating for the creation of judicial review, championing the rights of veterans to challenge VA benefits decisions in court. In the 1990s, VVALS evolved into the current VVA Service Representative program that continues to represent and advocate for veterans today. VVA Service Representatives continue to successfully challenge VA decisions that deny benefits to service members earned during their service and sacrifice to our nation.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 80 years, this Court has held that veterans-benefits statutes should be construed in the beneficiaries' favor. It has also consistently held that courts should apply such canons of interpretation before deeming a statute or regulation ambiguous; only then may they consider deferring to an agency's interpretation. Yet the Federal Circuit's opinion in this case deferred to VA's interpretation of the relevant statute, 38 U.S.C. § 5304(c), without considering this pro-veteran canon. This brief examines the history and application of the pro-veteran canon, explaining why the Federal Circuit's treatment of the canon improperly disregards this Court's case law at the expense of veterans and their beneficiaries.

The pro-veteran canon provides that, in construing a statute concerning veterans, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This approach effectuates Congress's legislative intent to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citation omitted). Moreover, the canon is meant to provide clarity and consistency in the laws governing veterans' benefits. The long history of this Court's application of this and similar canons illustrates its proper role.

The Federal Circuit's application of the pro-veteran canon, however, has long been inconsistent and has sown confusion, especially when deciding whether and in what circumstances to defer to an agency's interpretation of a statute. *See Chevron U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837 (1984).

The court has held that the canon applies at step 1 of *Chevron*. It has held that the canon applies at step 2 of *Chevron*. It has held that the canon applies at a novel third step after *Chevron*. And it has held that the canon does not apply at all in the face of *Chevron*.

Despite decades of precedent, veteran-litigants raising interpretive questions in the Federal Circuit often have no idea how that court will go about the task of interpretation. Even some Federal Circuit judges have expressed their dismay, calling on this Court for guidance.

The Federal Circuit has shown itself unable to resolve its intra-circuit split on this important and oft-arising question. The issue has repeatedly been presented to the en banc court, which has refused to take it up—but which nonetheless recently issued a patchwork of five opinions demonstrating that the court cannot achieve a workable, consensus theory of the canon's role. Only this Court can restore the canon to its rightful place among the traditional tools of statutory interpretation—at step 1 of *Chevron*. The time for that intervention is now.

ARGUMENT

I. The Federal Circuit Erred By Disregarding The Pro-Veteran Canon Of Construction.

Mr. Buffington's appeal asked the Federal Circuit to determine whether a VA regulation reflects a permissible interpretation of the governing statute. When a veteran who is receiving disability benefits returns to active-duty service, that statute avoids duplicative pay. Congress directed that veterans' benefits "shall not be paid … for any period for which such person receives active service pay." 38 U.S.C. § 5304(c).

The only natural reading of that statute is that the benefits *shall* be paid once the "period" of "active service pay" comes to an end. Not so, says a VA regulation. Instead, a veteran must file a "claim for recommencement of payments." 38 C.F.R. § 3.654(b)(2). And if the veteran does not do so within a year of leaving active service, the payments will only "be resumed

effective 1 year prior to the date of receipt of a new claim." *Id.*

For example, Mr. Buffington's last period of active service ended in 2005, but because he did not file for recommencement until 2009, he was only entitled to payments effective in 2008. Pet. 7. VA's regulation stretched the statutory "period" of suspended benefits an extra three years—three years in which Mr. Buffington received neither pay nor benefits.

This deprivation of benefits is especially disturbing because by its nature § 5304(c) applies only to veterans like Mr. Buffington who have served in the armed forces, been disabled in connection with that service, and nevertheless returned to serve again. Mr. Buffington did that twice over, returning to service in 2003-2004 and then again in 2004-2005. Pet. 7. Had he never returned to active duty, he would have received continuous disability benefits throughout the entire period.

Is that what Congress intended? This Court has over and over again said that, in answering that question, the pro-veteran canon should be a guide to understanding and effectuating congressional intent. But the Federal Circuit expressly refused to consider the canon before deferring to VA's regulation. Pet. App. 9a n.5. That disregard reflects serious and certiorari-worthy legal error.

A. The pro-veteran canon recognizes Congress's special regard for veterans.

As this Court has explained, the pro-veteran canon stems from Congress's intent to help veterans when enacting legislation providing them benefits. "'The solicitude of Congress for veterans is of long standing.' And that solicitude is plainly reflected in the [Veterans Judicial Review Act], as well as in subsequent laws that 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.'" *Henderson*, 562 U.S. at 440 (citation omitted) (first quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)); and then quoting *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)).

Federal Circuit Judge O'Malley recently highlighted Congress's intent to help veterans through remedial legislation like the Veterans Judicial Review Act (VJRA): "We need not guess the congressional intent behind the VJRA; Congress told us by legislating against the backdrop of the pro-veteran canon of construction, crafting a detailed remedial statutory scheme, and expressly affirming its beneficent purpose in the Act's legislative history." *Kisor v. McDonough* (*Kisor III*), 995 F.3d 1347, 1368 (Fed. Cir. 2021) (O'Malley, J., dissenting from denial of rehearing en banc), *cert. denied*, No. 21-465, 2022 WL 89296 (U.S. Jan. 10, 2022). As she further explained, Congress "wanted all aspects of the Act to be liberally construed in favor of the veterans." *Id.* And in her dissent in this case, Judge O'Malley reiterated that "[t]he development of this veteran-friendly scheme and its

remedial nature was the very raison d'être for passage of the VJRA." Pet. App. 18a.

This Court has likewise underscored Congress's intent to help veterans. "[W]e recognize that Congress has expressed special solicitude for the veterans' cause. A veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life." *Sanders*, 556 U.S. at 412 (citation omitted). "And Congress has made clear that the VA is not an ordinary agency. Rather, the VA has a statutory duty to help the veteran develop his or her benefits claim." *Id.*

Throughout its history, this country has prioritized repaying the debt owed to those who risk their lives and livelihoods to protect the American public. Dating back to the Revolutionary War, the government has provided medical care and benefits to our veterans. *See* U.S. Dep't of Veterans Affairs, *VA History* (May 27, 2021), https://www.va.gov/HISTORY/VA_History/Overview.asp. This has included pensions for veterans with disabilities, as well as hospital and medical care. *Id.*

In 1865, President Abraham Lincoln gave his second inaugural address as the Civil War was nearing its end. Seeking to heal a divided nation, he asked the country "to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow, and his orphan." U.S. Dep't of Veterans Affairs, *The Origin of the VA Motto* 1, va.gov/opa/publications/celebrate/vamotto.pdf. These words later became the VA motto, when two plaques reciting them were installed at the entrance to VA's

Washington, D.C., headquarters in 1959. *Id.* at 2. As VA itself has affirmed, "President Lincoln's words have stood the test of time, and stand today as a solemn reminder of VA's commitment to care for those injured in our nation's defense and the families of those killed in its service." *Id.*

The Veterans Administration was established as an independent federal agency in 1930, after Congress authorized the President to "consolidate and coordinate governmental activities affecting war veterans." Act of July 3, 1930, Pub. L. No. 71-536, 46 Stat. 1016, 1016. A few weeks later, President Herbert Hoover signed an executive order establishing the Veterans Administration. Exec. Order No. 5398 (July 21, 1930), https://www.presidency.ucsb.edu/node/276053.

In 1988, Congress elevated the agency to a cabinet-level executive department and renamed it the Department of Veterans Affairs. *See* Department of Veterans Affairs Act, Pub. L. No. 100-527, 102 Stat. 2635 (1988). VA is responsible for "administer[ing] the laws providing benefits and other services to veterans and the dependents and the beneficiaries of veterans." 38 U.S.C. § 301(b).

In providing benefits to veterans, Congress created a nonadversarial system to help veterans receive compensation for their service-connected disabilities. *See* 38 U.S.C. §§ 1110, 1131 (establishing entitlement to compensation); *id.* § 5103A (requiring VA to assist veterans with their disability claims); *id.* § 5107(b) (giving claimants the benefit of the doubt in close cases).

Unlike civil litigation, "proceedings before the VA are informal and nonadversarial," and are "designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson*, 562 U.S. at 431, 440 (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). Rather than opposing veterans' claims, "[t]he VA is charged with the responsibility of assisting veterans in developing evidence that supports their claims, and in evaluating that evidence, the VA must give the veteran the benefit of any doubt." *Id.* at 440.

Congress reiterated its intent to provide a cooperative pro-veteran benefits process when it enacted the VJRA, which authorized judicial review of decisions adverse to veterans in federal court. *See, e.g.*, 38 U.S.C. § 7251-52. The House Report explained: "Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans' benefits. This is particularly true of service-connected disability compensation…." H.R. Rep. No. 100-963, at 13 (1988). Congress further stated that it "expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits" and "to resolve all issues by giving the claimant the benefit of any reasonable doubt." *Id.*

B. The pro-veteran canon is a longstanding and meaningful interpretive tool.

Acknowledging Congress's clear and well-established intent to help veterans, this Court has recognized the pro-veteran canon for nearly 80 years. In *Boone v. Lightner*, for example, the Court considered the Soldiers' and Sailors' Civil Relief Act of 1940, a

federal law providing protections for active-duty servicemembers. 319 U.S. 561 (1943). The Court explained that the legislation "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Id.* at 575.

A few years later, when discussing the Selective Training and Service Act of 1940, the Court reiterated this pro-veteran approach to statutory construction: "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). The Court stated that it must "construe the separate provisions of the Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* Likewise, the Court explained decades later that the Vietnam Era Veterans' Readjustment Assistance Act of 1974 "is to be liberally construed for the benefit of the returning veteran." *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980).

More recently, the Court reaffirmed the canon's vitality in construing the Veterans' Reemployment Rights Act. The Court noted that, if the meaning of the text was unclear, it "would ultimately read [an uncertain] provision in [the veteran]'s favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991). The Court further held that it "will presume congressional understanding of such

interpretive principles." *Id.*; *see also Gardner*, 513 U.S. at 118 (noting "the rule that interpretive doubt is to be resolved in the veteran's favor").

The Court relied on the pro-veteran canon again in *Henderson v. Shinseki*, explaining that it has "long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" 562 U.S. at 441 (quoting *King*, 502 U.S. at 220-21 n.9). In *Henderson*, the Court concluded that Congress did not intend the deadline for filing a notice of appeal with the Court of Appeals for Veterans Claims to be jurisdictional. "Particularly in light of this canon, we do not find any clear indication that the 120-day limit was intended to carry the harsh consequences that accompany the jurisdiction tag." *Id.*

The canon is also well recognized by the courts of appeals, including the Federal Circuit in exercising its jurisdiction over veterans-benefits matters. *See Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) (quoting *Gardner*, 513 U.S. at 118) ("[I]n construing veterans' benefits legislation 'interpretive doubt is to be resolved in the veteran's favor.'"); *NOVA v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (referring to the pro-veteran canon as one of "the usual canons of statutory construction"); *see also Travers v. Fed. Express Corp.*, 8 F.4th 198, 208 n.25 (3d Cir. 2021) ("[A]ny interpretive doubt is construed in favor of the service member, under the pro-veteran canon."); *Boatswain v. Gonzales*, 414 F.3d 413, 417 (2d Cir. 2005) (noting canon as a "jurisprudential doctrine[] that counsel[s] for interpretation in favor of … veterans"); *Sykes v. Columbus & Greenville*

Ry., 117 F.3d 287, 294 (5th Cir. 1997) ("To the extent that [the Veterans' Reemployment Rights Act] is capable of multiple interpretations, [the veteran] is quite correct that ambiguities should be resolved in his favor.").

C. The pro-veteran canon works like other tools of statutory interpretation.

The well-established role of the pro-veteran canon ought to make clear how it fits into the statutory interpretation analysis. As the Court explained in *Chevron*, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent." 467 U.S. at 843 n.9. The Court in *Chevron* set out the now-familiar two-step process for passing upon the validity of an agency's interpretation of a statute it is charged with administering.

At the first step, courts examine whether "the intent of Congress is clear," bringing all traditional tools of statutory construction to bear. *Id.* at 842. "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." *Id.* at 843 n.9. If the statute's meaning is unclear, however, courts proceed to the second step and assess whether the agency's interpretation is reasonable. *Id.* at 843. This Court recently confirmed that courts only reach the second step if the statute's meaning remains unclear after applying traditional interpretive tools: "Even under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools

of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9).

As explained above, the pro-veteran canon is one of these "traditional tools." And, as this Court has recently explained, such traditional interpretive tools should be applied in the first instance—before considering whether any deference is due to the administrative agency. In *Epic Systems Corp. v. Lewis*, this Court held that no agency deference was due under *Chevron* because "the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle." 138 S. Ct. 1612, 1630 (2018). "Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'" *Id.* (quoting and abrogating *NLRB v. Alternative Ent., Inc.*, 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., concurring in part and dissenting in part)).

The same precepts apply to construing agency regulations. In *Kisor v. Wilkie*, for example, this Court explained that "the possibility of deference can arise only if a regulation is genuinely ambiguous." 139 S. Ct. 2400, 2414 (2019). "And when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Id.* Justice Gorsuch's concurrence also emphasized the primacy of these interpretive tools: "In the real world the judge uses his traditional interpretive toolkit, full of canons and tiebreaking rules, to reach a decision about the best and fairest reading of the

law." *Id.* at 2430 (Gorsuch, J., concurring in the judgment).[2]

II. The Court Should Grant Certiorari To Restore The Canon To Its Rightful Place In Statutory Interpretation.

The Federal Circuit has inconsistently and confusingly applied—or failed to apply—the pro-veteran canon, with no sign of clarity on the horizon. Although the court seems wary of allowing the canon to intrude on deference to the agency, there is no tension between these interpretive principles and thus no need for the doctrinal confusion such fears have produced. Like any other traditional interpretive tool, the pro-veteran canon can be applied harmoniously with the deference due to an agency under this Court's precedent. The Federal Circuit's case law has failed to achieve that harmony, and the only remedy is this Court's further guidance.

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[2] As then-Professor Barrett explained, the view that courts should be "the faithful agents of Congress" need not conflict with the use of substantive canons: "Substantive canons are in no tension with faithful agency insofar as they are used as tie breakers between equally plausible interpretations of a statute." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123 (2010). "Textualists have no difficulty taking policy into account when language is ambiguous," because "ambiguity is essentially a delegation of policymaking authority to the governmental actor charged with interpreting a statute." *Id.*

A. The Federal Circuit has sown unnecessary confusion about the pro-veteran canon—and has refused to resolve that confusion itself.

In allocating jurisdiction among the federal courts, Congress has identified a select few areas of law where there is a pronounced need for national uniformity and clarity. Veterans-benefit appeals are one of those categories, and Congress granted the Federal Circuit exclusive jurisdiction over these appeals, as well as challenges to VA regulations. *See* VJRA, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. §§ 502, 7292(c); H.R. Rep. No. 100-963, at 28 ("The committee believes that it is strongly desirable to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions on the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts.").

But the Federal Circuit has failed to achieve Congress's desired clarity when it comes to statutory interpretation in the veterans area. Across three decades of interpreting veterans-benefits statutes, and despite this Court's clear instructions, the Federal Circuit still has not settled on the proper role for the pro-veteran canon in interpretations.

The Federal Circuit has been especially inconsistent in its application of the pro-veteran canon in cases that implicate potential deference to VA's statutory interpretations. Despite principles of stare decisis, Federal Circuit panels have variously held that the pro-veteran canon applies:

At step 1 of the *Chevron* framework. *E.g.*, *NOVA*, 260 F.3d at 1378 (first weighing the pro-veteran canon—a "well-established rule of statutory construction"—before considering "defer[ence] to an agency's reasonably interpretation of an ambiguous statute").

At step 2 of the *Chevron* framework. *E.g.*, *Terry v. Principi*, 340 F.3d 1378, 1383-84 (Fed. Cir. 2003) (first identifying a "gap left by the statute," then determining the agency offered "a permissible construction" that was "not affect[ed]" by the pro-veteran canon).

After step 2. *E.g.*, *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010) ("Rather, that canon is only applicable after other interpretive guidelines have been exhausted, including *Chevron*.").

And not at all. *E.g.*, *Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011) ("The dissent suggests that any ambiguity … should be resolved in favor of the veteran instead of by reference to the DVA's interpretation…. In *Sears v. Principi*, however, we rejected the argument that the pro-veteran canon of construction overrides the deference due to the DVA's reasonable interpretation of an ambiguous statute.").

The Federal Circuit's precedent has taken the teeth out of the canon. It leads to inconsistent and unpredictable outcomes in a court designed to achieve just the opposite. As Judge Mayer explained in *Henderson*, the Federal Circuit "often pays lip-service to the canon that provisions for benefits to members of the Armed Services are to be construed in the

beneficiaries' favor. In reality, however, it not infrequently fails in its fundamental obligation to apply the law, when the issue is an open one, in favor of the veteran." *Henderson v. Shinseki*, 589 F.3d 1201, 1232 (en banc) (Fed. Cir. 2009) (Mayer, J., dissenting) (citation omitted); *accord DeBeaord v. Principi*, 18 Vet. App. 357, 368 (2004) (observing that the Federal Circuit "seems to bypass the Supreme Court's *Gardner* directive"). Sure enough, in *Henderson*, this Court applied the canon and reversed the Federal Circuit. 562 U.S. at 441.

As it stands, at least in some cases, the Federal Circuit is following "an effective hierarchy of canons, placing *Gardner*'s pro-veteran canon behind other interpretive canons … to be applied only when there remains interpretive doubt" after other canons are consulted. *Roby v. McDonough*, No. 2020-1088, 2021 WL 3378834, at *8 (Fed. Cir. Aug. 4, 2021) (unpublished). This subordination of the pro-veteran canon has no basis in this Court's case law. *See supra* at 13-15.

The Federal Circuit cannot agree on the canon, but many judges agree that this Court should intervene. Calls for certiorari began in the Court of Appeals for Veterans Claims nearly 20 years ago. *See DeBeaord*, 18 Vet. App. at 368 ("[G]uidance from the Supreme Court would appear necessary…."). Most recently, nine of the Federal Circuit's twelve active judges called for clarification. *See* Pet. 21 (citing *Kisor III*, 995 F.3d at 1358, 1376). As then-Chief Judge Prost explained, "Further guidance is necessary …." *Kisor III*, 995 F.3d at 1358 (Prost, J., concurring in

denial of rehearing en banc). The time for that guidance is now.

B. Fears about the canon improperly displacing agency deference are unfounded.

One reason for the doctrinal confusion is apparent. Some Federal Circuit judges have expressed concern that faithful application of the pro-veteran canon would improperly undermine judicial deference to VA. For example, in urging application of the canon at a novel third step of *Chevron*, Judge Hughes warned that application of the canon "at any earlier step … is to hold that the VA, alone among the executive agencies, is not entitled to deference." *Kisor III*, 995 F.3d at 1361 (Hughes, J., concurring in denial of rehearing en banc). VA itself recently staked out the same position in overwrought terms: "[T]he Court would be completely eviscerating all of the statutory and regulatory authority VA has to interpret statutes and provide for their interpretation…." Oral Argument at 33:25-33:48, *NOVA v. Sec'y of Veterans Affairs*, No. 20-1321 (Fed. Cir. Dec. 9, 2021), https://oralarguments.cafc.uscourts.gov/default.aspx?fl=20-1321_12092021.mp3. VA has even advocated that "consideration of the *Gardner* canon is optional, at the VA's discretion." *Roby*, 2021 WL 3378834, at *8.

These concerns are misplaced. As explained above, courts routinely apply canons of interpretation, including substantive canons, as part of the *Chevron* analysis. *See supra* at 13-15. Indeed, the

Federal Circuit itself has applied both the canon and agency deference harmoniously in the past.

In *NOVA*, a Federal Circuit panel concluded that the statutory text was ambiguous on its face—that the text alone "provide[d] no guidance." 260 F.3d at 1377. At *Chevron* step 1, it then examined the available interpretive tools, which included legislative history and the pro-veteran canon. *Id.* at 1377-78. In the Court's view, these "usual tools for resolution of that ambiguity push[ed] in opposite ways." *Id.* at 1377. Unable to resolve the ambiguity using the traditional tools at step 1, the Court proceeded to step 2 and considered *Chevron* deference. *Id.* at 1378-79.

While we respectfully disagree with the *NOVA* panel's precise balancing of the interpretive tools in that case, the court got the methodology right. The canon applies alongside all the other traditional tools at step 1. Only if unresolved ambiguity remains at the end of that process does the court then consider deference at step 2. Future Federal Circuit panels should have been bound by this approach. Instead, they have precipitated the confusion described above. For example, despite *NOVA* clearly applying the canon at step 1, Federal Circuit judges have thereafter incorrectly asserted that the Court has *never* "applied it at step one of *Chevron*." *Procopio v. Wilkie*, 913 F.3d 1371, 1394 (Fed. Cir. 2019) (en banc) (Chen, J., dissenting).

NOVA demonstrates that the pro-veteran canon does not undermine *Chevron* deference, and it certainly does not "eviscerate" VA's regulatory authority. Instead, *NOVA*'s approach provides a meaningful role

for the canon while preserving conventional deference to VA when appropriate. It is the same approach this Court has consistently taken with canons of interpretation generally: The "canons are not mandatory rules" but rather "guides" that "help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Those guides can sometimes point in different directions. And when there are other tools or canons genuinely weighing against the pro-veteran interpretation—like, say, ejusdem generis, the surplusage canon, or legislative history—deference to the agency *may* be warranted if the traditional tools alone are unable to resolve an ambiguity.

C. The canon should not be subordinated to agency deference.

Applying the interpretive tools before declaring a statute ambiguous makes sense, especially in the veterans context. *Chevron* is a blunt and heavy thumb on the scale in agencies' favor that applies without regard to the context or area of substantive law. The pro-veteran canon, by contrast, accounts for features unique to the veterans-benefit system. If Judge Hughes is correct that the canon singles out VA for less deference than other agencies, *see Kisor III*, 995 F.3d at 1361, that is because veterans' law *is* different in two notable respects.

First, as explained above, Congress designed the veterans-benefit system to be nonadversarial and pro-claimant, unlike the mine run of administrative schemes. The canon reflects this special solicitude.

See supra at 7-10. And the canon will not be called upon unless VA has deviated from that design by adopting an anti- rather than pro-veteran interpretation. Such cases should be rare. *But see Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Gorsuch, J., dissenting from denial of certiorari) ("But how is it that an administrative agency may manufacture for itself or win from the courts a regime that has no basis in the relevant statutes and does nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve?").

Second, when VA interprets its governing statutes, as it did in this case, it is rarely (if ever) employing any substantive expertise about veterans. Instead, it is applying dictionary definitions, canons, and the like. The statutory language to be interpreted is, as in this case, procedural or legal—not technical or scientific. *E.g.*, *Henderson*, 562 U.S. at 438 (interpreting statutory deadline); *Sanders*, 556 U.S. at 406 (interpreting "the rule of prejudicial error"); *Gardner*, 513 U.S. at 117 (interpreting "injury"); *Gurley v. McDonough*, No. 2021-1490, 2022 WL 175660, at *2 (Fed. Cir. Jan. 20, 2022) (interpreting "for the period beginning"); *Rudisill v. McDonough*, 4 F.4th 1297, 1301-02 (Fed. Cir. 2021) (interpreting text regarding "aggregate period[s]" of service), *reh'g en banc granted*, No. 2020-1637, 2022 WL 320680 (Fed. Cir. Feb. 3, 2022); *George v. McDonough*, 991 F.3d 1227, 1229, 1233 (Fed. Cir. 2021) (interpreting "clear and unmistakable error"), *cert. granted*, No. 21-234, 2022 WL 129504 (U.S. Jan. 14, 2022); *Procopio*, 913 F.3d at 1373 (interpreting "Republic of Vietnam").

It is reasonable, then, that in a system with special solicitude for veteran-claimants—and an agency specifically constituted to be nonadversarial—agency deference does not take its strongest form. This case demonstrates this dynamic in high definition. Congress passed a statute that suspends disability compensation while a veteran has returned to active duty so as to avoid duplicative pay. Nothing in the statute suggests that Congress intended that suspension to last beyond the end of that active service, i.e., beyond the end of the duplicative pay. But instead of applying the only reasonable (and pro-veteran) reading of the statute, VA interpreted it against veterans' interests. It applied a statute designed to avoid duplicative pay in such a way as to leave affected veterans with no pay at all.

These are the "harsh consequences" that the canon is meant to check against. *Henderson*, 562 U.S. at 441. Because the Federal Circuit has failed to enforce that check by means of the pro-veteran canon, this Court's intervention is urgently needed.

CONCLUSION

Amici respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

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