No. _____

In The
Supreme Court of the United States

DIANA GARVEY,

Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc., 467 U.S. 837, 842 (1984), held, the first question when interpreting a statute is "whether Congress has directly spoken to the precise question at issue." Courts may defer only to an agency's "permissible construction" of an ambiguous statute. In *Brown v. Gardner*, 513 U.S. 118 (1994), the Court held that "interpretive doubt is to be resolved in the veteran's favor." Furthermore, in *Kisor v. Wilkie*, ___ U.S. ___, 139 S.Ct. 2400, 2413 (2019), the Court held, when interpreting an agency's regulation, "the possibility of deference can arise only if a regulation is genuinely ambiguous."

Petitioner, widow of a Vietnam War veteran, seeks VA compensation benefits payable to the widow of a wartime veteran. The Secretary, in his regulation, treats a veteran who received a discharge or release from a service department under conditions other than dishonorable, to nonetheless lawfully bar such veteran, and his widow, to benefits because of "willful and persistent misconduct." More importantly, the Federal Circuit endorsed this by finding the statute ambiguous without providing any analysis as to the plain meaning of the text in the statute. The questions presented are:

1. Under *Chevron* step 1, is it permissible for the Secretary to write a regulation that redefines a "veteran" where Congress has provided a clear, unambiguous definition?

QUESTIONS PRESENTED—Continued

2. In the alternative when evaluating the meaning of a statute

a. Against what threshold must a federal court evaluate whether a statute's text and structure, the traditional canons of construction, and the statute's legislative history permit more than one reasonable interpretation of Congress' intent?

b. What role does *Brown v. Gardner* and *Kisor v. Wilkie* play in the Court's framework used to interpret a statute?

RELATED PROCEEDINGS

Diana Garvey v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 2020-1128 (Fed. Cir. Judgment entered August 27, 2020)

Diana Garvey v. Robert L. Wilkie, Secretary of Veterans Affairs, No. 18-5059 (Vet. App. Judgment entered October 22, 2019)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The discharge and release of servicemembers from active duty service is the individual service departments' responsibility. The character of discharge and release from active duty service is within the exclusive purview and discretion of the service departments. Any change deemed necessary in the character of discharge and release from active duty service is a function of the service departments. Congress has never authorized the Secretary of Veterans Affairs to change the character of a veteran's discharge or release to preclude receipt of VA benefits. Rather, Congress provided the Secretary authority only to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws."

This petition asks the Court to invalidate an *ultra vires* regulation. A regulation which, without authority from Congress, permits the Secretary to change the character of a veteran's discharge. A discharge characterized by the service department as having been under other than dishonorable conditions necessarily invokes upon that person veteran status. Yet, the Secretary has given himself the ability to treat a discharge under other than dishonorable conditions as having been under dishonorable conditions. This practice is unlawful and must be stopped.

In the decision below, the Federal Circuit held that the "willful and persistent misconduct" bar in the Secretary's rules governing the character of a

servicemember's discharge was not contrary to the statute that specified the conditions under which a former servicemember was ineligible for benefits. The Secretary's regulation is not consistent with the plain language of the statute which invokes veteran status upon all discharged or released former servicemembers except those who received a discharge under conditions other than dishonorable.

The Federal Circuit also departs from the text of Congress's definition of a "veteran" which unambiguously defines a veteran as having been discharged or released from service under conditions other than dishonorable. Yet, as clear as Congress's definition is, the Federal Circuit allowed to stand a regulation which allows the Secretary to deny VA benefits to veterans and their survivors who meet the definition of a veteran.

In short, the Federal Circuit let stand a regulation profoundly inconsistent with the statutes permitting the Secretary to recharacterize a discharge from service which allowed for the receipt of VA benefits based upon the Secretary's determination that should be "considered to have been under dishonorable conditions."

In the alternative, the Federal Circuit announced, without any analysis whatsoever, that 38 U.S.C. § 101(2) is ambiguous. Under controlling case law, the Federal Circuit must do more. What is not clear from the case law is what tools a court must employ when determining the meaning of a statute. In *Kisor v. Wilkie*, this Court explained that before a court can defer to an

agency's interpretation, it must first determine that a regulation is "genuinely ambiguous." Although *Kisor* dealt with the interpretation of a regulation, there is no reason to limit its ruling to regulations because the same rules of interpretation apply equally to the statute. Additionally, *Kisor* and other binding precedent directs courts to use all traditional canons of interpretation. The pro-veteran canon of interpretation announced in *Brown v. Garner* must inform the court's interpretation of the statute because it is a traditional tool of statutory interpretation.

Because the Federal Circuit has exclusive jurisdiction to decide issues of interpretation of VA regulations, there is no circuit conflict on this question of regulatory interpretation possible, and the decision below will have immediate nationwide effect on one of the country's largest and most important public-benefits programs. This Court's review is warranted to determine the Secretary's regulation is invalid in light of its unquestionable conflict with the relevant statutes under Title 38 and to end the unlawful denial of VA benefits to veterans and their survivors legally entitled to VA benefits.

OPINIONS AND ORDERS BELOW

The opinion of the Court of Appeals is reported at 972 F.3d 1333, Pet. App. 1-8, and the denial of rehearing and rehearing *en banc* is reproduced at Pet. App. 1-20. The opinion of the United States Court

of Appeals for Veterans Claims is unreported but is available at 2019 WL 4739435, Pet. App. 21-24. The opinion of the Board of Veterans' Appeals is not officially reported but appears at 2018 WL 9730690. Pet. App. 25-40.

JURISDICTION

The Federal Circuit entered judgment on August 27, 2020, and denied a timely petition for rehearing and rehearing *en banc* on October 9th, 2020. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2018).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

This case involves 38 U.S.C. § 101(2): "The term 'veteran' means a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable." This case also involves relevant portions of 38 U.S.C. § 5303 reproduced at Pet. App. 53-54. Relevant portions of 38 C.F.R. §§ 3.12(a), 3.12(c) and 3.12(d) are reproduced at Pet. App. 61-67.

STATEMENT OF THE CASE

Mr. Garvey Performed Faithful Service In Germany; But Like Many Others, That All Changed After Deploying To Vietnam.

Diana Garvey's late husband, John P. Garvey, served in the U.S. Army from February 1966 to May 1970. After training, Mr. Garvey was posted to Germany, where he served until November 1967. While in Germany, Mr. Garvey was punished under Article 15 of the Uniform Code of Military Justice for "disorderly conduct" in an incident with a German taxi driver. However, Mr. Garvey's service record indicates that his "conduct" and "efficiency" while in Germany were "[e]xc[ellent]."

Beginning in December 1967, Mr. Garvey was posted to Vietnam, where his record deteriorated significantly. In June 1968, Mr. Garvey was convicted by special court-martial of possessing four pounds of cannabis with intent to sell. He was sentenced to 90 days of confinement, ordered to forfeit a portion of his pay, and reduced in rank. In November 1968, Mr. Garvey was convicted by special court-martial of being absent without leave ("AWOL") from September 9, 1968, to October 1, 1968. In June 1969, he was convicted by special court-martial of being AWOL from April 18, 1969, to June 5, 1969. For each of these convictions he was given a suspended sentence of confinement and ordered to forfeit a portion of his pay. In April 1970, Mr. Garvey was convicted by special court-martial of being AWOL from February 16, 1970, to April 1, 1970. For

this conviction, he was sentenced to five months of confinement and again forfeited a portion of his pay.

Because of these events of misconduct, Mr. Garvey was discharged as unfit for service on May 13, 1970, with an "Undesirable Discharge." He waived consideration of his case before a board of officers and acknowledged that he "may be ineligible for many or all benefits as a veteran under both Federal and State laws." On June 23, 1977, under the Special Discharge Review Program, a procedure by which Vietnam-era servicemembers could have their discharge status upgraded if they met certain criteria, Mr. Garvey's discharge status was upgraded to "Under Honorable Conditions (General)." However, on August 1, 1978, a Discharge Review Board found that Mr. Garvey would not have been entitled to an upgrade under generally applicable standards. The apparent effect of this finding was to prevent Mr. Garvey from receiving benefits on the basis of his upgraded status. *See* 38 U.S.C. § 5303(e); 38 C.F.R. § 3.12(h).

Mr. Garvey Dies, And Mrs. Garvey's Claim For Survivor Benefits Is Denied Because The Secretary Determined That Mr. Garvey's Discharge Was Due To "Willful And Persistent Misconduct."

A surviving spouse is entitled to benefits, in her own right, in two instances. First, where the death of the veteran is related to service, she is entitled to Dependency and Indemnity Compensation payments.

See 38 U.S.C. § 1310. Secondly, a surviving spouse is entitled to a pension benefit when a veteran who served during a period of war has died for any reason. This payment is predicated on minimum service requirements on the part of the veteran, and the surviving spouse having income below limits imposed by Congress. *See* 38 U.S.C. § 1541.

Diana Garvey married Mr. Garvey on November 10, 1979. Mr. Garvey died on August 13, 2010. On September 4, 2012, Mrs. Garvey applied for dependency and indemnity compensation and death pension benefits on the basis of Mr. Garvey's service.

On August 28, 2018, the Board of Veterans' Appeals ("Board") denied Mrs. Garvey's claim. The Board concluded that Mr. Garvey was ineligible for benefits because he was discharged for "willful and persistent misconduct," which under 38 C.F.R. § 3.12(d)(4) precludes a finding of veteran status.

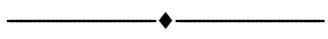
The Veterans Court Affirms, Ruling 38 C.F.R. § 3.12(d) Was Consistent With 38 U.S.C. § 5303.

On September 30, 2019, the United States Court of Appeals for Veterans Claims ("Veterans Court") affirmed the Board's decision, rejecting Mrs. Garvey's contention that the "willful and persistent misconduct" bar, section 3.12(d)(4), is contrary to 38 U.S.C. § 5303. The Veterans Court concluded it was bound by the Federal Circuit's holding in *Camarena v. Brown*, 60 F.3d 843 (Fed. Cir. 1995) which affirmed the Veterans Court's prior ruling.

The Federal Circuit Affirms Because It Determines That The Term "Under Conditions Other Than Dishonorable" Is Ambiguous; Therefore, The Secretary Is Authorized To Define A Discharge For "Willful And Persistent Misconduct" As A Discharge Under "Dishonorable Conditions."

Mrs. Garvey appealed to the Federal Circuit, which affirmed the decision of the Veterans Court. However, whereas the Veteran's Court upheld the regulation because it was consistent with § 5303, the Federal Circuit determined that § 3.12(d)(4) was a reasonable interpretation of § 101(2). The Federal Circuit announced, without any analysis, that the term "conditions other than dishonorable" in § 101(2) is ambiguous; therefore, the Secretary is authorized to interpret it. Pet. App. 10.

Having found the statute ambiguous, the Federal Circuit turned to a thorough review of the Congressional record. Ultimately, the Federal Circuit, citing *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council Inc.*, 467 U.S. 837 (1984), determined "[w]hether the statute is interpreted to expressly delegate to the VA the interpretation of 'conditions other than dishonorable,' or instead the delegation is implicit, we conclude that the VA has authority to define the term consistent with the Congressional Purpose." Pet. App. 16.



REASONS FOR GRANTING THE PETITION

I. The Decision Of The Federal Circuit Upholding The Validity Of 38 C.F.R. § 3.12(d)(4) Was Contrary To The Text Of Both 38 U.S.C. § 101(2) And 38 U.S.C. § 5303(a).

Congress defined the term "veteran" to mean "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." *See* 38 U.S.C. § 101(2). Under the plain reading of 101(2), Congress meant to bestow upon all discharged service members, the status of "veteran" except those who received a dishonorable discharge. Therefore, the Federal Circuit was wrong, first by finding ambiguity in this term, and second by finding the Secretary has the authority to restrict the class of persons to which Congress chose to give veteran status.

There is no dispute that Mr. Garvey served on active duty in the U.S. Army from February 1966 to May 1970. There is no dispute that Mr. Garvey on May 13, 1970, received a discharge characterized by the Army as an "Undesirable Discharge." It is equally indisputable that although an "Undesirable Discharge" is a discharge under conditions other than dishonorable, it is not a dishonorable discharge. Therefore, Mr. Garvey, who did not receive a dishonorable discharge, as a matter of law met the definition of under § 101(2) of a veteran and as such was entitled to receipt of VA benefits.

The only statutory basis which bars former servicemembers who meet the definition of veteran from

receipt of VA benefits is 38 U.S.C. § 5303(a). None of the statutory bars involve "willful and persistent misconduct." The conduct proscribed by Congress is specific and limited. There is no "gap" for the Secretary to have filled in the acts set out in § 5303(a).

In light of the pro-veteran canon of construction of statutes and regulations pertaining to veterans and their families, under which "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 n.9 (1991)), the Federal Circuit's upholding of 38 C.F.R. § 3.12(d) violated the pro-veteran canon of construction because that regulation is anti-veteran as defined by Congress in § 101(2) and was without basis in any valid source of law.

A. Under The Relevant Statutes, A Veteran Is Eligible To Receive VA Benefits So Long As Their Discharge Was Not Dishonorable And They Did Not Commit One Of The Specified Acts Set Out In 38 U.S.C. § 5303(a).

There are only two valid sources of law which bar a former servicemember from receiving VA benefits. The first source, and the one at issue here, is Congress' definition of a "veteran" found in 38 U.S.C. § 101(2). In accordance with the plain meaning of § 101(2), a veteran is "a person who served in the active military,

naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable." Under this definition, only service members who received a dishonorable discharge do not meet the definition of veteran provided by Congress. All other persons who were discharged from active duty service "under conditions other than dishonorable," must be understood to be eligible, meaning not barred by law, to receive VA benefits. This interpretation of the term "veteran" is consistent with the pro-veteran system envisioned by Congress.

Congress recognized that in certain circumstances former servicemembers could escape a dishonorable discharge, and therefore, still be entitled to VA benefits. Therefore, Congress delineated, in § 5303, actions, which if result in a discharge, would also bar a veteran from receiving VA benefits. Thus, the only former servicemembers who are barred from receiving VA benefits are those who cannot receive veteran status because they were "dishonorably discharged" from active duty; or they are veterans, but received a discharge as a result of one of the acts described in 38 U.S.C. § 5303(a).

1. Only Congress Can Specify The Acts Which Bar A Former Servicemember From Receiving VA Benefits.

In 38 U.S.C. § 5303(a), Congress identified the only acts upon which a veteran's discharge or dismissal was

based which will constitute a lawful basis for the Secretary to deny a veteran or a veteran's survivor VA benefits. None of the acts described in § 5303(a) included acts of "willful and persistent misconduct." The acts relied upon by the Secretary as "willful and persistent misconduct" were not acts set out in § 5303(a). More importantly, the acts committed by Mr. Garvey did not result in a dishonorable discharge. The adverse and unlawful effect of § 3.12(d) is that it allows the Secretary to consider acts which did not result in a dishonorable discharge to be determined by the Secretary to "have been under dishonorable conditions." Under § 5303(a), if the acts described were the basis for discharge, those acts were a bar to VA benefits. Mr. Garvey's discharge was not based on any act set out in § 5303(a). Since Congress did not specify the acts committed by Mr. Garvey, those acts cannot, as a matter of law, be the basis for a bar to VA benefits.

2. The Limitation In § 5303(a) Controls What Constitutes A Bar To Benefits And The Secretary Cannot In Regulation Lawfully Expand Those Bars.

Expanding the acts which constitute a bar to VA benefits cannot be squared with Congress's intentionally "paternalistic veterans' benefits system." *Jaquay v. Principi*, 304 F.3d 1276, 1280 (Fed. Cir. 2002). In § 3.12(d), generally, and § 3.12(d)(4) specifically, the Secretary has unlawfully expanded those acts which constitute a bar to VA benefits. Indeed, the nonadversarial process as designed by Congress makes VA

the advocate for veterans and not their adversary. The Secretary's promulgation of § 3.12(d)(4) unlawfully places the Secretary in the position to second guess the service department regarding the character of discharge.

Based on the statutory definition of a veteran in § 101(2) as "a person who served in the active military, naval, or air service, and who was discharged or released therefrom under conditions other than dishonorable," § 3.12(d)(4) allows the Secretary to reexamine the decision of the service department on the character of the veteran's discharge. In so doing, the Secretary becomes the veteran's *de facto* prosecutor seeking out "willful and persistent misconduct" which when found disqualifies the veteran's eligibility to receive VA benefits.

Such action by the Secretary is inconsistent with the VA's duty to assist and the Secretary's statement of policy found in 38 C.F.R. § 3.103(a) ("it is the obligation of VA to assist a claimant in developing the facts pertinent to the claim and to render a decision which grants every benefit that can be supported in law"). The Secretary's adversarial role under § 3.12(d) generally, and § 3.12(d)(4) specifically, is the antithesis of his duty to assist and his obligation to develop facts to award benefits.

B. The Federal Circuit's Interpretation Is Without Basis In Law.

Although it was ostensibly interpreting § 101(2) and § 5303(a), the Federal Circuit committed a

fundamental error: it failed to start with the text. *Bostock v. Clayton Cnty.*, 140 S.Ct. 1731, 1737 (2020); *Food Mktg. Inst. v. Argus Leader Media*, 139 S.Ct. 2356, 2364 (2019) ("In statutory interpretation disputes, a court's proper starting point lies in a careful examination of the ordinary meaning and structure of the law itself.") (citation omitted); *Milner v. Dep't of the Navy*, 562 U.S. 562, 569-72 (2011). In fact, the Federal Circuit made no examination of the text of either statute and instead merely made an unsubstantiated conclusion that § 3.12(d) was not contrary to either statute.

By declining to start with the text of § 101(2) and § 5303(a) and instead grounding its reasoning in legislative comments, the Federal Circuit employed the kind of faulty, atextual reasoning that this Court has described as "a relic from a 'bygone era of statutory construction.'" *Food Mktg.*, 139 S.Ct. at 2364. The Federal Circuit was attempting to craft a policy solution based on an attempt to discern congressional intent, but "[w]hen the express terms of a statute give us one answer and extratextual considerations suggest another, it's no contest." *Bostock*, 140 S.Ct. at 1737.

1. Neither § 101(2) Nor § 5303(a) Supports Or Contemplates The Secretary's Role In Determining What The Character Of The Veteran's Discharge Should Have Been.

It is evident that the Secretary's regulation allows him to revisit the character of the veteran's discharge.

This is problematic in light of the plain language of both relevant statutes. The statutory definition of the term "veteran" found in § 101(2) does not support the Secretary making an independent examination of the veteran's behavior while on active duty to determine whether the discharge should have been considered to have been under dishonorable conditions. To the contrary, the text of § 101(2) is unambiguous, if the veteran's discharge was "under conditions other than dishonorable," then the servicemember is a veteran.

As opposed to interpreting the law, the Federal Circuit made a ruling of what they thought the statute might or should mean. The Court's job is to interpret the law as it is written, using the plain language of that statute. If Congress wants another interpretation, they will tell us. *See* Pub. L. No. 105-111, 111 Stat. 2271 (Nov. 21, 1997) (codifying § 3.105(a) in 38 U.S.C. § 5109A and superseding the ruling in *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994); Pub. L. No. 104-204, § 422(a), 110 Stat. 2874, 2926-27 (1996) (abrogating, in part, *Brown v. Gardner*, 513 U.S. 115 (1994)); and Pub. L. No. 106-475, 114 Stat. 2096 (Nov. 9, 2000) (superseding the ruling in *Caluza v. Brown*, 7 Vet. App. 498 (1995), *aff'd*, 78 F.3d 604 (Fed. Cir. 1996) that the duty to assist did not apply until a claim was well grounded.

The panel magnified its textual errors when it concluded that Congress had chosen not to use a "Dishonorable discharge" bar to minimize the significance of Congress using the phrase "conditions other than dishonorable." The panel erroneously determined that

unlike a Dishonorable discharge, the phrase "conditions other than dishonorable" is not a term of art in the military. Mistakenly concluding that there was ambiguity in the phrase, the Federal Circuit incorrectly turned to the statute's legislative history to determine its meaning. No consideration at all was given to Congress's intent in not using the military term of art, Dishonorable discharge, was to rely on the ordinary meaning of the phrase "conditions other than dishonorable."

The goal of an interpretive endeavor is to identify and implement Congress's purpose in enacting a given statute. *See Am. Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) ("[W]e assume 'that the legislative purpose is expressed by the ordinary meaning of the words used.'" (*quoting Richards v. United States*, 369 U.S. 1, 9 (1962))). Here, the Federal Circuit did not assume the evident legislative purpose was being expressed by its use of the ordinary meaning of the words of the phrase "conditions other than dishonorable."

Veteran status is determined based on the character of the military discharge. This regulation permits the Secretary to determine whether a veteran's discharge "was issued because of willful and persistent misconduct." Nothing in the language Congress used in § 102(2) is even remotely consistent with authorizing the Secretary to determine whether a veteran's discharge "was issued because of willful and persistent misconduct." Additionally, this regulation allows the Secretary to make an independent determination as to whether a former service member's discharge should be considered "to have been issued under dishonorable

conditions." As with the other directive of § 3.12(d)(4) there is no support for this in the statute.

Regulatory language must be constrained by legal rights set out in statute. *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir. 1987); *accord United States v. Reinis*, 794 F.2d 506, 508 (9th Cir. 1986). In the tax context, for example, the government has successfully persuaded the courts that the language of a government form is not a legitimate source of law—except where the form itself has been promulgated as a regulation—and must give way to statutory and regulatory text. *Reinis*, 794 F.2d at 508; *see also United States v. Murphy*, 809 F.2d 1427, 1430-31 & n.4 (9th Cir. 1987). The language used by the Secretary in his regulations must be consistent with the language and purpose set by Congress.

Here, the purpose of Congress was to give veteran statute to all discharged individuals, except those who received a dishonorable discharge. Nothing in the plain language of § 101(2) gives the Secretary any authority to remove, from the rolls of veteran status, the class of individuals Congress intended to provide benefits.

II. In The Alternative, When Evaluating The Meaning Of A Statute:

Against What Threshold Must A Federal Court Evaluate Whether A Statute's Text And Structure, The Traditional Canons Of Construction, And The Statute's Legislative History Permit More Than One Reasonable Interpretation Of Congress' Intent?

What Role Does *Brown v. Gardner* And *Kisor v. Wilkie* Play In The Court's Framework Used To Interpret A Statute?

A. The Federal Circuit Simply Announced The Statute Is Ambiguous To Reach A Desired Result.

In its decision, the Federal Circuit stated "the phrase 'conditions other than dishonorable' is not a term of art in the military. In view of the ambiguity of that phrase, we turn to the statute's legislative history." Pet. App. 10. However, the law demands more. As articulated above, at a minimum, before reaching the legislative history, the court must "[f]irst, always, [determine] whether Congress has directly spoken to the precise question at issue." *See Chevron, supra*, 467 U.S. at 842.

"A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." *Perrin v. U.S.*, 444 U.S. 37, 42 (1977); citing *Burns v. Alcala*, 420 U.S. 575, 580-581 (1975). "If the statute is clear and unambiguous '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.' . . . The traditional deference courts pay to agency interpretation is not to be applied to alter the clearly expressed intent of Congress." *See Board of Governors, FRS v. Dimension Financial Corp*., 474 U.S. 361, 368 (1986), *quoting Chevron*, 467 U.S. at 842-843.

Kisor v. Wilkie instructs that an agency's interpretation must be reasonable or, in other words, "come within the zone of ambiguity the court has identified after employing all its interpretive tools." 139 S.Ct. 2400, 2416 (2019). *Kisor* does not answer, however, what framework a court must employ when determining how broadly to draw the zone of ambiguity.

If a court is to call balls and strikes, it must know whether the strike zone reaches from the chest to the knees or over some other span. The U.S. Court of Appeals for the Sixth Circuit has correlated the zone of ambiguity to "the range of meanings that a reasonable person would understand [the language at issue] to have." *United States v. Riccardi*, 989 F.3d 476, 486 (2021). At least two circuits have suggested, seemingly more broadly, that the zone of ambiguity embraces all interpretations that no particular "Step One" consideration, such as a particular traditional canon of construction, rules out. *See Nat'l Lifeline Ass'n v. FCC*, 983 F.3d 498, 512-513 (D.C. Cir. 2020); *Wolfington v. Reconstructive Orthopaedic Assocs. II PC*, 935 F.3d 187, 205 (3d Cir. 2019).

Here, the Federal Circuit never attempted to determine the "ordinary, contemporary, common meaning" of the statute. Likewise, the Federal Circuit did not employ the most important traditional tool of statutory construction in veteran's benefits cases—the pro-veteran canon. This analysis, is vitally important to understand what the statute means and Congress' intent. This Court has held over and over that in every case Congress meant to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *See Henderson v. Shinseki*, 562 U.S. 428, 44 (2011) (quotation omitted). *See also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. 561, 575 (1943)) ("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"); *Regan v. Taxation with Representation*, 461 U.S. 540, 550-551 (1983) ("our country has a long standing policy of compensating veterans for their past contributions by providing them with numerous advantages."); and *Brown, supra* (interpretative ambiguities in veterans' benefit programs are resolved in favor of the beneficiaries).

Therefore, the Court should grant certiorari to clarify the standard employed by the courts when interpreting a statute, generally, but also the role the traditional pro-veteran canon has in this process. The Circuits are split on precisely what canons apply or even if all the canons apply.

III. The Question Presented Is Recurring And Important.

The Federal Circuit's atextual and anti-veteran decision potentially affects tens of millions of American veterans, their dependents, and their survivors. Only this Court can rectify the Federal Circuit's error. Furthermore, since *Chevron*, the circuits are split as to which canons do or do not apply when interpreting a statute.

A. The Federal Circuit's Exclusive Jurisdiction Over Decisions Of The Veterans Court Favors This Court's Prompt Intervention.

The Federal Circuit has exclusive jurisdiction to review decisions of the Veterans Court. 38 U.S.C. § 7292(c) (2018). Thus, no circuit conflict can arise regarding the scope of a claim under Title 38. But where, as here, the Federal Circuit deviates from a statute and pro-veteran principles, this Court has routinely intervened and corrected the Federal Circuit's misinterpretation. *See* S. Ct. R. 10(c); *Kisor*, 139 S.Ct. at 2424 (remanding to the Federal Circuit to "seriously think through" its decision that VA regulation was ambiguous); *Kingdomware Techs., Inc. v. United States*, 136 S.Ct. 1969 (2016) (VA must apply pro-veteran contracting rules to every award where statute says "shall"); *Henderson*, 562 U.S. at 441 (120-day deadline for appealing from Board not jurisdictional "[p]articularly in light of [the pro-veteran] canon"); *Scarborough v. Principi*, 541 U.S. 401 (2004) (veteran's

EAJA application timely where curative amendment was filed outside filing period); *Brown*, 513 U.S. 115 (overturning as inconsistent with controlling statute VA regulation requiring veterans seeking certain benefits to prove disability resulted from negligent VA treatment). The Federal Circuit's atextual and anti-veteran interpretation of a benefit claim's scope likewise warrants this Court's review and correction.

B. The Federal Circuit's Error Affects Significant Numbers Of Former Service Members.

Left unchecked by this Court, the Federal Circuit's error could affect the more than 500,000 living former servicemembers who have been less-than-honorably discharged. Many of these individuals deployed to combat, experienced hardships, suffered trauma, and risked their lives. Many have physical and mental wounds that persist to this day or as in this case prevent surviving spouses from receiving benefits.

VA relies on its own regulatory bars five times more often than Congress's statutory bars. Legal Services Center of Harvard Law School, *Underserved: How the VA Wrongfully Excludes Veterans with Bad Paper* at 11 (2016), https://uploads-ssl.webflow.com/5ddda3d7ad8b1151b5d16cff/5e67da6782e5f4e6b19760b0_Underserved.pdf. And of the regulatory bars, the willful and persistent misconduct bar is, by far, the most frequently used; "84% of eligibility denials by the Board of Veterans' Appeals between 1992 and 2015"

were based on willful and persistent misconduct. *Id*. at 23.

C. Section 3.12(d) Sanctions The Unlawful Denial Of VA Benefits Contrary To An Intent To Do So By Any Statute.

The Secretary's regulation at 38 C.F.R. § 3.12(d) and the Federal Circuit's ruling have far-reaching consequences never intended by Congress. Among the most significant is its corrosive effect of allowing the Secretary to revisit the decisions of the service departments on how a former service member's discharge will be characterized. Service departments and not VA are in the best position to determine whether conduct while on active duty warrants the loss of VA benefits.

The service departments well understand the consequence of a dishonorable discharge. Congress did not choose to use this fatal characterization when it defined the term "veteran" in § 101(2) or the acts which would bar servicemembers from receiving VA benefits in § 5303(a). There is no statutory authority for the Secretary of the Department of Veterans Affairs to be allowed to "consider" what conduct of a servicemember should be a bar to VA benefits. The exclusive role of the Secretary should be to assist veterans in obtaining every benefit which can be supported under law. Congress never intended the role of the Secretary to be the gatekeeper to decide which former servicemembers conduct while on active duty should cause the qualifying discharge awarded by the service department to be

considered under dishonorable conditions thereby preventing eligibility from receiving VA benefits.

The existence of § 3.12(d) breaks faith with both the mandate of Congress and the nation's sacred promise to care for those who are injured in its defense. U.S. Dep't of Justice, Final Report of the Attorney General's Committee on Administrative Procedure 129 (1941) (VA is "a benefactory agency" that must act with "considerable leniency"); *see also Henderson*, 562 U.S. at 440 (federal laws "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions") (*quoting Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting)).

IV. This Case Is An Ideal Vehicle To Invalidate The Provisions Of 38 C.F.R. § 3.12(d)(4).

The outcome of this case—and Mrs. Garvey's entitlement to a decade's worth of Dependency and Indemnity Compensation (DIC) and non service connected death benefits—turns squarely on the question of the validity of the provisions of 38 C.F.R. § 3.12(d)(4). Both the Veterans Court and the Federal Circuit mistakenly relied on the validity of this regulation. Thus, only that legal issue is at stake, without any need to address complicating factual considerations.

At the same time, the legal question here is certainly outcome-determinative. The facts are not in dispute. Mr. Garvey was not dishonorably discharged. Mr. Garvey had an Undesirable Discharge. He was a

"veteran" as defined by § 101(2). Finally, he committed none of the acts set out in § 5303(a). As such, there is no basis the *ultra vires* action of the Secretary to re-characterize the character of Mr. Garvey's discharge in order to consider is qualifying discharge as dishonorable. Section 3.12(d)(4) is invalid as a matter of law. Mrs. Garvey's case tragically starkly demonstrates the inequities of the Secretary's invalid rule as the result of the Federal Circuit's atextual and anti-veteran rule interpretation if allowed to stand.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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