No. 20-1532

In the Supreme Court of the United States

DIANA GARVEY, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Acting Solicitor General
Counsel of Record
BRIAN M. BOYNTON
Acting Assistant Attorney General
TARA K. HOGAN
AMANDA L. TANTUM
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

Certain benefits for former servicemembers and their survivors are available only if, among other requirements, the servicemember was discharged "under conditions other than dishonorable." 38 U.S.C. 101(2) (2018). The governing statute does not define what "conditions" of a discharge should be treated as "dishonorable." *Ibid.* A Department of Veterans Affairs (VA) regulation provides that a discharge "issued because of willful and persistent misconduct" is considered to be one "issued under dishonorable conditions." 38 C.F.R. 3.12(d)(4). The question presented is as follows:

Whether the VA properly denied benefits to petitioner, the surviving spouse of a former servicemember, based on the agency's determination that the former servicemember had been discharged "under dishonorable conditions."

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes and regulations—Continued: Page

Miscellaneous:

Miscellaneous—Continued: Page

In the Supreme Court of the United States

No. 20-1532

DIANA GARVEY, PETITIONER

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-20) is reported at 972 F.3d 1333. The decision of the United States Court of Appeals for Veterans Claims (Pet. App. 21-24) is not published in the Veterans Appeals Reporter, but is available at 2019 WL 4739435. The order of the Board of Veterans' Appeals (Pet. App. 25-40) is unreported, but is available at 2018 WL 9730690.

JURISDICTION

The judgment of the court of appeals was entered on August 27, 2020. A petition for rehearing was denied on December 4, 2020 (Pet. App. 41-42). On March 19, 2020, this Court extended the time within which to file any petition for a writ of certiorari due on or after that date to 150 days from the date of the lower-court judgment, order denying discretionary review, or order denying a

timely petition for rehearing. The petition for a writ of certiorari was filed on April 29, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioner, the widow of a former servicemember, filed a claim with the Department of Veterans Affairs (VA) for certain spousal benefits. The Board of Veterans' Appeals denied the claim. Pet. App. 25-40. The United States Court of Appeals for Veterans Claims affirmed. *Id.* at 21-24. The court of appeals affirmed. *Id.* at 1-20.

1. a. Petitioner is the surviving spouse of John P. Garvey, who served in the United States Army from February 1966 to May 1970. Pet. App. 2-3. After Garvey's death in 2010, petitioner filed a claim for dependency and indemnity compensation, and for death pension benefits, based on Garvey's Army service. *Id.* at 2, 4; see 38 U.S.C. 1310(a) (providing in certain circumstances for dependency and indemnity compensation to a "veteran's surviving spouse" if the "veteran dies * * * from a service-connected or compensable disability"); 38 U.S.C. 1541(a) (providing for a "pension" to a "surviving spouse" of a "veteran of a period of war" who satisfies certain conditions).*

Both types of benefits are available only if, among other requirements, the former servicemember is a

---

* In January 2021, Congress amended several provisions of Title 38 to add references to the United States Space Force. *E.g.*, William M. (Mac) Thornberry National Defense Authorization Act for Fiscal Year 2021, Pub. L. No. 116-283, Div. A, Tit. IX, Subtit. C, § 926(a), 134 Stat. 3829 (replacing "or air service" with "air, or space service" in 61 provisions). Because those changes are immaterial to the issues in this case, this brief cites the relevant provisions of Title 38 as they appear in the 2018 edition of the United States Code.

"veteran." 38 U.S.C. 1310(a); 38 U.S.C. 1541(a); see 38 U.S.C. 5303 (listing additional "bars to benefits"). The term "'veteran'" is defined 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*." 38 U.S.C. 101(2) (emphasis added). The disputed issue in this case concerns the proper understanding of the italicized language. The statute does not define what "conditions" of discharge should be considered "dishonorable." *Ibid.* But Congress has authorized the Secretary of Veterans Affairs to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws." 38 U.S.C. 501(a).

Exercising that authority, the Secretary has promulgated a regulation addressing a servicemember's "[c]haracter of discharge." 38 C.F.R. 3.12. As relevant here, that regulation states that "[a] discharge or release because of one of [a list of specified] offenses" will be "considered to have been issued under dishonorable conditions." 38 C.F.R. 3.12(d). One of those offenses is "[w]illful and persistent misconduct." 38 C.F.R. 3.12(d)(4). The regulation clarifies that "[t]his includes a discharge under other than honorable conditions, if it is determined that it was issued because of willful and persistent misconduct." *Ibid.* The "willful and persistent misconduct" ground for finding a discharge to have been issued under dishonorable conditions has been codified in VA regulations since 1946. See 11 Fed. Reg. 12,840, 12,878 (Oct. 31, 1946) ("The requirement of the words 'dishonorable conditions' will be deemed to have been met when it is shown that the discharge" was, among other possibilities, issued "for an offense in-

volving moral turpitude or wilful and persistent misconduct."); 28 Fed. Reg. 101, 123 (Jan. 4, 1963) (promulgation of the rule in its current form).

On May 13, 1970, Garvey was discharged as unfit for service with an "Undesirable Discharge." See Pet. App. 4. That status was the result of several instances of misconduct during his military service:

- In 1967, Garvey was "punished under Article 15 of the Uniform Code of Military Justice" (UCMJ) "for 'disorderly conduct' in an incident with a German taxi driver." *Id.* at 3 (citation omitted).
- In June 1968, Garvey was "convicted by special court-martial of possessing four pounds of cannabis with intent to sell"; sentenced to "90 days of confinement"; "ordered to forfeit a portion of his pay"; and "reduced in rank." *Ibid.*
- In November 1968, Garvey was "convicted by special court-martial of being absent without leave ('AWOL') from September 9, 1968, to October 1, 1968." *Ibid.* He was "given a suspended sentence of confinement and ordered to forfeit a portion of his pay." *Ibid.*
- In June 1969, Garvey was "convicted by special court-martial of being AWOL from April 18, 1969, to June 5, 1969." *Ibid.* He again was "given a suspended sentence of confinement and ordered to forfeit a portion of his pay." *Ibid.*
- In April 1970, Garvey was "convicted by special court-martial of being AWOL from February 16, 1970, to April 1, 1970." *Ibid.* He was "sentenced to five months of confinement and again forfeited a portion of his pay." *Id.* at 4.

Upon his discharge, Garvey "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.'" *Ibid.* (citation omitted). Under a special Vietnam-era procedure, Garvey's discharge status was briefly upgraded to "Under Honorable Conditions (General)," but the Army's Discharge Review Board voted not to affirm that upgraded discharge. *Id.* at 31; see *id.* at 4.

b. The VA denied petitioner's claim for benefits, see Pet. App. 26, and the Board of Veterans' Appeals likewise denied the claim, *id.* at 25-40. As relevant here, the Board found "that the preponderance of the evidence shows that [Garvey's] May 1970 discharge was a result of his persistent and willful misconduct." *Id.* at 40; see *id.* at 25 (findings of fact). The Board observed that, under 38 C.F.R. 3.12(d)(4), Garvey's discharge was under dishonorable conditions, see Pet. App. 28, and that Garvey therefore "d[id] not have 'veteran' status for VA benefits purposes," *id.* at 40. Accordingly, the Board concluded that petitioner "is barred from any applicable VA death benefits." *Ibid.*

c. The United States Court of Appeals for Veterans Claims (CAVC) affirmed the denial of benefits. Pet. App. 21-24. Petitioner contended that the Secretary lacked authority to promulgate the "willful and persistent misconduct" regulation, see 38 C.F.R. 3.12(d), because the regulation imposes a bar to benefits in addition to those contained in 38 U.S.C. 5303, which establishes "[c]ertain bars to benefits." See Pet. App. 24. The CAVC rejected that argument, explaining that Section 5303's requirements for benefits eligibility are "[i]n addition to" the requirement that a servicemember "be a 'veteran.'" *Id.* at 22 (citation omitted). The court

further explained that "there is simply nothing in section 5303, nor in the overall statutory scheme," "that would suggest that the definition of 'veteran' was to be entirely removed from the rulemaking power of the Secretary." *Id.* at 23-24 (brackets and citation omitted). The CAVC also observed that, in *Camarena* v. *Brown*, 6 Vet. App. 565 (1994), affirmed per curiam, 60 F.3d 843 (Fed. Cir. 1995) (Tbl.), it already had considered and rejected "arguments nearly identical to those made by [petitioner]," and that petitioner "ha[d] not convinced the Court that reconsideration of *Camarena* is warranted." Pet. App. 23-24.

2. The court of appeals affirmed. Pet. App. 1-20. The court explained that petitioner "d[id] not dispute that" Garvey's discharge "rendered him ineligible for benefits under the regulation," but instead argued only "that the 'willful and persistent misconduct' bar is contrary to statute." *Id.* at 5. After observing that it had "previously upheld the regulation in a two-paragraph non-precedential decision" in *Camarena* v. *Brown*, 60 F.3d 843 (Fed. Cir. 1995) (Tbl.) (per curiam), the court stated that it "now [would] address the issue in a precedential decision." Pet. App. 6.

The court of appeals observed that "[e]very servicemember is assigned a status—Honorable, Dishonorable, or an intermediate status—upon discharge." Pet. App. 8. The court explained that a "servicemember with an Honorable discharge is eligible for benefits because a discharge 'under honorable conditions' is 'binding' on the VA as to benefits eligibility" under 38 C.F.R. 3.12(a), and conversely that a "servicemember with a Dishonorable discharge is ineligible for benefits because a Dishonorable discharge is a discharge by sentence of a general court-martial," which is "a bar to

benefits under" 38 C.F.R. 3.12(c)(2). Pet. App. 9 (citation omitted). The court further explained that, for servicemembers whose discharges are neither Honorable nor Dishonorable, "the character of their service governs." *Ibid.* The court emphasized that "Congress chose not to use a 'Dishonorable discharge' bar" in its definition of "veteran" in 38 U.S.C. 101(2), but instead "used the phrase 'conditions other than dishonorable.'" Pet. App. 10 (citation omitted).

The court of appeals explained that "the phrase 'conditions other than dishonorable' is not a term of art in the military," and is "ambigu[ous]." Pet. App. 10. Citing this Court's decision in *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837 (1984), the court of appeals concluded that "[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, * * * the VA has authority to define the term consistent with the Congressional purpose." Pet. App. 16 (citation omitted); see *id.* at 10 n.6 ("Congress left it to the VA to define the term by regulation.").

The court of appeals held that the VA had permissibly exercised that authority in promulgating 38 C.F.R. 3.12(d)(4), which defines "conditions other than dishonorable" to exclude "willful and persistent misconduct." Pet. App. 17. Citing a Senate committee report accompanying the 1944 statutory amendment that had originally added the "conditions other than dishonorable" language, the court explained that the purpose of that language was "to deny benefits to 'unworthy' former servicemembers even if they were not given a Dishonorable discharge." *Id.* at 12 (citations omitted). In that regard, the court noted the committee report's observation that "in some cases offenders are released or

permitted to resign without trial [by court martial]—particularly in the case of desertion without immediate apprehension. In such cases benefits should not be afforded as the conditions are not less serious than those giving occasion to dishonorable discharge by court martial." *Id.* at 13 (citation omitted); see *id.* at 15.

Citing a statement by the bill's sponsor, the court of appeals further observed that "a person with poor conduct in the service might nevertheless be discharged without a court-martial because the military 'did not want to take the trouble to court martial them and give them what they deserved—a dishonorable discharge.'" Pet. App. 14 (citation omitted). In such cases, the sponsor said, "the VA will have some discretion with respect to regarding the discharge from the service as dishonorable" for purposes of benefits eligibility. *Ibid.* (brackets, citation, and emphasis omitted). The court concluded that the "willful and persistent misconduct" bar to benefits that VA regulations impose is consistent with the statutory text because it "den[ies] benefits to those who committed serious misconduct even if they did not receive a Dishonorable discharge." *Id.* at 17.

The court of appeals also found it significant that VA regulations have contained the "willful and persistent misconduct" provision since 1946. Pet. App. 17. The court further emphasized that in 1977, Congress had modified the Vietnam-era upgrade program (under which petitioner had briefly obtained an upgrade to his discharge status) in order "to deny entitlement to veterans' benefits to certain persons who would otherwise become so entitled solely by virtue of the administrative upgrading." *Id.* at 18 (citation omitted); see Act of Oct. 8, 1977, Pub. L. No. 95-126, 91 Stat. 1106 (stating that "no benefits under laws administered by the [VA] shall

be provided, as a result of a change in or new issuance of a discharge" under the upgrade program, "except upon a case-by-case review" that "shall be historically consistent with criteria for determining honorable service"). The court explained that the 1977 statute thus "presuppose[d] that a servicemember discharged under less than honorable conditions would, but for his or her upgrade under the Program, not have been eligible for benefits in at least some circumstances." Pet. App. 19. The court further observed that "Congress was well aware" of the willful-and-persistent-misconduct bar to benefits, which "had been in force for over three decades" when Congress enacted the 1977 statute. *Ibid.*

ARGUMENT

Petitioner challenges the VA's longstanding regulation that treats a discharge "issued because of willful and persistent misconduct" as one "issued under dishonorable conditions." 38 C.F.R. 3.12(d)(4). The court of appeals correctly upheld the regulation, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The VA Secretary had statutory authority to promulgate 38 C.F.R. 3.12(d), and the regulation reflects a permissible construction of the relevant statutory text.

a. The Secretary is authorized to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws." 38 U.S.C. 501(a). And "[t]he power of an administrative agency to administer a congressionally created and funded program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by

Congress." *Morton* v. *Ruiz*, 415 U.S. 199, 231 (1974). Here, Congress defined the term "veteran" to mean a former servicemember who was discharged "under conditions other than dishonorable," but it did not specify the "conditions" of discharge that should be viewed as "dishonorable." 38 U.S.C. 101(2). That is precisely the sort of interpretive gap an agency is empowered to fill. See *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 843 (1984).

That is particularly so given Congress's decision not to use the term "dishonorable discharge" in Section 101(2), while using that phrase elsewhere in the statute, see, *e.g.*, 38 U.S.C. 105(b). "Every servicemember is assigned a status—Honorable, Dishonorable, or an intermediate status—upon discharge." Pet. App. 8. Congress declined either to limit the statutory definition of "veteran" to servicemembers who were "honorably discharged," or to encompass within that definition all servicemembers who were "not dishonorably discharged." Cf. *id.* at 14 n.9.

Congress evidently viewed the former approach as overly restrictive, since many servicemembers do not receive honorable discharges. Congress also rejected the latter approach, however, in light of the fact that "a dishonorable discharge is a term which applies only to sentences adjudged on enlisted personnel by a general court-martial." *Camarena* v. *Brown*, 6 Vet. App. 565, 567 (1994) (emphasis omitted), affirmed per curiam, 60 F.3d 843 (Fed. Cir. 1995) (Tbl.); see *Manual for Courts-Martial, United States Rules for Courts-Martial* 1003(b)(8)(B) (2019) ("A dishonorable discharge applies only to enlisted persons and warrant officers who are not commissioned and may be adjudged only by a general court-martial."). Defining the term "veteran" to

encompass every former servicemember who was "not dishonorably discharged" therefore would have conferred veteran status (and potential eligibility for veteran's benefits) on all non-enlisted former servicemembers, regardless of any misconduct they had committed or the circumstances of their respective discharges. And because the military does not necessarily pursue a general court martial in each case that might warrant one, see Pet. App. 12-14, such an expansive definition also could have produced untoward results even with respect to enlisted servicemembers who are discharged for serious misconduct.

By making "veteran" status (and concomitant eligibility for benefits) contingent on a discharge "under conditions other than dishonorable," 38 U.S.C. 101(2), Congress avoided both of the extremes described above. Congress's decision to use "discharged * * * under conditions other than dishonorable"—rather than "honorably discharged" or "not dishonorably discharged"—should be given effect. See *Department of Homeland Security* v. *MacLean*, 574 U.S. 383, 391 (2015) ("Congress generally acts intentionally when it uses particular language in one section of a statute but omits it in another."). And Congress's decision to eschew both of the available terms of art effectively requires the VA to determine in the first instance which "conditions" of discharge will qualify as "other than dishonorable." Rather than define that phrase or otherwise specify the types of discharges that it encompasses, Congress left the "eligibility of persons discharged with neither Honorable nor Dishonorable discharges * * * to a determination by the VA based on the pertinent facts." Pet. App. 15 n.9 (brackets and citation omitted).

Petitioner contends that 38 U.S.C. 5303 sets forth an exclusive list of bars to benefits, and that the Secretary therefore lacked authority to promulgate 38 C.F.R. 3.12(d). See Pet. 11-12 (arguing that Section 5303(a) identifies "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") (emphases added). That argument lacks merit. As the italicized language indicates, petitioner is entitled to benefits only if Garvey was a "veteran." And under the statutory definition of that term, Garvey would qualify as a "veteran" only if he was discharged "under conditions other than dishonorable." 38 U.S.C. 101(2). That statutory limitation on benefits eligibility is independent of and in addition to the requirements set forth in Section 5303. See Pet. App. 10. That Section 5303 sets forth additional "bars to benefits," 38 U.S.C. 5303, does not vitiate the agency's authority to interpret the term "conditions other than dishonorable" in Section 101(2) in order to determine whether Garvey was in fact a "veteran."

Indeed, the statutory provisions on which petitioner bases her claim for survivor's benefits impose additional requirements beyond the criteria listed in Section 5303. Petitioner applied for dependency and indemnity compensation under 38 U.S.C. 1310, and for death benefits under 38 U.S.C. 1541. Dependency and indemnity compensation is available only when the "veteran dies * * * from a service-connected or compensable disability," 38 U.S.C. 1310(a), and is prohibited "unless such veteran (1) was discharged or released under conditions other than dishonorable" or "(2) died while in the active" service, 38 U.S.C. 1310(b). Spousal death benefits are available only to "the surviving spouse of each veteran

of a period of war who met the service requirements prescribed in" 38 U.S.C. 1521(j) or "who at the time of death was receiving (or entitled to receive) compensation or retirement pay for a service-connected disability." 38 U.S.C. 1541(a). Those provisions further refute petitioner's view that Section 5303 sets forth the exclusive criteria for benefits under Title 38.

b. The longstanding VA regulation at issue here, which treats a discharge "issued because of willful and persistent misconduct" as one "issued under dishonorable conditions," 38 C.F.R. 3.12(d)(4), reflects a permissible construction of the statutory phrase "conditions other than dishonorable," 38 U.S.C. 101(2). Because Congress did not specify what "conditions" of discharge should be deemed "dishonorable," *ibid.*, and the statutory phrase is "not a term of art in the military," Pet. App. 10, the ordinary meaning of Section 101(2)'s language should control. See *Schindler Elevator Corp.* v. *United States ex rel. Kirk*, 563 U.S. 401, 407 (2011) ("Because the statute does not define 'report,' we look first to the word's ordinary meaning."); Pet. 16.

The ordinary meaning of "dishonorable" is "[e]ntailing dishonour; involving disgrace and shame; ignominious, base." 4 *The Oxford English Dictionary* 782 (2d ed. 1989); accord 3 *The Oxford English Dictionary* 457 (1933) (same). VA regulations define "[w]illful misconduct" to include "conscious wrongdoing or known prohibited action" that "involves deliberate or intentional wrongdoing with knowledge of or wanton and reckless disregard of its probable consequences." 38 C.F.R. 3.1(n)(1). "[P]ersistent" in this context means "[c]ontinued, continuous, constant; constantly repeated." 11 *The Oxford English Dictionary* 596 (2d ed. 1989); accord 7 *The Oxford English Dictionary* 723 (1933) (same).

A military discharge issued for repeated acts of deliberate or intentional wrongdoing is reasonably characterized as one involving disgraceful, shameful, or ignominious conditions. The "willful and persistent misconduct" regulation thus reflects a permissible construction of the statutory text. See *Chevron*, 467 U.S. at 843. Garvey himself was deemed unfit for service and issued an "Undesirable Discharge" for multiple instances of misconduct, including engaging in disorderly conduct with a foreign civilian, possessing drugs with intent to sell them, and being AWOL for many months in total. See Pet. App. 3-4.

c. Petitioner's principal argument is that, because an intermediate-status discharge (like the "Undesirable Discharge" Garvey received) is not a "dishonorable discharge," Garvey necessarily was discharged "under conditions other than dishonorable" within the meaning of Section 101(2). See Pet. 11 ("Under [Section 101(2)], only service members who received a dishonorable discharge do not meet the definition of veteran provided by Congress."); Pet. 12 ("The adverse and unlawful effect of [38 C.F.R.] § 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.'"); Pet. 9, 24-25. That argument disregards the fact that, unlike the term "dishonorable discharge," the phrase "conditions other than dishonorable" is not a term of art in federal military law.

Petitioner's argument is also inconsistent with a 1977 statutory amendment that addressed the armed forces' Vietnam-era procedures concerning upgrades to discharge status. "On April 5, 1977, President Carter initiated the Special Discharge Review Program," under

which certain Vietnam-era servicemembers could have their discharges upgraded to honorable status if a Discharge Review Board found that action to be appropriate. Pet. App. 17. Because an honorable discharge "is binding on the [VA]" for benefits purposes under 38 C.F.R. 3.12(a), "some servicemembers who were [previously] ineligible for benefits (due, for example, to the 'willful and persistent misconduct' bar), would become eligible because of their upgrade under the Program." Pet. App. 17-18. Persons who had received dishonorable discharges were not eligible for upgrades under the review program. See 42 Fed. Reg. 40,576, 40,578 (Aug. 10, 1977) (explaining that eligibility for the review program extended to "[a]ll discharges except Honorable Discharges and punitive discharges as a result of sentence by Court Martial (Bad Conduct and Dishonorable Discharges)."); 42 Fed. Reg. 21,308, 21,308 (Apr. 26, 1977) ("Persons discharged as a result of sentence by a General Court-Martial or discharged with a Bad Conduct Discharge by sentence of a Special Court-Martial are not eligible for review of their discharges under this program."); cf. 10 U.S.C. 1553(a) (directing each branch of the armed forces to "establish a board of review * * * to review the discharge or dismissal (*other than a discharge or dismissal by sentence of a general court-martial*) of any former member of an armed force") (emphasis added).

Members of Congress expressed concern that the review program "upgraded Vietnam-era servicemembers but not other servicemembers, and * * * unfairly allowed those with problematic service records to obtain veterans benefits." Pet. App. 18. Congress accordingly amended the statute to provide "that servicemembers upgraded to 'a general or honorable discharge' under

the Program were ineligible for veterans benefits unless, after a case-by-case review by a Discharge Review Board, the VA determined that the veteran would have received the upgraded discharge status even under generally applicable standards." *Ibid.*; see 38 U.S.C. 5303(e)(2). The House of Representatives committee report accompanying the 1977 legislation quoted the VA's regulation; explained that "[i]n cases of Undesirable Discharges," the VA will "make its own determination whether the discharge was issued 'under conditions other than dishonorable'"; and stated that "[t]here has never been any problem with" the VA's practice. H.R. Rep. No. 580, 95th Cong., 1st Sess. 8-9, 11 (1977); cf. *Traynor* v. *Turnage*, 485 U.S. 535, 546 (1988) (citing a Senate committee report to demonstrate Congress's awareness of a VA regulation about "willful misconduct").

"When Congress revisits a statute giving rise to a longstanding administrative interpretation without pertinent change, the congressional failure to revise or repeal the agency's interpretation is persuasive evidence that the interpretation is the one intended by Congress." *Sebelius* v. *Auburn Regional Medical Center*, 568 U.S. 145, 159 (2013) (brackets and citation omitted). That principle has particular force here. By 1977, the VA regulation at issue in this case had "been in force for over three decades." Pet. App. 19. The 1977 statute "presupposes" that, absent an upgrade, at least some former servicemembers who had received intermediate-status discharges would not have qualified as "veterans." *Ibid.* Yet far from disapproving that approach, Congress acted to reduce the likelihood that upgrades would render such individuals eligible for benefits. See *ibid.* ("That Congress required an upgraded servicemember

to remain subject to the VA's rules under his or her original discharge status (absent a specific dispensation) suggests approval of those rules, including the 'willful and persistent misconduct' bar.").

Indeed, under petitioner's interpretation of Section 101(2), neither the discharge review program nor Congress's legislative response to that program would have affected former servicemembers' eligibility for benefits. Upgrades under the review program were not available to individuals with dishonorable discharges, but only to former servicemembers with various types of intermediate-status discharges. See p. 15, *supra*. Under petitioner's approach, however, all persons with intermediate-status discharges were *already* entitled to treatment as "veterans," without the need for any upgrade to their discharge statuses, because they all had originally been discharged "under conditions other than dishonorable" as petitioner construes that phrase. The 1977 amendment reflects Congress's clear rejection of that premise.

d. Petitioner's remaining arguments also lack merit.

i. Petitioner asserts (Pet. 14) that the court of appeals "failed to start with the text" and "made no examination of the text" of the statute. But the court observed at the outset of its analysis (see Pet. App. 10) that Section 101(2) requires as a prerequisite to benefits a discharge "under conditions other than dishonorable," and it noted the difference between that language and the phrase "not dishonorably discharged." The court also observed that, because Congress has not defined the term "conditions other than dishonorable," and because that phrase is not a term of art, the VA's authority to administer the veterans'-benefits program necessarily encompasses the authority to interpret that language.

See *id.* at 10, 16-17. Finally, the court recognized that the regulation must be upheld if it reflects a permissible construction of the statutory text. See *id.* at 16-17 (citing *Chevron*, 467 U.S. at 843).

ii. Petitioner contends that the regulation at issue here impermissibly "allows the Secretary to reexamine the decision of the service department on the character of the veteran's discharge." Pet. 13; see Pet. 14 ("[T]he Secretary's regulation allows him to revisit the character of the veteran's discharge."); Pet. 23 (similar). That is incorrect. Under the regulation, honorable discharges and dishonorable discharges are dispositive as to benefits eligibility. See Pet. App. 9. But even with respect to former servicemembers who received intermediate-status discharges, the disputed regulation does not permit the Secretary to second-guess any prior determination regarding a particular individual's appropriate discharge status.

In this case, for example, the VA did not purport to change Garvey's discharge status from "Undesirable" to "Dishonorable." Rather, the agency simply examined the circumstances that had led to Garvey's discharge in order to decide a question (whether Garvey was a Section 101(2) "veteran" entitled to VA benefits that depend on that status) that is squarely within the VA's purview. Under the VA's longstanding regulatory approach, when a particular individual's discharge status "is neither 'under honorable conditions' nor Dishonorable," the individual's status as a "veteran" depends not on the particular type of discharge issued, but on "the character of [the individual's] service." Pet. App. 9. The agency therefore was required to conduct a circumstance-specific inquiry into whether Garvey's discharge was "under conditions other than dishonor-

able." 38 U.S.C. 101(2); see 38 U.S.C. 1310(a); 38 U.S.C. 1541(a). That determination was controlling with respect to Garvey's (and thus petitioner's) entitlement to certain VA benefits, but it did not alter the character of the discharge that Garvey had received.

iii. Petitioner objects (Pet. 16) to the court of appeals' reliance on "the statute's legislative history to determine its meaning." That objection is misplaced. Although legislative history cannot override unambiguous statutory language, the question here is whether the agency's interpretation of ambiguous statutory text is permissible. See *Chevron*, 467 U.S. at 843. It is relevant to answering *that* question that various legal observers—including both the Members of Congress who originally drafted and enacted the "conditions other than dishonorable" language in 1944, see Pet. App. 11-16, and those who drafted and enacted the 1977 statutory amendment, see pp. 14-17, *supra*—believed that the language vested the VA with discretion to determine whether particular intermediate-status discharges were issued under "conditions other than dishonorable." Those views are powerful evidence that the VA's regulation reflects a permissible construction of the statutory text. See Antonin Scalia & Bryan A. Garner, *Reading Law* 388 (2012) (explaining that legislative history may be useful "for the purpose of establishing linguistic usage—showing that a particular word or phrase is capable of bearing a particular meaning").

iv. To the extent petitioner relies (Pet. 10; see Pet. 20) on a "pro-veteran canon of construction," that reliance is misplaced. This Court has stated that, when construing ambiguous statutory provisions for benefits to veterans, "interpretive doubt is to be resolved in the veteran's favor." *Brown* v. *Gardner*, 513 U.S. 115, 118

(1994); see *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) ("We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'") (citation omitted). The statutory provision at issue here, however, is not a "provision[] for benefits," *Henderson*, 562 U.S. at 441 (citation omitted), but rather defines a term ("veteran") that is used in a variety of contexts. This Court has never suggested that the pro-veteran canon would apply to the interpretation of a generally applicable provision of that sort. Cf. *Clark* v. *Martinez*, 543 U.S. 371, 382 (2005).

v. Petitioner's reliance (Pet. ii, 18-20) on *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), is misplaced. The Court there addressed the issue of deference to an agency's interpretation of its own ambiguous regulations. See *id.* at 2408. The regulation at issue here, however, is not ambiguous: it unequivocally treats a discharge "issued because of willful and persistent misconduct" as a discharge issued "under dishonorable conditions." 38 C.F.R. 3.12(d)(4). Petitioner does not contend that the VA's denial of her benefits claim reflected a misinterpretation or misapplication of the regulation. See Pet. App. 5 ("On appeal, [petitioner] does not dispute that Mr. Garvey was discharged for willful and persistent misconduct, or that this rendered him ineligible for benefits under the regulation."). Rather, she challenges the Secretary's authority to promulgate the regulation and the regulation's consistency with the statute. *Kisor* is thus inapposite.

2. The court of appeals' decision does not warrant further review. Petitioner does not contend that the decision below conflicts with any decision of this Court or another court of appeals. Petitioner suggests (Pet. 3)

that the decision below will have an "immediate nationwide effect on one of the country's largest and most important public-benefits programs." But the effect of that decision is simply to leave in place the VA's longstanding rule that servicemembers discharged for "willful and persistent misconduct" are ineligible for veteran's benefits. The substance of that rule has been reflected in VA regulations since 1946, and the rule in its current form has been in effect since 1963. See 11 Fed. Reg. at 12,878; 28 Fed. Reg. at 123. More than 25 years ago, the court of appeals upheld that regulation against a challenge materially identical to the one petitioner brings now. See *Camarena* v. *Brown*, 60 F.3d 843 (Fed. Cir. 1995) (Tbl.) (per curiam). Petitioner offers no sound reason to disturb that settled law and practice.

Petitioner also asserts (Pet. 22) that the decision below "could affect the more than 500,000 living former servicemembers who have been less-than-honorably discharged." But there is no reason to believe that all or even a substantial portion of those individuals were discharged for "willful and persistent misconduct" as the VA construes that term. And to the extent former servicemembers who are ineligible for veteran's benefits because they were discharged for willful and persistent misconduct "have physical and mental wounds that persist to this day," *ibid.*, they may still be entitled to VA healthcare benefits for disabilities incurred or aggravated during active service, since eligibility for those benefits does not depend on "veteran" status. See 38 C.F.R. 3.360.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Acting Solicitor General
BRIAN M. BOYNTON
Acting Assistant Attorney General
TARA K. HOGAN
AMANDA L. TANTUM
Attorneys

AUGUST 2021