APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

OPINION Issued: August 12, 2020
OPINION MODIFIED: April 30, 2021[*]

KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS, argued for claimant-appellant. Also represented by PAUL WHITFIELD HUGHES, McDermott, Will & Emery LLP, Washington, DC.

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[*] This opinion has been modified and reissued following a petition for rehearing filed by Appellant.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by JEFFREY B. CLARK, MARTIN F. HOCKEY, JR., ROBERT EDWARD KIRSCHMAN, JR.; Y. KEN LEE, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

ROMAN Martinez, Latham & Watkins LLP, for amici curiae American Veterans, National Organization of Veterans' Advocates, Inc., Paralyzed Veterans of America, Veterans of Foreign Wars of the United States, Vietnam Veterans of America. Also represented by GREGORY B. IN DEN BERKEN.

Before REYNA, SCHALL, and WALLACH, *Circuit Judges*.

Opinion for the court filed by *Circuit Judge* SCHALL.

Dissenting opinion filed by *Circuit Judge* REYNA.

SCHALL, *Circuit Judge*.

INTRODUCTION AND DECISION

In *Kisor v. Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017) ("*Kisor I*"), we affirmed the decision of the United States Court of Appeals for Veterans Claims ("Veterans Court") in *Kisor v. McDonald*, No. 14-2811, 2016 WL 337517 (Vet. App. Jan. 27, 2016) ("*Veterans Court Decision*"). In that decision, the Veterans Court affirmed the April 29, 2014 decision of the Board of Veterans' Appeals ("Board") that denied Mr. Kisor an effective date earlier than June 5, 2006, for the grant of service connection for his post-traumatic stress disorder ("PTSD"). *Id.* at *1.

In its decision, the Board held that Mr. Kisor was not entitled to an earlier effective date under 38 C.F.R.

§ 3.156(c)(1). J.A. 78–91. That regulation states that the Department of Veterans Affairs ("VA") will reconsider a claim after a final decision if it receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1). The regulation further states that "[a]n award made based all or in part on the records identified by [§ 3.156(c)(1)] is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later." *Id.* § 3.156(c)(3).

In Mr. Kisor's case, the Board concluded that two service department records, which were received in 2006 and 2007, were not "relevant" under the regulation because they did not pertain to the basis of the 1983 denial of Mr. Kisor's claim, which was the lack of a diagnosis of PTSD. J.A. 85, 89, 90. Rather, they pertained to whether Mr. Kisor was in combat in "Operation Harvest Moon," a military operation in Vietnam in 1965. In that regard, when it denied Mr. Kisor's claim, the VA Regional Office ("RO") had before it a VA psychiatric examiner's report that recited Mr. Kisor's account of his participation in Operation Harvest Moon, *see* J.A. 19–20, and the RO did not dispute that account. The Board reasoned that the documents would not have changed the "outcome" of the VA's 1983 decision, which was based on the lack of "a diagnosis of PTSD," because they bore on a matter relating to entitlement to service connection for PTSD that was not in dispute: the presence of an in-service stressor. *Id.* at 90–91. The Board thus denied Mr. Kisor an effective date earlier than June 5, 2006, for a grant of service connection for his PTSD. J.A. 91. June 5, 2006 was the date Mr. Kisor submitted a request to reopen his claim, which the VA granted. J.A. 34. Pursuant to 38 U.S.C. § 5110(a) and 38 C.F.R. § 3.400(q)–(r), as in effect in 2014, the effective date of the grant of service connection for Mr. Kisor's reopened claim was the date he submitted his request to reopen.

In our prior decision, we held that the Board had not erred in construing the term "relevant" as it appears in § 3.156(c)(1). In reaching that holding, we concluded that the term "relevant" was ambiguous and had more than one reasonable meaning. *Kisor I*, 869 F.3d at 1367–68. We therefore deferred, under *Auer v. Robbins*, 519 U.S. 452, 461 (1997), to the Board's interpretation of the term, which we found to be reasonable. *Kisor I*, 869 F.3d at 1367–69.

The case is now before us again on remand from the Supreme Court. *See Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) ("*Kisor II*"). In *Kisor II*, the Court held that, in *Kisor I*, we were too quick to extend *Auer* deference to the Board's interpretation of "relevant" as it appears in § 3.156(c)(1). The Court therefore vacated our decision and remanded the case to us with the instruction that we decide whether *Auer* deference "applies to the agency interpretation at issue." 139 S. Ct. at 2408. The Supreme Court stated that "[f]irst and foremost, a court should not afford *Auer* deference unless the regulation is genuinely ambiguous." *Id.* at 2415. The Court directed us on remand "to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Id.* at 2424.

For the reasons stated below, we now conclude that, in the setting of § 3.156(c)(1), the term "relevant" is not "genuinely ambiguous." *Id.* at 2415. Accordingly, *Auer* deference is not appropriate in this case. In our view, in the context of § 3.156(c)(1), the term "relevant" has only "one reasonable meaning," the meaning the Board attributed to it. As the Board determined, and as we explain, under the regulation, in order to be "relevant," a record must speak to a matter in issue, in other words, a matter in dispute. We therefore once again affirm the decision of the Veterans Court that affirmed the decision of the Board denying Mr.

Kisor entitlement under § 3.156(c)(1) to an effective date earlier than June 5, 2006, for his PTSD.

BACKGROUND

I.

The pertinent facts are as follows: Mr. Kisor served on active duty in the Marine Corps from 1962 to 1966. *Veterans Court Decision*, 2016 WL 337517, at *1. In December of 1982, he filed an initial claim for disability compensation benefits for PTSD with the VA RO in Portland, Oregon. *Id.* Subsequently, in connection with the claim, the RO received a February 1983 letter from David E. Collier, a counselor at the Portland Vet Center. J.A. 17. In his letter, Mr. Collier stated: "[I]nvolvement in group and individual counseling identified . . . concerns that Mr. Kisor had towards depression, suicidal thoughts, and social withdraw[a]l. This symptomatic pattern has been associated with the diagnosis of Post-Traumatic Stress Disorder." *Id.*

In March of 1983, the RO obtained a psychiatric examination for Mr. Kisor. In his report, the examiner noted that Mr. Kisor had served in Vietnam. The examiner also noted that Mr. Kisor recounted that he had participated in Operation Harvest Moon; that he was on a search operation when his company came under attack; that he reported several contacts with snipers and occasional mortar rounds fired into his base of operation; and that he "was involved in one major ambush which resulted in 13 deaths in a large company." J.A. 19–20. The examiner did not diagnose Mr. Kisor as suffering from PTSD, however. Rather, it was the examiner's "distinct impression" that Mr. Kisor suffered from "a personality disorder as opposed to PTSD." *Id.* at 21. The examiner diagnosed Mr. Kisor with intermittent explosive disorder and atypical personality disorder. *Id.* Such conditions cannot be a basis for service

connection. *See* 38 C.F.R. § 4.127. Given the lack of a current diagnosis of PTSD, the RO denied Mr. Kisor's claim in May of 1983. J.A. 23. The RO decision became final after Mr. Kisor initiated, but then failed to perfect, an appeal. *Veterans Court Decision*, 2016 WL 337517, at *1.

II.

On June 5, 2006, Mr. Kisor submitted a request to reopen his previously denied claim for service connection for PTSD. J.A. 25. While his request was pending, he presented evidence to the RO. This evidence included a July 20, 2007 report of a psychiatric evaluation diagnosing PTSD, as well as a copy of the February 1983 letter from the Portland Vet Center. *See* J.A. 17, 100–11. The evidence also included service personnel records that had not been before the RO in 1983. These records included a copy of Mr. Kisor's Department of Defense Form 214 (subsequently corrected in 2007 to note, *inter alia*, a Combat Action Ribbon); and a Combat History, Expeditions, and Awards Record documenting his participation in Operation Harvest Moon. *See* J.A. 27–29. The RO also located an additional record it did not consider in 1983: a daily log from Mr. Kisor's unit, the 2nd Battalion, 7th Marines. J.A. 30–31. In June of 2007, the RO made a Formal Finding of Information Required to Document the Claimed Stressor. This was based on Mr. Kisor's statements; on his service medical records (which verified his service in Vietnam with the 2nd Battalion, 7th Marines); and on the daily log from his battalion, which detailed the combat events Mr. Kisor had previously described in connection with his claim. J.A. 30–31. In September of 2007, a VA examiner diagnosed Mr. Kisor with PTSD. J.A. 115.

In due course, the RO issued a rating decision reopening Mr. Kisor's previously denied claim. The decision granted Mr. Kisor service connection for PTSD and assigned a 50

percent disability rating, effective June 5, 2006. *Veterans Court Decision*, 2016 WL 337517, at *1. According to the decision, the rating was based upon evidence that included the July 2007 psychiatric evaluation report diagnosing PTSD, the September 2007 VA examination, and the Formal Finding of Information Required to Document the Claimed Stressor. J.A. 32–33. The RO explained that service connection was warranted because the VA examination showed that Mr. Kisor was diagnosed with PTSD due to experiences that occurred in Vietnam and because the record showed that he was "a combat veteran (Combat Action Ribbon recipient)." J.A. 33.

In November of 2007, Mr. Kisor filed a Notice of Disagreement. In it, he challenged both the 50 percent disability rating and the effective date assigned by the RO. *Veterans Court Decision*, 2016 WL 337517, at *1. Subsequently, in March of 2009, the RO issued a decision increasing Mr. Kisor's schedular rating to 70 percent. In addition, the RO granted Mr. Kisor an extraschedular entitlement to individual unemployability, effective June 5, 2006. J.A. 41–45. In January of 2010, the RO issued a Statement of the Case denying entitlement to an earlier effective date for the grant of service connection for PTSD. *See* J.A. 53–65.

III.

Mr. Kisor appealed to the Board. Although not raised by Mr. Kisor, the Board considered whether the records Mr. Kisor submitted in connection with his June 5, 2006 request to reopen and the additional record located by the RO warranted reconsideration of his claim under 38 C.F.R. § 3.156(c)(1). If it did, then Mr. Kisor would be eligible for an effective date for his disability benefits of December of 1982, "the date VA received the previously decided claim." 38 C.F.R. § 3.156(c)(3).

After reviewing the evidence, the Board denied Mr. Kisor entitlement to an effective date earlier than June 5, 2006. J.A. 91. The Board found that the VA did receive service department records documenting Mr. Kisor's participation in Operation Harvest Moon after the May 1983 rating decision. J.A. 89–90. As noted above, the Board concluded, though, that the records were not "relevant" for purposes of § 3.156(c)(1). J.A. 90. The Board explained that the 1983 rating decision denied service connection because there was no diagnosis of PTSD, and because service connection can be granted only if there is a current disability. *Id.* (citing *Brammer v. Derwinski*, 3 Vet. App. 223 (1992)). The Board stated that "relevant evidence, whether service department records or otherwise, received after the rating decision would suggest or better yet establish that the Veteran has PTSD as a current disability." *Id.* The Board noted that Mr. Kisor's "service personnel records and the daily [Battalion] log skip this antecedent to address the next service connection requirement of a traumatic event during service." *Id.* Finally, the Board concluded with the observation that the records at issue were not "outcome determinative" and "not relevant to the decision in May 1983 because the basis of the denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service." J.A. 90–91.

DISCUSSION

I.

As noted, this case is before us on remand from the Supreme Court. On remand, we asked the parties to provide us with their views as to how we should proceed in view of the Court's decision in *Kisor II*. In response, both Mr. Kisor and the government take the position that the term "rele-

vant," as it appears in 38 C.F.R. § 3.156(c), is not "genuinely ambiguous" and that therefore *Auer* deference is not appropriate. *See* Appellant's Suppl. Br. 4 ("In this case, the term 'relevant' as used by the Secretary in 38 C.F.R. § 3.156(c) is not 'genuinely ambiguous.'"); Appellee's Suppl. Br. 4 ("A thorough examination of the text, purpose, structure, and history of 38 C.F.R. § 3.156(c) demonstrates that our reading of 'relevant' in that subsection is the only reasonable reading of the regulation.").

Mr. Kisor's view is that the only reasonable reading of the regulation is that a service department record is "relevant" if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Appellant's Suppl. Br. 9–10 (quoting *Counts v. Brown*, 6 Vet. App. 473, 476 (1994)). In other words, Mr. Kisor reasons that a service record is "relevant" if it constitutes evidence probative of any fact necessary to substantiate a veteran's claim, even if the matter to which the record speaks is not in dispute. The government's view is that the only reasonable reading of the term "relevant" in § 3.156(c) is that, in order to be relevant, a record must "address a dispositive issue and therefore . . . affect the outcome of the proceeding." Appellee's Suppl. Br. 14. The government reasons that, in order for a record to affect the outcome of the proceeding it "must speak to the basis for the VA's prior decision." *Id.* at 16. That was not the case here because the basis for the VA's prior decision was the absence of a diagnosis of PTSD, not the absence of an in-service stressor (participation in combat). Thus, while the parties both take the position that "relevant," as it appears in the regulation, is not genuinely ambiguous, they advocate different meanings for the term.

As explained below, we too conclude that the term "relevant" in § 3.156(c) is not genuinely ambiguous. At the

same time, we agree with the government that, in the context of the regulation, the term has only one reasonable meaning. To be relevant, a record must be relevant to the issue that was dispositive against the veteran in the VA adjudication of the claim sought to be reconsidered and, in that way, bear on the outcome of the case. That is how we understand the Board's determination that the record must speak to a matter in issue, in other words, a matter in dispute. In this case, in 1983 the VA denied Mr. Kisor's claim for service connection for PTSD because he had not been diagnosed with PTSD, not because of the absence of an in-service stressor. Indeed, in this case, the presence of an in-service stressor has never been disputed. As the Supreme Court pointed out, "[t]he report of the agency's evaluating psychiatrist noted [Mr.] Kisor's involvement in . . . battle" during Operation Harvest Moon. *Kisor II*, 139 S. Ct. at 2409. Mr. Kisor has not made any showing that the service records at issue were relevant, even indirectly, to undermining the basis for the RO's 1983 rejection of his claim that he was suffering from PTSD, a rejection that did not question Mr. Kisor's experiences in the service. For this reason, we again affirm the decision of the Veterans Court that affirmed the decision of the Board denying Mr. Kisor an effective date earlier than June 5, 2006, for service connection for his PTSD.

II.

Establishing service connection for a PTSD claim requires (1) a medical diagnosis of PTSD; (2) "a link, established by medical evidence, between [the] current symptoms and an in-service stressor"; and (3) "credible supporting evidence that the claimed in-service stressor occurred." *AZ v. Shinseki*, 731 F.3d 1303, 1310 (Fed. Cir. 2013) (quoting 38 C.F.R. § 3.304(f)).

A veteran can seek to revise a Board denial of a claim for disability benefits through different procedures. First, Board decisions are subject to review to determine whether a clear and unmistakable error exists under 38 U.S.C. §§ 7111, 5109A, and 38 C.F.R. § 20.1400. Second, before amendments promulgated in 2019, a claimant could reopen a claim by submitting "new and material evidence" under former 38 U.S.C. § 5108 and 38 C.F.R. § 3.156. *See Garcia v. Wilkie*, 908 F.3d 728, 732–33 (Fed. Cir. 2018) (citing *Cook v. Principi*, 318 F.3d 1334, 1337 (Fed. Cir. 2002) (en banc)). As noted, in 2006, Mr. Kisor sought to reopen his claim for PTSD. Benefits awarded pursuant to a reopened claim under the former statutory and regulatory framework were granted an effective date no earlier than the date of the request for reopening. 38 U.S.C. § 5110 (2012), 38 C.F.R. § 3.400(q)–(r) (2006); *see also Sears v. Principi*, 349 F.3d 1326, 1331 (Fed. Cir. 2003).[1]

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[1] Under the Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. 115-55 ("Modernization Act"), veterans may now file "supplemental claims" based on "new and relevant" evidence. 38 U.S.C. § 5108 (2019); 38 C.F.R. §§ 3.156(d), 3.2501 (2019). Section 3.2501 defines "relevant evidence" as "information that tends to prove or disprove a matter at issue in a claim [and] includes evidence that raises a theory of entitlement that was not previously addressed." 38 C.F.R. § 3.2501. The comments accompanying the proposed rule explained that the definition of "relevant evidence" came from 38 U.S.C. § 101(35). VA Claims and Appeals Modernization, 83 Fed. Reg. 39,818, 39,822 (proposed Aug. 10, 2018). The comments accompanying the final rule explain that the "new and relevant" standard for supplemental claims is "a lesser standard and reduces the claimant's burden" as compared to the prior "new and material" standard. VA Claims and Appeals Modernization, 84 Fed. Reg. 138, 144 (Jan. 18, 2019) (codified

For claims based upon "new and material evidence" filed before 2019, such as Mr. Kisor's, 38 C.F.R. § 3.156(a) defined "new evidence" as "existing evidence not previously submitted to agency decisionmakers." "Material" evidence was defined under the same subsection as "existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." The regulation goes on to explain that "[n]ew and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim." 38 C.F.R. § 3.156(a).

Third, a veteran may seek to have the VA reconsider a previously-denied claim under 38 C.F.R. § 3.156(c)(1).[2] Section 3.156(c)(1) reads today as it did in 2006 and in 2014 when the Board considered Mr. Kisor's case. As noted above, the regulation states that the VA will reconsider a claim after a final decision if it receives "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1).[3] The regulation further

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at 38 C.F.R. pts. 3, 8, 14, 19, 20, and 21). The earliest effective date for an award of disability benefits pursuant to a supplemental claim is the date the supplemental claim was filed. 38 U.S.C. § 5110 (2019); 38 C.F.R. §§ 3.400, 3.2500(h)(2) (2019).

[2] In this case, Mr. Kisor did not explicitly seek reconsideration, but the Board considered reconsideration under § 3.156(c) when it addressed his request for an earlier effective date for service connection for PTSD. J.A. 88.

[3] Recently, in *Jones v. Wilkie*, we addressed a claim under § 3.156(c)(1). However, in that case, the government did

states that "[a]n award made based all or in part on the records identified by [§ 3.156(c)(1)] is effective on the date entitlement arose or the date VA received the previously decided claim, whichever is later." 38 C.F.R. § 3.156(c)(3). "In other words, § 3.156(c) serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014).

Unlike the "new" and "material" terms defined in § 3.156(a), § 3.156(c) does not provide a definition for the term "relevant." However, the context of § 3.156(c) makes clear that, in order to be "relevant" for purposes of reconsideration, additional records must speak to the basis for the VA's prior decision. Specifically, the effective date for an award under § 3.156(c) is retroactive to the "date entitlement arose or the date VA received the previously decided claim" only if the award is "based all or in part on" the newly identified records. § 3.156(c)(3). Duplicative records and records directed to an undisputed fact would not speak to the basis for the VA's prior decision; a claimant filing such records thus could not obtain an award "based all or in part on" the newly identified records. In this case, Mr. Kisor has not shown that the records at issue spoke, directly or indirectly, to the basis for the VA's prior decision: the absence of a diagnosis of PTSD.

Moreover, in the context of veteran's benefits, we have explained that "relevant" evidence is evidence that "must tend to prove or disprove a material fact." *AZ*, 731 F.3d at 1311; *see also* Black's Law Dictionary (10th ed. 2014) (defining "relevant" as "[l]ogically connected and tending to

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not dispute that the newly associated records were "relevant" and that reconsideration was required. 964 F.3d 1374, 1379 n.5 (Fed. Cir. 2020).

prove or disprove a matter in issue"). Similarly, the VA's duty to assist claimants under 38 U.S.C. § 5103A mandates that the VA make reasonable efforts to obtain "relevant" records, but this does not encompass the situation in which "no reasonable possibility exists that such assistance would aid in substantiating the claim." 38 U.S.C. § 5103A(a)(2); *see Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) ("Relevant records for the purpose of [38 U.S.C.] § 5103A are those records that relate to the injury for which the claimant is seeking benefits and have a reasonable possibility of helping to substantiate the veteran's claim."). Conversely, evidence that "simply does not tend to prove a fact that is of consequence to the action[] . . . is not relevant." *AZ*, 731 F.3d at 1311 (quoting 2 Jack B. Weinstein & Margaret A. Berger, Weinstein's Federal Evidence § 401.07 (2d ed. 2012)).[4]

Mr. Kisor's original claim was denied in 1983 because he had no diagnosis of PTSD, not because of any dispute as to whether he had suffered an in-service stressor. J.A. 23. The Rating Decision acknowledges consideration of the VA psychiatric examiner's evaluation. *Id.* In the evaluation, the examiner detailed Mr. Kisor's recounting of his participation in Operation Harvest Moon, noting "it . . . appear[ed] that [Mr. Kisor] was involved in one major ambush which resulted in 13 deaths." *Id.* at 19–20. The examiner concluded, however, that it was his "distinct impression that this man suffers from a personality disorder as opposed to PTSD." *Id.* at 21. It was on this lack of a PTSD

[4] This understanding of "relevant" is also consistent with the definition for that term in connection with "supplemental claims" under the Modernization Act noted above. 38 C.F.R. § 3.2501 ("Relevant evidence is information that tends to prove or disprove a matter at issue in a claim [and] includes evidence that raises a theory of entitlement that was not previously addressed.").

diagnosis that the Board relied when it concluded that PTSD was "not shown by evidence of record." *Id.* at 23.

As noted, the additional service records at issue here are Mr. Kisor's service personnel records, including his Form 214, corrected to add a Combat Action Ribbon; and his Combat History, Expeditions, and Awards Record noting his participation in Operation Harvest Moon. The additional service records also include the daily log of his battalion in Vietnam that confirmed Mr. Kisor's description of the ambush during Operation Harvest Moon. Although they provide further support for Mr. Kisor's prior statements that he participated in Operation Harvest Moon and indeed could provide "credible supporting evidence that the claimed in-service stressor occurred," *see AZ*, 731 F.3d at 1310, Mr. Kisor has presented no substantial argument that these additional service records helped to show that he had a medical diagnosis of PTSD as of 1983.

The Board's decision that Mr. Kisor's records were not "relevant" is also consistent with our holding in *Blubaugh*, 773 F.3d at 1314. In *Blubaugh*, we held that § 3.156(c) did not apply when a newly discovered service record "did not remedy [the] defects" of a prior decision and contained facts that "were never in question." *Id.* Indeed, we held that "[s]ection 3.156(c) only applies 'when VA receives official service department records that were unavailable at the time that VA previously decided a claim for benefits and *those records lead VA to award a benefit that was not granted in the previous decision*.'" *Id.* (quoting New and Material Evidence, 70 Fed. Reg. at 35,388 (proposed June 20, 2005)).

We therefore conclude that the Board did not err in holding that the records cited by Mr. Kisor were not "relevant" because they did not pertain to the basis of the 1983 denial, the lack of a diagnosis of PTSD. The records added

nothing to the case because Mr. Kisor has not shown that they bore, directly or indirectly, on any matter relating to entitlement to service connection for PTSD, other than a matter that was not in dispute: the presence of an in-service stressor.

III.

As noted, Mr. Kisor argues that a service department record is "relevant" under 38 C.F.R. § 3.156(c) if it has any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence. This view, however, is squarely contrary to what we have just explained is the correct reading of the regulation. We therefore reject it.

Mr. Kisor makes two additional arguments. First, he contends that his reading of the regulation is supported by the fact that § 3.156(c) is intended to be remedial in nature. According to Mr. Kisor, the regulation was promulgated "to address what occurs when VA fails to obtain all relevant service department records before adjudicating [a] claim in the first instance." Appellant's Suppl. Br. 11. Since the regulation is remedial, Mr. Kisor argues, the term "relevant" should be construed broadly in a manner consistent with the interpretation above that he urges. *Id.* at 13–15.

We disagree. Although broad, the VA's duty to assist is not without limits. Under 38 U.S.C. § 5103A(a)(2), "[t]he Secretary is not required to provide assistance to a claimant under this section if *no reasonable possibility exists that such assistance would aid in substantiating the claim*." (Emphasis added). Thus, to the extent the VA's duty to assist encompasses evidence necessary, but not sufficient, to substantiate a veteran's claim, the duty does not extend to the situation where, like here, the evidence provides no

reasonable possibility that the claim could be substantiated because the evidence does not establish a missing claim element.

Finally, Mr. Kisor argues that we should resort to the "pro-veteran canon" of construction, *see, e.g.*, *Brown v. Gardner*, 513 U.S. 115, 117–18 (1994), and thereby arrive at the reading of the term "relevant" in § 3.156(c) that he urges. Appellants' Suppl. Br. 16–18. Under *Brown*, however, the canon does not apply unless "interpretive doubt" is present. 513 U.S. at 117–18. That precondition is not satisfied where a sole reasonable meaning is identified through the use of ordinary textual analysis tools, before consideration of the pro-veteran canon. Having conducted such an analysis in this case, we have no remaining interpretive doubt. *Cf. Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253–54 (1992) (unambiguous result based on language analysis governs over canons). The canon therefore does not apply here.

In this case, both Mr. Kisor and the government take the position that the term "relevant" in § 3.156(c) is not "genuinely ambiguous." We agree with that position and hold today that the term has only "one reasonable meaning." That is the meaning adopted by the Board when it denied Mr. Kisor an effective date earlier than June 5, 2006 for service connection for his PTSD.

We have considered Mr. Kisor's other arguments and have found them to be without merit.

CONCLUSION

For the foregoing reasons, we conclude the term "relevant" has only one reasonable meaning in the context of § 3.156(c)(1): the "relevant" service records must, in the sense we have explained, speak to a matter in issue, in other words, a matter in dispute. Accordingly, we affirm

the decision of the Veterans Court that affirmed the decision of the Board denying Mr. Kisor an effective date earlier than June 5, 2006 for service connection for his PTSD.

AFFIRMED

COSTS

No costs.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

REYNA, *Circuit Judge*, dissenting.

This appeal is on remand from the U.S. Supreme Court.

Three and a half years ago, this panel unanimously held that the plain text of 38 C.F.R. § 3.156(c) was ambiguous as to the scope of the word "relevant." It was on that basis that, as informed by the Supreme Court, we erroneously applied *Auer* deference to what we determined was a reasonable interpretation of the regulation by the Department of Veterans Affairs ("VA"). We did not at the time consider a countervailing tool used to resolve ambiguities in veterans' benefits regulations, the pro-veteran canon.

The Supreme Court vacated our decision because we prematurely relied on an *Auer* analysis and remanded the

case to us to reconsider our initial view of § 3.156(c) using traditional tools of construction.

But on remand, the VA made a hard U-turn and waived *Auer* altogether.[1] Not to be left behind, the majority has decided to follow the VA and to adopt the agency's new belief that the very same text we initially declared ambiguous has sprung a lack of "interpretive doubt." According to the majority, if it lacks interpretive doubt, it is unambiguously correct. Slip Op. 9, 16–17.

I disagree with my colleagues on two principal points.

First, I disagree with my colleagues' new position that the "one reasonable meaning" of the word "relevant" in § 3.156(c) is the position that the VA adopted on remand. Slip Op. 4, 9, 16–17. Nothing in the text of the provision requires that to be relevant, "relevant records" must directly or indirectly "speak to the basis for the VA's prior decision," address facts expressly "in dispute," or "bear on the outcome." *See* Slip Op. 4, 9, 10, 13, 15, 17. If anything, the majority complicates and obfuscates the meaning and application of § 3.156(c), a key provision in VA law that is invoked by thousands of veterans in countless VA cases. As demonstrated in this dissent, established constructions of

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[1] Recording of Oral Argument at 16:10–22 ("The government is not contending that the agency's interpretation is entitled to deference."); *see also* Transcript of Oral Argument at 64:6–20, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019), http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2016-1929_1142020.mp3 (conceding that *Auer* deference only applies "if the determination reflects the considered judgment of the agency as a whole" and that "we [the government] don't think that any individual Board decision by the VA Board reflects the considered judgment of the agency as a whole").

the terms "relevant records" and "material evidence" in related veterans' benefit provisions support the conclusion that records are "relevant" so long as they help to establish unestablished facts that are necessary for substantiating the veteran's claim.

Second, I disagree with the new holding developed by my colleagues in this remand and which asserts that "interpretive doubt" must first be established before the pro-veteran canon can be applied. Slip Op. 16. This is not correct.

Fundamentally, when a veterans' benefit provision is ambiguous on its face, the pro-veteran canon must be weighed alongside the other traditional tools in resolving interpretive doubt, including whether interpretative doubt exists. Neither the Supreme Court's decision in this case, nor this court's precedent, supports the majority's assumption that interpretive doubt is to be determined before resort to the pro-veteran canon may be had. To the contrary, the pro-veteran canon is a traditional tool of construction. It requires that we discern the purpose of a veterans' benefit provision in the context of the veterans' benefit scheme as a whole and ensure that the construction effectuates, rather than frustrates, that remedial purpose: that benefits that by law belong to the veteran go to the veteran. For example, in this case, by brushing aside the canon and relegating it to last resort, to only after a determination of interpretive doubt is made, the majority adopts a construction of § 3.156(c) that substantially narrows the scope of its remedial function and thereby rends the overarching fabric of protection woven by Congress to assist and benefit the veteran.

Thus, Mr. Kisor, a veteran who was denied twenty-three years of compensation for his service-connected disa-

bility, after what was a disgracefully inadequate VA review, is denied relief by a facial interpretation of a regulation that was specifically promulgated to benefit him and other veterans in his situation. The result will reverberate like the thunder of a cannon from far beyond the horizon of this case.

I dissent.

I.

When James Kisor submitted his first claim for service-connected post-traumatic stress disorder ("PTSD") in 1982, he had undergone over a year of counseling for his symptoms at the Portland Vet Center. Yet a VA examiner diagnosed him with personality disorders rather than PTSD, and, based on that diagnosis, the VA denied his claim on a one-page form. J.A. 23.

There is no dispute that the agency made no effort, before or after receiving the examiner's report, to determine whether Mr. Kisor suffered a traumatic stressor during his service in Vietnam. This was in spite of the fact that (1) a legal element of any PTSD claim is a verified in-service stressor, and (2) the first clinical criterion for a medical diagnosis of PTSD (another legal element of a PTSD claim) is the experience of an objectively distressing traumatic event.[2] There was no documentation whatsoever of combat

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[2] *See* J.A. 107 (citing the diagnostic criteria for PTSD); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 309.81 (3d ed. 1980) (identifying the first diagnostic criterion for PTSD as "[e]xistence of a recognizable stressor that would evoke significant symptoms of distress in almost everyone"); *see also, e.g.*, *O'Donnell v. Shinseki*, 2012 WL 1660827, at *1 (Vet. App. 2012) ("A VA medical examination . . . concluded that he 'does not meet DSM–IV criteria for the diagnosis of

experience in Mr. Kisor's file because the VA had never bothered to request his personnel records from the service department. The rating decision made no mention of his combat status. J.A. 23.

It bears emphasizing a few neglected details of the examination that led to this rating decision against Mr. Kisor. Although the examiner's report recounted Mr. Kisor's descriptions of his combat experience, it did so with palpable skepticism[3] and noted that Mr. Kisor had reported "no battle problems or traumatic experiences" to his social worker. J.A. 18–20. At the time, Mr. Kisor's treating counselor had considered his symptoms to be consistent with PTSD. J.A. 21. The examiner noted he was "not impressed"

PTSD, in terms of a specific, identified stressor that meets Criterion A, which is required for the diagnosis to be made.'").

[3] *See, e.g.*, J.A. 19 ("The veteran seemed to be implying that the very exposure to *potential* combat and the *implied* danger did affect a change upon his adaptation.") (emphasis added); *id.* ("When the veteran was asked to describe combat situations he seemed very defensive and wanted to make certain that I understood that he was always in situations of combat danger."); *id.* ("[I]t would appear that he was involved in one major ambush which resulted in 13 deaths in a large company. The veteran does not remember how long this ambush lasted. He described the ambush in the context of the stupidity of his commanding officer's orders and judgment."); J.A. 20 ("Whenever I would ask direct questions concerning the actual amount of combat activity, this subject would get lost as he would again launch into another detailed anecdotal monologue."); J.A. 21 ("[H]is Vietnam combat situations were couched in the framework of his basic premise: that most people who have attempted to boss him around had been inferior to him either intellectually or morally.").

with that diagnosis but provided no explanation of the basis for his own opinion. J.A. 21. This was because he had "lost" the "portion of the original dictation" setting forth a "specific review of symptoms related to the PTSD criteria" and could not "recall the specifics." J.A. 21–22. All he could offer was his "impression." *Id.* Despite all this, the rating board accepted the examiner's diagnosis and went no further with Mr. Kisor's claim.

For the next twenty-three years, Mr. Kisor received no disability compensation from the VA, although the symptoms of his condition continued to keep him from holding down a job. In 2006, Mr. Kisor went to check his VA claims file, and discovered that there were no records of his combat history. He wrote to the VA, attaching service records documenting his combat history and Combat Action Ribbon, and demanded that the agency look again at his claim. J.A. 28–29. The VA construed his first letter as a request to reopen his claim based on new and material evidence, and although nothing else about his claim had changed, the VA this time proceeded to investigate his alleged in-service stressor, requesting an entry from his battalion's daily log that documented the following attack:

> battalion forward and rear elements taken under heavy fire by mortar, recoilless rifle, and automatic weapons. . . . VC [Viet Cong combatants] were well camouflaged and dug into concealed positions. All VC contacted were well armed and equipped . . . . VC KIA [killed in action] 105.

J.A. 30–31. Based on the information in the log—information that all along had been in the government's possession—the VA formally verified Mr. Kisor's stressor. *Id.*

Mr. Kisor then obtained and submitted an evaluation from a third-party psychiatrist, who concluded that Mr. Kisor met each of the diagnostic criteria for PTSD and had

been suffering from the effects of his condition for the last twenty-seven years. J.A. 109. In particular, the psychiatrist opined that the VA examiner in 1983 had likely "misunderstood the impact of the claimant's war trauma upon him," as symptoms of PTSD were apparent from Mr. Kisor's medical records at that time. *Id.* A new VA psychiatric examination concurred with this diagnosis.[4] J.A. 115–116. This time, the new examiner accepted the presence of "combat stressors" based on records of Mr. Kisor's combat action ribbon, J.A. 112, and proceeded to describe his combat accounts and symptoms fully and sympathetically. The examiner also received and reviewed the other records now in Mr. Kisor's claims file. *Id.*

Based on Mr. Kisor's new diagnosis of PTSD and his service records, the VA found that he had established the necessary elements of a service-connected PTSD claim and awarded compensation for the claim. J.A. 32–33. The agency, however, refused to treat its new review as a "reconsideration" under § 3.156(c), which would entitle him to an effective date retroactive to his 1982 claim. The Board of Veterans' Appeals ("Board") recognized that reconsideration is only triggered when the VA receives newly identified "relevant official service records." The Board reasoned

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[4] There are similar instances in which a Vietnam veteran, whose PTSD claim was initially denied based on absence of a PTSD diagnosis, is later diagnosed with PTSD in a new examination, and awarded benefits after the VA receives new evidence of an in-service stressor. *See, e.g.*, No. 13-00 404A, Bd. Vet. App. 1412187, 2014 WL 1897120, at *4 (BVA Mar. 24, 2014); No. 11-00 848, Bd. Vet. App. 1408416, 2014 WL 1417762, at *1 (BVA Feb. 27, 2014); No. 10-48-888, Bd. Vet. App. 1317296, 2013 WL 3770036, at *5 (BVA May 28, 2013). Notably, the Board found § 3.156(c) to be applicable in each of these cases without questioning the relevance of the newly identified stressor evidence.

that the newly received combat records in Mr. Kisor's case—i.e., his combat expeditions form, his Combat Action Ribbon award, and his battalion's daily log—were not "relevant" because they did not address the "basis" of the VA's prior decision and did not "manifestly change" its outcome. J.A. 90–91.

II.

In all cases, the VA has a statutory duty to assist the veteran by fully and sympathetically developing the veteran's claim to its optimum before deciding the claim on the merits. *McGee v. Peake*, 511 F.3d 1352, 1357 (2008). The VA bears this obligation so long as there is any "reasonable possibility" that such assistance would "aid in substantiating the claim." 38 U.S.C. § 5103A; *Golz v. Shinseki*, 590 F.3d 1317, 1323 (Fed. Cir. 2010). This includes making reasonable efforts to obtain evidence necessary to substantiate the veteran's claim. 38 U.S.C. § 5103A. In particular, the VA must obtain "relevant records pertaining to the claimant's active [military] service that are held or maintained by a governmental entity." 38 U.S.C. § 5103A(c)(1).

What happens when the VA fails to fulfill this duty? If, decades after a claim is denied, the veteran uncovers service records that prove a necessary element of his claim and should have been part of his file, will his claim be reconsidered, offering him a chance to prove entitlement dating back to his first claim? Or must he first bear the burden of showing that the missing records might have changed the VA's original decision? The answer turns on the construction of the word "relevant" in the VA's regulation, 38 C.F.R. § 3.156(c).

Section 3.156(c) provides for reconsideration of claims previously decided without the benefit of all relevant service records. Subsection (c)(1) requires the VA to reconsider a claim if it receives "relevant service department records"

that had not been considered when it first decided the claim:

> [A]t any time after VA issues a decision on a claim, if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the claims file when the VA first decided the claim, VA will reconsider the claim.

§ 3.156(c)(1). Reconsideration includes further VA assistance in developing any additional evidence needed to substantiate the claim. 38 U.S.C. § 5103A(a)(1); *Vigil v. Peake*, 22 Vet. App. 63, 67 (2008). If, after reconsideration of the claim, "an award [is] made based all or in part" on these records, then the award is effective as far back as the effective date of the previously decided claim, depending on when entitlement arose, as determined through a retroactive assessment of disability. § 3.156(c)(3), (c)(4).

The plain text of § 3.156(c)(1) does not specify whether the "relevant" records that trigger reconsideration must "cast[] doubt on the agency's prior rating decision" or only "relat[e] to the veteran's claim more broadly." *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017) ("*Kisor I*"). However, the history and text of § 3.156(c) make clear that reconsideration serves the dual remedial purpose of (1) providing a fair claim review based on a fully developed record to veterans who had been denied such a review before and (2) compensating such veterans for any benefits to which they can now prove they should have been entitled. We have noted that "§ 3.156(c) serves to place a veteran in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh v. McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). That includes affording him

both his procedural right to a complete review and his substantive right to full compensation.

In light of the ambiguity in § 3.156(c) and the regulation's remedial purpose, consistent with the Supreme Court's instructions on remand, I look to the provision's context and history for a construction of "relevant" that best effectuates the purpose of reconsideration. I turn first to our construction of "relevant records" in the context of the VA's duty to assist veterans. I then look to the historical scope of the "new and material evidence" standard for the reopening of claims, which served as the original standard for reconsideration under § 3.156(c). Both sources point to the conclusion that "relevant . . . records" need only address a necessary and unestablished element of the claim as a whole, not directly or indirectly "speak to the basis for the VA's prior decision," address facts expressly "in dispute," or "bear on the outcome."

A. "Relevant Records" and the Duty to Assist

As discussed, 38 U.S.C. § 5103A requires the VA to assist a claimant in obtaining "evidence necessary to substantiate the claimant's claim," including obtaining "*relevant records*" of the claimant's military service, so long as there exists any "reasonable possibility that such assistance would aid in substantiating the claim." 38 U.S.C. §§ 5103A(a)(1)–(a)(2), 5103A(c)(1)(A) (emphasis added). There is no dispute that "relevant" records for purposes of reconsideration should be construed consistently with the meaning of "relevant records" under § 5103A.

In interpreting § 5103A, this court has defined "relevant records" as "those records that relate to the injury for which the claimant is seeking benefits and have a reasonable possibility of helping to substantiate the veteran's claim." *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010). When determining the scope of "relevant records" for

a given claim, we look to the elements necessary to substantiate it. *See id.* at 1322. In particular, when a veteran seeks compensation for service-connected PTSD, we have held that the "records relevant to his claim are those relating to a medical diagnosis of PTSD, evidence corroborating claimed in-service stressors, or medical evidence establishing a link between any in-service stressor and a PTSD diagnosis." *Id.*

We have also made clear that the VA's obligation to obtain relevant records does not depend on whether the records would likely be "dispositive" of the claim. *McGee*, 511 F.3d at 1358 ("The statute [§ 5103A] simply does not excuse the VA's obligation to fully develop the facts of [the veteran's] claim based on speculation as to the dispositive nature of relevant records."). We have held that relevant records need not "independently prove" the veteran's claim. *Jones v. Wilkie*, 918 F.3d 922, 926 (Fed. Cir. 2019).

The scope of the VA's duty to assist thus supports the conclusion that "relevant" records are those that help to establish a necessary element of a veteran's claim, regardless of whether the evidence is relevant to an issue that would be dispositive of the outcome. By this standard, Mr. Kisor's combat records are relevant at least because they corroborate his in-service stressor, a necessary element of a PTSD claim that had not been established when the VA first decided his claim. 38 C.F.R. § 3.304(f); *AZ v. Shinseki*, 731 F.3d 1303, 1310 (Fed. Cir. 2013).

To be clear, § 5103A is not the origin of the VA's authority to promulgate § 3.156(c).[5] Rather, § 5103A is relevant to

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[5] The VA's authority to promulgate § 3.156(c) originates in 38 U.S.C. § 501. *See* 70 Fed. Reg. 35,388, 35,390 (June 20, 2005); *see also* 71 Fed. Reg. 52,455, 52,457 (Sept. 6, 2006).

this discussion insofar as it provides guidance as to how to interpret the statute in question.

B. "New and Material Evidence"

Up until 2019, all of 38 C.F.R. § 3.156 fell under the heading "New and Material Evidence." As originally enacted, the provision provided for (1) *reopening* of previously decided claims based on "new and material evidence" and (2) *reconsider[ation]* of previously decided claims based on new and material evidence that consisted of official records from the service department. *See* § 3.156, New and Material Evidence, 27 Fed. Reg. 11887 (Dec. 1, 1962) (emphasis added). The distinction between the two procedures was that reconsideration provided the veteran an opportunity to prove and receive retroactive entitlement to benefits, whereas reopening only entitled veterans to the effective date of the request to reopen.

Effective 2006, the VA amended the language in § 3.156(c) to delete the reference to "new and material evidence," and replace it with the current phrase "relevant official service records." In proposing the change, the VA stated that the change was intended to eliminate any confusion as to whether awards made upon reconsideration would be subject to the same effective date as awards made upon reopening. New and Material Evidence, 70 Fed. Reg. 35388, 35388-89 (Jun. 20, 2005). The VA was thus clear that the new "relevant . . . records" language was not intended to impose a higher threshold for triggering reconsideration than before. It follows that records are "relevant" under § 3.156(c)(1) if they would satisfy the definition of "material evidence" for purposes of reopening a claim.[6]

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[6] This is consistent with the VA's definition for "new and relevant evidence" for purposes of re-adjudicating "supplemental claims" under the recently enacted § 3.156(d). The

This is critical because the standard for "material evidence" has always been forward-looking toward the claim to be substantiated, not backward-looking toward the prior VA decision. Since 2001, the VA has defined "material" evidence as "evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the *claim*." § 3.156(a) (emphasis added); *see also* § 3.156, Duty to Assist, 66 Fed. Reg. 45620, 45630 (Aug. 29, 2001). Historically, when the VA promulgated its first binding definition of materiality in 1990, it stated that "it has always been VA's position that evidence may be new and material *even though it does not warrant revision of a previous decision*." New and Material Evidence, 55 Fed. Reg. 52274 (Dec. 21, 1990) (emphasis added).

Accordingly, in *Hodge v. West*, we rejected the Veterans Court's requirement that a claimant seeking reopening establish "a reasonable possibility that the new evidence, when viewed in the context of all the evidence, both new and old, *would change the outcome*." 155 F.3d 1356, 1363 (Fed. Cir. 1998) (citing *Colvin v. Derwinski*, 1 Vet App. 171, 174 (1991)) (emphasis added). We concluded that an outcome determinacy requirement for reopening, even under an attenuated "reasonable possibility" threshold, was "inconsistent with the general character of the underlying statutory scheme for awarding veterans' benefits." *Id.* at 1362. We reasoned that the availability of review based on new evidence reflects "the importance of a complete record for evaluation of a veteran's claim" that considers "all potentially relevant evidence." *Id.* at 1363. We recognized that "so much of the evidence regarding the veterans'

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definition provides that "[t]he new and relevant evidence" standard is no higher than the "new and material evidence" standard under § 3.156(a).

claims for service connection and compensation is circumstantial at best," and in this context, new evidence may "contribute to a more complete picture of the circumstances surrounding the origin of a veteran's injury or disability," and warrant another look at the claim, even if it does not demonstrably change the right outcome. *Id.* Moreover, both the reopening and reconsideration of a claim entitles the veteran to receive additional assistance from the VA, such as new medical examinations and requests for additional records. *See Paralyzed Veterans of Am. v. Sec'y of Veterans Affs.*, 345 F.3d 1334, 1339, 1343 (Fed. Cir. 2003); *Vigil v. Peake*, 22 Vet. App. 63, 67 (2008). The provisions thus contemplate that a claim that is not fully substantiated based on the new evidence alone may be substantiated after further factual development.

The VA adhered to these principles when it adopted the current definition of materiality in 2001. In particular, the VA withdrew as "too restrictive" a proposal that would have defined "material evidence" as "evidence that *relates specifically to the reason why the claim was last denied*." Duty to Assist, 66 Fed. Reg. at 45629 (final rule) (emphasis added); *cf.* Duty to Assist, 66 Fed. Reg. 17834, 17838–89 (Apr. 4, 2001) (proposed rule). In its place, the VA promulgated the current definition of materiality that focuses on the "unestablished fact[s] *necessary to substantiate the claim*." Duty to Assist, 66 Fed. Reg. at 45629 (emphasis added).[7]

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[7] The same amendment also added the requirement that new and material evidence must "raise a reasonable possibility of substantiating the claim." Duty to Assist, 66 Fed. Reg. at 45629. The VA clarified that this language required only that "there be a reasonable possibility that VA assistance would *help substantiate the claim*," in accordance with the threshold for the VA's duty to assist. *Id.* (emphasis

If the VA now intends to condition reconsideration on records that relate to the basis of the prior decision or change its outcome, it must do so through notice and comment. The agency cannot urge us to read those requirements into the word "relevant" when they have repeatedly refused to incorporate them into the criteria for reopening and reconsideration in promulgating prior versions of the regulation. The history and context of § 3.156 thus make clear that records relating to unestablished facts necessary to substantiate the veteran's claim are sufficient to trigger reconsideration under subsection (c).

* * *

Viewed as a whole, the context, history, and purpose of reconsideration support a construction of "relevant" that entitles Mr. Kisor to relief: that service records are "relevant" when they help to establish an unestablished fact necessary to substantiate a veteran's claim. Moreover, this reading of § 3.156(c) accords with the pro-veteran canon because it most effectuates the provision's remedial purpose of (1) ensuring that veterans whose claims were denied without the benefit of full VA assistance receive the full review and assistance they were owed; and (2) compensating veterans for any past benefits to which they can prove they should have been entitled.

III.

Nothing in the majority's reasoning undermines the soundness of this pro-veteran interpretation. The majority concludes that a combination of dictionary definitions, con-

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added). As I further explain in Section III, this "reasonable possibility" standard does not require new evidence to be independently capable of changing the outcome of a claim. *See infra*, 17–18.

text, and case law "makes clear" that the VA's interpretation is correct, but its inferences and assumptions fail under scrutiny.

First, borrowing from definitions of "relevant" as pertaining to "a matter in issue,"[8] the majority assumes that "in issue" means "in dispute," and reasons that evidence can only be relevant if it pertains to facts that were "disputed" during the claim's prior adjudication. Slip Op. 9, 13. Not only is this inference unwarranted in common legal usage, *see* Fed. R. Evid. 401 advisory committee's note ("[t]he fact to which [relevant] evidence is directed need not be in dispute"),[9] it is fundamentally out of place in the VA's "completely ex-parte system of adjudication." *Hodge*, 155 F.3d at 1362–63. Because no adverse party is expected to contest a claimant's assertions, the question of whether a fact is "disputed" has no import for whether it must be supported by competent evidence and adjudicated by the VA; that question depends instead on whether the fact remains unestablished and necessary for substantiating the claim. Here, regardless of whether the presence of Mr. Kisor's in-

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[8] *See* Slip Op. 13 (citing *Black's Law Dictionary* (10th ed. 2014) (defining "relevant" as "[l]ogically connected and tending to prove or disprove a matter in issue")).

[9] Indeed, the Advisory Committee observed that evidence directed to an uncontroversial point is often relevant and admissible at trial to "aid in understanding" the case. Fed. R. Evid. 401 advisory committee's note. Relatedly, in *Forshey v. Principi*, this court rejected the VA's argument that "relevant" questions of law must have been specifically raised and addressed in prior proceedings. 284 F.3d 1335, 1351–52 (Fed. Cir. 2002). In doing so, we construed "relevant" to mean "bear[ing] upon or properly apply[ing] to the issues *before us*" based on the term's dictionary definitions. *Id.* (emphasis added).

service stressor was "disputed" by the VA, it was not *established* at the time of the VA's first decision because the only mention of his combat experience in the record—a secondhand account by a VA examiner—was not competent evidence of a stressor. *See, e.g.*, *Cohen v. Brown*, 10 Vet. App. 128, 145–46 (1997) (noting, in remanding a case to the Board, that "[a]n opinion by a mental health professional based on a post[-]service examination of the veteran cannot be used to establish the occurrence of the stressor," and that the VA is "not require[d] [to] accept[] . . . a veteran's assertion that he was engaged in combat with the enemy").

Next, the majority infers from language in § 3.156(c)(3) that relevant records must "speak to the basis for the VA's prior decision."[10] Slip Op. 12–13. Subsection (c)(3) provides that an award granted after reconsideration can receive a retroactive effective date if it is "made based all or in part" on the records that triggered reconsideration. § 3.156(c)(3). The majority reasons that records that do not "speak to the basis for the VA's prior decision" cannot form all or part of the basis for the VA's current award of benefits after reconsideration. Slip Op. 12–13. But nothing in the text ties the

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[10] The VA's position on whether "relevant" records must pertain to the "basis for the VA's prior decision" has been a moving target. The Board relied on this requirement in denying Mr. Kisor an earlier effective date. J.A. 91. In its initial response to Mr. Kisor's appeal to this court, the VA disavowed that interpretation, calling it "distorted." Resp. 18–19. This panel accepted that disavowal. *Kisor I*, 869 F.3d at 1369. On remand, the VA changed course in its supplemental briefing, asserting unequivocally that "to be 'relevant' for purposes of reconsideration, the additional records must speak to the basis for the VA's prior decision." Gov. Supp. 16. The majority now accepts that interpretation without skepticism. Slip Op. 9, 12–13.

basis of the subsequent award to the basis of the prior decision. Nor are the two logically linked. If the VA denies a claim based on lack of evidence for one element without reaching the others, a later decision granting the claim will still be "based" on evidence of all the elements. And here, the VA's 2007 award to Mr. Kisor was indisputably "based" at least "in part" on his combat records. The majority seems to admit as much, *see* Slip Op. 6, and the Board never found otherwise.

In addition, the majority suggests that language in § 5103A(a)(2) excused the VA from further assisting with or reconsidering Mr. Kisor's claim after the first VA examiner failed to diagnose him with PTSD. Slip Op. 13, 16 (citing § 5103A(a)(2)). Section 5103A(a)(2) provides that the VA is not obligated to assist with a claim if "no reasonable possibility exists that such assistance would aid in substantiating the claim." The majority reasons that if "evidence does not establish a missing claim element," then it "provides no reasonable possibility that the claim could be substantiated." Slip Op. 16.

But that reading of § 5103A is irreconcilable with our precedent that the VA's duty to obtain records is not limited to "dispositive" evidence. *McGee*, 511 F.3d at 1358; *Jones*, 918 F.3d at 926. We have emphasized that the VA's duty to assist is excused only when "*no reasonable possibility exists* that such assistance would *aid* in substantiating the claim." *Jones*, 918 F.3d at 926 (emphasis in original) (citing 38 U.S.C. § 5103A(a)(2)).[11] Even when the availability of a new record leaves a claim element unestablished,

[11] It is instructive that the VA's own regulations appear to construe the "no reasonable possibility" standard extremely narrowly, limiting its examples to claims that are incapable of substantiation as a matter of law or facially

there often remains the possibility that the missing element will be established with further assistance. Indeed, the "no reasonable possibility" standard in § 5103A(a)(2) was enacted to replace the unduly burdensome "well-grounded claim" standard in § 5107(a) that had required a veteran to present plausible evidence of each element of his claim before triggering the VA's duty to assist. *See Paralyzed Veterans of Am.*, 345 F.3d at 1343; *Epps v. Gober*, 126 F.3d 1464, 1468 (Fed. Cir. 1997). The majority's reading of the "reasonable possibility" standard would import the well-grounded claim rule into the very provision enacted to overrule it.

Moreover, there is no factual basis for concluding that Mr. Kisor's claim had "no reasonable possibility" of being substantiated. The VA treated his claim as capable of substantiation when it obtained unit records to substantiate his combat stressor. On appeal, the Board found only that the combat records did not "manifestly change [the] outcome" of the VA's decision, not that they had no reasonable *possibility* of *helping* to do so. J.A. 90. In fact, Mr. Kisor's claim *was* substantiated with the aid of his combat records, and not miraculously so. Once there was competent evidence of Mr. Kisor's stressor, all that was needed to substantiate his claim was a new psychiatric examination. Given the history of his first examination, and the circumstantial nature of a PTSD diagnosis, there was at least a reasonable possibility that a new examination in light of

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incredible as a matter of fact: *e.g.*, a veteran with a dishonorable discharge applying for VA benefits; a compensation claim for prostate cancer from a female veteran or ovarian cancer from a male veteran; a compensation claim for a disability that is the result of willful misconduct; or a claim for service connection for alcoholism or drug addiction. 38 C.F.R. § 3.159(d); Duty to Assist, 66 Fed. Reg. at 17837.

the newly collected evidence would yield a different diagnosis and substantiate his claim.[12]

Finally, the majority relies on language from *Blubaugh v. McDonald* for the proposition that "relevant" service records must (1) "remedy the defects" of a prior decision, (2) pertain to facts that were "in question," and (3) "lead VA to award a benefit that was not granted in the previous decision." Slip Op. 14 (citing *Blubaugh*, 773 F.3d at 1314). But the majority reads these statements out of context. In *Blubaugh*, we were not construing the word "relevant" as the threshold for reconsideration. We were explaining that retroactive benefits are only available under § 3.156(c) if entitlement is in fact *awarded* upon reconsideration of the veteran's claim. In *Blubaugh*, the veteran's claim was *denied* when the VA reconsidered his claim in light of his newly identified service record—a document that was not probative of any fact necessary for substantiating his claim. *Id.* It was in the context of discussing this denial by the VA that we explained that the new record did not "remedy [the] defects" of the prior decision, pertain to facts that were "in question," or "lead VA to award a benefit." *Id.* at 1314. Thus, nothing in *Blubaugh* suggests that service records are not "relevant" when, as here, the VA awards a claim after considering the records and expressly relies on the records in making the award.

Ultimately, nothing in the majority's reasoning establishes that the VA's outcome determinacy requirement for relevance is compelled by the text of the regulation or otherwise unambiguously correct. Thus, the majority should have tested the strength of the VA's arguments against the weight of the pro-veteran canon. That the majority refused

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[12] As discussed, *supra* n.4, Mr. Kisor was not unique in having different VA examiners reach different diagnoses of his condition.

to do so here deprived Mr. Kisor of the solicitude and independent judgment he was owed in this appeal.

IV.

Courts have "long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220–21, n.9 (1991) (internal quotations omitted)). Thus, interpretive doubt in such provisions should be resolved for the benefit of veteran. *Brown v. Gardner,* 513 U.S. 115, 118 (1994). This canon is a corollary of the broader interpretive rule that remedial provisions are to be construed liberally to effectuate and not frustrate their remedial purpose. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943); *Beley v. Naphtaly*, 169 U.S. 353, 361 (1898).

This panel unanimously held in *Kisor I* that the plain text of § 3.156(c) was ambiguous as to the scope of the word "relevant," and that text has not changed since that decision. *Kisor I*, 869 F.3d at 1367. Yet the majority concludes that the canon "does not apply here," because after considering arguments that favor the VA's position under the other tools of construction, the majority has "no remaining interpretive doubt." Slip Op. 16. The majority relies entirely on this alleged lack of interpretive doubt to avoid the pro-veteran canon entirely. The majority is wrong: interpretive doubt does exist here and the canon should not be cast aside.

While we have held that the pro-veteran canon applies only to ambiguous statutes and cannot override plain text, that rule does not render the canon a tool of last resort,

subordinate to all others.[13] To the contrary, we have stated that the canon applies whenever the plain text does not expressly exclude the veteran's interpretation. *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009); *Hudgens v. McDonald*, 823 F.3d 630, 637 (Fed. Cir. 2016). Thus, we have accepted the canon's guidance over the VA's reliance on a dictionary definition. *Hudgens*, 823 F.3d at 637. We have weighed the canon against countervailing legislative history. *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1377–78 (Fed. Cir. 2001). We have favored the canon over arguments that the veteran's interpretation would lead to "irrational" results. *Sursely*, 551 F.3d at 1357–58. While the canon may not be dispositive of a provision's meaning every time it is applied, we are obligated to weigh it alongside the other tools of construction when the text itself gives us doubt.

Here, the majority points to nothing in the text that precludes Mr. Kisor's interpretation of "relevant." Indeed, this panel accepted in *Kisor I* that his position was reasonable. *Kisor I*, 869 F.3d at 1368. While the majority now rejects his view as "squarely contrary" to what it concludes is the

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[13] Indeed, plain text defeats all other tools of construction. *See Nat'l Ass'n of Mfrs. v. Dep't of Def.*, 138 S. Ct. 617, 631 (2018) (holding that when "plain language . . . is unambiguous, [the court's] inquiry begins with the statutory text, and ends there as well.") (internal citations omitted); *see also Decosta v. United States*, 987 F.2d 1556, 1558 n.3 (Fed. Cir. 1993) (holding that "legislative history cannot override the plain meaning of a statute."); *Charleston Area Med. Ctr., Inc. v. United States*, 940 F.3d 1362, 1370 (Fed. Cir. 2019) (stating that "principles of symmetry cannot override the plain text of the statute."); *Stern v. Marshall*, 564 U.S. 462, 478 (2011) (finding constitutional avoidance canon inapplicable where it would require rewriting the statute).

"correct reading" of the regulation, it does not explain why his reading is now contrary to the text.

In setting the preconditions for *Auer* deference, the Court requires courts to first exhaust the "traditional tools of construction" because "the core theory of *Auer* deference is that sometimes the law runs out, and [a] policy-laden choice is what is left over." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) ("*Kisor II*"). The pro-veteran canon is not based on this "deference" theory. The canon does not serve to provide a "policy-laden" position, adrift from traditional legal principles, that differs with each case. *Id.* Rather, the pro-veteran canon is squarely rooted in the purpose of veterans' benefit provisions, which we are bound to consider and effectuate in every construction.

If, as the majority seems to suggest, we can set aside the pro-veteran canon unless and until all other considerations are tied, then the canon is dead because there is no such "equipoise" in legal arguments. *Id.* at 2429–30 (Gorsuch, J., concurring in the judgment). It is our role as the court to fully employ the canons available in our "traditional interpretive toolkit" to reach "the best and fairest reading of the law." *Id.* at 2430, 2446. In this case, when the regulatory text provides no clear answer, i.e. interpretive doubt exists, as to the scope of the word "relevant," our consideration of other sources of its meaning should be guided by solicitude for the provision's pro-veteran remedial purpose.

Here, reconsideration under § 3.156(c) serves two remedial purposes: procedurally, it acknowledges to the veteran that the VA failed in its duty to assist him and provides him with the complete and sympathetic assistance and review that he was owed; substantively, it makes the veteran financially whole for the benefits that he can now prove he was entitled to. The VA's interpretation frustrates both of

those purposes. It denies veterans the right to a fair review unless they make the often impossible showing that an unsought record would have changed the course of the VA's prior decision. And it bars veterans from recovering compensation that is rightfully theirs.

The unreasonableness of that construction is plain in this case. The VA undeniably failed Mr. Kisor in this case when it made no effort whatsoever to obtain records to substantiate his in-service stressor. Rather than acknowledge its failure and make amends for it, the VA placed the burden on Mr. Kisor to show that its mistake was dispositive of its decision against him. When the agency deemed its new requirement unsatisfied, it denied the veteran twenty-three years of benefits for PTSD that he can now prove he suffered as a result of his service.

Those payments were compensatory, not charitable. They rightfully belonged to Mr. Kisor and his family. When Mr. Kisor and millions of others joined the armed services in their youth for modest pay, risking the rest of their lives, they did so with the government's promise that upon their return, it would make them as whole as possible, if only financially, for their wounds, and that, as veterans, they would be treated fairly and sympathetically in the process. That is the basic purpose of the VA's existence. Its governing statutes and regulations should always be construed liberally within the bounds of their text to effectuate that purpose. This recognition is at the core of the pro-veteran canon. The majority waves it aside.

On this remand, freed from deference to the agency, we owed Mr. Kisor our best independent judgment of the law's meaning. We fail in that obligation when we again accept the VA's arguments unmoored from both the text of the law and the basic principles underlying its purpose.

For these reasons, I dissent.

APPENDIX B

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

ON PETITION FOR REHEARING EN BANC

PAUL WHITFIELD HUGHES, McDermott, Will & Emery LLP, Washington, DC, filed a petition for rehearing en banc for claimant-appellant. Also represented by KENNETH M. CARPENTER, Law Offices of Carpenter Chartered, Topeka, KS.

IGOR HELMAN, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, filed a response to the petition for respondent-appellee. Also represented by JEFFREY B. CLARK, MARTIN F. HOCKEY,

JR., ROBERT EDWARD KIRSCHMAN, JR.; Y. KEN LEE, SAMANTHA ANN SYVERSON, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

ROMAN MARTINEZ, Latham & Watkins LLP, for amici curiae American Veterans, National Organization of Veterans' Advocates, Inc., Paralyzed Veterans of America, Veterans of Foreign Wars of the United States, Vietnam Veterans of America. Also represented by GREGORY B. IN DEN BERKEN.

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PROST, *Chief Judge*, with whom LOURIE, WALLACH, TARANTO, and CHEN, *Circuit Judges*, join, and with whom HUGHES, *Circuit Judge*, joins as to Parts I.B–C and II, concurs in the denial of the petition for rehearing en banc.

HUGHES, *Circuit Judge*, with whom WALLACH, *Circuit Judge*, joins, concurs in the denial of the petition for rehearing en banc.

DYK, *Circuit Judge*, concurs in the denial of the petition for rehearing en banc.

O'MALLEY, *Circuit Judge*, with whom NEWMAN, MOORE, and REYNA, *Circuit Judges*, join, dissents from the denial of the petition for rehearing en banc.

REYNA, *Circuit Judge*, with whom NEWMAN, MOORE, and O'MALLEY, *Circuit Judges*, join, dissents from the denial of the petition for rehearing en banc.

PER CURIAM.

O R D E R

James L. Kisor filed a petition for rehearing en banc. A response to the petition was invited by the court and filed by the Secretary of Veterans Affairs. American Veterans, National Organization of Veterans' Advocates, Inc., Paralyzed Veterans of America, Veterans of Foreign Wars of the United States, and Vietnam Veterans of America requested leave to file a brief as amici curiae, which the court granted. The petition for rehearing, response, and amicus brief were first referred to the panel that heard the appeal, which granted the petition in part as indicated in the accompanying order. Thereafter, the petition was referred to the circuit judges who are in regular active service. The court conducted a poll on request, and the poll failed.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for rehearing en banc is denied.

FOR THE COURT

April 30, 2021
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
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2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

PROST, *Chief Judge*, with whom LOURIE, WALLACH, TARANTO, and CHEN, *Circuit Judges*, join, and with whom HUGHES, *Circuit Judge*, joins as to Parts I.B–C and II, concurring in the denial of the petition for rehearing en banc.

I concur with the court's decision to deny rehearing en banc. I write separately in response to my dissenting colleagues regarding the proper role of the pro-veteran canon, which instructs that "interpretive doubt" is to be resolved in the veteran's favor. *Brown v. Gardner*, 513 U.S. 115, 118 (1994). In what follows, I (I) delineate my view of the proper place for this canon in the order-of-operations of textual interpretation, (II) respond to my dissenting colleagues' treatment of this canon, and (III) discuss the unresolved tension between this canon and the Supreme Court's *Chevron* and *Auer* doctrines.

DISCUSSION

I. THE PROPER ROLE OF THE PRO-VETERAN CANON

In my view, the Majority is right: "Interpretive doubt" is a precondition for applying the pro-veteran canon, and that precondition "is not satisfied where a sole reasonable meaning is identified through the use of ordinary textual analysis tools." Maj. at 16.[1] Put another way, courts must first seek the "best reading" of the statute based on "the words themselves," "the context of the whole statute," and "any other applicable semantic canons, which at the end of the day are simply a fancy way of referring to the general rules by which we understand the English language." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2144–45 (2016) (reviewing Robert A. Katzmann, *Judging Statutes* (2014)). As explained in detail below, in view of (A) the Supreme Court's insistence on the primacy of text, (B) the pro-veteran canon's historical usage and the other canons most like it, and (C) Congress's consistently active role in veterans law, I am persuaded that the pro-veteran canon should play a role only when a sustained textual analysis—including any applicable descriptive canons—yields competing plausible interpretations, none of which is fairly described as the best.

A. THE PRIMACY OF TEXT

In order to place the pro-veteran canon in the Supreme Court's interpretive methodology, it is necessary to first set the stage by outlining the hierarchy of interpretive tools

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[1] I refer to the Majority's panel opinion as "Maj." I refer to Judge Reyna's dissent from the panel's opinion as "Panel Dissent." I refer to Judge O'Malley's dissent from the denial of rehearing en banc as "O'Malley Dissent."

the Court applies.[2] At the top of this hierarchy is the text. In the Court's words, "canons of construction are no more than rules of thumb," and the text is the "one, cardinal canon" a court must turn to "before all others." *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253 (1992). And "[w]hen the words of a statute are unambiguous, . . . this first canon is also the last: 'judicial inquiry is complete.'" *Id.* at 254 (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)); *accord* Katzmann, *supra*, at 29 ("When statutes are unambiguous, . . . the inquiry for a court generally ends with an examination of the words of the statute."). Of course, this

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[2] Although the interpretive method described in this opinion is often set forth with reference to statutes, the same general methodology applies to regulations, as in this case. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (explaining that "a court must exhaust all the 'traditional tools' of construction" and observing that *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), adopted the "same approach for ambiguous statutes"). That said, if the pro-veteran canon is based on the theory that it is a proxy for congressional intent, one wonders why it should apply to regulations as well as statutes, or at least whether it would apply with equal force. The Supreme Court has not addressed that question. Regardless, because our court did apply the canon to a regulation in *Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016), I will assume for purposes of this opinion that it applies to both statutes and regulations. Even on this assumption, it is important when interpreting a regulation to consider the specific statutory provisions reflecting the pertinent congressional policies, which may include important limits on benefits. For example, as relevant here, the statute's finality policies tightly limit retroactive alteration of final agency determinations while making prospective redetermination broadly available.

text-first rule is not an instruction to "construe the meaning of statutory terms in a vacuum." *Tyler v. Cain*, 533 U.S. 656, 662 (2001). Rather, our focus on the text requires us to "interpret the words in their context and with a view to their place in the overall statutory scheme." *Id.* (internal quotation marks omitted).

As we analyze text and context, some canons of interpretation enter the analysis. "Canons are general background principles that courts have developed over time to guide statutory interpretation." *Arangure v. Whitaker*, 911 F.3d 333, 339 (6th Cir. 2018). They come in several flavors. Many canons are no more than aids for analyzing the text and context, "guides to solving the puzzle of textual meaning." Antonin Scalia & Bryan A. Garner, *Reading Law* 59 (2012). These "descriptive" canons "simply reflect broader conventions of language use, common in society at large at the time the statute was enacted." Caleb Nelson, *What Is Textualism?*, 91 Va. L. Rev. 347, 383 (2005).[3] The series-qualifier canon, for example, "generally reflects the most natural reading of a sentence." *Facebook, Inc. v. Duguid*, 141 S. Ct. 1163, 1169 (2021); *id.* at 1169–73 (identifying best meaning by analyzing text, context, and descriptive canons). Other familiar examples include *expressio unius est exclusio alterius* (the expression of one thing implies the exclusion of others) and *noscitur a sociis* (associated words bear on one another's meaning). *See generally* Scalia & Garner, *supra*, at 107–11, 195–98. Canons of this sort "are

[3] My focus when discussing descriptive canons is on the "strongest species"—i.e., those that "clearly and exclusively serve descriptive, rather than normative, purposes." *See Arangure*, 911 F.3d at 340. These canons, which may also be termed "linguistic" canons, may be further categorized under other labels, such as "semantic," "syntactic," or "contextual." *See generally* Scalia & Garner, *supra*, at 69–234.

not 'rules' of interpretation in any strict sense but presumptions about what an intelligently produced text conveys." *Facebook*, 141 S. Ct. at 1174 (Alito, J., concurring) (quoting Scalia & Garner, *supra*, at 51).

Other canons "direct courts to construe any ambiguity in a particular way in order to further some policy objective." Nelson, *supra*, at 418 n.140 (quoting Stephen F. Ross, *Where Have You Gone, Karl Llewellyn? Should Congress Turn Its Lonely Eyes to You?*, 45 Vand. L. Rev. 561, 563 (1992)). Canons of this sort are a type of "normative" canon. *Id.* They enter the calculus when judges "need some way to finish the job and to pick from among the possible meanings that their primary interpretive tools have identified." *Id.* at 394. Accordingly, many normative canons "express a rule of thumb for choosing between equally plausible interpretations of ambiguous text"—i.e., when descriptive tools do not illuminate a best meaning. Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 109 (2010). As explained below, the pro-veteran canon is of this variety—and therefore should be considered only if descriptive tools do not yield a best meaning.

B. The History of the Pro-Veteran Canon

With that backdrop in place, I turn to the pro-veteran canon. The canon's history is relatively short. It appears to have originated with a closing remark in the Supreme Court's World War II–era *Boone v. Lightner* opinion. 319 U.S. 561 (1943).[4] Not citing any authority, the Court concluded by stating that "[t]he Soldiers' and Sailors' Civil Relief Act 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.

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[4] The rule of lenity, by comparison, "antedates both state and federal constitutions." Scalia & Garner, *supra*, at 297.

Since *Boone*, the Court has applied the canon rarely. In some cases, the Court has referenced the canon without expressly applying it in statutory analysis. *Ala. Power Co. v. Davis*, 431 U.S. 581, 584 (1977) (analyzing Military Selective Service Act of 1967); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (analyzing Vietnam Era Veterans' Readjustment Assistance Act of 1974); *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) (recognizing Congress's "solicitude for the veterans' cause" but not applying the canon). In others, the Court has not mentioned the canon at all. *See McKinney v. Missouri-Kansas-Texas R.R. Co.*, 357 U.S. 265 (1958) (analyzing Universal Military Training and Service Act); *Accardi v. Penn. R.R. Co.*, 383 U.S. 225 (1966) (analyzing Selective Training and Service Act of 1940); *Foster v. Dravo Corp.*, 420 U.S. 92 (1975) (analyzing Military Selective Service Act); *Monroe v. Standard Oil Co.*, 452 U.S. 549 (1981) (ignoring the dissent's mention of the canon); *Conroy v. Aniskoff*, 507 U.S. 511 (1993) (ignoring the concurrence's mention of the canon). In still others, the Court has invoked the canon only to further confirm an interpretation that it reached by analyzing text and context. *E.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991); *Brown*, 513 U.S. at 118; *see also Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011) (also analyzing structure of the statutory scheme). Importantly, as the Court explained in *Brown*, the canon applies only when there is "interpretive doubt." 513 U.S. at 118.[5]

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[5] Accordingly, we have repeatedly emphasized this precondition. *See, e.g.*, *McKnight v. Gober*, 131 F.3d 1483, 1485 (Fed. Cir. 1997); *Jones v. West*, 136 F.3d 1296, 1299 n.2 (Fed. Cir. 1998); *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000); *Paralyzed Veterans of Am. v. Sec'y of Veterans Affairs*, 345 F.3d 1334, 1340 (Fed. Cir. 2003); *Thomas v. Nicholson*, 423 F.3d 1279, 1284 n.5 (Fed. Cir. 2005); *Niel-*

The Supreme Court has therefore used two formulations of the pro-veteran canon. The Court's initial formulation provides that provisions are "to be liberally construed" for the benefit of veterans. *Boone*, 319 U.S. at 575. This version resembles the broader notion that remedial statutes should be liberally construed. *See generally* Scalia & Garner, *supra*, at 364–66. The more recent formulation, on the other hand, provides that "interpretive doubt" is to be resolved in the veteran's favor. *Brown*, 513 U.S. at 118. This version closely resembles the rule of lenity, which instructs that ambiguity in a statute defining a crime or imposing a penalty should be resolved in the defendant's favor. *See, e.g.*, *Moskal v. United States*, 498 U.S. 103, 108 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists . . . ."); *see generally* Scalia & Garner, *supra*, at 296–302. As explained below, the result is the same under either formulation: The pro-veteran canon should be considered only after descriptive tools fail to yield a best meaning of the provision.

1. THE *BOONE* FORMULATION

The canon's origin as a species of the liberal-construction principle is one reason why the canon should play no role until after a full textual analysis yields no best meaning. As an initial matter, the liberal-construction principle has long been understood to yield to the text (as illuminated by the descriptive canons). As Justice Story once explained, "this liberality of exposition . . . is clearly inadmissible, if it extends beyond the just and ordinary sense of the terms." Scalia & Garner, *supra*, at 364 (quoting 1 Joseph

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son v. Shinseki, 607 F.3d 802, 808 (Fed. Cir. 2010); *Frederick v. Shinseki*, 684 F.3d 1263, 1269 (Fed. Cir. 2012); *Spicer v. Shinseki*, 752 F.3d 1367, 1371 (Fed. Cir. 2014); *Parrott v. Shulkin*, 851 F.3d 1242, 1251 (Fed. Cir. 2017).

Story, *Commentaries on the Constitution of the United States* § 429, 304 (2d ed. 1858)).[6]

Any broader view of the liberal-construction principle is now heavily disfavored. The Supreme Court has called the principle, when broadly understood to override the fair meaning of the text, the "last redoubt of losing causes." *Dir., Off. of Workers' Comp. Programs, Dep't of Labor v. Newport News Shipbuilding & Dry Dock Co.*, 514 U.S. 122, 135 (1995). And for good reason. Such a view "is premised on two mistaken ideas: (1) that statutes have a singular purpose and (2) that Congress wants statutes to extend as far as possible in service of that purpose." *Keen v. Helson*, 930 F.3d 799, 805 (6th Cir. 2019). Contrary to those mistaken ideas, the Supreme Court has explained that "[l]egislation is, after all, the art of compromise, the limitations expressed in statutory terms often the price of passage, and no statute yet known pursues its stated purpose at all costs." *Henson v. Santander Consumer USA Inc.*, 137 S. Ct. 1718, 1725 (2017) (cleaned up). Indeed, "[e]very statute proposes, not only to achieve certain ends, but also to achieve them by particular means—and there is often a considerable legislative battle over what those means ought to be." *Newport News*, 514 U.S. at 136. As Justice Sotomayor recently remarked for a unanimous Court: It is not for us to "take a chainsaw to . . . nuanced problems when Congress meant to use a scalpel." *Facebook*, 141 S.

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[6] The liberal-construction principle may have begun long ago as an "antidote" to the rule that statutes in derogation of the common law were to be strictly construed— reducing it to "nothing more than rejection of 'strict construction' and insistence on fair meaning." Scalia & Garner, *supra*, at 365–66. Justice Scalia remarked, however, that courts have at times used the liberal-construction principle "to devastating effect." Antonin Scalia, *A Matter of Interpretation* 27–28 (1997).

Ct. at 1171; *see also id.* at 1172–73 (rejecting "mere[] gestures at Congress' 'broad privacy-protection goals'" because the Court "must interpret what Congress wrote"). Ultimately "the effort, with respect to *any* statute, should be neither liberally to expand nor strictly to constrict its meaning, but rather to get the meaning precisely right." Antonin Scalia, *Assorted Canards of Contemporary Legal Analysis*, 40 Case W. Res. L. Rev. 581, 582 (1990). At best, to the extent that there are legitimate uses of the liberal-construction principle, it "may be invoked, in case of ambiguity, to find present rather than absent elements that are essential to operation of a legislative scheme; but it does not add features that will achieve the statutory 'purposes' more effectively." *Newport News*, 514 U.S. at 135–36.

Consistent with this critique, the Supreme Court in some cases has rejected the liberal-construction principle's application altogether. In *Norfolk Southern Railway Co. v. Sorrell*, for example, the Court rejected a party's reliance on the "remedial purpose" and "history of liberal construction" of the Federal Employers' Liability Act ("FELA"). 549 U.S. 158, 171 (2007). Although the Court recognized that "FELA was indeed enacted to benefit railroad employees," the Court explained that "[i]t does not follow, however, that this remedial purpose requires us to interpret every uncertainty in the Act in favor of employees." *Id.* (citing *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (per curiam) ("[I]t frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law.")). The Court concluded that "the statute's remedial purpose cannot compensate for the lack of a statutory basis." *Id.*; *see also Cronin v. United States*, 765 F.3d 1331, 1337–38 (Fed. Cir. 2014) (declining to rest on "the need to construe [a statute] liberally for members of the armed services" because doing so does not "give sufficient weight to the natural meaning" of

the provision "given its language and setting" and because "no legislation pursues its purposes at all costs").

Similarly, the Court in *CTS Corp. v. Waldburger* disagreed with the Fourth Circuit's analysis, which relied on "the proposition that remedial statutes should be interpreted in a liberal manner." 573 U.S. 1, 12 (2014). Specifically, the Court explained that the Fourth Circuit "was in error when it treated this as a substitute for a conclusion grounded in the statute's text and structure." *Id.*; *see also Rodriguez*, 480 U.S. at 525 ("[M]ost impermissibly, the Court of Appeals relied on its understanding of the broad purposes of the [statute] . . . ."). After all, the Court emphasized, "no legislation pursues its purposes at all costs." *CTS Corp.*, 573 U.S. at 12. To the contrary, "[c]ongressional intent is discerned primarily from the statutory text." *Id.* After dismissing the liberal-construction principle outright, the Court interpreted the statute by undertaking a sustained textual analysis. *Id.* at 12–18. Only after doing so did the Court consult a normative canon— that "when the text of a pre-emption clause is susceptible of more than one plausible reading, courts ordinarily accept the reading that disfavors pre-emption"—and only for "additional support." *Id.* at 18–19 (internal quotation marks omitted).

Christopher v. SmithKline Beecham Corp., on which Judge O'Malley relies, further proves the point. *See* O'Malley Dissent at 20–21 (discussing 567 U.S. 142 (2012)). After deciding that it would be improper to defer under *Auer v. Robbins*, 519 U.S. 452 (1997), the Court in *Christopher* proceeded to "employ traditional tools of interpretation." 567 U.S. at 161.[7] The Court followed the usual hierarchy. It started with the text. *Id.* Then it analyzed the context. *Id.*

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[7] Deferring under *Auer* there would have produced "unfair surprise" and deprived the employer of "fair warning" under the Court's cases. *Christopher*, 567 U.S. at 156.

at 162 (explaining that "any" can mean "different things depending upon the setting"). Next, it consulted a descriptive canon: "the rule of *ejusdem generis* should guide our interpretation of the catchall phrase, since it follows a list of specific items." *Id.* at 163. Only after that descriptive analysis did the Court turn to a normative canon—mentioning in a footnote a statement in an earlier case that exemptions for employers in the FLSA must be "narrowly construed against the employers." *Id.* at 164 n.21 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)).

But the Court in *Christopher* did not even apply that canon, noting instead that it was "inapposite" because the Court was "interpreting a general definition that applies throughout the FLSA." *Id.* Although Judge O'Malley argues that *Christopher* "did not relegate the remedial purpose of the [FLSA] scheme to an afterthought," O'Malley Dissent at 21, in fact *Christopher* declared the canon inapplicable to the case before it. And when the Court, near the end of its opinion, stated that its interpretation "comports with the apparent purpose" of the particular FLSA provision at issue, *Christopher*, 567 U.S. at 166, it was not applying a liberal-interpretation canon for remedial laws, but completing its textualist determination of the "fair reading" of the statute—a determination that "requires an ability to comprehend the *purpose* of the text, which is a vital part of its context." Scalia & Garner, *supra*, at 33. *Christopher* decided the case by analyzing the text in context. And although Judge O'Malley relies on *Christopher* to assert that "[v]eterans deserve no less protection than low wage employees," O'Malley Dissent at 12, *Christopher* actually held in favor of the employers.

Importantly, *Boone* itself, the progenitor of the pro-veteran canon, followed a similar path—relying on the text to reject the veteran's interpretation by applying descriptive

"[c]anons of statutory construction." 319 U.S. at 565 (reasoning that "we should not needlessly render as meaningless the [statutory] language"). Accordingly, the origin of the pro-veteran canon as a species of the liberal-construction principle confirms that it belongs at the end of a descriptive textual analysis when that analysis does not yield a best meaning.

2. THE *BROWN* FORMULATION

The more recent "interpretive doubt" formulation of the pro-veteran canon, which was articulated in *Brown*, does nothing to elevate the canon in the interpretive hierarchy. To the contrary, as a logical matter, if "interpretive doubt" is a precondition for applying the canon, as *Brown* declares, the existence of interpretive doubt must be determined without employing the canon. Otherwise, circularity results.

The *Brown* formulation strongly resembles the rule of lenity, moreover, and that rule is considered at the end of the analysis. In the words of Chief Justice Marshall, a court should not apply the rule unless the statute remains ambiguous "[a]fter seiz[ing] every thing from which aid can be derived." *Moskal*, 498 U.S. at 108 (quoting *United States v. Fisher*, 2 Cranch 358, 386 (1805)) (alterations in original and internal quotation marks omitted). Last year in *Shular v. United States*, for example, the Court concluded that the statute's text and context left "no ambiguity for the rule of lenity to resolve" after a textual analysis. 140 S. Ct. 779, 787 (2020). Speaking for the unanimous Court, Justice Ginsburg explained that the rule "applies only when, after consulting traditional canons of statutory construction, we are left with an ambiguous statute." *Id.* Similarly in *Yates v. United States*, the Court performed a textual analysis—featuring the canon against surplusage, *noscitur a sociis*, and *ejusdem generis*—and only after doing so buttressed its

interpretation with a remark that "if our recourse to traditional tools of statutory construction leaves any doubt[,] . . . we would invoke the rule [of lenity]." 574 U.S. 528, 543–47 (2015). And again, as *Boone* did with the older formulation of the pro-veteran canon, *Brown* similarly treated this more recent "interpretive doubt" formulation as subsidiary to the text and relevant context. In *Brown*, the Court declined to apply the canon because the statute was unambiguous. 513 U.S. at 117–18 ("The most, then, that the Government could claim . . . is the existence of an ambiguity . . . (assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor). But the Government cannot plausibly make even this claim here." (citation omitted)).

What's more, contrary to Judge O'Malley's suggestion that the pro-veteran canon in *Brown* did not rank below descriptive canons, O'Malley Dissent at 14–16, the Court in *Brown* concluded that the statute was not ambiguous *by applying a descriptive canon*: the "presumption that a given term is used to mean the same thing throughout a statute," which is "at its most vigorous when a term is repeated within a given sentence." 513 U.S. at 18. *Brown* came just three years after *St. Vincent's Hospital* similarly held for the veteran based on a descriptive analysis of the statute. 502 U.S. at 218–22. There, the Court's reasoning proceeded in two steps. First, the Court announced that it would "start with the text." *Id.* at 218. Second, it assessed the "context." *Id.* at 221 ("[W]e do nothing more, of course, than follow the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context." (citation omitted)). In a footnote, the Court in *St. Vincent's Hospital* surmised that even if a neighboring subsection of the statute "unsettled the significance of [the provision's] drafting," the Court "would ultimately read the provision in [the veteran's] favor." *Id.* n.9.

Accordingly, just as the Court has "declined to deem a statute 'ambiguous' for purposes of lenity merely because it was *possible* to articulate a construction more narrow than that urged by the Government," *see Moskal*, 498 U.S. at 108, it stands to reason that we should decline to find ambiguity for purposes of the pro-veteran canon merely because a veteran-friendly construction is possible. The pro-veteran canon—like the rule of lenity—"comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration." *See Callanan v. United States*, 364 U.S. 587, 596 (1961).[8]

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[8] Judge O'Malley attempts to distinguish the pro-veteran canon from the rule of lenity by arguing that, while the rule of lenity is a "judge-made tie breaker[] implementing *judicial* policy choices," the pro-veteran canon is a "rule[] implementing congressional intent." O'Malley Dissent at 18. First, both canons are judge-made. Second, conceptualizing and applying a broad notion of "congressional intent" at the "liberal construction" level of generality is also a judicial policy choice. *See* 3 *Sutherland Statutory Construction* § 58:1 (8th ed.) ("In cases of unresolvable ambiguity, [courts] additionally may rely on the presumptions embodied by strict and liberal construction as tie-breakers of last resort, a 'thumb on the scale' that allows them to fulfill their adjudicatory mandate." (footnote omitted)); *id.* ("[S]trict and liberal approaches to statutory language are normative, explicitly preferring certain interpretive results over others."). Indeed, resolving ambiguity with the pro-veteran canon instead of *Auer* in this case would have implemented one judicial policy choice over another. *See Kisor v. Shulkin*, 880 F.3d 1378, 1379 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of rehearing en banc) ("When these two doctrines pull in different directions, it is *Auer* deference that must give way.").

C. CONGRESS'S ACTIVE ROLE

Congress's active engagement in this area of law is a further reason we should constrain ourselves to apply the pro-veteran canon only after descriptive tools do not yield a best meaning.[9] Even if we accept the theory that the pro-veteran canon is justified as a proxy for congressional intent, Congress's undeniably active role in veterans' benefits law mitigates the concern that we will frustrate Congress's efforts by declining to apply at the outset a highly generalized veteran-friendly policy that is above and beyond the specific policies expressed in the text.

If the canon's predicate is Congress's intent, one thing that is clear about Congress's intent in this area is that it means to make very specific prescriptions, taking account of competing policies, and to monitor their implementation and actively adjust its laws as it deems necessary. Congress did not write a highly general law and leave the rest to the judiciary (or the Secretary). Far from it. There are few areas in which Congress has been so consistently proactive as it is here, in pursuit of its mission to ensure that our veterans are cared for. Indeed, both the House and the Senate have committees created exclusively for, and dedicated exclusively to, overseeing veterans' affairs. Senator Tester (MT), chairman of the Senate committee, has expressed that "Congress must hold the Department of Vet-

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[9] This part of my opinion is directed to underscoring the proper *order* of analysis. Contrary to Judge O'Malley's assertion, it is not an argument "*not* to consider the pro-veteran canon of construction when considering a less than clear term." *See* O'Malley Dissent at 11 n.3.

erans Affairs (VA) accountable in delivering timely, quality, and robust care and benefits to all veterans."[10] Similarly, Senator Moran (KS), ranking member of that committee, has explained that the committee's "top priority is to make sure we take care of our veterans who have dedicated their lives to serving our country" and has stated his intention to "work to make certain the U.S. Department of Veterans Affairs (VA) implements the Congressional reforms laid out in the VA MISSION Act bringing the VA into the 21st century and providing veterans with the best possible care and services."[11] And they have been busy. Indeed, a quick search reveals that no fewer than 134 pieces of legislation originating in these two committees have been signed into law over the last decade (i.e., during the six most recent Congresses).[12]

Indeed, as we have previously pointed out, "Congress has repeatedly passed legislation on veterans' benefits, including legislation specifically overruling judicial and agency interpretations of the veterans' benefits statutes." *Sears v. Principi*, 349 F.3d 1326, 1330 (Fed. Cir. 2003). For example, Congress enacted the Veterans Claims Assistance Act of 2000 ("VCAA") to legislatively overturn a 1999 decision of the Court of Appeals for Veterans Claims, thereby "eliminat[ing] the 'well-grounded' claim requirement" applied in that decision. *Mayfield v. Nicholson*, 499 F.3d 1317, 1319 (Fed. Cir. 2007); *see also Webster v. Shinseki*, 428 F. App'x 976, 978 (Fed. Cir. 2011) (recogniz-

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[10] U.S. Senate Committee on Veterans' Aff., https://www.veterans.senate.gov/about/chairman.

[11] U.S. Senate Committee on Veterans' Aff., https://www.veterans.senate.gov/about/ranking.

[12] https://www.congress.gov/ (legislation search).

ing that the "well-grounded claim" rule "has been legislatively overturned").[13] In other words, Congress has been proactively working to get veterans' issues right—including by intervening when it believes courts and agencies get them wrong. This institutionalized system, therefore, suggests a less imperative need for our thumb on a scale that Congress continuously monitors and calibrates.[14]

II. RESPONSES TO THE DISSENTS

I have several points of disagreement with the conceptions of the pro-veteran canon advanced by the dissenting opinions in this case. First, the dissenting opinions disregard the hierarchy of interpretive tools—in particular, the distinction between descriptive and normative canons. *See, e.g.*, Panel Dissent at 3 (asserting that "the pro-veteran canon must be weighed *alongside* the other traditional

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[13] In the evidentiary context, Congress has expressly prescribed a scale-tipping rule in favor of veterans. 38 U.S.C. § 5107(b) ("When there is an approximate balance of positive and negative evidence regarding any issue material to the determination of a matter, the Secretary shall give the benefit of the doubt to the claimant."). And in other contexts Congress has set forth a rule of statutory interpretation. *See, e.g.*, 21 U.S.C. § 853(o) (statute involving criminal forfeitures instructing that "[t]he provisions of this section shall be liberally construed to effectuate its remedial purposes"). But even in the latter situation, the Court has explained that such an instruction "only serves as an aid for resolving an ambiguity; it is not to be used to beget one." *Reves v. Ernst & Young*, 507 U.S. 170, 184 (1993) (cleaned up). Notably, Congress has issued no such instruction here.

[14] For further evidence on this point, see Judge O'Malley's detailed history of Congress's activity in veterans law, O'Malley Dissent at 8–10.

tools" (emphasis added)); O'Malley Dissent at 18 (concluding that "the pro-veteran canon should be used *alongside* traditional tools" (emphasis added)). For example, Judge O'Malley faults the Majority for using "some, but not all, canons of construction" and asserts that the Majority did "not pretend to end its analysis with the language." *Id.* at 19. But both of these concerns are addressed merely by recognizing that the interpretive tools the Majority applied were descriptive, rather than normative—and therefore were just a part of the Majority's analysis of the language. When these tools yielded a best meaning, there was no need to reach the normative pro-veteran canon.

Second, placing the pro-veteran canon on par with descriptive canons departs from the Supreme Court's text-first rule, which is the basis for applying descriptive canons before normative canons like the pro-veteran canon. Indeed, although Judge Reyna acknowledges that the canon "cannot override plain text" and that "plain text defeats all other tools of construction," Panel Dissent at 21 & 22 n.13 (collecting cases), he appears to accept only one textual constraint: that the text not "preclude[]" or "expressly exclude" the veteran's interpretation. *Id.* at 22; *see also* O'Malley Dissent at 17 ("Where differing plausible, reasonable interpretations of the terms of a regulation are *possible*, Congress has spoken: it wants veterans' benefits to be administered in a 'pro-claimant' manner." (emphasis added)). So far as I can tell, this approach would permit a court to adopt a veteran-friendly interpretation so long as it is not *expressly ruled out* by the text—and even if it is less plausible than the textually derived best meaning of a provision. Because "most statutes are ambiguous to some degree" (at least, if the analysis stops short of a full evaluation of the context and focuses only on particular words in isolation), *see Muscarello v. United States*, 524 U.S. 125,

138 (1998), the approach advocated by my dissenting colleagues would displace the more balanced determinations reflected in the statute as Congress chose to write it.

Third, and for similar reasons, I disagree that we should consider the pro-veteran canon when determining "whether interpretative doubt exists." Panel Dissent at 3. Presumably, that would mean that even if the text, context, and descriptive canons yield a best meaning, the pro-veteran canon could inject doubt as to whether that meaning is best—at which point the doubt would be resolved in the veteran's favor. In short, the pro-veteran canon could trump the best meaning derived from the text. Again, this departs from the Supreme Court's insistence that the text comes first.

Fourth, the dissenting opinions would apply the canon as a liberal-construction principle (resembling the *Boone* formulation). *E.g.*, Panel Dissent at 24 (arguing that the "governing statutes and regulations should always be construed liberally within the bounds of their text"); O'Malley Dissent at 10 (arguing that Congress "wanted all aspects of the [Veterans' Judicial Review Act] to be liberally construed in favor of the veterans"). And if the pro-veteran canon is simply a liberal-construction principle as my dissenting colleagues argue, this is further confirmation that—for reasons already stated—it is best considered only after a descriptive textual analysis does not yield a best meaning. *See supra* Part I.B.1.

III. TENSION WITH *CHEVRON* AND *AUER*

Last, I recognize that the Supreme Court's *Chevron* and *Auer* frameworks present a difficult and unresolved challenge—as they in many cases will create tension with the pro-veteran canon. This tension arises because both the pro-veteran canon and these deference doctrines are triggered by ambiguity. For example, if the pro-veteran canon

is used at step one of *Chevron* to resolve ambiguity in a veteran's favor, then step two of *Chevron* will never be reached.[15] This raises the question of how to decide what gets triggered first. Although the Supreme Court has applied various canons at step one of *Chevron*—indicating that some canons are "traditional tools" of interpretation that belong at that step, *Arangure*, 911 F.3d at 339–40 (collecting cases), the Court did not attempt to address this difficulty in *Brown* or any other case involving the pro-veteran canon (including this one).[16] Consequently, "[i]t is not clear where the *Brown* canon fits within the *Chevron* framework, or whether it should be part of the *Chevron* analysis at all." *Heino v. Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012).

Whether a canon applies before deferring to an agency likely depends on the character of the canon, measured against the rationales underpinning the *Chevron* and *Auer* frameworks. *See generally Arangure*, 911 F.3d at 339–42. For example, there is "broad agreement" that canons which "clearly and exclusively serve descriptive, rather than normative, purposes . . . belong in step one" of *Chevron*—which "has the same goal: determining the meaning of the stat-

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[15] I note, however, that this tension arises only where the ambiguity at issue is in the textual meaning of a statute or regulation—not where a regulation simply fills a gap left by Congress for agency discretion. *See Terry v. Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003) (deferring under *Chevron* to fill a gap instead of applying the canon).

[16] This difficulty is not limited to the pro-veteran canon. For example, while the D.C. Circuit has prioritized the Indian canon over *Chevron* step two, the Ninth Circuit has not. *Compare Cobell v. Norton*, 240 F.3d 1081, 1100–01 (D.C. Cir. 2001), *with Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015).

ute." *Id.* at 340–41. Normative canons present harder issues. For normative canons triggered by ambiguity, the answer may depend on whether the ambiguity is of the type where Congress has delegated its resolution to the courts or an agency. *See* Barrett, *supra*, at 123 (explaining that the rule of lenity may be justified under the theory that a court's "best understanding of Congress's instructions is that Congress left the problem to her").

I do not attempt to resolve this quandary here as to the pro-veteran canon. Further guidance is necessary to reconcile these competing doctrines. But setting aside the question of which doctrine gets triggered by an ambiguous statute *first*, it's worth reiterating the rigorous interpretive process that the Court has prescribed *before* finding ambiguity. On this point, the Court did not mince words in its recent pronouncement about the term "ambiguous": "when we use that term, we mean it—genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation." *Kisor*, 139 S. Ct. at 2414. A court must "exhaust" these "traditional tools," finding ambiguity "only when that legal toolkit is empty and the interpretive question still has no single right answer." *Id.* at 2415. A court therefore "cannot wave the ambiguity flag just because it found the regulation impenetrable on first read." *Id.* Rather, "hard interpretive conundrums, even relating to complex rules, can often be solved." *Id.* Indeed, "[i]f a reviewing court employs all of the traditional tools of construction, the court will almost always reach a conclusion about the best interpretation of the regulation at issue." *Id.* at 2448 (Kavanaugh, J., concurring in the judgment). Then there is "no reason or basis to put a thumb on the scale," whether in deference to an agency or in a veteran's favor. *See id.*

CONCLUSION

The Supreme Court has said that we are not at liberty to merely assume that "any result consistent with . . . the statute's overarching goal must be the law" as some versions of a liberal-construction principle assume. *Henson*, 137 S. Ct. at 1725. We must "presume more modestly instead that the legislature says what it means and means what it says." *Id.* (cleaned up). Undoubtedly the "entire [veterans-benefits] scheme is imbued with special beneficence from a grateful sovereign." *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (Michel, J., concurring); *see also Martin v. O'Rourke*, 891 F.3d 1338, 1352 (Fed. Cir. 2018) (Moore, J., concurring) ("The men and women in these cases protected this country and the freedoms we hold dear. . . ."). Our first order of business, however, and often our last, is to apply the properly understood words Congress chose for that scheme. It's hard to see how fidelity to those words "rends the overarching fabric of protection woven by Congress." Panel Dissent at 3. The words *are* the fabric. Consistent with the principles articulated above, we should consider the pro-veteran canon only if, after exhausting all applicable descriptive tools in search of the provision's best meaning, a range of plausible interpretations remains, none of them fairly described as the best. I concur in the denial of rehearing en banc.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

HUGHES, *Circuit Judge*, with whom WALLACH, *Circuit Judge*, joins, concurring in the denial of rehearing en banc.

I concur in the denial of en banc rehearing. I also agree with much of what Chief Judge Prost has written and specifically join Part I.B–C and Part II of her opinion concurring in the denial of en banc rehearing. I write separately to note my further views and, particularly, my agreement with our court's current precedent regarding the role of *Chevron* and *Auer* in interpreting veterans' benefits statutes.

In the years following *Chevron*, *Gardner*, and *Auer*, this court has on numerous occasions decided appeals from denials of benefits in which the VA's interpretation of a statutory or regulatory provision has been challenged by a veteran citing the pro-veteran canon. From these decisions, we

have established a clear framework for interpreting statutory and regulatory provisions in the veterans' benefits context where the VA argues that its interpretation is owed deference. That precedent is correct and does not warrant rehearing in any aspect.

The first step, as in all cases where *Chevron* deference is asserted, is to determine whether Congress has directly spoken to the precise question at issue. This court has done so by "first carefully investigat[ing] the matter to determine whether Congress's purpose and intent on the question at issue is judicially ascertainable . . . by employing the traditional tools of statutory construction." *Boyer v. West*, 210 F.3d 1351, 1355 (2000) (quoting *Delverde, SrL v. United States*, 202 F.3d 1360, 1363 (Fed. Cir. 2000)). These tools require "examin[ing] the statute's text, structure, and legislative history and apply[ing] the relevant canons of interpretation." *Id.* If we determine that the statute "plainly speaks to the issue," that is the end of the analysis. *Id.* at 1352. This court has consistently held that the pro-veteran canon does not apply at this juncture. *Id.* at 1355 ("A veteran 'cannot rely upon the generous spirit that suffuses the law generally to override the clear meaning of a particular provision.'") (quoting *Smith v. Brown*, 35 F.3d 1516, 1526 (Fed. Cir. 1994)). Instead, we have repeatedly stated that we must first find a statutory provision ambiguous before there can be "interpretative doubt" to be resolved in the veteran's favor. *Nielson v. Shinseki*, 607 F.3d 802, 808 n.4 (Fed. Cir. 2010) (collecting cases). But even then, we have never looked first to the pro-veteran canon to resolve questions of ambiguity.

Instead, once we have determined that the statute is silent on the issue or is genuinely ambiguous, we then determine whether the VA has promulgated a reasonable interpretation that is owed deference, typically (though not exclusively) in the form of a duly published regulation. We

then apply the same methodology as explained above, employing all the "standard tools of interpretation," *Kisor v. Wilkie*, 139 S.Ct. 2400, 2415 (2019), including "the text, structure, history, and purpose of a regulation," *id.* at 2415, in determining whether that regulation has a plain meaning or whether it is genuinely ambiguous. *See also O'Bryan v. McDonald*, 771 F.3d 1376, 1379 (Fed. Cir. 2014). If the regulation is plain and a reasonable interpretation of the ambiguous statute, then the VA is entitled to *Chevron* deference. *Sears v. Principi*, 349 F.3d 1326, 1330 (Fed. Cir. 2003); *Degmetich v. Brown*, 104 F.3d 1328, 1332 (Fed. Cir. 1997).

If we cannot discern the plain meaning of the regulation, we proceed to determine whether the VA's interpretation of its regulation is owed deference under *Auer*. As the Supreme Court explained in its decision remanding this case, an agency's interpretation is owed deference under *Auer* only if it is reasonable, implicates the agency's substantive expertise, and reflects the agency's "fair and considered judgment" rather than merely a "convenient litigating position or *post hoc* rationalization." *Kisor*, 139 S.Ct. at 2417. If the VA's interpretation satisfies each of these prongs, then it is owed deference even over an alternative interpretation that is arguably more generous to veterans.[1]

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[1] It is not clear—from either our precedent or the Supreme Court's limited discussions of the pro-veteran canon—whether interpretative doubt is to be resolved in favor of the specific veteran before the court in a given appeal or in favor of veterans in general. To the extent that the pro-veteran canon contemplates the interests of the latter, the agency is in the better position vis-à-vis this court to determine how to interpret its regulations to favor veterans seeking or receiving benefits as a group.

We have previously, and correctly in my view, held that if the conditions for either *Chevron* or *Auer* deference are met, then the VA is entitled to deference, without resort to the pro-veteran canon. *See, e.g.*, *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011); *Smith v. Nicholson*, 451 F.3d 1344, 1349–51 (Fed. Cir. 2006); *Sears*, 349 F.3d at 1331–32. The Supreme Court's decision in *Kisor* does not require alteration of this precedent, but simply clarifies the conditions for application of *Auer*.

If the VA's interpretation fails to satisfy any of the requirements for deference, then the interpretative doubt in the statute or regulation has not been resolved by the agency and the pro-veteran canon requires that we resolve the ambiguity in favor of the veteran. *See Hudgens v. McDonald*, 823 F.3d 630, 639 (Fed. Cir. 2016). To hold that the pro-veteran canon applies at any earlier step in the *Chevron* or *Auer* analysis is to hold that the VA, alone among the executive agencies, is not entitled to deference in interpreting its regulations and the statutes Congress has charged it with administering.[2] This position would be anomalous to say the least and has been flatly rejected by this court. *Sears*, 349 F.3d at 1331–32; *Nat'l Org. of Veterans Advocates, Inc., v. Sec'y of Veterans Affairs*, 809 F.3d 1359, 1363 (Fed. Cir. 2016).

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[2] The late Justice Scalia, in an address to the 12th CAVC Judicial Conference in 2013, suggested that *Chevron* and the pro-veteran canon are incompatible and opined that this court had correctly rejected the view that *Chevron* does not apply to the VA. Chadwick J. Harper, *Give Veterans the Benefit of the Doubt:* Chevron*,* Auer*, and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 950 n.128 (citing Ct. of Appeals for Veterans Claims Bar Assoc., *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, VETERANS L.J. 1, 1 (Summer 2013)).

Of course, most of these issues need not be resolved here. The panel majority concluded that the regulation at issue was clear and therefore there was no need to reach any questions of deference or the pro-veteran canon. I do not believe that regulation-specific determination warrants en banc rehearing and concur in the denial.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

DYK, *Circuit Judge*, concurring in the denial of rehearing en banc.

The role of the veteran's canon in statutory and regulatory interpretation is an important issue. If that issue were presented in this case, I would generally agree with Chief Judge Prost's analysis. But, in my view, that canon simply is not relevant to the disposition of this case. Resolution of the interpretative issue here does not depend on the application of the veteran's canon or other canons of construction, but on a plain reading of the language of the regulation.

The regulation states that "if VA receives or associates with the claims file relevant official service department records that existed and had not been associated with the

claims file when VA first decided the claim, VA will reconsider the claim." 38 C.F.R. § 3.156(c)(1). The question is what constitutes "relevant" records.

I.

Here, there was an original rating decision in 1983 denying benefits for post-traumatic stress disorder on the basis that the veteran was not diagnosed with PTSD. *See* J.A. 22–23. There was a later decision in 2007, concluding that the veteran did have PTSD and granting benefits based in part on service department records received by the VA after the original 1983 decision because these records verified an in-service stressor (an additional requirement for a PTSD award). *See* Majority Op. 6–7; J.A. 30–34; *see also AZ v. Shinseki*, 731 F.3d 1303, 1310 (Fed. Cir. 2013) (listing elements for service connection for a PTSD claim).

An earlier effective date under 38 C.F.R. § 3.156(c) was denied on the grounds that the newly received service department records were not relevant. The Board and the Veterans Court concluded that "relevant" records are those relevant to the earlier decision's basis for denying benefits, and here, the records were not relevant because they did not pertain to the basis of the 1983 denial of benefits, which was the lack of a PTSD diagnosis rather than the lack of a stressor. *See* J.A. 3–4, 90–91.

The panel agrees that the term "relevant" for the purposes of 38 C.F.R. § 3.156(c)(1) should be interpreted consistently with 38 U.S.C. § 5103A, the statutory basis for the VA's duty to assist. *See* Majority Op. 13; Dissenting Op. 8, 10. Section 5103A provides that "[t]he [VA] shall make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit under a law administered by the [VA]." 38 U.S.C. § 5103A(a)(1) (emphasis added). As the panel majority appears to admit, "[r]elevant records for the purpose of

§ 5103A are those records that relate to the injury for which the claimant is seeking benefits and have a reasonable possibility of helping to substantiate the veteran's claim." *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) (emphasis added); *see* Majority Op. 13. In other words, relevant records are those that help in "substantiat[ing] the claimant's claim for a benefit," 38 U.S.C. § 5103A(a)(1), not just those that "undermin[e]" some prior decision that denied that benefit, *see* Majority Op. 10. Short of an explicit statutory definition of "relevant," it can hardly be clearer what "relevant" means.

Similarly, the language of 38 C.F.R. § 3.156(c) makes clear that relevant records are those relevant to the decision awarding compensation—not the prior decision. The regulation states that the earlier decision is set aside and an earlier effective date is granted if "[a]n award" is "made based all or in part" on "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1), (3).

The language of the regulation does not restrict the availability of an earlier effective date only to records that speak to the basis for the prior decision. If the agency intended such a restriction, the regulation could easily state that "[a]n award made based all or in part on records relevant to the ground of the prior decision" qualifies for an earlier effective date. Instead, the rule makes relevancy turn on whether the award was "made based all or in part" on the records. 38 C.F.R. § 3.156(c)(3). Thus, plain language leads to the rather obvious interpretation of the regulation—that it refers to records relevant to the service connection claim.

II.

There is language in the panel opinion that appears to reject the correct interpretation of "relevant," *see, e.g.*, Majority Op. 12–13, but I read the panel opinion as taking a more nuanced view of what is relevant. The panel holds that service records are only not relevant if they relate to "a matter that was not in dispute" (i.e., conceded) in the earlier VA decision. Majority Op. 15.[1] Here, the panel concluded that the issue to which the records relate (i.e., whether there was an in-service stressor) was not in dispute; hence, the records are not relevant. The dissent and majority appear to differ as to whether the stressor was in dispute, *see id.*; Dissenting Op. 16, and it may be that the majority is incorrect, but that is hardly a ground for en banc review. Nor does the majority's view that records must relate to a disputed issue (based on the plain language of 38 C.F.R. § 3.156(c) that the award must be "based all or in part on" the newly discovered records, *see* Majority Op. 12–13), constitute a matter warranting en banc review. Service department records relevant to a claim for benefits will continue to provide grounds for reconsideration (and an earlier effective date) if they relate to a disputed claim

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[1] The majority's opinion states:

> We therefore conclude that the Board did not err in holding that the records cited by Mr. Kisor were not "relevant" because they did not pertain to the basis of the 1983 denial, the lack of a diagnosis of PTSD. The records added nothing to the case because Mr. Kisor has not shown that they bore, directly or indirectly, on any matter relating to entitlement to service connection for PTSD, other than a matter that was not in dispute: the presence of an in-service stressor.

Majority Op. 15.

element. The role of the veteran's canon, not being a pertinent issue here, must await another day and another case.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

O'MALLEY, *Circuit Judge*, with whom NEWMAN, MOORE, and REYNA, *Circuit Judges*, join, dissenting from the denial of the petition for rehearing en banc.

This case returned to us after a trip to the Supreme Court. I am surprised that the panel majority does not believe the Supreme Court's opinion compels judgment in Mr. Kisor's favor. I am also surprised by the analytical hoops through which the panel majority has jumped to reinforce its decision to rule against the veteran. And that the majority went to such great lengths to do so despite the remedial context in which Mr. Kisor's claim arose.

The procedural history of this case is important to understanding how we have arrived at this point and why we need to retreat from it.

The veteran's case turns on the meaning of the word relevant in 38 C.F.R. § 3.156(c)(1). If the term is given its common and well-understood meaning, the veteran likely is entitled to an additional twenty-six years of benefits. If the term is given the contorted meaning now dictated by the majority, he decidedly is not.

The panel majority initially held that the word "relevant" in § 3.156(c)(1) is ambiguous. *See Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017) ("*Kisor I*"). In fact, it concluded it was insolubly so. The panel said that "[i]n our view, the regulation is vague as to the scope of the word, *and canons of construction* do not reveal its meaning." *Id.* at 1367 (emphasis added). More specifically, it explained "§ 3.156(c)(1) does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* It concluded that "[t]his uncertainty in application suggests that the regulation is ambiguous." *Id.* The panel then emphasized that the parties' "varying, alternative definitions" of the term "underscore[d] § 3.156(c)(1)'s ambiguity" because neither party's position was unreasonable. *Id.* at 1367–68 ("Both parties insist that the plain regulatory language supports their case, and neither party's position strikes us as unreasonable.").

Reasoning that the Board's interpretation of the regulation was not "plainly erroneous or inconsistent" with the VA's regulatory framework, the panel concluded that the only way to resolve the parties' dispute was to rely on the principle of deference outlined in *Auer v. Robbins*, 519 U.S. 452 (1997). *Id.* at 1369. It thus concluded that the judge-made policy of giving deference to an agency's interpretation of its own regulations meant the insoluble interpretive tie with which it was faced went to the VA. The veteran lost.

Notably, before finding an ambiguity in the regulatory text and resorting to *Auer*, the panel did not consider the pro-veteran canon—the "rule that interpretive doubt is to be resolved in the veteran's favor," *Brown v. Gardner,* 513 U.S. 115, 117–118 (1994); the "canon that the 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, 220–221, n.9 (1991)). Mr. Kisor sought rehearing en banc before our court, which we denied, over the objection of three of our judges. *Kisor v. Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018). Mr. Kisor then sought certiorari, asking the Supreme Court to overrule *Auer*, or at least clarify that resort to *Auer* is inappropriate where the pro-veteran canon of construction could resolve the ambiguity in the veteran's favor.

The Supreme Court granted cert on the first question. *See Kisor v. Wilkie*, 139 S. Ct. 657 (2018) (mem.). While the Supreme Court refused to do away with *Auer*, it dramatically circumscribed the circumstances in which a court may resort to it. *Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) ("*Kisor II*"). Importantly, the Court explained that, before a regulation may be deemed "genuinely ambiguous" enough for *Auer* deference to come into play, "*all* the 'traditional tools' of construction" must be employed in assessing the regulation. *Id.* at 2415 (emphasis added). It explained that "only when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Id.* (quoting *Pauley v. BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

The case was then remanded. It would seem that the resolution on remand would have been easy. The panel originally found the regulation insolubly ambiguous with-

out having considered the pro-veteran canon of construction. Applying that canon in this court's "legal toolkit" to a circumstance in which there were two reasonable constructions of the regulation, and without the option of *Auer*, the result should have been that the veteran's proposed construction prevailed. The veteran should have won.

Surprisingly, the majority instead concluded that the regulation is not ambiguous at all. *Kisor v. Wilkie*, 969 F.3d 1333, 1338 (Fed. Cir. 2020) ("*Kisor III*"). According to the majority at that point, "relevant" "ha[d] only one reasonable meaning"—the one proffered by the VA. *Id.* at 1338–1339 ("[T]he record must speak to a matter in issue, in other words, a matter in dispute."). The majority never mentioned the "uncertainty in application" with which it had been concerned in *Kisor I*. It simply concluded that it no longer thought Mr. Kisor's proposed definition struck it as reasonable because it said the service records did not speak "directly or indirectly" to his non-diagnosis of PTSD. *Id.* at 1340. The panel majority conceded that the new records contained substantial additional information regarding Mr. Kisor's combat experiences during Operation Moon. *Id.* at 1341. Indeed, it conceded that the records contained "credible supporting evidence that the claimed stressor occurred." *Id.* (citation omitted). But it still somehow found the records irrelevant. *Id.* The majority then concluded that, because it no longer found the regulation ambiguous, it did not need to consider the pro-veteran canon of construction. *Id.* at 1342. According to the majority, the pro-veteran canon "only applies in the situation where the statute or regulation at issue is ambiguous."[1] *Id.*

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[1] The Concurrence to denial of en banc by Chief Judge Prost ("Prost Concurrence") questions whether the pro-veteran canon should apply during regulatory interpretation. Prost Concurrence at 3 n.2. But nothing about the regula-

(quoting *Paralyzed Veterans of Am. v. Sec'y of Veterans Affs.*, 345 F.3d 1334, 1340 (Fed. Cir. 2003)). The veteran lost again.

Mr. Kisor again petitioned our court to rehear this case en banc. *See* Pet. for Reh'g En Banc, *Kisor v. McDonough*, No. 16-1929 (Fed. Cir. Sept. 28, 2020), ECF No. 76. In doing so, he had the support of several amici who, alongside him, contended that the pro-veteran canon of construction was an important interpretive canon that was to be employed at step one of the analysis set forth in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)—that is, to be applied *along the way* to determining whether a true ambiguity exists within the meaning of *Kisor II*. In response, the panel majority pulled *Kisor III* back. It has now issued a modified opinion with a third set of rationales for its ruling against the veteran. *See* Majority Modified Op. ("*Kisor IV*").

In its modified opinion, the panel majority now asserts that the pro-veteran canon of construction is not to be considered unless there is "interpretive doubt" in the panel's mind after "use of ordinary textual analysis tools," which it says *do not include* the pro-veteran canon. *Id.* at 16. And,

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tory context undermines the pro-veteran canon's core justification—the special solicitude for those persons who "have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). And "[i]t is axiomatic that an administrative agency's power to promulgate legislative regulations is limited to the authority delegated by Congress." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 208 (1988). We have never differentiated between the interpretive exercise employed at the statutory level and that employed at the regulatory level. Neither has the Supreme Court. I see no reason why we should do so now.

the majority states that, using such tools, it finds that "relevant" records means records that are "relevant to the issue that was dispositive against the veteran in the VA adjudication of the claim sought to be reconsidered and, in that way, bear on the outcome of the case." *Id.* at 9. The panel majority concludes once more that Mr. Kisor's service records do not satisfy that definition of relevance. The veteran loses again.

Judge Reyna's dissent from *Kisor IV* explains in detail why, on this record—where the examiner originally found the absence of PTSD in part due to skepticism about what Mr. Kisor claimed about his in-service stressors—evidence of *in combat* and other substantial in-service stressors must certainly be relevant to his PTSD diagnosis. *See Kisor IV* Dissent Modified Op. at 15–20. PTSD is a differential diagnosis after all, that turns, in large measure, on the nature and existence of identified stressors. The majority's effort to render in-service records of those stressors irrelevant because the denial of Mr. Kisor's claim for benefits was premised on the absence of a diagnosis of PTSD and not on the absence of an in-service connection to his alleged disability is mental gymnastics. Where skepticism that stressors existed resulted in a non-diagnosis of PTSD, detailed records cataloging such stressors must certainly be "relevant" to that non-diagnosis, under any construction of that term. I defer to Judge Reyna's thoughtful discussion of that factual point in his panel dissent.

I write separately to address (1) the panel majority's dismissive treatment of the pro-veteran canon of construction and (2) emphasize that the panel's tortured definition of "relevant" in § 3.156(c)(1) is out of step with all common understandings of that term and is unsupported by any meaningful text-based interpretive analysis. I believe the veteran should win this time.

I.

The pro-veteran canon of construction is not meant to be an afterthought. It is a tool in the interpretive toolkit that aids in gleaning congressional intent where the plain text of the statute or regulation does not clearly answer the question at hand.[2] The pro-veteran canon has occupied a place in Supreme Court jurisprudence for almost eighty years. *See, e.g.*, *Boone v. Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act 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."); *see also Fishgold v. Sullivan Drydock & Repair Corp*., 328 U.S. 275, 285 (1946) ("Our problem is to construe the separate provisions of the [Selective Service] 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.").

It is against this common law backdrop that Congress passed the Veterans Judicial Review Act ("VJRA"). Veterans Judicial Review Act, Pub. L. No. 100–687, § 301, 102 Stat. 4105, 4113–22 (1988) (codified as renumbered at 38 U.S.C. §§ 7251–92); *see King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991) (stating expressly that the Supreme Court presumes that Congress legislates with an understanding of the pro-veteran "interpretive principle[]") (citing *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction. . . .")); *see also Lofton v. West*, 198 F.3d 846, 850 (Fed. Cir.

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[2] "We're all textualists now." Harvard Law School, *The Antonin Scalia Lecture Series: A Dialogue with Justice Elena Kagan on the Reading of Statutes*, YOUTUBE (Nov. 25, 2015) https://www.youtube.com/watch?v=dpEtszFT0Tg.

1999) ("Congress legislates against a common law background . . . ."); *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("[W]here a common-law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'") (citing *Isbrandtsen Co. v. Johnson*, 343 U.S. 779, 783 (1952)).

Congress created the Veterans Administration (the agency that preceded the VA) in 1930, *see* Act of July 3, 1930, Pub. L. No. 71-536, ch. 863, § 1, 46 Stat. 1016, and initially prohibited judicial review of the agency's decisions concerning veterans' benefits, *see* Act of Mar. 20, 1933, ch. 3, § 5, 48 Stat. 9 (codified as amended at 38 U.S.C. § 211(a) (1988)) (repealed 1988). The VA decisions concerning veterans' benefits existed in a state of "splendid isolation" from judicial review. *Brown*, 513 U.S. at 122 (citing H.R. Rep. No. 100–963, at 10 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5791). Congress changed that in the VJRA, however, expanding the scope of judicial review concerning veterans' benefits in two key aspects. Veterans Judicial Review Act, § 301. First, for veterans challenging their benefit awards, the VJRA established three levels of appeal: (1) the Court of Veterans Appeals (an Article I court the VJRA created), which has "exclusive jurisdiction to review decisions of the Board of Veterans' Appeals," 38 U.S.C. § 7252(a); (2) our court, which has "exclusive jurisdiction to review and decide any challenge to the validity of any statute or regulation or any interpretation thereof" (such as the regulation at issue in this case, 38 C.F.R. § 3.156(c)(1)), 38 U.S.C. § 7292(c); and (3) the Supreme Court, 38 U.S.C. § 7292(c). Second, for veterans dissatisfied with VA regulations and rules concerning veterans' benefits, the VJRA allows for direct challenges to our court. *See* 38 U.S.C. § 502. Congress created this two-step opportunity for review "for the purpose of ensuring that veterans

were treated fairly by the government and to see that all veterans entitled to benefits received them . . . ." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006).

Congress also codified the VA Secretary's duty to assist. Veterans' Judicial Review Act, Pub. L. No. 100–687 § 103, 102 Stat. 4106 (1988) (codified at 38 U.S.C. § 3007(a) (1988)) ("The Administrator shall assist such a claimant in developing the facts pertinent to the claim."). Prior to the VJRA's passage, Congress imposed no such statutory duty, and the Secretary's obligation to assist veterans make out their benefit claims only existed to the extent granted by regulation. *See, e.g.*, 38 C.F.R. §§ 3.102, 3.103 (1988). The codification of the Secretary's "duty to assist" removed the VA's ability to revise its regulations to strip veterans of this right or to receive *Auer* deference for any narrow interpretation of that right. These beneficent changes to provide greater remedial treatment to veterans in acknowledgement of their service to this country were just the beginning.

The VJRA is replete with provisions designed to make it easier for veterans to obtain benefits and to challenge denial of such benefits. The development of this veteran-friendly scheme and its remedial nature was the very raison d'être for passage of the VJRA. As we noted in *Hodge v. West*, "even in creating judicial review in the veterans context, Congress intended to preserve the historic, pro-claimant system." 155 F.3d 1356, 1363 (Fed. Cir. 1998). There, we cited the VJRA's legislative history discussing Congress's desire for the veterans' benefits system to remain "pro-claimant":

> Each year, the Veterans' Administration (VA) processes approximately 5 million claims. In most cases, claimants submit their own applications without assistance. If a claimant desires advice or other

> help, VA provides specially-trained personnel to answer inquiries and assist in the submission of the claim. VA's medical facilities often serve as an important referral source, and the major veterans service organizations also furnish claims assistance by trained specialists at no charge.
>
> *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 where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> *I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects VA to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, VA is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.*

H.R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95 (emphasis added).

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. It wanted all aspects of the Act to be liberally construed in favor of the veterans.

Congress asked the VA to effectuate this intent by promulgating regulations designed to do so. The text of 38 U.S.C. § 501 provides the VA Secretary with the "authority to prescribe all . . . regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws. . . ." 38 U.S.C. § 501(a)(1). Under this rulemaking authority, the VA Secretary promulgated 38 C.F.R. § 3.156, which generally allows a veteran to reopen a previously denied claim when "new and material evidence" surfaces. *See* 38 C.F.R. § 3.156(a). Section (c) of this regulation, at issue here, states an exception to this general rule by requiring the VA to reconsider a veteran's previously denied claim when "relevant official service department records that existed and had not been associated with the claims file when VA first decided the claim" come to light, regardless of whether they are "new and material." 38 C.F.R. § 3.156(c)(1) (noting that this section applies "notwithstanding paragraph (a)"). Thus, we are not only dealing with a remedial statute, we are dealing with a regulation designed to help right administrative wrongs. Our court has recognized that "courts are to construe remedial statutes liberally to effectuate their purposes." *Smith v. Brown*, 35 F.3d 1516, 1525–26 (Fed. Cir. 1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 n.9 (1991) and *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980)), *superseded on other grounds by* 38 U.S.C. § 7111. That includes remedial regulations.[3]

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[3] The Prost Concurrence argues that the very fact that Congress has worked hard over the years to protect veterans is reason *not* to consider the pro-veteran canon of construction when considering a less than clear term in a statute or regulation. Prost Concurrence at 14. That cannot be right. Congress cannot anticipate every linguistic debate over the terms of a statute, and certainly cannot anticipate debates

The Supreme Court has commanded as much in multiple contexts. *See, e.g.*, *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 431 (1939) ("[R]emedial legislation for the benefit and protection of seamen has been liberally construed to attain that end."); *McDonald v. Thompson*, 305 U.S. 263, 266 (1938) ("[T]he [Motor Carrier] Act is remedial and to be construed liberally. . . ."); *see also United States v. Merriam*, 263 U.S. 179, 188 (1923) ("If the words are doubtful, the doubt must be resolved against the government and in favor of the taxpayer.") (citing *Gould v. Gould*, 245 U.S. 151, 153 (1917)); *see also Bowers v. New York & Albany Lighterage Co.*, 273 U.S. 346, 350 (1927) ("The provision is a part of a taxing statute; and such laws are to be interpreted liberally in favor of the taxpayers."); *see also United Dominion Indus., Inc. v. United States*, 532 U.S. 822, 839 (2001) (Thomas, J., concurring) ("At a bare minimum, in cases such as this one, in which the complex statutory and regulatory scheme lends itself to any number of interpretations, we should be inclined to rely on the traditional canon that construes revenue-raising laws against their drafter."); *see also Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142, 163, 166 (2012) (interpreting regulations implementing the Fair Labor Standards Act ("FLSA") against the backdrop of the congressional intent behind FLSA—i.e., to protect low wage employees).

Veterans deserve no less protection than low wage employees or taxpayers. *See, e.g.*, *United States v. Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veter-

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regarding the meaning of not-yet drafted regulations. It is *because* Congress drafts veterans legislation against the backdrop of the pro-veteran canon that Congress does not need to be clairvoyant in order to see that its intent to benefit veterans can be effectuated when parties have legitimate debates regarding terms employed.

ans is of long standing."); *Henderson*, 562 U.S. at 440 (noting that Congress's longstanding solicitude for veterans "is plainly reflected in the VJRA, 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.'") (quoting *United States v. Oregon*, 366 U.S. at 647); *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009) ("[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. 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.") (quoting Veterans Claims Assistance Act of 2000, 38 U.S.C. § 5103A). Despite all of this, and the apparent recognition that deferring consideration of the pro-veteran canon until after an ambiguity is found would be inconsistent with the Supreme Court's directive in *Kisor II* to consider all canons of construction *before* finding an ambiguity, the panel majority charts a new course, with a familiar end.

II.

The majority has again modified its reasoning concerning the application of the pro-veteran "interpretive principle[]." *King*, 502 U.S. at 221 n.9; *see Kisor IV* Majority Modified Op. As noted, the *Kisor IV* majority now reasons that the pro-veteran canon does not apply unless there is "interpretive doubt" after the "use of ordinary textual analysis tools," which do not include the pro-veteran canon of construction. *Id.* at 16. I believe the majority's conclusion in *Kisor IV* is just as problematic as its challenged conclusion in *Kisor III*, if not more so.

As a threshold matter, I believe the majority's shift from relying on "ambiguity" in *Kisor III* to "interpretive doubt"

in *Kisor IV* to avoid applying the pro-veteran canon is a distinction without a difference. There is no discernible daylight between these terms. *See, e.g.*, *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) ("[W]hen a statute is ambiguous, interpretive doubt is to be resolved in the veteran's favor." (internal quotation omitted)); *compare Doubt*, *v.*, OED ONLINE, https://www.oed.com/view/Entry/57078 (last visited Apr. 14, 2021) (defining "doubt" as "[t]o be in doubt or uncertainty; to be wavering or undecided in opinion or belief") *with Ambiguity, n.*, OED ONLINE, https://www.oed.com/view/Entry/6144 (last visited Apr. 14, 2021) (defining "ambiguity" as "originally and chiefly with reference to language: the fact or quality of having different possible meanings; capacity for being interpreted in more than one way; (also) lack of specificity or exactness"). The entire point of statutory construction is to interpret text and give effect to congressional intent.

The majority cites nothing in support of its contention that "ordinary textual analysis tools" include *only* those narrowly subscribed by the majority. It cites only *Brown v. Gardner* for its decision to remove the pro-veteran canon—and apparently numerous other canons—from the interpretive toolkit it employs. But *Brown* does not hold that the pro-veteran canon is only an after the fact inquiry, or, as the Prost Concurrence asserts, must be relegated, like the rule of lenity, to "the end of the analysis."[4] Prost Concurrence at 12. Indeed, quite the contrary. The language in

[4] Despite the Supreme Court's opinion in this very case implying the opposite, the Concurrence by Judge Hughes ("Hughes Concurrence") asserts that *Chevron* and *Auer* deference must still trump the pro-veteran canon. The Prost Concurrence holds open the same possibility. That is flatly inconsistent not only with *Kisor II*, but with the Supreme Court's directive that *Chevron* and *Auer* do not even

Brown from which the *Kisor IV* majority's "interpretive doubt" language is plucked only refers to what the government "at most could claim" and appears just before the Court concludes that "the Government cannot plausibly make *even* this claim here." *Brown*, 513 U.S., 117–118 (emphasis added). In full, it reads,

> The most, then, that the government could claim on the basis of this term is the existence of an ambiguity to be resolved in favor of a fault requirement (assuming that such a resolution would be possible *after* applying the rule that interpretive doubt is to be resolved in the veteran's favor . . . .).

Id. (emphasis added). Nowhere does the Court hold what the panel claims it holds. It does *not* say that the parts of a "usual textual analysis"—other than the plain language of the words used—do anything other than help resolve "interpretive doubt." And, it does not say that the pro-veteran canon is anything other than an interpretive canon. All *Brown* did was emphasize that the pro-veteran canon of construction is an *additional* tool in the "usual" tool kit

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enter the picture until it is clear that the canons do not supply the answer. *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (quoting *NLRB v. Alt. Ent., Inc.*, 858 F.3d 393, 417 (6th Cir. 2017), *abrogated by Epic Sys. Corp.*, 138 S. Ct. 1612). Quite simply, the "canons trump deference." Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 64, 77 (2008). Given the agency context in which the canon arises, relegating its consideration until after *Chevron* and *Auer* deference would render it a nullity.

when the statute or regulation being interpreted is embedded in a remedial statute whose congressional purpose is to benefit veterans.[5]

Importantly, moreover, *Brown* did not overrule *Boone* and its progeny and create a new, more stingy, "*Brown* formulation" of the pro-veteran canon. Prost Concurrence at 12. Indeed, in *Brown*, the Court cited to *King*, *see Brown*, 513 U.S. at 118 (citing *King*, 502 U.S. at 220–221, n.9), which in turn cited to *Fishgold*, *see King*, 502 U.S. at 220–221, n.9 (quoting *Fishgold*, 328 U.S. at 285), which, in turn, relied upon *Boone*, *see Fishgold*, 328 U.S. at 285 (quoting

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[5] The Prost Concurrence misreads *Brown*. It understands *Brown* to create a new *necessary* condition for applying the pro-veteran canon: interpretive doubt. That is, the pro-veteran "canon applies *only when* there is 'interpretive doubt.'" Prost Concurrence at 6 (emphasis added) (quoting *Brown*, 513 U.S. at 118). But *Brown* does not narrow the Supreme Court's liberal interpretation rule. The Supreme Court made clear "interpretative doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 117–118. Put simply, if there is interpretive doubt, then the veteran gets the benefit of that doubt. That is a *sufficient* condition for applying the pro-veteran canon. By mixing necessary and sufficient conditions, the Prost Concurrence commits a classic fallacy. *See, e.g.*, *Wilson v. Horton's Towing*, 906 F.3d 773, 782 (9th Cir. 2018) ("Plaintiff's argument commits the logical fallacy of mistaking a sufficient factor for a necessary one."); *Arar v. Ashcroft*, 585 F.3d 559, 601 (2d Cir. 2009) ("This appears to reflect a classic logical fallacy, 'denial of the antecedent,' which mistakes a necessary condition for a sufficient one."); *cf. N. Am. Philips Corp. v. Am. Vending Sales, Inc.*, 35 F.3d 1576, 1580 (Fed. Cir. 1994) ("To suppose that a state must have a pecuniary interest in a matter . . . is to mistake a necessary for a sufficient condition for the assertion of personal jurisdiction.").

Boone, 319 U.S. at 575). And, in *Henderson*, which post-dated *Brown*, the Supreme Court again cited to *King*. *See Henderson*, 562 U.S. at 441 (quoting *King*, 502 U.S. at 220–221, n.9). If *Brown* changed the law, one would think the Supreme Court would acknowledge that fact rather than continue to rely on the line of cases relying on *Boone*.

The panel majority's latest approach is inconsistent with multiple Supreme Court cases which discuss the pro-veteran canon and treat it as one of the many canons of construction to be *collectively* employed when interpreting veterans benefit provisions. *See, e.g.*, *Henderson*, 562 U.S. 428; *King*, 502 U.S. 215. It is particularly important to include the pro-veteran canon in the interpretive mix when, not only is the entire statutory scheme at issue a beneficent one, but the *particular provision* at issue is intended to remedy administrative wrongs against veterans, as § 3.156(c)(1) does by relieving veterans of the finality of an adverse decision when records in the VA's possession relating to that decision are located and could upend the denial of benefits.

Once having started down the road of its interpretive exercise, the majority in *Kisor IV* was bound to include the pro-veteran canon of construction in its analysis and give effect to it along with other applicable canons of construction. *See, e.g.*, *Kisor II* at 2415 (saying all canons get construed at step one). The question here is not so much whether the word "relevant" (as used in 38 C.F.R. § 3.156(c)) could possibly have a restrictive meaning (as the *Kisor IV* majority appears to believe). Rather, when reviewing an agency's interpretation of a statute or regulation (as is the case here), the Supreme Court has made clear that we are to apply all tools of statutory construction to glean congressional intent. Where differing plausible, reasonable interpretations of the terms of a regulation are possible,

Congress has spoken: it wants veterans' benefits to be administered in a "pro-claimant" manner. Congress's explicit pro-veteran desire in the VJRA, as well as the remedial nature of 38 C.F.R. § 3.156(c), lead me to conclude that the pro-veteran canon should be used alongside traditional tools of statutory construction in this case.[6] *Kisor IV*'s failure to recognize as much flies in the face of clearly expressed congressional intent.

To be sure, there are certain rules courts may apply when all efforts to figure out the meaning of a statute or regulation leave courts to "guess as to what Congress intended." *Abramski v. United States*, 573 U.S. 169, 188 n.10 (2014) (discussing rule of lenity) (quoting *Maracich v. Spears*, 133 S. Ct. 2191, 2209 (2013)). These are judge-made tie breakers implementing *judicial* policy choices, however. *Auer* is one such tie breaker, as is the canon of constitutional avoidance. These do not represent rules implementing congressional intent, however, they are rules courts fall back on when congressional intent cannot be ferreted out. The Prost Concurrence is wrong to equate the

[6] This does not mean that the veteran will always win when the canon is considered. It may well be that other more appropriate interpretive tools compel a different resolution of the question presented. *See Lockhart v. United States*, 136 S. Ct. 958, 963 (2016) (applying the rule of the last antecedent as a statutory canon of construction to avoid finding a criminal statutory term ambiguous, but noting that "[o]f course, as with any canon of statutory interpretation, the rule of the last antecedent 'is not an absolute and can assuredly be overcome by other indicia of meaning'") (citations omitted). In this case, there is no such interpretive tool compelling the result the panel majority reaches.

two.[7] Here, as mentioned before, we know Congress's intent from multiple indicators—including the text of the VJRA itself—and that intent provides the backdrop against which the interpretive inquiry in veterans' benefit cases is to occur. *See, e.g.*, *Fishgold*, 328 U.S. at 285 ("Our problem is to construe the separate provisions of the [Selective Service] 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."); *see also King*, 502 U.S. at 221 n.9 ("Even if the express examples [in other portions of the Act] unsettled the significance of subsection (d)'s drafting, however, we would ultimately read the provision in King's favor under the canon that provisions for benefits to members of the Armed Services are

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[7] The Prost Concurrence is also wrong when it discusses the difference between "descriptive" and "normative" canons, characterizes the latter as less important, and then places the pro-veteran canon in the normative bucket, citing *Arangure v. Whitaker*, 911 F.3d 333, 346 (6th Cir. 2018). Putting aside the fact that *Arangure* never mentions the pro-veteran canon, it also never explains whose "norms" it was discussing—Congress's policy choices or the courts' policy choices. And, *Arangure* expressly concludes that the Supreme Court has never created a hierarchy ranking the importance of canons of construction, has applied even what some classify as classic policy-based canons at step one of the *Chevron* analysis, has adopted a "canons first" approach to *Chevron*, and that "most canons" are "traditional tools of statutory construction" that apply at step one. As the Supreme Court did in *King*, the pro-veteran canon is to be considered on the way to determining whether a genuine ambiguity within the meaning of *Chevron* exists. Characterizing the canon as "normative" does not change that fact.

to be construed in the beneficiaries' favor.") (citing *Fishgold*, 328 U.S. at 285).

This is why the majority's *cf.* cite to *Connecticut National Bank v. Germain*, 503 U.S. 249, 253–54 (1992) is particularly unhelpful to its cause. *See Kisor IV* Majority Modified Op. at 16. That case stands for the proposition that, where a statute is clear on its face, the court is to assume that Congress intended what it clearly said. In other words, courts must assume that Congress expressed its intention and that no other "tools" are needed to assess congressional intent. True. Here, however, the majority does not pretend to end its analysis with the language of § 3.156(c). It purports to use some, but not all, canons of construction to imbue a single word in the regulation with a thirty-nine word definition.[8] That case is also unhelpful to the panel majority's cause because it was not decided in the context of a remedial scheme designed to benefit the class of claimants of which the appellant was a part.

A return to the Supreme Court's decision in *Christopher* is instructive. *Christopher* involved the FLSA, whose legislative history indicated that Congress passed it with the goal, *inter alia*, of "protect[ing] all covered workers from substandard wages and oppressive working hours." *Christopher*, 567 U.S. at 147 (citation omitted). Petitioners argued that their employers violated FLSA by failing to compensate them for overtime. The Department of Labor submitted an amicus brief to the Court arguing that the Department interpreted its own regulations to exclude Petitioners from FLSA's overtime protections and asked the Court to defer to that conclusion under *Auer*. Relevant here, the Justices reasoned that to give deference to the

[8] As noted later, the panel majority does not even stay true to the canons on which it purports to rely.

Department would do damage to the remedial intent behind FLSA. It considered all tools of statutory interpretation with that remedial backdrop in mind. Thus, it did not relegate the remedial purpose of the scheme to an afterthought.[9]

I do not agree with the Prost Concurrence that the pro-veteran canon is a canon of last resort in the interpretive process, to be relegated to the end of the analysis. Nor do I believe Congress legislated with that mindset. After a tortured walk through the history of the pro-veterans canon, the Prost Concurrence concludes that whatever its form (a liberal construction principle or a narrower tie-goes-to-the-runner principle), it comes only at the end, if at all. The Prost Concurrence is clear that the pro-veteran canon applies *only after* other canons "yield[] competing plausible interpretations, none of which is fairly described as the best." Prost Concurrence at 2. What the Prost Concurrence never tells us is—by what measure do we decide if one plausible interpretation is "the best." Canons of construc-

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[9] The Prost Concurrence claims *Christopher* held that the remedial purpose canon was "inapposite because the Court was interpreting a general definition that applies throughout the FLSA." Prost Concurrence at 11 (internal quotations omitted). But the Prost Concurrence conflates two interpretive canons. In a footnote, the Court discusses a rule of narrow construction: "exemptions to the FLSA must be 'narrowly construed against the employers seeking to assert them. . . .'" 567 U.S. at 164 n.21 (quoting *Arnold v. Ben Kanowsky, Inc.*, 361 U.S. 388, 392 (1960)). Relegation of that narrow construction rule does not undermine the Court's lengthy discussion of and reliance on the statute's remedial purpose. *Id.* at 166–67. Most critically, *Christopher* applied the remedial construction canon at *Chevron* step one.

tion "are an unruly team," often "pulling in opposite directions." *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991). Such is not unusual. But when the text yields competing plausible interpretations, all of the canons ought to be consulted and weighed in the analysis.

Given the importance of the issue—the scope and applicability of a canon of construction—and the enormous impact of today's determination that the pro-veteran canon is all but inapplicable to future cases, I dissent from the court's refusal to take the issue en banc.

III.

Putting aside the pro-veteran canon and the role it should play in the inquiry before us, the actual interpretive exercise in which the panel now engages is flawed on multiple other levels. As the panel recognized in *Kisor I*, the plain language of 38 U.S.C. § 501 provides no clear indication that Congress intended for a "relevant" record as described in 38 C.F.R. § 3.156(c)(1) to "address a dispositive issue and therefore . . . affect the outcome of the proceeding" as the VA Secretary and the *Kisor IV* majority now contend. *Kisor IV* Majority Modified Op. at 9. Nor does the legislative history behind 38 U.S.C. § 501(a) (or its statutory precursor, 38 U.S.C. § 210(c)), provide such an indication. *See* Pub. L. No. 85–857, § 210(c) 72 Stat. 1105, 1114 (1958); *see also* Pub. L. No. 102–83, § 501(a) 105 Stat. 378, 386 (1991). The majority also fails to apply the canon of imputed common law meaning, which states that "[w]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. U.S.*, 527 U.S. 1, 21 (1999) (quoting *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)). As Judge Reyna

points out in his panel dissent, the majority's strained definition of relevant in § 3.156(c)(1) is inconsistent with the way we have defined relevance in multiple other veteran-related contexts. As he explains, it is inconsistent with how we have interpreted relevance in the context of 38 U.S.C. § 5103(A). *See, e.g.*, *Jones v. Wilkie*, 918 F.3d 922, 926 (Fed. Cir. 2019) (holding records need not "prove" claim to be relevant); *McGee v. Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008) (holding records need not be dispositive of claim to be relevant); *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) (holding records need only relate to a claim and have a reasonable possibility of substantiating it). And, it is inconsistent with what we have said qualifies as "material" evidence, a directly comparable concept. *See Kisor IV* Dissent Modified Op. at 11–13. I commend the reader to those thoughtful discussions.

Beyond these inconsistencies, the definition the *Kisor IV* majority now crafts is also inconsistent with both common and legal usages of the term "relevant." Rather than needing to be "relevant to an issue that was dispositive" as the *Kisor IV* majority asserts, *see Kisor IV* Majority Modified Op. at 9, the plain meaning of "relevant" simply indicates that something is "[b]earing on or connected with the matter in hand; closely relating to the subject or point at issue; pertinent to a specified thing," *Relevant, adj.*, OED ONLINE, https://www.oed.com/view/Entry/161893?redirectedFrom=relevant#eid (last visited Apr. 14, 2021). The Federal Rules of Evidence similarly provide an expansive definition of legal relevance. *See* Fed. R. Evid. 401 (defining evidence as relevant if "it has any tendency to make a fact more or less probable than it would be without the evidence; and the fact is of consequence in determining the action"). And, other circuits have recognized as much. *See, e.g.*, *United States v. Guerrero-Cortez*, 110 F.3d 647, 652 (8th Cir. 1997) (noting that "[t]he threshold of relevance [] is quite minimal"); *United States v. Hamzeh*, 986 F.3d

1048, 1052 (7th Cir. 2021) ("Whether evidence is relevant is a low threshold."); *Bielunas v. F/V Misty Dawn, Inc.*, 621 F.3d 72, 76 (1st Cir. 2010) (reasoning that "[a] relevancy-based argument is usually a tough sell" given how broadly the Federal Rules of Evidence define relevance).

In all of these ways, the *Kisor IV* majority ignores normal textual, contextual, and linguistic cues that point to an appropriate interpretive conclusion: Mr. Kisor is right that his detailed combat records are relevant to his service-related claim for benefits. The *Kisor IV* majority's definition of "relevant" is a strained, Federal Circuit-specific definition that is not only out of step with common and legal usages of the term, but ignores the remedial context in which it appears.

It is an interpretation, moreover, that none of the concurring opinions even pretend to defend. The Prost and Hughes Concurrences are silent on the issue.[10] And the Concurrence by Judge Dyk ("Dyk Concurrence") takes direct issue with the majority's interpretation, seeming to agree with the dissent's broader interpretation:

> As the panel majority appears to admit, "[r]elevant records for the purpose of § 5103A are those records that relate to the injury for which the claimant is seeking benefits and have *a reasonable possibility of helping to substantiate the veteran's claim*." *Golz v. Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) (emphasis added)

Dyk Concurrence at 2–3 (citing *Kisor IV* Majority Modified Op. at 13) (emphasis in original). While the Dyk Concurrence says the panel got it wrong, it also says it is not an

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[10] In this way, the Prost Concurrence is simply an interesting discussion of principles of construction untethered from the facts of this case.

important enough error to fix via the en banc process. *Id.* at 4. But, not fixing the error leaves intact a precedential interpretation of an important and oft-resorted to remedial regulation. It leaves intact a precedential decision effectively nullifying the pro-veteran canon of construction. And, it means that not only does the veteran lose here, he loses for reasons that the Dyk Concurrence concedes are wrong. We should not let any of that happen.

IV.

I must dissent from the denial of en banc once more in this matter. This is not a case of the panel majority repeatedly trying to get it right and finally doing so. It is not wisdom coming belatedly, but coming nonetheless. It is a circumstance where the panel majority ignores the remedial context in which it is operating and employs a strained, incorrect interpretive analysis to justify its ruling against this veteran. Because we have refused to hear this case en banc and make clear that the pro-veteran canon trumps *Chevron* and *Auer*, I hope the Supreme Court will be willing to grant certiorari once more, and that the veteran will finally win.

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

JAMES L. KISOR,
Claimant-Appellant

v.

DENIS MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2016-1929

Appeal from the United States Court of Appeals for Veterans Claims in No. 14-2811, Senior Judge Alan G. Lance, Sr.

REYNA, *Circuit Judge*, with whom NEWMAN, MOORE, and O'MALLEY, *Circuit Judges*, join, dissenting from the denial of rehearing en banc.

I dissent from the court's denial of appellant's petition for en banc review. As basis, I rely on my dissent to the underlying majority opinion, which I adopt and incorporate in this dissent. I make the following comments to cast further light on the importance of the pro-veteran canon of interpretation.

The majority opinion has created a new rule of law and uses it to reach a decision that will adversely impact thousands of veterans' claims for service-connected disability benefits. The majority holds that the pro-veteran canon only applies where "interpretive doubt" remains after all

other tools of statutory construction fail to resolve ambiguities. This means that the pro-veteran canon comes into play at the bottom of the ninth inning, after three outs have been made, and as the players head to their respective dugouts. But by then, it's game over.

The veterans disability statutes are remedial, and disability benefits provisions are benevolent in nature. Dissent Modified Op. at 3. Congress plainly intended that when an *ambiguity* arises in the interpretation of a provision pertaining to the award of disability benefits, resolution should tilt in favor of the veteran.[1] There is no distinction between ambiguity and interpretive doubt.

In sum, this case precisely illustrates the error inherent in this court's new "interpretive doubt" rule. First, the majority determined that there exists ambiguity in the meaning of the "relevant records" provision. Next, it considered arguments favorable to the VA's interpretation of "relevant records." Then, it applied some canons of statutory construction to reach a decision that was not favorable to veterans. Last, it determined that since it arrived at a construction, it no longer had "interpretive doubt," so the pro-veteran canon did not apply. Dissent Modified Op. at 21 (citing Majority Modified Op. at 16). Here, the majority utilized every single canon in its armory to find the provision unambiguous and avoid resorting to the pro-veteran canon.

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[1] *See Henderson v. Shinseki*, 562 U.S. 428, 439 (2011) ("The solicitude of Congress for veterans is of long standing. And that solicitude is plainly reflected in the VJRA, 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.") (internal quotation marks and citations omitted).

As a result, the pro-veteran canon was left out of the traditional interpretive toolkit altogether.

For these reasons, and those stated in my dissent to the majority opinion, I dissent to the denial of appellant's petition for en banc review.