No. 21-465

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY BRIEF FOR PETITIONER

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd.
Suite D
Topeka, KS 66601
(785) 357-5251

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Petitioner

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Further review is warranted. The government cannot deny that this case involves the interpretation of a regulation of enormous practical importance to our Nation's veterans. See Pet. 11-14. And because the Federal Circuit has exclusive jurisdiction claims like those at issue here, the government's observation (at 10) that the holding below "does not conflict with any decision of * * * another court of appeals" is quite beside the point. Rather, the closing plea of the four dissenting judges confirms the propriety of additional review: "I hope that the Supreme Court will be willing to grant certiorari once more, and that the veteran will finally win." Pet. App. 102a (O'Malley, J., dissenting).

On the merits, the government does not dispute that petitioner James Kisor suffers post-traumatic stress disorder (PTSD) due to his combat service in Vietnam. Nor does it contest that that Mr. Kisor *had* PTSD in 1983, when the Veterans Administration (now the Department of Veterans Affairs (VA)) denied his original claim for disability benefits. Finally, the government does not deny that, when the VA first adjudicated his claim, it employed "a disgracefully inadequate" review (Pet. App. 22a (Reyna, J., dissenting)), including by failing to locate essential service records demonstrating that Mr. Kisor fought in a notoriously deadly battle against the Viet Cong.

Against all that, the government resists certiorari based on what it perceives as "common[ ]sense" and the "role" of Section 3.156(c)(1). BIO 14 n.2, 15. As the government would have it, to access this remedial procedure, a veteran must prove a counterfactual—that, but for the VA's own error, the veteran would have received benefits at the initial adjudication. But given the passage of time and the paucity of records and

agency reasoning, it will often be impossible for a veteran to make that showing.

Contrary to the government's position, the regulation means exactly what it says: If the VA errs by failing to consider a record that should have been "associated with the claims file when VA first decided the claim," *and* the VA later grants that claim "based all or in part" on that overlooked record, then the veteran may receive retroactive benefits. 38 C.F.R. § 3.156(c)(1), (3). That is the most natural reading of the regulation—and it would dictate the provision of retroactive benefits to petitioner here.

In designing this measure to remediate past VA errors, it was eminently sensible for the agency to structure the reopening mechanism so that it operates favorably to the Nation's disabled veterans. Indeed, "[t]he government's interest in veterans cases is not that it shall win, but rather that justice shall be done, that all veterans so entitled receive the benefits due to them." *Barrett* v. *Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006). Section 3.156(c) is not, as the government would have it, a barrier to fulsome vindication of veterans' rights.

A. The government does not deny the importance of the question presented.

We explained in the petition that the proper interpretation of Section 3.156(c)—"a key provision in VA law that is invoked by thousands of veterans in countless VA cases" (Pet. App. 20a (Reyna, J., dissenting))—is critically important in ensuring that the Nation's veterans receive the benefits to which their service and sacrifices entitle them. See Pet. 11-14. Specifically, Section 3.156(c) provides retroactive disability benefits to veterans whose claims have been incorrectly denied

when the VA has failed in its duty to develop pertinent evidence.

As we further explained, such erroneous adjudications by the VA are commonplace. Indeed, the VA itself estimates that it incorrectly denies benefits in anywhere from one tenth to one fifth of cases—and that the error rate was previously as high as 36%. Pet. 12-13. What is more, PTSD diagnoses in particular are mis-adjudicated by the VA at remarkably high rates, a fact that is especially troubling given the high prevalence of PTSD among combat veterans like Mr. Kisor. *Id.* at 13.

With such high rates of error in VA adjudications—particularly in legacy adjudications and adjudications of common afflictions like PTSD—it is essential that the VA's procedure for rectifying past mistakes is interpreted and applied correctly.

The government has no response. It does not resist our demonstration that this is an "important and oft-resorted to remedial regulation." Pet. App. 102a (O'Malley, J., dissenting).

Instead, the government simply observes that the Federal Circuit's decision does not conflict with that of another circuit. BIO 10. But as we earlier explained, the absence of a circuit split is part of the point: No other court of appeals has jurisdiction to interpret Section 3.156, so the panel's "strained, Federal-Circuit specific" construction (Pet. App. 101a (O'Malley, J., dissenting)) will govern proceedings for *all* veterans, unless and until this Court takes action. Pet. 13-14; see 38 U.S.C. § 7292(c) (providing the Federal Circuit with "exclusive jurisdiction" over "interpretation" of veterans benefits regulations). That is, this Court's intervention is imperative precisely *because* no further percolation is possible.

B. The Federal Circuit's decision is wrong.

As we further explained (Pet. 14-21), the result reached by the Federal Circuit is wrong. "[R]elevant official service department records" (38 C.F.R. § 3.156(c)) are any official records that should have been associated with the claims file during the original adjudication. The term is not limited to records relating to the "dispositive defect" (BIO 12) earlier identified by the VA.

1. As we detailed in the petition, the Federal Circuit's textual analysis assumed its own conclusion; it canvassed dictionary definitions of the word "relevant," but then answered the question of what the records must be relevant *to* with an *ipse dixit*: that they must "speak to the basis of the VA's prior decision." Pet. App. 13a-14a; see Pet. 15.

The government's brief in opposition commits the same central error. It looks to dictionaries to define "relevant" as "tending to prove or disprove a matter in issue," but then simply assumes that the "matter in issue" must be "the reason for the prior denial"—rather than the veteran's claim as a whole, including all of its elements. BIO 14 (quoting *Black's Law Dictionary* 1481 (10th ed. 2014)). This maneuver pervades the whole of the government's defense of the result reached below. See BIO 12 (querying whether the records address "the dispositive defect in petitioner's 1983 claim"); BIO 15 ("the additional records therefore must speak to the basis of the VA's prior decision"). But the government provides no textual support for this assumption.

To the contrary, the regulatory text strongly supports our construction. See Pet. 15. The text itself identifies what qualifies as a "relevant record"—those documents which should have "been associated with the claims file when VA first decided the claim." 38 C.F.R. § 3.156(c)(1). This includes "[s]ervice records that are

related to a claimed in-service event, injury, or disease." *Id*. § 3.156(c)(1)(i). In view of this text, the term "relevant records" must be read broadly, to capture all those records that should have been in the file during the initial adjudication.

That remedial breadth, however, is modulated by the surrounding provisions. For a veteran to ultimately receive retroactive benefits in a reconsideration proceeding, the award must be "made based all or in part on the records" that were previously overlooked. 38 C.F.R. § 3.156(c)(3). Thus, *even if* a record qualifies as "relevant" for purposes of Section 3.156(c)(1), no retroactive benefits are provided unless the new award is based at least partially on the records erroneously overlooked.[1]

The government resists this textual evidence through a general reference to the "role of [Section] 3.156(c)(1) within the overall regulatory scheme" (BIO 15) and what the government takes to be "common[ ]sense" (BIO 14 n.1). As the government would construe the regulation, notwithstanding the existence of the VA's *own* mistake, the veteran would still have to

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[1] In practice, therefore, the VA can still vindicate the government's view that retroactive benefits should be unavailable where the overlooked records are "duplicative of information previously before the VA." BIO 15. In those circumstances, the VA could simply grant a request for benefits, explaining that its decision is *not* based "all or in part" on the records erroneously overlooked earlier. 38 C.F.R. § 3.156(c)(3). If the VA were to do so, no retroactive benefits would be available, a possibility that the government appears to recognize. BIO 15-16. Put differently, the safeguard against duplicative records forming the basis of a retroactive award is Section 3.156(c)(3), not Section 3.156(c)(1). Here, however, the VA's express reliance on the overlooked records (Pet. 7; Pet. App. 24a) belies the government's assertion that *these* records are somehow irrelevant.

engage in the exceedingly difficult task of proving a counterfactual—that, if the VA had not failed to obtain the relevant documents during the prior adjudication, it *would have* granted benefits. This will often be a difficult, if not insurmountable, obstacle to recovery. Many underlying decisions were issued decades ago, the records surrounding them are frequently incomplete, and—as here—the legacy decisions were often summary, containing shockingly little reasoning.

Rather than craft a remedial provision that would shut out so many veterans, it was reasonable for the VA to intend the regulation to be applied as written: A veteran is entitled to retroactive benefits if the VA erred by failing to consider records it should have associated with the file *and* the subsequent grant of benefits is based at least in part on that overlooked record. This is a sensibly calibrated way to remediate the VA's prior errors.[2]

2. If the regulatory text does not definitively answer the interpretive question here, the regulatory his-

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[2] The government's assertion that petitioner seeks to be placed "in a *better* position than he would have occupied" but for the VA's error (BIO 17) is extraordinary. Recall that the VA—through a "disgracefully inadequate" review (Pet. App. 22a (Reyna, J., dissenting))—made a substantial error. All now agree that petitioner has been suffering from PTSD for decades. *Id.* at 24a-25a (describing the "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"). Petitioner does not seek to be placed in a "*better*" position; rather, he seeks to avoid being saddled with the onerous burden of proving what the VA would have done, decades ago, but for its own error. The government is mistaken to callously suggest that petitioner—who has undeniably suffered PTSD for decades on account of his military service—is somehow seeking an improper windfall.

tory does. Cf. *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2424 (2019) (instructing the Federal Circuit to consider the "text, structure, history, and purpose" on remand in this case). As we laid out, the regulatory history establishes conclusively that "relevant" records under Section 3.156(c) can be no more restrictive a category than "new and material" records under Section 3.156(a). See Pet. 17.

That is, the pre-2006 version of the regulations was explicit that the evidence sufficient to trigger Section 3.156(c) (and therefore retroactive benefits) was a particular subset of the evidence sufficient to trigger Section 3.156(a). Then, as now, subsection (a) was triggered by any "new and material evidence." 38 C.F.R. § 3.156(a) (2005). And subsection (c) was expressly triggered "[w]here the new and material evidence *consists of* * * * official service department records which presumably have been misplaced and have now been located." *Id.* § 3.156(c) (2005) (emphasis added). In other words, the relevancy standard for the two subsections was the same ("new and material"); the *only* difference was that subsection (c) required the new and material evidence to also be an "official service department record[.]" *Ibid.*

When the VA updated these regulations in 2006, it did so only to "clarify" and "eliminate possible confusion" about their operation, not to make substantive changes by imposing an additional limitation on evidence sufficient to trigger subsection (c). *New and Material Evidence*, 70 Fed. Reg. 35,388, 35,388 (June 20, 2005). Indeed, the proposed rule stated that the "VA's current practice," which the revisions were intended to clarify, was that "when VA receives service department records that were unavailable at the time of the prior decision, VA may reconsider the prior decision, and the effective date assigned will relate back to the date of

the original claim." *Ibid.* That is precisely the rule we seek. Even the government does not appear to contest that the 2006 regulatory changes were clarifying, not substantive. Cf. BIO 19.

Given this history, "[i]t follows that records are 'relevant' under [Section] 3.156(c)(1) if they would satisfy the definition of 'material evidence' for purposes of reopening a claim" under Section 3.156(a). Pet. App. 30a (Reyna, J., dissenting). The only additional criterion in subsection (c), over and above the requirements of subsection (a), is that the new records proffered by the veteran "consist[] of * * * official service department records." 38 C.F.R. § 3.156(c) (2005).[3] Contrary to the government's assertions, that is the only distinction between the evidence contemplated by the two subsections. Cf. BIO 18. And these records thus necessarily qualify.[4]

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[3] Indeed, the VA in 2001 explicitly *rejected* a proposal to limit materiality to records "that relate[] specifically to the reason why the claim was last denied"—exactly the meaning the government now prefers—finding that standard "too restrictive." *Duty to Assist*, 66 Fed. Reg. 45,620, 45,629 (Aug. 29, 2001); see Pet. 18. The government objects that this "ignores" the distinction between reopening and reconsideration (BIO 19)—but when the VA rejected this proposal, "material evidence" was the standard explicitly governing *both* reconsideration and reopening. 38 C.F.R. § 3.156(a), (c) (2001). If the VA wanted reconsideration to depend upon evidence "that relates * * * to the reason why the claim was last denied" (66 Fed. Reg. at 45,629), it could easily have said so. It did not.

[4] The government is wrong to assert in passing (BIO 20) that petitioner cannot show that the existence of an in-service stressor was "unestablished" in 1983. 38 C.F.R. § 3.156(a). First, there is no basis to so limit Section 3.156(c), which speaks broadly to all overlooked, "relevant" records that later form a basis for an award. In any event, there was no finding of an in-service stressor in the initial proceeding—indeed, the psychiatric examiner's notes

C. This case presents an opportunity to clarify the proper role of the pro-veteran canon.

Finally, we explained (at 21-27) that this case presents an opportunity for the Court to clarify the correct interpretive role of the veteran's canon, which holds 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) (quotation marks omitted). Indeed, the concurring and dissenting opinions at the en banc stage below confirm that the Federal Circuit—the Article III court with "exclusive jurisdiction to review" challenges to veterans' benefits provisions (38 U.S.C. § 7292(c))—is intractably divided regarding when the canon may appropriately be applied. Pet. 26-27.

The government's sole response is that the veteran's canon "is inapplicable here because," "[a]s the

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are inadequate as a matter of law to establish the stressor element of Mr. Kisor's PTSD claim, since "[a]n opinion by a mental health professional based on a postservice examination of the veteran cannot be used to establish the occurrence of the stressor." *Cohen* v. *Brown*, 10 Vet. App. 128, 145 (1997); see Pet. App. 34a-35a (Reyna, J., dissenting). That is, regardless of whether Mr. Kisor's combat service was *disputed* in the 1983 proceedings, the combat stressor could not have been *established* by the psychiatrist's notes. The existence of an in-service stressor—one of the legal elements of a PTSD claim—thus remained "unestablished" after the 1983 adjudication.

Further, the government's focus on what was "disputed" in the 1983 adjudication—and any legal test that would turn on the existence of "disputed" facts—is incoherent on its face, since VA adjudications are non-adversarial. Pet. 18-19; see Pet. App. 34a (Reyna, J., dissenting). And Mr. Kisor's combat experience *was* disputed. As noted, the VA's 1983 rating decision in fact states that Mr. Kisor saw no combat, only emphasizing the difficulty of unravelling prior adjudications under the government's counterfactual test. Pet. 20-21 (quoting J.A. in No. 18-15, at 15).

court of appeals explained * * * the regulation is not ambiguous." BIO 20. But the manner in which the panel majority reached that conclusion, and therefore refused to consider the veteran's canon, is precisely what warrants further review.

As we noted (Pet. 23), the panel majority resorted to dictionaries and interpretive canons that, like the veteran's canon, are ultimately presumptions about congressional intent. Pet. App. 13a-14a (discussing definitions of "relevant" under other provisions, which bear on the meaning of Section 3.156(c), if at all, only through the presumption of consistent usage); cf., *Azar* v. *Allina Health Servs.*, 139 S. Ct. 1804, 1812 (2019) (noting the Court's "normal presumption that, when Congress uses a term in multiple places within a single statute, the term bears a consistent meaning throughout."). And it offered no justification for applying these interpretive aides while simultaneously refusing to consider the veteran's canon—which, as we explained, similarly illuminates the best meaning of the text. Pet. 24-25; see Caleb Nelson, *What is Textualism*, 91 Va. L. Rev. 347, 394 n.140 (2005) ("[M]any 'substantive' canons (such as those that reflect Congress's established patterns of behavior) help interpreters discern likely legislative intent, and hence can be seen as 'descriptive' rather than 'normative.'").

The proper role of the veteran's canon—that is, whether the panel majority was right to "utilize[] every single canon in its armory to find the provision unambiguous and avoid resorting to the pro-veteran canon" (Pet. App. 104a (Reyna, J., dissenting))—is thus squarely presented here. Indeed, as the dissenting judges below explained, the panel's decision "effectively nullif[ies] the pro-veteran canon." *Id.* at 102a (O'Malley, J., dissenting).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

KENNETH M. CARPENTER
Carpenter Chartered
1525 SW Topeka Blvd.
Suite D
Topeka, KS 66601
(785) 357-5251

PAUL W. HUGHES
Counsel of Record
MICHAEL B. KIMBERLY
ANDREW A. LYONS-BERG
McDermott Will & Emery LLP
500 North Capitol Street NW
Washington, DC 20001
(202) 756-8000
phughes@mwe.com

Counsel for Petitioner