No. 21-____

In the Supreme Court of the United States

THOMAS H. BUFFINGTON,

Petitioner,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

This Court has repeatedly held that when assessing whether to defer to an agency's interpretation of a statute under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.* courts must apply all "traditional tools of statutory construction" at Step One of the analysis. 467 U.S. 837, 843 n.9 (1984). Here, the Federal Circuit refused to apply the pro-veteran canon of construction—an interpretive tool that this Court has regularly invoked for nearly 80 years—when assessing petitioner's statutory right to resume disability benefits after finishing a period of active duty. The Federal Circuit then deferred to the Department of Veterans Affairs' implausible construction of the relevant statutes, thereby depriving petitioner of nearly three years of disability benefits to which he was legally entitled.

The questions presented are:

1. Whether the *Chevron* doctrine permits courts to defer to VA's construction of a statute designed to benefit veterans, without first considering the pro-veteran canon of construction.

2. Whether *Chevron* should be overruled.

PARTIES TO THE PROCEEDING

Petitioner Thomas H. Buffington was the appellant in both the U.S. Court of Appeals for Veterans Claims (the "Veterans Court") and the U.S. Court of Appeals for the Federal Circuit.

Secretary of Veterans Affairs Robert L. Wilkie was the appellee in the Veterans Court and, initially, in the Federal Circuit. He was replaced in the Federal Circuit by his successor, Respondent Secretary of Veterans Affairs Denis McDonough. McDonough is being sued in his official capacity only.

RELATED PROCEEDINGS

Buffington v. Wilkie, No. 17-4382 (Vet. App.). Judgment entered December 11, 2019.

Buffington v. McDonough, No. 20-1479 (Fed. Cir.). Judgment entered August 6, 2021.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit.

OPINIONS AND ORDERS BELOW

The opinion of the Federal Circuit is reported at 7 F.4th 1361 and is reproduced at App.1a-30a. The opinion of the Veterans Court is reported at 31 Vet. App. 293 and is reproduced at App.31a-57a. The opinion of the Board of Veterans' Appeals is unreported and is reproduced at App.58a-69a. The letter from the Department of Veterans Affairs informing petitioner of the start date for his disability benefits is reproduced at App.70a-74a.

JURISDICTION

The Federal Circuit issued its judgment on August 6, 2021. On October 22, 2021, Chief Justice John Roberts extended the time to file a petition for a writ of certiorari until December 6, 2021, and on November 27, 2021, further extended the time until January 3, 2022. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

The relevant statutory and regulatory provisions are set out in the appendix to this petition. App.75a-78a.

INTRODUCTION

In recent years, this Court has repeatedly placed limits on when courts must defer to federal agencies when construing statutes and regulations under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), and *Auer v. Robbins*, 519 U.S. 452 (1997). Among the most important such limits has been a rigorous enforcement of the comprehensive Step One inquiry into whether the relevant statute or regulation is truly ambiguous and thus eligible for deference. As this Court originally made clear in footnote 9 of *Chevron*, courts must apply all "traditional tools of statutory construction" in conducting the ambiguity analysis at Step One. 467 U.S. at 843 n.9. The Court has repeatedly reaffirmed that principle ever since. *See, e.g.*, *Kisor v. Wilkie* ("*Kisor I*"), 139 S. Ct. 2400, 2415 (2019); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018); *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

In this case, a divided panel of the Federal Circuit flouted this Court's direction and refused to apply an important and long-standing rule of construction—the pro-veteran canon—before finding a veterans disability statute ambiguous at Step One. Proceeding to Step Two, the court then deferred to the *anti*-veteran interpretation offered by the Department of Veterans Affairs (VA). As a result, it upheld VA's decision to deny petitioner Thomas Buffington nearly three years of disability benefits that VA had previously determined he was entitled to receive. Under VA's interpretation, Buffington could not receive those benefits because he had waited too long to ask for them to be reinstated after completing a short period of Air Force active duty. VA's

interpretation essentially invented a one-year forfeiture rule governing requests for reinstatement of benefits, without any basis in the statutory text.

The Federal Circuit's ruling is wrong—and should be overturned by this Court—for two reasons.

First, the Federal Circuit violated *Chevron*'s footnote 9 by refusing to apply the pro-veteran canon, a "traditional tool[] of statutory construction" regularly used to interpret laws pertaining to veterans. *See* 467 U.S. at 843 n.9. That canon—under which "interpretive doubt is to be resolved in the veteran's favor," *Brown v. Gardner*, 513 U.S. 115, 118 (1994)—has been applied by this Court for nearly 80 years. It is indisputably part of the "legal toolkit" for interpreting statutes affecting veterans. *Kisor I*, 139 S. Ct. at 2415. Accordingly, as Judge O'Malley rightly explained in her dissent below, the canon must "be employed before resorting to *Chevron* deference," at Step One of the analysis. App.28a. Here, the pro-veteran canon establishes that Buffington is entitled to the full disability benefits he earned, and not merely the one year of retroactive benefits allowed by VA.

The Federal Circuit's refusal to apply the pro-veteran canon was not surprising. For over a decade, judges on that court have expressed widely divergent views on how the pro-veteran canon intersects with deference doctrines, and in recent years it has repeatedly refused to apply the canon at Step One. In 2018, the court granted en banc review to consider whether and how the pro-veteran canon applies in *Chevron* cases, but then decided the case on other grounds. *See Procopio v. Wilkie*, 913 F.3d 1371, 1374, 1380 (Fed. Cir. 2019) (en banc). And last spring, members of that court wrote 5 different opinions

dividing on the issue—with none commanding a majority, and with a total of *nine* judges urging this Court to provide further guidance on the issue. *See Kisor v. McDonough* ("*Kisor III*"), 995 F.3d 1347, 1358 (Fed. Cir. 2021) (Prost, C.J., concurring in denial of rehearing en banc); *id.* at 1376 (O'Malley, J., dissenting from denial of rehearing en banc).

This Court should now provide that guidance. The Federal Circuit's persistent refusal to apply the pro-veteran canon at Step One defies this Court's precedent and condones a massive (and unwarranted) expansion of VA power. It does so, moreover, in a way that contravenes the intent of Congress and harms our Nation's veterans. The Court should grant review to reaffirm the limits on *Chevron* deference and protect veterans from an agency prone to issuing unlawful regulations against veterans' interests.

Second, the Federal Circuit's ruling spotlights the fundamental ways in which *Chevron* itself is contrary to law. The Federal Circuit faced competing interpretations of the veterans' disability benefits law at issue, one offered by Buffington, the other by VA. But instead of deciding for itself which interpretation was correct, the court invoked *Chevron* and rubber-stamped VA's construction. Such abdication of the independent Judiciary's responsibility to say what the law is cannot be reconciled with the constitutional separation of powers, with basic principles of due process of law, or with the Administrative Procedure Act. *Chevron* was wrongly decided.

Stare decisis does not support retaining *Chevron* in the face of these problems. After 37 years, experience has shown that *Chevron*'s deference regime is wrong, unworkable in practice, leads to arbitrary and subjective decisions, and affirmatively

undermines the stable development of law. Instead of tinkering at the margins, this Court should now reconsider—and overrule—*Chevron*.

This case provides an ideal vehicle for considering these questions. Buffington served our Nation with distinction in the Air Force for over nine years and became disabled in the course of that service. He is now being denied benefits based on VA's arbitrary decision to create a one-year forfeiture rule with no grounding in the statutory text. This Court should either cabin *Chevron*'s scope by enforcing footnote 9 or overrule *Chevron* altogether. Either way, the Federal Circuit's anti-veteran decision should not stand.

STATEMENT OF THE CASE

1. Throughout our Nation's history, Congress has provided generous benefits for those who serve our country in uniform. Federal law instructs that "the United States will pay" veterans compensation "[f]or disability resulting from personal injury suffered or disease contracted in line of duty" during wartime, 38 U.S.C. § 1110, or peacetime, *id.* § 1131. At the same time, Congress has determined that veterans should not receive disability compensation "for any period for which [they] receive[] active service pay." *Id.* § 5304(c). Thus, if a veteran retires from military service and is awarded disability benefits but is later recalled to active duty, he may not simultaneously receive *both* active-duty pay and disability pay for the same period of time.

Section 5304(c) places no restriction on a veteran's right to resume disability compensation when such active duty concludes. And indeed, shortly after that statute was enacted in 1958, the Veterans

Administration (VA's predecessor) issued a regulation interpreting that law as requiring that disability payments "be resumed the day following release from active duty if otherwise in order." 26 Fed. Reg. 1561, 1599 (Feb. 24, 1961) (establishing 38 C.F.R. § 3.654(b)).

In 1962, however, the Veterans Administration amended that regulation to create a brand-new forfeiture rule restricting veterans' ability to resume their disability benefits following active service. Specifically, the Veterans Administration determined that any request by a veteran to resume benefits would take effect "the day following release from active duty"—but *only* "if [a] claim for recommencement of payments is received within 1 year from the date of such release." 27 Fed. Reg. 11,886, 11,890 (Dec. 1, 1962) (revising 38 C.F.R. § 3.654 and adding subsection (b)(2)). If such a claim was not received within a year of the veteran's release from active duty, "payments will be resumed *effective 1 year prior to the date of receipt of a new claim*." *Id.* (emphasis added).

The Veterans Administration thus created a forfeiture rule under which veterans would lose disability benefits they have earned if they waited more than one year before submitting a claim to resume benefits. The rulemaking did not indicate any source of statutory authority for creating this rule. The modified version of Section 3.654 remains in effect today.

2. Buffington served on active duty in the U.S. Air Force from September 1992 to May 2000. App.3a. After being honorably discharged, Buffington sought disability compensation for tinnitus in July 2000. *Id.* VA concluded that Buffington's tinnitus was service

connected, rated his disability at 10%, and began paying him disability compensation effective May 31, 2000. *Id.* VA has never disputed that, from 2002 onward, Buffington continued to suffer from his service-connected disability and that the proper disability rating is 10%.

In July 2003, Buffington was recalled to active duty in the Air National Guard. *Id.* Buffington informed VA of his activation. *Id.* Applying 38 U.S.C. § 5304(c), VA discontinued paying Buffington disability compensation effective July 20, 2003, the day before his active service began. App.3a.

Buffington served on active duty from July 2003 to June 2004, and then again from November 2004 to July 2005. *Id.* VA did not reinstate his disability benefits between those periods of active duty; nor did VA do so when the second period concluded. In January 2009, Buffington formally requested that VA reinstate his disability benefits, including by paying the benefits he had earned in the periods of time (between June 2004 and November 2004, and after July 2005) when he had not received active-duty pay. *See* App.33a.

On August 20, 2009, VA agreed to reinstate Buffington's benefits "at the same 10 percent service connected disability rating [he] w[as] awarded prior to [his] return to active duty." But VA refused to award him the benefits due for the full periods in which he had not received active-duty pay. Instead, VA informed him that his reinstatement would only be retroactive to February 1, 2008. App.70a-74a. VA explained:

> We received your request for the reinstatement of your VA Compensation

> benefit more than one year after your release from active duty. By law we are only permitted to make payments retroactive to one year prior to the date we received your request.

App.72a.

3. Buffington appealed, and the Board of Veterans' Appeals affirmed. App.58a-69a. The Board explained that under Section 3.654(b)(2), "VA cannot resume compensation payments more than one year prior to the date of the claim." App.65a

4. Buffington appealed to the Veterans Court, arguing that Section 3.654(b)(2) is invalid because it conflicts with 38 U.S.C. §§ 1110 and 5304(c). Specifically, Buffington noted that Section 1110(a) creates a mandatory duty that VA "will pay" disability benefits once service connection is established, and Section 5304(c) is "clear" that VA may withhold or suspend a veteran's disability benefits only "'for any period for which such [veteran] receives active service pay.'" App.35a. Buffington argued that Section 3.654(b)(2) conflicts with these statutory provisions because it lets VA withhold a veteran's disability benefits for periods during which the veteran is not receiving active-service pay. *Id.*

A divided panel affirmed. App.31a-57a. The majority concluded that the relevant statutes are silent on the effective date for recommencement of disability benefits that were discontinued due to re-entry into active service. App.42a-43a. The majority then granted *Chevron* deference to Section 3.654(b)(2), concluding that the regulation was a permissible interpretation of a statutory "gap." App.42a-48a.

Judge Greenberg dissented. He argued that the regulation "creates an unnecessary and inappropriate impediment to a veteran receiving benefits he has already established entitlement to." App.57a. He also criticized the majority's resort to *Chevron*, calling it "nothing more than a rubber stamping of the Government's attempt to misuse its [regulatory] authority." App.56a. Judge Greenberg explained that he would "stop this business of making up excuses for judges to abdicate their job of interpreting the law, and simply allow the court of appeals to afford a 'claimant' its best independent judgment of the law's meaning.'" *Id.* (quoting *Kisor I*, 139 S. Ct. at 2426 (Gorsuch, J., concurring in the judgment)).

5. A divided panel of the Federal Circuit affirmed, also based on *Chevron* deference. App.1a-30a.

At Step One, Buffington again argued that 38 U.S.C. §§ 1110[1] and 5304(c) unambiguously establish that a veteran who has been recalled to active duty may be deprived of disability benefits that he has previously been granted *only* during "any period for which such [veteran] receives active service pay." He also argued that the pro-veteran canon of interpretation applies at Step One and precluded deference to VA at Step Two.

The Federal Circuit disagreed. It held that Section 5304(c) does not resolve the question because it does not explicitly say that the period during which the veteran receives active-service pay is the *only*

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[1] The Federal Circuit noted that Buffington's claim is actually governed by Section 1131, not Section 1110, because he served during peacetime—but also that "any differences [between those provisions] are immaterial for purposes of this appeal." App.7a-8a n.3.

period during which payments are barred. App.7a. The majority concluded that "the statutory scheme is silent regarding the effective date for recommencing benefits when a disabled veteran leaves active service." App.9a. Because of that silence, the court refused to apply the pro-veteran canon at Step One, and instead proceeded to consider whether VA's interpretation was reasonable at Step Two. App.9a n.5 ("Because we hold the statutory scheme is silent, we need not resolve the parties' dispute regarding the pro-veteran canon."). At Step Two, the majority upheld Section 3.654(b)(2) as a permissible gap-filling regulation. App.9a-11a.

Judge O'Malley dissented. App.12a-30a. She concluded that the statutory scheme, particularly 38 U.S.C. §§ 1131, 5110(a), and 5304(c), unambiguously provides that a disabled veteran who returns to active service "remains entitled to the benefits for which he originally qualified," except for the precise period during which he receives active-service pay. App.16a-17a. Alternatively, she would have applied the pro-veteran canon at Step One and thereby resolved any statutory ambiguity in Buffington's favor. App.26a-28a. Judge O'Malley explained that "a correct *Chevron* step one analysis … must take into account all other traditional canons of construction along the way, including the pro-veteran canon of construction." App.26a (citing *Kisor I*, 139 S. Ct. at 2414); *see also* App.28a (explaining that the pro-veteran canon is "an interpretive tool in the court's statutory construction toolbox that is to be employed before resorting to *Chevron* deference").

REASONS FOR GRANTING THE WRIT

I. THE FEDERAL CIRCUIT'S REFUSAL TO APPLY THE PRO-VETERAN CANON AT *CHEVRON* STEP ONE WARRANTS REVIEW

The Federal Circuit rejected Buffington's claim for benefits because it refused to apply the pro-veteran canon at Step One of the *Chevron* inquiry when determining whether VA's interpretation was eligible for deference. That refusal defies this Court's repeated instruction—in *Chevron*'s footnote 9 and ever since—that the Step One analysis must consider all "traditional tools of statutory construction." 467 U.S. at 843 n.9. The Federal Circuit has been confused and divided over the pro-veteran canon's interplay with deference for years. And that issue is enormously important to the proper interpretation of veterans-related statutes. This Court should grant review to resolve the confusion, clarify that the comprehensive Step One inquiry includes the pro-veteran canon, and curb VA's expansive assertion of interpretive authority.

A. The Federal Circuit's Decision Conflicts with *Chevron* and Its Progeny

1. *Chevron*'s "principle of deference to administrative interpretations" is rooted in a judicial assumption that when a "statute is silent or ambiguous with respect to the specific issue" at hand, Congress delegated authority to the administering agency to resolve the issue "within the limits of that delegation." 467 U.S. at 843-44, 865. In such a case, "a court may not substitute its own construction of a statutory provision for a reasonable interpretation made by the administrator of an agency." *Id.* at 844. But "if the intent of Congress is clear, that is the end

of the matter[]": The agency's interpretation gets no deference, and courts must give effect to Congress's intent. *Id.* at 842-43.

The Court has emphasized that this *Chevron* Step One inquiry requires a comprehensive examination of the statute. Courts may not reflexively defer to agencies as a matter of course. Rather, *Chevron*'s footnote 9 makes clear that before concluding that a statute is silent or ambiguous, a court must apply all "traditional tools of statutory construction." 467 U.S. at 843 n.9.

The Court has repeatedly emphasized this point. In *SAS Institute*, for example, the Court explained that "we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." 138 S. Ct. at 1358 (quoting *Chevron*, 467 U.S. at 843 n.9). And in *Epic Systems*, it noted that "deference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." 138 S. Ct. at 1630 (same). "Where … the canons supply an answer, '*Chevron* leaves the stage.'" *Id.* (citation omitted); *see also, e.g.*, *General Dynamics Land Sys., Inc. v. Cline*, 540 U.S. 581, 600 (2004); *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 (1987).

Most recently, the Court's decision in *Kisor I* emphasized the importance of applying the canons of construction at Step One of any deference inquiry. There, as in *SAS Institute* and *Epic Systems*, the Court emphasized that when analyzing whether a statute or regulation is "genuinely ambiguous" at Step One, "a court must exhaust *all* the 'traditional tools' of construction." *Kisor I*, 139 S. Ct. at 2415 (emphasis added) (quoting *Chevron*, 467 U.S. at 843

n.9). And the Court admonished that when it used the term "genuinely ambiguous," "we mean it—genuinely ambiguous, even after a court has resorted to *all* the standard tools of interpretation." *Id.* at 2414 (emphasis added). Deference is appropriate "only when that legal toolkit is empty and the interpretive question still has no single right answer." *Id.* at 2415.

2. The pro-veteran canon of construction undoubtedly qualifies as a "traditional tool of statutory construction" under *Chevron*. Since World War II, this Court has repeatedly instructed that veterans' benefits laws must be "liberally construed to protect those 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); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (holding that Selective Service Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need").

The pro-veteran canon requires courts to interpret "provisions for benefits to members of the Armed Services … in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Indeed, the Court has characterized the canon as a "*rule*" mandating that "interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 118 (emphasis added).

This Court has consistently applied the pro-veteran canon when interpreting veterans statutes—including to protect veterans from inflexible restrictions on the receipt of benefits. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (applying canon to reject "[r]igid jurisdictional treatment" of appeal deadline); *King*,

502 U.S. at 218, 220 n.9 (applying canon to reject lower court decisions that "engrafted a reasonableness requirement" onto statute); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("liberally constru[ing]" employment statute "for the benefit of the returning veteran").

Notably, the pro-veteran canon is not based on a *judicial* policy judgment that veterans are a particularly praiseworthy group of individuals who deserve special treatment. Rather, it is a descriptive canon reflecting this Court's view of the intent of *Congress*. As one expert has explained, this Court's embrace of the pro-veteran canon rests "upon the premise that Congress … created the system with a residual intent that ambiguity be resolved in the favor of veterans." James D. Ridgway, *Toward a Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. Mass. L. Rev. 388, 408 (2014).

In *Henderson*, the Court explained that the canon is a tool to "ascertain Congress' intent" on the meaning of a particular statute. 562 U.S. at 438; *see also id.* at 440 ("The solicitude of Congress for veterans is of long standing." (quoting *United States v. Oregon*, 366 U.S. 643, 647 (1961)). And it is an especially reliable tool because—as the Court emphasized in *King*—the canon is long-standing and "Congress legislates with knowledge of our basic rules of statutory construction." 502 U.S. at 221 n.9 (citation omitted); *see also* Antonin Scalia & Bryan A. Garner, *Reading Law* 31 (2012) ("A traditional and hence anticipated rule of interpretation … imparts meaning.").

3. Because the pro-veteran canon is a traditional tool of statutory construction, *Chevron*, *SAS Institute*, *Epic Systems*, and *Kisor I* all make clear that it must

be considered at Step One when deciding whether a veterans statute is genuinely ambiguous and eligible for deference. That is consistent with this Court's own treatment of the canon. In *Gardner*, for example, the Court implied that deference to VA would only "be possible *after* applying the rule that interpretive doubt is to be resolved in the veteran's favor." 513 U.S. at 117-18 (emphasis added). And in *Henderson*, the Court used the canon to "ascertain Congress' intent," 562 U.S. at 438, thereby confirming its relevance to the Step One inquiry (which likewise addresses that "intent[]," 467 U.S. at 843 n.9).

This Court has consistently applied similar canons to ascertain statutory meaning at *Chevron* Step One.[2] The courts of appeals likewise apply the standard canons at Step One.[3] And even the Solicitor General

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[2] *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defs. of Wildlife*, 551 U.S. 644, 666 (2007) (canon against implied repeals); *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (canon favoring construction of "lingering ambiguities in deportation statutes in favor of the alien" (citation omitted)); *id.* at 320 n.45 (canon against retroactivity); *Solid Waste Agency of N. Cook Cnty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (canon against preemption); *Nat'l Credit Union Admin. v. First Nat'l Bank & Tr. Co.*, 522 U.S. 479, 501-02 (1998) (canon presuming consistent usage); *see also Epic Sys.*, 138 S. Ct. at 1617, 1625-30 (applying *ejusdem generis*, *expressio unius*, and the presumption against implied repeals).

[3] *See, e.g.*, *Texas v. Alabama-Coushatta Tribe of Texas*, 918 F.3d 440, 449 (5th Cir. 2019) (holding that canons apply at *Chevron* Step One); *Arangure v. Whitaker*, 911 F.3d 333, 340, 343 (6th Cir. 2018) (noting that this Court applies "canons first" at Step One); *Maine Med. Ctr. v. Burwell*, 841 F.3d 10, 21 (1st Cir. 2016) (same); Kenneth A. Bamberger, *Normative Canons in the Review of Administrative Policymaking*, 118 Yale L.J. 65, 77 (2008) ("[C]anons trump deference.").

has said that "before you ever get to *Chevron*, you apply the canons of construction." Tr. of Oral Arg. at 60, *Babb v. Wilkie*, No. 18-882 (U.S. Jan. 15, 2020) (representing VA).[4]

There is no reason why the pro-veteran canon should be treated differently from any other traditional canon.

3. The Federal Circuit justified its refusal to apply the pro-veteran canon at Step One because it concluded the veterans statutes are "silent" on whether a veteran may resume disability benefits immediately upon finishing active duty. App.9a n.5. In doing so, the majority seemed to believe that when a statute is facially *silent*—as opposed to *ambiguous*—the Step One inquiry does not allow consideration of canons of construction. *Id.*; *see* App.13a-15a, 26a-28a (O'Malley, J., dissenting).

That approach finds no support in this Court's case law. The overarching purpose of the Step One inquiry is to ascertain the meaning of the statutory text. That inquiry is the same—and requires courts to consider "*all* the 'traditional tools' of construction"—regardless whether the agency asserts a gap, silence, or ambiguity. *Kisor I*, 139 S. Ct. at 2415 (emphasis added) (quoting *Chevron*, 467 U.S. at 843 n.9); *see also, e.g.*, *United States v. Home Concrete & Supply, LLC*, 566 U.S. 478, 488 (2012) (referring to gaps and ambiguities interchangeably).

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[4] *See also* Fed. Resp'ts Opp'n Br. 9, *Bais Yaakov of Spring Valley v. FCC*, No. 17-351 (U.S. Jan. 16, 2018), 2018 WL 1182931 ("At step one of *Chevron*, courts must analyze a statute's 'text, its context, the structure of the statutory scheme, and canons of textual construction ….'" (citation omitted)).

Here, the panel incorrectly assumed that any time a statute is "silent" on a particular point, that means Congress has empowered the agency to create new substantive rules of law. But silence does not "automatically mean that a court can proceed to *Chevron* step two." *Arangure*, 911 F.3d at 338. Rather, "*Chevron*'s theory of implicit delegation only applies to certain kinds of silences—those where we can plausibly infer Congress intentionally left a statutory gap for the agency to fill." *Id.* As Judge O'Scannlain has explained, the notion that silence invariably confers discretion to agencies is a "caricature of *Chevron*" that is "entirely alien to our system of laws." *Oregon Rest. & Lodging Ass'n v. Perez*, 843 F.3d 355, 360 (9th Cir. 2016) (dissenting from denial of rehearing en banc).

The panel erred by concluding that statutory silence authorized it to bypass traditional tools of construction like the pro-veteran canon at Step One and proceed straight to deference at Step Two.

4. VA's argument below against applying the pro-veteran canon was even less persuasive. According to VA, the canon comes into play only *after* a court completes its *Chevron* analysis: "Where the statute is ambiguous, the veteran canon applies if interpretive doubt remains in a veterans' benefit statute after other tools of statutory construction, *including deference principles*, have failed to resolve the ambiguity." VA C.A. Br. 9 (emphasis added).

That makes no sense. "[R]elegating [the pro-veteran canon's] consideration until after *Chevron* and *Auer* deference would render it a nullity." *Kisor III*, 995 F.3d at 1370 n.4 (O'Malley, J., dissenting from denial of rehearing en banc). Indeed, delaying consideration of key canons until after Step Two is

exactly the opposite of what this Court mandated in *Chevron*'s footnote 9, which made clear that traditional tools of statutory construction—such as the pro-veteran canon—are relevant at Step One *before* granting deference. *Supra* at 11-17. VA's approach violates *Chevron*.

B. This Court's Intervention Is Needed to Vindicate the Pro-Veteran Canon and Prevent Unwarranted Deference to VA

1. Each year, VA decides over a million disability claims, awarding approximately $88 billion in benefits.[5] In doing so, it routinely resolves interpretive questions which then bubble up to the Board of Veterans' Appeals, the Veterans Court, and the Federal Circuit. Many of those rulings involve close questions of statutory or regulatory construction. Unsurprisingly, VA virtually always demands *Chevron* or *Auer* deference to its interpretations, which all too often disfavor veterans.

Without the pro-veteran canon as an interpretive tool to be consulted at Step One, VA's anti-veteran proclivities will receive interpretive deference even when the better view of the law is pro-veteran. Clarifying the canon's role is thus crucial to ensuring that the veterans' benefit scheme is administered in the pro-claimant manner that Congress expects. "[I]t is difficult to overstate the importance of the veteran-friendly approach to veterans' benefits statutes and their accompanying regulations." *Kisor v. Shulkin*,

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[5] *See* U.S. Government Accountability Office, GAO-21-348, *VA Disability Benefits: Veterans Benefits Administration Could Enhance Management of Claims Processor Training* at 1 (June 2021), https://www.gao.gov/assets/gao-21-348.pdf.

880 F.3d 1378, 1381 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of rehearing en banc). Any rule banishing the pro-veteran canon from Step One will have an "enormous impact" on veterans and render that canon "all but inapplicable to future cases." *Kisor III*, 995 F.3d at 1374 (O'Malley, J., dissenting from denial of rehearing en banc).

2. Only this Court can fix the Federal Circuit's refusal to apply the pro-veteran canon at Step One. Over the past three decades, the Federal Circuit has been internally divided on whether and how to apply the canon in *Chevron* cases. And in recent years most of its rulings—like the decision below—have disregarded the canon at Step One. There is no prospect of consensus emerging anytime soon. This Court should provide the guidance that the Federal Circuit, the Veterans Court, and disabled veterans nationwide so desperately need.

a. The Federal Circuit's confusion over the relationship between the pro-veteran canon and agency-deference doctrines is long-standing and deeply rooted. The court has lamented that it "is not clear where the [pro-veteran] canon fits within the *Chevron* doctrine, 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); *see also Hudgens v. McDonald*, 823 F.3d 630, 639 n.5 (Fed. Cir. 2016).

Over the past two decades, the Federal Circuit has adopted different formulations of when the pro-veteran canon applies, or if it applies at all, in agency-deference cases. Early cases rightly suggested that it should be applied at *Chevron* Step One. *See, e.g.*, *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1378 (Fed. Cir. 2001); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692

(Fed. Cir. 2000), *overruled on other grounds by Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360 (Fed. Cir. 2020). But more recent cases have declined to apply the canon at Step One, deferring instead to VA's interpretations at Step Two. *See, e.g.*, *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008); *Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003).

Even when the Federal Circuit defers to VA's interpretations, its rationale for doing so is muddled. Sometimes, the court has suggested that the pro-veteran canon *never* applies in *Chevron* cases. *See Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011); *Terry v. Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003). Other times, the court has treated the canon as a tool of last resort, to be applied only after all "other interpretive guidelines have been exhausted, including *Chevron*." *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010); *see generally* Ridgway, *supra*, at 399-402 (collecting cases).

In 2018, the Federal Circuit sought to resolve the confusion by *sua sponte* granting en banc hearing and directing the parties to address "What role, if any, does the pro-claimant canon play in [the *Chevron*] analysis?" *Procopio*, 913 F.3d at 1374. But the court did not reach the issue. Instead, the majority ruled at Step One that the text of the contested statute unambiguously favored the claimants over VA—and it thus saw "no reason" to reach the pro-veteran-canon issue. *Id.* at 1380. In a concurring opinion, Judge O'Malley "lament[ed] the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference." *Id.* at 1387 (O'Malley, J., concurring).

b. The Federal Circuit again addressed the pro-veteran canon last year in *Kisor v. McDonough* ("*Kisor II*"), 995 F.3d 1316 (Fed. Cir. 2021), on remand from this Court's decision in *Kisor I*. The *Kisor II* panel split 2-1: Whereas the majority held that the contested regulation unambiguously supported VA's interpretation, 995 F.3d at 1322, Judge Reyna's dissent explained that the pro-veteran canon is "a traditional tool of construction" that "must be weighed alongside the other traditional tools in resolving interpretive doubt [at Step One], including whether interpretative doubt exists," *id.* at 1327.

The Federal Circuit then denied rehearing en banc, issuing 5 separate opinions joined by 11 of the court's 12 active judges. *Kisor III*, 995 F.3d 1347. No fewer than *nine* of those judges urged this Court to provide clarification on the interaction between deference doctrines and the pro-veteran canon.

Specifically, Judge O'Malley—joined by Judges Reyna, Newman, and Moore—explained in a dissent that "canons trump deference," and argued that this Court should grant certiorari to resolve the issue. *Id.* at 1370 n.4, 1376. And Chief Judge Prost—joined by Judges Lourie, Wallach, Taranto, and Chen—filed a concurrence recognizing that the "tension" between deference doctrines and the pro-veteran canon "present[s] a difficult and unresolved challenge," and welcoming "further guidance" from this Court on how to "reconcile these competing doctrines." *Id.* at 1358.[6]

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[6] Kisor has petitioned this Court for review of the Federal Circuit's judgment. *Kisor v. McDonough*, No. 21-465 (filed Sept. 24, 2021). But that petition does not raise either of the questions presented here, as VA expressly disclaimed any request for

c. Unsurprisingly, the Federal Circuit's inability to resolve these questions has trickled down to the Veterans Court (whose appeals are heard by the Federal Circuit). *Compare Pacheco v. Gibson*, 27 Vet. App. 21, 29 (2014) (en banc) (per curiam) (deferring to VA's interpretation under *Auer*), *with id.* at 42 (Davis, J., concurring in part and dissenting in part) (four of nine judges dissenting from majority's "fail[ure] to resolve interpretive doubt in favor of the veteran" and arguing that *Gardner* and Federal Circuit precedent require as much); *see also* Ridgway, *supra*, at 402 (explaining that the Veterans Court's application of the canon "is no more consistent than it is at the Federal Circuit"). Indeed, the Veterans Court invited "guidance from the Supreme Court" on this issue nearly two decades ago. *DeBeaord v. Principi*, 18 Vet. App. 357, 368 (2004).

3. The net effect of the Federal Circuit's refusal to apply the pro-veteran canon at Step One is to expand the range of circumstances in which the Federal Circuit and Veterans Court must defer to VA's interpretation of statutes and regulations. Deferring to federal agencies on pure legal questions is always suspect (*see infra* at 25-28), but it is especially inappropriate to give such deference to VA, which has a long history of advancing implausible interpretations that harm veterans.

VA's track record when it comes to interpreting the veterans laws is abysmal. Sometimes VA enacts a rule that simply "flies against the plain language of the statutory text," *Gardner*, 513 U.S. at 122, is supported by "no fair reading," *Procopio*, 913 F.3d at

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deference, and the Federal Circuit did not apply deference in ruling against the veteran.

1378, or attempts to "manufacture an ambiguity in language where none exists in order to redefine the plain language" of a governing statute, *Johnson v. McDonald*, 762 F.3d 1363, 1366 (Fed. Cir. 2014). Or VA dispenses with clarity altogether, "intentionally" promulgating a rule so "untenable" and "vague[]" that its later application amounts to "the equivalent of 'because I say so' or 'we know it when we see it.'" *Ray v. Wilkie*, 31 Vet. App. 58, 71 (2019) (citations and footnotes omitted).

Other times VA's actions lack "any rhyme or reason" and can only be described as "irrational," "aimless and adrift," and "just as arbitrary" as "flipping a coin." *Gray v. McDonald*, 27 Vet. App. 313, 322-25 (2015). And still other times VA appears hopelessly "confused," taking a position contrary to "common sense," *Turner v. Shulkin*, 29 Vet. App. 207, 216-17 (2018), or one that "reflects a lack of grasp of the APA" itself, *Preminger v. Sec'y of Veterans Affairs*, 632 F.3d 1345, 1351 (Fed Cir. 2011).

VA's approach has not gone unnoticed. As Justice Gorsuch has highlighted, VA too frequently issues regulations that have "no basis in the relevant statutes" and "do[] nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve." *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (dissenting from denial of certiorari).

Given VA's track record, the Court should be especially concerned by the Federal Circuit's failure to heed the clear limits on deference imposed by *Chevron*'s footnote 9. Review is necessary to reaffirm those limits and protect veterans from VA overreach.

C. This Case Offers an Ideal Vehicle for Resolving the Question Presented

This case provides a perfect vehicle for addressing threshold legal issues regarding the scope of *Chevron* deference. There are no disputed factual issues; the parties disagree only about the meaning of statutes governing award of veterans' benefits, and the core principles governing their interpretation.

Moreover, the question presented is outcome determinative: Buffington would have won this case if the panel had followed *Chevron*'s footnote 9 and applied the pro-veteran canon at Step One. The panel would have resolved any uncertainty over the statutory scheme by holding that a veteran is entitled to resume full disability benefits immediately upon the conclusion of active-duty service, without being subject to any sort of one-year limitations period.

As Judge O'Malley (in the Federal Circuit) and Judge Greenberg (in the Veterans Court) both recognized, that reflects the best interpretation of the statutory scheme, because Section 5304(c) authorizes VA to withhold benefit payments from disabled veterans *only* while the veteran is receiving active-service pay. *See* App.16a, 56a. Indeed, the Veterans Administration *itself* adopted that interpretation immediately after Section 5304(c) became law in 1958. *Supra* at 5-6. Buffington has the better argument based on the text and history of the relevant statutes. The pro-veteran canon makes it a slam dunk.

VA won this case because the Federal Circuit disregarded *Chevron*'s footnote 9 (and *Kisor I*) and failed to apply a traditional—and essential—tool for construing veterans statutes. This Court should

grant certiorari to reaffirm its precedent and protect veterans from VA's unreasonable interpretations.

II. THE COURT SHOULD RECONSIDER *CHEVRON*

The Federal Circuit misapplied *Chevron* when ruling for VA in this case. That flawed result implicates a larger problem—*Chevron* itself. As several Justices have recognized in recent years, *Chevron* is wrong. The Court should grant certiorari to overrule it.

A. *Chevron* Was Wrongly Decided

The problems with *Chevron* are legion, as members of both the Judiciary and academy have recognized.[7] Five flaws bear special emphasis here.

First, and most importantly, *Chevron* violates the Constitution's separation of powers. Article III vests "[t]he judicial power of the United States"—and with it, the duty "to say what the law is"—in the independent federal courts. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 177-78 (1803). *Chevron* abdicates that duty. It forces federal courts to let executive branch agencies authoritatively interpret the law in pending cases—even when the courts themselves disagree with what the agency says. That is nothing less than a massive "judicially orchestrated shift of power." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2150

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[7] *See, e.g.*, *Pereira v. Sessions*, 138 S. Ct. 2105, 2120-21 (2018) (Kennedy, J., concurring); *Michigan v. EPA*, 576 U.S. 743, 760 (2015) (Thomas, J., concurring); *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109-10 (2015) (Scalia, J., concurring in the judgment); *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring); Philip Hamburger, Chevron *Bias*, 84 Geo. Wash. L. Rev. 1187 (2016).

(2016). Neither Congress nor the courts themselves have authority to transfer judicial power to the Executive. That approach is unjustified by the Constitution's text or structure, and unsupported by history.[8]

Second, *Chevron* upends basic principles of constitutional due process of law. It is patently unfair for a court to defer to an agency's interpretation, especially when the agency *itself* is a litigant, before that same court, in the actual case at hand. Judges are supposed to be impartial arbiters of law—not home-team umpires for the executive branch.[9]

Third, the Administrative Procedure Act (APA) instructs federal courts to "decide all relevant questions of law," including by "determin[ing] the meaning … of the terms of an agency action." 5 U.S.C. § 706. Contrary to that instruction, however, *Chevron* demands that courts *not* decide fundamental,

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[8] *See* Aditya Bamzai, *The Origins of Judicial Deference to Executive Interpretation*, 128 Yale L.J. 908 (2017); Kristin Hickman & Richard Pierce, Jr., *Administrative Law Treatise* § 3.1 (6th ed. updated Nov. 1, 2021) ("In scores of cases and in every term through 1983, the Supreme Court relied on its own analysis and judgment regarding statutory meaning without regard for the administering agency.").

[9] *See, e.g.*, Hamburger, *supra*; *United States v. Harris*, 907 F.3d 439, 451 n.1 (6th Cir. 2018) (Thapar, J., concurring), *vacated on reh'g en banc*, 927 F.3d 382 (6th Cir. 2019). Underscoring the problem, the United States has taken the remarkable position that it possesses unilateral authority to turn *Chevron* deference *off* whenever it would benefit a private party invoking an agency's otherwise-binding interpretation when litigating against a different government entity. *See Babb* Tr. of Oral Arg. at 61 (Solicitor General arguing that pro-plaintiff EEOC interpretations do not receive *Chevron* deference in discrimination litigation against federal defendants).

outcome-determinative questions of law. As four Justices have noted, *Chevron* thus conflicts with Section 706, which requires "de novo review on questions of law." *Kisor I*, 139 S. Ct. at 2433 (Gorsuch, J., joined by Thomas, Alito, and Kavanaugh, JJ., concurring in the judgment) (citation omitted). *Chevron* "flout[s] the language of the Act." Kavanaugh, *supra*, at 2150 n.161.

Fourth, *Chevron* rests on a false presumption about Congressional intent. *Chevron* reasoned that an ambiguity in a statute reflects an implicit delegation of interpretive authority to federal agencies. 467 U.S. at 844. But there is no evidence supporting that presumed delegation. Most ambiguities in legal drafting are *un*intentional, and there is no reason to believe that every ambiguity in every statute is both (1) deliberate, and (2) created with the hope that it would be resolved by an agency.

Many Justices and commentators have acknowledged that this core premise of *Chevron* is "fictional"—i.e., made up.[10] That should be enough to

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[10] *See, e.g., Gutierrez-Brizuela*, 834 F.3d at 1153 (Gorsuch, J., concurring) ("*Chevron*'s claim about legislative intentions is no more than a fiction—and one that requires a pretty hefty suspension of disbelief at that"); David Barron & Elena Kagan, Chevron*'s Nondelegation Doctrine*, 2001 Sup. Ct. Rev. 201, 212 (2001) ("*Chevron* doctrine at most can rely on a fictionalized statement of legislative desire"); Stephen Breyer, *Judicial Review of Questions of Law and Policy*, 38 Admin. L. Rev. 363, 380 (1986) (acknowledging that *Chevron* rests on a "legal fiction"); Abbe Gluck & Lisa Bressman, *Statutory Interpretation from the Inside—An Empirical Study of Congressional Drafting, Delegation, and the Canons: Part I*, 65 Stan. L. Rev. 901, 996 (2013) (noting that majority of congressional staffers surveyed indicated "that their knowledge of *Chevron* does not mean that

condemn it. Why should the meaning of vast swaths of federal law be determined under a doctrine that rests on a premise that no one thinks is valid?

Of course, sometimes Congress *will* intentionally delegate to agencies the power to issue implementing regulations, make policy choices based on certain fact-finding, or fill gaps in a statutory scheme. But that is a far cry from pretending that *every* statutory ambiguity—even the unintentional ones—reflects such a delegation. *Chevron*'s central premise is overbroad and false.

Fifth, *Chevron* incentivizes agencies to disregard the law. As Justice Kavanaugh has explained, "*Chevron* encourages the Executive Branch … to be extremely aggressive in seeking to squeeze its policy goals into ill-fitting statutory authorizations and restraints." Kavanaugh, *supra*, at 2150; *see also Michigan*, 135 S. Ct. at 2713 (Thomas, J., concurring) ("[W]e should be alarmed that [the agency] felt sufficiently emboldened by those precedents to make the bid for deference that it did here."). By telling agencies that they are free to adopt any interpretation that is marginally *reasonable*—even if it does not reflect the best view of the statute—*Chevron* discourages fidelity to the rule of law.

To sum up: *Chevron* forces courts to defer to agency interpretations that the courts themselves believe are wrong. That is not consistent with an independent Judiciary or the rule of law. *Chevron* was wrongly decided.

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they intend to delegate whenever ambiguity remains in finalized statutory language").

B. *Stare Decisis* Does Not Support Retaining *Chevron*

Following precedent makes sense as a standard default rule because it usually "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Payne v. Tennessee*, 501 U.S. 808, 827 (1991). But that is not always true. This Court has long recognized that precedents should be overruled in appropriate circumstances, based on a careful assessment of factors like the quality of the precedent's reasoning in the decision, its workability, and the effect overruling the precedent would have on reliance interests and rule-of-law values. *See, e.g.*, *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2178 (2019). Here, these factors support overturning *Chevron*.

1. As discussed above, *Chevron*'s deference regime lacks any sound basis in law. Requiring courts to defer to agency legal interpretations is at odds with the Constitution and the APA, and *Chevron*'s ambiguity-equals-delegation rationale is widely acknowledged to be fictional. *Supra* at 27-28.

These problems with *Chevron*'s reasoning are uniquely pernicious due to the doctrine's broad, cross-cutting scope. Because *Chevron* sets forth a method of statutory interpretation potentially applicable to *all* statutes implemented by federal agencies, its ill effects are not confined to any single legal issue, but instead threaten to shape—and distort—the interpretation of virtually *all* regulatory regimes, in perpetuity. Whereas the cost of retaining any particular precedent misinterpreting a single

statutory provision is comparatively low, the cost of retaining the *Chevron* methodology is enormous.

Chevron's status as a rule of interpretation suggests that it should not even receive *stare decisis* effect in the first place.[11] At a minimum, though, *Chevron*'s capacity to generate new erroneous interpretations, of different statutes, over and over again, weighs strongly in favor of overturning it. *See Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 384 (2010) (Roberts, C.J., concurring) ("[A]llow[ing] the Court's past missteps to spawn future mistakes[] undercut[s] the very rule-of-law values that *stare decisis* is designed to protect.").

2. *Chevron* deference also undermines the "evenhanded, predictable, and consistent development of legal principles." *Payne*, 501 U.S. at 824. *Chevron* tells courts to *avoid* definitively declaring what a law means upon a finding of ambiguity, thus ensuring that the law remains ill-defined and subject to politically expedient agency reinterpretations. Moreover, *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005), makes clear that *Chevron* empowers agencies to require courts "to overrule their own declarations about the meaning of existing law in favor of interpretations dictated by executive agencies." *Gutierrez-Brizuela*, 834 F.3d at 1150 (Gorsuch, J., concurring). Overruling *Chevron*

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[11] *See, e.g., Kisor I*, 139 S. Ct. at 2443-44 (Gorsuch, J., concurring in the judgment); *Baldwin v. United States*, 140 S. Ct. 690, 691 n.1 (2020) (Thomas, J., dissenting from denial of certiorari); Kristin Hickman & Aaron Nielson, *Narrowing* Chevron*'s Domain*, 70 Duke L.J. 931, 991 (2021).

will thus promote—not undermine—consistency and predictability.

For essentially the same reasons, reliance interests "count *against* retaining *Chevron*." *Id.* at 1158 (emphasis added). *Chevron* and *Brand X* affirmatively undermine reliance: They let agencies change their minds about what the statute means and require courts to flip-flop along with them. By allowing federal law to fluctuate according to agency whims, *Chevron* creates *uncertainty* about the law—and thereby undermines reliance. *See Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 140 S. Ct. 789, 790 (2020) (statement of Gorsuch, J., respecting denial of certiorari).

These problems are only exacerbated by modern-day "political polarization," a phenomenon which "makes *Chevron* … a source of extreme instability in our legal system." Richard J. Pierce, Jr., *The Combination of* Chevron *and Political Polarity Has Awful Effects*, 70 Duke L.J. Online 91, 92 (2021). No one familiar with controversies over issues like immigration, climate change, and net neutrality can seriously argue that *Chevron* plays a *stabilizing* role as to these hot-button issues on which agency policies "will change dramatically every four to eight years" depending on who wins the White House. *Id.* at 96-103 (discussing agency flip-flops on DACA, the Clean Power Plan, and net neutrality, among others).

Overturning *Chevron* would address these problems by ensuring that agencies and regulated entities can rely on the best and most natural interpretation of statutory language. That result best serves the rule-of-law values that *stare decisis* is meant to advance.

3. *Chevron* has also proven unworkable in practice. *Chevron*'s ambiguity trigger is woefully indeterminate. "[N]o definitive guide exists for determining whether statutory language is clear or ambiguous." Kavanaugh, *supra*, at 2138. Not even the Government—*Chevron*'s biggest defender—can offer a coherent explanation for when a statute is sufficiently ambiguous to trigger *Chevron*. *See* Tr. of Oral Arg. at 71-72, *Am. Hosp. Ass'n v. Becerra*, No. 20-1114 (U.S. Nov. 30, 2021) (Assistant to the Solicitor General: "I don't think I can give you an answer to th[e] question" of "[h]ow much ambiguity is enough").

Thanks to this ambiguity over ambiguity, judges "have wildly different conceptions of whether a particular statute is clear or ambiguous." Kavanaugh, *supra*, at 2152. *Chevron*'s indeterminacy thus inevitably produces arbitrary and inconsistent results that are "antithetical to the neutral, impartial rule of law." *Id.* at 2154.

This Court's many caveats to *Chevron* complicate things still further. Under the Major Questions doctrine, *Chevron* does not apply to interpretive "question[s] of deep 'economic and political significance.'" *King v. Burwell*, 576 U.S. 473, 486 (2015). But this laudable effort to cabin *Chevron*'s scope (and mitigate its constitutional harm) creates a workability problem of its own: There is no clear or objective way to consistently determine what counts as a Major Question. Moreover, there is significant confusion over the scope of the Major Questions doctrine(s).[12] And some Justices have rightly

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[12] *See, e.g.*, Cass Sunstein, *There Are Two "Major Questions" Doctrines*, 73 Admin. L. Rev. 475, 477 (2021) (arguing that there are two versions of the doctrine, "weak" and "strong,"

recognized that in many cases ambiguity or a statutory gap should *not* be read as a delegation to the agency, even in the absence of a Major Question.[13]

There is also real confusion over other threshold *Chevron* questions. For example, *United States v. Mead Corp.*, 533 U.S. 218 (2001), declares that *Chevron* does not apply unless "Congress delegated authority to the agency generally to make rules carrying the force of law, and … the agency interpretation claiming deference was promulgated in the exercise of that authority." *Id.* at 226-27. But *Barnhart v. Walton*, 535 U.S. 212, 221 (2002), holds that interpretations that are merely "long standing" warrant *Chevron* deference even if *not* promulgated in exercise of an agency's delegated lawmaking authority. Moreover, there is considerable confusion over whether *Chevron* is mandatory, or waivable by the government.[14] And, as this case itself demonstrates, at least some judges remain confused

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each with "radically different implications"); *In re MCP No. 165*, __ F.4th __, 2021 WL 5989357, at *7 (6th Cir. Dec. 17, 2021).

[13] *See, e.g.*, *Entergy Corp. v. Riverkeeper, Inc.*, 556 U.S. 208, 223 (2009) ("[S]ometimes statutory silence, when viewed in context, is best interpreted as limiting agency discretion."); *City of Arlington v. FCC*, 569 U.S. 290, 308-09 (2013) (Breyer, J., concurring in part and concurring in the judgment) ("[T]he existence of statutory ambiguity is sometimes not enough to warrant the conclusion that Congress has left a deference-warranting gap for the agency to fill ….").

[14] *See, e.g.*, *Martin v. Soc. Sec. Admin.*, 903 F.3d 1154, 1161 (11th Cir. 2018) (per curiam) (noting circuit split on whether *Chevron* deference is waivable); Note, *Waiving* Chevron *Deference*, 132 Harv. L. Rev. 1520 (2019); *see also Guedes*, 140 S. Ct. at 789-90 (statement of Gorsuch, J., respecting denial of certiorari).

about how to apply *Chevron* Step One. *See supra* at 21 (discussing fractured *Kisor III* opinions).

4. Perhaps due to these workability problems, this Court appears to be *sub silentio* abandoning the *Chevron* framework in a great many cases to which it arguably applies. As a leading treatise observes, the Court sometimes "gives *Chevron* powerful effect," sometimes "ignores *Chevron*," and sometimes "characterizes the *Chevron* test in strange and inconsistent ways." Hickman & Pierce, *supra*, § 3.5.6; *id.* § 3.6.10 (surveying how the Court has treated *Chevron* in seemingly eligible cases over the last decade); *see also Pereira*, 138 S. Ct. at 2121 (Alito, J., dissenting) ("I can only conclude that the Court, for whatever reason, is simply ignoring *Chevron*.").

At a minimum, *Chevron* remains "hotly contested," such that it "cannot reliably function as a basis for decision in future cases. *Citizens United*, 558 U.S. at 379 (Roberts, C.J., concurring). The Court has repeatedly recognized in recent years that *Chevron*'s continued validity is up for debate. *See, e.g.*, *Epic Sys.*, 138 S. Ct. at 1629 (observing that "[n]o party to these cases has asked us to reconsider *Chevron* deference" and holding that no deference was warranted); *SAS Inst.*, 138 S. Ct. at 1358 ("[W]hether *Chevron* should remain is a question we may leave for another day."). And the government has gotten the message: Recent Solicitors General have seemed reluctant—almost apologetic—when invoking *Chevron* in this Court. *See also BNSF Ry. Co. v. Loos*, 139 S. Ct. 893, 908 (2019) (Gorsuch, J., dissenting) (noting private-party petitioner's reticence in relying on *Chevron*).

The Court's unwillingness to consistently apply the flawed *Chevron* framework speaks volumes.

There is no reason *Chevron* should continue to govern lower courts while this Court shuns it. The Court's "frequent disregard" of *Chevron* supports overruling that precedent. *Hohn v. United States*, 524 U.S. 236, 252 (1998).

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Chevron's deference regime is unlawful. The Court should at least reaffirm the importance of a rigorous and comprehensive Step One inquiry that encompasses the pro-veteran canon. Better yet, the Court should revisit *Chevron* and overrule it entirely.

CONCLUSION

The petition for a writ of certiorari should be granted.

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