No. 21-972

In the
# Supreme Court of the United States

THOMAS H. BUFFINGTON,
*Petitioner*,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
*Respondent*.

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

## BRIEF OF *AMICI CURIAE* SENATORS TOM COTTON, MARSHA BLACKBURN, KEVIN CRAMER, AND TED CRUZ IN SUPPORT OF PETITION FOR CERTIORARI


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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are four Republican members of the United States Senate: Senators Tom Cotton, Marsha Blackburn, Kevin Cramer, and Ted Cruz. Three *amici* sit on the Senate Committee on Armed Services; three *amici* sit on the Senate Committee on the Judiciary; and two *amici* sit on the Senate Committee on Veterans' Affairs. One *amicus*—Senator Tom Cotton—is a veteran who served in Iraq and Afghanistan.

As members of the Senate, *amici* have an unquestionable interest in protecting the legislative powers that Article I of the Constitution confers upon the Congress of the United States. See U.S. Const. art. I, § 1 ("All legislative Powers herein granted shall be vested in a Congress of the United States."). Moreover, *amici* have sponsored and voted on numerous bills regarding our nation's veterans laws, and have a patent interest in the proper interpretation of those laws. And given their responsibility for overseeing veterans' issues, *amici* have an unmistakable interest in the proper administration of veterans' benefits.

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[1] Pursuant to Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici curiae* and their counsel made a monetary contribution to its preparation or submission. Counsel of record for all parties received notice at least 10 days prior to the due date of the intention of *amici curiae* to file this brief. All parties consented to the filing of the brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

Our national duty to our veterans is deeply rooted in American law and tradition. At the close of the Civil War, Abraham Lincoln recognized our national obligation "to care for him who shall have borne the battle and for his widow and orphan." Abraham Lincoln, *Second Inaugural Address* (Mar. 4, 1865), available at https://bit.ly/3H9SX0W. Congress has honored that duty by enacting a comprehensive statutory regime to provide aid and relief to veterans, recognizing our enduring debt to those who have put their lives on the line to preserve our freedoms. And, since the Second World War, this Court has explained that those laws are "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." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Congress has enacted an entire title of the U.S. Code to assist veterans and has adopted dozens of provisions with that presumption in the background. *See generally* 38 U.S.C. §§ 101-8528.

Consistent with that history and tradition, Congress has recognized that our veterans' benefits laws are not isolated statutes subject to the interpretive whims of administrative agencies. Congress adopted the Veterans' Judicial Review Act ("VJRA") for the precise end of authorizing appeals by veterans from administrative decisions so that the *courts* can "decide all relevant questions of law." 38 U.S.C. § 7292(d)(1); *see also* 5 U.S.C. § 706. And, under the pro-veteran canon, the courts must construe all provisions in these laws in the light most favorable

to the veteran. *E.g.*, *Brown v. Gardner*, 513 U.S. 115, 118 (1994). That canon exists to resolve statutory ambiguities in favor of veterans without any need for courts to consider the question of agency deference.

The decision below got the analysis exactly backward. It disregarded that express statutory framework and the history underlying the pro-veteran canon, and approved instead an agency decision that imposed an artificial limit on veterans' disability benefits that is found nowhere in the statute. Thus, rather than following Congress's instruction that the *courts* should interpret these laws, and should do so *in favor* of veterans, the decision below invoked *Chevron* deference to endorse an *agency* "interpretation" that *disfavored* veterans. By refusing to apply the pro-veteran canon at *Chevron*'s first step, the lower court departed from the plain language of the statute and improperly placed the agency's view ahead of the established rule that any statutory ambiguities must be resolved in favor of the veteran.

That result strikes at the core of the separation of powers. It not only violates this Court's longstanding precedents, but it calls into question *Chevron*'s fundamental legitimacy. If *Chevron* requires courts to abdicate their own obligation to adjudicate legal questions by elevating an agency's views over Congress's intent to favor veterans, then it patently violates the basic structure of our Constitutional design. This Court should thus grant review of both questions presented and reverse.

## ARGUMENT

### I. The Court Should Grant Review To Safeguard Its Longstanding Recognition Of The Pro-Veteran Canon.

At a minimum, review is warranted to correct the Federal Circuit's disregard of the longstanding pro-veteran canon, which this Court has "long applied" to benefit "members of the Armed Services." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (citation omitted). As this Court has recognized, our nation's laws are strongly and deliberately pro-veteran. Congress has enacted a variety of statutes that both confer substantive benefits and erect procedural protections that favor veterans. The statute here is no exception, and it fits neatly into that pro-veteran scheme. Indeed, when Congress extended judicial review over veterans' benefits claims, it did so with the expectation that judicial review would *aid* veterans—not act as a rubber-stamp for anti-veteran administrative rulings. In light of that history, tradition, and deliberate legislative design, the pro-veteran canon must be deployed *before* any deference to the Department of Veterans Affairs ("VA"), not the other way around.

Over the course of nearly eighty years, this Court has consistently applied a pro-veteran canon of interpretation. It has done so based on what Congress has repeatedly enacted and what *amici* have worked to promote as legislators—veterans' benefits statutes that are pro-claimant. This Court has furthered that legislative mission by the pro-veteran canon. Beginning in 1943, the Court explained that our veterans laws are "always to be liberally construed" in

favor of veterans. *Boone*, 319 U.S. at 575. Even sixty years ago, this Court recognized that "[t]he solicitude of Congress for veterans is . . . long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). Because veterans' benefits laws are "designed to protect the veteran," such laws must be "construed for the benefit of those who left private life to serve their country." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). And more recently, this Court reiterated that "[w]e have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Henderson*, 562 U.S. at 441 (quoting *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991)).

Congress's concern for veterans is as understandable as it is long-established. Veterans have "subject[ed] themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Johnson v. Robinson*, 415 U.S. 361, 380 (1974). Although the Nation's debt to our veterans is immeasurable, Congress has sought to "compensate[e] [them] for their past contributions by providing them with numerous advantages." *Regan v. Taxation With Representation of Washington*, 461 U.S. 540, 551 (1983). These compensatory efforts express "gratitude for services that often entail hardship, hazard, and separation from family" and help "facilitate the reentry into civilian society." *Hooper v. Bernalillo Cty. Assessor*, 472 U.S. 612, 626 (1985) (Stevens, J., dissenting). The pro-veteran canon thus recognizes Congress's concern for veterans and ensures that the interpretation of any relevant provision "fit[s] well in

the pattern of legislation" that benefits them. *Oregon*, 366 U.S. at 647.

Congress has legislated against the backdrop of that pro-veteran canon, which reflects the long history of statutes to *benefit* our veterans and requires that any statutory ambiguities are to be resolved in their favor. Time and again, Congress has enacted laws to aid veterans—from the G.I. Bill of Rights of 1944 to the Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020.[2] It has enacted laws to benefit veterans after the Korean War, the Vietnam War, the Persian Gulf War, and the more recent wars in Iraq and Afghanistan.[3] It has passed laws to address veterans' unemployment, pensions, and job training programs.[4] It has

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[2] *See* An Act To Provide Federal Government Aid for the Readjustment in Civilian Life of Returning World War II Veterans, Pub. L. 78-346, 58 Stat. 284 (June 22, 1944) (G.I. Bill of Rights of 1944); Johnny Isakson and David P. Roe, M.D. Veterans Health Care and Benefits Improvement Act of 2020, Pub. L. 116-315, 134 Stat. 4932 (Jan. 5, 2021).

[3] *E.g.*, Veterans' Readjustment Assistance Act of 1952, Pub. L. 550-875, 66 Stat. 663 (July 16, 1952) (Korean War); Veterans' Readjustment Benefits Act of 1966, Pub. L. 89-358, 80 Stat. 12 (Mar. 3, 1966) (Vietnam War); Persian Gulf Conflict Supplemental Authorization and Personnel Benefits Act of 1991, Pub. L. 102-25, 105 Stat. 75 (Apr. 6, 1991) (Persian Gulf War); National Defense Authorization Act for Fiscal Year 2022, Pub. L. 117-81 (Dec. 27, 2021) (Afghanistan and Iraq wars).

[4] *E.g.*, Ex-Servicemen's Unemployment Compensation Act of 1958, Pub. L. 85-848, 72 Stat. 1087 (Aug. 28, 1958); Veterans' Pension Act of 1959, Pub. L. 86-211, 73 Stat. 432 (Aug. 29, 1959); Veterans and Survivors Pension Improvement Act, Pub. L. 95-588, 92 Stat. 2497 (Nov. 4, 1978); Emergency Veterans' Job Training Act of 1983, Pub. L. 98-77, 97 Stat. 443 (Aug. 15, 1983).

established benefits for veterans exposed to certain dangerous conditions, such as Agent Orange or toxic radiation.[5] And it has legislated to prevent veterans from suffering any workplace discrimination because of their service.[6]

The substance of those laws is consistently pro-veteran. Congress regularly confers benefits on veterans that are not available to ordinary Americans or even to ordinary federal employees. For example, Congress has offered veterans numerous educational benefits and has given them specific workplace protections.[7] It has established job counseling and training programs for veterans, and directed the VA to guarantee home and small business loans upon favorable terms.[8] And Congress has enacted many laws to provide medical and disability benefits for veterans who are injured in the line of duty, or who tragically give the last full measure of devotion in service of their country.[9]

Those statutes are uniquely designed to provide *both* substantive *and* procedural rights in veterans' favor. *Henderson*, 562 U.S. at 431-32. For example, unlike ordinary civil litigation, the VA's process of

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[5] *E.g.*, Agent Orange Act of 1991, Pub. L. 102-4, 106 Stat. 11 (Feb. 6, 1991); Radiation-Exposed Veterans Compensation Act of 1988, Pub. L. 100-321, 102 Stat. 485 (May 20, 1988).

[6] Uniformed Services Employment and Reemployment Rights Act of 1994, Pub. L. 103-353, 108 Stat. 3149 (Oct. 13, 1994).

[7] *E.g.*, 38 U.S.C. §§ 3311-20 (educational benefits programs); *id.* § 4311 (workplace protections).

[8] *E.g.*, *id.* § 4104 (job counseling and training programs); *id.* §§ 3712, 3742 (home and small business loan programs).

[9] *E.g.*, *id.* §§ 1101-1754, 2301-08.

adjudicating veterans' claims is nonadversarial. *Id.* Rather than tasking the VA with scrutinizing veterans' claims, Congress has imposed a "statutory duty" on the VA "to assist veterans in developing the evidence necessary to substantiate their claims." *Id.* (citing 38 U.S.C. §§ 5103(a), 5103A). Although other agencies may simply deny relief for deficient applications, *e.g.*, 42 U.S.C. § 421, Congress requires the VA to notify claimants of any "information necessary to complete" an application for benefits. 38 U.S.C. § 5102(b). Not only that, but consistent with the pro-veteran canon, Congress has specifically charged, by statute, that if there is any ambiguity as to an entitlement to benefits, the VA must give the veteran "the benefit of the doubt." *Id.* § 5107(b). And even the VA's appellate process strongly favors the veteran. Although veterans may appeal an adverse VA decision to the U.S. Court of Appeals for Veterans Claims, the government may not appeal any VA decision that awards benefits. *Id.* § 7252(a). Thus, the appellate process for benefit claims largely functions as a one-way street in favor of veterans.

Still further, where courts have imposed limits on veterans' claims, Congress has stepped in to supersede those adverse precedents by statute. For example, the U.S. Court of Appeals for Veterans Claims once barred the VA from developing claims that were not "well grounded." *Morton v. West*, 12 Vet. App. 477, 480-81 (1999). But that hurdle for veterans was plainly "contrary to the mission and non-adversarial nature of VA benefits claims." Terrence T. Griffin & Thomas D. Jones, Note: *The Veterans Claims Assistance Act of 2000: Ten Years Later*, 3 Vet. L. Rev. 284, 292-94 (2011). In response, Congress acted quickly with the

Veterans Claims Assistance Act of 2000 to make clear that the VA *always* has a duty to aid veterans in developing their claims, striving to ensure that every veteran entitled to benefits can obtain them. *Id.*; *see also* Pub. L. 106-475, 114 Stat. 2096 (Nov. 9, 2000).

That uniquely pro-claimant procedural scheme only underscores the strength of the pro-veteran canon. Thus, as this Court has recognized, Congress anticipated that courts would continue to enforce the pro-veteran canon when the VJRA first allowed for judicial review of veterans' claims in 1988. *See King*, 502 U.S. at 220 n.9 ("We will presume congressional understanding of" the pro-veteran canon.); Pub. L. 100-687, 102 Stat 4105 (Nov. 18, 1988). As the Senate Report for the statute explained, the VJRA was meant to ensure that "each individual veteran receives from the VA every benefit and service to which he or she is entitled under law." S. Rep. 100-418, at 31 (July 7, 1988). And so the courts were directed to review VA decisions "as a check on agency actions," which Congress believed would "prove beneficial" not to the government, but "to those with claims . . . before the VA." *Id.* at 51. Congress thus expressly counted on the judiciary to give effect to this purpose, by "trust[ing] that courts are no less aware of the vital interests which are at stake." H.R. Rep. 100-963, pt. 1, at 26 (Sept. 23, 1988). In short, the VJRA "was decidedly favorable to veterans." *Henderson*, 562 U.S. at 441.

This statutory framework leaves no doubt that Congress intended—and still intends—that judicial review of VA decisions should meaningfully apply the pro-veteran canon *before* a court can even consider

deferring to an agency. The plain text of the statute directs the courts—not the VA—to "decide all relevant questions of law, including interpreting constitutional and statutory provisions." 38 U.S.C. § 7292(d)(1). And it charges the courts, not the VA, with "hold[ing] unlawful and set[ting] aside any regulation or any interpretation . . . not in accordance with law." *Id.* By setting those statutory mandates, Congress intended to ensure that all veterans receive their "day in court" and "every benefit and service to which he or she is entitled." S. Rep. 100-418, at 31.

Although Congress made its pro-veteran commitment clear, the decision below missed it entirely. As Judge O'Malley recognized in dissent, the majority "put[] the cart before the horse in its *Chevron* analysis." *Buffington v. McDonough*, 7 F.4th 1361, 1368 (Fed. Cir. 2021) (O'Malley, J., dissenting). Rather than working to apply every principle of statutory interpretation to the relevant statute, the decision below quickly inferred a "statutory gap" from congressional "silence" and then deferred to the VA on that "silence." *Id.* at 1368-69. And, even though this Court has repeatedly made clear that the pro-veteran canon is a "traditional tool[] of statutory construction," *see Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984); *Henderson*, 562 U.S. at 441, the decision below ignored it at step one of its *Chevron* analysis and deferred to an agency interpretation that is hostile to veterans' interests.

To the extent that *Chevron* is valid, it can apply only because Congress has deliberately "left ambiguity in a statute meant for implementation by an agency" with the understanding that "the

ambiguity would be resolved, first and foremost, by the agency." *Smiley v. Citibank (S. Dakota), N.A.*, 517 U.S. 735, 740-41 (1996). Yet even that justification requires courts *first* to thoroughly examine whether Congress left ambiguity in the statute. That requires the courts to apply all traditional canons of construction—including the pro-veteran canon—at that *first step* in the analysis.

Here, the statutory text is plain: "the United States will pay" compensation for disabilities "contracted in line of duty," except during "any period" that veterans "receive[] active service pay." 38 U.S.C. §§ 1110, 1131, 5304(c). There is absolutely no ambiguity at all. Congress plainly intended for the benefits to apply broadly, except within the narrow exception provided in the statute. And, if there could be any lingering doubt, then the pro-veteran canon would require that it be resolved in favor of the veteran.

By taking the opposite approach, the decision below upends the statutory scheme at every turn. Although Congress has provided benefits and claims procedures that favor veterans, the VA crafted an administrative rule that imposes a limitation on those claims not found in the statute. And, although Congress extended judicial review over veterans' claims to aid those veterans, the court below simply deferred to the VA's anti-veteran interpretation of the law. Rather than allow that upside-down approach to stand, this Court should vindicate the pro-veteran canon by directing that it be applied at *Chevron* step one, before a court can even consider deferring to the agency. It thus should grant certiorari and reverse.

## II. If Allowed To Stand, The Decision Below Would Only Further Call Into Doubt The Constitutional Legitimacy of *Chevron*.

The decision below, if allowed to stand, would only further expose the fundamental constitutional flaws inherent in *Chevron*'s agency deference framework. Here, the lower court invoked *Chevron* to defer to the VA's atextual rule and to shirk its statutory and constitutional duty to resolve all legal questions. The agency claimed both the legislative power to make law and the judicial power to say what it means in cases within the jurisdiction of the federal courts. That distorted result underscores how *Chevron* has led courts, for decades, to erode Congress's constitutional authority to enact our laws and the Judiciary's constitutional mandate to interpret them.

"*Chevron* deference raises serious separation-of-powers questions" that plague all three branches. *Michigan v. E.P.A.*, 576 U.S. 743, 761 (2015) (Thomas, J., concurring). Article I of the Constitution vests "[*a*]*ll* legislative Powers herein granted . . . in a Congress of the United States." U.S. Const. art. I, § 1 (emphasis added). Article III likewise vests "*[t]he* judicial Power of the United States" in this Court and the lower federal courts. *Id.* art. III, § 1 (emphasis added). And Article II grants neither legislative nor judicial power, but instead vests "[t]he executive Power" in the President. *Id.* art. II, § 1. But *Chevron* risks impermissibly transferring to Article II agencies both the Article I power to make the law and the Article III power to interpret it.

First, *Chevron* unlawfully delegates Article I powers to Article II agencies. Giving "the force of law

to agency pronouncements on matters of private conduct as to which Congress did not actually have an intent" allows "an exercise of the legislative power" by a branch other than Congress. *Michigan*, 576 U.S. at 762 (Thomas, J., concurring) (cleaned up). By requiring courts to defer to an executive agency's interpretation of a so-called ambiguous statutory provision, *Chevron* "permit[s] executive bureaucracies to swallow huge amounts of core judicial and legislative power and concentrate federal power in a way that seems more than a little difficult to square with the Constitution of the framers' design." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1149 (10th Cir. 2016) (Gorsuch, J., concurring). The result has been "a massive shift of lawmaking from the elected representatives of the people to unelected bureaucrats." *Justice Samuel Alito's remarks at the Claremont Institute, 2/11/2017*, SCOTUSMAP (Feb. 13, 2017), https://bit.ly/35FYAGp. And so, when a citizen then "confront[s] thousands of pages of regulations" promulgated by an agency, he "can perhaps be excused for thinking that it is the agency really doing the legislating." *City of Arlington, Tex. v. F.C.C.*, 569 U.S. 290, 315 (2013) (Roberts, C.J., dissenting).

*Chevron* rests on the dubious assumption that when Congress "left ambiguity in a statute," it "understood that the ambiguity would be resolved, first and foremost, by the agency, and desired the agency (rather than the courts) to possess whatever degree of discretion the ambiguity allows." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (citation omitted). But that "fictionalized statement of legislative desire," *see* David J. Barron & Elena Kagan, *Chevron's Nondelegation Doctrine*, 2001 SUP.

CT. REV. 201, 212 (2001), allows agency discretion to assume "a form of legislative power." *Michigan*, 576 U.S. at 761 (Thomas, J. concurring). This petition is "an appropriate case" to "reconsider that fiction." *Cuozzo Speed Techs., LLC v. Lee*, 579 U.S. 261, 286 (2016) (Thomas, J., concurring).

The decision below necessarily turned on the VA's claim to *Chevron* deference: In the face of a clear statute with a clear purpose, the decision deferred to an *ex nihilo* regulation that could find sanction in neither. But Congress's grant of rulemaking authority to the VA cannot delegate the power to enact new laws—especially ones hostile to veterans and in direct conflict with Congress's pro-veteran mandate. And the lower court's elevation of the agency's view over a traditional tool of statutory interpretation is impossible to square with the Framers' conception of legislative power.

Second, *Chevron* also presents an "abdication of the judicial duty." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring). "It is emphatically the province and duty of the judicial department to say what the law is" in the cases within its jurisdiction. *Marbury v. Madison*, 1 Cranch 137, 177, 2 L. Ed. 60 (1803). And "[t]he rise of the modern administrative state has not changed that duty." *City of Arlington, Tex.*, 569 U.S. at 316 (Roberts, C.J., dissenting). Yet *Chevron*, as applied by the court below, "wrests from Courts the ultimate interpretative authority to say what the law is, and hands it over to the Executive." *Michigan*, 576 U.S. at 761 (Thomas, J., concurring) (cleaned up).

Indeed, that problem is both constitutional and statutory in nature. Consistent with Article III's grant of *the* judicial power to the judiciary, both the VJRA and the Administrative Procedure Act direct the *courts*, not administrative agencies, to "decide all relevant questions of law." 38 U.S.C. § 7292(d)(1); 5 U.S.C. § 706; *see also, e.g.*, *Perez v. Mortgage Bankers Ass'n*, 575 U.S. 92, 109 (2015) (Scalia, J., concurring in judgment); *Gutierrez-Brizuela*, 834 F.3d at 1151 (Gorsuch, J., concurring). Yet the lower court's interpretation of *Chevron* would surrender that duty to executive agencies. "This abandonment of office is particularly striking as to interpretation" of the law, "because the judges have a distinctive authority to expound the law" enacted by Congress. PHILIP HAMBURGER, IS ADMINISTRATIVE LAW UNLAWFUL? 316 (2014).

Although this Court has directed lower courts to resort to *Chevron only* in the case of true ambiguity, the opportunity for error persists. "Unfortunately, there is often no good or predictable way for judges to determine whether statutory text contains 'enough' ambiguity to cross the line beyond which courts may resort to . . . *Chevron* deference." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 HARV. L. REV. 2118, 2136 (2016). Instead, "[o]ne judge's clarity is another judge's ambiguity." *Id.* at 2137. As a result, "[i]t is difficult for judges (or anyone else) to" pin down a line for "ambiguity" "in a neutral, impartial, and predictable fashion." *Id.* And "[t]he simple and troubling truth is that no definitive guide exists for determining whether statutory language is clear or ambiguous." *Id.* at 2138. This Court has recognized as much: "there is no errorless test for

identifying or recognizing 'plain' or 'unambiguous' language." *United States v. Turkette*, 452 U.S. 576, 580 (1981). And this case shows it perfectly: the majority and dissent could not agree on whether the statute contained any ambiguity that would trigger administrative deference—and this is in a case where there is a strong pro-veteran backdrop.

The problem of deciding what is ambiguous, among many others, shows that there is no legislative reliance interest that would warrant preserving *Chevron* as a matter of *stare decisis*. Surely Congress can have no reliance interest in a precedent that has proven so unreliable. Indeed, *Chevron*'s policy of abdicating the judicial duty to interpret the law has sown extensive confusion in Congress over its legislative endeavors and encouraged open-ended statutory language that punt important legislative decisions to future agency discretion. Often, there is no telling how future administrations will expound upon the statutes that Congress enacts—they might, as the VA did here, craft new rules to achieve a purpose antithetical to the very one that Congress intended. And under the lower court's view of *Chevron*, they might reverse their "current view 180 degrees anytime based merely on the shift of political winds and *still* prevail." *Gutierrez-Brizuela*, 834 F.3d at 1152 (Gorsuch, J., concurring).

This case is thus a prime illustration of the distortions—and damage—that *Chevron* has caused. This Court has instructed that courts may defer to an agency only after considering "all the 'traditional tools' of construction." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (quoting *Chevron*, 467 U.S. at 843 n.9). And it

has held that the pro-veteran canon is a traditional tool of construction. *Henderson*, 562 U.S. at 441. Yet the decision below bypassed the pro-veteran canon to endorse the VA's anti-veteran view of the law based on a perceived ambiguity in the statute. Thus, under *Chevron*, no amount of clear drafting ensures that statutory language will be construed by agencies (often hungry to further entrench their power and expand their jurisdiction) according to its plain meaning. Statute after statute supporting veterans can do little good if they cannot stop a court from finding an ambiguity and then deferring to a contra-textual rule from the Executive.

In this case, *Chevron* enabled the Executive's view of a statute to trump the Judiciary's authority to interpret a law that Congress passed against the backdrop of a long-standing, crystal-clear rule of pro-veteran interpretation. That is simply inconsistent with our constitutional system. The Court should grant review to reconsider this "increasingly maligned precedent." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2121 (2018) (Alito, J., dissenting).

## CONCLUSION

For the foregoing reasons, *amici curiae* respectfully urge this Court to grant the petition for certiorari.

Respectfully submitted,

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