No. 22-360

IN THE

Supreme Court of the United States

VETERAN WARRIORS, INC.,
ANDREW D. SHEETS, KRISTIE SHEETS,
Petitioners,

v.

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

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

BRIEF OF MILITARY-VETERANS ADVOCACY INC., JEWISH WAR VETERANS OF THE UNITED STATES OF AMERICA, INC., AND NATIONAL DEFENSE COMMITTEE AS AMICI CURIAE IN SUPPORT OF PETITIONERS

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INTEREST OF AMICI CURIAE[1]

Military-Veterans Advocacy Inc. (MVA) is a nonprofit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates to protect and expand service members' and veterans' rights and benefits.

The Jewish War Veterans of the United States of America (JWV), organized in 1896 by Jewish veterans of the Civil War, is the oldest active national veterans' service organization in America. Incorporated in 1924 and chartered by an act of Congress in 1983, JWV's objectives include "encourag[ing] the doctrine of universal liberty, equal rights, and full justice to all men," and "preserv[ing] the spirit of comradeship by mutual helpfulness to comrades and their families," 36 U.S.C. § 110103(5), (7).

National Defense Committee is a nonprofit veteran service organization established as a 26 U.S.C. § 501(c)(4) social welfare organization dedicated to protecting military and veteran civil rights and benefits, in particular military voting rights, freedom of

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[1] The parties have consented to the filing of this amicus brief. No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

conscience, and timely access to quality and appropriate health care, including the support services provided by Department of Veterans Affairs-designated caregivers. National Defense Committee is especially involved in legislation authorizing the caregiver program and regulations promulgated to execute the program. It engages both Congress and the Department of Veterans Affairs (VA) to make the program more accessible, less arbitrary, and more in line with the identified needs of disabled veterans and their families.

An important tool in protecting and expanding the rights and benefits of veterans and their families is the pro-veteran canon—the canon of statutory construction dictating that, in construing a veterans' benefits statute, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). Yet the Federal Circuit has often misapplied or discarded the canon, thereby undermining the rights of the veterans it exists to protect. Such disregard has no place in a benefits system that Congress designed to be uniquely pro-claimant. *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011) (noting Congress's "'solicitude … for veterans is of long standing'" and its "laws … 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review'"). The Federal Circuit's erratic application of the canon erodes veterans' rights to the benefits that Congress has awarded them in exchange for their military service to the Nation.

In its decision below, the Federal Circuit abdicated its duty under this solicitous framework by declining even to consider the pro-veteran canon in weighing the validity of a VA rule governing personal care services for disabled veterans. *Veteran Warriors, Inc. v. Sec'y of Veterans Affairs*, 29 F.4th 1320, 1327 n.4 (Fed. Cir. 2022). Despite acknowledging Petitioners' repeated invocation of the canon in their briefing, the court nonetheless deemed the argument waived and declined to consider "whether or how" it applied. *Id.* Given the canon's long pedigree and its importance in correctly interpreting statutes and regulations governing veterans' benefits, MVA has a strong interest in this Court rectifying the Federal Circuit's error.

INTRODUCTION AND SUMMARY OF ARGUMENT

For nearly 80 years, this Court has held that veterans' benefits statutes should be construed in the beneficiaries' favor. It has also consistently held that courts should apply such canons of interpretation before deeming a statute or regulation ambiguous—and thus before the court may consider deferring to an agency's interpretation. Yet the Federal Circuit in this case declined even to consider the pro-veteran canon before deferring to VA's interpretation of the relevant statute, the John S. McCain III, Daniel K. Akaka, and Samuel R. Johnson VA Maintaining Internal Systems and Strengthening Integrated Outside Networks Act ("VA MISSION Act"). Pub. L. No. 115-182, 132 Stat. 1393 (2018).

This brief focuses on the Federal Circuit's misguided and inconsistent application of the pro-veteran canon and recommends a clear rule applying the canon at Step 1 of the *Chevron* analysis. *See Chevron U.S.A., Inc. v. Nat'l Res. Def. Council, Inc.*, 467 U.S. 837, 842 (1984). It also explains why there is no reason to fear that such a rule might improperly displace agency deference.

The pro-veteran canon provides that, in construing a statute concerning veterans, "interpretive doubt is to be resolved in the veteran's favor." *Brown*, 513 U.S. at 118. This approach effectuates Congress's legislative intent to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Henderson*, 562 U.S. at 440 (citation omitted). Moreover, the canon is meant to provide clarity and consistency in the laws governing veterans' benefits. The long history of this Court's application of this and similar canons illustrates its proper role as "an *additional* tool" for "provid[ing] remedial treatment to veterans in acknowledgement of their service to this country." *See Kisor v. McDonough*, 995 F.3d 1347, 1367, 1371 (Fed. Cir. 2021) (O'Malley, J., dissenting from denial of rehearing) (describing Supreme Court's historical reliance on pro-veteran canon).

The Federal Circuit's application of the pro-veteran canon, however, has long been inconsistent and has sown confusion, especially regarding whether and in what circumstances a court will defer to an agency's interpretation of a statute. The court sometimes has held that the canon applies at Step 1 of *Chevron*. *See, e.g., Nat'l Org. of Veterans' Advocates,*

Inc. v. Sec'y of Veterans Affairs, 260 F.3d 1365, 1377-78 (Fed. Cir. 2001) ("*NOVA*"). On other occasions, it has held that the canon applies only after Step 2 of *Chevron*. *See, e.g., Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010). It has held in still other instances that the canon does not apply at all in the face of *Chevron*. *See, e.g., Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003). And the court has even conceded that, indeed, it does not know how the pro-veteran canon fits into the *Chevron* framework. *See, e.g., Heino v. Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012).

Despite decades of precedent, veteran-litigants raising interpretive questions in the Federal Circuit thus have no idea how that court will go about the task of interpretation. Even some Federal Circuit judges have expressed their dismay, calling on this Court for guidance. *See, e.g., Kisor*, 995 F.3d at 1358 (Prost, C.J., concurring in denial of rehearing).

The Federal Circuit has shown itself unable to resolve its intra-circuit split on this important and frequently recurring question. The issue has repeatedly been presented to the en banc court, which has refused to take it up—but which nonetheless recently issued a patchwork of five opinions demonstrating that the court cannot achieve consensus on the canon's role. *Id.* Only this Court can restore the canon to its rightful place among the traditional tools of statutory interpretation—at Step 1 of *Chevron*. The time for that intervention is now.

ARGUMENT

I. The Federal Circuit's Pro-Veteran Canon Precedents Are Confused And Irreconcilable.

Despite being tasked to bring consistency to the judicial review of veterans' benefits decisions and VA regulations, the Federal Circuit has for decades inconsistently and confusingly applied—or failed to apply—the pro-veteran canon. There is no sign of clarity on the horizon. That leaves only this Court to remedy the Federal Circuit's discordance.

A. The Federal Circuit, the exclusive arbiter of veterans' benefit appeals among the federal circuit courts, has failed to achieve uniformity and clarity.

In allocating jurisdiction among the federal courts, Congress has identified a select few areas of law where there is a pronounced need for national uniformity and clarity. Veterans' benefit appeals are one of those categories, and Congress granted the Federal Circuit exclusive jurisdiction over these appeals, as well as challenges to VA regulations. *See* Veterans' Judicial Review Act, Pub. L. No. 100-687, 102 Stat. 4105 (1988); 38 U.S.C. §§ 502, 7292(c). In assigning this exclusive jurisdiction, Congress was motivated by a "strong[] desir[e] to avoid the possible disruption of VA benefit administration which could arise from conflicting opinions in the same subject due to the availability of review in the 12 Federal Circuits or the 94 Federal Districts." H.R. Rep. No. 100-963, at 28 (1988).

Unfortunately for veterans, the Federal Circuit has failed to achieve Congress's "strongly desir[ed]" uniformity and clarity when interpreting statutes authorizing veterans' benefits. Across three decades of case law, and despite this Court's clear instructions, the Federal Circuit has not settled on a proper role for the pro-veteran canon in statutory interpretation. Despite principles of stare decisis, Federal Circuit panels have applied four distinct approaches to the pro-veteran canon in cases that implicate potential deference to VA's statutory interpretations.

In *NOVA*, the Federal Circuit applied the canon at *Chevron*'s Step 1. 260 F.3d at 1377. Concluding that the relevant statutory language was ambiguous, the court applied "the usual tools for resolution of that ambiguity." *Id.* It weighed the statute's legislative history against "a well-established rule of statutory construction that when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'" *Id.* at 1378. Finding that "the usual canons of statutory construction push in opposite directions" and thus fail to clarify the ambiguity, the court noted that only "at this juncture" should it assess whether the agency's interpretation was reasonable under *Chevron* Step 2. *Id.*; *see also Terry v. Principi*, 340 F.3d 1378, 1383-84 (Fed. Cir. 2003) (noting that the pro-veteran canon applies at *Chevron* Step 1 if the plain language of a statute is ambiguous but "does not affect the determination of whether an agency's regulation is a permissible construction of a statute" at *Chevron* Step 2); *Jones v. West*, 136 F.3d 1296, 1299 n.2 (Fed. Cir. 1998) ("[G]iven the plain meaning of the statutory provisions at issue," *Brown*'s "mandate"

"that 'interpretive doubt is to be resolved in the veteran's favor' has no bearing on the resolution of this case" at *Chevron* Step 1).

Although *NOVA*'s holding was clear, subsequent Federal Circuit panels inexplicably departed from its reasoning. In *Nielson v. Shinseki*, the court announced that "ambigu[ity] does not compel us to resort to the *Brown* canon." 607 F.3d at 808. On the contrary, the court held that the pro-veteran "canon is *only* applicable *after* other interpretive guidelines have been exhausted, including *Chevron*." *Id.* (emphasis added). In other words, the pro-veteran canon comes into play only after *Chevron* Step 2 rather than at *Chevron* Step 1.

Not satisfied with just two incompatible approaches to the pro-veteran canon, the Federal Circuit then added two more. In *Sears*, the court declined to apply the canon at all, noting that it cannot "override[] *Chevron* deference" and that "this court has [never] invalidated a regulation that would otherwise be entitled to *Chevron* deference on this ground." 349 F.3d at 1331-32; *see also Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011) (holding that although "the language of subsection 1114(s) is not entirely free from ambiguity, we are compelled to defer to the DVA's interpretation" because the "pro-veteran canon of construction" cannot "override[]" *Chevron* deference).

In more recent (and perhaps more candid) opinions, the Federal Circuit has expressly conceded its confusion about how the pro-veteran canon ought to

apply to a *Chevron* analysis. "This court has not definitely resolved at what stage the pro-veteran canon applies and whether it precedes any claims of deference to an agency interpretation," *Roby v. McDonough*, No. 20-1088, 2021 WL 3378834, at *8 (Fed. Cir. Aug. 4, 2021), leaving it "[un]clear where the *Brown* canon fits within the *Chevron* doctrine, or whether it should be part of the *Chevron* analysis at all." *Heino*, 683 F.3d at 1379 n.8.

B. The Federal Circuit has abdicated responsibility for ensuring uniform and clear application of the pro-veteran canon, leaving only this Court to rectify the problem.

Even now, after more than 20 years of ferment, the Federal Circuit cannot reconcile its competing views of the pro-veteran canon. Just last year, the court denied a petition for rehearing en banc that sought to resolve its "irreconcilable" panel decisions. Pet. for Rehearing En Banc at 17, *Kisor v. Wilkie*, No. 2016-1929 (Fed. Cir. Sept. 28, 2020); *Kisor*, 995 F.3d at 1348. "Of course, reluctance in deploying en banc review is understandable. But only to a point." *Shoop v. Cunningham*, No. 21-1587, --- S. Ct. ---, 2022 WL 16909166, at *7 (U.S. Nov. 14, 2022) (Thomas, J., dissenting from denial of certiorari). With five separate opinions advocating three competing approaches to the pro-veteran canon, the Federal Circuit's denial of rehearing in *Kisor* proves the court is well past that point.

Then-Chief Judge Prost's opinion concurring in the denial of rehearing, which five judges joined in

whole or in part, asserted that the canon "should play a role only when a sustained textual analysis—including any applicable descriptive canons—yields competing plausible interpretations, none of which is fairly described as the best." *Kisor*, 995 F.3d at 1348 (Prost, C.J., concurring in denial of rehearing). She urged a hierarchy of interpretive canons, with descriptive canons (e.g., the series-qualifier and *expressio unius* canons) taking precedence over normative canons (e.g., the pro-veteran canon). *Id.* at 1349-50. Judge Prost would thus break down *Chevron*'s Step 1 into Step 1(a), applying descriptive canons exclusively, and Step 1(b), applying normative canons as "canon[s] of last resort in the interpretive process." *Id.* at 1373 (O'Malley, J., dissenting from denial of rehearing).

Judge Hughes, also concurring in the denial of rehearing and joined by one other judge, asserted—despite more than 20 years of conflicting precedents—that the court had "a clear framework" that "ha[s] never looked first to the pro-veteran canon to resolve questions of ambiguity." *Id.* at 1359-60 (Hughes, J., concurring in denial of rehearing). Judge Hughes then went even further, asserting "that if the conditions for … *Chevron* … deference are met, then the VA is entitled to deference, without resort to the pro-veteran canon." *Id.* at 1360. In other words, the pro-veteran canon has no role whatsoever in the *Chevron* analysis.

Then-Judge O'Malley dissented from the denial of rehearing, with three judges joining. *Id.* at 1363. Judge O'Malley advocated for weighing the pro-veteran canon "on the way to determining whether a genuine ambiguity within the meaning of *Chevron*

exists." *Id.* at 1372 n. 7 (O'Malley, J., dissenting from denial of rehearing). In other words, "the many canons of construction" should be "collectively employed" at *Chevron* Step 1, *id.* at 1371, as they were in *NOVA*, 260 F.3d at 1377-78, rather than in a hierarchy, as Judge Prost urged.

In light of the Federal Circuit's failure to consistently apply the pro-veteran canon over the last two decades and its recent signal that it cannot remedy that failure on its own, this Court should provide the sought-after "[f]urther guidance" and embed the pro-veteran canon firmly in *Chevron* Step 1. *Kisor*, 995 F.3d at 1358 (Prost, C.J., concurring in denial of rehearing).

II. The Court Should Grant Certiorari To Clarify That The Pro-Veteran Canon Applies At *Chevron* Step 1.

A court's first job when reviewing an agency's construction of a statute is to employ "traditional tools of statutory construction" to examine the statute's text and context to determine whether Congress's intent is clear. *Chevron*, 467 U.S. at 843 n.9. If it is, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Id.* at 842-43. After all, Congress's "intention is the law." *Id.* at 843 n.9. Thus, when applying *Chevron,* the court's job is limited: act as Congress's agent and give effect to the duly enacted law.

A. Substantive canons are traditional tools of construction that help discern congressional intent and inform whether a statute is ambiguous.

Lower courts struggle to determine what tools they may employ at *Chevron* Step 1. Courts routinely begin this analysis by applying rules of grammar and linguistic canons to unearth Congress's intent. But in cases where the linguistic canons and presumptions do not resolve the textual ambiguity, courts far too often abandon *Chevron*'s instruction to apply *all* rules of construction. They continue to do so even after this Court recently re-emphasized that, "under *Chevron*, 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." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018).

Admittedly, some of the confusion as to whether there is an ambiguity at *Chevron* Step 1 stems from the fact that "a certain degree of discretion … *inheres* in most executive or judicial action." *Mistretta v. United States*, 488 U.S. 361, 417 (1989) (Scalia, J., dissenting). Statutory language is often insufficiently precise to answer all possible questions that may arise in implementing the law. And, perhaps out of fear of frustrating Congress's will, some courts too quickly defer to agencies. But in doing so, courts abandon their role—to "discern[] the best reading of the text." Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2121 (2016).

Substantive canons, which incorporate presumptions about how Congress means for courts to interpret statutes, are critical to ensuring that courts find "the best and fairest reading" of a statute, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2430 (2019) (Gorsuch, J., concurring in judgment), and fulfill their obligations under Article III, *supra*, Kavanaugh, at 2120-21. As then-Professor Barrett explained, applying a substantive canon is in "no tension" with courts acting as Congress's "faithful agent" when the canon is used as a "tiebreaker[] between equally plausible interpretations of a statute." Amy Coney Barrett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 123 (2010). That is because, again, the substantive canon incorporates Congress's intent.

Unsurprisingly, this Court has routinely applied substantive canons at *Chevron* Step 1. In *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018), for example, the Court consulted the substantive canon against reading conflicts into two applicable statutes at Step 1 because it incorporates the "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* at 1624 (quotation marks and brackets omitted).

Epic's use of a substantive canon at *Chevron* Step 1 was not an outlier. In *INS v. St. Cyr*, 533 U.S. 289 (2001), the Court applied at Step 1 both the canon against retroactivity and the canon requiring that ambiguities in deportation statutes be resolved in favor of noncitizens. *Id.* at 315-16. Likewise, in *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr.*

Trades Council, 485 U.S. 568 (1988), the Court applied the canon of constitutional avoidance at Step 1. *Id.* at 574-75. And just last term, in *West Virginia v. EPA*, 142 S. Ct. 2587 (2022), the Court explained that reading a statute in its context also requires considering "whether Congress in fact meant to confer the power the agency has asserted." *Id.* at 2608. Therefore, in "extraordinary cases" carrying great "economic and political significance," courts must "presume that Congress intends to make major policy decisions itself, not leave those decisions to agencies." *Id.* at 2608-09 (internal quotations omitted).

Applying these canons to judge whether any real ambiguity exists makes good sense. As this Court has repeatedly recognized "[a]mbiguity is a creature not of definitional possibilities but of statutory context." *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *see also FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000). The very same word or phrase can be ambiguous when used in one context but crystal clear when used in another. *See, e.g.*, *Smith v. United States*, 508 U.S. 223, 242, 247 (1993) (Scalia, J. dissenting) (explaining that the ordinary meaning of "use" is unambiguous, but its meaning in statutes is sometimes unclear). Canons that add to the substantive context of a statute are useful—indeed, necessary—to determining whether Congress has spoken clearly or whether a true ambiguity remains. Courts should consider those canons at *Chevron* Step 1.

B. The pro-veteran canon is a substantive canon that applies at *Chevron* Step 1.

The pro-veteran canon embodies a presumption about how Congress understands its own enactments in the veteran's context. It therefore applies at *Chevron* Step 1.

The pro-veteran canon embodies a respect for veterans as old as American law itself. Beginning in the First Session of the First Congress in 1789, which guaranteed Revolutionary War pensions, Congress has passed laws to protect the veterans that protect the Nation. Act of September 29, 1789, ch. 24, § 1, 1 Stat. 95 (assuring federal payment of state pensions granted to veterans wounded and disabled "during the late war"). Reflecting Congress's concern for veterans, this Court formalized the pro-veteran canon nearly 80 years ago in *Boone v. Lightner*, a case interpreting the Soldiers' and Sailors' Civil Relief Act of 1940, a federal law providing protections for active-duty servicemembers. 319 U.S. 561 (1943). There, the Court explained that legislation conferring a benefit to veterans "is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Id.* at 575.

Since its pronouncement in *Boone*, the Court has consistently adhered to the pro-veteran canon. For example, in *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946), the Court again explained that it must construe separate provisions of the Selective Training and Service Act of 1940 "as parts of an organic whole and give each as liberal a

construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* Decades later, in *Coffy v. Republic Steel Corp.*, 447 U.S. 191 (1980), the Court once again explained that statutes that confer benefits upon veterans are "to be liberally construed." *Id.* at 196.

The pro-veteran canon's significance is especially evident in *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011). There, the Court applied the canon when considering whether a veteran's failure to file a notice of appeal carries jurisdictional consequences. In holding that it does not, the Court explained that the pro-veteran canon has been "long applied" and, therefore, Congress could not have intended for the "harsh consequences" that would result from treating the time limit in question as jurisdictional. *Id.* at 441.

Henderson's observation that Congress is aware of the pro-veteran canon and drafts statutes with it in mind cements its status as a substantive canon that applies at *Chevron* Step 1. While the canon is technically a Court-made rule—as all substantive canons are—it is "presumable that Congress legislates with knowledge of [the Court's] basic rules of statutory construction." *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991). And, ultimately, this Court-made rule simply acknowledges an indisputable fact: Legislation passed for veterans is drafted against the backdrop that veterans leave their private lives "to serve their country in its hour of great need." *Fishgold*, 328 U.S. at 285. Enactments in this area thus reflect the solicitude that veterans have earned, and

Congress has yet to object to this method of interpreting veterans-related legislation.

III. Applying The Pro-Veteran Canon At *Chevron* Step 1 Will Not Eviscerate Agency Deference.

Though the pro-veteran canon can resolve at *Chevron* Step 1 what might otherwise count as ambiguity, it in no way renders *Chevron* Step 2 obsolete. To start, in some cases Congress will expressly delegate to the VA—leaving no ambiguity and, thus, no need to apply the pro-veteran canon. *See, e.g.*, *Veterans Justice Grp., LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1350 (Fed. Cir. 2016). What's more, there will be some instances where an ambiguous statute will have no particular pro-veteran reading; in these cases, the canon plays no role. *See e.g.*, *Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) (canon inoperative where the interpretive question was whether benefits go to the veteran's surviving spouse or to his minor children).

But even in cases where the pro-veteran canon is relevant, it does not demand that courts inevitably defer to veterans in the way that *Chevron* Step 2 compels deference to agencies. Generally, courts routinely apply substantive canons as part of the *Chevron* analysis. Applying the pro-veteran canon would be no different. For evidence of the harmonious relationship between the pro-veteran canon and *Chevron*, one need look no further than *NOVA v. Sec'y of Veterans Affairs*, 260 F.3d 1365 (Fed. Cir. 2001). There, a Federal Circuit panel concluded that the statutory text alone "provide[d] no guidance." *Id.* at 1377. Thus, it turned

to both the legislative history and the pro-veteran canon. *Id.* at 1377-78. But, in the court's view, these "usual tools for resolution of that ambiguity push[ed] in opposite ways." *Id.* at 1377. With the ambiguity thus unresolved, the Court proceeded to Step 2 and considered *Chevron* deference. *Id.* at 1378-79.

While we respectfully disagree with the *NOVA* panel's precise balancing of the interpretive tools in that case, the court's methodology was correct. The canon applies alongside all the other traditional tools at Step 1. Only if unresolved ambiguity remains at the end of that process does the court consider agency deference at Step 2. *NOVA* demonstrates that the pro-veteran canon does not at all undermine *Chevron* deference. Rather, *NOVA*'s approach provides a meaningful role for the canon while preserving conventional deference where appropriate. It is the same approach this Court has consistently taken with canons of interpretation, generally: The "canons are not mandatory rules" but rather "guides" that "help judges determine the Legislature's intent as embodied in particular statutory language." *Chickasaw Nation v. United States*, 534 U.S. 84, 94 (2001). Those guides sometimes point in different directions, or in no definitive direction at all. And when there are other tools or canons genuinely weighing against the pro-veteran canon, deference to the agency may well be warranted if traditional tools alone fail to resolve an ambiguity.

Granting certiorari, and ruling for veterans, carries no risk of creating a universal "Heads: veterans win"-"Tails: the VA loses" framework. Instead, certiorari and reversal will clarify the pro-veteran canon's

place as a substantive canon that applies at *Chevron* Step 1. It will also ensure that courts, at Step 1, are discerning a statute's best reading. Because the Federal Circuit has utterly failed to properly and consistently apply the pro-veteran canon to resolve statutory ambiguities, as Congress presumes it will, this Court's intervention is urgently needed.

CONCLUSION

Amici respectfully request that the Court grant the petition for certiorari.

Respectfully submitted,

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