No. 22-360

In the Supreme Court of the United States

VETERAN WARRIORS, INC., ET AL., PETITIONERS

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

This Court has stated that, when interpreting certain statutes concerning veterans benefits, a court generally should "liberally construe[]" the statute, *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943), and resolve "interpretive doubt * * * in the veteran's favor," *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994). But when an agency already has construed a statute it administers, a reviewing court should "not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation," but instead should uphold the agency's interpretation if it reflects "a permissible construction of the statute." *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 (1984) (footnote omitted). The questions presented are as follows:

1. Whether the court of appeals correctly upheld various regulatory provisions adopted by the Department of Veterans Affairs to implement a veterans-benefits program mandated by Congress, based on the court's determination that those provisions reflect permissible constructions of the governing statutory language.

2. Whether *Chevron* should be clarified or replaced.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 29 F.4th 1320.

JURISDICTION

The judgment of the court of appeals (Pet. App. 59a) was entered on March 25, 2022. A petition for rehearing was denied on June 17, 2022 (Pet. App. 60a-61a). On September 6, 2022, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including October 14, 2022, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Petitioners filed a petition for review in the United States Court of Appeals for the Federal Circuit chal-

lenging seven aspects of a 2020 regulation promulgated by the Department of Veterans Affairs (VA). The court of appeals dismissed in part, granted in part, and denied in part the petition. Pet. App. 1a-58a.

1. In the Caregivers and Veterans Omnibus Health Services Act of 2010 (Caregivers Act), Pub. L. No. 111-163, 124 Stat. 1130, Congress directed that "[t]he Secretary [of Veterans Affairs] shall establish a program of comprehensive assistance for family caregivers of eligible veterans." Tit. I, § 101, 124 Stat. 1132 (38 U.S.C. 1720G(a)(1)(A)). To create and implement the caregiver-assistance program that Congress had mandated, the VA issued an interim final rule in 2011, see 76 Fed. Reg. 26,148 (May 5, 2011), and promulgated a final rule in 2015 after utilizing notice-and-comment procedures, see 80 Fed. Reg. 1357 (Jan. 9, 2015) (38 C.F.R. 71.10 *et seq.*); see also 38 U.S.C. 501(a) (authorizing the Secretary of Veterans Affairs "to prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the [VA] and are consistent with those laws").

In 2018, Congress amended the Caregivers Act to expand eligibility for that program, establish new benefits for family caregivers, and make other changes. See VA MISSION Act of 2018, Pub. L. No. 115-182, Tit. I, Subtit. C, § 161, 132 Stat. 1438-1440 (amending 38 U.S.C. 1720G). After a new round of notice-and-comment rulemaking, the VA updated the applicable regulations to "implement[]" the 2018 statute and to "make[] improvements to [the program] to improve consistency and transparency in decision making." 85 Fed. Reg. 46,226, 46,226 (July 31, 2020) (final rule); see 85 Fed. Reg. 13,356 (Mar. 6, 2020) (proposed rule).

The updated regulations made several changes that are relevant to this case. They clarified that benefits under the program "are provided only to those individuals residing in a State." 85 Fed. Reg. at 46,293 (38 C.F.R. 71.10(b)). They also added regulatory definitions of five phrases. 85 Fed. Reg. at 46,293-46,295; see 38 C.F.R. 71.15. Those phrases and definitions are as follows:

- "*Unable to self-sustain in the community* means that an eligible veteran: (1) Requires personal care services each time he or she completes three or more of the seven activities of daily living (ADL) listed in the definition of an inability to perform an activity of daily living in this section, and is fully dependent on a caregiver to complete such ADLs; or (2) Has a need for supervision, protection, or instruction on a continuous basis." 85 Fed. Reg. at 46,295 (paragraph breaks omitted).
- "*Need for supervision, protection, or instruction* means an individual has a functional impairment that directly impacts the individual's ability to maintain his or her personal safety on a daily basis." *Id.* at 46,294.
- "*In need of personal care services* means that the eligible veteran requires in-person personal care services from another person, and without such personal care services, alternative in-person caregiving arrangements (including respite care or assistance of an alternative caregiver) would be required to support the eligible veteran's safety." *Ibid.*
- "*Monthly stipend rate* means the Office of Personnel Management (OPM) General Schedule

(GS) Annual Rate for grade 4, step 1, based on the locality pay area in which the eligible veteran resides, divided by 12." *Ibid.*

- "*Serious injury* means any service-connected disability that: (1) Is rated at 70 percent or more by VA; or (2) Is combined with any other service-connected disability or disabilities, and a combined rating of 70 percent or more is assigned by VA." *Id.* at 46,295.

Finally, the updated regulations revised the definition of "Inability to perform an activity of daily living (ADL)." *Id.* at 46,294. The regulations previously had defined the phrase as referring to any inability to perform one of seven specified tasks, such as dressing, bathing, and feeding. See 38 C.F.R. 71.15 (2019). The updated regulations clarified that the "veteran or servicemember [must] require[] personal care services each time he or she completes" one of those tasks. 85 Fed. Reg. at 46,294 (38 C.F.R. 71.15).

Petitioners filed a petition for review in the Federal Circuit, see 38 U.S.C. 502, where they challenged the updated regulatory provisions described above.

2. The court of appeals dismissed in part, granted in part, and denied in part the petition for review. Pet. App. 1a-58a.

The court of appeals first held that petitioners lacked standing to challenge the definition of "unable to self-sustain in the community." Pet. App. 5a. The court found that resolution of that challenge would not affect the individual petitioners' entitlement to benefits under the program, and that the organizational petitioner could not demonstrate associational standing because it had not identified "an individual member who would have standing to [challenge that aspect of the regula-

tion] in his own right." *Ibid.* The court therefore dismissed that portion of the petition for review. *Id.* at 5a-6a.

The court of appeals then addressed the other six challenges. It explained that, under *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), a court "must give effect to the unambiguously expressed intent of Congress," but that, if "the statute is silent or ambiguous with respect to the specific issue," it would then determine "whether the agency's answer is based on a permissible construction of the statute." Pet. App. 6a (citations omitted).

Applying that framework, the court of appeals granted the petition for review insofar as it challenged the VA's regulatory definition of "need for supervision, protection, or instruction." Pet. App. 37a (capitalization omitted). The court held that the "'daily basis'" language in the regulation was invalid because it was "inconsistent with the statutory language." *Id.* at 39a. But the court rejected petitioners' remaining five challenges. With respect to each of those challenges, the court held that the agency's regulatory definition reflected a reasonable interpretation of the statute and filled a gap that Congress had either implicitly or explicitly left for the agency to fill. See *id.* at 7a-37a, 40a-57a.

The court of appeals noted that, "[a]t various points, Petitioners argue[d] [that] any silence or ambiguity in the statute must be resolved in the veteran's favor." Pet. App. 7a n.4. The court stated, however, that petitioners had "fail[ed] to develop those arguments" in their appellate briefing, and it therefore declined to "consider whether or how the pro-veteran canon applies in this case." *Ibid.*; see *ibid.* (noting that, under circuit

precedent, "when a party does not develop an argument, we treat that argument as waived").

ARGUMENT

The court of appeals correctly rejected the bulk of petitioners' challenges to the 2020 regulations, concluding that most of the contested regulatory definitions reflect permissible constructions of the relevant statutory language. See Pet. App. 7a-57a. The petition for a writ of certiorari does not directly seek review of those holdings or argue that any of those regulatory definitions is inconsistent with the statutory text. Instead, petitioners contend (Pet. 16) that this Court's review is warranted to address the "interaction between the Pro-Veteran Canon and" the framework set forth in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), or to revisit *Chevron* itself.

The court of appeals declined to "consider whether or how the pro-veteran canon applies in this case" because it concluded that no arguments on that point had been adequately developed in petitioners' appellate briefs. Pet. App. 7a n.4. That makes this a particularly poor vehicle in which to address the questions presented, given that this Court is one of review, not of first view. The Court recently denied the petition for a writ of certiorari in *Buffington* v. *McDonough*, 143 S. Ct. 14 (2022) (No. 21-972), which likewise involved the application of *Chevron* principles in the veterans-benefits context. The same result is warranted here.

1. In its decision below, the court of appeals did not address any broad issues regarding the interplay between the veterans canon and *Chevron*. That court has previously recognized, however, that the veterans canon is implicated only where "statutory language gives rise to interpretive doubt that must be resolved in

favor of the veteran." *Terry* v. *Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003) (citing *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)), cert. denied, 541 U.S. 904 (2004). That interpretive aid does not apply when the agency charged with administering an Act of Congress has formally adopted its own interpretation of ambiguous statutory text. See *ibid.* Instead, where a "gap [is] left by the statute" and Congress has "made it clear that the agency was to fill [such] gap[s]," courts should accept the answer that the agency has provided "unless it is 'arbitrary, capricious, or manifestly contrary to the statute.'" *Ibid.* (quoting *Chevron*, 467 U.S. at 844); see *Capital Cities Cable, Inc.* v. *Crisp*, 467 U.S. 691, 699 (1984) ("Where Congress has directed an administrator to exercise his discretion, his judgments are subject to judicial review only to determine whether he has exceeded his statutory authority or acted arbitrarily.") (citation omitted).

That principle is directly implicated here. In addition to vesting the VA with general rulemaking authority, see 38 U.S.C. 501(a), Congress has mandated that "[t]he Secretary shall establish a program of comprehensive assistance for family caregivers of eligible veterans," 38 U.S.C. 1720G(a)(1)(A). Establishment of such a "program" necessarily requires the agency to consider how various statutory directives and limitations should operate together. It also requires consideration of the practicalities of program administration, including in particular the need for clear and workable rules. See Pet. App. 56a ("Providing clear administrable rules is a reasonable policy goal."). The VA's ability to implement the caregiver-assistance program that Congress mandated would be seriously compromised if, as petitioners appear to contemplate, the agency were

required to give every disputed snippet of statutory language the plausible reading that is most favorable to veterans.

Petitioners assert (Pet. 16-24) that a court must first exhaust every conceivable interpretive aid—including the veterans canon—before it can find statutory language ambiguous and defer to the agency's reasonable interpretation of it. As an initial matter, petitioners are wrong in arguing (Pet. 18-21) that *Chevron* requires a rigidly bifurcated inquiry in every instance. Courts may appropriately defer under *Chevron* to an agency's "reasonable construction of [a] statute, whether or not it is the only possible interpretation." *Holder* v. *Martinez Gutierrez*, 566 U.S. 583, 591 (2012). A court need not always make a threshold determination of whether the statute has a single, unambiguous meaning.

In *Entergy Corp.* v. *Riverkeeper, Inc.*, 556 U.S. 208 (2009), for example, the Court held that an agency's position "governs if it is a reasonable interpretation of the statute—not necessarily the only possible interpretation, nor even the interpretation deemed *most* reasonable by the courts." *Id.* at 218. The Court rejected the dissent's contention that *Chevron* invariably requires a "supposedly prior inquiry of 'whether Congress has directly spoken to the precise question at issue,'" *i.e.*, whether the statute is unambiguous. *Id.* at 218 n.4 (citation and internal quotation marks omitted). The Court explained that, under *Chevron*, a single inquiry into the reasonableness of an agency's interpretation can suffice because "surely if Congress has directly spoken to an issue then any agency interpretation contradicting what Congress has said would be unreasonable." *Ibid.* And in *Martinez Gutierrez*, after concluding that the agency's position satisfied *Chevron*'s "reasonable

construction" test, the Court explained that it did not "need [to] decide if the statute permit[ted] any other construction." 566 U.S. at 591.

In any event, petitioners are wrong in asserting that a court must apply every other available tiebreaker, including the veterans canon, before determining whether the agency's interpretation warrants deference. Under *Chevron*, if "the intent of Congress is clear, 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." 467 U.S. at 842-843. As petitioners acknowledge (Pet. 2, 17-21), courts employ "traditional tools of statutory construction" in determining whether "Congress had an intention on the precise question at issue," *Chevron*, 467 U.S. at 843 n.9. If such an intention has been clearly expressed, "that intention is the law and must be given effect." *Ibid.*

Some interpretive principles are relevant to that inquiry because they enable courts to "ascertain[]" Congress's clear "intention," *Chevron*, 467 U.S. at 843 n.9, and so must be applied before deferring to an administrative interpretation, see *ibid.* For example, the Court has described the presumptions against extraterritorial and retroactive application of statutes as eliminating ambiguity that would otherwise exist and thus revealing Congress's clear intention. See *Morrison* v. *National Australia Bank Ltd.*, 561 U.S. 247, 255 (2010) ("When a statute gives no clear indication of an extraterritorial application, it has none."); *INS* v. *St. Cyr*, 533 U.S. 289, 321 n.45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.") (citation omitted).

In contrast, some interpretive aids are not tools for ascertaining whether a statute has one unambiguous meaning, but instead come into play when a statute is found to be ambiguous even after ordinary interpretive tools have been applied. For example, this Court has "used the lenity principle to resolve ambiguity in favor of the defendant only 'at the end of the process of construing what Congress has expressed' when the ordinary canons of statutory construction have revealed no satisfactory construction." *Lockhart* v. *United States*, 577 U.S. 347, 361 (2016) (citation omitted); see *Wooden* v. *United States*, 142 S. Ct. 1063, 1075 (2022) (Kavanaugh, J., concurring).

The Federal Circuit has described the veterans canon as the latter type of interpretive principle—as coming into play where uncertainty lingers even after a court has employed all other interpretive tools at its disposal. See, *e.g.*, *Nielson* v. *Shinseki*, 607 F.3d 802, 808 (2010) (observing that the veterans canon "is only applicable after other interpretive guidelines have been exhausted, including *Chevron*"). So understood, the canon does not aid in determining whether Congress had an unambiguous intention on a question. See *Heino* v. *Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012) ("[W]e will not hold a statute unambiguous by resorting to a tool of statutory construction used to analyze ambiguous statutes."). Whatever the role of that tiebreaking tool in cases where no administrative interpretation is at issue, it is not properly applied to displace a reasonable interpretation formally adopted by the agency that Congress has charged with filling gaps in a statutory scheme. Instead, the central tenet of *Chevron* is that Congress intended the agency, not courts, to fill such gaps. See 467 U.S. at 843-845. Petitioners identify

no sound basis to treat the VA as an exception to that rule. Cf. Court of Appeals for Veterans Claims Bar Association, *Justice Scalia Headlines the Twelfth CAVC Judicial Conference*, Veterans L.J. 1, 1, 12 (Summer 2013) (recounting Justice Scalia's stated view that "*Chevron* would apply with full force" to veterans statutes and that the veterans canon may be used to resolve only "interpretive doubt, *where not resolved by the administering agency*").

Petitioners likewise identify no decision in which this Court has applied the veterans canon to resolve a statutory ambiguity that the agency had reasonably addressed. In *Brown* v. *Gardner*, *supra*, the Court held invalid a VA regulation on the ground that it contravened the statutory language. 513 U.S. at 116-118. Although the Court briefly noted that interpretive doubt should be resolved in favor of veterans, *id.* at 118, it did not hold that the veterans canon supplanted *Chevron*. More recently, in *Henderson* v. *Shinseki*, 562 U.S. 428 (2011), the Court noted that its analysis of the text of 38 U.S.C. 7266(a) (2006) comported with the veterans canon. 562 U.S. at 441. But the Court did not rely on the canon to resolve the statutory ambiguity or to reject a contrary agency position; in that case, no VA regulation interpreting the relevant statute was at issue.

2. In their second question presented, petitioners ask (Pet. i) the Court to grant review to consider whether "*Chevron* should be clarified or replaced" in order to prevent the veterans canon "from becoming a nullity." Petitioners' arguments on that score largely reprise their core contention that, whenever a statute affecting veterans contains ambiguous language, a court must choose the reasonable construction that is most favorable to veterans, even if the agency charged

with the statute's administration has formally adopted a different interpretation that is otherwise reasonable. See Pet. 24-30. Those arguments lack merit for the reasons set forth above. To the extent petitioners seek a broader reconsideration of *Chevron*, they have not carried "the heavy burden of persuading the Court that changes in society or in the law dictate that the values served by *stare decisis* yield in favor of a greater objective." *Vasquez* v. *Hillery*, 474 U.S. 254, 266 (1986).

"Although 'not an inexorable command,' *stare decisis* is a foundation stone of the rule of law, necessary to ensure that legal rules develop 'in a principled and intelligible fashion.'" *Michigan* v. *Bay Mills Indian Community*, 572 U.S. 782, 798 (2014) (citations omitted); see *Kimble* v. *Marvel Entertainment, LLC*, 576 U.S. 446, 455 (2015). Adherence to precedent "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. *Tennes*see, 501 U.S. 808, 827-828 (1991). "For that reason, this Court has always held that any departure from the doctrine demands special justification." *Bay Mills*, 572 U.S. at 798 (citation and internal quotation marks omitted). *Stare decisis* carries "'special force'" in areas where "Congress exercises primary authority * * * and 'remains free to alter what [the Court] ha[s] done.'" *Id.* at 799 (quoting *Patterson* v. *McLean Credit Union*, 491 U.S. 164, 172-173 (1989)). That is true not only of decisions that interpret specific statutory language, but also of a decision "announc[ing] a 'judicially created doctrine' designed to implement a federal statute," which "effectively become[s] part of the statutory scheme, subject (just like the rest) to congressional change."

Kimble, 576 U.S. at 456 (citation omitted). For many of those reasons, this Court in *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), refused to disturb its prior holdings that agency interpretations of ambiguous regulations should receive deference so long as certain preconditions are satisfied. See *id.* at 2422-2423.

Petitioners bear an especially heavy burden in asking (Pet. i) this Court to "replace[]" *Chevron*, which stands at the head of "a long line of precedents" reaching back decades. *Bay Mills*, 572 U.S. at 798. The Court in *Chevron* described its approach not as an innovation, but as the application of "well-settled principles" concerning the respective roles of agencies and courts in resolving statutory ambiguities. 467 U.S. at 845; see *id.* at 842-845. Federal courts have invoked *Chevron* in thousands of reported decisions, and Congress has repeatedly legislated against its backdrop. Regulated entities routinely rely on agency interpretations that courts have upheld under the *Chevron* framework. By centralizing policy-laden interpretive decisions in expert agencies, *Chevron* promotes political accountability, national uniformity, and predictability, and it respects the expertise agencies bring to bear in administering complex statutory schemes.

Petitioners offer no persuasive "special justification" for replacing *Chevron*, let alone the type of "particularly special justification" that would be required to overturn such a deeply ingrained precedent. *Kisor*, 139 S. Ct. at 2423 (internal quotation marks omitted). Petitioners' suggestion that *Chevron* must be reconsidered to "protect the pro-veteran canon from becoming a nullity" lacks merit. Pet. 24 (capitalization omitted); see Pet. 24-28. As explained above, the two doctrines operate in different circumstances: *Chevron* applies only when the

agency *has* addressed the interpretive issue, whereas the veterans canon applies only when it has not. Indeed, petitioners acknowledge (Pet. 25) that the Federal Circuit and this Court have invoked and applied both the veterans canon and *Chevron* for decades. And because this case does not implicate the Indian canon (see Pet. 29), it would be an unsuitable vehicle in which to address the interaction between *Chevron* and that canon.

Petitioners' reliance (Pet. 26-28) on this Court's decision last Term in *West Virginia* v. *EPA*, 142 S. Ct. 2587 (2022), likewise is misplaced. There, the Court found that the agency had exceeded its statutory authority in determining that the "'best system of emission reduction'" within the meaning of the relevant Clean Air Act provisions was to "restructur[e] the Nation's overall mix of electricity generation, to transition from 38% coal to 27% coal by 2030." *Id.* at 2607 (citation omitted). The Court relied in part on what it called "the major questions doctrine," under which "in certain extraordinary cases" involving "assertions of 'extravagant statutory power over the national economy,'" the agency "must point to 'clear congressional authorization' for the power it claims." *Id.* at 2609 (citation omitted).

That doctrine does not apply here. The agency's implementation of the Caregivers Act through the 2020 regulations is not extraordinary and does not reflect an assertion of sweeping power over the national economy. Nor did the VA claim to have "'discover[ed] in a long-extant statute an unheralded power' representing a 'transformative expansion in its regulatory authority.'" *West Virginia*, 142 S. Ct. at 2610 (brackets and citation omitted). Instead, the challenged provisions simply clarify how the agency will implement a federal benefits

program that Congress expressly mandated and that the agency already had been administering for several years. See 38 U.S.C. 1720G.

3. This case would be a poor vehicle for addressing the questions presented. The court of appeals declined to address petitioners' arguments about the veterans canon on the ground that petitioners had not adequately preserved those arguments in the appellate briefing. See Pet. App. 7a n.4. Petitioners assert (Pet. 22-23) that the court "misconstrued" their arguments, which "do[] not require a detailed, nuanced elaboration." For present purposes, however, the salient points are that the court of appeals declined to address the potential relevance of the veterans canon, and that petitioners do not directly seek review of the court's factbound forfeiture determination.

This Court "is 'a court of final review and not first view,' and it does not 'ordinarily decide in the first instance issues not decided below.'" *City of Austin* v. *Reagan National Advertising of Austin, LLC*, 142 S. Ct. 1464, 1476 (2022) (brackets, citation, and ellipsis omitted). That principle is a sufficient reason to deny review here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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