No. 22-888

In the Supreme Court of the United States

JAMES R. RUDISILL,

Petitioner,

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF THE AMERICAN LEGION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

The American Legion is a veterans' service organization chartered by Congress "'to advance the interests . . . of all wounded, injured, and disabled American veterans' and 'to cooperate with the Department of Veterans Affairs . . . [in] advancing the condition, health, and interests of . . . disabled veterans.'" 36 U.S.C. §§ 50301, 50302(3), (4). It has nearly 1.6 million members, all of whom are wartime veterans, and operates a number of charitable programs to improve the lives of disabled veterans, their dependents, and survivors. In carrying out its duties and responsibilities, The American Legion regularly advocates for legislation on behalf of veterans and has a strong interest in the principles used to interpret such legislation. The original G.I. Bill program to provide educational benefits had its genesis with The American Legion during World War II and The American Legion has been heavily involved in legislative programs to update educational benefits for veterans in the decades since.

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[1]No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amicus curiae* and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The American Legions submits this *amicus* brief because this case raises an important question about the role of the pro-veteran canon in the interpretation of benefits statutes. This Court has long recognized "that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Nonetheless, after this Court remanded *Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019), a plurality of the United States Court of Appeals for the Federal Circuit (Federal Circuit) functionally eliminated the canon by holding that it was not a traditional tool of interpretation and, therefore, it applied only after all other canons are exhausted, which includes deference to the Department of Veterans Affairs. *Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021) (order denying en banc review) (hereinafter "*Kisor V*"). As Judge Reyna observed in dissent: "This means that the pro-veteran canon comes into play at the bottom of the ninth inning, after three outs have been made, and as the players head to their respective dug outs. But by then, it's game over." *Id.* at 1376. The Federal Circuit's erroneous approach to veterans law infected its analysis in this case and ought to be corrected both so that Mr. Rudisill and other veterans with multiple periods of service will get the benefits they have earned but also so that this departure from over a century of caselaw will not undermine our nation's commitment "[t]o care for him who shall have borne the battle and for his widow, and his orphan." Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865).

The crux of the Federal Circuit plurality's error in *Kisor V* is its misunderstanding that only linguistic

canons can be traditional tools of statutory interpretation. However, as Justice Barrett recently explained in *Biden v. Nebraska*, understanding Congress's instructions necessarily involves looking at its history, custom, and practices in the area to recognize the unspoken assumptions built into the legislature's instructions. 143 S. Ct. 2355, 2379-80 (2023) (Barrett, J., concurring). Since the earliest days of our country, Congress and its predecessor have treated America's veterans with a uniquely generous intent and this has been recognized in this Court's caselaw for over a century. Thus, as Judge O'Malley recognized in her dissent from *Kisor V*, the pro-veteran canon is not a tiebreaking canon that judges apply because of their preference for veterans, but rather a recognition of Congress's general intent that its instructions be interpreted in favor of veterans, which must be factored in at the first step of interpretation: determining whether Congress's intent can be discerned and followed. *Kisor V*, 995 F.3d at 1363-76.

When the proper analysis is applied, the denial of Mr. Rudisill's benefits should be reversed. The application of the pro-veteran canon to the interpretation of educational benefits is particularly appropriate because of the unique success of the G.I. Bill in helping veterans who donned the uniform of the United States to ensure "that government of the people, by the people, for the people, shall not perish from the earth." Abraham Lincoln, Gettysburg Address (Nov. 19, 1863).

ARGUMENT

I. THE CANON OF VETERAN-FRIENDLY INTERPRETATION IS A TRADITIONAL CANON OF INTERPRETATION AND SHOULD HAVE A PRIMARY ROLE IN INTERPRETING VETERANS BENEFITS STATUTES BECAUSE IT REPRESENTS OUR UNDERSTANDING OF CONGRESS'S GENERAL INTENT IN FORMULATING PROGRAMS TO SUPPORT VETERANS.

In this case, the Federal Circuit held that the pro veteran canon had no role to play in interpreting the educational benefits provided by Congress to Veterans because the language of the statute was not ambiguous based upon the application of linguistic canons. *Rudisill v. McDonough*, 55 F.4th 879, 887 (Fed. Cir. 2022) (en banc). Although not directly cited, *Rudisill*'s statement that the pro-veteran canon was not for application was a clear application of its recent en banc plurality opinion in *Kisor v. McDonough*. 995 F.3d 1347 (Fed. Cir. 2021) (order denying en banc review). The American Legion supports the petitioner and submits this brief to emphasize that the Federal Circuit's unprecedented new analytical approach to veterans benefits statutes is erroneous and needs correction by this Court before it further corrupts judicial review of veterans benefits decisions.

A. The Central Mission Of Statutory Interpretation Is To Give Effect To The Intent Of Congress, Which Includes Factoring In Its Prior Dealings, Customs, And Usages In The Area Where It Is Legislating.

Ours is a nation of divided government where laws are created by Congress to be interpreted and applied by the executive and judiciary. Within that separation of powers, the duty of the other two branches is to give effect to Congress's intent when that can be determined. Accordingly, interpretation is first and foremost an exercise in discerning the instructions from that body which has the power to create laws. In other words, how to resolve a gap in a statute is an issue only "if Congress has not expressed a specific intent." *City of Arlington v. FCC*, 569 U.S. 290, 314, (2013) (Roberts, C.J., dissenting); *accord Kisor v. Wilkie*, 139 S. Ct. 2400, 2412 (2019) ("Want to know what a rule means? Ask its author.").

It has never been disputed in the field of veterans law that language is a crucial starting point in the exercise of interpretation. "Without standard word meanings and rules of construction, neither Congress nor the Secretary can know how to write authorities in a way that conveys their intent and no practitioner or—more importantly—veteran can rely on a statute or regulation to mean what it appears to say." *Tropf v. Nicholson*, 20 Vet. App. 317, 321 n.1 (2006). Nonetheless, "[s]tatutory language has meaning only in context." *Graham Cnty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 545 U.S. 409, 415 (2005); *see also Johnson v. United States*, 130 S. Ct.

1265, 1270 (2010) ("Ultimately, context determines meaning . . . .").

As Justice Barrett recently observed, the act of interpreting instructions requires more than just consideration of the words used to express the instructions. An agency giving effect to a statute is effectively acting on behalf of Congress, who is the principal with ultimate authority to direct the agency's actions:

> Think about agency law, which is all about delegations. When an agent acts on behalf of a principal, she "has actual authority to take action designated or implied in the principal's manifestations to the agent . . . as the agent reasonably understands [those] manifestations." RESTATEMENT (THIRD) OF AGENCY § 2.02(1) (2005). Whether an agent's understanding is reasonable depends on "[t]he *context* in which the principal and agent interact," including their "[p]rior dealings," industry "customs and usages," and "the nature of the principal's business or the principal's personal situation." *Id.*, §2.02, Comment *e* (emphasis added).

Biden v. Nebraska, 143 S. Ct. 2355, 2379 (2023) (Barrett, J., concurring). As she notes, if we think about the instructions provided to a store clerk, a babysitter, or any other agent, it would be absurd to allow them to claim that they have authority to follow any course permitted by the semantic meaning of the words used in a specific instruction where that interpretation is contrary to a long history of prior behavior. When parties deal with each other over an extended period of time, certain assumptions are naturally internalized to the point where a principal

does not think it necessary to explain that the same constraints apply this time as have always applied before.

This observation about the importance of history in interpreting Congress's instructions is true regardless of whether the words of a statute are being interpreted by an agency or the courts because the specific intent of the legislature does not change based upon who is reading its language. Past practice has a particular relevance in the field of veterans law because this Court has expressly recognized that Congress has a well established general intent that veterans benefits statutes be liberally construed. This is commonly referred to as the pro-veteran canon. Accordingly, the application of this context of past history to veterans law shows both: (1) the Federal Circuit erred as a matter of general law in holding in *Kisor V* that the pro-veteran canon is not a traditional rule of statutory interpretation and has no role in interpretation until after all other canons have been exhausted including deference to the agency; and (2) the Federal Circuit erred specifically in this case when it ignored Congress's long history of generously caring for our nation's veterans, including through providing educational benefits to promote successful reintegration into civilian life after service.

B. Since The Founding Of Our Country, Congress Has Recognized The Need To Support Veterans In Their Post-Service Lives.

The application of history as context for understanding Congress's instructions as set forth in statute has no more compelling place than in veterans law. The federal government has been caring for

veterans almost since the first shots were fired at Lexington and Concord. Within one month of George Washington being appointed to lead the Continental Army in 1775, the Continental Congress established the Army Medical Department to care for the wounded. MARY C. GILLET, THE ARMY MEDICAL DEPARTMENT: 1755-1818 26 (1981). As noted by Judge Reyna in his dissent in the present case, the Continental Congress created a pension program for disabled veterans in 1776 "in response to the states' failure to pay soldiers fighting the Revolutionary War and the resulting mutinies, protests, and rebellions." *Rudisill v. McDonough*, 55 F.4th 879, 896 (Fed. Cir. 2022) (en banc). As the Revolutionary War raged on, in 1778 the Continental Congress provided "full pay during the life of all her soldiers in the Continental Army who might be disabled in the service." WILLIAM HENRY GLASSON, FEDERAL MILITARY PENSIONS IN THE UNITED STATES 18 (1918). More notably, the United States also promised service pensions to all Revolutionary War veterans making it the first nation in history to recognize that *all* veterans should be cared for in their post-service life and not just a hereditary officer class. Sung Won Kang & Hugh Rockoff, *After Johnny Came Marching Home: The Political Economy of Veterans' Benefits in the Nineteenth Century* 13 (Nat'l Bureau of Econ. Research, Working Paper No. 13223, 2007), available at https://www.nber.org/system/files/working_papers/w13223/w13223.pdf.

After the Constitution was ratified creating our present government, Congress's first order of substantive business was drafting a law to care for disabled Revolutionary War veterans. Act of Sept. 29,

1789, Ch. 24, 1 Stat. 95. In fact, Revolutionary War veterans were among the strongest supporters of the new Constitution because they expected a strong central government to be more capable of fulfilling the promises made to them than the individual states. LIBRARY OF CONG., VETERANS BENEFITS AND JUDICIAL REVIEW: HISTORICAL ANTECEDENTS AND THE DEVELOPMENT OF THE AMERICAN SYSTEM 40 (1992). Throughout the pre-Civil War period, "Congress tended to be more generous than its European counterparts" despite the relatively less developed American economy. BERNARD ROSTKER, PROVIDING FOR THE CASUALTIES OF WAR: THE AMERICAN EXPERIENCE THROUGH WORLD WAR II 73 (2013). Less than one year after the conclusion of the Civil War, Congress realized that soldiers exiting service needed assistance transitioning to civilian life in an urbanizing economy and provided bounty-equalization payments as a method of disbursing lump sums to veteran so that they could establish a post-service life commensurate with their service to the country. MARY R. DEARING, VETERANS IN POLITICS: THE STORY OF THE G.A.R. 76-79 (1952). As the nation prepared to enter World War I, the House committee considering the War Risk Insurance Act of 1917 acknowledged that "[t]he Government, however, owes a higher duty, both to the injured man and his people, than merely to compensate him for his injuries. Its primary obligation is to develop all his potentialities, to fit him for the best life of which he is capable." LIBRARY OF CONGRESS' LEGISLATIVE REFERENCE SERVICE, THE PROVISION OF FEDERAL BENEFITS FOR VETERANS: AN HISTORICAL ANALYSIS OF MAJOR VETERANS' LEGISLATION, 1862-1954 190 (1955) (reprinted as H. Comm. Print No. 84-171) (hereinafter

"THE PROVISION OF FEDERAL BENEFITS FOR VETERANS") (quoting the Committee on Interstate and Foreign Commerce report on H.R. 5723). Accordingly, since the founding of our nation, Congress has honored our veterans by doing more than simply caring for the disabled. Rather, it has recognized that the citizen-soldier is entitled to transition assistance as he or she sheds the latter half of that title.

C. The Original G.I. Bill Was A Dramatic Success Story In Learning How To Support Veterans And Benefit The Nation.

The moral obligation and economic value of providing reintegration benefits reached its full fruition during World War II in the G.I. Bill. Many in the United States were terrified that after the war concluded, then nation would by crippled by millions of unemployed veterans struggling to find a place in civilian life. In 1943, the New Republic magazine predicted darkly: "When demobilization day comes we are going to suffer another Pearl Harbor, a Pearl Harbor perfectly foreseeable—now—a Pearl Harbor of peace, not of war." DAVIS R.B. ROSS, PREPARING FOR ULYSSES: POLITICS AND VETERANS DURING WORLD WAR II 34 (1969) (quoting When Demobilization Comes, *The New Republic*, Aug. 2, 1943, at 139). This economic Armageddon was avoided through another unprecedented innovation in veterans benefits.

That same year, the National Commander of The American Legion, Warren Atherton, appointed a committee "to consider the long-range view of veterans' benefits now that American citizen-soldiers were involved in another world war." THOMAS A. RUMER, THE AMERICAN LEGION: AN OFFICIAL HISTORY

1919-1989 244 (1990). This committee included former National Commander Harry W. Colmery, who became known as the principal architect of the benefits provided to World War II veterans. After five months of meetings at the Mayflower in Washington D.C., Colmery handwrote the first draft of what became the legislation on hotel stationery. *See* https://www.legion.org/distinguishedservicemedal/1975/harry-w-colmery. On January 9, 1944, The American Legion shared its vision by publishing "a bill of rights for G.I. Joe and G.I. Jane" in the New York Times. *See* ROSS, *supra*, at 99.

The G.I. Bill was a comprehensive economic package including educational benefits, home loans, farms loans, unemployment benefits, and rights to surplus government property designed to give every veteran a chance to flourish in civilian life. *See generally* EDWARD HUMES, OVER HERE: HOW THE G.I. BILL TRANSFORMED THE AMERICAN DREAM 5 (2006). As Congress considered The American Legion's proposal, its attitude was summarized by Congressman Leonard Allen who remarked:

> There were no differences in the objectives to be reached by this legislation, and it has been singular and encouraging that no differences in objectives have been voiced on this floor. . . . We all wish to accomplish the same purpose, namely, to do the thing that will be best for the veterans.

THE PROVISION OF FEDERAL BENEFITS FOR VETERANS 201 (quoting 90 Cong. Rec. 4445 (daily ed. May 12, 1944).

Today, the G.I. Bill is recognized as one of the most profoundly successful pieces of legislation in the

history of our country and "justly joins the Bill of Rights, the Civil Rights Act, and the Morrill Land Grant Colleges Acts, as one of a handful of landmark transformative legislative achievements." HUMES, *supra*, at 286. It furnished educations to "fourteen future Nobel Prize winners, three Supreme Court justices, three presidents, a dozen senators, two dozen Pulitzer Prize winners, 238,000 teachers, 91,000 scientists, 67,000 doctors, 450,000 engineers, 240,000 accountants, 17,000 journalists, 22,000 dentists, along with a million lawyers, nurses, businessmen, artists, actors, writers, pilots, and others." HUMES, *supra*, at 6. Almost twelve and a half million veterans benefited directly from the G.I. Bill and three-quarters of those veterans surveyed said that "[t]he GI Bill changed my life." GLENN C. ALTSCHULER & STUART M. BLUMIN, THE GI BILL: A NEW DEAL FOR VETERANS ix (2009).

Time has only enhanced our appreciation of this accomplishment. Barely a decade after the G.I. Bill, the Bradley Commission appointed by President Dwight Eisenhower recognized that it "opened a new and hopeful chapter in veterans' programs" and to confidently state that the best way for the Government to meet its obligations to nondisabled veterans is to provide them support in readjusting to civilian life by providing constructive assistance when it is most needed. THE PRESIDENT'S COMMISSION ON VETERANS' PENSIONS, VETERANS' BENEFITS IN THE UNITED STATES: A REPORT TO THE PRESIDENT 14 (1956). Half a century later, the Veterans' Disability Benefits Commission established by Congress under Public Law 108-136 summarized and endorsed the first principle of the Bradley commission: "Benefits should recognize the often enormous sacrifices of

military service as a continuing cost of war, and commend military service as the highest obligation of citizenship." VETERANS' DISABILITY BENEFITS COMMISSION, HONORING THE CALL TO DUTY: VETERANS' DISABILITY BENEFITS IN THE 21ST CENTURY 3 (2007).

This legacy continues today. In 1987, The American Legion provided "essential support" to the creation of a permanent G.I. Bill for today's all-volunteer forces, popularly known as the Montgomery G.I. Bill. RUMER, *supra*, at 519. In 1990, when the Montgomery G.I. Bill celebrated its one-millionth sign up, President George H.W. Bush lauded it as "among the most practical and efficient programs ever devised." G.V. "SONNY" MONTGOMERY, ACROSS THE AISLE: THE SEVEN-YEAR JOURNEY OF THE HISTORIC MONTGOMERY GI BILL 156 (2010). In 2008, The American Legion worked closely with Senator James Webb to pass the Veterans Education Assistance Act of 2008, which established the Post-9/11 GI Bill. In remarks at a 2018 panel discussion at the National WWII Museum, "I looked at this, both as a veteran and as the father a young Marine in Iraq, and I started saying, if you're going to call these people the next greatest generation, you should give them the same opportunity for a future that the greatest generation had." *The Post 9/11 GI Bill*, THE AMERICAN LEGION (Jun. 30, 2008), https://centennial.legion.org/timeline/16985/post-911-gi-bill. And in 2017, The American Legion again led the effort to improve educational benefits through the passage of the Harry W. Colmery Veterans Educational Assistance Act; a bill named to honor the original architect of veterans education benefits. *GI Bill Officially Becomes A Forever Benefit*, THE

AMERICAN LEGION (Aug. 16, 2017), https://www.legion.org/legislative/238884/gi-bill-officially-becomes-forever-benefit.

This commitment to equipping veterans for a successful post-service life continues today through the question of a veteran's right to education benefits presently before this Court. Whether it lives up to the legacy of its predecessors will depend in substantial part on how it is interpreted.

D. The Canon Of Veteran-Friendly Interpretation Is Best Understood As The Default Presumption Of How Congress As The Principal Creator Of Our Nation's Laws Uses That Power.

Questions of how to interpret benefits date back to the provision of pensions to Revolutionary War veterans. In honoring the promise of service pensions to those veterans, Congress provided for a death benefit payable "to his widow, or, if he leave no widow, to his children." *Walton v. Cotton*, 60 U.S. (19 How.) 355, 357 (1856). In *Walton*, the veteran's children predeceased him, but he was survived by grandchildren and the question arose as to whether they could claim the benefit although grandchildren were not mentioned in the statute. This Court rejected the argument that the statute should be given strict literal effect:

> Congress, from high motives of policy, by granting pensions, alleviate, as far as they may, a class of men who suffered in the military service by the hardships they endured and the dangers they encountered. But to withhold any arrearage of this bounty from his grandchildren, who had the misfortune to be

> left orphans, and give it to his living children, on his decease, would not seem to be a fit discrimination of national gratitude.

Walton, 60 U.S. at 358. The Court acknowledged that "[t]here can be no doubt that Congress had a right to distribute this bounty at their pleasure," but concluded that "where the language used may be so construed as to carry out a benign policy, within the reasonable intent of Congress" then that was the best interpretation of the law. *Id.*; *accord Hayburn's Case*, 2 U.S. (2 Dall.) 408, 410 (1792) (subjoining letter from Chief Justice John Jay, sitting as circuit judge, interpreting Revolutionary War veterans' benefits statute so that "the objects of this act are exceedingly benevolent, and do real honor to the humanity and justice of Congress").

Even though veterans benefits were historically not subject to judicial review, over time this Court had numerous occasions to reiterate its understanding of Congress's intent. At the height of World War II, this Court addressed a statute designed to insulate active-duty service members from distracting lawsuits and commented that "[t]he Soldiers' and Sailors' Civil Relief Act 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." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). A year after the war, this Court reiterated that veterans benefits laws should "be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

In recent years, the Court has elaborated on the nature of the pro-veteran canon. In 1961, this Court not only remarked that "[t]he solicitude of Congress

for veterans is of long standing," but explained that the construction of the statute at issue "makes it fit well in the pattern of legislation dealing with this subject." *United States v. Oregon*, 366 U.S. 643, 647 (1961). Thus, this Court has long relied on the overall "pattern of legislation" as the foundation of the pro-veteran canon.

This Court again invoked the canon in *King v. St. Vincent's Hospital* when it stated that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." 502 U.S. 215, 221 n.9 (1991). Critically, the very next sentence in the opinion is: "We will presume congressional understanding of such interpretive principles." *Id.* (citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) for the proposition that "[i]t is presumable that Congress legislates with knowledge of our basic rules of statutory construction"). This again makes clear that the pro-veteran canon is based upon how this Court understands Congress's approach to communicating through legislation.

After judicial review of veterans benefits claims was enacted in 1988, this Court had its first opportunity to address the pro-veteran canon in *Brown v. Gardner*. 513 U.S. 115 (1994). This Court reaffirmed that statutes must be understood on the basis of "text and reasonable inferences from it," and reiterated that this means that "interpretive doubt is to be resolved in the veteran's favor." *Gardner*, 513 U.S. at 117-18. Importantly, it did so in the paragraph considering the plain language used by Congress. While the opinion did address agency deference under *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842 (1984), it did so only in the final paragraph after

invoking the pro-veteran canon during its analysis of the language and context.

Finally, in *Henderson ex rel. Henderson v. Shinseki*, this Court considered whether the statutory time period to appeal a denial of benefits was jurisdictional. 562 U.S. 428 (2011). This Court again applied the pro-veteran canon explaining that "[w]hile the terms and placement of [the statute] provide some indication of Congress' intent, what is most telling here are the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims." 562 U.S. at 440-42. This leaves no doubt that the canon plays an integral role in interpreting whether Congress has spoken directly to an issue in drafting a veterans benefits statute.

"Simply put, the veteran's canon is a traditional tool of interpretation." Chadwick J. Harper, *Give Veterans the Benefit of the Doubt:* Chevron*,* Auer*, and the Veteran's Canon*, 42 HARV. J.L. & PUB. POL'Y 931, 949 (2019); *see also Procopio v. Wilkie*, 913 F.3d 1371, 1383 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) ("There is also no doubt that the pro-veteran canon is one such traditional tool [of statutory interpretation]."). This means courts should fully employ the pro-veteran canon along with other canons in the "traditional interpretive toolkit" to reach the "best and fairest reading of the law" when considering a veterans benefits statute. *Kisor*, 139 S.Ct. at 2430 (Gorsuch, J., concurring in judgment).

E. The Federal Circuit Erred In *Kisor v. McDonough* In Concluding That "The Pro-Veteran Canon Comes Into Play At The Bottom Of The Ninth Inning, After Three Outs Have Been Made, And As The Players Head To Their Respective Dug Outs."

Subsequent to this Court's remand, the Federal Circuit addressed the issue of interpreting veterans benefits law in an order denying en banc review of the ensuing panel decision. *Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021) (order denying en banc review). In that case, a plurality of the court supported Chief Judge Prost's lengthy opinion dismissing the relevance of the pro-veteran canon. This opinion was explicitly based upon "[t]he [p]rimacy of [t]ext." *Id.* at 1348. The opinion characterized the pro-veteran canon as a "rule of lenity" and explicitly concluded that "that rule is considered at the end of the analysis." *Id.* at 1354.

The Federal Circuit's *Kisor V* plurality was incorrect that only grammatical and structural canons help courts understand congressional intent. Initially, it should be noted that recent empirical study has shown that "the pervasive linguistic-substantive division is a false dichotomy. Some traditional substantive canons are also linguistic canons, and some traditional linguistic canons are also substantive canons." Kevin Tobia & Brian Slocum, *The Linguistic and Substantive Canons*, HARVARD LAW REVIEW FORUM (forthcoming 2023) (manuscript at 64, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4186956. In other words, some canons are properly characterized as both textual and substantive

because the underlying policy considerations also reflect the way language is ordinarily understood.

Regardless of the false-choice framing, the plurality opinion in *Kisor* did admit that "'this text-first rule is not an instruction to 'construe the meaning of statutory terms in a vacuum.'" *Id.* at 1349 (quoting *Tyler v. Cain*, 533 U.S. 656, 662 (2001)). Nonetheless, it asserted that "we should consider the pro-veteran canon only . . . after exhausting all applicable descriptive tools in search of the provision's best meaning[.]" *Kisor v. McDonough*, 995 F.3d 1347, 1359. Crucially, the opinion considered "the theory that the pro-veteran canon is justified as a proxy for congressional intent," but rejected this understanding of the canon because "Congress's undeniably active role in veterans' benefits law mitigates the concern that we will frustrate Congress's efforts by declining to apply at the outset a highly generalized veteran-friendly policy that is above and beyond the specific policies expressed in the text." *Kisor V*, 995 F.3d at 1355.

This rationale is nothing more than an appeal to legislative inaction as affirmative Congressional intent. However, as Justice Scalia explained, relying on legislative inaction is simply unrealistic because

> [a]s a practical matter, it is impossible to assert with any degree of assurance that congressional failure to act represents affirmative congressional approval of one of this Court's decisions. There are many reasons Congress might not act on a decision and most of them have nothing at all to do with Congress' desire to preserve the decision.

Michigan v. Bay Mills Indian Cmty., 572 U.S. 782, 826 (2014) (cleaned up). Relying on legislative

inaction is especially inappropriate in this context. Veterans benefits law is vast and complex. The compendium of applicable statutes and regulations prepared by the National Veterans Legal Services Program runs more than 2,500 oversized, dual-column pages. *See* NATIONAL VETERANS LEGAL SERVICES PROGRAM, FEDERAL VETERANS LAWS, RULES AND REGULATIONS 2022-2023 (2023). Its companion volume summarizing relevant caselaw is nearly as long. NATIONAL VETERANS LEGAL SERVICES PROGRAM, FEDERAL VETERANS LAWS, VETERANS BENEFITS MANUAL 2022-2023 (2023). Judges of the expert Veterans Court have referred to it as a "confusing tapestry" dozens of times. *See*, *e.g.*, *Sears v. Principi*, 16 Vet.App. 244, 250 (2002) (Steinberg, J., concurring) (finding 38 C.F.R. § 3.157(b) to be "a confusing tapestry" with unclear meaning). Despite Congress's solicitude, it unrealistic to imagine that it tracks every judicial decision and corrects erroneous ones with ruthless efficiency. Indeed, this Court has rejected the government's appeal to legislative inaction when invoking the pro-veteran canon. *See Gardner*, 513 U.S. at 121 ("congressional silence 'lacks persuasive significance'") (quoting *Central Bank of Denver, N. A. v. First Interstate Bank of Denver, N. A.*, 511 U.S. 164, 187 (1994)). Thus, the justification of the *Kisor V* plurality does not withstand scrutiny.

The correct view of the pro-veteran canon was explained by Judge O'Malley in her dissent. "The pro-veteran canon of construction is not meant to be an afterthought. It is a tool in the interpretive toolkit that aids in gleaning congressional intent where the plain text of the statute or regulation does not clearly answer the question at hand." *Kisor V*, 995 F.3d at

1366. Judge O'Malley recognized that "there are certain rules courts may apply when all efforts to figure out the meaning of a statute or regulation leave courts to guess as to what Congress intended." *Id.* at 1372. However, she correctly observed that these "judge-made tie breakers" like the rule of constitutional avoidance are categorically different because "[t]hese do not represent rules implementing congressional intent." *Id.* As demonstrated above, the distinction recognized by Judge O'Malley is both crucial and correct.

This Court should correct the Federal Circuit's erroneous reformulation of the pro-veteran canon immediately as the unique structure of judicial review of veterans claims means that no circuit split will develop and the competing opinions in *Kisor V* flesh out the issue as fully as this Court could ever expect to see. If not corrected now, untold harm could be visited upon this nation's veterans before another opportunity arises.

CONCLUSION

The Federal Circuit plurality erred in denying en banc consideration in *Kisor v. McDonough* when it reimagined the pro-veteran canon as a tie-breaker of last resort that has no practical role in interpreting veterans benefits provisions. It is a traditional canon of interpretation that applies to the case at hand and every other veterans benefits case where the meaning of pertinent statutory or regulatory terms is debatable but may be construed in the veteran's favor. The Court should therefore reverse the Federal Circuit's ruling that a veteran with multiple periods of service is not entitled to the full 48 months of benefits allowed under 38 U.S.C. § 3695(a).

Respectfully submitted,

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