No. 22-888

IN THE

Supreme Court of the United States

JAMES R. RUDISILL,

Petitioner,

v.

DENIS R. MCDONOUGH,
SECRETARY OF VETERAN AFFAIRS,

Respondent.

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

BRIEF OF MILITARY-VETERANS ADVOCACY, INC. AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Military-Veterans Advocacy, Inc. (MVA) is a non-profit 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.

MVA has an interest in ensuring that veterans receive all benefits to which they are entitled by law, including the educational benefits at issue in this case. According to a report by the Congressional Budget Office, more than 500,000 veterans have taken advantage of the educational benefits provided in the Post-9/11 GI Bill. *Use of the Post-9/11 GI Bill by the National Guard and Reserves*, Congressional Budget Office, https://www.cbo.gov/publication/56308 (Dec. 2019). Furthermore, a study by Syracuse University showed that 53% of veterans joined the military because of the promise of educational benefits. Liann Herder, *Educational Opportunities Remain a Major Draw for New Military Recruits*, Diverse Education (Aug. 29, 2021), https://www.diverseeducation.com/military/article/15114180/educational-opportunities-remain-a-major-draw-for-new-military-recruits. MVA wants to ensure the Department

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

of Veteran Affairs' botched interpretation depriving veterans of earned educational benefits is corrected.

MVA also has an interest in ensuring that veterans' benefits statutes like the one at issue in this case are interpreted with reference to the long-standing interpretive doctrine known as the "pro-veteran canon." The court of appeals improperly disregarded the canon's role in its statutory analysis. Had it interpreted the statute at issue with Congress's pro-veteran purpose in mind, as this Court has long required, the Federal Circuit might not have gone astray in its reading of the law. MVA urges this Court not to repeat the error.

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than 80 years, this Court has been clear that veterans' benefits statutes should be construed in the beneficiaries' favor. Such 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). This pro-veteran canon recognizes the simple reality that, when Congress provides for veterans' benefits, it means to benefit veterans.

Despite its long history and straightforward nature, as Judge Reyna recognized in dissenting from the Federal Circuit's en banc ruling, "there exists a misunderstanding as to how—and when—the canon applies." Pet. App. 42a. The Federal Circuit majority, like many other courts, misunderstood the role of the canon in demoting it below other tools of statutory

interpretation. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (all "traditional tool[s] of statutory construction," including "traditional canons," must be considered in determining whether a statute is ambiguous). The majority first considered the statutory text, legislative history, surrounding provisions, and policy implications before declaring the language of 38 U.S.C. § 3327(d)(2) "unambiguous." Pet. App. 17a. But "[t]o exclude the canon from the initial—and significantly important—question on whether ambiguity exists in the law effectively bends the law to the favor of, and to the deference of, the agency." Pet. App. 43a (Reyna, J., dissenting). That puts the thumb on the opposite side of the scale from where Congress is presumed to want it.

The Federal Circuit majority's opinion suggests that the pro-veteran canon is unimportant and perhaps even non-existent. *See* Pet. App. 16a-17a ("Whatever role this canon plays in statutory interpretation, it plays no role where the language of the statute is unambiguous—the situation here."). But the canon has long served a critical role in enforcing Congress's pro-veteran purpose in the face of an executive agency (the Department of Veterans Affairs, or "VA") that has long resisted that purpose. It is essential to preserve this judicial check on an agency bent on misinterpreting the law—particularly in view of the tremendous hurdles veterans face in pursuing what are supposed to be "non-adversarial" claims.

The "practical result" of ignoring the pro-veteran canon is that "veterans like Mr. [Rudisill], even after returning home, are still fighting." *Procopio v. Wilkie*, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (O'Malley, J.,

concurring). This Court should make clear that the pro-veteran canon remains alive and well and should afford it the same analytical role as every other tool of statutory interpretation.

ARGUMENT

I. The Pro-Veteran Canon Is A Foundational Principle That Ensures That Congress's Pro-Veteran Intent Is Carried Out.

For at least as long as modern veterans' benefits have been available, this Court has recognized that the statutes providing those benefits must be interpreted with Congress's beneficent aims in mind. The courts of appeals—including the Federal Circuit, with its exclusive jurisdiction in the area of veterans' benefits—have followed suit, incorporating the canon into their analyses of veterans' benefits statutes. *Infra* § I.A. Moreover, the canon is not just firmly established in judicial decisions. As Judge Reyna recognized in dissenting from the Federal Circuit's en banc ruling, the canon reflects the broader "promise manifested in veterans' benefits laws passed by Congress since the founding of this nation." Pet. App. 38a-39a. For centuries, Congress has consistently enacted laws designed "[t]o care for him who shall have borne the battle and for his widow, and his orphan." President Abraham Lincoln, Second Inaugural Address (Apr. 10, 1865). *Infra* § I.B. The pro-veteran canon "is the lockbox that holds the promise expressed in Abraham Lincoln's words," Pet. App. 39a, and it cannot be cast aside as readily as the Federal Circuit majority declared.

A. This Court's recognition of a pro-veteran canon of construction has persisted throughout the modern era of veterans' benefits.

Acknowledging Congress's clear and well-established intent to help veterans, this Court has expressly recognized the pro-veteran canon for more than 80 years.

The Court first articulated the principle in *Boone v. Lightner* 319 U.S. 561 (1943). The *Boone* decision issued in the period between the First and Second World Wars, when this nation was modernizing and formalizing its approach to veterans' benefits. In 1930, Congress authorized the creation of the Veterans Administration—later renamed the Department of Veterans Affairs—to "consolidate and coordinate" the previously disparate agencies and bureaus responsible for "the relief and other benefits provided by law for former members of the Military and Naval Establishments of the United States." Act of July 3, 1930, § 1(a), Pub. L. No. 71-536, 46 Stat. 1016. Three years later, Congress replaced "the existing patchwork of veterans' benefits laws" with a unified statutory scheme and an authorization to the Executive to issue implementing regulations. James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 Veterans L. Rev. 135, 179 (2011); *see* Act of Mar. 20, 1933, tit. I, Pub. L. No. 73-2, 48 Stat. 8.

Despite this delegation of authority, however, Congress simultaneously made clear that the Executive Branch was not permitted to water down the

strong pro-veteran benefits provided through legislation. President Roosevelt insisted in a 1933 speech to the American Legion that "no person, because he wore a uniform, must thereafter be placed in a special class of beneficiaries over and above all other citizens." Ridgway, *supra*, at 180 (citations omitted). But Congress emphatically rejected this notion, repeatedly overriding presidential attempts to weaken the pro-veteran legislation it enacted. *See generally id.* at 179-82.

This Court concurred with the congressional preference for veterans' unique status in our society. The Court in *Boone* considered the Soldiers' and Sailors' Civil Relief Act of 1940, a federal law providing protections for active-duty service members. 319 U.S. 561, 564-65. While it ultimately rejected the servicemember's attempt to unduly delay civil litigation as among the "few cases" putting the "immunities of the Act" to "unworthy use," this Court took pains to emphasize that legislation like the Act in question "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. In doing so, this Court aligned itself with Congress in rejecting the Executive's attempt to deprive veterans of the special benefits to which they are entitled by virtue of their service and their sacrifice.

A few years later, when discussing the Selective Training and Service Act of 1940, this Court again reiterated the same pro-veteran approach to statutory construction: "This legislation is to 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). Here too, the Court rejected the veteran's claim that the statute, which guaranteed veterans reemployment without loss of seniority, further entitled him to an increase in seniority. *Id.* at 285-86. But the Court nonetheless recognized that Congress had provided for a veteran "to gain by his service for his country an advantage which the law withheld from those who stayed behind," and accordingly stressed the imperative to give each statutory provision "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Id.* at 284-85.

The Court adhered to this principle in interpreting the Vietnam Era version of employment protection for veterans. Decades after *Boone* and *Fishgold*, the Court explained that the Vietnam Era Veterans' Readjustment Assistance Act of 1974 "is to be liberally construed for the benefit of the returning veteran." *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980). And it did exactly that, deeming the steel industry's supplemental unemployment benefits plan to be a perquisite of seniority that must be afforded to returning veterans. *Id.* at 205-06.

In a pair of decisions in the 1990s, the Court again gave force to the notion that veterans' benefits statutes are entitled to a distinctly generous construction. The first of these decisions again came in the context of reemployment rights. The Court rejected an attempt to read an implicit time limitation into the statute. Even if certain surrounding statutory provisions might "unsettle[] the significance" of the relevant subsection's "drafting," the Court "would ultimately read

the provision in [the veteran]'s favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991).

The Court then expanded the canon's application beyond the reemployment rights context in *Brown v. Gardner*, 513 U.S. 115 (1994). Echoing the Executive's earlier attempts to restrict veterans' rights, VA had promulgated a regulation limiting compensation for injuries caused by the agency's medical treatment to instances of fault or negligence. *See id.* at 116-17. But the statute contained no such limitation. And the Court refused to accept the government's invitation to create ambiguity where it did not exist—while strongly suggesting that this would not even "be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor." *Id.* at 117-18.

Most recently, the Court relied on the pro-veteran canon in *Henderson v. Shinseki*, where it acknowledged Congress's long-standing solicitude for veterans and the uniquely generous nature of the veterans' benefits system. 562 U.S. 428, 440-41 (2011). Consistent with that acknowledgement, the Court reaffirmed "'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Id.* at 441 (quoting *King*, 502 U.S. at 220-21 n.9). "Particularly in light of this canon," the Court refused to attach jurisdictional consequences to the time limit for seeking judicial review under the Veterans' Judicial Review Act—a statute that was "decidedly favorable to veterans." *Id.*

The courts of appeals have followed this Court's lead in adhering to the pro-veteran canon of interpretation. Shortly after the *King* and *Gardner* decisions, for example, the Fifth Circuit cited this "canon of favorable construction" as one reason for its interpretation of a reemployment statute in the veteran's favor. *Sykes v. Columbus & Greenville Ry.*, 117 F.3d 287, 294 (5th Cir. 1997). Other circuits have done the same. *See, e.g.*, *Travers v. Fed. Express Corp.*, 8 F.4th 198, 208 n.25 (3d Cir. 2021) ("[A]ny interpretive doubt is construed in favor of the service member, under the pro-veteran canon."). And the Federal Circuit, which has exclusive jurisdiction to review both VA rulemakings and appeals from the Court of Appeals for Veterans Claims, has routinely endorsed the canon, even while it has not been consistent in how the canon should apply. *See, e.g.*, *Roby v. McDonough*, No. 2020-1088, 2021 WL 3378834, at *8 (Fed. Cir. Aug. 4, 2021) (vacating and remanding "for the Veterans Court to take into account the pro-veteran canon of construction"); *Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) ("[I]n construing veterans' benefits legislation 'interpretive doubt is to be resolved in the veteran's favor.'") (quoting *Gardner*, 513 U.S. at 118); *NOVA v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (referring to the pro-veteran canon as one of "the usual canons of statutory construction"); *Hodge v. West*, 155 F.3d 1356, 1363 (Fed. Cir. 1998) (noting "[t]his court and the Supreme Court both have long recognized" the liberal construction of veterans statutes in rejecting materiality test as "inconsistent with the underlying purposes ... of the veterans' benefits award scheme")*; Nichols v. Dep't of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993)

(requiring restoration of former chief of chaplain services after three-year active-duty tour because "the [Vietnam Era Veterans' Readjustment Assistance] Act is to be liberally construed in favor of the returning veteran").

B. The principle animating the pro-veteran canon pervades this area of law.

The principle that Congress legislates with a pro-veteran intent is not a judicial creation. On the contrary, "[t]he solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647 (1961). As this Court has noted, Congress began providing pensions to veterans "in early 1789," and it has continually done so "after every conflict in which the nation has been involved." *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 309 (1985). In the past century, since the end of World War I, Congress has consolidated and standardized these benefits, and the governing statutes have been recodified many times. *See, e.g.*, James D. Ridgway, *Recovering An Institutional Memory: The Origins of the Modern Veterans' Benefits System from 1914 to 1958*, 5 Veterans L. Rev. 1, 4 (2013) ("Ridgway, *Institutional Memory*"). But the "strongly and uniquely pro-claimant" principles reflected in the modern statutes have deep historical roots. *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see* Ridgway, *Institutional Memory* at 4, 16.

For example, there may be no more fundamental concept in the system of veterans' benefits than the principle that the veteran, not the government, receives the benefit of the doubt in a close case. Like the

pro-veteran canon, the benefit-of-the-doubt rule sets out a "unique standard of proof" that reflects our nation's singularly compassionate treatment of veterans. *Gilbert v. Derwinski*, 1 Vet. App. 49, 53 (1990). And, like the pro-veteran canon, the rule is firmly established in the law. Today this mandate exists in both statutory and regulatory form. *See* 38 U.S.C. § 5107; 38 C.F.R. § 3.102. But VA itself has recognized that the underlying policy dates "back to the post-Civil War era." 50 Fed. Reg. 34452, 34454 (Aug. 26, 1985) (citing 1899 report of the Bureau of Pensions, Medicine Division). The first-ever disability rating schedule, published after World War I, incorporated this benefit-of-the-doubt rule. *See id.* (quoting 1921 rating schedule). And the agency has consistently recognized the policy ever since in its formal regulations.

Moreover, in response to concerns that VA was not adhering to its own policy, Congress in 1988 codified the requirement that "the Secretary shall give the benefit of the doubt to the claimant" whenever "there is an approximate balance of positive and negative evidence" on any material issue. 38 U.S.C. § 5107(b); *see* Pub. L. No. 100-687, § 4061(b), 102 Stat. 4105, 4115 (1988); 134 Cong. Rec. S16632, S16659 (Senator Murkowski calling this provision "[t]he most significant of the VA practices being codified"). And when VA still was not rendering sufficiently pro-claimant decisions, Congress in 2002 strengthened the statutory benefit-of-the-doubt rule and directed courts to police the agency's compliance. 38 U.S.C. § 7261(b)(1); *see* 148 Cong. Rec. H8925, H9006 (Nov. 14, 2002) (explaining that statutory change would ensure "special emphasis" on this rule). The history of the benefit-of-the-doubt rule thus illustrates both the special

congressional solicitude that forms the basis of the pro-veteran canon, and the importance of the judiciary's continued alignment with Congress in guarding against the Executive's attempts to relegislate in this area.

II. The Pro-Veteran Canon Provides A Critical Judicial Check That Protects Deserving Veterans.

Veterans make profound sacrifices for our country; the promises made to them in exchange should be sacrosanct. Congress, recognizing these unique sacrifices, designed a system to compensate veterans and facilitate their reentry into civilian society when they return home from service. That system is meant to be non-adversarial and uniquely claimant-friendly, with VA obligated to assist veterans in obtaining the full benefits afforded them by law. But Congress's intentions have often gone unfulfilled. Veterans attempting to navigate the disability benefits system face daunting obstacles. The process is complicated, slow, and error-prone. Most veterans move through it without the aid of an attorney. The experience is even more complicated and disadvantageous for veterans with mental and physical impairments. In that context, judicial application of the pro-veteran canon helps to ensure that veterans receive their rightful benefits as Congress intended.

VA's administration of the congressional program for veterans' benefits is meant to function with a "high degree of informality and solicitude for the claimant." *Walters*, 473 U.S. at 311. Indeed, claimants are

supposed to be able to navigate this system without the aid of a lawyer; introducing lawyers into the proceedings would, this Court has observed, "be quite unlikely to further" Congress's goal of keeping the proceedings "as informal and nonadversarial as possible." *Id.* at 323-34. In theory, the agency should be acting in the veteran's interest, guiding them through the process toward an outcome that reflects the full benefits provided by the law. *See, e.g.*, 38 U.S.C. § 5103A (obligating VA to assist claimants); 38 C.F.R. § 3.103(a) (stating VA policy "to render a decision that grants every benefit that can be supported in law").

But Congress's beneficence is not reflected in the labyrinthine, adversarial VA system that exists today. David Shulkin, who served as the Secretary of Veterans Affairs from 2017-2018, candidly acknowledged this problem during his tenure. In a speech to the National Press Club, then-Secretary Shulkin opined that "[t]he system, it appears to me, puts VA in an adversarial relationship with veterans." National Press Club Luncheon With Secretary of Veterans Affairs David Shulkin, Tr. at 8 (Nov. 6, 2017), https://www.press.org/sites/default/files/20171106_shulkin.pdf; *see also, e.g.*, Stacey-Rae Simcox, *The Need for Better Medical Evidence in VA Disability Compensation Cases and the Argument for More Medical-Legal Partnerships*, 68 S.C. L. Rev. 223, 224 (2016) (noting that "the overall implementation of the [VA] system" is "not terribly efficient or effective"); Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom To Hire An Attorney*, 19 Fed. Cir. B.J. 433, 433 (2006) (describing VA's "compensation bureaucracy" as "difficult to navigate, slow, and inaccurate").

The delays in VA's processing of claims are notorious. In 2018, for example, the current Chief Judge of the Federal Circuit expressed incredulity at the fact that it took VA "an average of *773 days*" to certify a veteran's internal agency appeal—"a ministerial process that involves checking that the file is correct and complete and completing a two-page form which could take no more than a few minutes to fill out." *Martin v. O'Rourke*, 891 F.3d 1338, 1349-50 (Fed. Cir. 2018) (Moore, J., concurring).[2] Veterans hoping to obtain the benefits guaranteed them by Congress face a years- or decades-long process—and many do not live long enough to see the end of it. *See, e.g.*, Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. Rev. 277, 280-81 (2019).

Apart from the delay, veteran claimants also must navigate a complex set of substantive laws and regulations combined with intricate procedures that can daunt even experienced counsel. Indeed, "one of the most frequently cited barriers to veterans receiving—or even applying for—VA benefits is a veteran's inability to understand the system." Benjamin Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 Hamline L. Rev. 19, 45-46 (2014). The statute in this

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[2] Even today, this same simple process takes an average of 217 days—more than seven months. *See* Department of Veterans Affairs, Board of Veterans' Appeals, *Annual Report Fiscal Year (FY) 2022* at 41, https://www.bva.va.gov/docs/Chairmans_Annual_Rpts/bva2022ar.pdf ("2022 Board Report").

case provides a prime example. Consider a veteran who not only must figure out where within the 32 subsections of 38 U.S.C. § 3327 they should look to understand their election rights, but then must parse the words of the provision that required an en banc federal appeals court to try to decipher. Worse still, that veteran is then presented with a form requiring him or her to "acknowledge that [they] understand" the following language:

> If electing chapter 33 in lieu of chapter 30, my months of entitlement under chapter 33 will be limited to the number of months of entitlement remaining under chapter 30 on the effective date of my election. However, if I completely exhaust my entitlement under chapter 30 before the effective date of my chapter 33 election, I may receive up to 12 additional months of benefits under chapter 33.

Fed. Cir. J.A. 585. Respectfully, it is not credible to suggest that a claimant with no legal expertise or representation could understand the implications of signing that acknowledgement.

Nor is this case an outlier. VA's unfortunately named "Form 21-526EZ" presents claimants seeking any one of twelve different categories of disability benefits with seven pages of information presented in single-spaced, nine-point font. *See Forsythe v. McDonough*, No. 2022-1610, 2023 WL 2638319, at *5 (Fed. Cir. Mar. 24, 2023) (Mayer, J., dissenting). And, if the veteran receives an adverse decision on their claim, they are then confronted with a choice between three paths set out in the so-called "Appeals

Modernization Act": a "higher-level review" by a "more senior claims adjudicator"; a "supplemental claim" that allows for the submission of new evidence; and an "appeal" to the Board of Veterans' Appeals—which then leads to three additional sub-choices of "direct review," "evidence submission," or "hearing." Veterans Benefits Administration, Appeals Modernization, https://benefits.va.gov/benefits/appeals.asp (last visited Aug. 15, 2023).

Many veterans must navigate these complex choices alone. Nearly all veterans seeking disability benefits lack legal representation at the outset of the process, in part because attorneys are statutorily barred from charging for legal services until after the VA regional office's initial decision on the veteran's claim. *See* 38 U.S.C. § 5904(c)(1); Steven Reiss & Matthew Tenner, *Effects of Representation by Attorneys in Cases Before VA: The "New Paternalism,"* 1 Veterans L. Rev. 2, 3 & n.10 (2009). Even before the Board of Veterans Appeals, less than a quarter of claimants are represented by legal counsel. *See* 2022 Board Report, *supra*, at 35.

The challenges are particularly acute for veterans who struggle with psychological or cognitive impairments. A study by The Washington Post and the Kaiser Family Foundation found that "more than half of the 2.6 million Americans dispatched to fight the wars in Iraq and Afghanistan struggle with physical or mental health problems stemming from their service." Rajiv Chandrasekaren, *A Legacy of Pain and Pride*, The Washington Post (Mar. 29, 2014), https://www.washingtonpost.com/sf/national/2014/03/29/a-legacy-of-pride-and-pain/. The resulting report

cites veterans like Nicholas Johnson, who spent a year in Iraq serving as a former specialist in the Arkansas Army National Guard. During his deployment, Mr. Johnson's "platoon was ordered to fill roadside bomb craters, which required him to jackhammer asphalt while wearing 50 pounds of body armor and gear. He returned home with a fractured vertebra, three fused disks in his back, ringing ears and debilitating post-traumatic stress because of the frequent carnage he witnessed on Baghdad's roads." *Id.* But Mr. Johnson and his fellow veterans must not only overcome symptoms such as "lack of concentration" to parse the inscrutable Form 21-526EZ. Bryan A. Liang & Mark S. Boyd, *PTSD in Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform*, 22 Stan. L. & Policy Rev. 177, 178. They must also file additional paperwork describing the "Stressful Incidents" they experienced during service, including identifying "persons who were killed or injured" during those incidents. Department of Veterans Affairs, Form 21-0781, https://www.vba.va.gov/pubs/forms/VBA-21-0781ARE.PDF; *see* Liang & Boyd, *supra,* at 178 n.6 (citing "desire to avoid recurrence of events" and "avoidance of activities … that arouse recollections of the trauma" as symptoms of post-traumatic stress). Those veterans able to relive their disabling trauma in order to submit the requisite forms still face years of pursuing their benefits claims through VA's complicated procedural scheme.

If VA were abiding by its statutory duties—such as the duty to assist and to give veterans the benefit of the doubt—the complexity and lack of representation might be tolerable. But the agency instead is

routinely denying veterans both the rights and benefits to which they are entitled under the law. This is clear, for example, from the rate at which judicial review results in vacatur or reversal of a ruling adverse to the veteran. In 2022, for example, the Court of Appeals for Veterans Claims reversed or remanded, in whole or in part, in more than 84% of cases. *See* U.S. Court of Appeals for Veterans Claims, Fiscal Year 2022 Annual Report at 3, http://www.uscourts.cavc.gov/documents/FY2022AnnualReport.pdf ("2022 Veterans Court Report").[3]

Equally telling is the agency's track record under the Equal Access to Justice Act, which provides for an award of attorneys' fees to a prevailing party if the government's litigating position was not "substantially justified." 28 U.S.C. § 2412(d)(1)(A); *see Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (requiring government's position to be "justified to a degree that could satisfy a reasonable person"). In Fiscal Year 2022, the Veterans Court disposed of 8164 appeals, and it granted EAJA fees in 6522 appeals. *See* 2022 Veterans Court Report, *supra*, at 3-4. That means the court deemed the government's position not substantially justified in a remarkable 79% of cases. Nor was 2022 an outlier. On the contrary, more than a decade ago, this Court remarked on the same problem:

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[3] The Board of Veterans Appeals has attempted to defend this statistic by observing that many remands are for the purpose of requiring the Board to provide reasons and bases to support a decision. 2022 Board Report, *supra*, at 14. Astonishingly, the Board deems this "not legal error," *id.* at 17, notwithstanding its statutory obligation to provide "the reasons or bases for [its] findings and conclusions," 38 U.S.C. § 7104(d)(1).

> CHIEF JUSTICE ROBERTS: 70 percent of the time [in veterans cases] the government's position is substantially unjustified?
>
> [. . .]
>
> MR. YANG: It was, I believe, in the order of either 50 or maybe slightly more than 50 percent. It might be 60. But the number is substantial that you get a reversal, and in almost all of those cases, EAJA—
>
> CHIEF JUSTICE ROBERTS: Well, that's really startling, isn't it? In litigating with veterans, the government more often than not takes a position that is substantially unjustified?
>
> MR. YANG: It is an unfortunate number, Your Honor. And it is—it's accurate.

Oral Arg. Tr. 51-52, *Astrue v. Ratliff*, No. 08-1322 (Feb. 22, 2010).

In the thirteen years since *Ratliff*, VA's track record in EAJA cases has only become more "startling." As discussed above, Congress intended the VA system to provide a simple and non-adversarial process for veterans to pursue their statutory benefits. In reality, VA is not only routinely denying veterans' claims for benefits—it is frequently doing so without a legal basis that would satisfy a reasonable person.

In these circumstances, preserving the long-standing pro-veteran canon of statutory interpretation is especially crucial. Just as it did a century ago,

the administrative agency charged with assisting veterans in obtaining their statutory benefits is instead putting obstacles in their path. And, just as it did a century ago, this Court should make clear that the judiciary will enforce Congress's pro-veteran intent in interpreting the statutes that govern veterans' benefits.

CONCLUSION

MVA respectfully requests that the Court reverse the judgment of the Federal Circuit and make clear that the pro-veteran canon remains an important principle in interpreting veterans' benefits statutes.

Respectfully submitted,

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