No. 23-861

IN THE

Supreme Court of the United States

NICK FELICIANO,

Petitioner,

v.

DEPARTMENT OF TRANSPORTATION,

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 servicemembers and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains servicemembers and veterans concerning rights and benefits, represents veterans contesting improper benefits denials, and advocates to protect and expand servicemembers' and veterans' rights and benefits.

MVA has an interest in ensuring that veterans receive all benefits to which they are legally entitled, including the differential-pay benefit at issue in this case. MVA wants to ensure the Merit Systems Protection Board's and the Federal Circuit's atextual and punitive statutory construction that deprives servicemembers of their full federal salary when they are called to active duty is reversed.

MVA also has an interest in ensuring that veterans' benefits statutes are interpreted with reference to the long-standing interpretive doctrine known as the "pro-veteran canon." The court of appeals utterly neglected the canon when analyzing the differential-pay statute. *Feliciano v. Dep't of Transp.*, No. 22-1219, 2023 WL 3449138 (Fed. Cir. May 15, 2023); *see Adams v. Dep't of Homeland Sec.*, 3 F.4th 1375 (Fed. Cir. 2021). Had it interpreted the statute with Congress's pro-veteran purpose in mind, as this Court has long

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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 curiae and their counsel made a monetary contribution intended to fund the brief's preparation or submission.

required, the Federal Circuit would not have gone astray in its reading of the law. MVA urges this Court not to repeat that error.

INTRODUCTION AND SUMMARY OF ARGUMENT

The United States has relied throughout its history on citizen-soldiers to defend itself. As a result, Congress has long legislated "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 "solicitude is plainly reflected in … laws that 'place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions.'" *Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). This Court recognizes a judicial corollary to this congressional solicitude—the "venerable" pro-veteran canon. *George v. McDonough*, 596 U.S. 740, 756 (2022) (Sotomayor, J., dissenting). The Court recently reaffirmed the canon's simple principle—when Congress provides for veterans' benefits, it means to benefit veterans. *Rudisill v. McDonough*, 601 U.S. 294, 314 (2024) ("If the statute were ambiguous, the pro-veteran canon would favor Rudisill.")

At the same time, however, the Federal Circuit has neglected or even repudiated the pro-veteran canon. *See, e.g.*, *Rudisill v. McDonough*, 55 F.4th 879, 887 (Fed. Cir. 2022) (en banc) ("Whatever role this canon plays in statutory interpretation, it plays no role where the language of the statute is unambiguous."); *Buffington v. McDonough*, 7 F.4th 1361, 1366 n.5 (Fed. Cir. 2021) ("Because we hold the statutory

scheme is silent, we need not resolve the parties' dispute regarding the pro-veteran canon."); *see Kisor v. McDonough*, 995 F.3d 1347, 1355 (Fed. Cir. 2021) ("[W]e should decline to find ambiguity for purposes of the pro-veteran canon merely because a veteran-friendly construction is possible.") (Prost, C.J., concurring in denial of rehearing en banc). In this case, the Federal Circuit eviscerated an unambiguous statute designed to make whole servicemembers who leave their civilian federal jobs to defend the nation. Pet. Br. 14-16. In imposing an interpretation divorced from the statutory text and without recourse to the pro-veteran canon, it delivered a result that improperly penalizes servicemembers.

The pro-veteran canon, properly applied, ensures that congressional text and intent are honored. Had the Federal Circuit interpreted the differential-pay statute through the prism of the pro-veteran canon, it would have understood that a more generous reading was appropriate—not "implausible." *Compare* Br. of Members of Congress as Amici Curiae in Support of Petitioner 3 ("[B]oth contemporaneous statements by the law's authors and other legislative materials confirm that Congress did not intend to limit the application of the law by the kind of service the reservists rendered or the provision of law under which the reservists were called to active duty" during war or national emergency), *with Adams*, 3 F.4th at 1380 ("We find it implausible that Congress intended for the phrase 'any other provision of law during a war or national emergency,' to necessarily include § 12301(d) voluntary duty that was unconnected to the emergency at hand."). The court would not have adopted

an atextual interpretation that risks financial hardship for nearly 200,000 reservists who serve the federal government as both civilians and servicemembers. *Adams*, 3 F.4th at 1380; Pet. Br. 2. This Court should reverse the Federal Circuit's anti-veteran course and honor Congress's clear promise to make whole the citizen-soldiers who defend the nation during times of conflict and crisis.

ARGUMENT

I. The Federal Circuit's Statutory Interpretation Has Gone Astray.

The Federal Circuit fundamentally misunderstands the differential-pay statute, 5 U.S.C. § 5538.

Beginning in 2021, it ignored the plain language of the statute, instead rewriting it to promote the court's own policy preferences. Where § 5538(a) refers to reservists called up under "a provision of law referred to in section 101(a)(13)(B)," the court has added a judicial gloss requiring personnel be "directly called to serve in a contingency operation." *Infra* § I.A. Rather than correct its atextual interpretation, the court here doubled down on its prejudicial approach. *Infra* § I.B. Not only does the court's interpretation contradict the statutory language, it also contradicts the grateful benevolence that infuses Congress's veterans legislation. *Infra* § I.C. Given these statutory and beneficial imperatives, the Court should reverse the Federal Circuit and restore the statute's plain meaning.

A. The Federal Circuit first misconstrued the differential-pay statute in 2021.

To "'alleviate the financial burdens created when federal employees are called to active duty,'" Congress in 2009 enacted the Reservists Pay Security Act, codified at 5 U.S.C. § 5538. Br. of Members of Congress as Amici Curiae in Support of Petitioner 6 (quoting S. Rep. No. 108-409, at 2 (2004). The Act provides that:

> An employee who is absent from a position of employment with the Federal Government … to perform active duty in the uniformed services pursuant to a call or order to active duty under … a provision of law referred to in section 101(a)(13)(B) of title 10 shall be entitled [to differential pay].

5 U.S.C. § 5538(a). In turn, 10 U.S.C. § 101(a)(13)(B) refers to 10 U.S.C. §§ 688, 12301(a), 12302, 12304, 12304a, 12305, or 12406, 10 U.S.C. Ch. 13, 14 U.S.C. § 3713, "or any other provision of law during a war or during a national emergency declared by the President or Congress." 10 U.S.C. § 101(a)(13)(B). In short, a federal employee "call[ed] or order[ed] to … active duty" under "any … provision of law during a war or during a national emergency declared by the President" shall receive differential pay.

Prior to *Adams*, courts and administrative boards recognized that 5 U.S.C. § 5538 authorized differential pay for servicemembers mobilized pursuant to 10 U.S.C. § 12301(d) during a national emergency declared by the President, even though that section was not enumerated in § 101(a)(13)(B). *See, e.g., Downey*

v. United States, 147 Fed. Cl. 171, 178 (2020) (plaintiff alleged a "plausible claim under Section 5538" based on mobilization pursuant to 10 U.S.C. § 12301(d) during a presidentially-declared national emergency); *Marquiz v. Dep't of Defense*, No. SF-4324-15-0099-I-1, 2015 WL 1187022 (M.S.P.B. Mar. 12, 2015) ("Section 1201(d) [sic] is not one of the laws listed by number in § 101(a)(13)(B), but it does constitute 'any *other* provision of law … during a national emergency declared by the President"); *Marchand v. Gov't Accountability Office*, No. 12-GA-05 (VT), 2012 WL 8020671 (Cong. Acc. Office of Compl. Dec. 27, 2012) (§ 5538 "explicitly and unambiguously entitles" reservists mobilized under 10 U.S.C. § 12301(d) to differential pay). These courts and boards recognized the broad catchall provision reached unenumerated provisions like § 12301(d) during war or national emergency.

Despite this background, the Federal Circuit first misconstrued 5 U.S.C. § 5538 in *Adams v. Department of Homeland Security*, 3 F.4th 1375 (Fed. Cir. 2021). Mr. Adams, a Customs and Border Patrol employee, served in the Arizona Air National Guard. *Id.* at 1377. On two occasions in 2018, he was activated under 10 U.S.C. § 12301(d). *Id.* The Customs and Border Patrol denied Mr. Adams differential pay for these active periods, and the Merit Systems Protection Board affirmed. *Id.*

The Federal Circuit affirmed the denial of differential pay. The court first acknowledged the text of 5 U.S.C. § 5538(a). *Id.* at 1378. But the court's interpretation quickly went astray. The court reasoned that the provisions of law referenced in § 101(a)(13)(B) were not just incorporated by reference into § 5538

but "define what qualifies as a 'contingency operation'" eligible for differential pay under the statute. *Id.* In the court's estimation, Mr. Adams therefore was only entitled to differential pay if he was "directly called to serve in a contingency operation." *Id.* at 1379. Concluding that Mr. Adams' service did not "qualif[y] as an active duty contingency operation," the court denied him differential pay. *Id.* at 1380-81.

This interpretation effectively rewrote the statute. Again, § 5538 refers only to "a call or order to active duty under … a provision of law referred to in section 101(a)(13)(B)." 5 U.S.C. § 5538(a). In turn, § 101(a)(13)(B) enumerates certain provisions governing reserve activations: 10 U.S.C. §§ 251-255 (during insurrections), 688 (retirees), 12301(a) (involuntary activation during war or national emergency), 12302 (Ready Reserve), 12304 (for duty other than during war or national emergency), 12304a (for major disaster or emergency response), 12305 (suspending certain personnel actions) and 12406 (federalizing National Guardsmen), and 14 U.S.C. § 3713 (Coast Guard augmentation). 10 U.S.C. § 101(a)(13)(B). But § 101(a)(13)(B) doesn't stop there—it includes a sweeping catchall provision: "or any other provision of law during a war or during a national emergency declared by the President or Congress."

The Federal Circuit refused to implement the catchall provision. Instead of awarding differential pay to an employee called to active duty "under a provision of law referred to in section 101(a)(13)(B)," the Federal Circuit required that the employee be called up to serve "directly" in a statutorily defined "contin-

gency operation." *Adams*, 3 F.4th at 1378-79. This interpretation requires "an uncertain fact-intensive *post hoc* review of each reservist's individual service record" to assess whether it "bear[s] a sufficiently close connection to a national emergency" rather than the straightforward "provision-by-provision inquiry" the statutory text demands. Pet. Br. 17-18; *see id.* 27-28. In defense of its de facto redrafting, the court deemed it "implausible that Congress intended for the phrase 'any other provision of law during a war or national emergency'" to mean "§ 12301(d) voluntary duty that was unconnected to the emergency at hand"—even though that is plainly the most natural reading of the statute.[2] *Adams*, 3 F.4th at 1380.

In other words, although Congress used the broad phrase "any other provision of law during a war or national emergency," the Federal Circuit concluded that Congress didn't mean what it said.

B. The Federal Circuit doubled down on its mistaken interpretation here.

Explaining that it was "bound by *Adams*," the Federal Circuit repeated its error in this case.

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[2] The only substantive difference between the enumerated § 12301(a) and the unenumerated § 12301(d) is that the former authorizes involuntary activation and the latter voluntary activation. 10 U.S.C. § 12301(a), (d). It makes even less sense to presume Congress would want to punish those who volunteer during a war or national emergency while rewarding those who do not.

1. Mr. Feliciano is denied differential pay.

Mr. Feliciano, an air traffic controller, served in the Coast Guard Reserve. Pet. App. 2a. The Department of Defense activated him from July 2012 to July 2013 pursuant to 10 U.S.C. § 12302 and from July 2013 to September 2014 pursuant to 10 U.S.C. § 12301(d).[3] *Id.* Mr. Feliciano's federal employer denied him differential pay for his service between October 2012 and September 2014. *Id.* The Merit Systems Protection Board affirmed. *Id.*

Pointing to *Adams*, the Federal Circuit quickly disposed of Mr. Feliciano's appeal. It held that eligibility for differential pay depends on the federal employee's service "'pursuant to a call to active duty that meets the statutory definition of contingency operation.'" Pet App. 3a (quoting *Adams*, 3 F.4th at 1378). And if the employee is activated under the catchall provision in 10 U.S.C. § 101(a)(13)(B) rather than one of the enumerated statutes, the court added the requirement that "'there must be a connection between the voluntary military service and the declared national emergency'"—a direct connection at that. Pet. App. 4a (quoting *Nordby v. Soc. Sec. Admin.*, 67 F.4th 1170, 1173 (Fed. Cir. 2023)). Because he did not provide evidence that he satisfied this atextual requirement, the court deemed Mr. Feliciano ineligible for differential pay. *Id.*

[3] Mr. Feliciano's orders called him "to support a Department of Defense contingency operation." 2023 WL 3449138, at *1.

2. 5 U.S.C. § 5538(a) plainly incorporates only 10 U.S.C. § 101(a)(13)(B)'s list of provisions—not its definition of "contingency operations."

The statutory language is unambiguous—5 U.S.C. § 5538(a) entitles a federal employee to differential pay if he is activated pursuant to "a provision of law referred to in [10 U.S.C.] § 101(a)(13)(B)." In addition to certain enumerated provisions, § 101(a)(13)(B) refers to "any other provision of law during a war or during a national emergency declared by the President or Congress." The Court has long recognized that "any" is an "all-encompassing phrase." *Ali v. Fed. Bureau of Prisons*, 552 U.S. 214, 221 (2008) *see United States v. Gonzales*, 520 U.S. 1, 5 (1997) ("[r]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind.'"). This language dictates a simple statutory inquiry: Was the employee activated pursuant to a provision of law during a national emergency declared by the President or by Congress?

Rather than implement this unambiguous statutory text, the Federal Circuit "replace[d] the actual text with speculation[s] as to Congress' intent." *Magwood v. Patterson*, 561 U.S. 320, 334 (2010); *see Oklahoma v. Castro-Huerta*, 597 U.S. 629, 642 (2022) ("the text of a law controls over purported legislative intentions unmoored from any statutory text."); *Connecticut Nat'l Bank v. Germain*, 503 U.S. 249, 253-54 (1992) ("courts must presume that a legislature says in a statute what it means and means in a statute what is says there"). The Federal Circuit mistook a

simple incorporation by reference of statutory provisions for a broader intent to engraft onto § 5538 a complex definition of "contingency operation." This unnecessarily complicates the analysis, "[r]equiring a crystal ball to determine the legality of differential pay on a case-by-case basis." Pet. Br. 29. Finally, the court compounded its error by speculating about the plausibility of Congress's intent.

Under the simpler (and more appropriate) textual inquiry, Mr. Feliciano is entitled to differential pay. He was activated pursuant to 10 U.S.C. §§ 12301(d) and 12302. Section 101(a)(13)(B) enumerates § 12302, and § 12301(d) falls within the "any other provision of law" rubric. Mr. Feliciano indisputably activated during a national emergency declared by the President. Proclamation No. 7463, Declaration of National Emergency by Reason of Certain Terrorist Attacks, 66 Fed. Reg. 48199 (Sept. 14, 2001), renewed annually, most recently 88 Fed. Reg. 62433 (Sept. 7, 2023); *see* Authorization for Use of Military Force, Pub. L. No. 107-40, 115 Stat. 224 (2001). Because Mr. Feliciano was activated pursuant to any provision of law during a presidentially declared national emergency, no further analysis is required to award him differential pay.

This Court should therefore overturn *Adams* and its progeny.

3. The Federal Circuit's interpretation also violates the spirit of the law.

Punishing citizen-soldiers for taking up the burdens of national defense contradicts not only the differential-pay statute's text but also the spirit of grateful benevolence that has always infused veterans law. The First Session of the First Congress in 1789 guaranteed federal payment of state pensions granted to those wounded and disabled during the Revolutionary War. Act of September 29, 1789, ch. 24, § 1, 1 Stat. 95. Such laws have always sought to ease the adversities that attend military service.

Congress's earliest efforts to ameliorate the hardships of service focused on conflict-by-conflict grants of limited benefits. *See, e.g.*, Act of July 14, 1862, ch. 166, § 1, 12 Stat. 566 (pensions for disabled Civil War veterans). During the Depression, facing broad disenchantment over the treatment of World War I veterans, Congress consolidated and standardized these benefits, and the governing statutes have been re-codified many times. Economy Act of 1933, Pub. L. No. 73-2, § 1(a), 48 Stat. 8; *see* 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). The Attorney General's Committee on Administrative Procedure captured the new spirit in veterans' benefits when it concluded that "[t]he nature of the work of the Veterans' Administration as a benefactory agency justifies considerable leniency" toward their adjudication. 7 U.S. Dep't of Justice, Rep. of the Atty. Gen's. Comm. on Admin. Proc. at 129 (1941).

In this modern era, Congress and VA established a uniquely pro-claimant system. They codified numerous presumptions to facilitate the award of benefits. *See, e.g.*, 38 U.S.C. §§ 1111, 1118 (presumptions of soundness); 38 C.F.R. §§ 3.309, 3.317 (presumptions of service-connection). Congress imposed a duty to assist veterans to perfect their claims, and VA obligated itself to grant "every benefit that can be supported in law." 38 U.S.C. § 5103A (duty to assist); 38 C.F.R. § 3.103(a) (duty to maximize benefits). VA grants them the benefit of the doubt in close cases. 38 U.S.C. § 5107; 38 C.F.R. § 3.102. Indeed, 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). Congress also awarded generous benefits to help servicemembers transition to civilian life and to incentivize service in the all-volunteer era. *See, e.g.*, Servicemen's Readjustment Act of 1944, Pub. L. No. 78-346, 58 Stat. 284 (the original "GI Bill") (providing for veterans' education, unemployment, and housing); 38 U.S.C. § 3301 *et seq.* ("Post-9/11 GI Bill"); 38 U.S.C. § 1101 *et seq.* (service-connected disability compensation); 38 U.S.C. § 1301 *et seq.* (service-connected death benefits).

The differential pay statute serves the same beneficial purpose. When reservists are activated, they may "experience a reduction in pay because their military pay and allowances are less than their basic federal salary." S. Rep. No. 108-409, at 2 (describing near-identical precursor bill); *see* Pet. Br. 26-28. By guaranteeing federal employees the difference between their higher civilian and lower military salaries, Congress "minimize[s] the disruption to the lives

of persons performing service in the uniformed services." 38 U.S.C. § 4301 (expression of congressional purpose in enacting Uniformed Services Employment and Reemployment Rights Act of 1994).

Given these clear remedial goals, the Federal Circuit's interpretation of 5 U.S.C. § 5538(a) violates both the statute's express language and its guiding purpose.

II. The Federal Circuit's Misinterpretation Exemplifies Its Recent Substitution Of Policy Preference For Legislative Text.

The Federal Circuit's misinterpretation of 5 U.S.C. § 5538 unfortunately illustrates how it has recently arrogated Congress's role, ignoring both statutory text and the pro-veteran canon. *See Loper Bright Enters. v. Raimondo*, 144 S. Ct. 2244, 2268 (2024) (courts must not "construe the law … with an eye to policy preferences"). As a result, it has produced a spectrum of tortured, anti-veteran opinions—involving, for example, educational benefits (*infra* § II.A.), disability benefits (*infra* §§ II.B.-II.C.), and class actions (*infra* § II.D.).

A. Educational benefits in *Rudisill v. McDonough*.

This Court recently reversed a Federal Circuit decision erroneously capping a veteran's educational benefits below the statutorily mandated 48 months. *Rudisill,* 601 U.S. 294.

Mr. Rudisill served three active-duty tours in the Army between 2000 and 2011. 55 F.4th at 883; *id.* at 888 (Newman, J., dissenting). He therefore earned benefits under both the Montgomery and the Post-9/11 GI Bills. *Id.* at 883; *id.* at 888 (Newman, J., dissenting). He used 25 months and 14 days of Montgomery benefits but sought to take advantage of his remaining benefits under the more generous Post-9/11 bill. *Id.* Veterans with qualifying periods of service under both bills were authorized up to 48 months of benefits. *Id.* at 883. In 2011, however, VA deemed Mr. Rudisill eligible for only 10 months and 16 days of Post-9/11 benefits—that is, a total of only 36 months of benefits under both bills. *Id.*

Mr. Rudisill appealed. *Id.* The en banc Federal Circuit agreed with VA. Focusing on a single provision, 38 U.S.C. § 3327(d)(2), to the exclusion of other relevant text and context, the court imported into the statute a punitive exhaustion requirement—a veteran qualified under the Montgomery and Post-9/11 GI Bills must exhaust or waive his remaining Montgomery benefits before using his Post-9/11 benefits. *Id.* at 886. Despite earning Post-9/11 benefits through distinct periods of wartime service, *id.* at 899 (Reyna, J., dissenting), the court ruled Mr. Rudisill was entitled only to 12 months of the more generous Post-9/11 GI Bill benefits. Dismissing "[w]hatever role this [pro-veteran] canon plays," the Federal Circuit interpreted a veterans' benefit statute to take away benefits Mr. Rudisill "ha[d] already earned … through his significant service." *Id.* The court ignored the pro-veteran canon and contravened its motivating principle by harming the veteran.

This Court reversed, concluding that the Federal Circuit's ruling ignored the "plain text" of the statutes at issue. *Rudisill*, 601 U.S. at 307, 312. Except for certain limitations on simultaneously receiving Montgomery and Post-9/11 GI Bill benefits, VA "shall pay" earned educational benefits up to 48 months without offset. *Id.* at 302. Although the Court ultimately "resolve[d] this case based on statutory text alone," it reaffirmed that had it found statutory ambiguity, "the pro-veteran canon would favor [the petitioner]." *Id.* at 314.

B. Disability benefits in *Buffington v. McDonough*.

In *Buffington v. McDonough*, 7 F.4th 1361 (Fed. Cir. 2021), the Federal Circuit similarly departed from "bedrock principles of statutory interpretation" to affirm VA's withholding of accrued benefits. *Buffington v. McDonough*, 143 S. Ct. 14, 15 (2022) (Gorsuch, J., dissenting from denial of certiorari).

VA awarded Mr. Buffington disability benefits in 2000 after he separated from the Air Force. 7 F.4th at 1363. In 2003, he returned temporarily to active duty. *Id.* VA correctly suspended his disability compensation while he received active-duty pay. *Id.* When he left active duty in 2005, VA did not restart his disability payments. *Id.* In 2009, Mr. Buffington petitioned VA to restart his disability benefits, which it did—retroactive only to 2008. *Id.* Mr. Buffington challenged VA's limited payment as inconsistent with the governing statute, 38 U.S.C. § 5304(c).

The Federal Circuit affirmed. Section 5304(c) states that "compensation ... pa[id] on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." 38 U.S.C. § 5304(c). Without deciding whether the statute was ambiguous, the court held that "Congress left a gap in the statutory scheme"—"when or under what conditions compensation recommences once a disabled veteran leaves active service"—that VA could fill. 7 F.4th at 1364-65. According to the Federal Circuit, this gap rendered the pro-veteran canon irrelevant. *Id.* at 1366 n.5. VA's rule requiring disabled veterans to reapply for benefits after a period of active duty was "a reasonable gap-filling regulation" warranting deference under the now-discredited *Chevron* doctrine. *Id.* at 1367; *see Loper Bright*, 144 S. Ct. at 2273 ("*Chevron* is overruled.").

Judge O'Malley dissented. She explained that the majority failed to "apply traditional tools of statutory construction" to evaluate ambiguity, instead "fast-track[ing] past this step" to identify a purported statutory gap. *Id.* at 1368. Noting § 5304(c) creates "an exception to the continuous payment obligation," she explained that the statute makes clear that "Congress only wanted a veteran's benefits to discontinue for '*any period* for which such person receives active service pay.'" *Id.* at 1369 (italics original). Outside that window, Mr. Buffington "remain[ed] entitled to the benefits for which he originally qualified." *Id.* The majority contradicted the statute's plain meaning by concluding "that 'any period' encompasses more than just the time period in which a veteran receives active service pay." *Id.* at 1372.

C. Statutory notice in *Forsythe v. McDonough*.

In *Forsythe v. McDonough*, No. 22-1610, 2023 WL 2638319 (Fed. Cir. Mar. 24, 2023), the Federal Circuit again misconstrued a disability benefits statute and abdicated responsibility for enforcing a valid regulation.

In 1988, during a three-year Navy tour, Mr. Forsythe injured his shoulder. *Id.* at *1. In the years following his service, Mr. Forsythe "suffered persistent shoulder problems." Pet. 11, *Forsythe v. McDonough*, No. 23-779 (U.S. Jan. 16, 2024). In March 2019, Mr. Forsythe sought compensation for his shoulder disability, supporting his claim with an opinion by his private physician deeming his disability "more likely than not … related to his military service." *Id.* After receiving his claim, VA did not notify Mr. Forsythe that he could or should submit additional supporting evidence, such as treatment records or lay statements. A VA medical examiner then disagreed with Mr. Forsythe's doctor, and VA denied Mr. Forsythe's claim, based on the lack of such evidence. *Id.* at 12-13.

On appeal, Mr. Forsythe challenged VA's notice pursuant to 38 U.S.C. § 5103(a), arguing that both the statute and its implementing regulation, 38 C.F.R. § 3.159(b)(1), required the agency to provide an evidentiary notice after receiving a veteran's claim. 2023 WL 2638319, at *2. VA violated these provisions "by providing notice on the claim form itself, rather than waiting until after [Forsythe] had submitted his claim." *Id.* The Federal Circuit misconstrued § 5103(a) to permit pre-claim notice even though the

statute expressly refers to "notice of any information … not previously provided to" VA—which contemplates notice after the veteran has provided some information. *Id.* The court compounded its error by allowing VA to ignore its regulation explicitly requiring notice be sent after "VA receives a complete or substantially complete … claim." *Id.* at *3. Inexplicably, the court excused VA from enforcing its own regulation because it thought the operative regulation "outdated." *Id.*

D. A class-action vehicle in *Skaar v. McDonough*.

Statutory misinterpretation also led the court to deny veterans a meaningful class-action vehicle. In *Skaar v. McDonough*, 48 F.4th 1323 (Fed. Cir. 2022), *cert. denied*, 143 S. Ct. 2637 (2023), the court vacated a class certification order that would have accelerated relief to aging veterans intentionally exposed to nuclear radiation. Disregarding the lower court's authority under 38 U.S.C. § 7252 and the All Writs Act, the court imposed an atextual jurisdictional exhaustion requirement on every class member rather than only the named class representative.

Mr. Skaar served in the Air Force. In 1966, he and 1,400 other servicemembers decontaminated the site of a nuclear accident in Palomares, Spain. *Id.* at 1326. Although the Air Force initially monitored them, in 1967 it concluded their health "was not in 'jeopardy.'" *Id.* In 1998, however, Mr. Skaar was diagnosed with leukopenia. *Id.* His doctor concluded Mr. Skaar's exposure to the ionizing radiation in Spain was to

blame. *Id.* VA denied his claim for disability compensation in 2000. *Id.*

In 2011, Mr. Skaar moved to reopen his claim. *Id.* Relying on an Air Force radiation dose-estimate methodology, VA again denied his claim. *Id.* While Mr. Skaar's appeal of this denial was pending, "the Air Force discovered [it] was underestimating doses." *Id.* at 1327. In 2016, VA obtained a new dose estimate opinion for Mr. Skaar but again denied the claim. *Id.* Even after Mr. Skaar produced another medical report connecting his leukopenia to his radiation exposure, the Board affirmed VA's denial of his claim. *Id.*

Before the Veterans Court, Mr. Skaar challenged the Board's reliance on "unsound dose estimates." *Id.* He sought to certify a class of similarly situated veterans. The Veterans Court agreed, certifying a class consisting of Palomares veterans who: (1) had appealed or could still timely appeal their claim denial; (2) had a still-pending claim VA had not yet decided; and (3) had developed a radiation-related condition but had not yet filed a VA claim. *Id.* at 1328. A year later, the Veterans Court concluded the Board inadequately justified its reliance on the Air Force's dose-estimated methodology and remanded the case. *Id.* at 1329. VA appealed. *Id.*

The Federal Circuit reversed, concluding that every veteran class member must individually satisfy the jurisdictional requirements of filing a claim and receiving a Board decision. *Id.* at 1333. It therefore limited the class to those few veterans whose claims the Board had decided. *Id.* The court neglected Mr. Skaar's argument that the All Writs Act authorized

the Veterans Court to aggregate claims and distinguished district court jurisdiction over agency class actions—which may include unexhausted claims—from the Veterans Court's jurisdiction. *Id.* at 1333-34. Instead of providing efficient relief to aging veterans, the Federal Circuit acquiesced in VA's protracted claims process that disabled veterans sadly mock as "delay, deny, wait till they die." Hugh B. McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 S.M.U. L. Rev. 277, 277 (2019).[4]

These examples illustrate the adverse effects of the Federal Circuit's atextual approach to veterans-related legislation and its disregard of the pro-veteran canon. The Court should correct the Federal Circuit's latest error before this parade of horribles grows even longer.

III. The Pro-Veteran Canon Would Produce Federal Circuit Decisions More Consistent With Congress's Text.

Given the pro-veteran canon's heritage, the Federal Circuit's refusal to apply it correctly and routinely frustrates the implementation of duly enacted law. This Court has long recognized the role this canon plays in correctly interpreting veterans-related legislation—often in the employment context at issue

[4] In 2021, there were only 300-400 surviving Palomares veterans. Dave Collins, *Bill would give US vets of 1966 Spain bomb accident benefits*, AP News (Apr. 15, 2021), https://tinyurl.com/5xx6976e.

here. *Infra* § III.A. The court of appeals would more faithfully interpret federal statutes if it incorporated the pro-veteran canon into its analysis. *Infra* § III.B.

A. This Court has long recognized a pro-veteran canon of construction.

Acknowledging Congress's well-established intent to help veterans, this Court has recognized the pro-veteran canon for more than 80 years.[5]

The Court first articulated the principle in *Boone v. Lightner*, 319 U.S. 561 (1943). As explained above, *supra* § I.C., this decision issued when the United States was modernizing its approach to veterans' benefits. As part of this drive, Congress authorized 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* Economy Act of 1933, Pub. L. No. 73-2, 48 Stat. 8. Despite this delegation, however, Congress simultaneously clarified that the Executive Branch could not water down the strong pro-veteran benefits provided through legislation. President Roosevelt insisted in a 1933 American Legion speech that "no person, because he wore a uniform, must thereafter be placed in a special class of beneficiaries over and above all other

[5] The beneficence animating the canon predates the modern era of veterans' benefits. *Walton v. Cotton*, 60 U.S. (19 How.) 355 (1856) (Revolutionary War pension statute designed to "alleviate … a class of men who suffered in the military service by the hardships they endured and the dangers they encountered" should "be so construed as to carry out a benign policy, within the reasonable intent of Congress.").

citizens." Ridgway, *Splendid Isolation*, *supra*, at 180 (citations omitted). But Congress emphatically rejected this notion, repeatedly overriding presidential attempts to weaken its pro-veteran legislation. *See generally id.* at 179-82.

This Court concurred with Congress's preference. In *Boone*, it considered the Soldiers' and Sailors' Civil Relief Act of 1940, which provided protections for active-duty servicemembers. 319 U.S. at 561, 564-65. While it ultimately rejected the servicemember's attempt to delay civil litigation as among the "few cases" putting the "immunities of the Act" to "unworthy use," this Court emphasized that legislation like the 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." *Id.* at 575. This Court thus 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 sacrifice.

A few years later, addressing the Selective Training and Service Act of 1940, this Court 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, entitled him to an increase in seniority. *Id.* at 285-86. 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 statute "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 Vietnam Era legislation. 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 two decisions in the 1990s, the Court reinforced the principle that veterans' benefits statutes are entitled to a distinctly generous construction. The first of these decisions again came in the context of employment rights, with the Court rejecting an attempt to read an implicit time limitation into a 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 expanded the canon's application beyond the employment 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 VA medical treatment to instances of fault or negligence. *See id.* at 116-17. But the statute contained no such limitation. The Court declined the government's invitation to find 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.

More 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 veterans' benefits. 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, like 5 U.S.C. § 5538, was "decidedly favorable to veterans." *Id.*

Again last Term, the Court affirmed the continued vitality of the pro-veteran canon. Although it ultimately decided *Rudisill* based on unambiguous statutory text, the Court's majority acknowledged that had it found the text ambiguous, "the pro-veteran canon would favor Rudisill." 601 U.S. at 314; *but cf. id.* ("not[ing] some practical and constitutional questions about the [canon's] justifications") (Kavanaugh,

J., concurring); *id.* at 329 ("the veterans' canon rest[s] on uncertain foundations") (Thomas, J., dissenting).

The courts of appeals have followed this Court's lead in applying the pro-veteran canon. Shortly after *King* and *Gardner*, for example, the Fifth Circuit cited this "canon of favorable construction" for its interpretation of an employment 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.*, *Myrick v. City of Hoover*, 69 F.4th 1309, 1318 (11th Cir. 2023) ("[W]hen two plausible interpretations of USERRA exist—one denying benefits, the other protecting the veteran—we must choose the interpretation that protects the veteran"); *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."). Before its recent shift away from the canon, the Federal Circuit routinely, albeit inconsistently, endorsed it. *See, e.g.*, *Roby v. McDonough*, No. 20-1088, 2021 WL 3378834, at *8 (Fed. Cir. Aug. 4, 2021) (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) (calling it one of "the usual canons of statutory construction"); *Hodge v. West*, 155 F.3d 1356, 1360, 1362 (Fed. Cir. 1998) ("[t]his court and the Supreme Court both have long recognized" the liberal construction of veterans statutes in rejecting materiality test as "in-

consistent 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) (affirming employee's right-of-return 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").

Considering the historic congressional solicitude underpinning veterans' benefits legislation, *supra* § I.C., the judiciary's continued alignment with Congress in guarding against the Executive's attempts to re-legislate in this area is essential.

B. Application of the pro-veteran canon here would have corrected the Federal Circuit's atextual reading.

When interpreting a contested statute, a court must "pay careful attention to text, context, and traditional tools of interpretation," *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari), to ascertain the statute's "single, best meaning," *Loper Bright*, 144 S. Ct. at 2266. Indeed, "courts [must] use every tool at their disposal to determine the best reading of the statute." *Id.*

Substantive canons, which incorporate presumptions about how Congress means for courts to interpret statutes, are critical to ensuring that courts find "the best and fairest reading" of a statute, *see Kisor v. Wilkie*, 139 S. Ct. 2400, 2430 (2019) (Gorsuch, J., concurring in judgment). That is because, again, the substantive canon incorporates Congress's intent. And in

turn, the Court "presume[s] congressional understanding of such interpretive principles" as the pro-veteran canon when Congress enacts veterans-related legislation. *King*, 502 U.S. at 220 n.9.

Because the pro-veteran canon embodies a judicial presumption about how Congress understands its own enactments in the veterans context, a statutory provision should, where possible, be read in a veteran's favor. *Id*. For example, had the pro-veteran canon been applied to the educational benefits statutes in *Rudisill*, Congress's manifest purpose to incentivize and reward military service would have been satisfied by an interpretation that protected—rather than stripped away—the veterans' benefits. And here, if 5 U.S.C. § 5538 weren't already clear, the pro-veteran canon would evince Congress's long-standing interest in ameliorating the financial hardships inflicted on veterans who defend the nation during time of war or national emergency. *See* Br. for Members of Congress as Amici Curiae in Support of Petitioner 7 ("[L]awmakers did not limit the law's application by the kind of service rendered or the provision under which the reservists were called to active duty.").

Along with dutiful interpretation of a statute's plain language, application of the pro-veteran canon ensures veterans receive the grateful munificence and remedial benefits Congress intends for them. The Court should reverse the Federal Circuit to ensure the Federal Government keeps faith with Congress's laws and America's servicemembers and veterans.

CONCLUSION

This Court should grant the Petition.

Respectfully submitted,

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