No. 17a_____

In the Supreme Court of the United States

JAMES L. KISOR,
Applicant,

v.

ROBERT L. WILKIE, Acting Secretary of Veterans Affairs,
Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

TO THE HONORABLE JOHN G. ROBERTS, JR., CHIEF JUSTICE OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE FEDERAL CIRCUIT:

Pursuant to 28 U.S.C. § 2101(c) and Rule 13.5 of the Rules of this Court, Applicant James L. Kisor respectfully requests a 59-day extension of time, to and including Friday, June 29, 2018, for the filing of a petition for a writ of certiorari to review the decision of the United States Court of Appeals for the Federal Circuit dated September 7, 2017 (Exhibit 1). On January 31, 2018, the court of appeals denied a timely-filed petition for panel rehearing and rehearing en banc (Exhibit 2). The jurisdiction of this Court is based on 28 U.S.C. § 1254(1).

1. Absent an extension of time, the deadline for filing the petition for certiorari would be May 1, 2018.

2. This case presents the following questions: (1) whether federal courts must defer to an agency's reasonable interpretation of that agency's own regulations

(commonly referred to as "*Auer* deference"[1]), as the court of appeals did here with respect to the Department of Veterans Affairs' ("VA") interpretation of 38 C.F.R. § 3.156(c)(1); and, if federal courts must do so, (2) whether the canon of interpretation requiring courts to construe interpretive ambiguity in favor of veterans trumps *Auer* deference.

3. Applicant served as a Marine in the Vietnam War. Ex. 1 at 2. In 1982, he filed an initial claim for disability compensation benefits for post-traumatic stress disorder (PTSD). *Ibid*. Because he did not have a diagnosis of PTSD at that time, the VA denied his claim. *Ibid.* In 2006, Applicant requested to reopen his previously denied claim for service-connected compensation for PTSD. *Ibid.* He presented evidence in support of his request, including official service department records not previously submitted as part of his 1983 claim. *Id.* at 2-3. Although the VA granted Applicant's new claim for compensation for PTSD, it assigned an effective date of 2006 rather than Applicant's requested date of 1983. *Id.* at 3. Applicant appealed, arguing that the proper effective date for his claim was the date of his initial 1983 application. *Ibid.* The VA reviewer denied his challenge, and the Board of Veterans' Appeals affirmed. *Id.* at 3-4.

In declining to reconsider Applicant's claim for benefits, the Board relied upon 38 C.F.R. § 3.156(c)(1), which requires it to reconsider a claim when it "receives or associates with the claims file *relevant* official service department records that existed and had not been associated with the claims file when VA first decided the

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[1] *Auer* v. *Robbins*, 519 U.S. 452, 461 (1997). See also *Bowles* v. *Seminole Rock & Sand Co.*, 365 U.S. 410, 413-414 (1945).

claim." Ex. 1 at 4 (emphasis added). The Board concluded that because Applicant's newly-submitted records were not "outcome determinative," they were "not relevant" under 38 C.F.R. § 3.156(c)(1) and, therefore, reconsideration of the initial claim was not required. *Ibid.*

4. Applicant appealed to the Federal Circuit, which affirmed the VA's decision. The panel found that Section 3.156(c)(1) was "ambiguous as to the meaning of the term 'relevant'" and afforded *Auer* deference to the VA's narrow interpretation of that term. Ex. 1 at 6-7. Applicant's rehearing was denied. Three judges dissented from the denial of rehearing en banc; the dissenting judges would not apply *Auer* deference in this case. Ex. 2 at 2.

5. The Court of Appeals' decision, and the dissent from denial of the en banc petition, highlight the perverse incentives of the *Auer* doctrine. *Auer* encourages agencies to promulgate broad and ambiguous regulations, but define the contours of those rules later. Ex. 2 at 2. *Auer* also enables agencies to make an end-run around the notice-and-comment rulemaking process. *Ibid.*

In fact, "[s]everal Members of this Court have said that [*Auer*] merits reconsideration in an appropriate case." *Garco Constr., Inc.* v. *Speer*, 138 S. Ct. 1052, 1053 (2018) (Thomas, J., dissenting from the denial of certiorari) (citing *Perez* v. *Mortg. Bankers Ass'n*, 135 S. Ct. 1199, 1210-1211 (2015) (Alito, J., concurring in part and concurring in the judgment)); *Perez*, 135 S. Ct. at 1213-1225 (Thomas, J., concurring in the judgment); *Decker* v. *Northwest Envtl. Def. Ctr.*, 568 U.S. 597, 615-616 (2013) (Roberts, C.J., concurring). See also *Perez*, 135 S. Ct. at 1211-1213 (Scalia, J., concurring in the judgment); *Decker*, 568 U.S. at 616-621 (Scalia, J., concurring in

part and dissenting in part); *Talk Am., Inc.* v. *Michigan Bell Tel. Co.*, 564 U.S. 50, 68-69 (2011) (Scalia, J., concurring).

Further, the opinions below illustrate the tension between two lines of this Court's precedent: *Auer* deference and the pro-veteran canon of construction. Ex. 2 at 2 (citing *Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011)). See also *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994) (noting the "rule that interpretive doubt is to be resolved in the veteran's favor"). The Court of Appeals for Veterans Claims has correctly stated that "guidance from the Supreme Court would appear necessary to resolve this matter definitively." *DeBeaord* v. *Principi*, 18 Vet. App. 357, 368 (Vet. App. 2004). In fact, as the dissent from denial here noted (Ex. 2 at 3), the D.C. Circuit has held that *Chevron* deference yields to the "governing canon of construction requir[ing] that 'statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit.'" *Cobell* v. *Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) (quoting *Montana* v. *Blackfeet Tribe of Indians*, 471 U.S. 759, 766 (1985)). Without guidance from this Court, it is unclear whether and when *Auer* deference similarly will yield to the pro-veteran canon of construction.

6. The issue of interpreting 38 C.F.R. § 3.156(c)(1) is important even apart from the implications for *Auer* deference. This Court has long recognized the sacrifices servicemembers make in "drop[ping] their own affairs to take up the burdens of the nation." *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). But here, despite this Court's repeated reminders that laws should be construed to benefit veterans, the panel declined to employ that canon to resolve ambiguity in the VA's regulation. Instead, the Federal Circuit concluded that because both the Applicant and the VA

had proffered interpretations of the word "relevant," and that "neither party's position strikes us as unreasonable," the VA was entitled to deference in interpreting its own ambiguous regulation. Ex. 1 at 7-8.

7. Good cause exists for an extension of time to prepare a petition for a writ of certiorari in this case. To begin with, undersigned counsel was recently retained to represent petitioner. Counsel thus requires additional time to familiarize himself with the complex statutory and regulatory scheme at issue.

Additionally, undersigned counsel has, and has had, several other matters with proximate due dates, including: an oral argument on April 17, 2018, in *Lamar, Archer & Cofrin* v. *Appling*, No. 16-1215 (S. Ct.); a petition for a writ of certiorari due on April 26, 2018, in *Smith* v. *Berryhill* (S. Ct.) (application for extension pending); a reply in support of a petition for a writ of certiorari due on April 30, 2018, in *Borrell* v. *Richer*, No. 17-1305 (S. Ct.); a brief in opposition due on May 2, 2018, in *Maddox* v. *Miller*, No. 17-1123 (S. Ct.); and a brief in opposition due on May 9, 2018, in *Michigan Gaming Control Board* v. *Moody*, No. 17-1142 (S. Ct.).

For the foregoing reasons, the application for a 59-day extension of time, to and including Friday, June 29, 2018, within which to file a petition for a writ of certiorari should be granted.

April 19, 2018

Respectfully submitted.

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