No. 20-1148

In the Supreme Court of the United States

ROBERT M. SELLERS,

Petitioner,

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS,

Respondent.

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

BRIEF OF NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

When a veteran has submitted an application for disability benefits, does the veteran's claim encompass all reasonably identifiable conditions within the veteran's service records?

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INTEREST OF *AMICUS CURIAE*[1]

The National Organization of Veterans' Advocates, Inc. (NOVA), is a not-for-profit educational membership organization comprising hundreds of attorneys and other qualified members who represent our Nation's veterans and their families before the Department of Veterans Affairs (VA) and federal courts. NOVA works to develop high standards of service and representation for all persons seeking veterans' benefits.

NOVA has extensive experience in dealing with VA, both in administrative proceedings and before the federal courts. This case is of interest to NOVA because its resolution will have a significant effect on its work and the work of veterans-focused organizations around the country. Given NOVA's wealth of experience with VA, NOVA is well-positioned to explain the history and context of the VA's pro-veteran claims process. And NOVA has a strong interest in ensuring that the pro-veteran canon of construction remains an important feature of statutory and regulatory interpretation.

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[1] The parties have consented to the filing of this brief. 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

This case implicates important questions of statutory interpretation and veterans' law warranting this Court's review. As this Court has previously explained, "the VA is not an ordinary agency," and it has "a statutory duty to help the veteran develop his or her benefits claim." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). The Federal Circuit's decision below disregards that duty and grafts an atextual administrative pleading requirement onto a benefits-claims process that is meant to be informal and solicitous of veterans. NOVA submits this amicus brief to highlight two reasons this Court should grant certiorari and reverse the Federal Circuit's ruling.

First, the decision below subverts the pro-claimant structure of veterans' benefits laws and deprives countless veterans of the benefits that Congress intended them to receive. This Court has repeatedly recognized that Congress designed the process for awarding veterans' benefits to be flexible and non-adversarial, allowing veterans to present their claims pro se, and "with a high degree of informality and solicitude for the claimant." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (citation omitted). The statutory scheme governing that process therefore requires VA to make all "reasonable efforts to assist a claimant" in developing a claimant's "claim for a benefit." 38 U.S.C. § 5103A(a)(1). Numerous statutory provisions ensure that VA will "fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed.

Cir. 1998) (emphasis omitted) (quoting H.R. Rep. No. 100-963, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5795)).

The Federal Circuit's decision undermines that statutory scheme by requiring veterans who seek disability benefits to identify the specific conditions or symptoms giving rise to their benefits claims. Under the rule articulated by the Federal Circuit, many of the thousands of veterans who annually file their claims without the assistance of an attorney or representative will forfeit valuable benefits to which they are properly entitled, even when the conditions or symptoms giving rise to their benefits claims are apparent on the face of their service records. And the Federal Circuit's decision will have particularly pernicious consequences for claimants, like petitioner, who suffer from mental-health conditions, or those with impairments of mental acuity resulting from traumatic brain injuries. This case offers the right vehicle with which to review the Federal Circuit's error on a recurring question of enormous importance.

Second, the decision below implicates a longstanding point of confusion within the Federal Circuit regarding application of the pro-veteran canon of statutory construction, particularly in cases involving agency rulemaking. The decision below relied heavily on the Federal Circuit's decision in an earlier case, *Veterans Justice Group LLC v. Secretary of Veterans Affairs* (*VJG*), which applied *Chevron* deference to uphold a VA regulation implementing VA's restrictive claims-pleading rule. 818 F.3d 1336, 1356 (Fed. Cir. 2016). The *VJG* court concluded that the statutory framework at issue here was ambiguous, and did not mandate the restrictive rule

imposed by VA. *Id.* But rather than applying the pro-veteran canon to resolve the ambiguity, the Federal Circuit deferred to VA's interpretation at *Chevron* Step Two. *Id.* The confused statutory analysis set out in the decision below—which again ignored the pro-veteran canon, and clearly misapprehended the *VJG* court's *Chevron* analysis—only compounded the *VJG* court's error. The Federal Circuit's uncertainty as to how the pro-veteran canon intersects with *Chevron* is well documented, and requires this Court's intervention.

This Court has historically played a vital role in safeguarding the unique statutory protections afforded to the Nation's veterans. *See, e.g.*, *Howell v. Howell*, 137 S. Ct. 1400, 1402 (2017); *Kingdomware Techs., Inc. v. United States*, 136 S. Ct. 1969, 1973 (2016); *Henderson*, 562 U.S. at 431-32; *Brown v. Gardner*, 513 U.S. 115, 116 (1994). This case presents a dual opportunity for the Court to reaffirm VA's statutory duty to assist veterans in the development of their benefits claims while clearing up a welter of contradictory Federal Circuit precedents regarding the pro-veteran canon of statutory construction. The petition for certiorari should be granted.

ARGUMENT

I. CERTIORARI IS WARRANTED BECAUSE THE DECISION BELOW VITIATES THE PRO-VETERAN STATUTORY SCHEME GOVERNING VA BENEFITS CLAIMS

The relationship between veteran claimants and VA is unique. Unlike many other agencies, VA has a statutory duty to "make reasonable efforts to assist a claimant" in "substantiat[ing] the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). That duty reflects

Congress's "special solicitude for the veterans' cause," as well as the fact that the VA "adjudicatory process is not truly adversarial, and the veteran is often unrepresented during the claims proceedings." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009). Time and again, this Court has recognized that the VA adjudicatory process "is designed to function throughout with a high degree of informality and solicitude for the claimant." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). The decision below relieves VA of its statutory duty by allowing VA to overlook even manifest disabilities evidenced in a claimant's records. And it mistakenly imposes an administrative pleading requirement on VA claimants, who often proceed without attorneys and are thus ill-equipped to comply with that requirement. This case, arising in the context of petitioner's mental-health issues, presents a classic example of that problem.

This Court has carefully guarded veterans' interests with respect to "VA's statutory obligations to assist veterans in the development of their disability claims." *Mathis v. Shulkin*, 137 S. Ct. 1994, 1995 (2017) (Sotomayor, J., statement respecting the denial of certiorari). But in this case, as elsewhere, VA has done "nothing to assist, and much to impair, the interests of those the law says the agency is supposed to serve." *Id.* at 1995 (Gorsuch, J., dissenting from denial of certiorari). Given the significance of the Federal Circuit's error, and that circuit's exclusive jurisdiction over appeals concerning veterans' claims, certiorari is warranted.

A. Congress Established A Uniquely Pro-Claimant Veterans' Benefits Process

Consistent with VA's mission to "care for him who shall have borne the battle," *Preminger v. Secretary of Veterans Affairs*, 517 F.3d 1299, 1314 (Fed. Cir. 2008) (citation omitted), VA's adjudicative process is designed to be uniquely pro-claimant, *see Henderson*, 562 U.S. at 431, and is deliberately "paternalistic," *Butler v. Principi*, 244 F.3d 1337, 1340 (Fed. Cir. 2001). The unique nature of the veterans' benefits-claims process is reflected in the text of the statutory scheme governing that process, as well as the history of the regulations implementing that text.

By statute, Congress crafted a claims process that expressly favors benefits claimants and enlists VA's help in developing claims. For example, at the outset of the claims process, VA must provide, free of charge, all instructions and forms for applying for benefits to any claimant. 38 U.S.C. § 5102(a). If a submitted application is incomplete, VA must inform the claimant of any information necessary to complete the application. *Id.* § 5102(b). And once a claimant has submitted a complete application, VA must assist the claimant in developing and substantiating his claim, *id.* § 5103A, and resolve any doubts about the claim in the claimant's favor, *id.* § 5107(b). In short, "Congress expects [VA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits." *Hodge*, 155 F.3d at 1362 (emphasis omitted) (quoting H.R. Rep. No. 100-963, at 13 (1988), *as reprinted in* 1988 U.S.C.C.A.N. 5782, 5795)).

VA's statutory duty to develop a veteran's claim is all the more crucial in view of the statutory

limitations on legal representation in the VA claims process. By law, veterans may not pay a lawyer for assistance in preparing an initial claim for benefits. 38 U.S.C. § 5904(c)(1). That leaves veterans either to rely on the assistance of pro bono counsel or a veterans service organization, or to go it alone. Veterans frequently take the latter course. *See* U.S. Gov't Accountability Off., GAO-13-643, *VA Benefits: Improvements Needed to Ensure Claimants Receive Appropriate Representation* 4 (2013), https://www.gao.gov/assets/gao-13-643.pdf (noting that 22% of veterans represented themselves in the initial claims process). Even at later stages of the claims process, when paid representation is allowed, many veterans continue to proceed pro se. U.S. Court of Appeals for Veterans Claims, *Fiscal Year 2019 Annual Report* 1 (2020) (noting that in fiscal year 2019, 27% of the appeals filed in the Court of Appeals for Veterans Claims were from pro se litigants).

Moreover, many VA claimants, like petitioner, suffer from mental-health problems that can complicate self-representation. Indeed, some experts estimate that more than a third of veterans of the Iraq War suffer from mental illness. Michael Serota & Michelle Singer, *Veterans' Benefits and Due Process*, 90 Neb. L. Rev. 388, 397 (2011); *see also* Christine Ramsey et al., *Incidence of Mental Health Diagnoses in Veterans of Operations Iraqi Freedom, Enduring Freedom, and New Dawn, 2001–2014*, 107 Am. J. Pub. Health 329 (2017) (discussing the prevalence of mental-health challenges among the most recent generation of veterans).

In light of Congress's statutory scheme and the realities of the claims process, VA has historically promulgated regulations designed to facilitate the

informal and sympathetic development of veterans' claims. At the time petitioner submitted his claim, a veteran could submit a formal claim for benefits by filling out the appropriate form, *see* 38 C.F.R. § 3.151(a) (1995), or an "informal" claim, which simply needed to "identify the benefit sought" and "indicat[e] an intent to apply" for benefits, *id.* § 3.155(a) (1995); *see* 26 Fed. Reg. 1561, 1570 (Feb. 24, 1961). Upon receipt of an informal claim, VA would forward the appropriate application form to the claimant and, if the claimant completed that form within one year, it would be considered filed as of the date of receipt of the informal claim. *See* 38 C.F.R. § 3.155(a) (1995). Although VA replaced the informal claims process with the "intent to file" process, the rules are similar. *See* 38 C.F.R. § 3.155(b); 79 Fed. Reg. 57,660, 57,663 (Sept. 25, 2014) (effective Mar. 24, 2015) (describing VA's decision to replace the informal claims process with the "intent to file" process).

If VA determines that an application is incomplete, it will "notify the claimant of the information necessary to complete the application," 38 C.F.R. § 3.159(b)(2), and once VA receives a complete application, it is obligated to "notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim." *Id.* § 3.159(b)(1). Likewise, VA recognizes its obligation "to assist claimants in obtaining evidence to substantiate" their claims, *id.* § 3.159(c), to resolve any doubts in the claimant's favor, *id.* § 3.102, and to "render a decision which grants every benefit that can be supported in law while protecting the interests of the Government," *id.* § 3.103(a). And even in the event of an adverse decision, a previously denied

claim may be reopened simply by submitting "new and material evidence." *Id.* § 3.156(a); *see also* 38 U.S.C. § 5108 (permitting the presentation of "new and relevant" evidence in the submission of a supplemental claim); 38 C.F.R. § 3.156(d).

In sum, the statutes and regulations impose on VA a "statutory duty to help the veteran develop his or her benefits claim," *Sanders*, 556 U.S. at 412, and thereby "maximize benefits," *Morgan v. Wilkie*, 31 Vet. App. 162, 168 (2019). That duty arises from Congress's solicitude for veterans and its recognition that veterans who proceed pro se will often be unable to articulate and develop their benefits claims on their own. *See Sanders*, 556 U.S. at 412.

B. The Decision Below Impairs Congress's Pro-Claimant Benefits Scheme And Will Harm Veterans

1. The Federal Circuit's decision ignores both the longstanding structure of veterans' benefits laws and this Court's consistent recognition that the VA claims process should "'function throughout with a high degree of informality and solicitude for the claimant,'" with a view to VA's "duty to assist veterans" in the development of their claims. *Henderson*, 562 U.S. at 431-32 (citation omitted). This Court's intervention is needed to restore the pro-veteran scheme enacted by Congress.

First, contrary to the statutory text and structure, the Federal Circuit's decision places the onus on veterans to develop their claims for benefits by specifically identifying—at the outset of each claim—the particular medical conditions giving rise to that claim. *See* Pet. App. 21a. But as petitioner has explained, a "claim" for VA disability benefits is a

claim for compensation for any condition or injury that VA could reasonably identify based on the claimant's medical files. That reading flows naturally from the text enacted by Congress, which specifically instructs VA to make all "reasonable efforts to assist a claimant" in developing that claimant's "claim for a benefit." 38 U.S.C. § 5103A(a)(1); *see* Pet. 14-18.

Second, the Federal Circuit's decision ignores the fundamentally pro se–oriented nature of veterans' benefits laws. If a lay veteran is meant to present her claim on her own, without the benefit of an attorney's expertise, then it makes little sense to impose technical legal requirements on her at the outset of her claim. As this Court has emphasized, "[a] necessary concomitant of Congress' desire that a veteran not need a representative to assist him in making his claim was that the system should be as informal and nonadversarial as possible." *Nat'l Ass'n of Radiation Survivors*, 473 U.S. at 323.

Third, the Federal Circuit's rule permits VA to ignore conditions or injuries, such as petitioner's mental-health problems, that are obvious on the face of the veteran's medical records. *See* Pet. 4-5 (noting that petitioner, shortly before submitting his claim for benefits, had received "treatment for his psychiatric symptoms," had "threatened suicide," been "involuntarily hospitalized," and had been "diagnosed with both depression and personality disorder"). That flies in the face of Congress's deliberately "paternalistic" system. *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009); *see* 38 U.S.C. § 5107(b) (VA "shall consider all information and lay and medical evidence of record in a case"); *id.* § 5103A(c)(1) (even if the veteran does not provide such records himself, VA "shall . . . obtain[]" the

claimant's "service medical records" and other "[r]ecords of relevant medical treatment or examination of the claimant at [VA] health-care facilities or at the expense of [VA]" that are "relevant to the claim"). Indeed, VA itself has recognized its statutory obligation to "assist a claimant in developing the facts pertinent to the claim and to render a decision which grants *every benefit that can be supported in law* while protecting the interests of the Government." 38 C.F.R. § 3.103(a) (emphasis added). The Federal Circuit's decision is impossible to reconcile with VA's express statutory duties and the purposely non-adversarial system established by Congress.

2. The significant flaws in the Federal Circuit's legal analysis should not distract from the practical consequences of its ruling. Simply put, that ruling will have a significant—and harmful—real-world effect on countless veterans who depend on disability benefits to sustain themselves and their families.

In the 2019 fiscal year, VA processed more than 1.1 million disability claims. U.S. Gov't Accountability Off., GAO-20-620, *VA Disability Benefits: VA Should Continue to Improve Access to Quality Disability Medical Exams for Veterans Living Abroad* 38 (Sept. 2020), https://www.gao.gov/assets/gao-20-620.pdf. The Federal Circuit's opinion ignores that, in many of those cases, veterans developed and filed their claims without the assistance of counsel, and therefore often may not have been equipped to explain their disabilities in the manner required by the Federal Circuit's rule, or even recognize the need to do so in the first place. *See Ingram v. Nicholson*, 21 Vet. App. 232, 256 (2007) ("The duty to sympathetically read

[veterans' claims] exists because a pro se claimant is not presumed to know the contents of title 38 or to be able to identify the specific legal provisions that would entitle him to compensation.").

What's more, the burden of the Federal Circuit's rule will fall hardest on those who are the most vulnerable: veterans suffering from psychological disability or trauma who, for one reason or another, may not be able to diagnose or describe their own symptoms precisely *because* of their disability. *See* Pet. 33. That possibility is not remote. In 2018, over one million veterans sought treatment at VA for post-traumatic stress disorder—a rate that dwarfs the treatment rate for almost every other medical condition treated by VA. U.S. Gov't Accountability Off., GAO-20-26, *VA Disability Compensation: Actions Needed to Enhance Information about Veterans' Health Outcomes* 12 (Dec. 2019), https://www.gao.gov/assets/gao-20-26.pdf; *see also* Veterans Benefits Admin., *Annual Benefits Report Fiscal Year 2019 – Compensation* 26 (updated July 2020), https://www.benefits.va.gov/REPORTS/abr/ (noting almost half a million new mental-disability compensation recipients over the last five years).

The decision below thus presents a major new barrier to the benefits claims of pro se claimants, especially those claimants who already face serious difficulties in navigating VA's benefits-adjudication system. *See, e.g.*, Sarah K. Mayes, *Unraveling the PTSD Paradox: A Proposal to Simplify the Adjudication of Claims for Service Connection for Posttraumatic Stress Disorder*, 6 Veterans L. Rev. 125, 175 (2014) (arguing that existing VA regulations make it unlikely that "claim reviewers will even identify alternative or coexisting psychiatric

conditions upon initial review of the [claimant's] file"); Amitis Darabnia, *To Care For Him Who Shall Have Borne The Battle: Government's Response to PTSD*, 25 Fed. Cir. Bar J. 453, 454 (2016) (arguing that, "to date, the VA has struggled to meet its statutory . . . obligations to address the needs of veterans with PTSD"); *see also id.* at 475 (noting that because of the "negative stigma around mental disorders in the military," many veterans are "discouraged from seeking medical attention and diagnosis").

The harmful consequences of the decision below are not merely theoretical—veteran claimants have already begun to experience the decision's bite. Even in the short time since the Federal Circuit issued its decision in this case, the Court of Appeals for Veterans Claims has repeatedly cited it as a reason for rejecting a veteran's claim for benefits. *See, e.g.*, *Scott v. McDonough*, No. 19-4715, 2021 WL 560831, at *2 (Vet. App. Feb. 16, 2021); *Evans v. Wilkie*, No. 19-6676, 2020 WL 6734865, at *2 (Vet. App. Nov. 17, 2020); *Towers v. Wilkie*, No. 19-3169, 2020 WL 7133888, at *4 (Vet. App. Dec. 7, 2020); *White v. Wilkie*, No. 19-7852, 2020 WL 7017622, at *4 (Vet. App. Nov. 30, 2020); *Chambers v. Wilkie*, No. 19-7939, 2020 WL 5805532, at *6 (Vet. App. Sept. 30, 2020); *Van Allen v. Wilkie*, No. 19-2229, 2020 WL 5552059, at *1 (Vet. App. Sept. 17, 2020). And the number of veterans impacted by the Federal Circuit's ruling will only grow over time.

3. The issues presented in the petition are important and recurring, and this Court's intervention is the only mechanism available for fixing the Federal Circuit's error.

As this Court knows, the Federal Circuit has exclusive jurisdiction over appeals concerning the

construction of veterans' benefits laws. This means that—unlike in many challenges to administrative action by other agencies—there is no possibility that veterans will obtain the benefit of a more favorable rule in another circuit, or that percolation among the circuits could persuade the Federal Circuit to alter course. And given the Federal Circuit's infrequent recourse to en banc review, the panel decision is likely to be the final word on this question. Christopher A. Cotropia, *Determining Uniformity Within the Federal Circuit by Measuring Dissent and En Banc Review*, 43 Loy. L.A. L. Rev. 801, 817 (2010) (noting that the Federal Circuit only granted en banc review in 0.18% of its cases).

In short, the Federal Circuit's erroneous rule will govern *all* veterans' claims. This Court's review is the only available mechanism to vindicate "the singular characteristics of the review scheme that Congress created for the adjudication of veterans' benefits claims." *Henderson*, 562 U.S. at 440. Given the exceptional importance of this issue to countless veterans who honorably served their country, certiorari is warranted. *See* Sup. Ct. R. 10(c).

II. THIS COURT SHOULD USE THIS CASE TO RESOLVE CONFUSION ABOUT THE INTERSECTION OF THE PRO-VETERAN CANON AND *CHEVRON* DEFERENCE

The Federal Circuit's disregard for the relaxed claim standards reflected in the statutory scheme is reason enough to grant review. But the opinion below also implicates a deep internal split in the Federal Circuit over the interaction between an important rule of statutory construction—the "pro-veteran" canon this Court recognized in *Brown v. Gardner*, 513

U.S. 115, 117-18 (1994)—and *Chevron* deference. This Court should seize the opportunity to reaffirm the importance of the pro-veteran canon and confirm that it must be applied at Step One of the *Chevron* inquiry.

A. The Federal Circuit Has Long Been Confused About The Proper Application Of The Pro-Veteran Canon

1. Since World War II, this Court has repeatedly instructed that veterans' benefits laws are "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); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (holding that the Selective Service Act "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need"). The pro-veteran canon requires courts to interpret "provisions for benefits to members of the Armed Services . . . in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *see also Hodge*, 155 F.3d at 1362 (collecting cases). The canon functions as a tie-breaker; if the underlying statutory provision is truly ambiguous, that ambiguity must be resolved in favor of the veteran. *See Gardner*, 513 U.S. at 117-18.

This Court has consistently applied the pro-veteran canon when interpreting statutes, including to protect veterans from inflexible restrictions on the receipt of benefits. *See, e.g.*, *Henderson*, 562 U.S. at 441 (applying the canon to reject "[r]igid jurisdictional treatment" of a notice of appeal deadline); *King*, 502 U.S. at 218, 220 n.9 (applying the canon to reject lower court decisions that "engrafted a

reasonableness requirement" onto the statute); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("liberally constru[ing]" an employment statute "for the benefit of the returning veteran"). These cases and others applying the canon recognize that Congress has a "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan v. Tax'n with Representation*, 461 U.S. 540, 550-551 (1983). The Court presumes that Congress legislates against the backdrop of the canon. *See King*, 502 U.S. at 220 n.9.

2. Despite this Court's longstanding commitment to the pro-veteran canon, the Federal Circuit has repeatedly expressed confusion over how it should apply—especially in cases implicating agency-deference doctrines like *Chevron* and *Auer*. This case exemplifies the deep divisions within the Federal Circuit over application of the canon and provides an excellent opportunity for this Court to set the law straight.

The Federal Circuit's confusion over the relationship between the pro-veteran canon and agency-deference doctrines is longstanding and deeply rooted. The Federal Circuit itself has lamented that it "is not clear where the [pro-veteran] canon fits within the *Chevron* doctrine, or whether it should be part of the *Chevron* analysis at all." *Heino v. Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012); *see also Hudgens v. McDonald*, 823 F.3d 630, 639 n.5 (Fed. Cir. 2016) ("[T]he tension between *Auer* and [the pro-veteran canon] is difficult to resolve . . . ."). This confusion stems from the fact that both rules "seemingly direct courts to resolve ambiguities" but

"w[ill], in many cases, counsel contrary outcomes." *Hudgens*, 823 F.3d at 639 n.5.

Over the past two decades, the Federal Circuit has adopted different formulations of when the pro-veteran canon applies, or if it applies at all, in agency-deference cases. Early cases rightly suggested that the pro-veteran canon should be applied at *Chevron* Step One. *See, e.g.*, *Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 260 F.3d 1365, 1378 (Fed. Cir. 2001); *cf. Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (pro-veteran canon "modif[ies] the traditional Chevron analysis"), *overruled on other grounds by Nat'l Org. of Veterans' Advocs., Inc. v. Sec'y of Veterans Affs.*, 981 F.3d 1360 (Fed. Cir. 2020). But more recent cases have declined to apply the canon at *Chevron*'s first step, deferring instead to VA's interpretations at *Chevron* Step Two. *See, e.g.*, *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (concluding that, "where the statutory language is ambiguous," "deference to the [VA's] interpretation" is appropriate notwithstanding the pro-veteran canon).

Even in more recent cases, where the Federal Circuit has deferred to VA's interpretations, its rationale for doing so is muddied. On some occasions, the Federal Circuit has suggested that the pro-veteran canon *never* applies in *Chevron* cases. *See Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011) ("reject[ing] the argument that the pro-veteran canon of construction overrides the deference due to [VA's] reasonable interpretation of an ambiguous statute"); *Terry v. Principi*, 340 F.3d 1378, 1384 (Fed. Cir. 2003) ("[The] canon of statutory construction that requires that . . . interpretive doubt . . . be resolved in favor of the veteran . . . does not affect the

determination of whether [VA's] regulation is a permissible construction of a statute."). On other occasions, the court has treated the canon as a tool of last resort, to be applied only after all "other interpretive guidelines have been exhausted, including *Chevron*." *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010).

This persistent confusion recently prompted a panel of the Federal Circuit to request supplemental briefing on "the impact of the pro-claimant canon on step one of the *Chevron* analysis." *See Procopio v. Wilkie*, 913 F.3d 1371, 1374 (Fed. Cir. 2019) (en banc). But after a *sua sponte* order that the case be heard en banc, the full Federal Circuit declined to address the issue. *Id.* at 1380 (leaving for another day the question of "the role the pro-veteran canon should play in [the *Chevron*] analysis"); *see also id.* at 1387 (O'Malley, J., concurring) ("lament[ing] the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference").

The Federal Circuit's inability to resolve these questions has also trickled down to the Court of Appeals for Veterans Claims (CAVC), whose appeals are heard by the Federal Circuit. *Compare Pacheco v. Gibson*, 27 Vet. App. 21, 29 (2014) (en banc) (per curiam) (deferring to VA's interpretation under *Auer*), *with id.* at 42 (Davis, J., concurring in part and dissenting in part) (four of nine judges dissenting from majority's "fail[ure] to resolve interpretive doubt in favor of the veteran" and arguing that *Gardner* and Federal Circuit precedent require as much); *see also* James D. Ridgway, *Toward A Less Adversarial Relationship Between* Chevron *and* Gardner, 9 U. Mass. L. Rev. 388, 402 (2014) (explaining that CAVC's

application of the pro-veteran canon "is no more consistent than it is at the Federal Circuit"). Indeed, nearly twenty years ago, CAVC called for "guidance from the Supreme Court" on this issue. *Debeaord v. Principi*, 18 Vet. App. 357, 368 (2004). That guidance is still sorely needed.

B. This Court Should Grant Review To Confirm That The Pro-Veteran Canon Must Be Considered At *Chevron* Step One

1. This Court should grant review to clarify the pro-veteran canon's status as a traditional tool of statutory construction that must be applied at *Chevron* Step One. That approach is the only one consistent with the reasoning of *Chevron* itself. As the Court explained in *Chevron*, "If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984). And this Court has recently and repeatedly affirmed that command. *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (directing courts to "exhaust all the 'traditional tools' of construction" before concluding a regulation is "genuinely ambiguous" (citation omitted)); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("[D]eference is not due unless a 'court, employing traditional tools of statutory construction,' is left with an unresolved ambiguity." (citation omitted)); *see also* Brett M. Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2153 n.175 (2016) (book review) (emphasizing importance of "*Chevron* footnote 9").

Indeed, this Court has consistently applied similar canons of presumed congressional intent at *Chevron* Step One. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 (2001) (canon favoring construction of "lingering ambiguities in deportation statutes in favor of the alien" (citation omitted)); *id.* at 320 n.45 (canon against retroactivity); *Solid Waste Agency of N. Cook Cty. v. U.S. Army Corps of Eng'rs*, 531 U.S. 159, 172-73 (2001) (canon against preemption). Although the Court has never directly addressed the relationship between *Chevron* and the pro-veteran canon, its precedent aligns with the general rule that such canons apply at Step One. In *Gardner*, for example, the Court suggested that deference to VA would only "be possible *after* applying the rule that interpretive doubt is to be resolved in the veteran's favor." *See* 513 U.S. at 117-18 (emphasis added); *see also Henderson*, 562 U.S. at 437-38 (using the canon to "ascertain Congress' intent," a *Chevron* Step One–style inquiry).

Applying the pro-veteran canon at Step One also aligns with this Court's presumption that Congress legislates against the backdrop of the canon. *See, e.g.*, *King,* 502 U.S. at 220 n.9. This Court has emphasized the "paramount importance" attached to Congress's ability to "legislate against a background of clear interpretive rules." *Finley v. United States*, 490 U.S. 545, 556 (1989). Such rules are valuable only insofar as courts reliably follow them.

Finally, applying the pro-veteran canon at *Chevron* Step One is the only approach that would prevent the canon from becoming a dead letter with respect to statutory language that is the subject of agency rulemaking. That is because the canon *always* operates in contexts pitting veterans against VA, the very agency tasked with helping them. If *Chevron*

deference and the pro-veteran canon were both applied at Step Two, then courts would be required to defer to VA's rules so long as they were reasonable, no matter how ambiguous the statutory language and no matter the impact on veterans. *See* Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling* Brown v. Gardner*'s Presumption That Interpretive Doubt Be Resolved in Veterans' Favor With* Chevron, 61 Am. U. L. Rev. 59, 102 (2011) (explaining that applying the pro-veteran canon at *Chevron* Step Two would "eviscerate" it). That would effectively allow VA's regulatory construction of the law to trump veterans' interests *in every case*. But as this Court has made clear, Congress expects courts to resolve ambiguity in favor of *veterans*, not *VA*.

2. This case presents a suitable vehicle for this Court to reaffirm the pro-veteran canon as a traditional tool of statutory construction and provide much-needed guidance to the Federal Circuit. As petitioner has explained, the decision below relied heavily on the Federal Circuit's decision in *Veterans Justice Group* (*VJG*). *See* Pet. 11-12 (describing *VJG*, 818 F.3d 1336 (Fed. Cir. 2016)). In *VJG*, the Federal Circuit considered an Administrative Procedure Act challenge to a VA regulation codifying VA's condition-or-symptom pleading rule. At *Chevron* Step One, the court declared the statutory language ambiguous, concluding that it "does not directly address" whether VA must assist the veteran in developing claims for conditions or symptoms other than those listed on the veteran's initial application form. *VJG*, 818 F.3d at 1354-56. Despite the parties' argument that any "interpretive doubt" must be resolved in favor of veterans, *Gardner*, 513 U.S. at 118, the Federal Circuit failed to apply the pro-veteran canon,

skipping ahead to *Chevron* Step Two and deferring to VA's interpretation. *See VJG*, 818 F.3d at 1356.[2]

The implied holding of *VJG*—that deference to VA under *Chevron* Step Two trumps the pro-veteran canon—is indefensible. "Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'" *Epic Sys.*, 138 S. Ct. at 1630 (citation omitted). The Federal Circuit has once again "jumped the gun in declaring [a statute] ambiguous" before applying "all its interpretive tools." *Kisor*, 139 S. Ct. at 2423.

The decision below in this case deepened that error and introduced further confusion into the Federal Circuit's *Chevron* analysis. First, the decision below mistakenly recast *VJG* as a decision "under the *first step* in the *Chevron* analysis." Pet. App. 17a. *But see VJG*, 818 F.3d at 1356 (finding the statute ambiguous and "therefore turn[ing] to *Chevron* step two"). Then, the Federal Circuit relied on *VJG* to find that the "relevant statutes, regulations, and judicial precedent *require*" VA's condition-or-symptom pleading rule. Pet. App. 18a-19a (emphasis added). In other words, not only did the Federal Circuit improperly defer to VA's interpretation in *VJG*, it then leveraged that

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[2] In *VJG*, the Federal Circuit made the pro-veteran canon disappear by asserting that a regulation's consistency with statutory commands "'cannot be reduced to the single-factor test of whether the regulation is uniformly "pro-claimant."'" *VJG*, 818 F.3d at 1352 (quoting VA brief). That assertion tore down a straw man: No one in *VJG* argued that the pro-veteran canon is the *only* canon governing the construction of veterans' statutes. The argument presented in *VJG* was simply that, as a traditional canon of construction, the pro-veteran canon must be considered at *Chevron* Step One. *See, e.g.*, American Legion Br. 21-22, *VJG*, 818 F.3d 1336 (Fed. Cir. 2016) (No. 15-7061), 2015 WL 2379119.

decision to discover a statutory *requirement* that VA apply its restrictive pleading rule—all without ever considering the pro-veteran canon.

The Federal Circuit's decisions in *VJG* and in this case represent a serious abdication of its duty to say what the law is. By failing to exhaust the traditional methods of statutory construction, the Federal Circuit allowed VA to step into the void with its own self-serving construction. That approach violates this Court's recent warnings that courts ought not hand over the interpretive reins to administrative agencies. *See, e.g.*, *Kisor*, 139 S. Ct. at 2423; *Pereira v. Sessions*, 138 S. Ct. 2105, 2120 (2018) (Kennedy, J., concurring) (emphasizing that "reflexive deference" and "cursory analysis" contribute to "an abdication of the Judiciary's proper role in interpreting federal statutes").

The Federal Circuit's repeated failure to apply the pro-veteran canon is troubling, and it warrants this Court's review. The petition, which presents a clean vehicle for resolution of a pure question of statutory construction, offers an apt opportunity for this Court to reaffirm the continuing importance of the canon as a traditional tool of statutory interpretation.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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