No.

In the Supreme Court of the United States

JAMES L. KISOR,

Petitioner,

v.

DENIS MCDONOUGH,
Secretary of Veterans Affairs,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019), this Court vacated the Federal Circuit's holding that the word "relevant" in a veteran's-benefit regulation was ambiguous. It remanded for the Federal Circuit to scrutinize the regulatory text more closely—"bring[ing] all its interpretive tools to bear"—before deferring to the government's interpretation. *Id.* at 2423.

On remand, the Federal Circuit again ruled against petitioner—but this time on the grounds that the government's view of the word "relevant" was *unambiguously* correct. The court thus reversed its reasoning, but stood by its earlier conclusion that petitioner must be denied decades of disability benefits for the post-traumatic stress disorder he undisputedly suffers due to his combat service in Vietnam.

Dissenting from the denial of rehearing en banc, Judge O'Malley (writing for four members of the Federal Circuit) explained that the panel's "error" misconstrues "an important and oft-resorted to remedial regulation." App., *infra*, 102a. And it "effectively nullif[ies] the pro-veteran canon of construction." *Ibid*. In all, the dissenting judges expressed "hope" that this Court "will be willing to grant certiorari once more, and that [petitioner] will finally win." *Ibid*.

The question presented is:

Whether the term "relevant official service department records" in 38 C.F.R. § 3.156(c)(1)'s "reconsideration" provision encompasses all records that "go to a benefits criterion," or is instead restricted to only those records that "relate to the basis of the VA's initial denial of benefits." *Kisor*, 139 S. Ct. at 2423.

RELATED PROCEEDINGS

Kisor v. *Wilkie*, No. 18-15
(U.S. Mar. 27, 2019)

Kisor v. *McDonough*, No. 16-1929
(Fed. Cir. Apr. 30, 2021)

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PETITION FOR A WRIT OF CERTIORARI

Petitioner James L. Kisor respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The Federal Circuit's panel opinion on remand from this Court, as modified on petition for rehearing en banc (App., *infra*, 1a-42a) is reported at 995 F.3d 1316. The Federal Circuit's order denying rehearing en banc, along with concurrences and dissents therefrom (App., *infra*, 43a-105a) is reported at 995 F.3d 1347.

JURISDICTION

The judgment of the court of appeals, modifying the original panel opinion upon denial of a petition for rehearing en banc, was filed on April 30, 2021. The Court's order of March 19, 2020, extended the time to file this petition to September 27, 2021. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

REGULATORY PROVISION INVOLVED

The version of the Department of Veterans Affairs' New and Material Evidence regulation, 38 C.F.R. § 3.156, applicable to petitioner's claim[1] provides in relevant part:

> (a) General. A claimant may reopen a finally adjudicated claim by submitting new and material evidence. New evidence means existing

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[1] Section 3.156(a) was amended in 2019, but the prior version applies to claims filed before that date. See App., *infra*, 12a. The amended language does not materially bear on this dispute. Section 3.156(c) has not been amended, and "reads today as it did in 2006 and in 2014 when the Board considered Mr. Kisor's case." *Ibid.*

evidence not previously submitted to agency decisionmakers. Material evidence means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim. New and material evidence can be neither cumulative nor redundant of the evidence of record at the time of the last prior final denial of the claim sought to be reopened, and must raise a reasonable possibility of substantiating the claim.

* * *

(c) Service department records.

(1) Notwithstanding any other section in this part, at any time after VA issues a decision on a claim, if VA 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 claim, VA will reconsider the claim, notwithstanding paragraph (a) of this section. Such records include, but are not limited to:

(i) Service records that are related to a claimed in-service event, injury, or disease, regardless of whether such records mention the veteran by name, as long as the other requirements of paragraph (c) of this section are met;

* * *

(3) An award made based all or in part on the records identified by paragraph (c)(1) of this section is effective on the date entitlement arose or the date VA received

> the previously decided claim, whichever is later, or such other date as may be authorized by the provisions of this part applicable to the previously decided claim.

STATEMENT

As part of the Nation's commitment to veterans, the Department of Veterans Affairs (VA) provides disability benefits to those injured on account of their service. For decades, the VA's adjudication system was broken, with extraordinarily high error rates. Even today, statistics show that ten to twenty percent of claims are improperly denied.

38 C.F.R. § 3.156(c) partially remediates past VA mistakes. When the VA errs by failing to obtain and consider "relevant official service department records" in a benefits adjudication, the veteran may receive benefits retroactive to the original claim date, if a subsequent benefits award is based at least on part on these overlooked records. That is, Section 3.156(c) is designed to make a veteran whole following the VA's own error.

Petitioner James Kisor served in the Vietnam War and participated in the deadly Operation Harvest Moon. All now agree that he has suffered from post-traumatic stress disorder (PTSD) since the early 1980s due to his combat service in Vietnam. And it is further undisputed that, when the VA first adjudicated his claim for veteran's disability benefits, it erred by failing to consider important parts of his service record that substantiated his participation in Operation Harvest Moon. But the VA nonetheless denied retroactive benefits under Section 3.156(c), concluding that the overlooked records were not "outcome determinative." Holding the regulation ambiguous, the Federal Circuit affirmed that result on the basis of *Auer* deference.

After granting certiorari, this Court vacated that judgment, explaining that *Auer* deference is appropriate "only if [the] regulation is genuinely ambiguous * * * even after a court has resorted to *all* the standard tools of interpretation." *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2414 (2019) (emphasis added); see also, *e.g.*, *id.* at 2423 ("We have insisted that a court bring all its interpretive tools to bear before finding" deference appropriate.). The Court concluded that "the Federal Circuit jumped the gun in declaring the regulation ambiguous" and deferring to the VA's position, and thus remanded for the court of appeals to "make a conscientious effort to determine, based on indicia like text, structure, history, and purpose, whether the regulation really has more than one reasonable meaning." *Id.* at 2423-2424.

On remand, the Federal Circuit has once again ruled against Petitioner, this time on the grounds that the VA's interpretation has become *unambiguously* correct. That is, the very same regulatory text the court of appeals earlier found "ambiguous," "vague," and resistant to interpretation through "canons of construction" (*Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017)) now "has only one reasonable meaning"—the meaning under which the veteran loses once again. App, *infra*, 17a.

That renewed judgment is substantially wrong. In the words of an opinion dissenting from the denial of rehearing en banc below, it misconstrues "an important and oft-resorted to remedial regulation." App., *infra*, 102a; see also *id.* at 20a ("[T]he majority complicates and obfuscates the meaning and application of § 3.156(c), a key provision in VA law that is invoked by thousands of veterans in countless VA cases."). And it "effectively nullif[ies] the pro-veteran canon of construction." *Id*. at 102a. For these reasons, four judges below expressed their "hope" that this Court "will be

willing to grant certiorari once more, and that [petitioner] will finally win." *Ibid*.

A. Legal Background

A veteran may seek readjudication of a denied claim for disability benefits in two different ways. First, he may "*reopen*" the claim "by submitting new and material evidence." 38 C.F.R. § 3.156(a) (emphasis added). "Material evidence" for purposes of reopening "means existing evidence that, by itself or when considered with previous evidence of record, relates to an unestablished fact necessary to substantiate the claim." *Ibid.*

Second, the "VA will *reconsider* the claim, notwithstanding paragraph (a)" if the "VA 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 claim." 38 C.F.R. § 3.156(c)(1) (emphasis added). The term "relevant official service department records" is not exhaustively defined by the regulation, but includes "[s]ervice records that are related to a claimed in-service event, injury, or disease." *Id.* § 3.156(c)(1)(i).

The reconsideration procedure is more favorable to the veteran because it provides for benefits retroactive to the date of the earlier, erroneously denied claim. 38 C.F.R. § 3.156(c)(3). This embodies the policy that "a claimant should not be harmed by an administrative deficiency of the government" (*New and Material Evidence*, 70 Fed. Reg. 35,388, 35,389 (June 20, 2005))—in particular, the VA's failure, at the time of the earlier adjudication, to "associate[] with the claims file" "relevant official service department records" in the government's possession (38 C.F.R. § 3.156(c)(1)).

B. Factual and Procedural Background

1. James Kisor served this country on active duty with the 2nd Battalion, 7th Marines, from 1962 to 1966. App., *infra*, 6a. In December of 1965, while participating in Operation Harvest Moon in Vietnam, his unit was "ambush[ed]" (C.A. J.A. 19) and came under "heavy fire by mortar, recoilless rifle, and automatic weapons" by an estimated Viet Cong battalion that was "well camouflaged and dug into concealed positions." App., *infra*, 24a (quoting C.A. J.A. 30-31). More than a dozen U.S. servicemen died, and over 100 Viet Cong troops were killed. C.A. J.A. 30.

As the VA now recognizes, Kisor's combat service in Vietnam, specifically during Operation Harvest Moon, left him with severe post-traumatic stress disorder, resulting in his "unemployability." App., *infra*, 7a.

2. Kisor first applied for VA disability benefits in 1982. App., *infra*, 5a. "There is no dispute that the agency made no effort" at that time "to determine whether Mr. Kisor suffered a traumatic stressor during his service in Vietnam." *Id.* at 22a. "This was in spite of the fact that (1) a legal element of any PTSD claim is a verified in-service stressor, and (2) the first clinical criterion for a medical diagnosis of PTSD * * * is the experience of an objectively distressing traumatic event." *Id.* at 22a. Instead, an examiner with "palpable skepticism" of "Mr. Kisor's descriptions of his combat experience" (*id*. at 23a) diagnosed Kisor with "a personality disorder as opposed to PTSD" (*id.* at 5a). *See also id.* at 23a n.3 (cataloguing instances of skepticism by the examiner). On the basis of this diagnosis, which is ineligible for service connection, the VA—with "no documentation whatsoever of combat experience in Mr. Kisor's file" (App., *infra*, 22a-23a)—denied his claim in May of 1983.

3. Twenty-three years later, in 2006, Kisor discovered the absence of his combat records from his VA claims file. App., *infra*, 24a. He submitted the records of his combat service to the agency, which the VA construed as a request to reopen his claims. *Ibid.*; see also *id.* at 6a. "Based on the information in the [relevant records]—information that all along had been in the government's possession—the VA formally verified Mr. Kisor's stressor." *Id.* at 24a. A VA examiner then diagnosed Kisor with PTSD "due to experiences that occurred in Vietnam," and the VA granted disability benefits effective June 5, 2006. *Id.* at 7a.

Kisor appealed the denial of retroactive benefits to the Board of Veterans' Appeals. App., *infra*, 7a. The Board held that the service records demonstrating Kisor's combat experience were not "relevant" within the meaning of Section 3.156(c)(1) because "the basis of the [original] denial was that a diagnosis of PTSD was not warranted, not a dispute as to whether or not the Veteran engaged in combat with the enemy during service." *Id*. at 8a. Because these records were not "outcome determinative," the Board reasoned, they did not qualify within the meaning of Section 3.156(c). *Ibid*.

4. Kisor appealed to the Federal Circuit, which upheld the Board's interpretation by applying *Auer* deference. *Kisor* v. *Shulkin*, 869 F.3d 1360 (Fed. Cir. 2017). The panel explicitly held "that [Section] 3.156(c)(1) is ambiguous as to the meaning of the term 'relevant.'" *Id.* at 1367. As the panel explained, "the regulation is vague as to the scope of the word, and canons of construction do not reveal its meaning. Significantly, [Section] 3.156(c)(1) does not specify whether 'relevant' records are those casting doubt on the agency's prior rating decision, those relating to the veteran's claim more broadly, or some other standard." *Id.* (citations omitted); *see also id.* ("The varying, alternative definitions

of the word 'relevant' offered by the parties further underscore [Section] 3.156(c)(1)'s ambiguity."). Applying *Auer* deference, the panel adopted the VA's construction of its own regulation. *Id.* at 1368. It therefore upheld the denial of retroactive benefits, since "Mr. Kisor's 2006 records did not remedy the defects of his 1982 claim," and thus were not "relevant" under the government's definition. *Ibid.*

Following a grant of certiorari, this Court vacated and remanded. See *Kisor* v. *Wilkie*, 139 S. Ct. 2400 (2019). The Court's opinion restated and substantially curtailed the *Auer* deference doctrine on which the Federal Circuit had relied. *Id.* at 2410-2423; *see also id.* at 2425 (Gorsuch, J., concurring in the judgment) ("[T]he majority proceeds to impose so many new and nebulous qualifications and limitations on *Auer* that * * * the doctrine emerges maimed and enfeebled—in truth, zombified."). The Court directed the Federal Circuit to "bring all its interpretative tools to bear" in interpreting the regulation, including "indicia like text, structure, history, and purpose." *Id*. at 2423-2424.

5. On remand, the government abandoned its reliance on *Auer*—but the panel majority reached the same result anyway. See App., *infra*, 20a ("[O]n remand, the VA made a hard U-turn and waived *Auer* altogether."). [2] As Judge Reyna put it in dissent, "the majority has decided to follow the VA and to adopt the agency's new belief that the very same text we initially declared ambiguous has sprung a lack of 'interpretive doubt.'" *Ibid*.

Looking to the "context of [Section] 3.156(c)," the panel majority held that "in order to be 'relevant' for

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[2] The panel opinion, and dissent, reproduced in the appendix are the versions as amended upon denial of rehearing en banc.

purposes of reconsideration, additional records must speak to the basis for the VA's prior decision." App., *infra*, 13a.

Judge Reyna dissented. As he explained, "[n]othing in the text of the provision requires that to be relevant, 'relevant records' must directly or indirectly 'speak to the basis for the VA's prior decision,' address facts expressly 'in dispute,' or 'bear on the outcome.'" App., *infra*, 20a. In a thorough opinion carefully canvassing the text, structure, history, and precedent, Judge Reyna demonstrated to the contrary that "established constructions of the terms 'relevant records' and 'material evidence' in related veterans' benefit provisions support the conclusion that records are 'relevant' so long as they help to establish unestablished facts that are necessary for substantiating the veteran's claim." *Id.* at 20a-21a. Finally, Judge Reyna explained that the majority was wrong to reject the applicability of the veteran's canon while simultaneously "considering arguments that favor the VA's position under the other tools of construction." App., *infra*, 39a.

6. Kisor petitioned for rehearing en banc. The petition was denied, but occasioned multiple concurring and dissenting opinions—five in all—reflecting a deep split of opinion among the judges of the Federal Circuit, regarding both the meaning of Section 3.156(c) specifically and the proper role of the veteran's canon more broadly. In all that discussion, however, "none of the concurring opinions even pretend to defend" the panel's interpretation of Section 3.156(c)(1). App., *infra*, 101a.

Judge Prost wrote a lengthy concurrence that studiously avoided any discussion of the meaning of Section 3.156(c) itself. App., *infra*, 46a-67a. Instead, the concurrence focused on the position that courts "should consider the pro-veteran canon only if, after exhausting

all applicable *descriptive* tools in search of a provision's best meaning, a range of plausible interpretations remains." *Id*. at 67a (emphasis added). Judge Prost also appeared to endorse a rule under which the veteran's canon would be triggered only by the same sort of "genuine[] ambigu[ity]" that justifies *Auer* deference under this Court's decision in *Kisor*. *Id.* at 56a (quoting *Kisor*, 139 S. Ct. at 2414). Judge Hughes went even further, suggesting that the veteran's canon is subordinate even to *Chevron* and *Auer* deference. *Id.* at 71a.

Judge Dyk penned a concurrence generally agreeing with the dissent that "it can hardly be clearer" that Section 3.156(c)(1) "does not restrict the availability of an earlier effective date only to records that speak to the basis for the prior decision"—but adopted an idiosyncratic reading of the majority opinion as consistent with that principle. App, *infra*, 75a; see also *id.* at 101a (noting that the Dyk concurrence "takes direct issue with the majority's interpretation, seeming to agree with the dissent's broader interpretation").

Judge Reyna (joined by Chief Judge Moore and Judges Newman and O'Malley) reprised his panel dissent, emphasizing that the majority's rejection of the veteran's canon was inappropriate given this Court's instruction in *Kisor*: "Here the majority utilized every single canon in its armory to find the provision unambiguous and avoid resorting to the pro-veteran canon. As a result, the pro-veteran canon was left out of the traditional interpretive toolkit altogether." App, *infra*, 104a-105a.

Finally, Judge O'Malley (joined by Chief Judge Moore and Judges Newman and Reyna) dissented as well, explaining both that "*all* of the canons"—including the veteran's canon—"ought to be consulted and weighed in the analysis" when "the text yields competing plausible interpretations," and that the

panel "majority's definition of 'relevant' [in Section 3.156(c)(1)] is a strained, Federal Circuit-specific definition that is not only out of step with common and legal usages of the term, but ignores the remedial context in which it appears." App, *infra*, 99a, 101a; see also *id.* at 78a ("I am surprised that the panel majority does not believe the Supreme Court's opinion compels judgment in Mr. Kisor's favor. I am also surprised by the analytical hoops through which the panel majority has jumped to reinforce its decision to rule against the veteran.").

Judge O'Malley therefore explicitly urged the Court to review and reverse the Federal Circuit's decision: "Because we have refused to hear this case en banc and make clear that the pro-veteran canon trumps *Chevron* and *Auer*, I hope the Supreme Court will be willing to grant certiorari once more, and that the veteran will finally win." App., *infra*, 102a.

REASONS FOR GRANTING THE PETITION

The Court should review the Federal Circuit's fundamentally incorrect construction of Section 3.156(c), a regulation central to the Nation's promise to care for our veterans upon their return home. In so doing, the Court may also resolve the substantial disagreement apparent within the Federal Circuit regarding the appropriate use of the pro-veteran canon.

A. The Court should resolve the proper construction of Section 3.156, which is of tremendous importance to our Nation's veterans.

To begin, the profound importance of the regulation at issue to our Nation's 19 million veterans counsels strongly in favor of this Court's intervention. See Pew Research Center, *The Changing Face of America's*

Veteran Population (Apr. 5, 2021), perma.cc/6MBH-2EB6.

> 1. As Judge Reyna explained in dissent below:
>
> When Mr. Kisor and millions of others joined the armed services in their youth for modest pay, risking the rest of their lives, they did so with the government's promise that upon their return, it would make them as whole as possible, if only financially, for their wounds, and that, as veterans, they would be treated fairly and sympathetically in the process. That is the basic purpose of the VA's existence.

App, *infra,* 42a.

Section 3.156(c)—"a key provision in VA law that is invoked by thousands of veterans in countless VA cases" (App., *infra*, 20a)—is a vital guarantor of that promise. It ensures that when the VA fails in its duty to develop pertinent evidence for a veteran's disability claim in the first instance (see *McGee* v. *Peake*, 511 F.3d 1352, 1357 (Fed. Cir. 2008); 38 U.S.C. § 5103A), the "veteran [is placed] in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim." *Blubaugh* v. *McDonald*, 773 F.3d 1310, 1313 (Fed. Cir. 2014). That is, veterans are not to be denied full benefits—retroactive to the date of their initial disability claim—because of the government's mistakes.

2. Nor is the possibility of VA mistakes in claim adjudication merely academic. To the contrary, the VA's own statistics show that the "claims-based accuracy" of adjudications currently fluctuates between 82% and 92%—meaning that somewhere between one in ten and one in five veterans will have his disability or pension claim incorrectly denied. *Veterans Benefits Administra-*

tion Reports: Claims-Based Accuracy (Sept. 21, 2020), https://perma.cc/52SZ-DK6C.

What is more, certain disabilities are subject to even more inaccurate processing from the VA. Studies reflect that PTSD—a particularly common disability for combat veterans[3]—is misadjudicated for close to a third of claimants. See Brian P. Marx et al., *Validity of Posttraumatic Stress Disorder Service Connection Status in Veterans Affairs Electronic Records of Iraq and Afghanistan Veterans*, 77 J. Clinical Psychiatry 517, 517 (2016) (reporting that "[c]oncordance between PTSD [service-connection] status and current and lifetime PTSD diagnosis was 70.2% and 77.2%, respectively," reflecting a "concerning" "number of veterans who meet PTSD diagnostic criteria but have not been granted [service-connection] status").

As bad as these numbers are, they were far worse in the past; in 1998, for example, a VA statistical analysis "found an accuracy rate of only *64 percent*" in disability adjudications. U.S. General Accounting Office, *Veterans' Benefits Claims: Further Improvements Needed in Claims-Processing Accuracy* 1 (Mar. 1999), perma.cc/H2DM-4VZZ. Such abysmal accuracy in legacy adjudications only increases the importance of procedures—principally Section 3.156(c)—through which veterans can receive retroactive compensation for longstanding wrongs.

3. Finally, because the Federal Circuit has exclusive jurisdiction over veteran's claim appeals (see 38 U.S.C. § 7292), the panel's erroneous decision—unless

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[3] The VA itself estimates that 30% of Vietnam veterans have had PTSD in their lifetimes, and that up to 20% of veterans who served in Operations Iraqi Freedom and Enduring Freedom have PTSD in any given year. National Center for PTSD, *How Common is PTSD in Veterans?*, perma.cc/UK48-ZSCC.

corrected—will be the last word on this important question, effectively shutting the door on retroactive compensation for many veterans, like Mr. Kisor, whose meritorious benefits claims have been denied for no better reason than the government's carelessness. See pages 11-13, *supra*; see also App., *infra*, 25a n.4 (describing additional cases of mistaken PTSD non-diagnoses later being corrected through the reconsideration process).

The Court should not let the panel's "strained, Federal Circuit-specific definition" of relevance (App., *infra*, 101a), control all future proceedings under this critical remedial provision for disabled veterans that have been failed by the very claims process designed to make them "as whole as possible, if only financially, for their wounds" suffered in service of this country (*id.* at 42a).

* * *

As Judge Reyna put it, "Mr. Kisor, a veteran who was denied twenty-three years of compensation for his service-connected disability after a disgracefully inadequate VA review, is denied relief under a regulation specifically promulgated to benefit him and other veterans in his situation. The result will reverberate like the thunder of a cannon from far beyond the horizon of this case." App., *infra*, at 21-22a. The Court should grant certiorari to resolve the meaning of Section 3.156(c).

B. The Federal Circuit's decision is wrong.

Three years ago, the Federal Circuit deferred to the government's construction of Section 3.156(c) because it concluded that the regulatory text was "ambiguous" and "vague," and "canons of construction [did] not reveal its meaning." *Kisor I*, 869 F.3d at 1367. Now, on remand from this Court's vacatur of that judgment, the

Federal Circuit has reached the same substantive result, this time because the identical regulatory text "has only one reasonable meaning." App., *infra*, 18a. The Federal Circuit's construction is wrong at every turn.

1. The court of appeals largely relied on definitions of "relevant" as some variation on "tending to prove or disprove a matter in issue." App., *infra*, 13a-14a (quoting Black's Law Dictionary (10th ed. 2014)). But it then concluded, without textual support, that the "matter in issue" is "the basis of the [earlier] denial," rather than *all* the unestablished elements that make up the veteran's claim. *Id.* at 15a. That is the central error. Put differently, this case is not really about what "relevant" means in a vacuum, but what the overlooked service records must be "relevant" *to*.

The regulatory text, viewed as a whole, answers that question: the records must be "relevant" to the veteran's "claim." 38 C.F.R. § 3.156(c)(1). The triggering event for reconsideration is the VA "associat[ing] with the *claims file*" material that is an "official service department record[]" and that should have been "associated with the *claims file*" the first time. *Id.* (emphases added). What goes into the "*claims* file"? Documents that are "relevant" to the veteran's "claim." *Ibid.*

In promulgating the current regulation, this is precisely how the VA understood it would work: "If a newly discovered service department record is one that VA *should have received at the time* it obtained the veteran's service medical records, we believe it ordinarily would be within the scope of proposed [Section] 3.156(c)(1)." *New and Material Evidence*, 71 Fed. Reg. 52,455, 52,456 (Sept. 6, 2006) (emphasis added). A "relevant" record is thus any record that belonged in the "claims file" at the time of the original adjudication.

The context provided by the overarching structure of the veterans' benefit statutes further underscores this result. Cf., *e.g.*, *Torres* v. *Lynch*, 136 S. Ct. 1619, 1626 (2016) ("[W]e must, as usual, 'interpret the relevant words not in a vacuum, but with reference to the statutory context.'") (quoting *Abramski* v. *United States*, 573 U.S. 169, 179 (2014)).

Specifically, the VA is under a statutory duty "to assist a claimant in obtaining evidence necessary to substantiate" his benefits claim, including by "obtaining * * * relevant records" about the claimant's medical history and military service. 38 U.S.C. § 5103A(a)(1), (c). It makes perfect sense that the scope of the "relevant records" that the VA is obligated to obtain for the claimant's benefit under Section 5103A should be coextensive with the "relevant * * * records" that justify reconsideration under Section 3.156(c)(1), such that reconsideration (and a retroactive benefit award) is appropriate when the VA has failed in its statutory duty to assist. Cf. *Blubaugh*, 773 F.3d at 1313 (Section 3.156(c) ensures the "veteran [is placed] in the position he would have been had the VA considered the relevant service department record before the disposition of his earlier claim.").

But "relevant records" under the VA's duty to assist are undisputedly *not* limited to those that would be "dispositive" of the claim. See, *e.g.*, *McGee*, 511 F.3d at 1358 ("The statute simply does not excuse the VA's obligation to fully develop the facts of McGee's claim based on speculation as to the dispositive nature of the relevant records."); *Jones* v. *Wilkie*, 918 F.3d 922, 926 (Fed. Cir. 2019) ("[T]o trigger the VA's duty to assist, a veteran is not required to show that a particular record * * * would independently prove his or her claim."). It follows that "relevant * * * records" under the parallel provisions of Section 3.156(c)(1) similarly need not be

dispositive, so long as they go to a necessary element of the veteran's claim. See App., *infra*, 29a; cf. *Golz* v. *Shinseki*, 590 F.3d 1317, 1321 (Fed. Cir. 2010) ("Relevant records" for purposes of VA's duty to assist with a claim of PTSD "are those relating to a medical diagnosis of PTSD, evidence corroborating claimed in-service stressors, or medical evidence establishing a link between any in-service stressor and a PTSD diagnosis.").[4]

The regulatory history also confirms that "relevant service department records" are not limited to those that "speak to the basis for the VA's prior decision." cf. App., *infra*, 13a. Prior to 2006, both reconsideration and reopening under Section 3.156 required "new and material evidence." 38 C.F.R. § 3.156(a), (c) (2005); see App., *infra*, 30a. When the VA revised the regulation to eliminate the "new and material" requirement from the reconsideration provision, it did so "to clarify VA's current practice" and "[t]o eliminate possible confusion," *not* to impose a higher standard for reconsideration. *New and Material Evidence*, 70 Fed. Reg. 35,388, 35,388 (June 20, 2005). "It follows that records are 'relevant' under [Section] 3.156(c)(1) if they would satisfy the definition of 'material evidence' for purposes of reopening a claim.'" App., *infra*, 30a.

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[4] The panel majority resisted this conclusion by noting that reconsideration results in retroactive benefits "only if the award is 'based all or in part on' the newly identified records," and posits that "a claimant * * * could not obtain an award 'based all or in part on'" records that do not "speak to the basis for the VA's prior decision." App., *infra*, 13a (quoting 38 C.F.R. § 3.156(c)(3)). But as Judge Reyna pointed out, the 2006 award *in this very case* was based in part on the newly found service documents, since they—and only they—prove that Kisor's PTSD was a result of in-service stressors, a necessary element that was unestablished at the time of the first determination. *Id.* at 35a-36a.

That parallelism is critical, because "it has always been VA's position that evidence may be new and material even though it does not warrant revision of a previous decision." *New and Material Evidence*, 55 Fed. Reg. 52,274, 52,274 (Dec. 21, 1990). Indeed, in 2001 the VA expressly *rejected* as "too restrictive" a proposed definition of materiality under Section 3.156 that would have limited material records to those "that relate[] specifically to the reason why the claim was last denied." *Duty to Assist*, 66 Fed. Reg. 45,620 45,629 (Aug. 29, 2001). In its place, the agency instituted the current regulatory definition—which explicitly governed reconsideration until 2006, and, as noted, continues to govern it by implication: "Material evidence means existing evidence that * * * relates to an unestablished fact necessary to substantiate the claim." *Ibid.*; see 38 C.F.R. § 3.156(a).

In other words, the VA in 2001 expressly declined to promulgate by regulation the exact same substantive rule it is now attempting to achieve through interpretation—and that the Federal Circuit has blessed. As Judge Reyna explained, in light of this history, "[i]f the VA now intends to condition reconsideration on records that relate to the basis of the prior decision or change its outcome, it must do so through notice and comment." App., *infra*, 33a.

Finally, the Federal Circuit's approach—which focuses on whether the records in question "speak to * * * a matter in dispute" (App., *infra*, 4a)—"is fundamentally out of place in the VA's 'completely ex-parte system of adjudication'" (*id.* at 34a (quoting *Hodge* v. *West*, 155 F.3d 1356, 1362-1363 (Fed. Cir. 1998))). That is, "[b]ecause no adverse party is expected to contest a claimant's assertions" during the claims process, "the question of whether a fact is 'disputed' has no import"; the relevant question for the VA's inquisitorial system

of adjudication is "whether the fact remains unestablished and necessary for substantiating the claim." *Ibid.* And here, "regardless of whether the presence of Mr. Kisor's in-service stressor was 'disputed' by the VA, it was not *established* at the time of the VA's first decision." *Ibid.*

Thus, even without the assistance of the pro-veteran canon, Petitioner (and the dissents below) have the better of the regulatory interpretation here. But as discussed in more detail below, that canon should have controlled the outcome—particularly given this Court's prior decision and remand. As Judge O'Malley put it, given this Court's instruction that "*all* the traditional tools of construction' must be employed" before "a regulation may be deemed 'genuinely ambiguous' enough for *Auer* deference," "[i]t would seem that the resolution on remand would have been easy":

> The panel originally found the regulation insolubly ambiguous without having considered the pro-veteran canon of construction. Applying that canon in this court's "legal toolkit" to a circumstance in which there were two reasonable constructions of the regulation, and without the option of *Auer*, the result should have been that the veteran's proposed construction prevailed. The veteran should have won.

App, *infra*, 80-81a (quoting *Kisor*, 139 S. Ct. at 2415).

In sum, "the context, history, and purpose of reconsideration support a construction of 'relevant' that entitles Mr. Kisor to relief: that service records are 'relevant' when they help to establish an unestablished fact necessary to substantiate a veteran's claim." App, *infra*, 33a.

2. Moreover, as Judges Reyna and O'Malley explained below, the nature of a PTSD diagnosis in par-

ticular—again, an affliction that affects a great percentage of our Nation's veterans (see page 12 n.3, *supra*)—highlights the flaws in the majority's interpretation.

That is, "PTSD is a differential diagnosis * * * that turns, in large measure, on the nature and existence of identified stressors." App., *infra*, 83a (O'Malley, J., dissenting from denial of rehearing en banc). That being the case, "the majority's effort to render in-service records of those stressors irrelevant because the denial of Mr. Kisor's claim for benefits was premised on the absence of a diagnosis of PTSD and not on the absence of an in-service connection to his alleged disability is mental gymnastics." *Ibid.*; see also *ibid.* ("Where skepticism that stressors existed resulted in a non-diagnosis of PTSD, detailed records cataloging such stressors must certainly be 'relevant' to that non-diagnosis, under any construction of that term."). In other words, because the existence of a stressor is *both* an independent legal element for service connection *and* a medical element of a PTSD diagnosis, the two inquiries cannot so neatly be separated. App., *infra*, 22a; cf. *Hodge*, 155 F.3d at 1363 (recognizing, in the context of Section 3.156(a) reopening, that "so much of the evidence regarding the veterans' claims for service connection and compensation is circumstantial at best" and that "new evidence may well contribute to a more complete picture of the circumstances surrounding the origin of a veteran's injury or disability, even where it will not eventually convince the Board to alter its ratings decision").

Even more striking than the Federal Circuit's illogical insistence that evidence of combat is irrelevant to a PTSD diagnosis, it appears that the Federal Circuit was simply *wrong* in claiming that "the RO did not dispute [Mr. Kisor's] account" of his combat service; that

"the presence of an in-service stressor has never been disputed"; and that the rejection of his claim "did not question Mr. Kisor's experience in the service." App., *infra*, 3a, 10a. To the contrary, the 1983 rating decision itself affirmatively—and incorrectly—states that Mr. Kisor did *not* see combat in Vietnam. See J.A. in No. 18-15, at 15 (rating decision, with the "COMBAT" box filled out with a "1," meaning "NONE"). That is, Mr. Kisor's combat records *do* "b[ear] * * * on [a] matter relating to entitlement to service connection to PTSD, other than a matter that was not in dispute"—the existence of an in-service stressor—and the Federal Circuit therefore got this case wrong even under its own erroneous interpretation of Section 3.156(c).

C. Review is further warranted so that the Court may clarify the proper role of the pro-veteran canon.

In construing Section 3.156(c), the Court may also confirm the appropriate role of the veteran's canon in the process of textual interpretation. Doing so is essential to resolve the manifest disagreement about the canon's proper use expressed by the court below, which has "exclusive jurisdiction to review" challenges to veterans' affairs statutes and regulations. 38 U.S.C. § 7292(c).

1. To start with, the decision below erroneously disregards the pro-veteran canon of construction. The Court has repeatedly made clear that "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson* v. *Shinseki*, 562 U.S. 428, 441 (2011) (quoting *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991)); 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.").

Meanwhile, the Court held earlier in this case that "a court must exhaust all the 'traditional tools' of construction" before "concluding that a rule is genuinely ambiguous" such that *Auer* deference may apply. *Kisor*, 139 S. Ct. at 2415 (quoting *Chevron U.S.A. Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 843 n.9 (1984)); see also *id.* at 2414 ("[T]he possibility of deference can arise only if a regulation is genuinely ambiguous * * * even after a court has resorted to *all* the standard tools of interpretation."); *id.* at 2423 ("We have insisted that a court bring all its interpretive tools to bear before" deferring under *Auer.*).

The Court explained that the deference doctrine occupies this uniquely disprivileged position because "the core theory of *Auer* deference is that sometimes the law runs out, and policy-laden choice is what is left over." *Kisor,*, 139 S. Ct. at 2415. That is why all other interpretive tools must be exhausted before turning to *Auer*: "[O]nly when that legal toolkit is empty and the interpretive question still has no single right answer can a judge conclude that it is 'more [one] of policy than of law.'" *Ibid.* (quoting *Pauley* v. *BethEnergy Mines, Inc.*, 501 U.S. 680, 696 (1991)).

The Federal Circuit below, however, held that the veteran's canon *also* cannot be considered unless that same level of genuine ambiguity—ambiguity that would justify *Auer* deference under this Court's *Kisor* decision—exists. App., *infra*, 17a (refusing to apply veteran's canon because "the term 'relevant' in § 3.156(c)(1) is not 'genuinely ambiguous'"); accord *id.* at 66a (Prost, J., concurring in the denial of rehearing en banc) (asserting that without genuine ambiguity, "there is 'no reason or basis to put a thumb on the scale,' whether in deference to an agency or in the veteran's favor.") (quoting *Kisor*, 136 S. Ct. at 2448 (Kavanaugh, J., concurring in the judgment)).

That cannot be right—indeed, it is incoherent—because the veteran's canon *is* one of the "traditional tools of construction" that courts must consider before deferring under *Auer*. See, *e.g.*, *Henderson*, 562 U.S. at 441 ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the benficiaries' favor.") (quotation marks omitted). Indeed, the canon dates back nearly a century. See *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943) ("The Soldiers' and Sailors' Civil Relief Act is always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation."); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("Our problem is to construe the separate provisions of the [Selective Service] Act as parts of an organic whole and give each as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits.").

Moreover, the panel decision below made no lucid attempt to explain why it was applying some canons and interpretive aids, but not the veteran's canon, in resolving the "interpretive doubt" it had identified in its pre-remand decision. App., *infra*, 13a-14a. That is not the hallmark of a well-reasoned decision, and is no state in which to leave the law on this important issue of veteran's affairs.

2. At the en banc stage, Judge Prost's concurrence attempted to supply a rationale for the panel's unexplained derogation of the pro-veteran canon: that "descriptive" canons must be exhausted before resort may be had to "normative" canons like the rule of lenity and (the concurrence argues) the veteran's canon. See App.

infra, 49a-50a. But whatever the merit of that proposition in the abstract,[5] it cannot justify the result here.

That is because the veteran's canon is *not* a normative canon in the same vein as the rule of lenity, which self-consciously expresses a judge-made policy choice. See Antonin Scalia & Bryan A. Garner, *Reading Law* 296 (2012) (explaining that the rule of lenity embodies "the judge-made public policy that a legislature ought not" "decree punishment without making clear what conduct incurs the punishment and what the extent of the punishment will be") (emphasis omitted).

Instead, the pro-veteran canon is best understood as a presumption about congressional intent: "[T]he Supreme Court decided [its pro-veteran canon cases] upon the premise that Congress, knowing that it cannot resolve all issues *ex ante*, created the system with a residual intent that ambiguity be resolved in the favor of veterans." James D. Ridgway, *Toward A Less Adversarial Relationship Between Chevron and Gardner*, 9 U. Mass. L. Rev. 388, 408 (2014); see also *Henderson*, 562 U.S. at 440 ("The solicitude of Congress for veterans is of long standing.") (quoting *United States* v. *Oregon*, 366 U.S. 643, 647 (1961)); *Shinseki* v. *Sanders*, 556 U.S. 396, 412 (2009) ("Congress has expressed special solicitude for the veterans' cause."); cf. Caleb Nelson, *What is Textualism*, 91 Va. L. Rev. 347, 394 n.140 (2005) ("[M]any 'substantive' canons (such as those that reflect Congress's established patterns of behavior) help interpreters discern likely legislative intent,

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[5] But cf., *e.g.*, Thomas B. Bennett, Note: *The Canon at the Water's Edge*, 87 N.Y.U. L. Rev. 207, 212, 213-220 (2012) (expounding "a *spectrum* between fact- and value-based canons of interpretation, and rejecting "a pure dichotomy" between the two) (emphasis added).

and hence can be seen as 'descriptive' rather than 'normative.'").

What is more, the Court has explained that the pro-veteran canon is a background principle upon which Congress is understood to legislate. *King*, 502 U.S. at 220 n.9 ("We will presume congressional understanding of * * * interpretive principles" such as "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."). And when canons—even truly normative ones—reach this status, they appropriately play a part in textual analysis. Scalia & Garner, *supra*, at 31 ("A traditional and hence anticipated rule of interpretation, no less than a traditional and hence anticipated meaning of a word, imparts meaning.").

The pro-veteran canon is thus nothing more than a guide that attempts to discern the intent of Congress by reference to its longstanding "pattern of legislation" (*Oregon*, 366 U.S. at 647), which in turn reflects the legislature's "special solicitude for the veterans' cause" (*Sanders*, 556 U.S. at 412). In other words, it is a tool for illuminating the context and purpose of a veteran's benefit statute—factors that the Court has both required courts generally to evaluate as part of their textual analysis and instructed the Federal Circuit to consider in this very case. See *Kisor*, 136 S. Ct. at 2423-2424; *Abramski*, 573 U.S. at 179 ("[W]e must (as usual) interpret the relevant words not in a vacuum, but with reference to the statutory context, structure, history, and purpose.") (quotation marks omitted).[6] There is

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[6] Accord, *e.g.*, *Gundy* v. *United States*, 139 S. Ct. 2116, 2126 (2019) (plurality opinion of Kagan, J.) ("[S]tatutory interpretation [is] a 'holistic endeavor' which determines meaning by looking not to isolated words, but to text in context, along with purpose and history."); *Dolan* v. *U.S. Postal Serv.*, 546 U.S. 481, 486 (2006)

thus no justification for relegating the canon to a status as "a tool of last resort, subordinate to all others," as the Federal Circuit's decision has done. App, *infra*, 39a-40a.

3. The disagreement below regarding the role of this canon—among the members of the only Article III court with jurisdiction over veteran's benefits appeals—further warrants this Court's review. Indeed, the concurring judges below agree that the proper role of the veteran's canon is an issue of the utmost importance. See, *e.g.*, App, *infra*, 66a, 73a. But they are intractably divided as to the answer to that question—and judges on both sides of the debate have asked for this Court's guidance. *Id.* at 66a, 102a. The Court should take this opportunity to provide it.

The concurring and dissenting opinions below demonstrate that the Federal Circuit is divided into at least three camps regarding the proper role of the veteran's canon. Judges Prost, Lourie, Taranto, and Chen posit that courts "should consider the pro-veteran canon only if, after exhausting all applicable *descriptive* tools in search of a provision's best meaning, a range of plausible interpretations remains," but express a need for "[f]urther guidance * * * to reconcile" the canon with *Chevron* and *Auer* deference in the event of genuine ambiguity. App., *infra*, 66a (emphasis added). Judges Hughes and Wallach go even further, asserting that even in the event of genuine ambiguity, "the VA is entitled to deference, without resort to the pro-veteran

("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132 (2000) ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed into context.").

canon." *Id.* at 71a. Finally, Chief Judge Moore and Judges O'Malley, Newman, and Reyna take the commonsense position that "when the text yields competing plausible interpretations, *all* of the canons"—including the pro-veteran canon—ought to be consulted and weighed in the analysis." App., *infra*, 99a.

The Federal Circuit is unique in its subject matter-based, rather than geographic, jurisdiction. Indeed, it is the only Article III forum with jurisdiction over veterans' benefits appeals, and is thus the primary—if not exclusive—court in which cases implicating the veteran's canon are likely to arise. The evident internal confusion (if not outright conflict) among its members is therefore grounds for additional guidance from the Court.

As Judge O'Malley put it in dissent below, "the importance of the issue—the scope and applicability of a canon of construction—and the enormous impact of [the panel's] determination that the pro-veteran canon is all but inapplicable in future cases" is ample justification for further review. App., *infra*, 102a. Indeed, the decision below "effectively nullif[ies] the pro-veteran canon of construction." *Ibid.*; see also *id.* at 104a (Reyna, J., dissenting from denial of rehearing en banc) (Under the holding below, "the pro-veteran canon comes into play at the bottom of the ninth inning, after three outs have been made, and as the players head to their respective dugouts. But by then, it's game over.").

For that reason—and because of the erroneous and hugely harmful interpretation the majority has placed on Section 3.156(c)—the dissenting judges expressed their "hope" that this Court "will be willing to grant certiorari once more, and that [petitioner] will finally win." App., *infra*, 102a. The Court should take this opportunity to do so.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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