No. 21-6344

IN THE SUPREME COURT OF THE UNITED STATES

JOSEPH J. SNYDER, PETITIONER

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

ELIZABETH M. HOSFORD
KYLE S. BECKRICH
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the Secretary of Veterans Affairs (Secretary) acted reasonably in adopting by regulation an evidentiary presumption that a veteran's post-discharge development of amyotrophic lateral sclerosis (ALS) is service connected, 38 C.F.R. 3.318(a), while limiting that presumption to veterans with at least 90 days of active, continuous service, 38 C.F.R. 3.318(b)(3).

2. Whether limiting Section 3.318's evidentiary presumption to veterans with least 90 days of active, continuous service is consistent with the definition of "veteran" in 38 U.S.C. 101(2).

3. Whether the Secretary's adoption of Section 3.318's evidentiary presumption was authorized by 38 U.S.C. 501, which authorizes the Secretary to prescribe regulations "necessary or appropriate" to carry out the laws that the Secretary administers, including "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws," 38 U.S.C. 501(a)(1).

IN THE SUPREME COURT OF THE UNITED STATES

No. 21-6344

JOSEPH J. SNYDER, PETITIONER

v.

DENIS R. MCDONOUGH, SECRETARY OF VETERANS AFFAIRS

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 1 F.4th 996. The decision of the Court of Appeals for Veterans Claims (Pet. App. B) is not published in the Veterans Appeals Reporter but is available at 2020 WL 3966756. The order of the Board of Veterans' Appeals (Pet. App. C) is unreported but is available at 2019 WL 4561571.

JURISDICTION

The judgment of the court of appeals was entered on June 9, 2021. A petition for rehearing was denied on August 24, 2021 (Pet. App. D). The petition for a writ of certiorari was filed

on November 17, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Congress has authorized disability-benefit payments to any "veteran" with a "disability resulting from" a personal injury or disease incurred "in [the] line of duty" -- or from the "aggravation" of a "preexisting" injury or disease "in [the] line of duty" -- during "active" service "during a period of war." 38 U.S.C. 1110; see 38 U.S.C. 101(2) and (24), 1101(1) (defining "veteran"); cf. 38 U.S.C. 1131 (addressing disability resulting from service during peacetime). To establish that a disability "result[s] from" injury, disease, or the aggravation thereof "in [the] line of duty" while in "active" service (38 U.S.C. 1110), a veteran generally must prove that his disability is "service-connected." See 38 U.S.C. 101(16); 38 C.F.R. 3.303.

By enacting statutory presumptions of service connection in certain discrete contexts, Congress has relaxed the requirement that the veteran prove "service connection." 38 U.S.C. 1113(a). For instance, if a veteran who "served for ninety days or more during a period of war" develops a "chronic disease," including an organic disease of the nervous system, the disease "shall be considered to have been incurred in or aggravated by such service" if it became manifest to a degree of at least ten percent within one year after the veteran's separation from service. 38 U.S.C. 1112(a)(1); see 38 U.S.C. 1101(3).

b. The Secretary of Veterans Affairs (Secretary) may prescribe regulations "necessary or appropriate" to carry out the laws he administers. 38 U.S.C. 501(a). The rules that Section 501(a)(1) authorizes include "regulations with respect to the nature and extent of proof and evidence and the method of taking and furnishing them in order to establish the right to benefits under such laws." 38 U.S.C. 501(a)(1). Pursuant to that grant of authority, the Secretary has promulgated 38 C.F.R. 3.318, which establishes an evidentiary presumption of service connection for certain veterans who have contracted amyotrophic lateral sclerosis (ALS), also known as Lou Gehrig's disease.

ALS is a "neuromuscular disease" that "causes degeneration of nerve cells in the brain and spinal cord that leads to muscle weakness, muscle atrophy, and spontaneous muscle activity." 73 Fed. Reg. 54,691, 54,691 (Sept. 23, 2008). ALS is "relentlessly progressive and almost always fatal," eventually resulting in the inability "to move [one's] arms and legs and to speak and swallow" and, for most, in death by "respiratory failure within 5 years." Ibid. "About 5-10% of ALS cases are inherited; the cause of the remaining 90-95% of cases is not known." C.A. App. 252, 259.

In 2008, the Secretary adopted Section 3.318 as an interim final rule in light of a November 2006 report, prepared at the VA's request by the National Academy of Sciences' Institute of Medicine (IOM), that addressed an apparent association between active military service and ALS. 73 Fed. Reg. at 54,691. Section

3.318 generally provides that "the development of [ALS] manifested at any time after discharge or release from active military, naval, or air service is sufficient to establish service connection for that disease." 38 C.F.R. 3.318(a). That evidentiary presumption does not apply, however, "[i]f the veteran did not have active, continuous service of 90 days or more." 38 C.F.R. 3.318(b)(3).

Based primarily on a 2005 study by M.G. Weisskopf et al., the IOM report concluded that "there is limited and suggestive evidence of an association between military service and later development of ALS." Inst. of Med. of the Nat'l Acads., Amyotrophic Lateral Sclerosis in Veterans: Review of the Scientific Literature 3 & n.3 (2006) (IOM Report) (emphasis omitted), https://www.nap.edu/download/11757; see C.A. App. 244-305 (IOM Report). The report further explained, however, that the evidence did not "rule out chance and bias, including confounding factors, with confidence." Id. at 5. The report stated that the Weisskopf study was of "high-quality" but had inherent "limitations," id. at 34, and it made recommendations to assist the VA in gathering information to "assess causality" and "to determine more definitively whether there is an association between military service and ALS," id. at 4.

The Weisskopf study (C.A. App. 202-207), in turn, used data from an earlier cancer study in which participants had been asked to report prior military service. The study divided the data on 217 servicemember deaths from ALS into quintiles based on "[y]ears of military service." Id. at 204. The median period of service

of the first quintile -- the 21 servicemembers with the least amount of service -- was two years, while the median periods of service for the second through fifth quintiles were three, four, five, and nine years respectively. Ibid. (Tbl. 3). Based on those data, the study found that male servicemembers had a 1.53 relative risk of death from ALS "compared with those who did not serve," id. at 202, and concluded that the "[i]ncreased risk [of death from ALS] appeared largely independent of * * * the number of years served," id. at 205; see id. at 204. Because the study's authors "did not have information on deployment during wartime, which was the principal exposure considered in [earlier ALS studies involving Gulf War veterans]," they noted that their calculation of relative risk might have been reduced if some "nondeployed men" had been included in the analysis. Id. at 205-206.

The Secretary adopted Section 3.318's presumption of service connection for ALS in light of the "statistical correlation between activities in military service and the development of ALS" suggested by existing research. 73 Fed. Reg. at 54,691. The Secretary determined that, while it was "unlikely that conclusive evidence will be developed in the foreseeable future," ALS's "rapid[] progressi[on]" and other factors "unique to ALS" warranted action. Id. at 54,692. The Secretary further determined that the regulation should be issued immediately as an interim final rule, without prior public notice and comment, because "any delay would be extremely detrimental to veterans who are currently afflicted with

ALS," given that the "survival period" is "generally 5 years or less from the onset of symptoms." Id. at 54,692.

The Secretary explained that Section 3.318's requirement of "active, continuous service of 90 days or more" reflected the fact that "the Weisskopf study relied upon by the IOM report" -- which the Secretary invoked in support of the regulation -- had "focused on veterans' 'years' of service" and "did not consider minimum periods of service" needed to produce an increased risk of developing ALS. 73 Fed. Reg. at 54,692. The Secretary observed that "Congress [has] considered 90 days to be the minimum period necessary to support an association between [military] service and subsequent development" of "various conditions, such as chronic diseases." Ibid. (citing 38 U.S.C. 1112(a)). "Consistent with that [congressional] judgment," the Secretary determined that "90 days is a reasonable period to ensure that an individual has had sufficient contact with activities in military service to encounter any hazards that may contribute to development of ALS." Ibid.

Only one comment on the interim final rule addressed the 90-day service requirement. 74 Fed. Reg. 57,072, 57,073 (Nov. 4, 2009) (final rule); see Dep't of Veterans Affairs, AN05 – Interim Final Rule - Presumption of Service Connection for Amyotrophic Lateral Sclerosis, Docket VA-2008-VBA-0026, https://go.usa.gov/xtHHR (reproducing comments). That comment from the ALS Association "expressed support for th[e] regulation" and stated the Association's "belief that 90 continuous days of service in the milita-

ry and a diagnosis of ALS are sufficient to establish presumptive service connection for that disease." 74 Fed. Reg. at 57,073.

2. a. Petitioner enlisted in the United States Army in 1974 during the Vietnam War; trained at Fort Polk, Louisiana; and performed active-duty service as a trainee for 47 days before he was honorably discharged on medical grounds. C.A. App. 161, 163; see Pet. App. B2. Petitioner's discharge was based on the recurrent dislocation or misalignment of both knees ("recurrent subluxation of the patella bilaterally") with runner's knee ("chondromalacia"). C.A. App. 163 (capitalization omitted). Because of his prompt discharge during training, petitioner did not serve in the Indochina war zone. Id. at 161.

b. In November 2015, petitioner was diagnosed with ALS. Pet. App. B2. In 2016, the Department of Veterans Affairs (VA) denied petitioner's request for veterans' disability benefits on the ground that petitioner had failed to establish the requisite service connection to his ALS. Id. at C1, C3. Because petitioner had served in the military for only 47 days, he did not qualify for a presumption of service connection under Section 3.318. Id. at C4; see 38 C.F.R. 3.318(b)(3); p. 4, supra. Petitioner did not appeal, and the VA decision became final. Pet. App. C1.

c. In 2019, the Board of Veterans' Appeals reopened the VA's earlier denial of petitioner's claim for ALS-based disability benefits, Pet. App. C2-C3, but held that petitioner was not entitled to those benefits. See id. at C1-C6. The Board found that

petitioner did not qualify for a presumption of service connection under Section 3.318 because he had served less than 90 days, and that he had not otherwise shown a "causal connection between [his] current ALS and [his] service." Id. at C5-C6.

3. The Court of Appeals for Veterans Claims affirmed. Pet. App. B1-B4. As relevant here, the court denied petitioner's request to "invalidate 38 C.F.R. § 3.318," id. at B1, rejecting his argument that the 90-day service requirement is arbitrary and capricious, id. at B3-B4.

4. The court of appeals also affirmed. Pet. App. A1-A17.

a. The court of appeals held that the Secretary's broad authority under 38 U.S.C. 501(a)(1) to adopt rules governing the nature and extent of proof and evidence in benefits proceedings encompasses the promulgation of rules like Section 3.318 that establish evidentiary presumptions of service connection. Pet. App. A9-A10. The court rejected as "meritless" petitioner's contention that Section 3.318's 90-day service requirement had impermissibly modified "the statutory definition of 'veteran' in 38 U.S.C. § 101(2)." Id. at A11. The court explained that "there is no dispute that [petitioner] meets the definition [of 'veteran']," and that the statutory definition does not require that "all veterans be subject to the same regulatory evidentiary requirements" in all contexts. Ibid.

b. The court of appeals further held that Section 3.318's 90-day service requirement is neither arbitrary nor capricious.

Pet. App. A12-A17. The court observed that "[t]he Secretary's rationale [for the 90-day requirement] is easy to discern." Id. at A14. The court explained that the Secretary's "general logic" was that "the statutory requirement at issue is one of causal connection to activities in military service" and that, "in the absence of evidence to the contrary, at some point near the de minimus end of the spectrum of service length, there is too little time in service * * * to make the causal connection likely." Ibid. The court further explained that the Secretary had "focus[ed] on the record regarding ALS" and had "found no reliable evidence of a correlation between ALS and service of periods as short as 90 days." Ibid. The court noted the Secretary's determination that "the crucial Weisskopf 'study [had] focused on veterans' "years" of service and did not consider minimum periods of service,'" and it concluded that the Secretary's determination was "supported by the study itself," which measured service in "years, not any smaller units," and which "supplie[d] no evidence of a service-ALS correlation for veterans with service periods substantially shorter than a year." Ibid. (quoting 73 Fed. Reg. at 54,692).

The court of appeals also found no basis for rejecting the Secretary's determination that 90 days of service was a reasonable period that ensured some "minimum degree of contact with hazards that may contribute to development of ALS," particularly since that period was consistent with Congress's specification of "a 90-day-service period for its presumption of service connection for

chronic and tropical diseases." Pet. App. A14-A15. The court stated that "neither the evidence nor logic required the Secretary" to "ignor[e] length of service altogether." Id. at A16. The court of appeals concluded that the "Secretary could reasonably choose a familiar short period to avoid what he reasonably found would be too demanding an evidentiary standard (no presumption) or too lenient a standard (no minimum service period) for applying the statutory requirement of service connection to veterans with ALS." Ibid.

ARGUMENT

Petitioner contends (Pet. 12-20) that the Secretary acted arbitrarily and capriciously by limiting Section 3.318's evidentiary presumption of ALS service connection to veterans who completed at least 90 days of active service. Petitioner further argues (Pet. 21-33) that the 90-day requirement impermissibly modifies the definition of "veteran" in 38 U.S.C. 101(2) and exceeds the Secretary's rulemaking authority under 38 U.S.C. 501. Petitioner also asserts (Pet. 13-14, 20, 23-28, 30-32) that the Federal Circuit's decision conflicts with decisions of other courts of appeals. The decision below is both factbound and correct, and it does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. The court of appeals correctly held (Pet. App. A12-A17) that Section 3.318(b)(3)'s 90-day service requirement is neither arbitrary nor capricious because the Secretary "reasonably considered the relevant issues," rendered a rulemaking decision within

the "zone of reasonableness," and "reasonably explained the decision." Id. at A16 (quoting FCC v. Prometheus Radio Project, 141 S. Ct. 1150, 1158 (2021) (Prometheus)); see 38 U.S.C. 7292(d)(1)(A) (authorizing Federal Circuit to review VA regulations under the arbitrary-and-capricious standard during judicial review of veterans' benefit claims).

a. The "arbitrary-and-capricious standard" requires that a reviewing court conduct "deferential" review of agency rulemaking in determining whether the agency's action was "reasonable and reasonably explained." Prometheus, 141 S. Ct. at 1158. The "court may not substitute its own policy judgment for that of the agency"; rather, the court's review "simply ensures that the agency has acted within a zone of reasonableness and, in particular, has reasonably considered the relevant issues and reasonably explained the decision." Ibid. (citing, e.g., Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (State Farm)). That standard is satisfied if the agency has "examine[d] the relevant data and articulate[d] a satisfactory explanation for its action including a 'rational connection between the facts found and the choice made.'" State Farm, 463 U.S. at 43 (citation omitted). The VA regulation at issue here fully satisfies that standard.

First, when the Secretary promulgated Section 3.318, he considered the scientific evidence concerning a possible link between military service and ALS. 73 Fed. Reg. 54,691, 54,691-54,692 (Sept. 23, 2008); cf. 74 Fed. Reg. 57,072, 57,073 (Nov. 4,

2009) (addressing comments). That evidence was essential to justify an evidentiary presumption of an ALS service connection, since an insufficiently supported presumption would subvert the operation of the statutory service-connection requirement. See 38 U.S.C. 1110; pp. 2, supra. The Secretary therefore examined the existing scientific evidence to determine whether, and to what extent, that evidence justified a presumption that a veteran's development of ALS was caused by his earlier active service.

Second, the Secretary recognized the shortcomings of the existing research, which established a "statistical correlation between activities in military service and development of ALS" but left the "cause" of ALS "unknown." 73 Fed. Reg. at 54,691. In particular, the Secretary reasonably explained that the Weisskopf study -- the key evidence supporting a presumption of service connection -- "did not consider minimum periods of service" that might yield an increased risk of developing ALS. Id. at 54,692. The study instead "focused on veterans' 'years' of service" to assess veterans' relative risks. Ibid. The Secretary deemed that evidentiary gap significant because, in order to justify an inference of causation in this context, a servicemember should have "sufficient contact with activities in military service" to allow him "to encounter any hazards that may contribute to [his subsequent] development of ALS." Ibid.

Third, that evidentiary gap required the Secretary to determine how much time in service would justify a presumption of ALS

service connection. Veterans in the first quintile of the Weiss-kopf study -- i.e., the 21 individuals who developed ALS after the shortest periods of military service -- had a median of two years of service. C.A. App. 204 (Tbl. 3). The study also did not indicate that any of those 21 veterans had served for significantly shorter periods. And because the study found that veterans had a "relative risk[]" of 1.53 "compared with those who did not serve" in the military, id. at 202; see id. at 204 (1.60 for first quintile), the study's data suggest that only seven or eight of the 21 ALS deaths in that quintile (a 53% or 60% increase from a no-military-service baseline) may have resulted from military service. Given such a small data sample, with no indication that any veterans in the study with very short periods of military service had developed ALS, the Secretary could reasonably have limited Section 3.318's presumption to veterans with a year or more of active service. Indeed, the Secretary might reasonably have declined to adopt any presumption of ALS service connection in light of the IOM report's determination that, while there was "limited and suggestive evidence of an association between military service and later development of ALS," C.A. App. 254 (IOM Report 3) (emphasis omitted), that evidence did not "rule out chance and bias, including confounding factors, with confidence," id. at 256 (IOM Report 5); see p. 4, supra.

The Secretary instead determined, however, that "sufficient evidence indicating a correlation between ALS and activities in

military service" warranted a presumption of service connection in light of factors "unique to ALS." 73 Fed. Reg. at 54,691-54,692. The Secretary further concluded that 90 days was "a reasonable period" to allow "sufficient contact with activities in military service to encounter [the] hazards" that might increase the risk of developing ALS. Id. at 54,692. The Secretary noted that a 90-day requirement was "[c]onsistent with [Congress's] judgment" that 90 days of service was sufficient to warrant a statutory presumption of service connection for certain conditions "such as chronic diseases." Ibid. The Secretary's determination, which may reflect a measure of administrative grace and which appears to err (if at all) on the side of expanding disability compensation, reflects a reasonable implementation of the veterans' disability laws. Given the absence of any evidence reflecting a correlation between ALS and military service as short as 90 days, it was not arbitrary and capricious for the Secretary to limit the presumption of service connection to veterans with at least that much service.

Petitioner contends (Pet. 15-16) that the Secretary's 90-day requirement is unreasonable, and that any period of military service should trigger the presumption that a veteran's ALS is service-connected, because the Weisskopf study concluded that "longer periods of service do not correlate to an increased risk of ALS." The Weisskopf study, however, simply estimated the relative risk of developing ALS for veterans within data quintiles in which the median service was two to nine years. C.A. App. 204

(Tbl. 3). The study indicated that, for those veterans, "[t]he increased risk of ALS was largely independent of the number of years served." Ibid. The study did not suggest that a service-member discharged after less than 90 days of active service is at an increased risk of ALS. See Pet. 20 (acknowledging that the study did not examine "a potential correlation between ALS and shorter periods of service"). And the study posited that "environmental factors" associated with service -- such as exposure to chemicals, traumatic injury, certain viral infections, or intense physical activity -- might increase the risk of ALS. C.A. App. 206. The Secretary therefore reasonably concluded that some "minimum period[] of service" should be required to warrant the presumption that a servicemember has "encounter[ed] hazards that may contribute to development of ALS." 73 Fed. Reg. at 54,692.

Petitioner argues (Pet. 18) that the 90-day service requirement is unreasonable because "the Weisskopf study did not break down the periods below two years of service." But that fact undermines rather than supports petitioner's position, by suggesting that the Secretary might permissibly have lengthened the minimum period of service that would trigger a presumption of service connection.

b. Petitioner contends (Pet. 13-14, 20) that the court of appeals' decision implicates a circuit conflict about "what analysis is necessary to comply with [the arbitrary-and-capricious] standard." Petitioner does not appear to argue that the court of

appeals erred in its articulation of the relevant standard. Cf. Pet. App. A12-A13, A16. He instead states (Pet. 20) that review is warranted on the factbound "question of whether the Secretary has provided a rational, supported connection between the facts found in the record and the decision he made." Because none of the decisions that petitioner cites (Pet. 13-14, 20) as reflecting a purported conflict addresses a rulemaking context materially similar to that here, none reflects a division of authority that might warrant review in this case.

2. The court of appeals correctly rejected as "meritless" petitioner's contention that Section 3.318's 90-day service requirement unlawfully modified "the statutory definition of 'veteran' in 38 U.S.C. § 101(2)." Pet. App. A11. Section 101(2) defines "'veteran'" to mean "a person who served in the active military, naval, air, or space service, and who was discharged or released therefrom under conditions other than dishonorable." 38 U.S.C. 101(2). "[T]here is no dispute that [petitioner] meets th[at] definition," Pet. App. A11, despite the short duration of his military service.

Petitioner argues that Section 501(a)(1) does not contain any "express grant of authority to create veteran classes as part of the Secretary's general rulemaking authority." Pet. 21; see Pet. 21-23. But neither the evidentiary presumption of service connection established by Section 3.318, nor the limitation on that presumption to veterans with 90 days or more of active service,

purports to alter the meaning of "veteran" or create formal "classes" of veterans. That limitation simply implements the Secretary's reasonable determination that the presumption is not justified if the length of a veteran's service is shorter than 90 days. And while some veterans will benefit from the presumption while others will not, nothing in Section 101(2)'s definition of "veteran" requires differently situated veterans to be treated the same with respect to disability benefits.

3. Petitioner also appears to argue (Pet. 23-33) that 38 U.S.C. 501(a)(1) did not authorize the Secretary to promulgate Section 3.318's evidentiary presumption of service connection. The court of appeals correctly held that the Secretary's authority to adopt "necessary or appropriate" regulations addressing "the nature and extent of proof and evidence" in veterans' benefits adjudications, 38 U.S.C. 501(a)(1), includes authority to adopt that evidentiary presumption. See Pet. App. A9-A10.

A decision invalidating Section 3.118(a) in its entirety would not aid petitioner's cause, because petitioner then could not invoke the (invalidated) presumption of ALS service connection, and would instead be required to establish causation through individualized proof. Rather, petitioner seeks to invoke the evidentiary presumption that the rule establishes, while avoiding Section 3.118(b)(3)'s limitation on that presumption. Petitioner identifies no sound basis for concluding that Section 501(a)(1) authorizes the Secretary to create an evidentiary presumption of

ALS service connection, but not to limit that presumption to veterans with 90 days or more of continuous active service.

Petitioner asserts (Pet. 23-28, 30-32) that the decision below conflicts with decisions of other courts of appeals that (in petitioner's view) hold that congressional silence cannot authorize agency regulation. That principle is not implicated here. Congress expressly authorized the Secretary to adopt regulations regarding "the nature and extent of proof and evidence" in veterans' benefits adjudications. 38 U.S.C. 501(a)(1). Section 3.318's presumption of service connection falls squarely within that authority, and the Secretary's power to adopt that presumption includes the power to define the set of veterans who may invoke it. Petitioner's reference to statutory gap-filling and congressional silence is therefore misplaced.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General

BRIAN M. BOYNTON
Principal Deputy Assistant
Attorney General

ELIZABETH M. HOSFORD
KYLE S. BECKRICH
Attorneys

FEBRUARY 2022