No. 21-972

In the Supreme Court of the United States

THOMAS H. BUFFINGTON,
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

REPLY BRIEF FOR PETITIONER

Roman Martinez
Charles S. Dameron
Gregory B. in den Berken
Brent T. Murphy
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Richard A. Samp
Counsel of Record
Kara Rollins
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street, NW
Suite 450
Washington, DC 20036
(202) 869-5210
rich.samp@ncla.legal

Counsel for Petitioner

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INTRODUCTION

In VA's telling, this case has nothing to say about the interaction between the pro-veteran canon and *Chevron*, and barely even implicates *Chevron* at all. But the Federal Circuit's decision below—which upheld VA's regulation based on *Chevron* after expressly refusing to apply the pro-veteran canon at Step One—rebuts that revisionist account.

The Federal Circuit's decision is just the latest in a confused and internally divided series of cases concerning the intersection of the pro-veteran canon and *Chevron*. The upshot of the Federal Circuit's approach is to deprive that canon—a traditional tool of construction recognized and applied by this Court for nearly 80 years—of virtually all operative force. Last year, as petitioner has already pointed out, *nine* Federal Circuit judges called for this Court to step in and sort out the problem. VA does not dispute the significance of the issue, and its arguments for why this Court should decline review turn on a blinkered reading of the decision below.

To the extent that VA attempts a substantive defense of the Federal Circuit's approach, it does so on the ground that the pro-veteran canon is not a means of ascertaining Congress's intent and is therefore inapplicable at *Chevron* Step One. But this Court has already described the pro-veteran canon as a means of ascertaining Congressional intent, *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438, 440-41 (2011), and VA has previously acknowledged in this Court that the canon can play a role at Step One. In any event, VA's argument only highlights an active disagreement among the circuits as to whether some canons of construction can be

disregarded at Step One. This case provides the opportunity to clarify what *Chevron* meant when it said that *all* "traditional tools of statutory construction" must be applied in that inquiry.

This case also presents an ideal vehicle to reconsider *Chevron* itself. The decision below exemplifies *Chevron*'s core flaws: It leads courts to abandon their normal methods of resolving legal questions, and permits agencies to say what the law is—even when there is no real sign that Congress intended agencies to exercise such power. VA's flagging attempt to defend *Chevron* offers no response to many of the arguments for why *Chevron* should be overturned, and it makes no good argument for why this case is an unsuitable vehicle for review of that question. Both questions should be granted.

ARGUMENT

I. THE DECISION BELOW SQUARELY IMPLICATES THE FEDERAL CIRCUIT'S CONFUSION ABOUT *CHEVRON* AND THE PRO-VETERAN CANON

The Federal Circuit needs this Court's guidance on whether the pro-veteran canon is applied at Step One of *Chevron*, and this case directly implicates that question. VA resists that conclusion with four principal points. None has merit.

1. Most importantly, VA does not deny that the Federal Circuit is intractably divided on the question whether the pro-veteran canon applies at *Chevron* Step One, nor that nine of that court's judges have expressly asked for guidance from this Court to resolve that question. *See* Pet. 19-21. Instead, VA tries to argue (at 16-18) that the decision below did not actually implicate any conflict between the pro-veteran canon and *Chevron*. To that end, VA offers a

lengthy summary of the Federal Circuit's decision (at 8-16) that somehow fails to mention even once that the court applied *Chevron*.

VA's attempt to hide the ball should fool no one. The Federal Circuit's entire analysis below proceeds under the familiar *Chevron* framework. The introduction to the "Discussion" asserts that "In [these] circumstances, we apply the two-step framework set forth in *Chevron*." App.5a. Section I then addresses Step One. *See* App.6a ("At step one, we hold that Congress left a gap in the statutory scheme."). And Section II addresses Step Two. *See* App.10a-11a ("At step two," "the Secretary had power to fill the gap … with a reasonable regulation," and "[VA's regulation] is a reasonable gap-filling regulation."). VA's effort to ignore the Federal Circuit's application of *Chevron* is especially surprising given that VA cited *Chevron* no fewer than *58 times* in its successful appellate brief. *See* VA C.A. Br. 6-9, 12-13, 17-18, 21-22, 25, 28-38.

In conducting its *Chevron* analysis, the Federal Circuit expressly held that the pro-veteran canon did not apply "[b]ecause … the statutory scheme is silent" at Step One, thereby allowing the court to proceed directly to Step Two. App.9a n.5 (citing *Terry v. Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003)). That conclusion reflects the Federal Circuit's *Chevron* case law, which frequently refuses to apply the pro-veteran canon at Step One. *See, e.g.*, *Terry*, 340 F.3d at 1383-84; Pet. 19-20. It also tracks the argument of VA's own brief, which devoted nine full pages to arguing that "The Veteran Canon Does Not Apply At *Chevron* Step One, Nor Does It Displace Deference Under *Chevron* Step Two." VA C.A. Br. 19-38. That approach violates *Chevron* footnote 9, which says that

all "traditional tools of statutory construction" must be consulted *before* a court concludes that a statute is silent or ambiguous. *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 n.9 (1984); *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) ("Where … the canons supply an answer, '*Chevron* leaves the stage.'" (citation omitted)).

As Judge O'Malley explained in dissent, the Federal Circuit's conclusion that Congress left a "gap" for the agency to fill "puts the cart before the horse in [the] *Chevron* analysis." App.13a. It makes an assumption about statutory meaning before "'employing [the] traditional tools of statutory construction'" to determine if the court is "[]able to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9). A court cannot determine that Congress left a gap for an agency to fill without first concluding that the "legal toolkit is empty and the interpretive question still has no single right answer." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019).

VA argues (at 17-18) that it makes a difference that this case involved a statutory "gap" rather than an "ambiguity," suggesting that *Chevron* displaces the pro-veteran canon in the case of statutory silences. But VA ignores that *Chevron* deference applies only to "*certain kinds of silences*—those where we can plausibly infer Congress intentionally left a statutory gap for the agency to fill." Pet. 17 (emphasis added) (quoting *Arangure v. Whitaker*, 911 F.3d 333, 337 n.2 (6th Cir. 2018)). That determination requires application of all relevant interpretive canons. As the government has itself told this Court, "the interpretation of statutory 'silence,' like statutory ambiguity, is context-dependent *and requires resort to*

the available tools of statutory construction." Gov't Br. 24, *Cal. Sea Urchin Comm'n v. Combs*, 139 S. Ct. 411 (2018) (No. 17-1636), 2018 WL 4407369 (emphasis omitted); *see also id.* at 18-19, 24-27. Contrary to the Federal Circuit, "[s]ilence alone does not necessarily reflect a congressional delegation of authority to an agency to fill a gap for which deference can be warranted." Gov't Br. 21, *Nat'l Rest. Ass'n v. Dep't of Labor*, 138 S. Ct. 2697 (2018) (No. 16-920), 2018 WL 2357725.

In any event, the Federal Circuit has elevated *Chevron* over the pro-veteran canon in cases involving both "gaps" *and* "ambiguity." *See, e.g.*, *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008) (refusing to apply canon "where the statutory language is ambiguous"); *Terry*, 340 F.3d at 1383 (refusing to apply canon when there was a "gap left by the statute"). Regardless of whether it characterizes a question as implicating a statutory "gap" or "ambiguity," the Federal Circuit's practice of ignoring *Chevron*'s footnote 9 and jumping immediately to deference violates *Chevron*.

2. VA next contends (at 18-19) that *Chevron* does not necessarily require a two-step inquiry. But it is hard to see how that point is relevant here, when the Federal Circuit itself applied the two-step framework, at VA's invitation. App.4a-12a; VA C.A. Br. 12 (asserting that *Chevron* "sets forth a two-step framework for interpreting a statute" (citation omitted)); *see also id.* at 12-38 (applying framework).

True, courts and commentators sometimes characterize *Chevron* as having only one step. *See, e.g.*, *Waterkeeper All. v. EPA*, 853 F.3d 527, 534 (D.C. Cir. 2017) (characterizing the *Chevron* inquiry as one "for reasonableness"). But that formulation does not

authorize an end-run around *Chevron*'s footnote 9. Even if *Chevron* is understood as having a single step, a court may ask whether an agency's interpretation is "reasonable" only after using all the "traditional tools of statutory construction" to determine statutory meaning for itself. As Chief Judge Sutton has explained, "[i]f you believe that *Chevron* has only one step, you would say that *Chevron* requires courts 'to accept only those agency interpretations that are reasonable *in light of the principles of construction* courts normally employ.'" *Carter v. Welles-Bowen Realty, Inc.*, 736 F.3d 722, 731 (6th Cir. 2013) (Sutton, J., concurring) (emphasis added) (citation omitted). The decision below violated that principle.

3. VA's real argument seems to be that not all interpretive canons apply at *Chevron* Step One. Thus, VA contends (at 19-22) that only canons that enable courts to "ascertain" congressional "intent[]" should be employed before deferring to an agency's interpretation—and that the pro-veteran canon is categorically inapplicable because it doesn't count as an intent-based canon. This argument fails too.

VA's taxonomy of canons is inconsistent with this Court's clear instruction in *Chevron* that courts should always employ "*all* the 'traditional tools' of construction." *Kisor*, 139 S. Ct. at 2415 (emphasis added) (quoting *Chevron*, 467 U.S. at 843 n.9). That plainly includes *all* traditional canons.

To the extent that VA would exclude from Step One those canons that determine "which party should … prevail" in close cases, Opp. 20-21, that distinction is a controversial one that has split the circuits examining other such canons. *See, e.g.*, *Rancheria v. Jewell*, 776 F.3d 706, 713 (9th Cir. 2015) (*Chevron* trumps pro-Indian canon); *Cobell v. Norton*, 240 F.3d

1081, 1101 (D.C. Cir. 2001) (*Chevron* does not trump pro-Indian canon). *Compare Guedes v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, 920 F.3d 1, 27-28 (D.C. Cir. 2019) (*Chevron* trumps rule of lenity), *with Gun Owners of Am., Inc. v. Garland*, 19 F.4th 890, 928 (6th Cir. 2021) (Murphy, J., dissenting) (*Chevron* does not trump rule of lenity), *petition for cert. filed*, No. 21-1215 (Mar. 3, 2022). Inter- and intra-circuit confusion over whether the footnote 9 inquiry excludes certain disfavored canons only underscores the need for review.

Even on VA's own terms, the pro-veteran canon is an intent-based canon that must be applied before deferring under *Chevron*. This Court recognized as much in *Henderson ex rel. Henderson v. Shinseki*, when it treated the canon as a tool to "ascertain Congress' intent," as "plainly reflected" in various provisions of the veterans' statutes "that place a thumb on the scale in the veterans' favor in the course of the administrative and judicial review of VA decisions." 562 U.S. 428, 438, 440-41 (2011); Pet. 14-15. VA does not even attempt to rebut this point about *Henderson*. And VA's focus on intent is especially odd given the universal recognition that *Chevron* itself turns on a *fiction* about intent. *See* Pet. 27-28. If Congress's true intent is what matters, the pro-veteran canon trumps *Chevron*. There is no basis for treating the pro-veteran canon as a second-class interpretive rule.

Finally, VA's categorical rejection of the pro-veteran canon in deference cases appears to contradict the position it took in *Kisor*. There, VA (1) successfully urged the Court to preserve *Auer* deference based on a robust Step One inquiry including all "ordinary tools" of construction, Gov't Br.

28, *Kisor v. Wilkie*, 139 S. Ct. 2400 (2019) (No. 18-15), 2019 WL 929000 (citation omitted), and (2) recognized that the pro-veteran canon would apply as part of this inquiry as a "tie-break[er]" when "two interpretations are equally plausible," *Kisor* Oral Argument Tr. 66. VA should not be allowed to disown the theory it successfully urged in *Kisor*.

4. Beyond these points, VA includes a lengthy statutory argument (at 11-16) attempting to justify the merits of its regulatory approach in Section 3.654(b)(2). And yet (1) VA concedes (at 13-14) that its regulatory interpretation of the 1958 statute at issue has flip-flopped; (2) VA relied exclusively on *Chevron* deference to win on this argument below, *see supra* at 3; and (3) VA does not even argue that it can win without *Chevron* here. To be sure, VA's statutory arguments are wrong. *See* Pet. 5-6; App.16a, 56a. But the key point is that the decision below turned on the *Chevron*-vs.-pro-veteran canon issue presented in the petition. VA cannot seriously pretend otherwise.

II. *CHEVRON* SHOULD BE OVERTURNED

VA also asserts (at 22-27) that *stare decisis* and vehicle problems weigh against granting review to reconsider *Chevron*. Not so.

1. It is telling that VA barely addresses petitioner's merits arguments. Petitioner pointed to "[f]ive flaws" with *Chevron* that "bear special emphasis" and establish why it should be overruled. Pet. 25-28 (discussing various constitutional, statutory, and practical problems with *Chevron*). VA argues otherwise in a single paragraph (at 24) that ignores most of petitioner's critique. VA's cursory response does not hold up.

Pointing to *Kisor*, VA asserts that "this Court recently confirmed that deference to the Executive Branch's interpretations" under *Chevron* passes muster under the APA and the separation of powers. Opp. 24 (citing *Kisor*, 139 S. Ct. at 2419, 2421-22). "[T]his Court" did no such thing in *Kisor*. VA relies on the four-justice *plurality* opinion in that case—but five members of the Court either expressly reserved the issue of *Chevron*'s validity or voted to overrule *Auer*. *See Kisor*, 139 S. Ct. at 2425 (Roberts, C.J., concurring in part); *id.* at 2425-34 (Gorsuch, J., joined by Thomas, Alito, and Kavanaugh, JJ., concurring in the judgment); *id.* at 2448-49 (Kavanaugh, J., joined by Alito, J., concurring in the judgment). And VA's failure to offer any substantial defense of *Chevron*'s merits just confirms petitioner's point: *Chevron* is indefensible.

2. VA's discussion of the *stare decisis* factors is equally unpersuasive. As noted, VA does not try to defend the "quality" of *Chevron*'s reasoning. *See Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2177-78 (2019) (citation omitted). And with respect to reliance interests, VA declares that *Chevron* lets "regulated entities and the public … rely on an agency's regulations and other measures," and argues that such reliance interests would be undermined if those measures could be overturned by courts. Opp. 24-25. That's just not true. "*Chevron*'s very point is to permit agencies to upset the settled expectations of the people by changing policy direction depending on the agency's mood at the moment." *Gutierrez-Brizuela v. Lynch*, 834 F.3d 1142, 1158 (10th Cir. 2016) (Gorsuch, J., concurring). *Chevron* leaves statutory meaning unsettled and constantly subject to administrative revision.

VA asserts (at 23-25) that overruling *Chevron* would be disruptive. But overruling *Chevron* would eliminate the pervasive possibility of expedient changes in agency interpretations of statutory text. Indeed, VA does not deny that *Chevron* (together with *National Cable & Telecommunications Association v. Brand X Internet Services*, 545 U.S. 967 (2005)), lets agencies change their minds about what a statute means and directs courts to flip-flop along with them—including on major issues of national policy on which the public deserves clarity. *See* Pet. 31. *Chevron* does not promote stability—it ensures *instability*.

As to whether *Chevron* is unworkable, *see* Pet. 32-34, VA all but agrees (at 25) with petitioner. Remarkably, VA does not deny the workability problems; instead, it *blames this Court's current* Chevron *doctrine*—including the Two-Step inquiry, the Major Questions doctrine, and decisions raising threshold questions about *Chevron*'s applicability—for creating them. *See* Opp. 25 (citing Pet. 32-33). That response just underscores petitioner's workability point. The current doctrine reflects the Court's effort to mitigate *Chevron*'s many flaws piecemeal. But tinkering at the margins is not the solution.* The Court should instead overrule *Chevron* altogether.

VA also argues (at 25) that courts have no problem applying *Chevron* and do so all the time. That might be true in the lower courts, but not so in this Court. *See* Pet. 34-35. The reality is that the government

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* VA actually proposes (at 20-21) making the doctrine even *more* complicated by identifying a new threshold test for which interpretive canons can be considered at Step One.

often litigates and wins cases on *Chevron* grounds in the lower courts (as it did in this case) before changing its tune here. *See, e.g.*, Gov't Br. 47, *Am. Hosp. Ass'n v. Becerra*, *cert. granted*, 141 S. Ct. 288 (No. 20-1114), 2021 WL 4937288 (arguing that *Chevron* deference is "[w]arranted [b]ut [u]nnecessary," after successfully urging *Chevron* deference in D.C. Circuit); *see supra* at 2-4. That kind of *Chevron* bait-and-switch highlights the need for this Court's review.

3. Finally, VA says (at 26) this case is a poor vehicle because it "does not implicate" the concerns with *Chevron* that petitioner identified. That's also wrong. The statutory interpretation issue presented here is outcome-determinative; petitioner's reading reflects the best interpretation of the statute; and the Federal Circuit reflexively relied on *Chevron* to defer to VA's anti-veteran interpretation. *See* Pet. 24-25. Moreover, the court did so even though the question whether a veteran should receive the full statutory benefits to which he is entitled is obviously not the kind of technical issue on which Congress would have deferred to agency expertise. The decision below underscores the flaws in an increasingly untenable *Chevron* regime.

* * *

The two questions presented in this case are closely intertwined. *Chevron*'s flaws are manifest, but if *stare decisis* requires adherence to that decision, it is especially important for the Court to enforce the robust Step One inquiry mandated by footnote 9. VA's position—that courts should interpret veterans benefit laws by deferring to the agency's policy preferences and ignoring the traditional pro-veteran canon—is inconsistent with *Chevron* and undermines the rule of law. The Court should review both

questions to address these weighty issues in a comprehensive fashion.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Roman Martinez
Charles S. Dameron
Gregory B. in den Berken
Brent T. Murphy
LATHAM & WATKINS LLP
555 Eleventh Street, NW
Suite 1000
Washington, DC 20004
(202) 637-2200

Richard A. Samp
Counsel of Record
Kara Rollins
Mark Chenoweth
NEW CIVIL LIBERTIES ALLIANCE
1225 19th Street, NW
Suite 450
Washington, DC 20036
(202) 869-5210
rich.samp@ncla.legal

Counsel for Petitioner

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