

IN THE
Supreme Court of the United States

VETERAN WARRIORS, INC., ANDREW D. SHEETS, KRISTIE SHEETS,
Petitioners,

v.

SECRETARY OF VETERAN AFFAIRS,
Respondent.

**Application for an Extension of Time Within
Which to File for a Writ of Certiorari
to the United States Court of Appeals
for the Federal Circuit**

**APPLICATION TO THE HONORABLE CHIEF JUSTICE
JOHN G. ROBERTS, JR. AS CIRCUIT JUSTICE
FOR THE FEDERAL CIRCUIT**

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August 31, 2022

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APPLICATION FOR AN EXTENSION OF TIME

Pursuant to Rule 13.5 of the Rules of this Court, Applicants Veteran Warriors, Inc., Andrew Sheets, and Kristie Sheets (collectively, “Veteran Warriors”) hereby request a 29-day extension of time within which to file a petition for a writ of certiorari up to and including Friday, October 14, 2022.

JUDGMENT FOR WHICH REVIEW IS SOUGHT

The judgment for which review is sought is *Veteran Warriors, Inc. et al. v. Sec’y of Veterans Affairs*, 29 F.4th 1320 (Fed. Cir. 2022) (attached as Exhibit 1). The U.S. Court of Appeals for the Federal Circuit (“Federal Circuit”) denied Veteran Warriors’ petition for review pursuant to 38 U.S.C. § 502 on May 25, 2022 (attached as Exhibit 2), and denied Veteran Warriors’ timely petition for panel rehearing and re-hearing en banc on June 17, 2022 (attached as Exhibit 3).

JURISDICTION

This Court will have jurisdiction over any timely filed petition for certiorari pursuant to 28 U.S.C. § 1254(1). Under Rules 13.1, 13.3, and 30.1 of the Rules of this Court, a petition for a writ of certiorari is due on or before September 15, 2022. In accordance with Rule 13.5, this application is being filed more than 10 days in advance of the filing date for the petition for a writ of certiorari.

REASONS JUSTIFYING AN EXTENSION OF TIME

Veteran Warriors respectfully requests a 29-day extension of time within which to file a petition for a writ of certiorari seeking review of the decision of the

U.S. Court of Appeals for the Federal Circuit in this case, up to and including October 14, 2022. This is Veteran Warriors' first request for an extension.

1. In 2020, the Department of Veterans Affairs ("VA") promulgated a Final Rule to implement the Caregiver Act, 124 Stat. 1130 (2010), as amended by the VA MISSION ACT, 132 Stat. 1393 (2018), which required VA to establish a program to assist veterans who require personal care services.

Veteran Warriors challenged VA's Final Rule, arguing that under the Pro-Veteran Canon, any silence or ambiguity in the statute must be resolved in the veteran's favor. See *Brown v. Gardner*, 513 U.S. 115, 118 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991). Because the Pro-Veteran Canon requires VA to resolve any statutory silence or ambiguity in the veterans' favor, VA did not have authority to adopt its anti-veteran construction in its Final Rule, and the Pro-Veteran Canon instead supports Veteran Warriors' reading of the statute.

Veteran Warriors argued, for example, that "[t]o the extent that VA could validly claim that it is resolving a statutory ambiguity in favor of an in person requirement, any such ambiguity should be resolved in favor of the veteran based on the veteran canon." *Veteran Warriors, Inc. et al. v. Sec'y of Veterans Affairs*, Appeal No. 21-1378, Petitioners' Corrected Opening Brief, D.I. 33 at 43 (Fed. Cir.) (citing *King*, 502 U.S. at 2020 n.9, and *Brown*, 513 U.S. at 117-118). It argued that "[t]o the extent that VA could validly claim the existence of a statutory ambiguity that could ordinarily be resolved in favor of a service-connected disability requirement, that ambiguity should instead be resolved in the veteran's favor based

on the veteran's canon." *Id.* at 46 (citing *Brown* and *King*). It also argued that "[t]o the extent that VA could validly claim the existence of a statutory ambiguity on the amount of assistance required for each ADL, that ambiguity should be resolved in the veteran's favor under the veteran's canon." *Id.* at 48 (citing *Brown* and *King*). And it argued that "[e]ven if VA could claim a statutory ambiguity to be resolved in favor of an inability to self-sustain requirement, any such ambiguity should be resolved in the veteran's favor under the veteran's canon." *Id.* at 57 (citing *Brown* and *King*). In furtherance of these points, Veteran Warriors consistently argued that the Pro-Veteran Canon is a tie-breaker that must be considered as part of the legal toolkit before deferring to VA.

Although the Federal Circuit ruled in Veteran Warriors' favor, in part, by setting aside part of VA's Final Rule that limited personal caregiver benefits only to those veterans whose impairments threatened their ability to maintain their personal safety on a daily basis, the Federal Circuit deferred to VA under *Chevron* and ruled against Veteran Warriors' other challenges. *See Veteran Warriors*, 29 F.4th at 1328–29, 1336, 1340, 1346, 1348, 1351. In giving *Chevron* deference to the VA's interpretation, the Federal Circuit failed to consider the Pro-Veteran Canon.

This Court recognized the Pro-Veteran Canon nearly 80 years ago and, since then, has applied it consistently. *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."). Given its long and well-established history, the Pro-Veteran Canon

is a customary tool of statutory construction in cases affecting the interests of veterans. And in *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843 n.9 (1984), this Court explained that “all” the traditional tools of construction must be applied before deciding that a statute is truly ambiguous. The Federal Circuit’s decision in this case is thus inconsistent with this Court’s precedents.

Indeed, the Federal Circuit’s decision below results from larger inconsistency and disagreement within the Federal Circuit. In *Kisor v. Wilkie*, this Court, in the context of interpreting a regulation involving veterans’ benefits, reaffirmed that a court must consider all the tools of statutory construction before deciding that the text at issue is truly ambiguous. 139 S. Ct. 2400, 2415 (2019). On remand from this Court, however, the Federal Circuit declined to include the Pro-Veteran Canon as one of the tools of statutory construction, and the Federal Circuit instead proceeded directly to finding the text at issue unambiguous. *Kisor v. McDonough*, 995 F.3d 1316, 1322, 1325-26 (Fed. Cir. 2021) (panel opinion on remand); *Kisor v. McDonough*, 995 F.3d 1347, 1358 (Fed. Cir. 2021) (denying rehearing en banc). Four judges disagreed with that approach, explaining that the Federal Circuit was wrong to ignore the Pro-Veteran Canon. *Kisor*, 995 F.3d at 1362-76 (O’Malley, J., dissenting; Reyna, J., dissenting). Certiorari is warranted to resolve the conflict between the Federal Circuit’s approach to the Pro-Veteran Canon and *Chevron* deference, as well as clarify the confusion and inconsistency within the Federal Circuit.

Independent of the conflict over whether the Pro-Veteran Canon must be applied before deciding whether the statutory text is truly ambiguous under *Chevron*, this case presents an even greater question—whether *Chevron* deference is appropriate in light of the Pro-Veteran Canon. In her concurrence with the Federal Circuit’s denial of rehearing en banc in *Kisor*, then-Chief Judge Prost wrote that *Chevron* deference and the Pro-Veteran Canon are in tension with one another because (in her view) each is triggered by ambiguity, and there is no guidance regarding which doctrine operates first after such ambiguity is found. *Kisor v. McDonough*, 995 F.3d at 1358 (Prost, C.J., concurring in denial of rehearing en banc). Chief Judge Prost did not propose a resolution to this question, but noted that “[f]urther guidance is necessary to reconcile these competing doctrines.” *Id.* Indeed, *Chevron* and the Pro-Veteran Canon establish competing rules for courts to follow: *Chevron* says that statutory ambiguity reveals an implicit delegation of authority that warrants deference to an agency; the Pro-Veteran Canon says that to the extent there is any ambiguity in a statute, it must be resolved in favor of the veteran, not the agency.

Given the complexity and importance of the issues presented, an extension of time will allow counsel to explain how the Federal Circuit’s decision is inconsistent with this Court’s precedent, including the disagreement and inconsistency within the Federal Circuit’s own case law, and present a thorough and coherent petition.

2. Veteran Warriors has requested that Sidley Austin LLP assist in preparing this petition. An extension of time will allow the participants in this

petition the necessary time to complete a cogent and well-researched petition. The requested extension is made in good faith and not for the purpose of delay. The issues raised by this petition are of vast import and may impact how the Federal Circuit, the Court of Appeals for Veterans Claims, and VA itself may apply the competing doctrines of the Pro-Veteran Canon and *Chevron*.

3. The extension of time is also necessary because of the press of other client business. For example, in the coming months, the undersigned counsel has several overlapping commitments representing other clients.

Mr. Li, Mr. Stichman, and Ms. Burbank are counsel for petitioners in *Joshua Kimmel, Amanda Wolfe v. Secretary of Veterans Affairs*, Appeal No. 22-1754, pending in the U.S. Court of Appeals for the Federal Circuit, for which petitioners' opening brief is due on September 19, 2022. Mr. Li is also counsel for *Novozymes in Novozymes North America, Inc. v. Danisco US Inc.*, Appeal No. 2021-2184, pending in the U.S. Court of Appeals for the Federal Circuit, for which Mr. Li has upcoming meetings with co-counsel in preparation for co-counsel's argument on October 3, 2022. Mr. Li is also counsel for Carrie Jean Huffman in *Huffman v. Dunn*, pending in the U.S. District Court for the Northern District of Alabama, for which Mr. Li is responsible for taking multiple depositions from September 26-30, 2022. Mr. Li is also counsel for I-Mab Biopharma in *I-Mab BioPharma v. Inhibrx, Inc. and Brendan Eckelman*, C.A. No. 22-276 (CJB), pending in the U.S. District Court for the District of Delaware, for which an evidentiary hearing is set for November 8, 2022,

depositions of hearing witnesses are due by October 14, 2022, and pre-hearing briefs are due on October 28, 2022.

Mr. Stichman and Ms. Burbank are also counsel for *Jeremy Beaudette in Beaudette v. McDonough*, Appeal No. 22-1264, pending in the U.S. Court of Appeals for the Federal Circuit, for which Mr. Beaudette's responsive brief is due on October 11, 2022. Mr. Stichman and Ms. Burbank are also counsel for petitioners in *Ripley v. McDonough*, C.A. No. 21-0947, pending in the U.S. Court of Appeals for Veterans Claims, for which they have forthcoming meetings with co-counsel in preparation for co-counsel's argument on September 16, 2022. They are also counsel for plaintiffs in *Springs v. Braithwaite*, C.A. No. 20-03244, pending in the U.S. District Court for the District of Columbia, for which plaintiffs' briefing regarding certain discovery motions is due on September 30, 2022.

Mr. Franzinger is counsel for Canadian Solar in *Silicon Photovoltaic Cells and Modules with Nanostructures, and Products Containing the Same*, ITC-337-TA-1271, pending in the U.S. International Trade Commission, for which the final initial determination is scheduled to be issued on September 2, 2022. Petitions for review of the initial determination are due within 12 days thereafter, followed by responses to the opposing side's petition for review 8 days later. 19 C.F.R. § 210.43 (2022).

Mr. Mahoney is counsel for *Microsoft Corporation* in *Microsoft Corporation v. SurfCast, Inc.*, IPR2022-00423, IPR2022-00590, IPR2022-00591, IPR2022-00592, pending in the U.S. Patent and Trademark Office, and the related *SurfCast, Inc. v.*

Microsoft district court case, C.A. No. 6-21-01018, pending in the Western District of Texas, for which Microsoft's Final Invalidity Contentions are due on September 2, 2022, a claim construction hearing is scheduled on September 16, 2022, and an Institution Decision for the IPRs is expected by October 12, 2022.

Mr. Morris has ongoing commitments and obligations in other cases during the first two weeks of September that would make preparation of the certiorari petition impracticable.

A 29-day extension for Veteran Warriors would provide Counsel with the necessary amount of time to effectively contribute to all open matters, and most notably, Veteran Warriors' petition.

CONCLUSION

For the foregoing reasons, Counsel for Veteran Warriors respectfully requests that this Court grant an extension of 29 days, up to and including October 14, 2022, within which to file a petition for a writ of certiorari in this case.

Respectfully submitted,

Dated: August 31, 2022

/s/ Ryan C. Morris

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