No. 22-360

IN THE

Supreme Court of the United States

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

Petitioners,

v.

SECRETARY OF VETERAN AFFAIRS,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

The government's opposition does nothing to dispel the confusion engendered by the Federal Circuit's inconsistent efforts at reconciling *Chevron* deference with the Pro-Veteran Canon. Instead, the government seeks shelter from the question by embracing the Federal Circuit's flawed attempt to insulate its decision through a finding of waiver, and by suggesting the Pro-Veteran Canon should be discarded entirely whenever the agency makes a formal interpretation. Both of these positions lack merit.

First, this case is an ideal vehicle to clarify what role *Chevron* should have in veterans' cases. As the petition demonstrates, the Federal Circuit has repeatedly fractured over how the Pro-Veteran Canon operates with *Chevron* deference, spurring subsequent panels of that court to avoid the issue even when it was raised, as it was in this case. See Pet. App. 1a-58a; see also *Nat'l Org. of Veterans' Advocs.* v. *Sec'y of Veterans Affs.*, 48 F.4th 1307, 1317 n.4 (Fed. Cir. 2022) ("This court has not definitively resolved at what stage the Pro-Veteran Canon applies and whether it precedes any claims of deference to an agency interpretation. Because we conclude that the Secretary's interpretation is not entitled to *Auer* deference, we decline to opine on whether the Pro-Veteran Canon precedes or follows *Auer* deference.") (internal citation and quotation marks omitted). Indeed, petitioner explicitly raised the Pro-Veteran Canon, and the court of appeals cannot be allowed to dodge the issue by simply declaring a wavier. The Federal Circuit's inconsistency and confusion, and its affirmative efforts at avoiding any resolution of this issue, warrants this Court's intervention.

On the merits, the government's opposition fares no better. The government's opposition claims *Chevron*

deference applies "only when the agency *has* addressed the interpretive issue," whereas traditional tools of construction such as a the Pro-Veteran Canon "appl[y] only when [the agency] has not" addressed the interpretive issue. Opp. 13-14; see also *id.* 6-7. The Federal Circuit does not adopt such an aggressive reading of *Chevron* even in other cases, including the one cited by the government in support of this argument. See *Terry* v. *Principi*, 340 F.3d 1378, 1383 (Fed. Cir. 2003). By treating the mere existence of a formal agency interpretation as an automatic bar against the Pro-Veteran Canon, the government's analysis improperly skips the first step of *Chevron* by immediately deferring to the agency's interpretation, effectively assuming statutory ambiguity. In so doing, the government's brief underscores the confusion over the Pro-Veteran Canon's role as a traditional tool of statutory construction when evaluating an agency interpretation.

As the petition demonstrated, the Federal Circuit's cases are hopelessly confused and inconsistent on the interaction of the Pro-Veteran Canon and *Chevron*. Only this Court can dispel the confusion. The Court should grant the petition.

ARGUMENT

I. THIS CASE IS AN IDEAL VEHICLE FOR ADDRESSING THE QUESTIONS PRESENTED.

As the petition and amici have demonstrated, the Pro-Veteran Canon is a well-established tool of statutory construction, and yet the Federal Circuit's efforts to address how this canon works with *Chevron* deference have produced only inconsistency and confusion. Pet. 16-24; see Brief of the Federal Circuit Bar Association as *Amicus Curiae* at 2-5; Brief of Military-Veterans Advocacy, Inc. et al. as *Amici Curiae* at 4-5. The

Federal Circuit's inconsistency—and continued refusal to resolve it—warrants this Court's intervention. Indeed, now is the time for the Court to address this issue, given that no split among the circuit courts is possible in light of the Federal Circuit's exclusive jurisdiction. Pet. 3.

The government does not dispute that the Federal Circuit's precedent is inconsistent and confused. Instead, it highlight's the Federal Circuit's indication that the issue was waived, contending that "the court of appeals did not address any broad issues regarding the interplay between the veterans canon and *Chevron*." Opp. 6. But this represents another effort by the Federal Circuit to avoid the issue. *Buffington* v. *McDonough*, 143 S. Ct. 14, 16 (2022) (mem.) (Gorsuch, J., dissenting from denial of certiorari) ("Instead, both courts simply deferred to the agency's (current) regulations as 'reasonable' ones and said this Court's decision in *Chevron* required them to do so. That kind of judicial abdication disserves both our veterans and the law."). Veteran Warriors explicitly argued that the Pro-Veteran Canon rendered the statute unambiguous at *Chevron* step one. Indeed, Veteran Warriors applied the canon throughout its opening brief at the Federal Circuit. See D.I. 33 at 17, 41, 43-44, 46, 48, 50, 53-54, 57; Statement of the Case § II.B.

The circumstances below are entirely unlike the case the Federal Circuit cited in support of its conclusion of waiver. In *SmithKline Beecham Corp* v. *Apotex*, the plaintiff failed to explicitly include the waived argument in its opening brief, and merely alluded to its disagreement with the District Court's decision in a footnote. See *SmithKline Beecham Corp.* v. *Apotex Corp.*, 439 F.3d 1312, 1319-20 (Fed. Cir. 2006) (where SmithKline "failed to include [the relevant argument] in the Argument section of its opening brief" and

merely presented a reference to the argument in a footnote). Here, by contrast, Veteran Warriors repeatedly argued that the Federal Circuit should construe the VA's Final Rule under the Pro-Veteran Canon, explaining that any ambiguity in the statutory provisions should be construed in favor veterans. In fact, the Federal Circuit recognized that Veteran Warriors raised its Pro-Veteran Canon argument multiple times in its briefing, noting that "[a]t *various* points, Petitioners argue any silence or ambiguity in the statue must be resolved in the veteran's favor." Pet. App. 7a n.4 (emphasis added). Rather than applying the canon as suggested by precedent (see *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994)), however, the Federal Circuit used waiver to avoid addressing an inconvenient issue. Pet. App. 7a n.4; see also D.I. 33 at 17, 41, 43-44, 46, 48, 50, 53-54, 57; Statement of the Case § II.B. Veteran Warriors thus adequately preserved the issue in the lower court. See *MedImmune, Inc.* v. *Genentech, Inc.*, 549 U.S. 118, 125 (2007) ("That petitioner limited its contract argument to a few pages of its appellate brief does not suggest a waiver").

Veteran Warriors explicitly argued that the Pro-Veteran Canon should resolve any ambiguity in favor of the veteran, making it unnecessary to proceed to *Chevron* step two and inquire into the possibility of deference to the agency's interpretation. Because that issue was squarely presented, the Federal Circuit should not be permitted to allow the confusion and inconsistency in that circuit to persist by merely invoking waiver. The sheer number of petitions seeking to define the scope of how interpretive canons and traditional tools of statutory construction must interact with *Chevron* (or similar precedent, such as *Auer*) illustrate the need for this Court's intervention. See *Kisor* v. *McDonough*,

No. 21-465; *Buffington* v. *McDonough*, No. 21-972; *Kisor* v. *Wilkie*, No. 18-15; *George* v. *McDonough*, No. 21-234; *Arellano* v. McDonough, No. 21-432. And without further guidance, the Federal Circuit may avoid addressing the issue in its entirety as it has done recently. Pet. 28; see *Procopio* v. *Wilkie*, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring) (noting "the court's failure—yet again—to address and resolve the tension between the Pro-Veteran Canon and agency deference."); see also *Kisor* v. *Wilkie*, 139 S. Ct. 2400, 2425 (2019) (Gorsuch, J., concurring in part) (explaining in the context of *Auer* deference that "today's decision is more a stay of execution than a pardon," and "[t]he Court cannot muster even five votes to say that *Auer* is lawful or wise."). This case presents an excellent vehicle for the Court to address the interplay between the Pro-Veteran Canon and *Chevron*. See Pet. 16-24.

II. THE GOVERNMENT'S INTERPRETATION CONFIRMS THAT CERTIORARI IS WARRANTED

As Veteran Warriors explained, the Pro-Veteran Canon is a longstanding tool of statutory interpretation, reflecting Congress's view that any ambiguity in a statute should be interpreted in favor of the veteran and against the government. Pet. 4-6. *Chevron* deference to an agency interpretation is available only after courts have employed all tools of statutory interpretation. Accordingly, courts should apply the Pro-Veteran Canon at *Chevron* step one, and properly applied, the canon will make it unnecessary to proceed to step two because any ambiguity should result in a reading that favors the veteran, not the government. Despite the straightforward application of this Court's precedents,

the Federal Circuit has made a mess of the issue, issuing inconsistent and contradictory decisions. Pet. 16-17.

The government does not contend that the Federal Circuit's precedent is anything but confused and inconsistent. Instead, the government suggests that the Pro-Veteran Canon has no role to play when the VA has been given authority to develop a "program" and "formally adopted its own interpretation." Opp. 6-7. Such an aggressive reading of *Chevron* would make the Pro-Veteran Canon (and potentially other interpretive canons) almost non-existent in this context, and would promote almost automatic deference to any reasonable agency interpretation. This contravenes the will of Congress, which has a long history of supporting veteran's benefits. *United States* v. *Oregon*, 366 U.S. 643, 647 (1961) ("The solicitude of Congress for veterans is of long standing."); *Shinseki* v. *Sanders,* 556 U.S. 396, 412 (2009) ("Congress has expressed special solicitude for the veterans' cause."); *Henderson ex rel. Henderson* v. *Shinseki* 562 U.S. 428, 440 (2011) ("[t]he solicitude of Congress for veterans is of long standing."). The Pro-Veteran Canon reflects Congress's intent to protect veterans in seeking judicial review of the VA's decisions and its specific intent in legislating in the area of veteran's benefits. Chadwick J. Harper, *Give Veterans the Benefit of the Doubt: Chevron, Auer, and the Veteran's Canon*, 42 Harv. J.L. & Pub. Pol'y 931, 933 (2019); *King* v. *St. Vincent's Hosp.,* 502 U.S. 215, 220-21 n.9 (1991)).

The government reaches its aggressive view of *Chevron* by first misinterpreting the order of operations required by *Chevron*. The government contends that courts need not resort to interpretive canons before deciding that deference is warranted, stating that "[c]ourts may appropriately defer under *Chevron* to an

agency's 'reasonable construction of [a] statute, whether or not it is the only possible interpretation.'" Opp. 8. However, this Court has held that courts must "always" *first* decide whether "Congress has directly spoken to the precise question at issue[,]" using "traditional tools of statutory construction." *Chevron U.S.A., Inc.* v. *Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 & n.9 (1984).

Indeed, the government's argument cannot be squared with this Court's explanation that "[e]ven under *Chevron*, we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable 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); see also Brett M. Kavanaugh, *Book Review: Fixing Statutory Interpretation Judging Statutes*, 129 Harv. L. Rev. 2118, 2153 n.175 (2016) ("[I]f we took *Chevron* footnote 9 at face value, fewer cases would get to *Chevron* step two in the first place."). The Pro-Veteran Canon *is* a traditional tool of construction, precisely the kind of tool that courts must employ to reveal Congress' intent for veteran's benefits statutes. *Rudisill* v. *McDonough*, 55 F.4th 879, 896 (Fed. Cir. 2022) (en banc) (Reyna, J., dissenting) ("The Pro-Veteran Canon of statutory interpretation … is a traditional tool of statutory construction that assists courts in interpreting statutes and reaching the best and fairest reading of the law.").

Only after applying traditional tools of statutory construction, and concluding that a statute remains ambiguous or silent on the issue at hand, may a court *then* determine whether the agency's interpretation is "based on a permissible construction of the statute." *Chevron*, 467 U.S. at 843.

The government thus errs in contending that *Chevron* does not require "a rigidly bifurcated inquiry in every instance" and that "Courts *may* appropriately defer under *Chevron* to an agency's 'reasonable construction of [a] statue, whether or not it is the only possible interpretation.'" Opp. 8 (emphasis added). Deference to an agency's interpretation occurs only *after* employing traditional tools of statutory construction to interpret congressional intent behind an ambiguous statute, which occurs at the first step of *Chevron*, 467 U.S. at 843 ("Rather, if the statute is silent or ambiguous with respect to the specific issue, the [next] question for the court is whether the agency's answer is based on a permissible construction of the statute.").

The government improperly relies on *Entergy Corp* v. *Riverkeeper, Inc.* and *Holder* v. *Martinez Gutierrez* to support the notion that "[a] court need not always make a threshold determination of whether the statute has a single, unambiguous meaning." Opp. 8. Those cases deal with the *Chevron* step two analysis, which occurs only after applying traditional tools of statutory construction and concluding the statutory provision remains ambiguous. *Chevron*, 467 U.S. at 843; see also *Regions Hosp.* v. *Shalala*, 522 U.S. 448, 457 (1998) ("If, by employing traditional tools of statutory construction, we determine that Congress' intent is clear, that is the end of the matter. But if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.") (internal quotation marks and citations omitted).

The government next attempts to categorize traditional interpretive aids into two distinct groups, arguing that "some interpretive aids are not tools for ascer-

taining whether a statute has one unambiguous meaning, but instead come into play when a statute is found to be ambiguous even after ordinary interpretive tools have been applied." Opp. 10. And it compares the Pro-Veteran Canon to the rule of lenity, noting that lenity does not reveal congressional intent but has been used "used … to resolve ambiguity in favor of the defendant only 'at the end of the process of construing what Congress has expressed' when the ordinary canons of statutory construction have revealed no satisfactory construction." *Id*.

As explained, however, the Pro-Veteran Canon reflects Congress' intent because the Court "presume[s] congressional understanding of such interpretive principles" and that "Congress legislates with knowledge of our basic rules of statutory construction." *King* v. *St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); Pet. 5, 19-20. Moreover, as explained, the Pro-Veteran Canon is a well-established and longstanding canon of statutory construction. See *supra*, 20; *King*, 502 U.S. at 220 n.9; *Henderson,* 562 U.S. at 440; see also *Rudisill*, 55 F.4th at 898 (Reyna, J., dissenting). Courts have long understood that "as between the government and the individual[,] the benefit of the doubt about the meaning of an ambiguous law must be given to the individual, not to authority; for the state makes the laws." *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari). Because "[a] veteran, after all, has performed an especially important service for the Nation, often at the risk of his or her own life," this Court explained, "Congress has made clear that the VA is not an ordinary agency," and "VA has a statutory duty to help the veteran develop his or her benefits claim." Pet. 20 (citing *Shinseki*, 556 U.S. at 412). Thus,

the Pro-Veteran Canon does "enable courts to 'ascertain[]' Congress's clear 'intention.'" Opp. 9.[1]

Finally, the government alleges Veteran Warriors failed to present a "persuasive 'special justification' for replacing *Chevron*," and further argues Veteran Warriors' reliance on *West Virginia* v. *EPA* is misplaced since the "implementation of the Caregivers Act through the 2020 regulations is not extraordinary and does not reflect an assertion of sweeping power over the national economy." Opp. 13-14.

The issues with *Chevron* are well known and have been starkly highlighted by members of the Court. *Buffington*, 143 S. Ct. at 19 (Gorsuch, J., dissenting from denial of certiorari); Kavanaugh, *supra*, at 2153 n.175; Harper, *supra*, at 949-50. Given the need for the Court to address the intersection of the Pro-Veteran Canon and *Chevron* deference, members of the Court may wish to revisit the *Chevron* doctrine. However, Veteran Warriors present this petition in search of clarity on what role, if any, *Chevron* should have in veterans' cases, especially amidst the well-known issues with the interaction between *Chevron* and the Pro-Veteran Canon. *Buffington*, 143 S. Ct. at 19-20 (Gorsuch, J., dissenting from denial of certiorari) ("To this day, the federal government, *Chevron*'s biggest beneficiary, has yet to offer a coherent explanation for

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[1] Moreover, the government's analogy to the rule of lenity does not aid it. The most the government can say is that the rule of lenity is used "to resolve ambiguity in favor of the defendant only 'at the end of the process of construing what Congress has expressed' when the ordinary canons of statutory construction have revealed no satisfactory construction." Opp. 10. But the issue is not the order in which tools of statutory construction are employed. It is whether they must be exhausted before a court can resort to *Chevron* deference.

when a statute is sufficiently ambiguous to trigger deference."); see also *id.* at 20 ("Thanks to all this ambiguity about ambiguity, courts have pursued 'wildly different approaches.'") (citing Brett Kavanaugh, *Fixing Statutory Interpretation*, 129 Harv. L. Rev. 2118, 2152 (2016). These issues are further intractable in the context of veterans benefits, where the Pro-Veteran Canon seemingly obviates the need to move to *Chevron* step two. See Harper, *supra*, at 949-50 (citing Justice Scalia Headlines the Twelfth CAVC Judicial Conference, Veterans L.J. 1, 1 (2013) (explaining that "Justice Scalia, in a speech to the Judicial Conference of the Court of Appeals for Veterans Claims, suggested that Chevron and the veteran's canon simply could not co-exist")).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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