No. 23-178

IN THE

Supreme Court of the United States

PETER VAN DERMARK,

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

BRIEF OF THE BETTY AND MICHAEL D. WOHL VETERANS LEGAL CLINIC AT SYRACUSE UNIVERSITY COLLEGE OF LAW AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Founded in 2015, the Betty and Michael D. Wohl Veterans Legal Clinic at Syracuse University College of Law (the "Clinic") provides pro bono legal services and community outreach to veterans and their families across New York state. Under the supervision of the Executive Director, student attorneys work year-round with clients on complex U.S. Department of Veterans Affairs ("VA") benefits claims, appeals of improper denials of benefits, and military discharge upgrades for all branches of the armed services. A single case may require hundreds of hours of the Clinic's legal work. These student attorneys have successfully represented veterans before VA Regional Offices, the Board of Veterans' Appeals, the U.S. Court of Appeals for Veterans Claims, and the U.S. Court of Appeals for the Federal Circuit.

The Clinic is keenly aware of how difficult it can be for veterans to navigate and secure VA benefits—especially for disabled veterans, like Mr. Van Dermark, for whom these benefits are essential. The Clinic has seen firsthand the inequities rendered in the lives of veterans when legal battles and unjust rulings prevent them from receiving critical benefits.

As a legal services and community outreach organization dedicated to serving the veteran community, the Clinic has a particular interest in this case because of the importance of ensuring the proper application of

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[1] No party's counsel authored this brief in part or in whole, and no person other than the *Amicus Curiae*, its members, or its counsel made any monetary contribution to fund the preparation or submission of this brief. Counsel for the *Amicus Curiae* notified counsel of record for all parties of its intention to file this brief, as required by the Court's rules.

the pro-veteran canon of statutory interpretation. This case offers the Court an ideal vehicle to guide the Federal Circuit and other courts in their application of the canon to veterans' law, which has far-reaching implications for the Clinic's work.[2]

INTRODUCTION AND SUMMARY OF ARGUMENT

Members of the Armed Forces dedicate themselves to serving and defending the United States of America. Congress reciprocates by providing a range of benefits to qualified service members. In recognition of Congress's expressed intent to improve and expand access to veterans' benefits, this Court has established the pro-veteran canon, under which "provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991).

Mr. Van Dermark is a service-disabled veteran of the U.S. armed services. He received emergency medical treatment abroad and later sought reimbursement for it under 38 U.S.C. § 1728(a)—which requires "reimburse[ment] . . . for the customary and usual charges of emergency treatment"—and 38 U.S.C. § 1725(a)—which requires "reimburse[ment] . . . for the reasonable value of emergency treatment." The VA, however, denied his request under 38 U.S.C. § 1724(a)—which prohibits the VA from "furnish[ing]

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[2] The brief writers identified above wish to acknowledge the following Clinic students from Syracuse University College of Law, who contributed to the preparation of this brief: Gina L. Bilotti, Natalie A. Bravo, Brandon J. Bryant, Christopher Foreman, Jaclyn Gilley, Amanda I. Higginson, John H. Hubert, Sam Hudzik, Joseph K. Jasper, Kaylene Kunzel, Chezelle S. McDade, Seth M. Owens, Andrew M. Patterson, and Christina M. Ralph.

hospital or domiciliary care or medical services outside any State." *See* App. 59a–73a (reproducing statutes).

The U.S. Court of Appeals for Veterans Claims ("the Veterans Court") affirmed the VA. App. 25a–46a. In dissent, Judge Greenberg noted that the majority's analysis completely failed to apply the pro-veteran canon. *See* App. 45a–46a.

On appeal, the Federal Circuit affirmed. App. 1a–24a. The panel gestured toward, but declined to apply, the pro-veteran canon when interpreting a single word in § 1724(a). *See* App. 12a. And, crucially, the panel failed to even acknowledge the canon's existence when determining which "emergency treatment" must be "reimburse[d]" under §§ 1728(a) and 1725(a), instead deciding that only "simple textual harmonization" was required. App. 24a. The panel's textual analysis spanned just five sentences and made no effort to reconcile the provisions at issue with the broader statutory scheme providing for veterans' benefits.

The Federal Circuit has jurisdiction over all appeals from the Veterans Court and therefore has primary interpretative authority regarding the scope of benefits provided under §§ 1725(a) and 1728(a). This means that, in a single paragraph, the Federal Circuit put every veteran living or traveling abroad at risk of being unable to afford emergency, life-saving treatment. The "importan[ce]" of this "question of federal law" is thus undeniably paramount, and "should be . . . settled by this Court." Sup. Ct. R. 10(c).

More broadly, this case is the latest example of the Federal Circuit's demotion of the pro-veteran canon in its interpretations, contrary to this Court's precedent. The pro-veteran canon has a clear role to play in *every* case involving the interpretation of a veterans' benefits

law or regulation. The canon—and the Federal Circuit's failure to apply it consistently, if at all—has major implications for veterans' access to disability benefits, *see*, *e.g.*, *Roby v. McDonough*, 2021 WL 3378834, at *3 (Fed. Cir. Aug. 4, 2021), unemployment benefits, *see, e.g.*, *Cooper v. McDonough*, 57 F.4th 1366, 1373 (Fed. Cir. 2023), pension benefits, *see, e.g.*, *Lamm v. McDonald*, 640 F. App'x 979, 980 (Fed. Cir. 2016), home loan benefits, *see, e.g.*, *Burkhart v. Wilkie*, 971 F.3d 1363, 1368 (Fed. Cir. 2020), and more.

To ensure proper application of the pro-veteran canon of statutory construction and the full realization of Congress's intent to support eligible veterans, this Court should grant Mr. Van Dermark's petition for a writ of certiorari.

ARGUMENT

I. The Federal Circuit's decision carries enormous consequences for veterans.

Veterans, like other Americans, travel out of the country for many reasons. They may visit extended family or reunite with friends, return to the places they served in, or explore new locations. A significant number of veterans have also relocated abroad, for a variety of reasons. They may feel at ease or find life partners in a foreign country after having spent considerable service-connected time there. They may seek work with companies looking to contract ex-U.S. military personnel. Or they may find that their fixed military pension stretches further in another country. Whatever their reason for stepping outside U.S. borders, veterans face enormous risk as a result of the Federal Circuit's decision. It puts them in the untenable position of having to "choose" between emergency medical care and their financial well-being.

But, as we discuss, this problem has a solution: The devasting result required by the Federal Circuit's ruling is not one Congress intended and is avoided through proper application of the pro-veteran canon.

II. This case is an opportunity to clarify the application of the pro-veteran canon.

A. The pro-veteran canon has deep roots in American history.

Veterans have occupied a hallowed position in both the law and public consciousness throughout American history. As early as 1636, the Pilgrims of Plymouth Colony passed a law stating that the colony would support disabled soldiers. *See History Overview*, U.S. Department of Veterans Affairs, https://department.va.gov/history/history-overview/ (last visited Sept. 15, 2023). In 1776, the Continental Congress enacted laws to provide pensions to disabled soldiers and award grants of public land to members of the Continental Army. *See Object 2: Bounty land warrant*, U.S. Department of Veterans Affairs, https://department.va.gov/history/100-objects/object-2-bounty-land-warrant/ (last visited Sept. 15, 2023). "As the Civil War drew to a close, President Lincoln spoke of the nation's duty 'to care for him who shall have borne the battle and for his widow and his orphan.'" 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, 931 (2019) (quoting Abraham Lincoln, Second Inaugural Address (Mar. 4, 1865)). World War I and World War II each precipitated reorganizations of veterans' benefits programs and vastly expanded public support, first by creating the Veterans Administration and then by extending home loan, education, and health care benefits to returning World War II veterans. *See About the Department*, U.S. Department of Veterans Affairs,

https://department.va.gov/about/ (last visited Sept. 19, 2023). And Congress has continued to expand and solidify veterans' benefits over the past century, culminating in what is now Title 38 of the U.S. Code.[3]

In 1988, recognizing the important role of courts in guaranteeing the benefits provided by federal statutes, Congress enacted the Veterans' Judicial Review Act, Pub. L. No. 100–687, 102 Stat 4105. The Act provides a framework to ensure judicial review of the VA's administrative decisions. *See* H.R. Rep. 100-963, pt. 1, at 26 (Sept. 23, 1988) (House Report on the VJRA) (We "trust[] that courts are . . . aware of the vital interests which are at stake" when they "review VA policy.").

This Court has honored Congress's express intent to protect veterans' interests by formulating the pro-veteran canon, under which laws affecting veterans are to be "liberally construed to protect those who have . . . drop[ped] their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (noting that a statute affecting veterans had "to be liberally construed for the

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[3] "Congress specifically included a number of statutory advantages to veterans." Linda D. Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive Doubt Be Resolved in Veterans' Favor with Chevron*, 61 Am. U. L. Rev. 59, 64 (2011). For example, veterans face no statute of limitations on disability claims. *See* Benjamin P. Pomerance, Katrina J. Eagle, *The Pro-Claimant Paradox: How the U.S. Department of Veterans Affairs Contradicts Its Own Mission*, 23 Widener L. Rev. 1, 3–4 (2017). Further, the agency must "make reasonable efforts to assist a claimant in obtaining evidence necessary to substantiate the claimant's claim for a benefit." 38 U.S.C. § 5103A(a)(1). And, throughout adjudication, the veteran is afforded the "benefit of the doubt," thereby easing the evidentiary burden the claimant must satisfy. *Id*. § 5107(b).

benefit of those who left private life to serve their country"). Congress's many pro-veteran legislative efforts over the last eighty years—including Title 38—have been enacted against the canon's backdrop. *See King*, 502 U.S. at 220 n.9 ("We . . . presume congressional understanding [of the pro-veteran canon].").

This Court has repeatedly invoked the canon when interpreting veterans' laws, leading to rulings in favor of veterans. In *King v. St. Vincent's Hospital*, this Court held that a statute providing reemployment rights to reservists called to active duty did not limit the length of military service after which reservists retained the right to civilian reemployment. 502 U.S. at 220–21. Several circuit courts had read a reasonableness requirement into the statute, which reduced the benefits available. *Id.* at 218. This Court, relying in part on the pro-veteran canon, overruled them, stating that it "would ultimately read the provision in [the veteran]'s favor." *Id.* at 220 n.9.

In *Brown v. Gardner*, this Court held that a statute providing benefits for an "injury" or an "aggravation of injury" that occurs as a result of VA treatment did not require the veteran to demonstrate fault. 513 U.S. 115, 117 (1994). The VA had promulgated a regulation requiring such a showing, but this Court—relying in part on the pro-veteran canon—rejected it, noting that it was bound by "the rule that interpretive doubt is to be resolved in the veteran's favor." *Id.* at 118 (citing *King*, 502 U.S. at 220–21 n.9).

As this Court has noted, "[t]he contrast between ordinary civil litigation . . . and the system that Congress created for the adjudication of veterans' benefits claims could hardly be more dramatic." *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 440 (2011). The

pro-veteran canon helps ensure that contrast is properly considered in cases like the one now before this Court.

B. The Federal Circuit has outsized responsibility for applying the pro-veteran canon.

When a veteran is denied benefits by the VA, he or she must appeal to the Board of Veterans' Appeals ("the Board"). 38 U.S.C. § 7104(a). The Veterans Court has exclusive jurisdiction to review the Board's decisions, *id.* § 7252(a), and the Federal Circuit, in turn, has exclusive jurisdiction to review the Veterans Court's decisions, *id.* § 7292(c).

The Federal Circuit, then, has nearly exclusive—and, absent review by this Court, final—jurisdiction to decide questions relating to the provision of veterans' benefits. Accordingly, of all the courts of appeals, the Federal Circuit has the most opportunities to apply—or misapply—the pro-veteran canon, and its approach has the greatest consequences for veterans.[4] Given the Federal Circuit's unique role, ensuring that the court applies the pro-veteran canon correctly, even in the absence of a clear circuit split, is a matter of great significance.

C. The Federal Circuit has incorrectly applied the canon and explicitly expressed confusion regarding its application.

This Court treats the pro-veteran canon as a general presumption in favor of veterans. The Federal Circuit does not. It applies the canon inconsistently and often

[4] A Westlaw search reveals that more than 90% of the federal court opinions referring to the "pro-veteran canon" come from the Federal Circuit.

incorrectly. The result is a deeply divided bench, significant confusion, and—most critically—bad outcomes for veterans.

The pro-veteran canon instructs courts to resolve "interpretative doubt" in favor of the veteran. *Brown*, 513 U.S. at 118. The canon is a more specific formulation of a fundamental rule of statutory interpretation: "[A] statute is to be read as a whole, . . . [and] the meaning of statutory language, ***plain or not***, depends on context." *King*, 502 U.S. at 221 (emphasis added); *see also id.* ("Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used."); *Sw. Airlines Co. v. Saxon*, 142 S. Ct. 1783, 1788 (2022) ("To discern th[e] ordinary meaning, th[e] words must be read and interpreted in their context, not in isolation." (internal quotation marks omitted)).

The pro-veteran canon operates in precisely this way. Congress, through its enactment of a host of laws benefitting veterans, has expressed a significant solicitude for veterans. Accordingly, the canon "requires that we discern the purpose of a veterans' benefit provision in the context of the veterans' benefit scheme as a whole and ensure that the construction effectuates, rather than frustrates, that remedial purpose: that benefits that by law belong to the veteran go to the veteran." *Kisor v. McDonough*, 995 F.3d 1316, 1327 (Fed. Cir. 2021) (Reyna, J., dissenting). That is statutory interpretation 101.

The Federal Circuit has not come to grips with this. The court cabins the rule, declining to consider it without first independently finding the statutory text ambiguous. *See, e.g.*, *Kaster v. United States*, 158 Fed.

Cl. 86, 94 (2022) (finding the canon only "applies where a statute or regulation is ambiguous"); *Rudisill v. McDonough*, 55 F.4th 879, 887 (Fed. Cir. 2022) ("Whatever role this canon plays in statutory interpretation, it plays no role where the language of the statute is unambiguous."), *cert. granted*, 143 S. Ct. 2656 (2023). But that approach "ignores the Supreme Court's recent instruction that courts should exhaust ***all*** the traditional tools of construction before concluding that a rule [or, in this case, a statute] is ambiguous." *Id.* at 898 (Reyna, J., dissenting) (emphasis added). In the context of veterans' benefits, the pro-veteran canon is a foundational tool of construction.

The Federal Circuit commits a second error. In addition to requiring a finding of ambiguity before applying the pro-veteran canon, it treats the canon as one of "last resort," to be used if—but only if—"all other avenues for resolving ambiguity, ***including Chevron***, fail."[5] Jellum, *Heads I Win, Tails You Lose: Reconciling Brown v. Gardner's Presumption That Interpretive*

[5] The Federal Circuit has recognized the difficulties these interactions present. As Judge Prost has explained, "the Supreme Court's *Chevron* and *Auer* frameworks present a difficult and unresolved challenge—as they in many cases will create tension with the pro-veteran canon. This tension arises because both the pro-veteran canon and these deference doctrines are triggered by ambiguity." *Kisor v. McDonough*, 995 F.3d 1347, 1358 (Fed. Cir. 2021) (order denying petition for rehearing en banc) (Prost, C.J., concurring). *See, e.g.*, *Heino v. Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012) ("It is not clear where the *Brown* canon fits within the *Chevron* doctrine, or whether it should be part of the *Chevron* analysis at all."); *Roby*, 2021 WL 3378834, at *3 ("This court has not definitively resolved at what stage the pro-veteran canon applies."). And although the Federal Circuit has not "attempt[ed] to resolve this quandary," judges have called out for further guidance "to reconcile these competing doctrines." *Kisor*, 995 F.3d at 1358 (Prost, C.J., concurring).

Doubt Be Resolved in Veterans' Favor with Chevron, 61 Am. U. L. Rev. at 85 (emphasis added). In other words, the Federal Circuit applies the canon if—but only if—the court concludes, first, that the statutory text is ambiguous; second, that the agency's proposed interpretation of that ambiguous statute is unreasonable; and third, that the plain text can accommodate a pro-veteran construction. By ranking the canon dead last in the hierarchy, the Federal Circuit guarantees that it will rarely, if ever, apply. Federal Circuit Judge Reyna sums it up well: "[The Federal Circuit's approach] means that 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." *Kisor v. McDonough*, 995 F.3d 1347, 1376 (Fed. Cir. 2021) (order denying petition for rehearing en banc) (Reyna, J., dissenting).

This is not the result that either Congress or this Court intended, and it is growing more intractable with each confused decision by the Federal Circuit. This Court can and should restore the pro-veteran canon to its rightful place in the construction of Congress's pro-veteran legislation. Once restored, veterans like Mr. Van Dermark and those the Clinic strives to help will finally be able to realize the full benefits of existing federal legislation—benefits to which they are entitled by virtue of their loyal service to our nation.

CONCLUSION

The Clinic respectfully urges this Court to grant the petition for a writ of certiorari.

Respectfully submitted,

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