No. 23-779

In the Supreme Court of the United States

David Forsythe,

Petitioner,

v.

Denis R. 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 *AMICUS CURIAE* OF MILITARY-VETERANS ADVOCACY SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE* [1]

Military-Veterans Advocacy, Inc. (MVA) is a non-profit organization that litigates and advocates on behalf of service members and veterans. Established in 2012 in Slidell, Louisiana, MVA educates and trains service members and veterans concerning rights and benefits, represents veterans contesting the improper denial of benefits, and advocates for legislation to protect and expand service members' and veterans' rights and benefits.

The VA has a duty to notify veterans of any additional evidence necessary to substantiate their claims *after* evaluating whether the existing evidence is sufficient. The statute and regulation requiring such notice are unambiguous on this point. Specifically, 38 U.S.C. § 5103(a)(1) says that the VA shall provide the veteran "notice of any information, and any medical or lay evidence, *not previously provided* to the [VA] that is necessary to substantiate the claim." (emphasis added). And the effectuating regulation, 38 C.F.R. § 3.159(b)(1), similarly states that "*when* [the] VA receives a complete or substantially complete initial or supplemental claim, [the] VA will notify the claimant of any information and medical or lay evidence that is necessary to substantiate the claim." (emphasis added).

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[1] The parties were timely notified of MVA's intent to file this brief. No counsel for a party authored any part of this brief, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae*, its members, or its counsel made a monetary contribution to the brief's preparation or submission.

The Federal Circuit disregarded this clear language to hold that the requisite notice may be provided as part of a generic form that the veteran fills out before a claim is even initiated. In so doing, the court of appeals ignored the role that the pro-veteran canon plays in statutory interpretation, the VA's duty to assist veterans in substantiating their claims, and the VA's responsibility to follow the regulations it promulgates pursuant to that duty.

To make matters worse, the court devised a form of super-*Chevron* deference that defers—not merely to an agency's interpretation of a statute and corresponding regulation—but to what the agency *intended* the regulation to be. The panel majority then invited the VA to modify its regulation to comport with the agency's alleged intent.

MVA has an interest in seeing that pro-veteran principles endure as prominent features of our pro-veteran benefits system and that veterans are not subject to the whim of the VA's unexpressed intent.

SUMMARY OF THE ARGUMENT

Both § 5103(a) and § 3.159(b) require individualized, post-claim notice to veterans of what further evidence is needed to substantiate their claims. This requirement makes sense—the VA cannot give notice to a veteran about what evidence is needed until after the claim has been filed and evaluated.

Yet, the VA has provided "notice" only as a preface to a generic form that veterans fill out *before* a claim is initiated. And the Federal Circuit here permitted the VA to continue this practice. Not only did the

court misinterpret the statute, it dismissed the VA's regulation as "outdated" and "unlikely" to reflect what "the agency intended." Pet. App. 9a. The court then "urge[d]" the VA to amend the rule to "avoid further confusion" in the future. *Id.* at 9a n.1. In other words, rather than hold the agency to the statute and the actual regulation it promulgated, the court deferred to an interpretation that the agency intended but did not express.

The Federal Circuit's willingness to afford the VA the benefit of the doubt is antithetical to the strongly and uniquely pro-claimant nature of the veterans-benefits system. By design, the system is supposed to favor the veteran—rather than the government—at every turn. *See infra* Section I.A.

Emblematic of this design are two principles relevant here. The first is the pro-veteran canon, which requires that veterans-benefits statutes "always . . . be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943). Even if § 5103(a) were ambiguous as to whether individualized, post-claim notice is required, the pro-veteran canon should have tipped the balance in veterans' favor to require such notice. *See infra* Section I.B.

The second relevant principle is the VA's duty to assist, which requires the VA to help veterans substantiate their claims. Again, even if § 5103(a) were ambiguous, the VA was obligated to assist veterans by following its own regulation, § 3.159(b), requiring post-claim notice. *See infra* Section I.C.

Yet the Federal Circuit ignored both principles; its opinion says nothing at all about the pro-claimant nature of the veterans-benefits system. That is reason enough for the Court to grant the petition.

Even apart from pro-veteran considerations, the Federal Circuit's ruling is deeply problematic from an administrative-law standpoint. By allowing the VA to comply with the regulation it allegedly intended but did not promulgate, the Federal Circuit permitted the VA to circumvent notice-and-comment rulemaking. *See infra* Section II.A. And, in so doing, the court went well beyond merely deferring to the VA's interpretation of § 5103(a) as reflected in the agency's regulation under *Chevron*. Rather, the court deferred to the agency's unwritten "inten[t]," *notwithstanding* the regulation. *Chevron* deference is generally problematic and is particularly so in the veterans-benefits context because it derogates the pro-veteran principles described above. But here, the problem is even worse—the court of appeals devised a new, super-deferential interpretative canon that takes *Chevron* to the extreme. *See infra* Section II.B.

Finally, the court of appeals' holding has real and harmful consequences. As Judge Mayer noted in dissent, the pre-claim notice used by the VA is prohibitively dense and confusing, and many veterans do not get a chance to read, let alone understand, the document. Pet. App. 17a–18a (Mayer, J., dissenting). As a result, more claims are being denied now than ever before. Indeed, the Federal Circuit's decision has already been invoked to deny benefits, *see Lewis v. McDonough*, 2023 WL 8519089, at *3–4 (Ct. App. Vet. Cl. Dec. 8, 2023), and will continue to be if permitted to stand. The decision also weakens the veterans-

benefits system itself. The VA's post-claim-notice practice has led to more supplemental claims being filed, as well as lengthier and more complicated proceedings, which only exacerbates the VA's already-severe and well-documented administrative problems. *See infra* Section III.

In short, allowing the VA to ignore the notice statute and its own regulation does not advance the paternalistic character that the veterans-benefits system is designed to reflect. On the contrary, it would be difficult to devise a "notice" that is less helpful than the one the VA provides. The Court should grant the petition, reaffirm the importance of the pro-veteran canon and duty to assist, and establish that the type of agency deference exercised by the Federal Circuit here has no place in the law, let alone in veterans-benefits cases.

ARGUMENT

I. THE COURT OF APPEALS' DECISION CONFLICTS WITH THE VETERANS-BENEFITS SYSTEM'S PRO-CLAIMANT DESIGN.

A. Veterans Proceedings Are Strongly and Deliberately Pro-Veteran.

From its inception, the veterans-benefits system was intended to be "strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (citing *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980)). "Congress' intent in crafting the veterans benefits system [was] to award entitlements to a special class of citizens, those who risked harm to serve and defend their country," and, consequently,

the "entire scheme is imbued with special beneficence from a grateful sovereign." *Barrett v. Nicholson*, 466 F.3d 1038, 1044 (Fed. Cir. 2006) (cleaned up); *Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (noting that "systemic justice and fundamental considerations of procedural fairness carry great significance" in the regime), *overruled on other grounds by Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002) (en banc).

The solicitous nature of the system is reflected in several doctrines that inure to the veteran's benefit. Two are relevant here. The first is the canon of construction that "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). Recognized as an important tool in protecting veterans' rights for the past seventy-five years, the pro-veteran canon requires courts to give statutes "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Moreover, the canon forms part of the backdrop against which Congress is presumed to legislate. *King v. St. Vincent's Hosp.*, 502 U.S. 215 n.9 (1991) ("[w]e will presume congressional understanding of" the canon).

The second doctrine is the VA's duty to assist. That duty reflects "the paternalistic nature" of the veterans-benefits system, *Comer v. Peake*, 552 F.3d 1362, 1368 (Fed. Cir. 2009), and requires the VA—unlike almost every other federal agency that administers a benefits scheme—to "assist a claimant in obtaining evidence necessary to substantiate the claimant's claim," 38 U.S.C. § 5103A(a)(1). To discharge its duty, the VA must "fully and

sympathetically develop the veteran's claim to its optimum before deciding it on the merits." H.R. Rep. No. 100-963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5795.[2]

As explained below, the Federal Circuit's ruling here subverts both of these doctrines.

B. The Federal Circuit's Interpretation of § 5103(a) Disregards Both the Statute's Plain Text and the Pro-Veteran Canon.

The court of appeals glossed over § 5103(a)'s text and did not mention the pro-veteran canon, let alone apply it. Rather, focusing on the statute's legislative history, the court observed that § 5103(a) was amended in 2012 to remove language requiring notice to be given "[u]pon receipt of a complete or substantially complete application." Pet. App. 6a–7a. The court concluded from this amendment that the statute does not require post-claim notice. This cursory analysis is misguided.

The statute is clear: the VA must notify the veteran of information "not previously provided to the Secretary that is necessary to substantiate the claim." This language, which was preserved even after the 2012 amendment, requires post-claim notice because the VA cannot know what evidence bears on a claim before the claim is filed. Pet. 18, 20–21; *Locklear v. Nicholson*, 20 Vet. App. 410, 416 (2006) (noting that

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[2] These are just two examples; there are many others. *See Walters v. National Ass'n of Radiation Survivors*, 473 U.S. 305, 309–312 (1985) (surveying pro-veteran features of veterans-benefits system).

this language "indicates that some cognitive review of the claim must be made prior to providing the notice"). The statute's clarity should have ended the inquiry. *See Gardner*, 513 U.S. at 122 (rejecting an interpretation of a statute that "flies against the plain language of the statutory text").

Even if the statute did not clearly require post-claim notice, it at least casts doubt on the Federal Circuit's contrary interpretation. And, under the pro-veteran canon, any lingering ambiguity in the statute should have been resolved in Mr. Forsythe's favor to require post-claim notice. *See Henderson v. Shinseki*, 562 U.S. 428, 440–441 (2011) (the canon, like other pro-veteran doctrines, "place[s] a thumb on the scale in the veteran's favor"); *Gardner*, 513 U.S. at 118.

The legislative history does not compel a contrary conclusion. To start, "legislative history is not the law." *Epic Sys. Corp. v. Lewis*, 584 U.S. 497, 523 (2018); Pet. App. 16a (Mayer, J., dissenting) (noting that any alleged congressional intent "did not explicitly make it into the law"). And, as the petition explains, the legislative history is not probative of whether the statute permits pre-claim notice. *See* Pet. 19–23.

Even if it were, the legislative history should have been weighed against the pro-veteran canon, which, as explained above, favors post-claim notice. "While the canon may not be dispositive of a provision's meaning every time it is applied," courts are at least "obligated to weigh it alongside the other tools of construction"—including any "countervailing legislative history"—when the statutory text is ambiguous. *Kisor v. McDonough*, 995 F.3d 1316,

1336–1337 (Fed. Cir. 2021) (Reyna, J., dissenting), *cert. denied*, 142 S. Ct. 756 (2022); *see also National Org. of Veterans' Advocates, Inc. v. Secretary of Veterans Affairs*, 260 F.3d 1365, 1377–1378 (Fed. Cir. 2001) (invoking pro-veteran canon as a "usual tool" for resolving statutory ambiguity even in the face of countervailing legislative history).

Had the Federal Circuit considered the pro-veteran canon, it would have had to reconcile the statute's legislative history with Mr. Forsythe's countervailing reading of the statute. And, given that Mr. Forsythe's reading is at least as plausible as the VA's (and, in fact, more so), that reading should have prevailed. *See Gardner*, 513 U.S. at 117–118 (all "interpretive doubt is to be resolved in the veteran's favor"); *Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009) (where two interpretations are "plausible," the pro-veteran interpretation should prevail).

Whatever probative value § 5103(a)'s legislative history has, it does not outweigh the statute's plain text or the pro-veteran canon.

C. The Federal Circuit's Refusal to Demand that the VA Follow its Own Regulation Allows the VA to Flout its Duty to Assist.

Even if § 5103(a) does not require the VA to provide post-claim notice, it does not prohibit the VA from promulgating regulations requiring such notice. Pet. App. 15a–16a (Mayer, J., dissenting). The VA did just that when it promulgated § 3.159(b)(1). The regulation requires the VA to provide notice "when [the] VA receives a complete or substantially complete initial or supplemental claim"—i.e., *after* a claim has been filed. And, critically, even after Congress

amended § 5103(a) in 2012, the VA did not amend the regulation to permit pre-claim notice. Pet. App. 8a.

Yet, rather than require the VA to follow its regulation, the Federal Circuit relied on the VA's 2012 congressional testimony to conclude that the regulation is not what "the agency intended." Pet. App. 9a. The court thus "urge[d]" the VA to change the regulation (but without waiting for the VA to do so). *Id.* at 9a n.1. The court's willingness to let the VA off the hook is deeply troubling and inappropriately allows the VA to disregard its duty to assist.

As explained above, the VA's duty to assist reflects "the paternalistic nature" of the veterans-benefits system, *Comer*, 552 F.3d at 1368, and requires the VA to "assist a claimant in obtaining evidence necessary to substantiate the claimant's claim," 38 U.S.C. § 5103A(a)(1). Rule 3.159(b) itself is designed to promote this duty by providing individualized, clear notice and guidance to those who need it most. *Locklear*, 20 Vet. App. at 414. Many veterans are elderly or suffer from impairments that prevent them from understanding the system.[3] These individuals are typically "incapable of developing the factual record alone" and "may not know the requisite

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[3] *See* Bryan A. Liang & Mark S. Boyd, *PTSD in Returning Wounded Warriors: Ensuring Medically Appropriate Evaluation and Legal Representation Through Legislative Reform*, 22 STAN. L. & POL'Y REV. 177, 182 (2011); Benjamin P. Pomerance, *Fighting on Too Many Fronts: Concerns Facing Elderly Veterans in Navigating the United States Department of Veterans Affairs Benefits System*, 37 HAMLINE L. REV. 19, 47 (2014).

language for recognition of benefits claims."[4] Rule 3.159(b) and the VA's duty to assist ensure that these individuals receive the guidance needed to at least apply for benefits rightly owed to them. *See infra* Section III.

Given that the VA's duty to assist forms the foundation on which the veterans-benefits system is built, veterans should be entitled to "rely on the VA to fully comply" with regulations specifically designed to promote that duty. *See Santana-Venegas v. Principi*, 314 F.3d 1293, 1298 (Fed. Cir. 2002) ("It is not unreasonable for veterans to rely on the VA to fully comply with the comprehensive policies adopted by the agency including the duty to assist timely.").

Stated differently, the VA should not be permitted to "tell a veteran" one thing in its regulation and then "move the goal-posts" after the veteran has relied on the regulation. *Hudick v. Wilkie*, 755 F. App'x 998, 1007 (Fed. Cir. 2018). Such maneuvering hardly advances—and, in fact, is flatly inconsistent with—the VA's duty to assist. And yet, that is exactly what the VA has done here, with the full endorsement of the Federal Circuit.

"Each time the VA chips away at the duty to assist, the VA changes course farther away from its guiding principles to ensure that claimants are afforded every

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[4] Kristi A. Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How Expanding Presumptions for Service Connection Can Help*, 26 T.M. COOLEY L. REV. 113, 125 (2009).

opportunity to substantiate their claim[.]"[5] Respectfully, the Court should not permit the VA to continue to do so.

* * *

The Court should grant the petition and reaffirm the preeminence of the above pro-veteran principles in veterans-benefits cases.

II. THE FEDERAL CIRCUIT'S DECISION ALSO CONFLICTS WITH FUNDAMENTAL PRINCIPLES OF ADMINISTRATIVE LAW.

The Federal Circuit's ruling is flawed for another fundamental reason: it conflicts with well-established principles of administrative law. The court's refusal to require the VA to follow its regulation impermissibly allows the agency to effectuate a *de facto* change to the regulation without going through notice-and-comment rulemaking. Further, the court's deference to what the VA intended (but did not express in a regulation) significantly departs from the already misguided principles of agency deference espoused in *Chevron*.

These infirmities provide yet another basis for the Court to grant the petition.

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[5] Stacey-Rae Simcox, *Thirty Years of Veterans Law: Welcome to the Wild West*, 67 U. KAN. L. REV. 513, 558–559 (2019) (cleaned up).

A. The Federal Circuit Permitted the VA to Circumvent Notice-and-Comment Rulemaking.

Regardless of what the VA "intended," § 3.159(b) is clear on its face, which should have been sufficient to rule in Mr. Forsythe's favor: "a federal agency must comply with its own regulations." *Army & Air Force Exch. Serv. v. Sheehan*, 456 U.S. 728, 733 (1982); *see also Accardi v. Shaughnessy*, 347 U.S. 260, 266–267 (1954); Pet. 23–28.

Indeed, "[e]ven when an agency's rules are more generous than they are required to be by statute, these rules still must be followed." *Hudick*, 755 F. App'x at 1005 (citing *Vitarelli v. Seaton*, 359 U.S. 535, 539 (1959)). Thus, even if the Federal Circuit were correct that § 5103(a) does not require post-claim notice and that the VA did not intend that such notice be provided, the VA was still bound by its more generous regulation unambiguously requiring post-claim notice.

The Third Circuit's decision in *Director, Office of Workers' Compensation Programs v. Eastern Association Coal Corp.*, 54 F.3d 141 (3d Cir. 1995) ("*OWCP*"), provides a roadmap for what the Federal Circuit should have done. There, the court addressed OWCP's interpretation of the Black Lung Benefits Act, which establishes a comprehensive scheme to compensate coalminers and their surviving dependents for medical problems caused by black lung disease. The statute provided that employer payments under the Act be offset by employee compensation received under a "workers' compensation law." *Id.* at 143 (citing 30 U.S.C.

§ 932(g) (1986)). The Department of Labor had implemented a regulation clearly defining "worker's compensation law" to include any state law requiring compensation, irrespective of whether the payment was funded by employers or by the state's general revenues. *Id.* at 148 (quoting 20 C.F.R. § 725.101(a)(4) (1978)).

Notwithstanding the regulation's plain language, OWCP urged the court to defer to its longstanding interpretation of the regulation as carving out state laws that compensate coalminers from the public fisc. *Id.* at 148, 149. OWCP argued that its interpretation comported with what the agency actually intended and that a contrary interpretation would confer a windfall on employers. *Id.* at 149.

The Third Circuit rejected that argument. Although the court agreed that the statute was ambiguous and that OWCP's interpretation made good policy sense, the court refused to interpret the regulation based on what the agency "may have intended." *Id.* at 149. "The issue," the court explained, "is what the Secretary said through regulation, not what the Secretary might have intended." *Id.* at 148. The court noted, moreover, that OWCP's "policy concerns" must be "address[ed] through rewriting the regulation[]." *Id.* at 149. The court emphasized that the agency "has the means and obligation to amend its regulation[]" to effectuate any contrary intended meaning, and so courts "cannot accord more deference to [OWCP's] interpretation of the regulation than to the actual regulation" itself. *Id.* at 149–150.

The Department of Labor took the hint. Following the Third Circuit's decision, the agency amended its

regulation to make clear that "[a] payment funded wholly out of general revenues shall not be considered a payment under a workers' compensation law." 20 C.F.R. § 725.01(a)(31) (2001). In so doing, the agency explained that its amendment was meant "to reflect accurately the Department's intended meaning." 65 Fed. Reg. 79,920, 79,958 (Dec. 20, 2000). But, importantly, that intent was not—and could not have been—binding before the amendment was enacted. This is how the system is supposed to work.[6]

The Federal Circuit here got it exactly backwards. Rather than apply the regulation as written and let the VA amend the regulation to reflect a contrary intent going forward, the court inferred a contrary intent and urged the VA to amend the regulation to match it. The court's novel approach to regulatory interpretation would have disastrous consequences if ever followed and expanded to other agencies and contexts. It should be soundly rejected.

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[6] *See also Fina Oil & Chem. Co. v. Norton*, 332 F.3d 672, 676 (D.C. Cir. 2003) (agencies may not "circumvent[] the notice-and-comment process by rewriting regulations under the guise of interpreting them"); *Powell v. Heckler*, 789 F.2d 176, 179 (3d Cir. 1986) ("[I]t would be improper for us to construe the regulation to mean what the Secretary might have intended but did not adequately express."); *accord Usery v. Kennecott Copper Corp.*, 577 F.2d 1113, 1117–1119 (10th Cir. 1977); *Tobin v. Edward S. Wagner Co.*, 187 F.2d 977, 979 (2d Cir. 1951).

B. The Super-*Chevron* Deference that the Federal Circuit Afforded the VA Conflicts with Pro-Veteran Principles and Has No Legal or Policy Justification.

The flawed nature of the Federal Circuit's analysis is particularly evident when viewed through the lens of *Chevron* and agency deference.

By now, the Court is well acquainted with *Chevron*'s frequently voiced criticisms. As others have pointed out, for example, *Chevron* violates separation-of-powers principles by requiring courts to abdicate their duty to say what the law is.[7] The doctrine also leads to due-process concerns because the government is essentially empowered to act as a judge in its own case. *See Buffington v. McDonough*, 143 S. Ct. 14, 19 (2022) (Gorsuch, J., dissenting from denial of certiorari) (*Chevron* requires courts to "place a finger on the scales of justice in favor of the most powerful of litigants, the federal government, and against everyone else"). And, as a practical matter, the doctrine has proven to be unadministrable.[8]

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[7] *See, e.g.*, Cass R. Sunstein, *Law and Administration After* Chevron, 90 COLUM. L. REV. 2071, 2074–2075 (1990) (referring to *Chevron* as "counter-*Marbury*"); *see also Henriquez-Rivas v. Holder*, 707 F.3d 1081, 1087 (9th Cir. 2013) ("If the [agency's] construction is reasonable, we must accept that construction under *Chevron*, even if we believe the agency's reading is not the best statutory interpretation.").

[8] *See, e.g.*, *Loper Bright Enters. v. Raimondo*, No. 22-451, Brief for Petitioners 32–40 (July 17, 2023) (cataloging practical problems with *Chevron*).

Chevron deference is especially problematic in the veterans-benefits context because it requires courts to defer to VA regulations that harm veterans. Such deference is, quite literally, antithetical to the pro-veteran canon. Indeed, as one former Federal Circuit judge aptly explained:

> Congress recognized that veterans should not have to fight for benefits from the very government they once risked their lives to defend. We ignore this purpose when we fail to apply the pro-veteran canon to resolve ambiguities in statutes and regulations that provide benefits to veterans; and, by failing to hold that agency deference must yield to the pro-veteran canon, we permit agencies to do the same.

Procopio v. Wilkie, 913 F.3d 1371, 1387 (Fed. Cir. 2019) (en banc) (O'Malley, J., concurring); *Rudisill v. McDonough*, 55 F.4th 879, 898 (Fed. Cir. 2022) (Reyna, J., dissenting) (warning that allowing *Chevron* to trump the pro-veteran canon "effectively bends the law to the favor of, and to the deference of, the agency"), *cert. granted*, 143 S. Ct. 2656 (2023). In short, *Chevron*'s "judicial abdication" in such circumstances "disserves both our veterans and the law." *Buffington*, 143 S. Ct. at 16 (Gorsuch, J., dissenting).

But the problem here is even worse than that. Here, the Federal Circuit deferred to the VA's supposed intent nowhere articulated in any regulation. It is one thing for a court to defer to an agency's regulation interpreting a statute—that is

bad enough for all the reasons described above. But it is something else entirely for a court to defer to what the agency *intended but did not express*. That type of deference amounts to a complete and total abdication of the court's duty to interpret the law and gives the agency nearly unfettered discretion to implement the law as it sees fit, without notice-and-comment rulemaking or other accountability protections. There simply is no legal or policy rationale that would justify such super-deference—the Federal Circuit certainly did not articulate one.

In fact, the super-*Chevron* deference exercised here is even worse than the deference advocated in *OWCP*. At least there, OWCP urged that the regulation at issue "be liberally construed" in favor of coalminers, consistent with the "remedial" purpose of the legislation. 54 F.3d at 149. Here, by contrast, the VA's interpretation (at least as inferred by the Federal Circuit) is *adverse to veterans*, which flies in the face of the veterans-benefits system's "strongly and uniquely pro-claimant" design. *Hodge*, 155 F.3d at 1362. If OWCP's pro-coalminer interpretation in *OWCP* could not override the clear language of the regulation at issue, then the VA's anti-veteran interpretation of § 3.159(b) here should not either.

* * *

The Court should grant the petition and make clear that the VA must follow its duly promulgated regulations and that courts cannot defer to agency intent not reflected in any regulation.

III. THE FEDERAL CIRCUIT'S DECISION WILL HARM VETERANS AND FURTHER WEAKEN AN ALREADY-BROKEN SYSTEM.

The court of appeals' refusal to apply the pro-veteran principles described above not only violates this Court's precedent, it also has real and harmful consequences for millions of veterans currently eligible for disability compensation, as well as the veterans-benefits system itself.

As explained below, the timing of the VA's notice makes a difference—by providing pre-claim notice divorced from the particulars of a veteran's claims, the VA effectively provides no notice at all. As a result, an increasing number of claims are being denied. Accordingly, veterans are either unable to receive benefits rightly owed to them or forced to file supplemental claims, which, in turn, has led to longer proceedings and greater delay—the last thing the VA needs.

The court of appeals' misinterpretation of § 5103(a) and § 3.159(b) thus leads to the perverse assumption that the VA intended both to make it more difficult for veterans to understand the statutory notice and to further burden and backlog the VA's own system. This is an untenable proposition.

A. Veterans' ability to understand the VA's notice is inextricably linked to *when* the notice is received. This is best illustrated by the VA's historical notice practice. Before changing course sometime in 2015, the VA provided *post*-claim notice in the form of a three-page, easily digestible letter. *See* CAFC Reply Br., Ex A. The letter calls the veteran's

attention to evidence—and a deadline for submitting it—required to substantiate the claim and explains what evidence the VA will be responsible for collecting. Further, at the time the letter is received, the veteran has already filed a claim and thus has the requisite context for understanding the letter. The letter presents the notice, moreover, using clear and concise language.

The VA abruptly abandoned this practice in 2015, when—without amending § 3.159(b)—it began providing the notice that Mr. Forsythe received here: a seven-page, cluttered preface to Form 21-526EZ that veterans must fill out to initiate a claim. *See* CAFC Appx89. Nothing about this "notice" is helpful. Rather, it is dense boilerplate that veterans are unlikely (or unable) to carefully read. Even if a veteran does carefully review the content, the veteran may not appreciate at that early stage in the process—before a claim has been filed—how the content relates to the veteran's circumstances (and, indeed, much of the content may be completely irrelevant to the veteran's circumstance).

Even though the VA has acknowledged that the content of the notice "depends on the amount of information and evidence VA already has regarding an individual claim," 66 Fed. Reg. 45,620, 45,622 (Aug. 29, 2001), the VA's adopted notice is not tailored to any particular individual's claim—it is a one-size-fits-all that fits no one.[9] *See* Pet. 8–10, 29–30.

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[9] The VA's failure to provide post-claim notice also raises due-process concerns, Pet. 32, which only further undermines

It is unsurprising, therefore, that the VA's current notice practice has created problems for veterans. A recent audit of Camp Lejeune water-contamination claims, for example, revealed that more than 80% of all incorrectly-processed claims (and more than 40% of all such denied claims) were caused by the VA's failure to provide adequate notice of evidence through Form 21-526EZ and to provide such notice post-filing.[10] This example supports the commonsense notion that a notice's timing makes all the difference in a veteran's ability to substantiate a claim.

B. The Federal Circuit's decision endorsing the VA's pre-claim notice practice will also further burden an already (and notoriously) inefficient and backlogged system. *See, e.g.*, *Martin v. O'Rourke*, 891 F.3d 1338, 1349, 1351 (Fed. Cir. 2018) (Moore, J., concurring) (noting universal agreement that the veterans-benefits system is "fundamentally" and "deeply" flawed and traps veterans "for years in a bureaucratic labyrinth, plagued by delays and inaction").[11] This is because veterans are forced to file

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the Federal Circuit's reading of the statute and regulation, *see Jennings v. Rodriguez*, 583 U.S. 281, 286 (2018) ("Under the constitutional-avoidance canon, when statutory language is susceptible of multiple interpretations, a court may shun an interpretation that raises serious constitutional doubts and instead may adopt an alternative that avoids those problems.").

[10] OIG Report #21-03061-209, at ii, 4, 9–10, *available at* https://www.oversight.gov/sites/default/files/oig-reports/VA/VAOIG-21-03061-209.pdf.

[11] *See also, e.g.*, Michael P. Allen, *Justice Delayed; Justice Denied? Causes and Proposed Solutions Concerning Delays in the Award of Veterans' Benefits*, 5 U. MIAMI NAT'L SEC. & ARMED

supplemental claims to submit evidence that could have been submitted sooner had the requisite post-claim notice been provided. Pet. App. 32a, 34a. Indeed, 63% of all currently pending claims are supplemental claims.[12]

As a result, benefits determinations are taking longer than ever before. The available data for 2023 shows that the number of supplemental claims resolved within 125 days was just 67.8%—many supplemental claims took much longer.[13] And that is just the tip of the iceberg: when one factors in the nearly 160 days that the VA takes on average to adjudicate claims, as well as an endless cycle of appeals and remands, claims "can take years to resolve," often leading veterans to "become discouraged and simply give up."[14] Meanwhile, it is

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CONFLICT L. REV. 1, 3 (2015) ("The VA is perhaps the definition of a byzantine bureaucracy."); Benjamin W. Wright, *The Potential Repercussions of Denying Disabled Veterans the Freedom to Hire an Attorney*, 19 FED. CIR. B.J. 433, 433-434 & n.5 (2009) (collecting cases "demonstrating the glacial pace of the VA in determining benefits, the difficulty of . . . navigating the bureaucracy, and VA blunders").

[12] *Characteristics of Claims*, VA, https://www.benefits.va.gov/REPORTS/characteristics_of_claims.asp (last visited Feb. 14, 2024).

[13] *See* December 2023 AMA Metrics Report, Part 1–AMA (W-Y), *available at* https://www.benefits.va.gov/REPORTS/AMA/.

[14] *The VA Claim Process After You File Your Claim*, VA, https://www.va.gov/disability/after-you-file-claim/ (last updated Feb. 5, 2024); Kristi A. Estrada, *Welcome Home: Our Nation's Shameful History of Caring for Combat Veterans and How*

sadly common for elderly claimants to pass away in the interim, in which case the "government does not pay" at all.[15] Hence the unfortunate but apt slogan: "delay, deny, wait 'till they die."[16]

All this adds up to a bleak picture for veterans seeking disability benefits and harms the very system designed to provide such benefits. The Federal Circuit's erroneous interpretation of § 5103(a) and § 3.159(b) only magnifies these problems, as it will lead to a lengthier, less efficient, and less pro-veteran system. The decision should not be permitted to stand.

CONCLUSION

Our Nation's veterans have "subject[ed] themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service and which do not exist in normal civil life." *Johnson v. Robinson*, 415 U.S. 361, 380 (1974). The least we can do for them is hold the VA to its regulations and require it to do what it says it will do. The Court should grant Mr. Forsythe's petition.

Expanding Presumptions for Service Connection Can Help, 26 T.M. COOLEY L. REV. 113, 128 (2009).

[15] James T. O'Reilly, *Burying Caesar: Replacement of the Veterans Appeals Process Is Needed to Provide Fairness to Claimants*, 53 ADMIN. L. REV. 223, 224 (2001).

[16] Hugh McClean, *Delay, Deny, Wait Till They Die: Balancing Veterans' Rights and Non-Adversarial Procedures in the VA Disability Benefits System*, 72 SMU L. REV. 277 (2019).

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