**2017-1821**

**IN THE**
# UNITED STATES COURT OF APPEALS
**FOR THE FEDERAL CIRCUIT**

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ALFRED PROCOPIO, JR.,

*Claimant-Appellant,*

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,

*Respondent-Appellee.*

Appeal from the United States Court of Appeals for
Veterans Claims, 15-4082, Judge Pietsch

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## BRIEF OF *AMICUS CURIAE* DISABLED AMERICAN VETERANS IN SUPPORT OF CLAIMANT-APPELLANT

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October 11, 2018

## CERTIFICATE OF INTEREST

Counsel for *Amicus Curiae* Disabled American Veterans certifies the following:

1. The full name of every party or amicus represented by me is:

   Disabled American Veterans

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

   None

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

   None

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this Court (and who have not or will not enter an appearance in this case) are:

   None

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. See Fed. Cir. R. 47. 4(a)(5) and 47.5(b).

   None known.

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Disabled American Veterans (DAV) respectfully submits this brief as an *amicus curiae* pursuant to Fed. R. App. P. 29 and Fed. Cir. R. 29 and the Court's Order dated August 16, 2018, authorizing *amicus* briefs in this case. No party's counsel has authored any portion of this brief, and no party or person has contributed money to fund preparing or submitting the brief.

## INTEREST OF THE *AMICUS CURIAE*

DAV is a federally chartered veterans service organization, founded in 1920 to serve the interests of this nation's disabled veterans. 36 U.S.C. §§ 50301 *et seq*. DAV has nearly 1.3 million members, all of whom are service-connected disabled veterans. Although DAV operates several charitable programs serving the interests of its constituency, its marquee program, and the one for which it is best known, is the "National Service Program." Through that program, and from approximately one hundred locations around the United States and Puerto Rico, DAV's National Appeals Officers, National Service Officers, and Transition Service Officers assist veterans with their claims for benefits from the United States Department of Veterans Affairs (VA).

In the most recent year for which statistics are available, DAV representatives, all accredited by VA, handled more than 250,000 benefits claims for disabled veterans. In 2017, the Board of Veterans' Appeals (Board) acted on more than 16,400 cases, with 31% of those cases represented by DAV, the most by

any veterans service organization. DAV has developed, in conjunction with two outside law firms, the largest program now existing for *pro bono* representation at the U.S. Court of Appeals for Veterans Claims (Veterans Court) and at the Court of Appeals for the Federal Circuit. This program represents well over 1,000 veterans each year at the Veterans Court and the Federal Circuit. DAV is a leading advocate in ensuring that Congress's intent that statutes and regulations are interpreted in a pro-veteran way is fulfilled, thus serving the interests of our nation's veterans.

## SUMMARY OF ARGUMENT

This Court invited the views of *amicus curiae* on two questions. DAV submits this brief to address the question of the role the pro-veteran canon set out in *Brown v. Gardner* plays in the interpretation of 38 U.S.C. § 1116 and other veteran's statutes. Because the pro-veteran *Gardner* canon is a traditional tool of statutory construction, reflecting Congress's intent that interpretive doubt be resolved in favor of veterans, the canon should be considered at step one of the *Chevron* analysis.

## ARGUMENT

### I. Applying *Gardner*'s Pro-Veteran Canon of Construction at Step One of the *Chevron* Analysis Benefits Veterans and the System Serving Them

VA is an enormous agency. It provides disability benefits to nearly 4.5 million veterans and, over the past four years alone, added more than one million

veterans to its compensation rolls. *See* Veterans Benefits Administration Reports, *Detailed Claims Data*, available at https://www.benefits.va.gov/reports/detailed_claims_data.asp. VA performs this function guided by several core values that define its mission and culture, including a commitment to "[w]ork diligently to serve Veterans and other beneficiaries" and advocacy for "the interests of Veterans." *See I CARE Core Values*, available at https://www.va.gov/icare. VA's stated commitments dovetail with one of DAV's missions—providing free, professional assistance to veterans and their families in obtaining benefits and services earned through military service and provided by VA. *See* https://dav.org/learn-more/about-dav/mission-statement.

VA's commitments and DAV's mission are served by applying the *Gardner* canon at step one of the *Chevron* analysis because doing so will benefit veterans and the sound and equitable administration of the veterans' system. First, courts will construe statutes in accordance with Congress's intent that the veterans' system be a non-adversarial one, designed to compensate veterans for their service to the United States. In that context, the *Gardner* canon properly ensures that any interpretive doubt will be resolved in favor of the intended beneficiaries of the statutory scheme—the veterans.

Further, applying the *Gardner* canon at step one of the *Chevron* analysis will speed up the resolution of veterans' benefits claims, an issue constantly plaguing

VA, by decreasing the number of appeals to the Veterans Court and to this Court. Construing veterans' statutes in accordance with the *Gardner* canon will decrease the number of cases in which VA's statutory interpretation is inconsistent with Congress's intent that interpretive doubt be resolved in favor of veterans. That, in turn, will reduce the number of appeals that veterans and organizations like DAV must file by ensuring correct VA adjudications in the first instance. A decrease in the number of appeals will allow VA, DAV, and other stakeholders to focus on getting benefits to veterans quickly and correctly, important goals of all involved in the veterans' benefits system.

DAV, working with its allied *pro bono* law firms, handles over 1,000 appeals to this Court and the Veterans Court each year. Decreasing the number of appeals in which statutory construction serves as a barrier to an award of benefits is particularly likely to reduce the number of appeals filed in this Court, whose jurisdiction is strictly limited by statute to appeals that raise issues of law. Applying the *Gardner* canon at *Chevron* step one will thus improve the functioning of the veterans' system and benefit the hundreds of thousands of veterans that DAV serves each year, allowing DAV to focus its finite resources on other areas that benefit veterans.

## II. The Pro-Veteran *Gardner* Canon Is a Traditional Tool of Statutory Construction That Must Be Applied at *Chevron* Step One

### A. Supreme Court Precedent Established a Pro-Veteran Canon of Statutory Construction Requiring Courts to Resolve Ambiguity in Favor of Veterans

The Supreme Court in *Brown v. Gardner* reaffirmed that "interpretive doubt" in construing veterans' statutes "is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994) (citing *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n. 9 (1991)).

The *Gardner* canon has its origins in the Supreme Court's World War II-era case law, in which the Court explained that veterans' statutes are to be construed liberally in favor of veterans in recognition of their sacrifice for their country. In *Boone v. Lightner*, for example, the Court stated that legislation 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." 319 U.S. 561, 575 (1943). The Court reiterated this principle in *Fishgold v. Sullivan Drydock & Repair Corp.*, stating that veterans' legislation "is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need." 328 U.S. 275, 285 (1946) (citing *Boone v. Lightner*, 319 U.S. at 575).

The Supreme Court articulated the pro-veteran rule again in *King v. St. Vincent's Hospital*, specifically identifying it as a canon of construction. The issue there was whether a provision of the Veterans' Reemployment Rights Act

implicitly limited the length of military service after which a veteran would still retain a right to civilian reemployment. *St. Vincent's Hospital*, 502 U.S. at 215-216 (1991). The Court explained that, even if it were to find that the express statutory language did not favor the veteran, it "would ultimately read the provision in [the veteran's] favor under the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Id.* at 220 n.9 (citing *Fishgold*, 328 U.S. at 285).

The Court further explained that Congress is presumed to have drafted the statute knowing that the courts would construe it using "basic rules of statutory construction," such as the pro-veteran canon. *Id.* (citing *McNary v. Haitian Refugee Center, Inc.*, 498 U.S. 479, 496 (1991) ("It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.")).

The Supreme Court has referenced this canon of statutory construction in many other cases. In *Henderson v. Shinseki*, for example, the Court noted that it has "long applied" the pro-veteran canon under which provisions for benefits to veterans are to be construed in their favor. *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) (citing *St. Vincent's Hospital*, 502 U.S. at 220-21 n.9). The Court described the pro-veteran canon as a "guiding principle" for interpreting a veterans' statute. *Alabama Power Co. v. Davis*, 431 U.S. 581, 584 (1977); *see also Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) ("The statute is to be

liberally construed for the benefit of the returning veteran." (citing *Fishgold*, 328 U.S. at 285)).

The Court in *Henderson v. Shinseki* explained that overly rigid interpretation of veterans' benefits statutes to the detriment of veterans clashed with the non-adversarial statutory scheme Congress established. *Henderson*, 562 U.S. 428, 440 (2011). VA is charged with assisting veterans in developing evidence supporting their benefits claims and must give the veteran the benefit of any doubt in evaluating that evidence. *Id.* Further, while a veteran is entitled to further review in the Veterans Court if he or she loses before the Board, a Board decision in the veteran's favor is final. *Id.* at 440-41.

### B. This Court and the Veterans Court Have Recognized the *Gardner* Canon But Have Applied It Inconsistently

This Court has similarly recognized the pro-veteran nature of the system, stating that Congress created "a unique system of processing and adjudicating claims for benefits that is both claimant friendly and non-adversarial." *Hayre v. West*, 188 F.3d 1327, 1331 (Fed. Cir. 1999). Speaking forcefully to this issue, Judge O'Malley recently stated that "it is difficult to overstate the importance of the veteran-friendly approach to veterans' benefits statutes and their accompanying regulations." *Kisor v. Shulkin*, 880 F.3d 1378, 1381 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of rehearing en banc).

Despite these repeated enunciations of the pro-veteran canon of construction, neither the Veterans Court nor this Court have consistently applied it to construe statutes and regulations in favor of veterans. In some cases, such as *Cook v. Snyder*, the Veterans Court resolved interpretive doubt in favor of the veteran and rejected VA's less veteran-friendly interpretation based on the pro-veteran canon. 28 Vet. App. 330, 345 (2017). In other cases, however, the Veterans Court has failed to apply the canon. In *Hudgens v. Gibson*, for example, VA interpreted a regulation governing knee replacements to preclude benefits for a veteran who had a *partial* knee replacement. 26 Vet. App. 558, 567 (2014), *rev'd and remanded sub nom. Hudgens v. McDonald*, 823 F.3d 630 (Fed. Cir. 2016). Although the Veterans Court recognized the *Gardner* canon, a divided panel declined to apply it, finding that the plain language of the regulation precluded compensation for partial knee replacement. *Id.* In a dissent, then-Chief Judge Kasold expressed his disagreement with the failure to apply the *Gardner* canon, stating that "this is when *Gardner* trumps *Chevron* with regard to regulatory interpretation." *Id.* at 567 (Kasold, C.J., dissenting-in-part and concurring-in-part).

This Court, too, has inconsistently applied the *Gardner* canon and has even expressed doubt as to its validity in the context of both *Chevron* and *Auer* deference. *See, e.g.*, *Heino v. Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012) ("It is not clear where the [*Gardner*] canon fits within the *Chevron* doctrine, or

whether it should be part of the *Chevron* analysis at all."); *Kisor*, 880 F.3d at 1380 (stating that, "where the agency's interpretation of an ambiguous regulation [under *Auer*] and a more veteran-friendly interpretation are in conflict, it is unclear from our precedent which interpretation should control.") (O'Malley, J., dissenting from denial of rehearing en banc).

Consistent with this uncertainty, this Court has, in some cases, applied the *Gardner* canon but in other cases, has held that the canon does not apply or has not addressed *Gardner* at all. For example, this Court reversed the Veterans Court in *Hudgens*, stating that the *Gardner* presumption requires resolving any interpretive doubt in the veteran's favor and thus concluding that a partial knee replacement could be compensable. 823 F.3d at 637-39.

This Court has properly applied the *Gardner* presumption in other cases as well. In *Disabled American Veterans v. Gober*, for example, the Court explained that "modifying the traditional *Chevron* analysis is the doctrine governing the interpretation of ambiguities in veterans' benefit statutes—that 'interpretative doubt is to be resolved in the veteran's favor.'" *Disabled American Veterans v. Gober*, 234 F.3d 682, 692, 694 (Fed. Cir. 2000) (quoting *Gardner*, 513 U.S. at 118); *see also Sursely v. Peake*, 551 F.3d 1351, 1357 (Fed. Cir. 2009) ("[I]n the face of statutory ambiguity, we must apply the rule that 'interpretive doubt is to be resolved in the veteran's favor.'" (quoting *Gardner*, 513 U.S. at 118)).

But those decisions conflict with the reasoning in cases in which the Court has declined to apply the *Gardner* canon. In *Kisor*, for example, the Court endorsed a more restrictive and less pro-veteran interpretation of a regulation without any mention of *Gardner*. *Kisor v. Shulkin*, 869 F.3d 1360, 1367 (Fed. Cir. 2017). The Court in *Nielson v. Shinseki* relegated the *Gardner* canon to secondary status, stating that it "is only applicable after other interpretive guidelines have been exhausted, including *Chevron*." *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010). And in *Heino*, the Court addressed the *Gardner* canon but concluded that it had no place in the *Chevron* analysis and declined to apply it to interpret the statute in the veteran's favor. 683 F.3d at 1379 & n.8. The Court reasoned that doing so would require it to "hold a statute unambiguous by resorting to a tool of statutory construction used to analyze ambiguous statutes." *Id.*

The lack of clarity in the precedent of this Court and the Veterans Court supports reevaluation and reaffirmation of the Supreme Court's pro-claimant precedent and accompanying application of the *Gardner* canon at step one of *Chevron*.

### C. Traditional Tools of Statutory Construction—Like the *Gardner* Pro-Veteran Canon—Apply at *Chevron* Step One

The pro-veteran canon, reaffirmed in *Gardner*, must be considered at step one of *Chevron* because it is a traditional tool of statutory construction. In step one, a court reviewing an agency's interpretation of a statute must determine whether

"the intent of Congress is clear." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). To ascertain whether Congress had an intention on the precise question at issue, courts must "employ[] traditional tools of statutory construction." *Id.* at 843 n.9. Those tools include "the statute's text, structure, and legislative history," as well as any "relevant canons of interpretation." *Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017) (quoting *Heino*, 683 F.3d at 1378). If Congress's intent is clear, "that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron*, 467 U.S. at 842-43.

A court may defer to an agency's statutory interpretation only if, after considering the relevant tools of construction, including the pro-veteran canon, it concludes either that Congress had no intent or that its intent is unclear. *Id.* at 843. As the Supreme Court has stated, "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) (quotation marks omitted). Whether an agency's interpretation of an ambiguous statute is reasonable and permissible is determined at step two of the *Chevron* analysis.

Canons of construction are an important tool at step one of the *Chevron* analysis because they provide context as to whether Congress has addressed the

question at issue. This is particularly vital where the statutory text *in isolation* may appear ambiguous. It is "a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (quoting *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989)). A "reviewing court should not confine itself to examining a particular statutory provision in isolation. The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context." *Id.* at 132. As part of this analysis, "[s]tatutory purposes, including those revealed in part by legislative and regulatory history, can be similarly relevant." *Arlington*, 569 U.S. at 309-10.

Supreme Court precedent provides numerous examples in which canons of construction, such as the *Gardner* canon, are considered at *Chevron* step one. In *Epic Systems Corp. v. Lewis*, for example, the Court concluded that the statutory language at issue was not ambiguous based on the canon of construction guiding courts to avoid reading conflicts into statutes. 138 S. Ct. 1612, 1630 (2018). The Court also relied on the "strong presumption" that Congress does not repeal laws solely by implication. *Id.* at 1617. Because those traditional tools of statutory construction revealed Congress's intent, the Court concluded that agency deference at *Chevron* step two was not appropriate. *Id.* ("Where, as here, the canons supply an answer, '*Chevron* leaves the stage.'" (quoting *NLRB v. Alternative*

*Entertainment*, 858 F.3d 393, 417 (6th Cir. 2017) (Sutton, J., concurring-in-part and dissenting-in-part))).

The *Gardner* canon likewise provides guidance on Congress's intent, supporting its application at *Chevron* step one as with other canons. The presumption that interpretive doubt is to be resolved in a veteran's favor ensures that individual statutory provisions are read in the broader context of the non-adversarial, pro-veteran statutory scheme. In line with this canon, words or provisions that may *appear* ambiguous on their own must be read against the backdrop of Congress's intent that VA administer the veterans' benefits scheme in a pro-claimant, non-adversarial way.

Here, if the Court concludes that Congress's intent as to the meaning of the statutory language "served in the Republic of Vietnam" is ambiguous or unclear, the *Gardner* canon demands "as liberal a construction for the benefit of the veteran as a harmonious interplay of the separate provisions permits." *Fishgold*, 328 U.S. at 285. Such a construction requires interpreting the statute such that service in "the Republic of Vietnam" includes service in the Republic's territorial sea. Where, as here, the pro-veteran canon of construction supplies the answer regarding Congress's intent, "*Chevron* leaves the stage." *Epic*, 138 S. Ct. at 1630.

### D. Applying the Pro-Veteran Canon at *Chevron* Step One Does Not Usurp VA's Role Within the Veterans' Benefits Scheme

Applying the pro-veteran canon at *Chevron* step one will not "usurp" VA's role within the veteran's benefits scheme, as VA has stated. *See* Dkt. 57 at 10. The role of VA is to appropriately award veterans' benefits provided for by statute. It is the role of the courts to construe those statutes consistent with the congressionally-intended pro-veteran canon. VA's role is not usurped by allowing courts to perform their proper role in construing statutes. Applying traditional tools of statutory construction at step one of the *Chevron* analysis ensures that courts will defer to agency expertise only when Congress's intent is ambiguous, and the ambiguity remains unresolved after application of the canons. It affords agencies substantial deference in those cases.

*Chevron* makes clear that an agency is authorized to interpret a statutory provision only where Congress has either expressly or implicitly "left a gap for the agency to fill." *Chevron*, 467 U.S. at 843-44. Where, as here, traditional tools of statutory construction, including the pro-veteran canon, show Congress's intent, the statute is not ambiguous, and no gap exists for the agency to fill. *Id.* In those circumstances, a court will resolve the question at *Chevron* step one, and the agency is not entitled to any deference. *See, e.g.*, *Arlington v. Fed. Commc'ns Comm'n*, 569 U.S. 290, 308 (2013) (stating that if Congress's intent is clear, "[t]he agency is due no deference, for Congress has left no gap for the agency to fill").

Thus, even if VA is correct that agency expertise is a principal justification behind *Chevron* deference, that expertise is irrelevant to the purely interpretive task of determining the meaning of a statute where canons of construction leave no ambiguity.

Further, situations exist in which the *Gardner* canon would not apply or where a court may still conclude that a statute is ambiguous even after applying the canon. Some statutes, for example, do not have a particular "pro-veteran" reading, and in those cases, the *Gardner* canon may be inapplicable. And in certain cases, applying the *Gardner* canon would not affect the ultimate result. In *Burden v. Shinseki*, for example, this Court concluded that applying the *Gardner* canon would not affect VA's determination of whether a claimant met the relevant state law burden of proof to show that a veteran had entered into a common law marriage under Alabama state law, and thus had a surviving spouse who would be entitled to benefits. 727 F.3d 1161, 1169 (Fed. Cir. 2013).

### E. In Other Areas of Law, the Supreme Court and Other Circuits Have Held That Canons of Construction Can Trump Agency Deference

In similar contexts, the Supreme Court and courts of appeals have held that canons of construction must be applied before resorting to agency deference. Those courts have applied canons similar to the pro-veteran *Gardner* canon to

conclude that agency deference is inapplicable where a statute is to be liberally construed in favor of the party it is intended to benefit.

In the context of Indian law, for example, both the Supreme Court and the circuit courts have explained that the pro-Indian canon of construction trumps agency deference and other canons of construction that might otherwise apply. In *Montana v. Blackfeet Tribe of Indians*, for instance, the Supreme Court explained that "the standard principles of statutory construction do not have their usual force in cases involving Indian law." 471 U.S. 759, 766 (1985). Instead, those principles yield to the canon of construction, which states that "statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Id.*

The D.C. Circuit has relied on the pro-Indian canon to conclude that the deference ordinarily given to an agency is inapplicable. In *Cobell v. Norton*, for example, the D.C. Circuit relied on the canon to reject the government's contention that its interpretation of the statute was entitled to deference as to how it discharged its fiduciary duties to beneficiaries of Individual Indian Money trust accounts. 240 F.3d 1081, 1100-01 (D.C. Cir. 2001). The Court explained that the pro-Indian canon of construction compelled a departure from the customary *Chevron* deference because it stems "'from principles of equitable obligations and normative rules of behavior,' applicable to the trust relationship between the

United States and the Native American people." *Id.* (quoting *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991)); *see also Oneida County v. Oneida Indian Nation*, 470 U.S. 226, 247 (1985) (stating the pro-Indian canon is "rooted in the unique trust relationship between the United States and the Indians").

The Court reaffirmed the primacy of the pro-Indian canon in *Cobell v. Kempthorne*, stating that "the normally-applicable deference was trumped by the requirement" of construing statutes liberally and interpreting ambiguous provisions to the benefit of Native Americans. 455 F.3d 301, 304 (D.C. Cir. 2006).

The Tenth Circuit has also applied the pro-Indian canon to trump *Chevron* deference. In *Ramah Navajo Chapter v. Lujan*, the Tenth Circuit concluded that the purpose of the legislation was incompatible with deferring to an agency interpretation of the statute detrimental to Native Americans. 112 F.3d 1455, 1461-62 (10th Cir. 1997). The Court explained that "it would be entirely inconsistent with the purpose of the Act . . . to allow the canon favoring Native Americans to be trumped in this case." *Id.* at 1462. It thus concluded "that the canon of construction favoring Native Americans controls over the more general rule of deference to agency interpretations of ambiguous statutes." *Id.*

Just as the pro-Indian canon is rooted in the trust relationship between Native Americans and the United States, *Gardner*'s pro-veteran canon of construction is

rooted in Congress's decision to award benefits to veterans who "drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575. Both canons reflect equitable obligations owed by the United States and both areas of law are animated by Congress's intent to offer a measure of protection to a specific class of people based on their special relationship to the United States. As the Supreme Court stated in *Fishgold*, veterans are "to gain by [their] service for [their] country an advantage which the law withheld from those who stayed behind." *Fishgold*, 328 U.S. at 284.

This Court, too, has recognized that "the veterans benefit system is designed to award 'entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign.'" *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2014) (quoting *Bailey v. West*, 160 F.3d 1360, 1370 (Fed. Cir. 1998) (en banc) (Michel, J., concurring in the result)). And this Court has recognized the unique nature of a veterans' benefits system "that is both claimant friendly and non-adversarial." *Hayre*, 188 F.3d at 1331.

In this context, the pro-veteran canon of construction, reaffirmed in *Gardner*, properly reflects Congress's intent to provide benefits to veterans and construe statutes and regulations in their favor. The *Gardner* canon thus trumps agency deference and must be considered at step one of the *Chevron* analysis.

## CONCLUSION

DAV respectfully urges the Court to hold that the *Gardner* canon is a traditional tool of statutory construction that applies at step one of the *Chevron* analysis.

Date: October 11, 2018

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## CERTIFICATE OF SERVICE

I certify that on October 11, 2018, this **BRIEF OF *AMICUS CURIAE* DISABLED AMERICAN VETERANS IN SUPPORT OF CLAIMANT-APPELLANT** was filed electronically using the CM/ECF system and served via the CM/ECF system on counsel of record.

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Fed. Cir. Rule 29(a)(5) and Fed. Cir. Rule 28.1 because it contains 4,255 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman.

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