2020-1479

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

THOMAS H. BUFFINGTON,
Claimant-Appellant,

v.

ROBERT WILKIE,
Secretary of Veterans Affairs,
Respondent-Appellee.

Appeal from the United States Court of Appeals for Veterans Claims in Case No. 17-4382, Judges William S. Greenberg, Amanda L. Meredith, Joseph L. Falvey, Jr.

CORRECTED BRIEF FOR RESPONDENT-APPELLEE

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December 17, 2020

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STATEMENT OF RELATED CASES

Pursuant to Rule 47.5, respondent-appellee's counsel states that she is unaware of any other appeal in or from this action that previously was before this Court or any other appellate court under the same or similar title. Respondent-appellee's counsel is unaware of any case pending in this or any other court that may directly affect or be affected by this Court's decision in this appeal.

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STATEMENT OF THE ISSUE

A veteran is prohibited under 38 U.S.C. § 5304(c) from receiving disability compensation from the Department of Veterans Affairs (VA) for any period for which he or she receives active service pay. 38 C.F.R. § 3.654(b)(2) establishes a procedure for recommencing benefits upon a veteran's release from active duty and provides that payments will be resumed effective the day following release from active duty if a claim for recommencement is received within one year from the date of such release or, in the alternative, one year prior to the date of the claim. Did the United States Court of Appeals for Veterans Claims (Veterans

Court) correctly hold that 38 C.F.R. § 3.654(b)(2) is a valid exercise of the Secretary's rulemaking authority under 38 U.S.C. § 501(a)?

STATEMENT OF THE CASE SETTING FORTH RELEVANT FACTS

I. Nature Of The Case

Claimant-appellant, Thomas H. Buffington, appeals the decision of the Veterans Court in *Thomas H. Buffington v. Robert L. Wilkie, Secretary of Veterans Affairs*, No. 17-4382, 31 Vet. App. 293 (July 12, 2019), affirming the July 20, 2017 board decision denying an effective date earlier than February 1, 2008, for the reinstatement of VA benefits. Appx2-18.

II. Statement Of The Facts

A. Mr. Buffington's Military Service, Award Of VA Disability Compensation, And Notice Of Wavier Of VA Compensation

Mr. Buffington served on active duty in the United States Air Force from September 1992 to May 2000 and in the Air National Guard from July 2003 to June 2004, November 2004 to July 2005, in December 2009, and from February 2016 to May 2016. Appx3. Mr. Buffington was granted entitlement to VA disability compensation for tinnitus with a 10 percent rating in March 2002. Appx1771-1777. In August 2003, Mr. Buffington submitted a VA Form 21-8951, Notice of Waiver of VA Compensation or Pension to Receive Military Pay and Allowances, electing to receive military pay and allowances in lieu of VA benefits. Appx1732.

VA informed Mr. Buffington in October 2003 that it was proposing to terminate his VA benefits, effective July 20, 2003, because his National Guard unit had been activated on July 21, 2003. Appx1728-1729. In response, Mr. Buffington submitted another waiver form, again indicating that he was electing to waive his VA compensation benefits in order to retain military training pay. Appx1724-1725.

In December 2003, VA informed him that it had stopped his benefits the day before he was recalled to active duty and instructed him to provide a copy of his DD-214 upon his release from active duty so his benefits could be reinstated. Appx1154-1155.

Mr. Buffington was released from active duty in June 2004, and served again from November 2004 to July 2005. Appx3. In January 2009, Mr. Buffington requested that his benefits be reinstated. Appx1709. A VA regional office (RO) reinstated his VA disability compensation, effective February 1, 2008. Appx1695-97. The RO explained that his request for reinstatement was received more than one year after his release from active duty and therefore payments were only permitted one year prior to the date his request was received. *Id.* Mr. Buffington appealed. Appx3.

B. The Board's Decision

Before the board, Mr. Buffington testified that in 2003 VA did not clarify that there was a time line for when he needed to submit his DD-214s to reinstate benefits. Appx4. He explained that he had three different activations between 2003 and 2009 and "kind of forgot about it." *Id.* He explained that "I'm in the Guard and it was kind of like my full-time job." *Id.*

On July 20, 2017, the board issued a decision denying an effective date earlier than February 1, 2008, for the reinstatement of VA benefits. Appx501-510. The board explained that a veteran is prohibited from receiving VA disability compensation concurrently with active service pay. Appx506. The board further explained that payment of VA benefits following active service will be resumed effective the day following release from active duty if a claim for recommencement is received within one year from such release, otherwise payments will be resumed effective one year prior to the date of receipt of the new claim. *Id.* (citing 38 C.F.R. § 3.654(b)(2)).

C. The Veterans Court Decision

In a July 12, 2019 decision, the Veterans Court affirmed the board's decision. Appx2-18.

Before the Veterans Court, Mr. Buffington sought reversal of the board's decision denying an earlier effective date for reinstatement of VA benefits. Mr.

Buffington argued that 38 C.F.R. § 3.654(b)(2) is inconsistent with 38 U.S.C. § 5304(c), which he argued "does not predicate payment or reinstatement of benefits upon notice by the veteran." Appx4. He also argued that reading section 5304(c) in the context of 38 U.S.C. § 1110(a), which provides that VA "will pay" disability compensation benefits once service connection is established, demonstrates that "Congress has *prohibited* VA from withholding or suspending benefits due to a veteran's receipt of active pay during any period . . . section 5304(c) does not encompass." *Id.*[1]

The Veterans Court rejected Mr. Buffington's arguments. The court first considered step one of the *Chevron* analysis and determined that "Congress did not speak to the precise question at issue: Whether the Secretary may predicate the effective date for the recommencement of benefits on the date of the veteran's claim." Appx9. The court reasoned that 38 U.S.C. § 1110, which "generally establishes that, under certain circumstances, the United States 'will pay' disability compensation for disability resulting from or aggravated by military service," does not "[b]y its terms, . . . establish when disability compensation payments shall begin or impose any limitation on continued receipt of compensation benefits."

[1] Mr. Buffington also made several alternative arguments before the Veterans Court. *See* Appx4-5. He has not renewed those arguments before this Court, and they are waived. *SmithKline Beecham Corp. v. Apotex Corp.*, 439 F.3d 1312, 1319 (Fed. Cir. 2006) ("arguments not raised in the opening brief are waived").

Appx8. The Veterans Court observed that section 5304(c), "imposes one such limitation: VA 'shall not' pay pension or compensation benefits to any person on account of that person's service during any period for which that person receives active service pay." Appx8-9.

Regarding Mr. Buffington's argument that reading sections 1110 and 5304(c) together leaves VA no discretion, the court held that the word "only" does not appear in the statute and the court would not "insert limiting language that is not present in the statute." Appx9 (citing *Bates v. United States*, 522 U.S. 23, 29 (1997) ("[W]e ordinarily resist reading words or elements into a statute that do not appear on its face.")).

The court further reasoned that while "Congress separately addressed the effective date for the discontinuation of benefits by reason of active service pay in section 5112(b)(3)," Appx9, "Congress did not separately address the effective date for the recommencement of benefits," *id.* The Veterans Court determined that adopting Mr. Buffington's "construction of sections 1110 and 5304(c) . . . would effectively render Congress's specific directive in section 5112(b)(3) superfluous." *Id.* (citing *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009); *Duncan v. Walker*, 533 U.S. 167, 174 (2001).

Having found a gap in the statute, the Veterans Court turned to step two of the *Chevron* analysis, "whether the agency's answer is based on a permissible

construction of the statute." Appx9-10 (quoting *Chevron*, 467 U.S. at 843). The court explained that "Congress conferred on the Secretary broad authority to 'prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws.'" Appx10 (quoting 38 U.S.C. § 501(a)). The court noted that authority granted to the Secretary by Congress includes establishing "'regulations with respect to the nature and extent of proof and evidence . . . in order to establish the right to benefits under such laws,' 'the forms of application by claimants under such laws,' and 'the manner and form of adjudications and awards.'" Appx10 (quoting 38 U.S.C. § 501(a)(1), (2), (4)). The court determined that 38 C.F.R. § 3.654(b)(2), which "provides a procedure and structure for recommencing benefits upon release from active duty," Appx10, is "a valid exercise of the Secretary's rulemaking authority," Appx13. The court reasoned that "Congress was silent regarding when and how VA shall resume the payment of benefits after a veteran's release from active duty[,]" and that VA's regulation, which "fill[s] the gap left by Congress[,] . . . is necessary and appropriate to carry out the laws administered by the Department." Appx12 (citing 38 U.S.C. § 501(a)). Additionally, the Court concluded "that VA's decision to predicate the effective date of recommencement of benefits on the date of the application therefor is not 'arbitrary, capricious, of

manifestly contrary to' section 5304(c)." Appx13 (quoting *Chevron*, 467 U.S. at 844).

Judge Greenberg dissented, expressing his view that 38 C.F.R. § 3.654(b) is not a "necessary or appropriate" regulation because 38 U.S.C. § 5304(c) "already delineates the period for which veterans may not receive VA benefits – while they are on active duty." Appx18.

This appeal followed.

SUMMARY OF THE ARGUMENT

Congress prohibits veterans from receiving both disability compensation from the VA and active service pay. 38 U.S.C. § 5304(c). Congress specified the date for the discontinuation of VA benefits based on receipt of active service pay, 38 U.S.C. § 5112(b)(3), but did not address the effective date and terms for the recommencement of benefits. The VA promulgated 38 C.F.R. § 3.654(b)(2), which established a procedure for recommencing benefits upon a veteran's release from active duty. Section 3.654(b)(2) provides that payments will be resumed effective (1) the day following release from active duty if a claim for recommencement is received within one year from the date of such release; or (2) one year prior to the date of the claim.

Section 3.654(b)(2) is a valid exercise of the Secretary's rulemaking authority under 38 U.S.C. § 501(a). Under the first step of the two-step framework

established in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 87 (1984), Congress did not speak to the precise question at issue – whether the Secretary may predicate the effective date for the recommencement on the date of the veteran's claim – and a gap remained for VA to fill. The Secretary filled the gap and reasonably predicated the effective date of the recommencement of benefits on the date of the claimant's application. The regulation is necessary and appropriate to carry out the laws administered by VA and is not inconsistent with those laws.

The rule of interpretive doubt does not require a different result. Contrary to Mr. Buffington's contentions, the Court does not consider the veteran canon at *Chevron* step one. This Court's analysis at *Chevron* step one is limited to determining whether the intent of Congress is clear. Moreover, no court has held that the veteran canon displaces deference under *Chevron*. Notably, where Congress has left a gap in a statutory scheme for VA to fill, as opposed to using an ambiguous word in need of interpretation, there is no interpretive doubt to be resolved in a veteran's favor and no role for the veteran canon to play. VA is simply authorized to fill the statutory gap. Where the statute is ambiguous, the veteran canon applies if interpretive doubt remains in a veterans' benefits statute after other tools of statutory construction, including deference principles, have failed to resolve the ambiguity. Applying the veteran canon this way reflects

Congress's express delegation of authority to VA to administer the veterans' benefits scheme.

Finally, although the rule of interpretive doubt is not at issue in this appeal, section 3.654(b)(2) is nonetheless consistent with the pro-claimant policy underlying the veterans' benefits statutes. Section 3.654(b)(2) affords veterans a full year after release from active duty to file an application to recommence disability benefits and receive an effective date of the day following the veteran's release – the earliest possible date given the bar on dual compensation. In those instances where a veteran does not apply to recommence disability benefits for more than a year following the veteran's release from active duty, section 3.654(b)(2) provides that the effective date will be one year prior to the date of the claim. Section 3.654(b)(2) is not inconsistent with the statute's pro-claimant scheme simply because it does not provide for a pro-claimant outcome in every instance – such as where a veteran, like Mr. Buffington, delays filing an application to recommence disability benefits for more than a year after release from active duty.

The Veterans Court's decision should be affirmed.

ARGUMENT

I. Jurisdiction And Standards Of Review

"This [C]ourt's jurisdiction to review decisions by the Veterans Court is limited." *Wanless v. Shinseki*, 618 F.3d 1333, 1336 (Fed. Cir. 2010). Pursuant to 38 U.S.C. § 7292(a), this Court may review a Veterans Court decision "with respect to the validity of a decision of the Court on a rule of law or of any statute or regulation . . . or any interpretation thereof . . . that was relied on by the Court in making the decision." It may not, however, "review the Veterans Court's factual findings or its application of law to facts absent a constitutional issue." *Singleton v. Shinseki*, 659 F.3d 1332, 1334 (Fed. Cir. 2011) (citing 38 U.S.C. § 7292). This Court has consistently applied section 7292 strictly to bar fact-based appeals of Veterans Court decisions. *See, e.g., Conway v. Principi*, 353 F.3d 1369, 1372 (Fed. Cir. 2004) (noting that the Federal Circuit reviews only questions of law and cannot review any application of law to fact); *see also Madden v. Gober*, 125 F.3d 1477, 1480 (Fed. Cir. 1997), *Andre v. Principi*, 301 F.3d 1354, 1363 (Fed. Cir. 2002).

In reviewing a Veterans Court decision, this Court must decide "all relevant questions of law, including interpreting constitutional and statutory provisions," and set aside any interpretation thereof "other than a determination as to a factual matter" relied upon by the Veterans Court that it finds to be: "(A) arbitrary,

capricious, an abuse of discretion, or otherwise not in accordance with law; (B) contrary to constitutional right, power, privilege, or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or in violation of a statutory right; or (D) without observance of procedure required by law." 38 U.S.C. § 7292(d)(1). The Court reviews questions of statutory and regulatory interpretation *de novo*. *See Mayfield v. Nicholson*, 499 F.3d 1317, 1321 (Fed. Cir. 2007).

II. The Veterans Court Correctly Held That 38 C.F.R. § 3.654(b)(2) Is A Valid Exercise Of The Secretary's Rulemaking Authority

The Supreme Court's decision in *Chevron, U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 87 (1984), "sets forth a two-step framework for interpreting a statute . . . that is administered by an agency." *Procopio v. Wilkie*, 913 F.3d 1371, 1375 (Fed. Cir. 2019) (citation omitted). The question at step one is "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 842. "If the intent of Congress 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.

If congressional intent cannot be discerned, the analysis moves to a second step, where the Court "must defer to the agency's interpretation if it is reasonable." *Encino Motorcars, LLC v. Navarro,* 136 S. Ct. 2117, 2125 (2016); *see Chevron*, 467 U.S. at 843-44. If Congress has left a "gap" for the agency to fill, "the legislative regulations are given controlling weight unless they are arbitrary,

capricious, or manifestly contrary to the statute." *Chevron*, 467 U.S. at 843-44. In other words, where "a statute is ambiguous and the administering agency has issued a reasonable gap-filling or ambiguity resolving regulation, [the Court] must uphold that regulation." *Sears v. Principi*, 349 F.3d 1326, 1332 (Fed. Cir. 2003).

A. Congress Left A Gap Regarding The Effective Date And Terms Of Recommencement Of VA Benefits After Active Duty

Section 5304, titled "Prohibition against duplication of benefits," provides that "compensation . . . on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." 38 U.S.C. § 5304(c). Thus, section 5304(c) "establishes an unequivocal bar to dual compensation," Appx9, and prohibits VA from paying disability compensation to a veteran who is receiving active service pay.

Section 5304(c) does not specifically address the effective date for the discontinuation of benefits or the effective date and terms for recommencement. However, in section 5112, Congress expressly provided that the effective date of a discontinuance of compensation "by reason of receipt of active service pay or retirement pay shall be the day before the date such pay began." 38 U.S.C. § 5112(b)(3). Congress made no comparable provision regarding the effective date for recommencing disability compensation following a veteran's active service, nor did Congress otherwise address how the VA is to administer interruptions in the payment of benefits due to a veteran's receipt of active service pay.

Mr. Buffington contends that reading section 5304(c) together with sections 1110 and 5110 leaves VA with no discretion and demonstrates Congress's unambiguous intent that VA may discontinue disability compensation "*only* for the period when [the veteran] is receiving active service pay." *See* Applnt. Br. at 13 (emphasis added). He is incorrect. Section 1110 establishes the general requirement that the United States "will pay" disability compensation to certain veterans for disability resulting from or aggravated by military service. 38 U.S.C. § 1110. But, as the Veterans Court correctly noted, section 1110 "does not establish when disability compensation shall begin or impose any limitation on continued receipt of compensation benefits." Appx8. And although Congress made certain provisions regarding effective dates of awards in section 5110, Congress did not address recommencement of a veteran's service-connected disability benefits following a veteran's period of active-duty service. 38 U.S.C. § 5110.[2] As the Veterans Court correctly determined, when reading sections 1110, 5110, and 5304(c) together, a gap remains regarding how interruptions in payment will be administered. *See* Appx9.

[2] Generally, an award of disability compensation will "be fixed in accordance with the facts found, but shall not be earlier than the date of receipt of application therefor." 38 U.S.C. § 5110(a)(1). Certain provisions allow for an award that is earlier than the date of receipt of the application. For example, section 5110(b)(1) provides an effective date for disability compensation of "the day following the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." 38 U.S.C. § 5110(b)(1).

Thus, Congress chose to define the effective date of the discontinuation of benefits, 38 U.S.C. § 5112(b)(3), but Congress chose not to specify the effective date or terms of recommencement of disability benefits following a veteran's period of active service. "[I]n general, 'a matter not covered is to be treated as not covered . . . .'" *GE Energy Power Conversion Fr. SAS, Corp. v. Outokumpu Stainless USA, LLC*, 140 S. Ct. 1637, 1645 (2020) (quoting Antonin Scalia & Brian Garner, Reading Law: The Interpretation of Legal Texts 93 (2012)). In other words, a gap exists in the statute regarding the effective date and terms of recommencement of disability benefits precisely because Congress *intended* for there to be a gap for VA to fill. In leaving this gap, Congress left open the possibility that the VA might adopt procedures to administer recommencement that could bear on the effective date – particularly if VA were to determine that the process was best administered by requiring a claim and some degree of substantive claims processing. Congress's decision likely reflects the commonsense conclusion that recommencing benefits is a more substantive process than simply stopping a running award and could require evaluation of the state of the veteran's disability following a new period of active duty – and that VA, as the agency charged with administering the statutory scheme, is in the best position to develop such procedures pursuant to its authority under 38 U.S.C. § 501(a).

Mr. Buffington disagrees that Congress left a gap in the statute for VA to fill, but his contentions are premised on a misconstruction of the statute. In contending that his "reading of section 5304(c) is consistent with its surrounding text," Applnt. Br. at 15, Mr. Buffington is, in actuality, urging this Court to treat matters not covered by the statute as if they were covered. As Mr. Buffington notes, section 5304(c) and 5304(a)(1) both prohibit the duplication – or concurrent receipt – of benefits. Congress's bar on dual compensation, however, only establishes the period in which VA is *prohibited* from paying benefits, nothing more. In barring dual compensation, Congress chose to explicitly address the effective date for the discontinuation of benefits, 38 U.S.C. § 5112(b)(3), but Congress elected to not address the effective date for recommencement or the process by which recommencement would occur. By not covering those matters, Congress left a gap in the statute that it intended VA to fill.

Indeed, as the Veterans Court correctly recognized, Mr. Buffington's proposed interpretation inserts limiting language that is not present in the statute. *See* Appx9. Under section 5304(c), the VA must discontinue a veteran's disability compensation for those periods in which the veteran receives active service pay. Under Mr. Buffington's proposed interpretation, VA may discontinue disability compensation "*only* for the period when [the veteran] is receiving active service pay." *See* Applnt. Br. at 13 (emphasis added). "'It is a fundamental principle of

statutory interpretation that 'absent provision[s] cannot be supplied by the courts.'" *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2381 (2020) (quoting *Rotkiske v. Klemm*, 140 S. Ct. 355, 360-61 (2019) (in turn quoting Scalia & Garner, Reading Law: The Interpretation of Legal Texts at 94)). "This principle applies not only to adding terms not found in the statute, but also to imposing limits on an agency's discretion that are not supported by the text." *Id.*

Mr. Buffington's contention that his interpretation does not insert limiting language into the statute, Applnt. Br. at 17-18, does not withstand scrutiny. Section 5304(c) prohibits concurrent benefits and provides that "compensation . . . on account of any person's own service shall not be paid to such person for any period for which such person receives active service pay." Thus, under the statute, the earliest possible recommencement date for disability benefits following a period of active duty service is the day following the veteran's release from active duty service. It does not follow – and Congress did not provide – that a veteran's disability benefits *must* resume on the earliest possible effective date in every instance, as Mr. Buffington contends. Rather, Congress specifically addressed the effective date for the discontinuation of benefits and left a gap for the VA to fill regarding the effective date and terms of recommencement of disability benefits. By leaving the effective date and procedures for recommencement of benefits

unaddressed at the statutory level, Congress recognized that administrative procedures for recommencement would be necessary, just as with any other adjustment to benefits. *See Chevron*, 467 U.S. at 843 ("The power of an administrative agency to administer a congressionally created . . . program necessarily requires the formulation of policy and the making of rules to fill any gap left, implicitly or explicitly, by Congress." (citation omitted)). Allowing VA to fill this gap (as Congress clearly intended) would not permit VA to discontinue payments "in situations and for reasons Congress never contemplated," as Mr. Buffington contends. *See* Applnt. Br. 18-19. In so arguing, Mr. Buffington is simply trying to impose limits on VA's authority that are not supported by the text of the statute. *See Little Sisters of the Poor*, 140 S. Ct. at 2381.

In addition, as the Veterans Court correctly determined, Mr. Buffington's proposed reading "would effectively render Congress's specific directive in section 5112(b)(3) superfluous." Appx9 (citing *Sharp*, 580 F.3d at 1238 (noting that the canon against surplusage requires courts to avoid an interpretation that results in portions of text being read as meaningless); *Duncan v. Walker*, 553 U.S. 167, 174 (2001)). Mr. Buffington disagrees with the Veterans Court on this point, but fails to demonstrate that section 5112(b)(3) is not rendered superfluous or insignificant under his interpretation. *See* Applnt. Br. at 19-22. If, as Mr. Buffington contends, sections 1110 and 5304(c) mean that VA can only discontinue disability

compensation payments while a veteran is in receipt of active service pay, section 5112(b)(3) would be superfluous. If section 5304(c) "articulates the period of the discontinuance," Applnt. Br. 21, it also, by necessity, defines when the discontinuance starts. Nor does Mr. Buffington's contention that "Congress just as easily could have chosen a different date in section 5112(b)(3)," Applnt. Br. at 20, demonstrate that section 5112(b)(3) is not rendered superfluous by his interpretation. Indeed, the examples Mr. Buffington proffers run afoul of section 5304(c). Congress could not have, as Mr. Buffington contends, set the effective date for discontinuance as either "the date that his active service pay began," Applnt. Br. at 20; or "the last day of the month in which an event occurs," *id.*, without violating the prohibition on concurrent receipt of benefits.

Moreover, the Veterans Court did not, as Mr. Buffington contends, frame the issue incorrectly. *See* Applnt. Br. at 23. The Veterans Court properly framed the issue as "whether the Secretary's regulation, 38 C.F.R. § 3.654(b)(2), which governs the effective date for the recommencement of VA benefits following a period of active duty, is inconsistent with 38 U.S.C. § 5304(c), which prohibits concurrent receipt of active service pay and pension, compensation, or retirement pay." Appx2; *see also* Appx9 (determining that "Congress did not speak to the precise question at issue: Whether the Secretary may predicate the effective date for the recommencement of benefits on the date of the veteran's claim"). Thus, the

Veterans Court appropriately grounded the issue in the plain language of section 5304(c). In contrast, Mr. Buffington posits that the "correct question is whether the Secretary can by regulation impose a forfeiture when Congress explicitly limited the period of discontinuance to 'any period for which such person receives active service pay.'" Applnt. Br. at 23-24 (citing 38 U.S.C. § 5304(c)). Mr. Buffington's characterization of the issue (like his proffered interpretation of the statue) is premised on a misconstruction of the plain language of the statute. Congress did not "explicitly limit[] the period of discontinuance," *id*. at 23, nor does section 5304(c) "necessarily identif[y] the start of recommencement," *id.* at 24.[3] Mr. Buffington likewise errs in contending that section 5110 demonstrates that Congress did not intend application date forfeiture consequences to apply to recommencement of benefits after active duty service. *See id.* at 25-26. Section

[3] Notably, Mr. Buffington's reliance on 38 U.S.C. § 5313(a)(1), which limits payment of compensation to persons incarcerated for conviction of a felony, is misplaced. *See* Applnt. Br. at 24. In both sections 5304(c) and 5313(a)(1), Congress specified a period for which VA "shall not" pay benefits, but Congress was silent with respect to how benefits would be recommenced and left it to VA to establish procedures for recommencement. A defined period in which VA "shall not" pay benefits does not, as Mr. Buffington would have it, "necessarily identif[y] the start of recommencement." *See* Applnt. Br. at 24. By establishing a period in which VA is *prohibited* from paying benefits, Congress did not limit VA's discretion to establish, pursuant to validly promulgated regulations, requirements for such benefits to be resumed, including consequences with respect to the effective date of such resumption. *See* 38 U.S.C. § 501(a). In both circumstances, VA promulgated regulations that have effective date consequences associated with VA's receipt of notice that the period in question has ended. *See* 38 C.F.R. §§ 3.654(b)(2), 3.665(i)(1).

5110 does not address the recommencement of benefits after receipt of active service pay. Congress' decision to expressly provide effective date consequences related to the date of application in certain circumstances does not mean, as Mr. Buffington contends, that Congress intended to prohibit VA from applying similar consequences when filling gaps like the one at issue here.[4]

In sum, Congress (1) prohibited the concurrent receipt of active service pay and disability benefits, 38 U.S.C. § 5304(c); (2) expressly established the effective date of discontinuance, 38 U.S.C. § 5112(b)(3); and (3) left a gap for VA to fill regarding the effective date and terms for recommencing disability compensation following a veteran's period of active duty service. Because the statute is silent 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." *Chevron*, 467 U.S. at 844.

[4] Mr. Buffington's reliance on 38 U.S.C. § 5306(c) fails for the same reason. *See* Applnt. Br. at 16. There, Congress provided for a one-year period in which renounced benefits could be reinstated and "payable as if the renouncement had not occurred." 38 U.S.C. § 5306(c). Contrary to Mr. Buffington's contentions, Congress's use of a one-year period in section 5306(c) did not limit VA's ability implement a one-year period in which benefits would be resumed on the day following discharge from active duty; rather, Congress's use of a similar provision in section 5306(c) bolsters the reasonableness of the procedure VA promulgated in 38 C.F.R. § 3.654(b)(2).

B. 38 C.F.R. § 3.654(b)(2) Is A Reasonable Gap-Filling Regulation And Is A Valid Exercise Of The Secretary's Rulemaking Authority

The Secretary promulgated section 3.654(b)(2) to fill the gap left by Congress regarding the effective date and administrative procedure for recommencement of VA benefits after a veteran's period of active duty service. Section 3.654(b)(2) is entitled to *Chevron* deference and must be upheld by this Court because it is reasonable and consistent with the statutory framework. *Sears*, 349 F.3d at 1330.

As this Court has held, "[a]n agency that has been granted authority to promulgate regulations necessary to the administration of a program it oversees may fill in gaps in the statutory scheme left by Congress." *Contreras v. United States*, 215 F.3d 1267, 1274 (Fed. Cir. 2000). In 38 U.S.C. § 501(a), Congress granted the Secretary broad authority to "prescribe all rules and regulations which are necessary or appropriate to carry out the laws administered by the Department and are consistent with those laws." Section 3.654(b)(2) is a valid exercise of this authority. Under 38 U.S.C. § 5304(c), Congress prohibited dual compensation, but was silent as to the effective date and procedure for recommencement of disability benefits following a period of active duty service. VA rationally filled the gap left by Congress by creating a procedure and structure for recommencing benefits upon release from active duty and predicating the effective date on a veteran's claim for recommencement. 38 C.F.R. § 3.654(b)(2); *see* Appx10-11 (explaining that "the

regulation effectively establishes 'the nature and extent of proof and evidence and the method of taking and furnishing them' and falls within the Secretary's authority 'to determine the forms of application [for] benefits, and the manner of awards"). Section 3.654(b)(2) provides that a veteran has a full year after release from active duty to submit a claim for recommencement and receive the earliest possible effective date – the day following release from active duty. If a claim for recommencement is submitted more than a year after release from active duty, section 3.654(b)(2) provides that the effective date will be one year prior to the date of receipt of a new claim. The effective date provisions in section 3.654(b)(2) are a reasonable means of promoting the efficient administration of benefits. When payments are resumed, compensation is "authorized based on the degree of disability found to exist at the time the award is resumed." 38 C.F.R. § 3.654(b)(2). Predicating the effective date on a veteran's claim – and thereby encouraging veterans to timely file a claim for recommencement – helps to avoid the need for retrospective disability evaluations covering large periods of time, which can be difficult and resource intensive.[5] *See Hettleman v. Bergland*, 642

[5] Mr. Buffington acknowledges that VA can require a veteran to provide notice of release from active duty before benefits are paid, but contends that VA cannot tie the effective date of the resumption of benefits to the date of such notification. Applnt. Br. 32-33. Under this theory, a veteran's delay could lead to VA having to expend disproportionate claims processing resources on a single claim. For example, a veteran could wait 20 years after release from active duty before requesting recommencement, and VA would then be required to undertake a

F.2d 63, 66-67 (4th Cir. 1981) ("[T]he government has an interest in seeing that the program [it administers] runs efficiently; . . . and the Secretary, as head of the responsible agency, is in the best position to promulgate uniform procedures." (internal quotation marks omitted)); *Veterans Justice Grp., LLC v. Secretary of Veterans Affairs*, 818 F.3d 1336, 1351 (Fed. Cir. 2016) ("[T]he VA is in a better position than this court to evaluate inefficiencies in its system." (citing *Hettleman*, 642 F.2d at 66-67; additional citation omitted)).

Section 3.654(b)(2) does not, as Mr. Buffington contends, exceed the Secretary's rulemaking authority under 38 U.S.C. § 501 because the regulation's effective date provisions are, as he sees it, "irrelevant to any duplication of benefits." *See* Applnt. Br. at 30. This contention is nothing more than an attempt to inappropriately limit the broad discretion that Congress has afforded VA to administer the veterans' benefits scheme. When, like here, a statute is silent on an issue, VA has discretion under section 501(a) to create reasonable restrictions – like section 3.654(b)(2)'s effective date provisions – for purposes of systemic order and efficiency. *See Carpenter v. Secretary of Veterans Affairs*, 343 F.3d 1347, 1351-52 (Fed. Cir. 2003).

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retrospective disability evaluation for the full 20-year period and assign staged ratings covering that 20-year period.

Mr. Buffington fails to otherwise demonstrate that section 3.654(b)(2) is arbitrary or manifestly contrary to the statute. Mr. Buffington offers lengthy critiques of the Veterans Court's reasoning, Applnt. Br. at 33-38, 42, but does not demonstrate that the Veterans Court erred in determining that section 3.654(b)(2) is entitled to deference under *Chevron* step 2. For example, the Veterans Court did not err, as Mr. Buffington contends, Applnt. Br. at 33-34, in noting that the effective date provisions in section 3.654(b)(2) are comparable to other one-year deadlines in the veterans' benefits scheme. *See* Appx11. Indeed, the Veterans Court correctly noted that a one-year time limit is generally used throughout title 38. Appx11. For example, section 5110(b)(1) provides an effective date for an award of disability compensation of "the day following the veteran's discharge or release if application therefor is received within one year from such date of discharge or release." 38 U.S.C. § 5110(b)(1). Just as Congress provided one year for a veteran to file a claim following discharge, 38 C.F.R. § 3.654(b)(2) provides the same reasonable period. In fact, the regulation is more favorable in that it also allows for payments to resume one year prior to receipt of a claim even when the claim for recommencement of payments is not received within one year of discharge. 38 C.F.R. § 3.654(b)(2). Contrary to Mr. Buffington's contentions, 38 U.S.C. § 5110 does not demonstrate that VA lacked discretion to predicate the effective date for recommencement on a veteran's claim. *See* Applnt. Br. 34. As

discussed above in response to a similar argument, 38 U.S.C. § 5110 does not address the recommencement of benefits after receipt of active service pay. Congress instead left it to VA to determine the terms for the recommencement of benefits, which VA did by promulgating 38 C.F.R. § 3.654(b) pursuant to the authority granted by Congress in 38 U.S.C. § 501(a). Nor did the Veterans Court rely improperly on *Jernigan v. Shinseki*, 25 Vet. App. 220 (2012), as Mr. Buffington contends. *See* Applnt. Br. at 34-35. The Veterans Court correctly cited *Jernigan* as an example of a previous instance in which the Veterans Court upheld a time limit for filing a claim. Appx11; *Jernigan*, 25 Vet. App. at 227.

Mr. Buffington's contention that section 3.654(b)(2) "exceeds the scope of any possible gap left by the statute," Applnt. Br. at 39, is also incorrect. Mr. Buffington believes that VA's discretion in filling the gap left by Congress was limited to identifying the day following release from active duty as the effective date for recommencement of disability compensation. *See id.* This contention, however, is again premised on Mr. Buffington's incorrect interpretation of the statute and improper attempt to impose limits on VA's discretion that are not supported by the statute. Mr. Buffington further errs in contending that section 3.654(b)(2) is arbitrary or inconsistent with the statute because it purportedly "altered Mr. Buffington's entitlement to disability compensation." *See id.* at 41. Had Mr. Buffington applied for recommencement within a year after his 2005

separation from active duty, his effective date would have been the day following his discharge – the earliest possible effective date given the bar on dual compensation. Section 3.654(b)(2) does not alter any veteran's entitlement to disability compensation, but a veteran's failure to promptly apply for recommencement could affect the amount of disability compensation the veteran may ultimately receive. Mr. Buffington's delay in applying for recommencement does not render section 3.654(b)(2) unreasonable or contrary to law.

Finally, section 3.654(b)(2) is not arbitrary and capricious because "veterans who do not inform VA of their return to active duty may, in the end, receive and retain more monthly benefits than veterans, like [Mr. Buffington], who waive benefits during a period of active service but who do not inform VA of their release within 1 year following release from service." Appx12. "No adjudicatory scheme can produce perfect results in every case, and the law does not require that, to be valid, an agency regulation do so. The applicable standard is merely reasonableness . . . ." *Sears*, 349 F.3d at 1332. An otherwise reasonable regulation is not rendered unreasonable even if there are cases in which the regulation, as applied to the particular facts of the case, "does not produce the most desirable result." *See id.* at 1331. As the Veterans Court properly determined, "[t]he Secretary . . . is charged with managing compensation benefits for all veterans and

[Mr. Buffington] has not demonstrated that it is unreasonable to craft rules with the expectation that they will be followed." Appx12.

C. The Veteran Canon Does Not Displace *Chevron*

Contrary to the contentions of Mr. Buffington and Amicus New Civil Liberties Alliance (NCLA), the veteran canon does not take precedence over deference to VA under *Chevron*. Applnt. Br. at 26-27; [NCLA cite].

1. The Rule Of Interpretative Doubt Is Not At Issue As There Is No Textual Ambiguity To Resolve

Contrary to Mr. Buffington's contentions, the veteran canon is not at issue in this appeal because there is no textual ambiguity to resolve. Rather, there is a gap, one Congress clearly intended to leave. Where Congress has left a gap in a statutory scheme for VA to fill, as opposed to using an ambiguous word in need of interpretation, there is no interpretive doubt to be resolved in a veteran's favor and no role for the veteran canon to play – VA is simply authorized to fill the statutory gap. *Chevron*, 467 U.S. at 843. Indeed, where a statute is silent on an issue, VA has discretion under section 501(a) to create reasonable restrictions for purposes of systemic order and efficiency. *Carpenter*, 343 F.3d at 1351-52 (holding that VA may regulate where not directly authorized if the regulation "is reasonably related to the purposes of the enabling legislation"); *see also Veterans Justice Grp.*, 818 F.3d at 1352-53 (holding that where the statute does not address a specific issue, VA had discretion to fill the gap) (citing *Gallegos v. Principi*, 283 F.3d 1309, 1313

(Fed. Cir. 2002)). Notably, there does not appear to be any real disagreement that there is no textual ambiguity at issue here – Mr. Buffington does not contend that any specific word or phrase is ambiguous. Thus, there is no ambiguous word or phrase in the relevant statutory sections to which the veteran canon *could* be applied. Rather, Congress left a gap that VA filled pursuant to its section 501(a) rulemaking authority.

Although the rule of interpretive doubt is not at issue, section 3.654(b)(2) is nonetheless consistent with the pro-claimant policy underlying the veterans' benefits statutes. Section 3.654(b)(2) affords veterans a full year after release from active duty to file an application to recommence disability benefits and receive an effective date of the day following the veteran's release – the earliest possible date given the bar on dual compensation. If a veteran does not apply to recommence disability benefits for more than a year following the veteran's release from active duty, section 3.654(b)(2) provides that the effective date will be one year prior to the date of the claim. Section 3.654(b)(2) is not inconsistent with the statute's pro-claimant scheme simply because it does not provide for a pro-claimant outcome in every instance – such as where a veteran, like Mr. Buffington, delays filing an application to recommence disability benefits for more than a year after release from active duty. *Cf. Sears*, 349 F.3d at 1331-32.

2. The Veteran Canon Does Not Apply At *Chevron* Step One, Nor Does it Displace Deference Under *Chevron* Step Two

Mr. Buffington erroneously contends that the veteran canon should be applied at *Chevron* step one, Applnt. Br. at 27, but the principle of resolving interpretative doubt in a veterans' benefits statute in a claimant's favor is incompatible with the inquiry at *Chevron* step one. Under *Chevron* step one, when "the intent of Congress is clear, that is the end of the matter[.]" 467 U.S. at 843. *Chevron* is clear – this Court's analysis at step one is limited to determining whether the intent of Congress is clear. If it is not, this Court must proceed to step two and defer to VA's reasonable interpretation.

Contrary to Mr. Buffington's contentions, Applnt. Br. at 26-28, the veteran canon is not a "traditional tool of statutory construction" that takes precedence over deference to VA. *See Chevron*, 467 U.S. at 843 n.9. In determining Congress's intent, courts "employ traditional tools of statutory construction and examine 'the statute's text, structure, and legislative history, and apply the relevant canons of interpretation.'" *Heino v. Shinseki*, 683 F.3d 1372, 1378 (Fed. Cir. 2012) (citation omitted); *see also City of Arlington v. FCC*, 569 U.S. 290, 309 (2013) (Breyer, J., concurring) (collecting cases). If those tools enable a court to "ascertain[] that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9.

Under this approach, all traditional canons of statutory construction that legitimately aid in discerning Congress's intent, *see Encino Motorcars*, 136 S. Ct. at 1142, come into play in the *Chevron* analysis. But not all canons are equally helpful in resolving congressional ambiguity at step one. Aside from linguistic canons that apply rules of syntax to statutes, helping ascertain the technical meaning of Congress's chosen text, the most decisive canons take the form of "clear statement rules," which "ensure Congress does not, by broad or general language, legislate on a sensitive topic inadvertently or without due deliberation." *Sossamon v. Texas*, 563 U.S. 277, 291 (2011) (citations omitted). Those canons, which require Congress to speak unambiguously to enact certain results, will typically resolve the *Chevron* inquiry at step one because they have the effect of rendering a statutory provision unambiguous. *See, e.g.*, *INS v. St. Cyr*, 533 U.S. 289, 320 n. 45 (2001) ("Because a statute that is ambiguous with respect to retroactive application is construed under our precedent to be unambiguously prospective, . . . there is, for *Chevron* purposes, no ambiguity in such a statute for an agency to resolve.").

In contrast, the veteran canon neither helps to identify the technical meaning of statutory text nor does it enforce the requirement of a clear expression of Congress's intent. The canon, which directs only that ambiguity that cannot otherwise be resolved be construed in a veteran's favor, does not render a statutory

provision unambiguous by establishing a default rule that courts apply unless Congress displaces it with a clear statement. Instead, the veteran canon applies to situations where interpretive doubt lingers even after a court has used all other interpretive tools at its disposal, including principles of deference. *See Nielson v. Shinseki*, 607 F.3d 802, 808 & n.4 (Fed. Cir. 2010) (holding that the veteran canon "is only applicable after other interpretive guidelines have been exhausted, including *Chevron*"); *Sears*, 349 F.3d at 1331 ("We do not agree" that the veteran canon "overrides *Chevron* deference.").

Indeed, the very premise of the pro-claimant canon – that interpretive doubt is to be resolved in the veteran's favor – is incompatible with the Court's inquiry at *Chevron* step one, which looks to whether Congress's intent is clear from the statute. This Court's veterans benefits precedent is firm on this point – resolving interpretive doubt in a veterans benefit statute in the veteran's favor at *Chevron* step one is error. *See Heino*, 683 F.3d at 1379 n.8 ("Regardless, Mr. Heino asks this court to resolve 'interpretive doubt' in his favor by holding that there is no doubt as to what 'the cost to the Secretary' could mean. However, we will not hold a statute unambiguous by resorting to a tool of statutory construction used to analyze ambiguous statutes.").

In this respect, the veteran canon is much like the rule of lenity, which applies only to "those situations in which a reasonable doubt persists about a

statute's intended scope even *after* resort" to other tools of construction. *Moskal v. United States*, 498 U.S. 103, 108 (1990). This distinction explains why cases mentioning the veteran canon typically do so only following lengthy analysis that resolves the ambiguity through other means. *See, e.g.*, *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 438-41 (2011) (concluding that section 7266(a) is facially non-jurisdictional); *Kirkendall v. Department of the Army*, 479 F.3d 830, 843-44, 845-46 (Fed. Cir. 2007).[6] It also explains why (i) the canon does not preclude VA from resolving statutory ambiguities in a manner that might be characterized by an appellant as adverse to certain veterans as long as its interpretation is reasonable, *see Sears*, 349 F.3d at 1331-32, and (ii) this Court typically considers the canon only after considering agency deference, *see*, *e.g.*, *Gallegos*, 283 F.3d at 1313-14; *Disabled Am. Veterans*, 234 F.3d at 694, or where there is no agency interpretation to defer to, *e.g.*, *Sursely v. Peake*, 551 F.3d 1351, 1355-57 & n.5 (Fed. Cir. 2009).

Using the canon to resolve lingering doubt in this way reflects the basic premise of *Chevron* "that when Congress grants an agency the authority to administer a statute by issuing regulations with the force of law, it presumes the agency will use that authority to resolve ambiguities in the statutory scheme."

[6] We are aware of no case since *Kirkendall* that has read it as establishing the primacy of the veteran canon over agency deference.

Encino Motorcars, 136 S. Ct. at 2125 (citations omitted). Congress delegated broad authority to the VA to prescribe rules and regulations to carry out title 38. 38 U.S.C. § 501(a)(1). This general delegation amply demonstrates that Congress intended VA, not courts, to interpret ambiguous veterans' benefits statutes. *See City of Arlington*, 569 U.S. at 307 ("[T]he preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the [agency] with general authority to administer the [act] through rulemaking and adjudication, and the agency interpretation at issue was promulgated in exercise of that authority.").

Furthermore, no court has held that the veteran canon displaces agency deference under *Chevron*. The Supreme Court has never endorsed using the veteran canon to resolve ambiguity where an administrative agency has already reasonably done so. The Court in *Brown v. Gardner* struck down a VA regulation because it contravened the plain language of the controlling statute. *Brown*, 513 U.S. 115, 116-18 (1994). Although the Court noted in passing that interpretive doubt should be resolved in favor of veterans, *id.* at 118, it did not hold that the veteran canon negates *Chevron* deference. In *Henderson*, the Court noted that its textual analysis of 38 U.S.C. § 7266(a) was consistent with the veteran canon. 562 U.S. at 441. But the Court did not rely on the veteran canon to resolve the statutory ambiguity, much less address *Chevron* deference because there was no

VA regulation interpreting section 7266(a). The cases that are generally understood to have given rise to what is now the veteran canon predate *Chevron* and did not apply the veteran canon in lieu of deferring to an agency interpretation worthy of deference. *See Boone v. Lightner*, 319 U.S. 561, 575 (1943) (no agency interpretation); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (noting that contrary rulings from the agency authorized to administer the statute were "not entitled to the weight which is accorded interpretations by administrative agencies entrusted with the responsibility of making *inter partes* decisions"); *Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196 (1980) (no agency interpretation). And in *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), where the Court again referenced the veteran canon in dicta, there was no agency interpretation of the statute, *id.* at 220 n.9.

Mr. Buffington identifies one decision from this Court that he contends supports interpreting ambiguous veterans' benefits statutes without regard to VA's interpretation, *see* Applnt. Br. 27, but the decision he cites did not apply the canon this way. *See Disabled Am. Veterans v. Gober*, 234 F.3d 682, 694 (Fed. Cir. 2000) (considering the canon after applying deference principles). Indeed, this Court has not held that the veteran canon displaces *Chevron* deference whenever statutory language applicable to veterans' benefits is ambiguous. Instead, this Court has "rejected the argument that the pro-veteran canon of construction overrides the

deference due to [VA's] reasonable interpretation of an ambiguous statute." *Guerra v. Shinseki*, 642 F.3d 1046, 1051 (Fed. Cir. 2011) (citing *Sears*, 349 F.3d at 1331-32); *see also Veterans Justice Grp.*, 818 F.3d at 1352 ("[W]e must take care not to invalidate otherwise reasonable agency regulations simply because they do not provide for a pro-claimant outcome in every imaginable case." (internal quotation marks and citation omitted)); *National Org. of Veterans Advocates, Inc. v. Sec'y of Veterans Affairs*, 809 F.3d 1359, 1363 (Fed. Cir. 2016) ("There is no force to [petitioner's] suggestion that the [VA's] interpretations are not entitled to *Chevron* deference because of *Gardner*."); *Nielson*, 607 F.3d at 808 (The veteran canon "is only applicable after other interpretive guidelines have been exhausted, including *Chevron*."); *Gallegos*, 283 F.3d at 1314 (noting that "*Chevron* deference may apply in the pro-claimant context of title 38").

In addition, cases addressing the Indian canon do not provide a basis to conclude that the veteran canon should supersede *Chevron* deference, as NCLA contends. ECF No. 29 at 17-18. Courts have not uniformly held that the Indian canon precludes *Chevron* deference. *See, e.g.*, *Haynes v. United States*, 891 F.2d 235, 239 (9th Cir. 1989). And, although the Supreme Court has not decided whether courts should employ the Indian canon before or after considering *Chevron* deference, it has rejected the notion that the Indian canon is "inevitably stronger" than other applicable canons of construction. *Chickasaw Nation v.*

United States, 534 U.S. 84, 95 (2001). Further, the Indian canon is unique among substantive canons. It arose in the early 1800s as "a strong, albeit implicit, presumption against reading any particular treaty provision to effectuate an abandonment of tribal sovereignty." Philip P. Frickey, *Marshalling Past and Present: Colonialism, Constitutionalism, and Interpretation in Federal Indian Law*, 107 Harv. L. Rev. 381, 397 (1993); *see also* Amy Coney Barnett, *Substantive Canons and Faithful Agency*, 90 B.U. L. Rev. 109, 151-52 (2010) (discussing the historical development of the Indian canon). The Indian canon thus "grew out of the trust obligation that Congress owes to Indian tribes," and requires that statutory ambiguities be resolved "'generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence.'" *Artichoke Joe's California Grand Casino v. Norton*, 353 F.3d 712, 729 (9th Cir. 2003) (quoting *Merrion v. Jicarilla Apache Tribe*, 455 U.S. 130, 152 (1982)). This explains why, unlike the veteran canon, the Indian canon is frequently articulated and applied as a clear statement rule. *E.g.*, *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 765 (1985). The Indian canon, and cases addressing it, are therefore of little utility in deciding what role the veteran canon should play in the Court's *Chevron* analysis. *Cf. Chickasaw Nation*, 534 U.S. at 95 (noting that past decision are "too individualized, involving too many different

kinds of legal circumstances" to determine the relative strength of the Indian canon vis-à-vis other interpretive canons).

NCLA's reliance on the rule of lenity, ECF No. 29 at 18-19, is likewise misplaced. NCLA contends, incorrectly, that the Supreme Court's rejection of the application of *Chevron* deference to disputes over the interpretation of criminal statutes is grounded in the rule of lenity. The rule of lenity, however, is not the primary reason that the Supreme Court has rejected applying *Chevron* to criminal statutes. *See Crandon v. United States*, 494 U.S. 152, 177-78 (1990) (Scalia, J., concurring in judgment). Rather, the rule of lenity was cited in an explanation for why an administrative interpretation was "not even deserving of any persuasive effect." *Crandon*, 494 U.S. at 177 (Scalia, J., concurring in judgment). With respect to *Chevron* deference, Justice Scalia explained that it does not apply to criminal statutes because they are administered by the courts, not any agency. *Id.* at 177. Here, unlike in the criminal context, VA has specific responsibility for administering title 38 that triggers *Chevron*. *See, e.g.*, *Gallegos*, 283 F.3d at 1314 ("This court has already decided that *Chevron* deference may apply in the pro-claimant context of title 38."); *see also* 38 U.S.C. § 501(a).

CONCLUSION

For these reasons, we respectfully request that the Court affirm the Veterans Court's decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE PURSUANT TO RULE 32(b)

This brief complies with the type-volume limitation of Federal Rule of Federal Circuit Rule 32(b). According to the word-count calculated by the word processing system with which this brief was prepared, the brief contains a total of 9,009 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

s/ Shari A. Rose

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 17th day of December, 2020, a copy of the foregoing Corrected Brief Of Respondent-Appellee was filed electronically. The filing was served electronically to all parties by operation of the Court's electronic filing system.

s/ Shari A. Rose