2019-2211

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRUCE R. TAYLOR,
Claimant-Appellant,

v.

DENIS MCDONOUGH,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

On Appeal from the United States Court of
Appeals for Veterans Claims, No. 17-2390
Judges William S. Greenberg, Amanda L. Meredith, & Joseph L. Falvey, Jr.

AMICUS BRIEF BY THE AMERICAN LEGION

(In Support of Claimant-Appellant and Reversal)

The American Legion

By its Attorneys,

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2019-2211

Short Case Caption Taylor v. McDonough

Filing Party/Entity The American Legion

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/01/2021

Signature: /s/ James D. Ridgway

Name: James D. Ridgway

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
The American Legion		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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STATEMENT OF INTEREST OF AMICUS

Amicus The American Legion submits this brief in support of Claimant-Appellant Bruce R. Taylor. The American Legion is a veterans' service organization chartered by Congress "'to advance the interests . . . of all wounded, injured, and disabled American veterans' and 'to cooperate with the Department of Veterans Affairs . . . [in] advancing the condition, health, and interests of . . . disabled veterans.'" 36 U.S.C. §§ 50301, 50302(3), (4). It has nearly two million members, all of whom are wartime veterans, and operates a number of charitable programs to improve the lives of disabled veterans, their dependents, and survivors. In carrying out its duties and responsibilities, The American Legion regularly advocates for legislation on behalf of veterans and has a strong interest in the principles used to interpret such legislation.

SUMMARY OF ARGUMENT

The American Legion joins Claimant-Appellant in urging this Court to reverse the judgment of the Veterans Court. It supports Claimant-Appellant's argument that the Appropriations Clause does not bar equitable estoppel in this case. However, it believes that the argument in favor of Mr. Taylor is much stronger because of the important role that the canon of veteran-friendly interpretation plays in negating the ordinary canon that waivers of sovereign immunity must be interpreted narrowly.

The Supreme Court's recent decision in *Maine Community Health Options*, makes clear that the Appropriations Clause is not an independent barrier to payment in situations where Congress has waived sovereign immunity through statute. 140 S. Ct. 1308, 1321 (2020). In the constitutional scheme, sovereign immunity is implemented primarily through the default lack of a cause of an action or a forum to bring it absent Congressional enactment.

Since Congress waived sovereign immunity through the enactment of the Veterans' Judicial Review Act, the Supreme Court has repeatedly indicated that ambiguity in veterans benefits statutes should not be resolved in favor of narrow authorizations of benefits, *see Brown v. Gardner*, 513 U.S. 115 (1994), or against access to judicial remedies, *see Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011), but rather in a veteran-friendly manner.

This Court analyzed Congress's intent in passing the Veterans' Judicial Review Act in detail in *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998). Since *Hodge* was decided, it has

been cited ubiquitously in support of veteran-friendly procedural and substantive outcomes. Decisions of this Court such as *Viegas v. Shinseki*, 705 F.3d 1374, 1378 (Fed. Cir. 2013), and *Sursely v. Peake*, 551 F.3d 1351 (Fed. Cir. 2009), are prime examples of how ambiguity is consistently resolved in favor of Veterans instead of sovereign immunity. Furthermore, the en banc Veterans Court considered and rejected the applicability of *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), to veterans benefits cases in *Allen v. Brown*, 7 Vet. App. 439, 445-46 (1995) (en banc).

Accordingly, The American Legion completely agrees that "[t]he relief Mr. Taylor seeks . . . perfectly aligns with the federal scheme in question because Mr. Taylor 'ha[s] not asked for anything that Congress did not intend for the statute to provide' and 'all of the substantive qualifying requirements were met.'" Claimant En Banc Br. at 35 (quoting *Brush v. Off. of Pers. Mgmt.*, 982 F.2d 1554, 1562-63 (Fed. Cir. 1992)). Even if there could be some doubt as to Congress's intent to permit judicial power to encompass equitable estoppel against the Government in a different context, in veterans benefits cases the normal presumption in favor of sovereign immunity simply does not apply.

ARGUMENT

I. The Appropriations Clause Does Not Bar Courts from Providing Equitable Relief to Veterans such as Mr. Taylor Because the Canon of Veteran-Friendly Interpretation Trumps the General Canon of Narrowly Interpreting Waivers of Sovereign Immunity.

The American Legion supports Claimant-Appellant's argument that existing Appropriations Clause case law makes clear that equitable relief is not barred in this case. However, it argues that the outcome is more strongly compelled by recognizing that the Appropriations Clause is a manifestation of sovereign immunity and that the canon of veteran-friendly interpretation recognized in *Brown v. Gardner*, 513 U.S. 115 (1994), trumps the canon that waivers of sovereign immunity must be narrowly construed.

A. The Appropriations Clause is not a barrier to payment in this case because the critical issue is whether Congress has waived sovereign immunity for Veterans like Mr. Taylor by creating compensation benefits and a court to pursue entitlement to such benefits.

The Appropriations Clause implements only one aspect of the founders' concept of the appropriate role for sovereign immunity to play in our democracy. Limits on suits against the government stem primarily from the default lack of a cause of action or a forum in which to bring it. *See generally In re Supreme Beef Processors, Inc.*, 468 F.3d 248, 258 (5th Cir. 2006) (en banc) (Higginbotham, J., concurring). Under *Cohens v. Virginia*, the practical source of sovereign immunity is not in the constitution, i.e., the Appropriations Clause, but rather in the choice of Congress as to what jurisdiction to provide to the federal courts to hear actions against the government. 19 U.S. 264, 411-

12 (1821) ("The universally received opinion is, that no suit can be commenced or prosecuted against the United States; that the judiciary act does not authorize such suits."). Thus, the critical inquiry in determining whether a court can award a payment is the scope of Congress's intended waiver. If the relevant statutory waiver of sovereign immunity authorizes the payment, then the Appropriations Clause is a non-issue.

As the Supreme Court recently explained in *Maine Community Health Options*, , the Appropriations Clause is not an independent barrier to payment of a government obligation: "Neither the Appropriations Clause nor the Anti-Deficiency Act addresses whether Congress itself can create or incur an obligation directly by statute. Rather, both provisions constrain how federal employees and officers may make or authorize payments without appropriations." 140 S. Ct. 1308, 1321 (2020). "Budget authority is an agency's power 'provided by Federal law to incur financial obligations,'" *id.* at 1322 (quoting U.S. GOVERNMENT ACCOUNTABILITY OFFICE, PRINCIPLES OF FEDERAL APPROPRIATIONS LAW 2-1 (4th ed. 2016)). "Put succinctly, Congress can create an obligation directly through statutory language." *Id.* at 1320.

Thus, in *Maine Community Health Options*, the Supreme Court concluded that Congress had authorized an obligation even though it later failed to expressly appropriate money to fulfill that obligation. In that case, the Court concluded that a Tucker Act suit was an appropriate vehicle to pursue the action against the Government even though that was not the payment process envisioned in the authorizing legislation. *Id.* at 1330-31.

Mr. Taylor's argument is analogous in that he seeks payment of benefits owed under existing law through a procedure that was not expressly enumerated in the statute creating the benefit. Congress may not have envisioned that a Veteran would be prevented from seeking benefits by threat of criminal prosecution, but it did authorize compensation and also created a forum for seeking it. In *Maine Community Health Options*, the Supreme Court concluded that "Petitioners' suit . . . lies in the Tucker Act's heartland." *Id.* at 1331. So too does Mr. Taylor's suit lie in the heartland of cases permitted under the Veterans' Judicial Review Act.

Put another way, although the Appropriations Clause may be implicated in veterans benefits cases when there is a government shutdown caused by the failure of Congress and the president to duly enact appropriations legislation, there is no dispute that Congress has appropriated money to pay compensation benefits to Veterans like Mr. Taylor who have disabilities related to their service. Accordingly, there is no Appropriations Clause barrier to awarding him the benefits authorized by statute in the forum where it is proper to seek such benefits.

B. The traditional canon that waivers of sovereign immunity must be construed narrowly does not apply in veterans claims where the canon of veteran-friendly interpretation is used to resolve ambiguity.

As noted above, under *Cohens*, sovereign immunity is generally not a constitutional issue but rather an issue of interpreting the statutes where Congress has chosen to waive sovereign immunity. Given the critical role of Congress in deciding

when waiver is appropriate, the traditional canon of sovereign immunity requires that "[w]aivers of immunity must be construed strictly in favor of the sovereign and not enlarged beyond what the language requires." *Ruckelshaus v. Sierra Club*, 463 U.S. 680, 685 (1983) (cleaned up); *see also Library of Congress v. Shaw*, 478 U.S. 310, 318 (1986). In other words, ambiguity must be construed in the government's favor.

Nonetheless, this canon has never been applied in interpreting veterans benefits statutes. As demonstrated below, in case after case, courts have invoked the principle of veteran-friendly interpretation to resolve veterans benefits cases against the government. This is not to say that sovereign immunity does not apply to veterans benefits. For two centuries Congress chose to deny veterans judicial review of their claims. *See generally* James D. Ridgway, *The Splendid Isolation Revisited: Lessons from the History of Veterans' Benefits Before Judicial Review*, 3 VETERANS L. REV. 135, 213-17 (2011). However, now that Congress has waived sovereign immunity through the Veterans' Judicial Review Act, that waiver has been interpreted liberally.

The modern principle of veteran-friendly interpretation is eponymously named for the first Supreme Court decision in a case appealed from the Veterans Court, *Brown v. Gardner*, 513 U.S. 115 (1994). *Gardner* dealt with the scope of benefits authorized under the extant version of 38 U.S.C. § 1151. The central issue was whether compensation for a disability caused by VA medical treatment required a showing of negligence. In analyzing this issue, the Supreme Court observed that "[t]he most, then, that the Government could claim . . . is the existence of an ambiguity to be resolved in favor of a fault requirement (assuming

that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor)." 513 U.S. at 117-18. If the sovereign immunity canon applied to veterans benefits, then *Gardner* simply could not have dismissed the Government's argument so brusquely.

The Supreme Court applied the canon of veteran-friendly interpretation again in a case that is even more closely analogous. In *Henderson ex rel. Henderson v. Shinseki*, the issue was whether the time period for filing an appeal to the Veterans Court was a jurisdictional requirement. 562 U.S. 428 (2011). The Court held that it was not and observed that rigid procedural rules are inconsistent with a veteran-friendly, paternalistic system and with "'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor.'" *Id.* at 430 (quoting *King v. St. Vincent's Hospital*, 502 U.S. 215, 220-221, n. 9 (1991)). As in *Gardner*, there is no mention of sovereign immunity nor any suggestion that once Congress chose to waive sovereign immunity through the Veterans Judicial Review Act, there was any necessity to narrowly construe the authority of the courts to hear claims and award compensation squarely within the basic entitlement set forth in 38 U.S.C. § 1110.

While the examples from the Supreme Court are compelling on their own, in *Hodge v. West*, this Court fully explored the fundamental intent of Congress in waiving sovereign immunity through the VJRA:

> [W]hen it passed the Veterans' Judicial Review Act and Veterans' Benefits Improvement Act of 1988, and thus for the first time established judicial review for DVA disputes, Congress emphasized the historically non-adversarial system

of awarding benefits to veterans and discussed its intent to maintain the system's unique character:

> Each year, the [DVA] processes approximately 5 million claims. In most cases, claimants submit their own applications without assistance. If a claimant desires advice or other help, [the DVA] provides specially-trained personnel to answer inquiries and assist in the submission of the claim. [The DVA's] medical facilities often serve as an important referral source, and the major veterans service organizations also furnish claims assistance by trained specialists at no charge.
>
> *Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits.* This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> *Implicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.* In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof.
>
> H.R. Rep. No. 100-963, at 13 (1988), reprinted in 1988 U.S.C.C.A.N. 5782, 5794-95 (emphasis added). This passage demonstrates that, even in creating judicial review in the veterans context, Congress intended to preserve the historic, pro-claimant system.

155 F.3d 1356, 1362-63 (Fed. Cir. 1998) (emphasis in original). This examination of the legislative history of the VJRA makes clear that the waiver of sovereign immunity is uniquely generous for veterans both as to the interpretation of benefits and of the procedures available for claiming those benefits. Since *Hodge* was decided, it has been cited by this Court dozens of times and by the Veterans Court hundreds of times to guide the interpretation of Congress's intent in creating the veterans benefits scheme. Therefore, the Claimant-Appellant is absolutely correct when he argues that "[t]he relief

Mr. Taylor seeks vindicates congressional intent rather than contravenes it." En Banc Brief of Claimant-Appellant (Claimant En Banc Br.) at 33.

An examination of the case law bears this out. For example, in *Viegas v. Shinseki*,—a case interpreting the scope of the current version of 38 U.S.C. § 1151—this Court interpreted the phrase "medical treatment or hospital care" broadly to include providing access to handicapped-accessible restrooms. 705 F.3d 1374, 1378 (Fed. Cir. 2013). In doing so, the panel explicitly reasoned that it could find no evidence that Congress meant for the provision to be interpreted narrowly. *See id.* at 1380. If the traditional sovereign immunity canon applied to veterans benefits, then the analysis could not have been conducted this way. Instead of assuming a broad meaning and searching for evidence that Congress intended a narrow interpretation, the panel would have been compelled to look for unambiguous language authorizing the broad interpretation.

Similarly, in *Sursely v. Peake* this Court broadly interpreted the clothing allowance benefit provided under 38 U.S.C. § 1162 to allow a single veteran to obtain multiple clothing allowances when he or she had multiple disabilities affecting different body parts, 551 F.3d 1351, 1357 (Fed. Cir. 2009). This Court reached this interpretation despite the fact that the Congressional Budget Office's cost estimate was explicitly based upon the straightforward multiplication of the number of eligible veterans times the cost of the individual benefit. *See Sursely v. Peake*, 22 Vet. App. 21, 26 (2007). Instead of relying on legislative history that supported the government's position with

mathematical precision, this Court quoted *Gardner*: "In veterans benefits cases, 'interpretive doubt is to be resolved in the veteran's favor.'" 551 F.3d at 1355 (quoting 513 U.S. at 118). Therefore, even equivocal evidence that Congress's intent might have been narrower than a veteran-friendly reading cannot overcome the strength of the *Gardner* canon.

There is one notable case in veterans law where *Off. of Pers. Mgmt. v. Richmond*, 496 U.S. 414 (1990), does make an appearance. In *Allen v. Brown*, the en banc Veterans Court considered whether the basic entitlement statute, 38 U.S.C. § 1110, extended compensation to a Veteran's condition that was not caused by service, but was only aggravated by a service-connected condition. 7 Vet. App. 439, 445-46 (1995) (en banc). This was a difficult question because it was undisputed that certain hospital benefits that Congress had created using similar language did not encompass secondary aggravation. *See id.* at 448-49. The majority resolved the issue in favor of the Veteran, noting that the then-recent decision in *Gardner* "provides the Court with critical guidance as to which interpretation should prevail." *Id.* at 448.

In dissent, Judge Holdaway relied upon *OPM v. Richmond* to argue that the language of Title 38 should be narrowly construed because benefits must be explicitly authorized by Congress. *See id.* at 452 (Holdaway, J., dissenting). However, no other member of the Veterans Court joined his opinion. This demonstrates that *OPM v. Richmond* and the general concept of sovereign immunity have not been overlooked in veterans law. Rather, they have been considered and found to have no place in light of

Gardner. Indeed, it is not apparent that the Government ever thinks it appropriate to even raise an argument based upon sovereign immunity when a veterans benefits statute is ambiguous.

This is not to say that *Gardner* enjoys unlimited power as a canon of interpretation. As has been observed, "[c]anons of construction 'are an unruly team,' often 'pulling in opposite directions.'" *Kisor v. McDonough*, 995 F.3d 1347, 1374 (Fed. Cir. 2021) (order denying en banc review) (O'Malley, J., dissenting) (quoting *Sullivan v. Freeman*, 944 F.2d 334, 337 (7th Cir. 1991)). The veteran-friendly interpretation must still be reasonable for it to be a plausible interpretation of Congressional intent. It is still true in interpreting veterans statutes that Congress does not "hide elephants in mouseholes." *Whitman v. Am. Trucking Ass'ns., Inc.*, 531 U.S. 457, 468 (2001). Just because a more veteran-friendly policy can be imagined does not mean that the plain language of the statute can bear that weight. Ordinary canons of word usage, structure, and absurdity still apply. The courts may also fairly look to the agency context to determine when an interpretation is unreasonable.

The case of *Heino v. Shinseki*, 683 F.3d 1372 (Fed. Cir. 2012), is an example of such a situation. In *Heino*, the veteran argued that the copayment charged for his prescription drug was too high because his doctor ordered him to cut his pills in half, which was unaccounted for in how he was charged. *See id.* at 1374. Although the veteran's interpretation of the statute would clearly be friendlier in cutting copayments in half in such situations, this Court did not accept it. *See id.* at 1380-81. To explain

this result, Judge Plager's concurrence candidly admitted: "[T]he administrative complications that [the appellant's interpretation] would introduce can only be imagined, given the several billion dollars' worth of drugs that pass through the VA each year." *Id.* at 1382. Accordingly, he continued, "With a creative bit of definitional construction and *Chevron* analysis, we conclude that what the VA does is legitimate; this avoids throwing the VA co-payment system into total chaos, and probably is, in a broad sense, consistent with what Congress thought the VA should be doing." *Id.* Accordingly, there are limits to veteran-friendly interpretation, but rigid rules requiring express authorization from Congress for each tiny detail is not one of them.

In sum, although The American Legion agrees with the Claimant-Appellant's argument regarding general principles of equitable relief, it submits that the argument is actually much stronger once the inquiry is broadened to examine how the principle of veteran-friendly interpretation negates the normal role of sovereign immunity in this context. Accordingly, The American Legion completely agrees that "[t]he relief Mr. Taylor seeks . . . perfectly aligns with the federal scheme in question because Mr. Taylor 'ha[s] not asked for anything that Congress did not intend for the statute to provide' and 'all of the substantive qualifying requirements were met.'" Claimant En Banc Br. at 35 (quoting *Brush v. Off. of Pers. Mgmt.*, 982 F.2d 1554, 1562-63 (Fed. Cir. 1992)). Even if there could be some doubt as to Congress's intent to permit judicial power to encompass equitable estoppel against the Government in a different context, in

veterans benefits cases the normal presumption in favor of sovereign immunity simply does not apply.

For these reasons, The American Legion requests that this Court reverse the judgment of the Veterans Court.

Respectfully submitted,

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Certificate of Service

I hereby certify that Amicus's Brief was served on counsel of record by electronic service under the Court's CM/ECF system on October 1, 2021.

/s/James D. Ridgway
James D. Ridgway

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1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The brief contains 3,379 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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/s/James D. Ridgway
James D. Ridgway

October 1, 2021