No. 2022-1264

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

JEREMY BEAUDETTE
MAYA BEAUDETTE,

Claimants-Appellees,

v.

DENIS MCDONOUGH
Secretary of Veterans Affairs,

Respondent-Appellant.

REPLY BRIEF FOR RESPONDENT-APPELLANT

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February 16, 2023

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REPLY BRIEF FOR RESPONDENT-APPELLANT

Claimants-appellees Jeremy and Maya Beaudette have not established that the term "medical determination" refers to anything but a preexisting Department of Veterans Affairs (VA) regulation explicitly exempting "medical determinations" from review by the Board of Veterans' Appeals (board). *See* 38 C.F.R. § 19.3(b) (1983); 38 C.F.R. § 20.104(b) (2019). The Beaudettes assert that the phrase refers to the colloquially-named *Colvin* rule and echo the Court of Appeals for Veterans Claims's (Veterans Court) underbaked pronouncements on various canons of statutory construction, but these arguments, as well as the Beaudettes' sundry other contentions, fail. Accordingly, this Court should reverse the writ of mandamus issued by the Veterans Court.

ARGUMENT

The Beaudettes allege that the text, structure, and history of the statute do not indicate Congress's intent to proscribe board review of decisions pertaining to the Program of Comprehensive Assistance for Family Caregivers (PCAFC).[1] *See* Beaudette Br. at 18, 32, 35. But this contention ignores that the very phrase "medical determination," lifted verbatim from an existing regulation, serves as clear indication of Congress's intention to insulate PCAFC decisions from board review. It also cannot be squared with Congress's presumed pre-enactment knowledge of the VA regulation and its declination, in the face of actual knowledge of VA's interpretation, to amend the Caregiver Act to explicitly provide for board review of PCAFC decisions, despite at least two conspicuous opportunities to do so.[2]

Even if the statute's language, history, and structure could be fairly read as relatively quiet on whether to exempt PCAFC decisions from board review, the

[1] The Caregiver Act also established the Program of General Caregiver Support Services (PGCSS) at 38 U.S.C. § 1720G(b), but for ease of reference, and because the Beaudettes participated in PCAFC, we refer mainly to PCAFC for purposes of this brief.

[2] To the extent the Beaudettes argue that Congress would have amended section 1720G(c) in 2018 or 2020 if it wanted to clarify that PCAFC decisions are medical determinations insulated from board review, *see* Beaudette Br. at 28, there would have been no reason to do so because VA was already interpreting and implementing the statute in accordance with Congress's intention.

silence is deafening regarding Congress's purported intent that "medical determination" refer to the *Colvin* rule. And, despite the Veterans Court's refusal to "settle on a definitive reading of section 1720G(c)(1),"[3] Appx7, this Court must engage with the meaning of "medical determination" in order to render a meaningful decision on the interpretation of section 1720G(c)(1); subsection (c)(1), deliberately included by Congress, is not simply a redundancy or throwaway phrase that can be rendered a nonentity.

I. The Term "Medical Determination" Cannot Be Rendered Mere Surplusage, And Makes Sense Only If Referring To The VA Regulation

As Judge Falvey astutely noted in dissent, VA's "construction of section 1720G is the ***only*** interpretation that gives effect to all the statute's provisions and presumes that Congress understands the implications of its words." Appx12 (emphasis added). Nonetheless, and even though the Beaudettes' interpretation "either disregards the language of [the statute] or assumes that Congress did not know the regulatory meaning of 'medical determination' when enacting section 1720G," *id.*, they insist that the term "medical determination" refers to a standard set forth by the Veterans Court in *Colvin v. Derwinski*, 1 Vet. App. 171, 175

[3] The Beaudettes mischaracterize the Veterans Court's failure to engage with the meaning of "medical determination" as judicial restraint, claiming that the issue was not squarely before the court. Beaudette Br. at 43. But the parties' briefs below demonstrate the inaccuracy of this claim, as both parties addressed *Colvin* in detail. Appx60, Appx72-73, Appx1401-1402.

(1991), *overruled on other grounds by Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1988)). *See* Beaudette Br. at 39-43.[4] This argument does not pass muster.

"It is a cardinal principle of statutory construction that a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *TRW Inc. v. Andrews*, 534 U.S. 19, 31 (2001) (cleaned up); *see also Duncan v. Walker*, 533 U.S. 167, 174 (2001) ("This Court's duty [is] to give effect, if possible, to every clause and word of a statute") (cleaned up); *Sharp v. United States*, 580 F.3d 1234, 1238 (Fed. Cir. 2009) (rejecting interpretation that would violate the canon against surplusage). Consequently, section 1720G(c)(1), which is centered around the phrase "medical determination," must be interpreted in a manner giving it true effect and not rendering it meaningless.

VA's interpretation is the only one consistent with the canon against surplusage, the presumed and actual awareness of Congress, and, frankly, common

[4] The Beaudettes indicate in a section heading that we must show by "clear and convincing evidence" that "medical determinations" refers to the VA regulation rather than the *Colvin* rule. Beaudette Br. at 38. But this standard applies to statutory intent to withhold judicial review and only applies when substantial doubt about Congressional intent exists, *see Block v. Comm. Nutrition Institute*, 467 U.S. 340, 350-51 (1984), not to the canon against surplusage or to the presumption of Congressional awareness, which are the interpretive tools applicable to determining the meaning of "medical determination."

sense. The Beaudettes, understanding that subsection (c)(1) must have significance, posit that Congress intended the subsection to refer to the *Colvin* rule, which does not employ, anywhere, the term "medical determination." Puzzlingly, they contend that subsection (c)(1) stands for the proposition that the board is required to consider only independent medical evidence to support its findings rather than provide its own medical judgment. *See Colvin*, 1 Vet. App. at 175. This argument is untenable.

First, the Beaudettes attempt to highlight the import of the *Colvin* rule, calling it a "groundbreaking" safeguard. Beaudette Br. at 40-41. But the importance of *Colvin* fails to shed light on why Congress would have referenced it in section 1720G(c)(1).[5] Indeed, the Beaudettes' position begs the question of why, if Congress had intended to codify the *Colvin* rule, it would have done so ***only*** in the context of the Caregiver Act. Put another way, if Congress had found it necessary to mandate application of the *Colvin* rule through the use of the term "medical determination" in section 1720G(c)(1), it surely would have included such a mandate in ***all*** post-*Colvin* statutes governing decisions subject to board review. Congress cannot have intended to require *Colvin* to apply only to

[5] This stands in stark contrast to the interpretation that "medical determination" refers to the VA regulation; with that, the purpose is clear—to exempt PCAFC decisions from board review.

decisions under section 1720G, while giving free rein to the board to disregard *Colvin* in other contexts.

The Beaudettes try to brush away our point that *Colvin* does not use the term "medical determination," mentioning that the Veterans Court has "consistently" employed that phrase in subsequent decisions invoking the *Colvin* rule. Beaudette Br. at 41-42. As an initial point, it appears that, pursuant to a legal database search, of the approximately 1,429 Veterans Court cases citing the *Colvin* rule, only 293 of those cases use that term anywhere at all in the decision.[6] Such a low percentage can hardly be called "consistent," or serve as reason to believe Congress intended "medical determination" to refer to *Colvin*. If Congress had wanted *Colvin* to apply to PCAFC decisions, it would have either referred explicitly to the *Colvin* rule or at least used the operative terminology from *Colvin* by stating that the board must use "independent medical evidence" or that the board may not draw its own "unsubstantiated medical conclusions." *Colvin*, 1 Vet. App. 171, 175.

The Beaudettes contend that Congress must have intended to refer to the *Colvin* rule because it is important to the functioning of PCAFC; to the Beaudettes' mind, without "medical determination" referring to *Colvin*, the board could decide

[6] We searched Westlaw for all Veterans Court cases citing *Colvin*, then narrowed those results to only those employing the term "medical determination" or "medical determinations."

that certain PCAFC issues are not medical in nature and then "substitute its own judgment . . . despite contrary medical evidence in the record." Beaudette Br. at 42. But because the adjudicatory requirement set by *Colvin* ***already applies*** to all board determinations, construing the term "medical determination" as a reference to *Colvin* would serve no purpose if we were to presume, as the Beaudettes do, that PCAFC determinations are subject to board review.

In addition, the Beaudettes' interpretation of "medical determination" would lead to an absurd outcome where all PCAFC decisions, even ones not implicating medical evidence, must be supported with "independent medical evidence." For instance, section 1720G(a)(4) requires the submission of a joint application, and section 1720G(a)(6)-(7) mandates that a provider of personal care services under PCAFC must be a "family member" of the eligible veteran, as that term is defined in section 1720G(d)(3)(B). 38 U.S.C. §§ 1720G(a)(4), (a)(6)-(7), (c)(1), (d)(3). By the Beaudettes' logic, any decision rendered by the board regarding whether a joint application had been submitted or whether a caregiver applicant is a family member of the veteran would have to be supported with "independent medical evidence"—an absurd result. In contrast, it makes perfect sense for Congress to have construed all PCAFC decisions affecting the furnishing of assistance and support as "medical determinations" in the context of the VA regulation, because

Congress's intent was to exempt ***all*** such decisions, even those that do not obviously involve medical aspects, from the board's purview.

Significantly, the tools of statutory construction invoked by the Beaudettes and the Veterans Court—namely, the inter-statutory comparison with 38 U.S.C. § 1703(f), the presumption favoring judicial review, and the disfavoring of repeals by implication—can either be reconciled or, at worst, do not favor the Beaudettes' interpretation over VA's. But the cardinal principle that every statutory clause should have meaning and not be rendered superfluous can ***only*** support the interpretation that "medical determination" refers to the VA regulation insulating medical determinations from board review.

II. The Beaudettes' Comparison Of 38 U.S.C. §§ 1720G And 1703 Is Unpersuasive

Like the Veterans Court, the Beaudettes cite 38 U.S.C. § 1703(f)—a statute amended in 2018 to establish the Veterans Community Care Program (VCCP) and explicitly prohibits board review of certain VCCP decisions—to show that Congress could have also explicitly stated that PCAFC decisions are not subject to board review. Beaudette Br. at 25-28. In doing so, they downplay the large temporal gap between the passage of the two statutes. *Id*. at 27. But the issue is not solely one of an eight-year interval between the enactment of the statutes—it is also the difference in context, which is illustrated by the temporal gap.

While courts often give significance to the presence of certain language in one statute that is absent in another statute, "[c]ontext always matters." *Dermark v. McDonough*, 57 F.4th 1374, 1380-81 (Fed. Cir. 2023) (citing *Artis v. District of Columbia*, 138 S. Ct. 594, 603-04 (2018)). And, even when interpreting differences between parts of a ***single*** statute (not the case here), "courts give effect to clear differences in context to identify which of the available meanings is the right one for a particular setting[.]" *Id.* (citing *Return Mail, Inc. v. U.S. Postal Serv.*, 139 S. Ct. 1853, 1863 (2019) (requiring different meanings "when a statutory term is used throughout a statute and takes on distinct characters in distinct statutory provisions.") (cleaned up). Indeed, "Congress need not, and frequently does not, use the same term to mean precisely the same thing in two different statutes, even when the statutes are enacted at about the same time." *Sec. Indus. Ass'n v. Bd. of Governors of Fed. Rsrv. Sys.*, 468 U.S. 137, 174-75 (1984).

Here, the context surrounding the two statutes demonstrates why Congress would have chosen to explicitly forbid board review in section 1703(f), while simply referring to PCAFC decisions as "medical determinations" in section 1720G(c)(1), but still intended the same result for both. As an initial matter, it makes little sense to view Congress's decisions in drafting section 1720G(c)(1) in light of the language it selected for section 1703(f), as the latter did not exist at the time section 1720G was enacted.

More importantly, Congress reasonably employed less explicit language in enacting section 1720G in 2010 because, in establishing PCAFC (and PGCSS), it created unprecedented and novel programs for caregivers and so had no need to wrestle with any precedent or preconceived notions based on earlier similar programs. Contrastingly, VA's provision of health care through non-VA providers was not a new practice by the time the VCCP was established. And, indeed, under the VCCP's predecessors, decisions concerning community care eligibility were ***actually reviewable by the board***. *See, e.g.*, VHA Directive 1700, *Veterans Choice Program* (Oct. 25, 2016), § 2.e, *available at* https://www.va.gov/vhapublications/ViewPublication.asp?pub_ID=3287 ("Appeals regarding eligibility for VCP are considered administrative appeals and should follow the process in VHA Directive 1032, Health Benefit Appeals Processing, or subsequent policy").[7] Thus, it made sense for Congress to be more explicit in stating that VCCP decisions are not subject to board appeal; doing so removed any potential confusion for veterans who had experience with VCCP's predecessors and thus had preexisting expectations about the ability to appeal to the board.

[7] VHA Directive 1032 provided "guidance regarding Health Benefit Appeals and certification of such appeals to the Board of Veterans' Appeals." VHA Directive 1032 (2013), *attached as* Exhibit A.

In addition, even a cursory comparison between sections 1703(d)-(e) and 1720G reveals that, by and large, section 1703(d)-(e) sets forth more objective standards not requiring clinical expertise or "judgmental treatment decisions." 38 C.F.R. § 20.104(b); *see also* Govt. Br. at 34 (giving examples of decisions made under the VCCP). Section 1720G, on the contrary, requires judgmental treatment decision-making for much of its eligibility criteria, such as determining whether the veteran is in need of personal care services based on various factors.[8] *See* 38 U.S.C. § 1720G(a)(2)(C).

Finally, the Beaudettes also point to the fact that the title for section 1703(f) is "Review of Decisions," while section 1720G(c) is titled "Construction." Beaudette Br. at 29. They claim that section 1720G(c) being titled "Construction" supports their conclusion that the phrase "medical determination" is unrelated to board review. Beaudette Br. at 29. But the general words of a heading do not control the more specific words of the actual statutory language. *See, e.g., United States v. Roemer*, 514 F.2d 1377, 1380 (2nd Cir. 1975) (citing *Brotherhood of R.R. Trainmen v. Baltimore & O.R. Co.*, 331 U.S. 519, 528 (1947) ("headings and titles

[8] We are not suggesting that all criteria set forth in section 1720G require clinical expertise or judgmental treatment decisions, or that none of the criteria in section 1703(d)-(e) are clinical in nature. Rather, we point out the clear contrast between the criteria in the two statutes to illustrate why Congress may have determined a more explicit statement was necessary to exempt section 1703(d)-(e) decisions from board review.

are not meant to take the place of the detailed provisions of the text. Nor are they necessarily designed to be a reference guide or a synopsis.")). Indeed, for interpretive purposes, a heading is of use "only when it sheds light on some ambiguous word or phrase." *Pa. Dep't of Corrs. v. Yeskey*, 524 U.S. 206, 212 (1998).

Here, section 1720G(c) consists of multiple provisions directing the manner in which the statute must be construed, and only one of those provisions involves appeals; it would have made no sense for Congress to use a heading that does not apply to the subsection as a whole. In addition, unlike in *Henderson v. Shinseki*, 562 U.S. 428 (2011), there was no more appropriate heading or section under which to place the "medical determination" clause.

III. Post-Enactment Developments Support VA's Interpretation

While true that pre-enactment legislative history provides no indicia of Congress's intent, post-enactment activity clearly reveals Congress's understanding as accordant with VA's interpretation, particularly in light of the multiple opportunities to amend the Caregiver Act to refute VA's interpretation and the decision not to do so. "If Congress had intended the opposite result [of the agency's interpretation], it would have said so." *Nat'l Federation of the Blind v. Fed. Trade Comm'n*, 420 F.3d 331, 337 (4th Cir. 2005).

Post-enactment history generally cannot serve to contradict a legislative intent expressed pre-enactment, but it still has interpretive value, particularly when that history is consistent with the statutory language and legislative history. *See, e.g.*, *Grove City College v. Bell*, 687 F.2d 684, 695 (3rd Cir. 1982) ("Although postenactment developments cannot be accorded the weight of contemporary legislative history, we would be remiss if we ignored these authoritative expressions") (quoting *North Haven Bd. of Ed. v. Bell*, 456 U.S. 512, 535 (1982)); *Wilshire Westwood Associates v. Atlantic Richfield Corp.*, 881 F.2d 801, 808 (9th Cir. 1989). Here, post-enactment activity is entirely consistent with the language of the statute and VA's interpretation.

In our brief, we demonstrated Congress's awareness of VA's interpretation, demonstrated by direct statements[9] and reports to Congress from VA, as well VA's published final rules. *See* Govt. Br. at 30-31. But, should this Court still doubt that Congress was aware of VA's interpretation, further post-enactment activity must correct that misimpression.

[9] The Beaudettes protest our reliance on the 2011 written response to Congress, in which VA directly informed a House subcommittee that PCAFC decisions may not be appealed to the board, contending that VA's earlier testimony created confusion because VA explained that, "[i]f the family is still uncomfortable with that decision, we will bump it up to . . . eventually the Central Office, where we will convene a board to re-review." Beaudette Br. at 45-46. But the "board" referred to in the statement is clearly not the Board of Veterans' Appeals (which does not convene at a Central Office), and there is no conflict with VA's clear assertion that PCAFC decisions are not appealable to the board.

In 2014, Senator Burr, ranking member of the Senate Committee on Veterans' Affairs, pointed to the lack of a "formal process to appeal [PCAFC] decisions" as what he felt was a problem, noting that the appeals process for PCAFC is "vastly different from the appeals process at VBA, the Veterans Benefit Administration . . . VSOs have been told that VA considers it a medical decision and they cannot question the denial." 160 Cong. Rec. 3121, 3136-38 (2014), *available at* https://www.govinfo.gov/content/pkg/CRECB-2014-pt3/pdf/CRECB-2014-pt3-Pg3121-3.pdf. The next day, Senator Burr read aloud from a letter by the Wounded Warrior Project (WWP), quoting WWP as believing that VA's PCAFC regulation "leave[s] 'appeal rights' unaddressed. . . . Simply extending the scope of current law at this point to caregivers of other veterans would inadvertently ***signal to VA acquiescence in its flawed implementation of that law***." 60 Cong. Rec. 3327, 3347 (2014), *available at* https://www.govinfo.gov/content/pkg/CRECB-2014-pt3/pdf/CRECB-2014-pt3-Pg3327-2.pdf. (emphasis added).

While Senator Burr expressed concerns with VA's appeals process for PCAFC decisions, he made clear the understanding that those decisions are appealed in a different manner from Veterans Benefits Administration decisions, which are appealable to the board and Veterans Court. Moreover, even after an explicit warning from WWP to Congress that amending the Caregiver Act without addressing VA's approach to appeals of PCAFC decisions would signal

Congress's acquiescence to VA's interpretation, Congress ***still*** chose not to "correct" this interpretation, indicating that VA's interpretation was already consistent with Congress's original intention.

In addition, at a 2011 hearing before the House Committee on Veterans' Affairs, Subcommittee on Health, certain veterans service organizations testified with regard to VA's interim final rule implementing section 1720G. *See Implementation of Caregiver Assistance: Moving Forward: Hearing Before the H. Subcomm. on Health of the H. Comm. on Veterans' Affairs*, 112th Cong. 1 (2011); *available at* https://www.govinfo.gov/content/pkg/CHRG-112hhrg68452/pdf/CHRG-112hhrg68452.pdf. During that hearing, WWP stated that the interim final rule did not provide the right to appeal to the board ("VA claimants are barred from obtaining judicial or even administrative review (through the Board of Veterans Appeals)") and urged that the final rule make clear that Congress ***did not*** intend all PCAFC decisions to be insulated from board review. *Id*. at 69-70. VA then specified in the final rule that PCAFC decisions "may not be adjudicated in the standard manner as claims associated with veterans' benefits." 80 Fed. Reg. 1,357, 1,366 (Jan. 9, 2015). Congress still elected not to amend the Caregiver Act in a manner refuting VA's interpretation.

Post-enactment activity, including VA's direct statements to Congress, VA's final rules, statements to Congress by veterans service organizations, and explicit

statements by a committee member, clearly establishes Congressional awareness regarding VA's interpretation of section 1720G(c)(1) as insulating PCAFC decisions from board review. And "[w]here an agency's statutory construction has been fully brought to the attention of the public and the Congress, and the latter has not sought to alter that interpretation although it has amended the statute in other respects, then presumably the legislative intent has been correctly discerned." *North Haven*, 456 U.S. at 535 (cleaned up); *see also Lorillard v. Pons*, 434 U.S. 575, 580 (1978) (Congress is "presumed to be aware of an administrative or judicial interpretation of a statute and to adopt that interpretation when it re-enacts a statute without change.") (citations omitted)); *Schism v. United States*, 316 F.3d 1259, 1295 (Fed. Cir. 2002) (collecting cases). These multiple statements and the public controversy stemming from veterans' service organizations constitute indicia of Congress's attention to VA's interpretation of "medical determinations." *See Butterbaugh v. Dept' of Justice*, 336 F.3d 1332, 1342 (Fed. Cir. 2003).

As described in our opening brief, Congress issued two amendments to the Caregiver Act; these amendments provided clear opportunities for Congress to refute VA's interpretation. Govt. Br. at 6-8, 31-32, 35. Because Congress had knowledge of VA's statutory construction of section 1720G(c)(1), but did not alter VA's interpretation despite amending the statute in numerous other respects, we

can reasonably conclude that VA had "correctly discerned" Congress's intent.[10] *See North Haven*, 456 U.S. at 535.

Finally, there is no hint that Congress understood "medical determination" to refer to *Colvin* or that it was aware that the term could even be interpreted as referring to *Colvin*, at least until the issuance of the Veterans Court's decision currently on appeal. And, at that point, Congress made very clear its disagreement with the Veterans Court's interpretation. Just three months after issuance of the decision, legislation was introduced to overturn the effects of that decision.[11] This legislation called for amending section 1720G(c)(1) to clarify that "[t]he review of any decision under [section 1720G] shall be subject to the clinical appeals process of the Department, and such decisions ***may not be appealed to the Board of Veterans' Appeals***." H.R. 4625, 117th Cong. § 2 (2021), *available at* https://www.congress.gov/117/bills/hr4625/BILLS-117hr4625ih.pdf.

In discussing the proposed amendment, Congressman Bost stated that it "***would clarify long-established Congressional intent*** by stipulating that appeals

[10] Notably, during the 2018 amendment, Congress directed VA to monitor and assess data on "the status of applications, ***appeals***, and home visits in connection with [PCAFC]" using a new information technology system. Pub. L. 115-182, § 162(c)(1)(A) (emphasis added). So, despite touching on the subject of appeals, Congress did not act to rebut VA's interpretation.

[11] The bill did not ultimately reach a full Congressional vote during the operative legislative session.

for the family caregivers program go through the VA's clinical appeals process, not through the Board of Veterans Appeal." H. Comm. On Veterans' Affairs, Full Comm. Markup (July 28, 2021), *available at* https://democrats-veterans.house.gov/events/hearings/07/23/2021/full-committee-markup (starting at 1:08:80) (emphasis added). Congressman Takano additionally proclaimed that the bill "will help make clear that it is Congress's intent that the Program of Comprehensive Assistance for Family Caregivers be administered as a clinical program, not as a benefit." *Id*. (starting at 1:07:33). The Court would be remiss in ignoring relevant post-enactment developments, as they are consistent with VA's interpretation of the statutory language and refute the Beaudettes' interpretation.

IV. The Beaudettes' Remaining Arguments Fail

A. Other Canons Of Construction Cannot Overcome The Clear Meaning Of "Medical Determination" And Evidence Of Congressional Intent

In discussing the issues above, we have already touched on the other canons of construction relied on by the Veterans Court and the Beaudettes: the presumption favoring judicial review and the disfavoring of repeals by implication. These canons cannot overcome the plain language of the statute and the significance of the term "medical determination," which can only rationally refer to the VA regulation exempting medical determinations from board review. It is axiomatic that the best evidence of Congressional intent is the plain meaning of the

statutory language itself. *See, e.g., Jimenez v. Quarterman*, 555 U.S. 113, 129 (2009); *Park 'N Fly, Inc. v. Dollar Park & Fly, Inc.*, 469 U.S. 189 (1985). The Beaudettes simply cannot show that Congress meant the statutory language to refer to anything other than the regulation.

The Beaudettes also urge an application of the presumption favoring judicial review that would render that presumption nigh irrebuttable in the absence of explicit language prohibiting such review. This is not the standard. Rather, as the Beaudettes acknowledge, it is only to the extent there is genuine ambiguity regarding the meaning of a statutory provision that the ambiguity may be resolved in favor of allowing judicial review. *See* Beaudette Br. at 30 (citing *Salinas v. U.S. R.R. Ret. Bd.*, 141 S. Ct. 691, 698 (2021)). Here, the standard tools of interpretation allow the Court to resolve the meaning of "medical determination" in our favor without "wav[ing] the ambiguity flag." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2415 (2019) (*Kisor I*); accordingly, there is no reason to consider the presumption, which, by the Beaudettes' own admission, applies when ambiguity is found. But even if this Court considers the presumption, it may still be rebutted whenever Congressional intent is "fairly discernible in the statutory scheme." *Block*, 467 U.S. at 350-51. The legislative intent behind the term "medical determination" is, at the very least, "fairly discernible."

The Beaudettes' arguments regarding repeal by implication also fail. First, they have not established that the VJRA and section 1720G(c)(1) are incapable of co-existence. But the VJRA, which post-dates the VA regulation, has always implicitly accounted for the fact that medical determinations are not subject to board review. *See, e.g., Gebhart v. Nicholson*, 154 F. App'x 207, 209 (Fed. Cir. 2005); *Meakin v. West*, 11 Vet. App. 183, 187 (1998). Section 1720G(c)(1) only makes clear that PCAFC determinations are to be construed as medical determinations for that same purpose. There is no reason to find the statute, which refers to a VA regulation—predating the VJRA and still in good effect—irreconcilable with the VJRA. Moreover, "a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment." *Morton v. Mancari*, 417 U.S. 535, 550-51 (1974) (cleaned up). It is beyond doubt that section 1720G is more specific in nature than the VJRA. The Beaudettes' argument also assumes that, if the two statutes are not capable of co-existence, then repeal by implication should ***not*** be found. But they have it backwards—should the Court determine the statutes irreconcilable, then section 1720G, as the statute enacted later in time and more specific, "constitutes an implied repeal of the earlier one[,]" at least to the extent necessary.[12] *Neptune Mut. Ass'n, Ltd. of Bermuda*, 862 F.2d 1546, 1551 (Fed. Cir. 1988).

[12] We by no means suggest that the VJRA is repealed in its entirety by

Finally, the Beaudettes refer to VA's interpretation as withdrawing an entire veterans benefits program from judicial review, and assume Congress cannot have intended such a result. Beaudette Br. at 37. But, as discussed elsewhere in this brief, the PCAFC differs from other veterans' benefits programs, such as the program regarding compensation for service-connected disabilities. *See* 38 U.S.C. § 1155; 38 C.F.R.§ 3.321(a). Indeed, section 1720G(c)(2)(B) specifies that the PCAFC shall not be construed to create "any entitlement to any assistance or support provided under this section." There is no reason to doubt Congress's intention to insulate PCAFC and PGCSS from board review.

B. *Chevron* Deference Applies If The Court Finds The Statute Ambiguous

The Court should determine, without resorting to a finding of ambiguity, that Congress intended "medical determination" to refer to the VA regulation and exempt PCAFC decisions from board review. But, should the Court find the statute ambiguous, it should reject the Beaudettes' argument that VA is not due deference under *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984).

The Beaudettes' primary argument is that Congress did not intend to "delegate to VA the authority to determine when judicial review of benefit

section 1720G(c)(1).

decisions under the Caregiver Program should be available." Beaudette Br. at 49. But they mistake both the ambit of authority granted by Congress to VA and the question of what authority need be considered in determining whether to grant deference.

Not only has Congress granted VA express statutory 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, including . . . the manner and form of adjudications and awards[,]" 38 U.S.C. § 501(a)(4), it also specifically charged VA with establishing the PCAFC. *See* 38 U.S.C. § 1720G(a)(1)(A). And the appropriate question is not whether Congress delegated to VA the authority to determine when judicial review should be available, but whether Congress delegated to VA the authority of prescribing regulations to carry out PCAFC, which includes construing section 1720G(c)(1). Accordingly, if this Court determines the statutory language is ambiguous, it should defer to VA's interpretation, as set forth in its final rules.

C. The Court Need Not Consider The Veterans Canon And, If It Does, Should Not Consider It Over Agency Deference

The Beaudettes appear to concede that the veterans canon cannot be considered unless the statute is, at the very least, ambiguous. Beaudette Br. at 47. Because this Court should determine that Congress intended "medical determination" to refer to the VA regulation without resorting to a finding of

ambiguity, this Court need not look to the veterans canon. *See Kisor v. McDonough*, 995 F.3d 1316, 1325-26 (Fed. Cir. 2021) (*Kisor II*); *Nielson v. Shinseki*, 607 F.3d 802, 805 (Fed. Cir. 2010).

But, even if this Court determines the statute ambiguous, the veterans canon does not invalidate the agency's interpretation merely because the Beaudettes believe another interpretation is more favorable to them. *See, e.g., Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003) ("we 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."); *Nielson*, 607 F.3d at 808 ("The mere fact that the particular words of the statute . . . standing alone might be ambiguous does not compel us to resort to the [veterans] canon."). Indeed, the Supreme Court recently stated that, ***if*** the text and structure of statute already favored the veteran, then the "nature of the subject matter would garnish an already solid argument." *Arellano v. McDonough*, 143 S. Ct. 543, 552 (2023). Here, the text and structure do not favor the Beaudettes, and the veterans canon should not be used to garnish their arguments.

Moreover, as illustrated by *Kisor v. McDonough*, 995 F.3d 1347 (Fed. Cir. 2021) (*Kisor III*), neither this Court nor the Supreme Court has held that the veterans canon should be applied before deferring to an agency interpretation. *Id.* at 1358. Indeed, this Court has indicated that, when certain preconditions are met,

VA is owed deference without resort to the veterans canon. *Id*. at 1360 (Hughes, J., concurring) ("if the conditions for [ ] deference are met, then the VA is entitled to deference, without resort to the pro-veteran canon"); *see also, e.g.*, *Smith v. Shinseki*, 647 F.3d 1380, 1385 (Fed. Cir. 2011); *Smith v. Nicholson*, 451 F.3d 1344, 1349–51 (Fed. Cir. 2006); *Sears*, 349 F.3d at 1331–32. As the concurrence in *Kisor III* noted:

> To hold that the pro-veteran canon applies at any earlier step in the *Chevron* or *Auer* analysis is to hold that the VA, alone among the executive agencies, is not entitled to deference in interpreting its regulations and the statutes Congress has charged it with administering. This position would be anomalous to say the least and has been flatly rejected by this court.

Kisor III, 995 F.3d at 1361 (Hughes, J., concurring). This Court should not accept a presumption that the veterans canon negates deference to agency interpretation.

D. Mandamus Was Not Appropriate

As we argued in our opening brief, the Veterans Court erred in holding that the Beaudettes satisfied the conditions for entitlement to mandamus and impermissibly expanded its jurisdiction by granting the writ; the Beaudettes, of course, disagree.

Putting aside the issue of whether they had a "clear and indisputable right to a writ," the Beaudettes primarily contend that 38 U.S.C. § 502 did not prevent the Veterans Court from issuing a writ and that they were "forced" to seek mandamus

because they did not have alternative means of relief. Beaudette Br. at 54-59. Both assertions are incorrect.

The Beaudettes first assert that we have waived the right to make a section 502 argument because VA did not challenge the Veterans Court's jurisdiction below.[13] [14] *Id.* at 54. To the extent that the Court construes this issue as jurisdictional, it is axiomatic that jurisdiction can be raised at any time and cannot be forfeited or waived. *See, e.g., St. Bernard Parish Gov't v. United States*, 916 F.3d 987, 992-93 (Fed. Cir. 2019). In any event, waiver is a prudential matter, and appellate courts are "given the discretion to decide when to deviate from this general rule of waiver." *Interactive Gift Exp., Inc. v. Compuserve Inc.*, 256 F.3d 1323, 1344 (Fed. Cir. 2001). Because the issue involves a pure question of law that presents a significant question of general impact with regard to veterans law, there exists ample justification for addressing it. *Id.* at 1344-45 (collecting cases and giving examples of reasons to deviate from the waiver rule). Moreover, it is

[13] VA did challenge the Veterans Court's jurisdiction, Appx1391, it just did not specifically invoke section 502.

[14] The Beaudettes appear to suggest that we have waived only the section 502 argument, and not our overall argument as to whether they have satisfied the elements for entitlement to a writ of mandamus. To the extent the Court reads their argument differently, there is no waiver because the Veterans Court explicitly stated that the Beaudettes have established a "lack of an adequate administrative means of securing that right[.]" Appx8.

critical to clarify the proper roles of this Court and the Veterans Court in reviewing challenges under 38 U.S.C. § 502.

With regard to the Beaudettes' substantive arguments regarding section 502, the fact that 38 U.S.C. § 1720G(c)(1) renders PCAFC decisions unappealable to the board does not mean that their only other option was to petition for a writ of mandamus. VA interpreted—via rulemaking—38 U.S.C. § 1720G(c)(1) as rendering PCAFC decisions unappealable to the board. Review of such rulemaking "may be sought only" before this Court. 38 U.S.C. § 502. Thus, the Beaudettes are incorrect insofar as they assert that their only option to bring a challenge to VA's interpretation before a Court was to petition for a writ of mandamus. *See* Beaudette Br. at 59.

The Beaudettes further mischaracterize the process for bringing an Administrative Procedure Act challenge to this Court by claiming that, to file a section 502 petition, they would have had to first submit a rulemaking petition to VA. *Id*. This assumption is incorrect. VA issued two final rules, in 2015 and 2020, implementing section 1720G and making clear that it would exempt PCAFC decisions from board review. *See* Govt. Br. at 6-7. That the Beaudettes decided not to bring a section 502 challenge to one of these final rules does not

mean that they were ***unable*** to, or that a petition pursuant to section 502 is not an adequate means for obtaining relief.[15]

Section 502 also authorizes regulatory challenges at the Veterans Court "in connection with an appeal brought under the provisions of chapter 72[,]" *i.e.*, challenges to regulations ***as applied in a final board decision***.[16] The Beaudettes did not bring such an appeal to the Veterans Court. Instead of seeking a writ compelling VA to issue a statement of the case (or subsequently, to compel any inaction by the board in issuing a decision regarding its jurisdiction to consider the Beaudettes' PCAFC eligibility), which would have been the proper remedy had "VA cut off the entire VJRA appeal path," Beaudette Br. at 59, the Beaudettes bypassed the regular appeals process and brought a direct, sweeping challenge to VA's interpretation of section 1720G(c)(1), formalized in its final rules, via their petition for writ of mandamus.

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[15] Indeed, it appears unlikely the Beaudettes are time-barred from challenging VA's 2020 rulemaking as of the date of this brief.

[16] The Beaudettes statement that section 502 does not set forth an exclusive method for a challenge to the validity of a VA regulation, Beaudette Br. at 55, obscures that the Veterans Court's scope of review under section 7261 is limited to review which is "sought in connection with an appeal brought under [38 U.S.C. Chapter 72]." 38 U.S.C. § 502. Moreover, this Court has interpreted section 7261 as authorizing Veterans Court review where the court "already has jurisdiction by virtue of a timely appeal from a final board decision[.]" *Mayer v. Brown*, 37 F.3d 618, 620 (Fed. Cir. 1994).

This Court has been clear that the All Writs Act (AWA) does not expand the jurisdiction of the Veterans Court. *See In re Fee Agreement of Wick*, 40 F.3d 367, 373 (Fed. Cir. 1994). Yet the Veterans Court elected to disregard the limits of its authority and, at most, order VA to issue a statement of the case. In rendering a decision on the validity of VA's interpretation of section 1720G(c)(1), the Veterans Court exceeded its jurisdiction, displacing this Court's authority to review VA's regulations, and interpreting a question of law outside the confines of an individual benefits decision.

Had the Beaudettes brought an "as applied" challenge to the Veterans Court, that Court may have reached the same outcome regarding VA's interpretation of section 1720G(c)(1). It is nevertheless necessary to note that Congress did not assign the same jurisdictional roles to this Court and the Veterans Court in reviewing legal challenges under 38 U.S.C. § 502. A petition to this Court is the only means Congress created for challenging the validity of regulations outside the facts of a specific case. This Court should set aside the attempts by the Beaudettes and the Veterans Court to create another.

V. The Arguments Of Amici Curiae Are Unconvincing[17]

Amicus Curiae Vietnam Veterans of America (VVA) suggests that there is a

[17] We also disagree with multiple factual and policy-related assertions made by amici curiae.

distinction between determinations of eligibility for veterans and caregivers, with only eligibility of the latter constituting a medical determination. VVA Br. at 7-8. The basis for this argument is unclear, but, in any event, the plain language of section 1720G(c)(1) applies to all decisions affecting the furnishing of assistance or support, not just decisions regarding caregiver eligibility. Subsection (c)(1) thus naturally covers eligibility decisions that hinge on the medical situation of the veteran.

Amicus Curiae National Law School Veterans Clinic Consortium (NLSVCC) contends that board review is necessary to "ensure due process." NLSVCC Br. at 22-23. And, while the Beaudettes do not explicitly assert a due process argument, they claim that judicial review is "an important safeguard" against VA's wrongfully PCAFC eligibility decisions. Beaudette Br. at 47-48. But neither NLSVCC nor the Beaudettes provide any support for the position that not allowing board review of PCAFC decisions would violate the due process rights of veterans and caregivers, or that judicial review of all agency decisions is required in order to satisfy due process requirements.

The "core of due process is the right to notice and a meaningful opportunity to be heard." *LaChance v. Erickson*, 522 U.S. 262, 266 (1998). And "[t]he first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Int'l Custom Prod., Inc. v. United*

States, 791 F.3d 1329, 1337 (Fed. Cir. 2015) (quoting *Am. Mfrs. Mut. Ins. Co. v. Sullivan*, 526 U.S. 40, 59 (1999)). The Beaudettes have never claimed that the inability to appeal to the board violates any right to notice. And, with regard to a meaningful opportunity to be heard, we explained in our brief that the Veterans Health Administration (VHA) clinical appeals process provides two distinct levels of review beyond the initial PCAFC decision. Govt. Br. at 8-10. To the extent the Beaudettes have a due process right to have their PCAFC decision heard at all,[18] the VHA clinical appeals process would certainly satisfy that right. And, while NLSVCC touts the need for an impartial adjudicator, NLVSCC Br. at 22, as we stated previously, VA updated the clinical appeals process in 2020 to ensure that appeals are conducted by medical professionals who were not involved in the decision being disputed. Govt. Br. at 9-10.

[18] Presumably, the Beaudettes would not claim that they are being deprived of life or liberty, meaning the only possible interest they could invoke regards property. But neither amici nor the Beaudettes have established that assistance or support under PCAFC is "property" for the purposes of due process, and 38 U.S.C. § 1720G(c)(2)(B) explicitly warns that "Nothing in this section shall be construed to create . . . any ***entitlement*** to any assistance or support provided under this section." (emphasis added). Accordingly, the Beaudettes have no protectable interest in property with regard to caregiver assistance or support.

CONCLUSION

For these reasons, and those stated in our opening brief, we respectfully request that the Court reverse the writ of mandamus issued by the Veterans Court and vacate the court's April 19, 2021 decision.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7) and Federal Circuit Rule 32(b), the undersigned certifies that the word processing software used to prepare this brief indicates there are a total of 6,980 words, excluding the portions of the brief identified in the rules. The brief complies with the typeface requirements and type style requirements of Fed. R. App. P. 32(a)(5) and has been prepared using Times New Roman 14 point font, proportionally spaced typeface.

/s/Sosun Bae

EXHIBIT A

Department of Veterans Affairs
Veterans Health Administration
Washington, DC 20420

VHA DIRECTIVE 1032
Transmittal Sheet
August 16, 2013

HEALTH BENEFIT APPEALS PROCESSING

1. REASON FOR ISSUE: This Veterans Health Administration (VHA) Directive provides policy guidance regarding Health Benefit Appeals and certification of these appeals to the Board of Veterans' Appeals (BVA).

2. SUMMARY OF CONTENT: This VHA Directive identifies timelines, policy, and guidance when completing a Health Benefit Appeal and certification of such appeal to the BVA.

3. RELATED ISSUES: None.

4. RESPONSIBLE OFFICE: The Chief Business Office (10NB) is responsible for the content of this Directive. Questions may be referred to VHACBOAdminAppeals@va.gov.

5. RESCISSION: VHA Directive 2008-039, dated July 31, 2008, is rescinded.

6. RECERTIFICATION: This document is scheduled for recertification on or before the last working day of August 2018.

Robert A. Petzel, M.D.
Under Secretary for Health

DISTRIBUTION: E-mailed to the VHA Publications Distribution List 08/21/13

HEALTH BENEFIT APPEALS PROCESSING

1. PURPOSE: This Veterans Health Administration (VHA) Directive provides policy guidance regarding Health Benefit Appeals and certification of such appeals to the Board of Veterans' Appeals (BVA). **AUTHORITY:** 38 U.S.C. § 7105(d); 38 CFR 17.133; 38 CFR 17.276; 38 CFR 17.904; 38 CFR Parts 19 and 20.

2. BACKGROUND: In accordance with Title 38 Code of Federal Regulation (CFR) Part 20, when the Department of Veterans Affairs (VA) makes a determination regarding benefits, the Veteran may file a "Notice of Disagreement" (NOD), which is a written communication expressing dissatisfaction or disagreement with a decision rendered by VA and a desire to contest the result. For non-Veteran beneficiaries, a description of their appeals processes is available at 38 CFR 17.276 and 17.904. VA must review the initial decision when a NOD is filed and must develop the case into a formal appeal, which can be submitted to BVA for a final decision. This Directive outlines VHA policy for processing health benefit appeals at the facility level and the submission of appeal records to the Chief Business Office (CBO) (10NB6) for certification to BVA. Health benefit appeals are also known as medical appeals. Health benefits appeals include questions of eligibility for hospitalization, outpatient treatment, and nursing home and domiciliary care; for sensori-neural aids such as eyeglasses and hearing aids; and for other benefits administered by VHA. Health benefits appeals do not include medical determinations, such as the need for and appropriateness of specific types of medical care and treatment for an individual. ***NOTE:*** *For more information, consult 38 CFR 20.101(b).*

3. POLICY: It is VHA policy that when a Veteran expresses a disagreement with a VA determination regarding benefits, the Veteran must be advised of the Veteran's right to appeal that decision, and the correct process for initiating such an appeal.

4. RESPONSIBILITIES

a. **Facility Director.** The facility Director or designee is responsible for:

(1) Ensuring claimants who disagree with a VA determination are afforded due process by providing:

(a) A Veterans Claims Assistance Act Notice (VCAA);

(b) VA Form 4107VHA, Your Rights to Appeal Our Decision;

(c) VA Form 21-22, Appointment of Veterans Service Organization as Claimant's Representative; and

(d) VA Form 21-22a, Appointment of Attorney as Claimant's Representative.

(2) Ensuring administrative staff adheres to established timeframes for processing appeals.

(3) Ensuring staff use the Reconsideration Process defined in 38 CFR 17.133.

(4) Ensuring a Health Benefit Appeal record is established for Veterans appealing VA's decision. This record must contain copies of the following information in sequential order and properly secured in a brown, 2-prong folder:

(a) A record of the Veteran applying for benefits or requesting services; for example: application for care, request for payment of non-VA medical services, request for a sensori-neural aid, request for beneficiary travel, and request for dental services.

(b) A Hospital Inquiry (HINQ).

(c) The VCAA notice or VCAA memorandum provided to the Veteran as required by paragraph 4a(1)(a) above.

(d) The decision dated with the original date of determination.

(e) The NOD. ***NOTE:*** *The Veteran, or authorized representative, must express dissatisfaction or disagreement with the decision and a desire to contest the decision.*

(f) The Statement of the Case, as described in 38 CFR 19.29.

(g) The signed and dated VA Form 9, Appeal to Board of Veterans' Appeals.

(h) The VA Form 8, Certification of Appeal.

(i) The Form Letter (FL) 1-26, Notice to Claimant of Transmittal of Appeal to BVA. ***NOTE:*** *FL 1-26 can be found at: http://vaww4.va.gov/vaforms/. This is an internal VA Web site and is not available to the public.*

(5) Ensuring the health care facility submits the complete and certified (as required by 38 CFR 19.35) case record to VHA CBO within 60 days from the date of the VA Form 9, Appeal to Board of Veterans' Appeals. The facility must also forward all appeal files directly to the CBO at the following address:

VHA Chief Business Office (10NB6)
Appeals Team
810 Vermont Avenue, NW
Washington, DC 20420

(6) Providing to VHA CBO (10NB6), within 7 days of discovery, any information identified by VHA CBO (10NB6) as missing from the appeal folder, or requesting an extension of time if this deadline cannot be met.

(7) Processing appeals remanded by BVA according to the Appeals Procedure Guide located at: http://vaww1.va.gov/CBO/apps/policyguides/index.asp within 60 days from the date of the remand. VHA must fully comply with BVA's remand request. ***NOTE:*** *This is an internal VA Web site and is not available to the public.*

(8) Ensuring that staff at the facility interact with the VHA CBO Appeals Team (10NB6) regarding appeals that originate at their facility.

(9) Complying with any orders or final decisions by BVA.

b. **VHA CBO (10NB6).** The VHA CBO (10NB6) is responsible for:

(1) Ensuring all appeals received are reviewed for completeness;

(2) Ensuring the health care facility is contacted for any appeal determined to be incomplete, and requesting corrective action or information for the appeal;

(3) Entering appeals information into the Veterans Appeals Control and Locator System to be placed on BVA's docket;

(4) Scheduling videoconference hearings, Travel Board hearings, and coordinating with BVA's hearing office to schedule central office hearings when requested;

(5) Obtaining Veteran's claims folder from the Veterans Benefits Administration facility when available;

(6) Transferring Health Benefit Appeals records to BVA for the final decision making process; and

(7) Receiving and transmitting remands and decisions from BVA and to the appropriate health care facility for action.

5. REFERENCES

a. Title 38 CFR Parts 17, 19, 20

b. Title 38 U.S.C. Sections 5904, 7104(a), 7105(d)(3), 7304

c. Appeals Procedure Guide, found at:
http://vaww1.va.gov/cbo/apps/policyguides/contents.asp?address=VHA_PG_1601G.
NOTE: *This is an internal VA Web site and is not available to the public.*