17-1821

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

ALFRED PROCOPIO, JR.,
Claimant-Appellant,

v.

ROBERT WILKIE,
SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee.

On Appeal from the United States Court of
Appeals for Veterans Claims, No. 15-4082
Hon. Coral W. Pietsch

CORRECTED AMICUS BRIEF BY THE AMERICAN LEGION

(In Support of Claimant-Appellant and Reversal)

The American Legion

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v. No. 17-1821

Robert Wilkie,
Secretary of Veterans Affairs,
Respondent-Appellee

Certificate of Interest

James D. Ridgway, counsel for Amicus The American Legion, certifies the following:

1. The full name of every party represented by me is: The American Legion.

2. The real name of the real party in interest represented by me is: The American Legion.

3. The American Legion is a federally chartered corporation and no parent corporations or publicly held companies own any stock in it.

4. The names of all law firms and partners or associates that are expected to appear in this Court for The American Legion are Glenn R. Bergmann and James D. Ridgway of Bergmann & Moore, LLC.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be affected by this Court's decision in the pending appeal: None.

Date: October 15, 2018 */s/ James D. Ridgway*
James D. Ridgway

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STATEMENT OF IDENTITY AND INTEREST OF AMICUS

Amicus The American Legion submits this brief in support of Claimant-Appellant Alfred Procopio, Jr, and reversal. The American Legion is a veterans' service organization chartered by Congress "to preserve the memories and incidents of the 2 World Wars and the other great hostilities fought to uphold democracy." 36 U.S.C. §§ 21701 21702(3). It has over two million members, all of whom are wartime veterans, and operates a number of charitable programs to improve the lives of veterans, their dependents, and survivors.

This brief was drafted by above counsel for the Amicus and no funds or support from any other sources contributed the creation of this brief.

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 by federal courts to interpret such legislation, which have been raised as an issue in this case. As to the particular merits of this case, The American Legion was an early champion of legislation to care for veterans harmed by exposure to herbicides in Vietnam and supported during the legislative process the specific legislation and statutory provision at issue before the court in this matter.

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 intent of Congress is clear in this matter. However, it believes that the simple application of

the principle of veteran-friendly interpretation of step one of the traditional analysis from *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984), misstates the long-established relationship between Congress and the agency on veterans issues and downplays the interpretive principle that the Supreme Court reaffirmed after *Chevron* in cases such as *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991), and *Brown v. Gardner*, 513 U.S. 115 (1994).

The American Legion agrees that the application of proper deference resolves any lingering doubt as to the interpretive issue here. However, this particular application of the *Gardner* principle to a question of the scope of substantive entitlement serves an important role in counterbalancing the null hypothesis of science that typically works against veterans whose disabilities are related to service in hidden and complex ways. These are often difficult to understand on the timescales that flesh-and-blood veterans experience the employment impairment and mortality that the system was intended to compensate.

Belatedly awarding benefits to Americans who served in Vietnam is small consolation to those who have lived a lifetime without proper compensation. The practical application of resolving interpretive doubt in favor of veterans often means erring on the side of supporting disabled veterans in need while their lives can still be changed, instead of waiting for a scientific consensus that might arrive—if ever—only after those who have borne the battle are no longer around to be cared for.

ARGUMENT

I. Supreme Court precedent establishes that the specific rule of *Gardner* trumps the general presumption of *Chevron* because the history of the *Gardner* rule and the structure of Title 38 demonstrate that Congress acts explicitly when it intends to delegate authority to determine the scope of a substantive veterans benefit.

A. *Supreme Court precedent establishes that the general presumption of delegation of interpretive authority under* Chevron *applies only when there is no contrary understanding of Congress's intent.*

Although the interpretive regime of *Chevron* is widely portrayed as a simple, two-step process, the Supreme Court has repeatedly declined to defer to agencies when it concluded that Congress had not delegated interpretive authority. Beginning with *United States v. Mead Corporation*, 533 U.S. 218 (2001), the Supreme Court held that deference applies only "when it appears that Congress delegated authority to the agency generally to make rules carrying the 'force of law,'" *id.* at 226-27 (2001). Notably, Justice Scalia dissented, contending that the opinion was watering down *Chevron* by not applying it uniformly, *see id.* at 239-61 (Scalia, J., dissenting), but the majority responded that "the Court's choice has been to tailor deference to variety," *id.* at 236. Similarly, in *Barnhart v. Walton*, 535 U.S. 212, 222 (2002), the Supreme Court articulated a variety of factors that could be used for determining whether deference was appropriate, which provoked a concurrence from Justice Scalia arguing that their inquiry should have looked only at whether the interpretation was the product of notice and comment, *see id.* at 226-27 (Scalia, J. concurring in part and concurring in the judgment). Therefore, although *Chevron* sets a default rule, Supreme

Court precedent requires a determination of whether there is an actual intent of Congress regarding a specific statutory scheme. Only when a specific intent cannot be determined, do courts fall back to the presumption articulated in *Chevron*.

Relevant here, the Supreme Court has repeatedly found that there are some interpretive issues that Congress did not intend to delegate even though they would appear to fall squarely within the statutes administered by particular agencies. For example, in *Food and Drug Administration v. Brown & Williamson Tobacco Corporation*, 529 U.S. 120 (2000), the Court concluded that no deference was owed to the FDA's regulation defining tobacco as a "drug" because the history of Congress's treatment of tobacco policy showed that it did not intend to delegate tobacco regulation to the FDA, no matter how thoroughly the agency justified its conclusion that tobacco is a drug, *see id.* at 155-56. In other words, actual congressional practice overrode the default rule, at what has sometimes been called "*Chevron* step-zero." Cass R. Sunstein, Chevron *Step Zero*, 92 VA. L. REV. 187 (2006).

Similarly, in *Gonzales v. Oregon*, 546 U.S. 243 (2006), the Supreme Court concluded that an agency position was unentitled to deference regardless of the plain text of the authorizing statute, when it would be "unusual" to believe Congress had delegated power over an issue. In *Gonzales*, the Attorney General had attempted to regulate physician-assisted suicide through his power over "controlled substances." *Id.* at 253. The Court found it improbable that the general delegation of authority over illegal drugs could include an intent on the part of Congress to grant broad

power over the medical profession. *See id.* at 267. In other words, power to define federal substantive law originates with the legislature and cannot be manufactured by an agency beyond the scope of the delegation. A major substantive expansion of agency power is something that would be "unusual" for Congress to delegate. Once again, this outcome was reached over a dissent by Justice Scalia, who would have simply deferred to the agency's interpretation of the statute it was charged to administer. *See id.* at 281-84.

More recently, in *Hamden v. Rumsfeld*, 548 U.S. 557 (2006), Congress authorized the president to create military commissions to try enemy combatants using procedures that were as similar to the Uniform Code of Military Justice (UCMJ) as practicable. The scheme that was then established allowed for the presentation of evidence without the opportunity for cross-examination. The Supreme Court ignored a plea for deference and invalidated this scheme under its own interpretation of the UCMJ. *See id.* at 622-25. Thus, even when Congress delegates a *specific* problem, no deference is owed when the agency violates a pre-established *general* understanding of how the law in a particular area works.

Taken as a whole, the Supreme Court's precedent demands that courts look at Congress's approach to a policy area to determine exactly when it has delegated interpretive authority and when it intended courts to provide deference to an agency. The presumption of delegation applies only when contrary intent cannot be discerned.

B. *The structure of explicit delegations of authority in Title 38 shows that Congress intended for courts to defer to the Secretary's interpretation of the statute only in specific instances.*

Congress's general relationship with VA is expressed through the structure of Title 38. Within that title, Congress has delegated explicit authority to VA to make adjudicative procedure rules, subject to judicial review. *See* 38 U.S.C. § 501. It has also delegated absolute authority to determine the content of the rating code, immune from judicial review. *See* 38 U.S.C. §§ 1155, 7252(b). In contrast, there is no general delegation of authority to interpret substantive laws. Rather, Congress's repeated approach has been to make explicit delegations authorizing VA to expand the scope of benefits in certain circumstances, specifically in which emerging scientific evidence allows VA to identify additional conditions that ought to be compensated pursuant to a framework established by Congress. *See*, *e.g.*, 38 U.S.C. §§ 1113 (extensively enumerating presumptive conditions); 1103(3) (enumerating dozens of chronic diseases and authorizing the Secretary to add to the list); 1116(b) (authorizing the Secretary to add to the list of enumerated conditions in 38 U.S.C. § 1116(a)(2)); 1117(b) (authorizing the Secretary to add to the list of conditions described with illustrative examples in 38 U.S.C. § 1117(a)). The absence of a general delegation over substantive issues and the frequency with which Congress delegates authority over specifically defined issues makes it clear that Congress does not delegate authority over substantive benefits law without explicitly stating so.

This multi-faceted approach to delegation makes sense based upon history, separation-of-powers concerns, and an examination of the core competencies of the different branches. Historically, the statutory scheme administered by VA is not a product of the modern administrative state for which Congress has broadly defined problems, nor the subject matter in the organic statute of a new agency that is then charged with developing expert solutions. Rather, VA administers veterans benefits, which is a policy area in which Congress has kept a close hand ever since the founding of the nation. *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 (2011). Therefore, VA does not have broad license on substantive issues.

As to separation of powers, *Chevron* is concerned with appreciating the core competencies of the different branches. It generally presumes deference for agency interpretations in which the agency's expertise puts it into a superior position to understand complex problems and the application of law to the infinite variety of facts that might arise. *See Chevron*, 467 at 865. It also counsels that courts should leave the resolution of sensitive policy questions to the democratic branches. *See id.* The three-tier deference regime in veterans benefits cases respects both expertise and democratic accountability.

First, as to the content of the rating code, Congress has charged the Secretary with determining "the average impairments of earning capacity resulting from such injuries in civil occupations" for each disability, 38 U.S.C. § 1155; and Congress has

explicitly forbidden judicial review of this work under 38 U.S.C. § 7252(b). This allocation of power makes sense because such detailed economic determinations require extensive agency expertise beyond the experience of courts, as well as consideration of macroeconomic data that would not appear in the record of any individual claim subject to review. Furthermore, reevaluating and updating ratings for the hundreds of medical conditions covered in Part 4 of the regulations for Title 38 is an enormous and ongoing task that Congress sensibly delegated despite its political sensitivities.

Second, as to the development of procedural rules, administering a process that handles millions of claims per year for a wide variety of benefits and medical conditions inevitably leads to difficult applications of law to messy fact patterns, complex tradeoffs between speed and accuracy, and prioritization of the needs of some classes of veterans over others. It is impractical for Congress to handle this work directly, but it is appropriate for courts to review these rules to ensure that they make rational categorizations, respect due process, and make choices that can be characterized as veteran friendly from some high-level perspective, given the need to serve classes of veterans with different needs and situations.

In contrast, Congress has extensively defined the scope of the benefits provided to veterans. As to substantive benefits, Congress has provided not only the presumptions described above, but also addressed a variety of special circumstances, such as "special consideration for certain cases of loss of paired organs or extremities"

under 38 U.S.C. § 1160 and clothing allowances under 38 U.S.C. § 1162. Creating general categories of benefits is the traditional work of the legislature. Indeed, prior to *Chevron*, the Supreme Court typically treated issues involving the scope of an agency's authority as questions of law for which it applied no deference, and applied deference to issues of the application of the law to facts for which the general bounds of the agency's authority were not in dispute, *see*, *e.g.*, *Gray v. Powell*, 314 U.S. 402 (1941) (applying the different standards to the two different types of questions); *O'Leary v. Brown-Pacific-Maxon, Inc.*, 340 U.S. 504 (1951) (same).

The uniform application of the canon of veteran-friendly interpretation to substantive benefits does not cause the courts to usurp the role of the democratic branches. Rather, it provides a clear default backdrop against which Congress addresses politically sensitive policy choices. Furthermore, application of the *Gardner* canon to substantive benefits statutes does not invade the role of the agency as the expert administrator of the adjudication process. It simply provides clarity as to which categories of veterans are included within the bounds of any given benefit that must be administered. Managing the complexities or trade-offs that arise in delivering the defined benefits remains the primary province of the executive branch.

Finally, it must be recognized that Congress typically consults the Secretary in the process of drafting substantive veterans benefits legislation. Therefore, the expertise of the agency is not barred from the process of defining the scope of benefits. Rather, it primarily occurs *ex ante* in Congress's drafting process, not *ex post*

facto in the interpretation. The structure of Title 38 shows that Congress defines the boundaries of new benefits and expressly chooses when it wants to delegate authority to the Secretary to expand the scope.

C. *The Supreme Court's case law is consistent with its general approach to determining Congress's interpretative intent and the structure of Title 38.*

The structural evidence of Congress's intent is consistent with the *Gardner* presumption and the Supreme Court's practice in interpreting veterans benefits statutes. The first major veterans benefits case decided after *Chevron* was *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991). There, in ruling for the veteran, the Supreme Court found that the statute was clear. *See id.* at 221. Nonetheless, it continued to say that, even if the statute were ambiguous, the Court would have ruled for the veteran anyway "under the canon that provisions for benefits to members of the Armed Services are to be constructed in the beneficiaries favor." *Id.* at 220-21 n.9. Importantly, the Court further noted that it believed that Congress was aware of this principle and had drafted the language with an expectation that it would be interpreted accordingly. *See id.* Therefore, *King* is explicit that the canon of veteran friendliness is based upon a specific understanding of congressional intent.

It must be admitted that *King* was an action between private parties over a right that is not administered by the agency. Nonetheless, the Supreme Court reaffirmed the principle in a benefits case in *Brown v. Gardner*, 513 U.S. 115 (1994). When presented with a question of the scope of a benefits statute—38 U.S.C. § 1151—the

Court again stated that any ambiguity would be resolved in favor of the veteran. *Gardner,* 513 U.S. at 120. The Court made this statement regardless of the fact that there was a regulation on point, 38 C.F.R. § 3.358(c)(3) (1993), that would have been entitled to deference had the default rule of *Chevron* applied.

More recently, the Court applied the principle of veteran-friendly interpretation in *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428 (2011). *Henderson* is notable because the Court applied the principle to a procedural question. In doing so, it 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*, 502 U.S. at 220-21 n.9). This demonstrates that the principle is not limited to substantive issues. Indeed, the principle traces back at least to pre-*Chevron* cases such as *Boone v. Lightner*, 319 U.S. 561 (1943), which was also an issue involving a procedural right.

Accordingly, the canon of veteran-friendly interpretation is not synonymous with the issue of whether Congress has delegated interpretive authority. It is broader. It is true *both* that (1) Congress has not generally delegated interpretative authority to the Secretary over issues of substantive entitlement *and* (2) veterans benefits statutes of must be liberally interpreted in favor of veterans. Here, both propositions apply.

D. *The past applications of* Gardner *are consistent with this understanding of its role as a canon of interpretation.*

Recognizing that Congress's approach to delegating interpretive authority varies depending upon the nature of the issue, it is helpful to examine how the *Gardner* principle operates on the different types of issues. In summary, on issues of substantive entitlement, statutes should be interpreted to include additional classes of veterans whenever there is a question of whether a particular category of veterans benefits from a provision. On issues of procedure, courts owe appropriate deference to the Secretary depending upon the form of interpretation provided, but whatever the level of deference—*Chevron* step two, *Skidmore*, *Auer*—the discretion of the Secretary is limited to choosing an interpretation that can be reasonably understood as veteran friendly from some perspective. This can include choosing a rule that is veteran friendly on a systemic level, even if it would not lead to a positive outcome in every case. However, the Secretary may not interpret a procedure in a way that is unambiguously unfriendly to veterans when there is a reasonable, veteran-friendly alternative.

1. Veteran-friendly interpretation of substantive statutes means in part that the sovereign immunity canon does not apply to veterans benefits.

One useful way of articulating how the *Gardner* canon operates in substantive areas is that it inverts the normal canon of sovereign immunity. The Supreme Court has frequently articulated the principle that statutes that allow citizens to make monetary claims against the federal government, must be strictly construed as

sovereign immunity is the default rule. *See*, *e.g.*, *Sossamon v. Texas*, 563 U.S. 277, 285 (2011) (analyzing examples). That canon has no force in the realm of veterans benefits. *Gardner* is an example in which the canon would normally apply, but there was no suggestion that it could play any factor at all to limit the government's liability under section 1151.

This aspect of *Gardner* also explains numerous cases in which the canon was applied. For example, in *Viegas v. Shinseki*, 705 F.3d 1374, 1378 (Fed. Cir. 2013)—a case interpreting the scope of section 1151—this court interpreted the phrase "medical treatment or hospital care" broadly. 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. In *Sursely v. Peake*, 551 F.3d 1351 (Fed. Cir. 2009), 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, *see id.* at 1357. The 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). Therefore, even indirect evidence that Congress's intent might have been narrower than a veteran-friendly reading cannot overcome the strength of the *Gardner* presumption.

At the Veterans Court, the canon of sovereign immunity was raised by a dissenting judge in the en banc case of *Allen v. Brown*, 7 Vet. App. 439 (1995) (en banc). The issue in that case was whether compensation benefits extended to conditions that were not caused by service, but were aggravated by a service-connected condition. *See id.* at 445-46. Judge Holdaway argued that the language of Title 38 should be narrowly construed and cited a case discussing the canon of sovereign immunity. *See id.* at 452 (Holdaway, J. dissenting) (citing *OPM v. Richmond*, 496 U.S. 414 (1990)). However, the majority relied upon *Gardner* to broadly interpret the scope of benefits even when it was undisputed that hospital benefits that Congress had created using similar language were not as broad. *See id.* at 448-49.

The principle is not unlimited. The veteran-friendly interpretation must still be reasonable. Just because a more veteran-friendly policy can be suggested does not mean that the plain language of the statute can bear the 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, the court did not accept it. *See id.* at 1380-81. However, 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 (Plager, J., concurring). 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.*

The lesson here is that when Congress legislates against a backdrop of an established process within VA, the courts can fairly interpret Congress's intent as not reasonably including a *sub silentio* unfunded process overhaul. Accordingly, application of the principle of veteran-friendly interpretation does not require thoughtless and reflexive rulings in favor of individuals. However, there must be a clear and compelling reason to find it unreasonable to adopt a liberal construction of Congress's language.

2. The Veteran-friendly interpretation of procedural rules means that the Secretary is restricted to selecting a reasonable interpretation that is also veteran friendly when such an approach is possible.

As conceded, Congress has expressly delegated general authority to the Secretary to make procedural rules for the benefits system through 38 U.S.C. § 501. Nonetheless, the principle of veteran-friendly interpretation does not leave the stage. In this arena, the normal rules of *Chevron* apply. Procedural regulations are entitled to *Chevron* deference. For example, in *Nat'l Org. of Veterans Advocates, Inc. (NOVA) v. Sec'y*

of Veterans Affairs, 809 F.3d 1359 (Fed. Cir. 2016), the court deferred to a regulation implementing a new statute allowing for substitution after a veteran dies while a claim is pending. Although *NOVA* advocated for a different rule that it thought was veteran friendly, VA explained in comments to the final rule why there were practical reasons why it chose not to implement the statute in the manner preferred by *NOVA*. *Id.* at 1362-63. Under this circumstance, the court recognized that the Secretary may implement a procedure through a reasonable rule even though it does not result in a veteran-friendly outcome in every conceivable case. *Id.* at 1363.

When the Secretary's interpretation is less formal, only *Skidmore* deference applies. However, regardless of the level of deference, *Gardner* still provides a limitation on the options from which the Secretary may choose. This limitation is best expressed in the Veterans Court decision in *Trafter v. Shinseki*, 26 Vet. App. 267 (2013). In *Trafter*, the Veterans Court was presented with the issue of when the duty to assist is triggered in a section 1151 claim based upon VA medical care. In resolving this dispute, the court held:

> Within the complex veterans benefits scheme, if VA's interpretation of the statutes is reasonable, the courts are precluded from substituting their judgment for that of VA, unless the Secretary has exceeded his authority; the Secretary's action was clearly wrong; *or the Secretary's interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, and a more liberal construction is available that affords a harmonious interplay between provisions*.

Trafter v. Shinseki, 26 Vet. App. 267, 272 (2013) (emphasis added); *see also Martin v. Shinseki*, 26 Vet. App. 451, 456 (2014).

In other words, if the range of possible interpretations can be described as a Venn diagram of the universe of reasonable interpretations and the universe of veteran-friendly interpretations, then the interplay of *Gardner* and *Chevron* requires the Secretary to choose an interpretation that falls within the overlap. Within this overlap, courts give deference to the fact that different approaches might be characterized as veteran friendly based upon an evaluation both of different priorities and of *all* the veterans that might be affected by a procedural rule, and not just the veteran presently before the court. Nonetheless, the burden must be on the Secretary to articulate a theory of how the chosen interpretation is veteran friendly from some systemic perspective despite how it might affect any individual. It is this reasoning to which the courts owe deference, not the Secretary's general desire to have his way.

The major Federal Circuit precedent that does not fit comfortably in this framework is *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003). The issue in *Sears* was whether the effective date for a reopened claim relates back to the original application. The opinion concluded that the statute was not clear and that *Chevron* deference was owed to the regulation. *See id.* at 1330. The analysis in *Sears* is flawed for two reasons. First, *Sears* treated congressional intent as an issue to be considered in *Chevron* step two. *See id.* at 1329. Second, the intent of Congress was actually clear as Judge Clevenger argued. *See id.* at 1332 (Clevenger, J., concurring). In particular, the statute was not ambiguous prior to rephrasing in 1962 and an accompanying Senate report explicitly stated: "This is a restatement of the original claim rule in

existing law." *Id.* at 1330 (quoting S. Rep. No. 87-2042, at 5 (1962), reprinted in 1962 U.S.C.C.A.N. 3260, 3263). Thus, the outcome of *Sears* should have been reached based upon unambiguous congressional intent.

E. Based upon this understanding of Chevron *and* Gardner*, the court should adopt an explicit, multi-step approach to issues interpreting veterans benefits authorities.*

The following framework would provide clear guidance to applying *Gardner* and *Chevron*. Initially, in cases in which the intent of Congress is clear, then that intent controls. *See*, *e.g.*, *Nielson v. Shinseki*, 607 F.3d 802 (Fed. Cir. 2010). As eloquently explained by the Veterans Court,

> [A] functioning system of laws must give primacy to the plain language of authorities, not the Secretary's litigation position. Without standard word meanings and rules of construction, neither Congress nor the Secretary can know how to write authorities in a way that conveys their intent and no practitioner or—more importantly—veteran can rely on a statute or regulation to mean what it appears to say. In such a realm, claimants would always be at the mercy of the Secretary's litigation position and there would be no meaningful role for the Court to perform under the separation of powers. This is not the manner in which the rule of law operates.

Tropf v. Nicholson, 20 Vet. App. 317, 321 n.1 (2006).

Only when the meaning or application of the authority is unclear do the courts need to resort to principles of interpretation. This lack of clarity can happen for a variety of reasons, including ambiguous language, gaps in the scheme defined by the plain language, and changes in the environment that create unanticipated new circumstances. As has been recognized in the complex world of veterans benefits, language that plainly answers one question can be ambiguous when a different one

arises. *See Haas v. Nicholson*, 20 Vet. App. 257, 262 n.2 (2006), *rev'd on other grounds, Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008).

When an issue of interpretation arises, the courts should first determine whether the authority defines a substantive benefit, creates procedure for adjudicating entitlement, or is related to defining the content of the rating code. Based upon the intent of Congress as expressed in the substance and structure of Title 38, the answer to this question would determine how the courts should approach the issue of determining the appropriate level of deference.

As to the content of the rating code, Congress has delegated absolute authority, and the court's inquiry ends immediately. *See*, *e.g.*, *Wingard v. McDonald*, 779 F.3d 1354, 1356-57 (2015); *Wanner v. Principi*, 370 F.3d 1124, 1131 (Fed. Cir. 2004); *Marcelino v. Shulkin*, 29 Vet. App. 155 (2018); *Byrd v. Nicholson*, 19 Vet. App. 388 (2005).

As to issues of procedure, Congress has delegated general rulemaking authority through 38 U.S.C. § 501. The deference owed to the Secretary for these types of issues follows general *Chevron* principles based upon the form of the authority and how it was created, but is bounded by the principle of veteran-friendly interpretation, such that the Secretary may not choose a reasonable interpretation that is not veteran friendly over one that is. However, courts owe deference to the Secretary's interpretation of what procedure is veteran friendly when it comes to balancing speed and accuracy, developing procedures that accommodate veterans with different interests, and allocating scarse adjudicative resources.

Within this approach, interpretations of statutes may be subject to *Chevron* step-two deference or *Skidmore* deference, depending upon whether the interpretation was promulgated through regulation or other authority that carries the "force of law." Interpretations of regulations are subject to *Auer* deference, again subject to the bounds of veteran friendliness. However, deference is not blind trust and should be based upon an articulation by the Secretary of how the interpretation chosen by the agency is veteran-friendly at some level, even when it does not favor the claimant contesting the procedure.

Finally, if the issue is one of defining substantive benefits, then the courts should determine if the specific issue is one that has been delegated by Congress to the Secretary. Delegated questions should be treated with appropriate deference, still within the bounds of *Gardner*. Otherwise, courts owe no deference and should fully apply *Gardner* to interpret statutes as broadly defining benefits without regard to the principle of sovereign immunity.

F. *The Secretary's proposed approach to the canon of veteran-friendly interpretation ignores the Supreme Court's description of the canon and renders it virtually toothless.*

In his supplemental briefing, the Secretary proposes that the *Gardner* canon applies only *after Chevron* step two and only in two circumstances: (1) when VA has not interpreted a statute or (2) when VA's interpretation is unreasonable. *See* Secretary's Supp. Br. at 7. This proposal cannot be correct.

The latter category is an empty vessel because it is explicit in *Chevron* that courts do not owe deference to *unreasonable* interpretations, 467 U.S. at 844 ("[A] court may not substitute its own construction of a statutory provision for a *reasonable* interpretation made by the administrator of an agency.") (emphasis added)), and applying a veteran-friendly interpretation only because the alternative is unreasonable robs the canon of real force. As to the first category, the Secretary proposes an interpretive race in which statutes are interpreted in a veteran-friendly manner only if courts are presented with an issue first, but not if VA regulates first. This approach is also inconsistent with the language and approach of the Supreme Court cases analyzed above. Accordingly, this Court should explicitly reject the framework offered by the Secretary as contrary to the history, structure, and governing precedent regarding Title 38.

II. "Blue Water" Navy veterans of Vietnam should receive benefits under 38 U.S.C. § 1116 based upon both interpretative principles and a recognition of how the *Gardner* canon mitigates the friction between science and the burden of proof in veterans claims.

A. *Applying* Gardner *to the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 leads to the conclusion that the term includes service in offshore waters within the legally recognized territorial limits of the Republic of Vietnam.*

The American Legion agrees with and supports the argument of Claimant-Appellant regarding the history and the language of the Agent Orange Act (AOA) to as it clearly expresses Congress's intent. *See* Claimant-Appellant's En Banc Supplemental Br. at 30-44. It also agrees that no deference is owed to the Secretary's

position under *Chevron,* but believes this conclusion should be based upon the above analysis. To the extent that there is any ambiguity, the specific issue of how to define the geographic scope of the law is not something that Congress explicitly delegated to the Secretary. Rather, Congress delegated authority only to add to the list of presumptive conditions based upon procedures outlined in the Act. Therefore, this interpretive issue is one in which no deference is owed to the Secretary's interpretation, regardless of form. Instead, the traditional principle of veteran-friendly interpretation requires that ambiguity be resolved in favor of veterans by adopting the broader definition that includes benefits for "Blue Water" Navy veterans.

B. *The application of* Gardner *to substantive veterans benefits statutes plays an important role in mitigating the null hypothesis of science.*

Recently, the Secretary publicly opposed benefits for "Blue Water" Navy veterans on the grounds that the scientific evidence was insufficient. *See* Nikki Wentling, *Wilkie Opposes Bill that Would Extend Agent Orange Benefits to "Blue Water" Veterans*, Stars & Stripes (Sept. 11, 2018), https://www.stripes.com/news/wilkie-opposes-bill-that-would-extend-agent-orange-benefits-to-blue-water-veterans-1.547062. This was a reversal of the position of the previous Secretary. *See id.* The inconsistent opinions of the agency are irrelevant, however, because the court owes no deference to the agency's position on this issue. Nonetheless, they provide an excellent context for appreciating the role played by the *Gardner* principle. Liberally

interpreting benefits statutes, such as the AOA, acts as a counterweight to the realities of providing benefits for harms based upon exposure.

One of the hallmarks of modern veteran disabilities is invisible injuries that occur unnoticed and often take years or decades to manifest as observable conditions. Although this case involves the effects of the herbicides used in Vietnam, the general problem of caring for those harmed by exposures is a recurring issue that is likely to become more prevalent as military technology, environmental science, medicine, and epidemiology become ever more sophisticated. Nonetheless, big data and super computers have not brought about a world in which answers to complex issues of causation are easy to generate.

1. The null hypothesis in science often creates a gap in which veterans go uncompensated for decades, while evidence is developed to prove an association between their conditions and harmful exposures in service.

As to invisible exposures, the most difficult foe for veterans is not uncaring government bureaucrats, but the remorseless law of science known as the null hypothesis. This is the baseline assumption that two observed facts have no relationship to each other until a proper application of the scientific method provides reliable evidence of a relationship. *See generally* WILBER J. SCOTT, VIETNAM VETERANS SINCE THE WAR: THE POLITICS OF PTSD, AGENT ORANGE, AND THE NATIONAL MEMORIAL 255-56 (2d ed. 2004).

The development of this baseline was critical to overcoming ancient superstitions and developing the scientific method as a reliable way to generate

knowledge. Nonetheless, when applied to the problem of providing benefits to veterans who were exposed to harmful agents in service, the result is that the award of benefits often lags decades behind the experiences of veterans and survivors who are affected by service but cannot successfully prove causation.

Inevitably, whenever a new type of exposure affects veterans, some are at the front edge and develop problems first. Based upon their experience in service, they might have an intuition about why they became sick. Typically, the first complaints are rejected based upon a "lack of evidence" to support their suspicions. For example, it was 1977 when VA received the first claim asserting a condition was caused by Agent Orange. *See* SCOTT, *supra,* at 87. However, that was only the beginning of a decades-long struggle to obtain recognition of the harms caused by the use of herbicides. As of 1988, VA recognized only the skin condition chloracne as related to Agent Orange and—even though it had received 150,000 claims for conditions related to Agent Orange exposure—it had not granted a single one. *See* GERALD NICOSIA, HOME TO WAR: A HISTORY OF THE VIETNAM VETERANS' MOVEMENT 475 (2001); *see also* Diseases Associated with Exposure to Contaminants in the Water Supply at Camp Lejeune, 82 Fed. Reg. 4,173 (Jan. 13, 2017) (recognizing service connection for conditions caused by exposure to contaminated water for the *more than three decades* between August 1, 1953, to December 31, 1987). Many of those most severely poisoned never lived to see their claims vindicated. Many others suffer for years without compensation.

Typically, benefits are not retroactive prior to the filing of a claim, *see* 38 U.S.C. § 5110, but, even when large retroactive awards occur, they still do allow veterans to relive the years that they struggled without compensation. Veterans cannot retroactively choose to send their children to college when they could not afford it at the time. Veterans make endless choices about employment, retirement, health care treatment, and living circumstances that cannot be reversed decades later. Even when lost income is fully replaced, a lost lifetime of opportunity cannot be.

The application of *Gardner* to issues such as this one serves—at least in a small way—to mitigate the effects of the null hypothesis. Initially, it always operates to cause the system to err on the side of denying benefits. This is unavoidable and appropriate given that science often debunks claims of association, such as that between vaccines and autism. *See*, *e.g.*, *Canuto v. Sec'y of HHS*, 660 Fed. Appx. 955 (Fed. Cir. 2016). However, once evidence becomes sufficient to generate action by Congress, liberally interpreting benefits is an appropriate way of erring on the side of compensation when the system has a long history of erring in the other direction.

This is not to argue that two wrongs make a right. Rather, answers to these difficult questions tend not to be binary. Consensus begins to emerge around the core, while uncertainty lingers around the scope of the problem. In fact, there is no guarantee that science will ever be able to fully resolve the uncertainties involved in any issue. *See*, *e.g.*, INSTITUTE OF MEDICINE OF THE NATIONAL ACADEMIES, GULF WAR AND HEALTH, TREATMENT FOR CHRONIC MULTISYMPTOM ILLNESS 1 (2010).

("Despite considerable efforts by researchers in the United States and elsewhere, there is no consensus among physicians, researchers, and others as to the cause of C[hronic] M[ultisymptom] I[llness]. *There is a growing belief that no specific causal factor or agent will be identified.*" (emphasis added)).

Therefore, *some* approach is required to deal with scientific uncertainty, recognizing that *any* approach carries a risk that it might be someday be judged as wanting in retrospect. Consistent with *Gardner* and the history of interpreting veterans benefits statutes, the proper approach is to resolve lingering uncertainty in favor of veterans, within the bounds of the benefits authorized by Congress, rather than wait for certainty that might never come while veterans continue to suffer and die.

2. The rule of *Gardner* is also appropriate because it helps address the problem of friction between the scientific framework for reaching conclusions and the legal framework for compensating veterans.

Aside from the null hypothesis, another aspect that causes friction in the veterans benefits realm is the difference between how scientists and adjudicators are trained to handle uncertainty. Benefits adjudicators work in a process built on a binary standard in which they look for fifty-percent certainty because "ties go to the runner." *Gilbert v. Derwinski*, 1 Vet. App. 49, 55 (1990). Scientifically trained professionals deal with layers of uncertainty. Taking scientific evidence generated in

one framework and applying it to a different legal question can be fraught with problems.

The first problem is the multiple layers of uncertainty involved when it comes to causation. There can be uncertainty as to the magnitude of an observed correlation, uncertainty as to the reliability of the measurement, uncertainty in whether an observed correlation is best explained by a proposed causation relationship, and uncertainty as to the similarity between the population studied and the veterans seeking benefits. In some situations, the evidence might show a dramatic effect, but there might be tremendous uncertainty that the effect is real because of a small sample size. In other cases, there might be high confidence that an effect is real, but the magnitude of the effect is so tiny that any given incidence of a condition is unlikely to be related. In still other cases, the effect might be large and well replicated, but only in animal populations that might not be good proxies for human beings.

Furthermore, rare conditions present additional difficulties. As Judge Newman lamented in her dissent in *Bastien v. Shinseki*, 599 F.3d 1301 (Fed. Cir. 2010), the system is ill-equipped to handle rare conditions for which it is unlikely that there will ever be enough data to determine causation with scientific certainty, *id.* at 1307-08 (Newman, J., dissenting). Combining all these uncertainties into a single, binary determination under the benefit of the doubt is a problem has never been squarely addressed.

However, the veterans benefits system is not based upon the scientific gold standard of ninety-five-percent confidence that an observed effect is real and not simply a random variation within a small sample. The paternalistic system is willing to act in the face of more uncertainty than that with which scientists are comfortable. Although courts cannot change the standards established by Congress, they can apply interpretive doubt liberally in favor of veterans, as a partial bridge over the gap between differences in how the legal and the scientific worlds handle uncertainty.

The fundamental issue is how to deal with uncertainty, rather than how to predict the outcomes of further research. It is inherent in uncertainty that future information could cut in either direction or fail to bring any further clarity at all. The goal is not to have courts become amateur scientists who interpret studies or referee competing predictions as to what consensus is likely to emerge. Rather, once Congress has decided to act after listening to scientists and the Secretary, the role of the courts is to liberally interpret the statute so as to care for those who are suffering today and who—very frequently—have been suffering without compensation for many years while waiting for science to catch up with their everyday reality.

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' Brief was served on counsel of record by electronic service under the Court's CM/ECF system on October 15, 2018.

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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 6,988 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The Brief was prepared in proportionately spaced typeface using Microsoft Word in Garamond, 14 Point.

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