No. 12-749

In the Supreme Court of the United States

RUTH HILL FREDERICK, PETITIONER

v.

ERIC K. SHINSEKI, SECRETARY OF VETERANS AFFAIRS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals correctly interpreted Section 101(e) of the Veterans Benefits Act of 2003, Pub. L. No. 108-183, 117 Stat. 2653, which requires a "surviving spouse" who remarried after age 57 and before the Act's passage to submit an application for benefits "not later than the end of the one-year period beginning on the date of the enactment of this Act," to make the filing of an application within the specified one-year period a mandatory condition for the receipt of benefits.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-28a) is reported at 684 F.3d 1263. The opinion of the Court of Appeals for Veterans Claims (Pet. App. 29a-44a) is reported at 24 Vet. App. 335. The decision of the Board of Veterans' Appeals is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 3, 2012. A petition for rehearing was denied on September 20, 2012 (Pet. App. 45a-46a). The petition for a writ of certiorari was filed on December 19, 2012. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The "surviving spouse" of a veteran who "dies after December 31, 1956, from a service-connected" or

otherwise compensable disability is entitled to receive "[d]ependency and indemnity compensation" (DIC) from the Secretary of Veterans Affairs (Secretary). 38 U.S.C. 1311(a). The base monthly rate of such compensation is currently $1154—an amount that may be slightly increased based on the deceased veteran's pay grade, the surviving spouse's own medical condition, the need to support children under age 18, and other factors. See 38 U.S.C. 1311(a)(2)-(3) and (b)-(f).

Until 2004, any surviving spouse who remarried was barred from continuing to receive DIC benefits. See Pet. App. 4a; see also 38 U.S.C. 101(3) (defining "surviving spouse" as a person "who was the spouse of a veteran at the time of the veteran's death * * * and who has not remarried"); 38 U.S.C. 103 (1988). Congress grew concerned, however, that the prospect of benefits termination unduly discouraged older surviving spouses from remarrying. See H.R. Rep. No. 211, 108th Cong., 1st Sess. 11-12 (2003) (House Report). Accordingly, on December 16, 2003, Congress revised the remarriage rule as part of the Veterans Benefits Act of 2003 (Act), Pub. L. No. 108-183, 117 Stat. 2651. Section 101(a) of the Act provides that, effective January 1, 2004, "[t]he remarriage after age 57 of the surviving spouse of a veteran shall not bar the furnishing of [DIC] benefits to such person as the surviving spouse of the veteran." § 101(a), 117 Stat. 2652 (38 U.S.C. 103(d)(2)(B)); see 38 U.S.C. 103 Note; Pet. App. 4a-5a.

Congress also provided limited relief for individuals who had already remarried after their 57th birthdays but before the Act's effective date. Section 101(e) of the Act, which is entitled "Application for Benefits" and is uncodified, provides:

> In the case of an individual who but for having remarried would be eligible for benefits under title 38, United States Code, by reason of the amendment made by [Section 101(a)] and whose remarriage was before the date of the enactment of this Act and after the individual had attained age 57, the individual shall be eligible for such benefits by reason of such amendment only if the individual submits an application for such benefits to the Secretary of Veterans Affairs not later than the end of the one-year period beginning on the date of the enactment of this Act.

§ 101(e), 117 Stat. 2653. The "one-year period beginning on the date of the enactment of this Act" began on December 16, 2003, and ended on December 16, 2004. *Ibid.*; see 38 C.F.R. 3.55(a)(10)(ii) (stating that "[a] surviving spouse who remarried after the age of 57, but before December 16, 2003, may be eligible for dependency and indemnity compensation * * * only if the application for such benefits was received by VA before December 16, 2004").

2. On February 25, 1961, petitioner married World War II veteran Fred T. Hill. Pet. App. 4a. Mr. Hill died of a service-related disability on May 26, 1970, at which time petitioner became entitled to DIC benefits as his surviving spouse. See *ibid.*; see also 38 U.S.C. 1310-1318. She applied for the benefits shortly after his death and received them for many years. See Pet. App. 4a, 30a. In 1986, at the age of 57, she married Spencer Frederick, and she was thereby disqualified from continuing to collect DIC benefits. See *id.* at 4a; 38 U.S.C. 101(3). When she notified the Secretary of her new marital status, her benefits ceased. See Pet. App. 4a, 30a.

In 2007, nearly four years after enactment of the Act, petitioner asked the Department of Veterans Affairs to begin paying DIC benefits to her once again. Pet. App. 7a, 31a. Both the Veterans Affairs Regional Office and the Board of Veterans' Appeals denied her request because she had not filed it within the "one-year period beginning on the date of the enactment of [the] Act." § 101(e), 117 Stat. 2653; see Pet. App. 7a, 31a.

3. Petitioner appealed to the Court of Appeals for Veterans Claims (Veterans Court), arguing that the Act did not require her to file an application for reinstatement of benefits because she had filed a benefits application in 1970 after her first husband's death. Pet. App. 8a, 32a-33a. The Veterans Court agreed, concluding that the Act "does not create a one-year 'window' in which to submit an application" but instead "only an end date by which an application must be submitted." *Id.* at 34a. Because petitioner's initial 1970 application for survivor benefits had been submitted before December 16, 2004, the Veterans Court found that application sufficient to entitle petitioner to the Act's protections. See *id.* at 9a, 35a-36a, 40a.

4. The court of appeals reversed, holding that petitioner's request for benefits was untimely under the plain language of Section 101(e). Pet. App. 3a-21a.

The court of appeals concluded that several different aspects of Section 101(e)'s text dictated that result. The court noted that the provision is worded in a "forward-looking" way, since it uses the present tense "submits" and not the past tense "submitted." Pet. App. 14a-15a. The court also explained that the required submission relates to a new entitlement to benefits, which "became available for the first time by virtue of" the Act and "did not exist in 1970" when petitioner filed her original

application. See *id.* at 14a-15a. The court further emphasized that Section 101(e) does not merely include an end date, but creates a filing time with the "specific beginning" of "the date of enactment of the statute"—language that would be inexplicable if Congress had intended simply to create a deadline of December 16, 2004. *Id.* at 15a. For all of those reasons, the court held, "[t]here is only one reasonable way to read the relevant words in the statute." *Ibid.*[1]

The court of appeals also explained that its interpretation of Section 101(e) was bolstered by a comparison between that provision and other sections of the Act. Most notably, the court pointed to a section of the Act that uses the word "during," in reference to a specified one-year period, interchangeably with "not later than the end of." See Pet. App. 17a-18a. Section 701(d) of the Act states that the Secretary will readjudicate certain claims if the request for readjudication is received "not later than the end of the one-year period that begins on the date of the enactment of this Act"; it also states that the Secretary is not obligated to readjudicate a claim that "is not submitted during the one-year period." § 701(d)(1) and (4)(A), 117 Stat. 2670, 2671; see Pet. App. 17a. In the court's view, Section 701(d)'s wording strongly indicates that, when Congress used the "not later than the end of" language in Section 101(e), it intended to create a one-year "filing window" that began on "the date of enactment of the Act." Pet. App. 18a.[2]

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[1] Because the court concluded that the text of Section 101(e) was "unambiguous," it did not "recite the legislative history of subsection (e), admitted by [petitioner] as adverse to her case." Pet. App. 13a; see *id.* at 21a.

[2] The court of appeals also relied on Section 101(f), which made a "technical correction" to a provision relating to medical benefits

Judge Reyna dissented. See Pet. App. 22a-28a. He agreed with the Veterans Court that the Act unambiguously created only an end date for submission of an application for DIC benefits, not a "bounded period of one year during which applications under the Act should have been filed." *Id.* at 23a-24a. Accordingly, he would have held that petitioner's original 1970 application for DIC benefits—filed decades before the enactment of the Act—satisfied the timing requirement of Section 101(e). See *ibid.*

ARGUMENT

The court of appeals correctly interpreted a statutory provision of limited applicability, and its decision does not conflict with any decision of this Court or another court of appeals. Further review is not warranted.

1. Petitioner appears to concede that an application for benefits filed after December 16, 2004, is too late to satisfy the time limitation set forth in Section 101(e). She contends (Pet. 6-14), however, that an application filed at any point before that date—even one filed more than 30 years before the Act's enactment—is sufficient to entitle a claimant to resumption of previously discontinued benefits. The Federal Circuit correctly rejected that argument, concluding instead that Section 101(e)'s forward-looking language requires the filing of a new

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provided to a surviving spouse who remarries after age 55. Pet. App. 16a. Section 101(f) replaced the requirement to file an application "during the 1-year period ending on the effective date" of a 2002 law with the requirement to file an application "before the end of the one-year period beginning on the date of the enactment" of the Act. § 101(f), 117 Stat. 2653; see Pet. App. 9a-10a, 16a-17a. In the court's view, Section 101(f) "simply lengthened the window filing period," and could not be read to "replace a window filing requirement with an end date filing requirement." *Id.* at 17a.

request for benefits within the one-year period beginning on December 16, 2003. As the court of appeals explained, that conclusion is unambiguously required by the text of the provision and confirmed by other indicia of congressional intent. See Pet. App. 3a-21a.

First, Section 101(e) states that an individual "shall be eligible for" benefits "only if the individual *submits* an application"—a requirement that is stated in the present tense. § 101(e), 117 Stat. 2653 (emphasis added). Within the context of a statute that was enacted into law in December 2003, Section 101(e)'s reference to an individual who "submits an application" is not naturally read to encompass persons who had previously submitted applications under a different legal regime. Rather, the requirement to submit an application is sensibly understood as a way to notify the agency that particular individuals who were previously barred from receiving DIC benefits wish to claim those benefits on a going-forward basis pursuant to Section 101(e). See Pet. App. 14a-15a.

The authorities on which petitioner relies (Pet. 9-10) in support of her "omnitemporal" reading do not advance her cause. This Court has recognized that "omnitemporality[] * * * is not the typical understanding of the present tense in either normal discourse or statutory construction"; indeed, "the present tense generally does not include the past." *Carr* v. *United States*, 130 S. Ct. 2229, 2236 & n.5 (2010); see 1 U.S.C. 1 ("In determining the meaning of any Act of Congress, unless the context indicates otherwise[,] * * * words used in the present tense include the future as well as the present."). And while congressional drafting manuals state that drafters should use the present tense "[w]henever possible," they also recognize that the topic at hand may

require use of the past tense or an "explicit[]" discussion of "temporal relationships." Pet. 9-10 (citing House Office of Legislative Counsel, *House Legislative Counsel's Manual on Drafting Style* 2, 60 (1995), and Senate Office of Legislative Counsel, *Legislative Drafting Manua*l 4 (1997)).

The purpose of Section 101(e) is to extend certain benefits to individuals who remarried *in the past*—prior to the Act's effective date. If Congress had intended to permit applications submitted before the Act's enactment to satisfy Section 101(e)'s temporal requirement, it could have said so expressly. See *Carr*, 130 S. Ct. at 2236; see also, *e.g.*, *Gwaltney of Smithfield, Ltd.* v. *Chesapeake Bay Found., Inc.*, 484 U.S. 49, 57 (1987) ("Congress could have phrased its requirement in language that looked to the past * * * , but it did not choose this readily available option."); *Barrett* v. *United States*, 423 U.S. 212, 216 (1976) (noting that Congress used the present perfect tense to "denot[e] an act that has been completed").[3]

Second, Section 101(e) creates a "one-year period" with both a "beginning" (the date of enactment) and an end (the date one year after enactment), and it requires submission of a benefits application before that period expires. If Congress had wanted to tie benefits under Section 101(e) to the filing of an application at any time before a specified date, no matter how far in the past that filing took place, there would have been no need to

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[3] In fact, Congress used tenses other than the present tense in Section 101(e) itself, as well as in other provisions of the Act. See § 101(e), 117 Stat. 2653 ("having remarried"); see also, *e.g.*, § 701(d)(2), 117 Stat. 2670 (claimant "received notice"; claimant "did not submit [requested] information"; claimant "did not file a timely appeal").

create such a bounded period at all; Congress could simply have set a statutory deadline, such as "one year after the date of the enactment of this Act." Accordingly, the reading urged by petitioner renders Congress's use of the words "one-year period" and "beginning" wholly superfluous—a result that is highly disfavored. See, *e.g.*, *Ratzlaf* v. *United States*, 510 U.S. 135, 140 (1994); see also Pet. App. 14a-15a.

Third, in addition to requiring an "application" for DIC benefits, Section 101(e) establishes substantive eligibility criteria, including the requirement that the claimant's remarriage occurred "after the individual had attained age 57." Petitioner contends that the "application" requirement was satisfied by her initial 1970 application for DIC benefits. In 1970, however, petitioner had not yet remarried and was younger than 57 years old. It would be anomalous to conclude that petitioner satisfied Section 101(e)'s requirement of an "application" through a document submitted when she did *not* satisfy Section 101(e)'s substantive requirements.

Fourth, a comparison between Section 101(e) and other provisions of the Act that use similar language reinforces the conclusion that Section 101(e) opens only a one-year window for submission of a benefits application. As the court of appeals explained (see Pet. App. 17a-18a), in Section 701(d) of the Act, Congress equated "not later than the end of the one-year period that begins on the date of the enactment of this Act" with "during the one-year period." § 701(d)(1) and (4)(A), 117 Stat. 2670-2671. Petitioner's interpretation of Section 101(e) cannot be reconciled with that statutory language. See, *e.g.*, *Sorenson* v. *Secretary of Treasury*, 475 U.S. 851, 860 (1986) ("The normal rule of statutory construction assumes that identical words used in different

parts of the same act are intended to have the same meaning.") (internal quotation marks and citation omitted). Petitioner relies in part (Pet. 12) on Section 101(f) of the Act, which addressed medical care for surviving spouses who remarry, and which replaced the phrase "during the 1-year period" with "before the end of the one-year period." As the court of appeals explained, however, Section 101(f) made only a "technical correction" that extended the window of time during which a benefits application could be filed, without altering the prior understanding that the period for filing *was* a "window." Pet. App. 16a-17a; see § 101(f), 117 Stat. 2653.

Fifth, although resort to materials other than the plain language of Section 101(e) is not necessary in this case, see, *e.g.*, *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992), the legislative history confirms that Congress intended that provision to open a one-year window during which previously remarried individuals could apply for DIC benefits. See Pet. App. 13a, 21a. The record of the Act's passage in Congress contains an "explanatory statement" that surviving spouses who remarried "after attaining age 57" and before the law's enactment "would have one year to apply for reinstatement" of benefits. 149 Cong. Rec. S15,133 (daily ed. Nov. 19, 2003); 149 Cong. Rec. H11,705, H11,716 (daily ed. Nov. 20, 2003); see also House Report 12 (referring to "those surviving spouses who apply for reinstatement of their DIC benefits under this provision").[4]

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[4] The Congressional Budget Office cost estimate included in the House Report was based on the same understanding. See House Report 32 (stating that law would permit surviving spouses to "resume receiving DIC payments but only if they apply for the benefit within one year after this bill is enacted"); *id.* at 33 (stating that law

In the face of those indicia of congressional intent, petitioner suggests (Pet. 14) that the regulation by which the Secretary implemented Section 101(e) supports her preferred interpretation of the statute. In fact, the agency's "parrot[ing]" language, Pet. App. 33a n.2, states only that a claimant "*may* be eligible for dependency and indemnity compensation" if she files an application before December 16, 2004—not that any filing submitted before that date automatically entitles the claimant to receive DIC benefits. See 38 C.F.R. 3.55(a)(10)(ii); see also *Gonzales* v. *Oregon*, 546 U.S. 243, 257 (2006) (explaining that "the existence of a parroting regulation does not change the fact that the question here is not the meaning of the regulation but the meaning of the statute"); 71 Fed. Reg. 29,083 (May 19, 2006) (stating that the regulation was issued without notice and comment because it merely "restate[d] current statutory provisions, and ma[d]e nonsubstantive technical changes").

Petitioner also asserts (Pet. 14) that the Federal Circuit's decision gives rise to "unjust and absurd results." But it is hardly absurd to require a new application in order to take advantage of a newly conferred entitlement, especially when there is no other obvious way for the agency charged with administering the relevant scheme to identify persons who might qualify to receive that entitlement. Any statutory deadline necessarily disadvantages some claimants who "have an almost equally strong claim to favored treatment" as the claimants who file within the prescribed period. *United*

"would require all those eligible to apply for resumption [of DIC] within one year"); *id.* at 43 (stating that law "would provide a one-year limit for [the Department of Veterans Affairs] to accept applications for reinstated DIC").

States R.R. Ret. Bd. v. *Fritz*, 449 U.S. 166, 179 (1980) (quoting *Mathews* v. *Diaz*, 426 U.S. 67, 83-84 (1976)) (internal quotation marks omitted). If petitioner had filed a request for reinstatement of benefits "the day before enactment of the 2003 Act," Pet. 14, the Department of Veterans Affairs could have advised her to file a new application, see generally 38 U.S.C. 5103(a) and 5103A. But it would scarcely have been feasible for the agency to attempt to contact all individuals, like petitioner, whose DIC benefits had been discontinued many years earlier as a result of remarriage. Section 101(e) accordingly requires would-be beneficiaries to bring themselves to the agency's attention through the filing of an application within the specified one-year window.[5]

2. Finally, petitioner argues (Pet. 15-17) that the decision of the court of appeals is "inconsistent" with this Court's decisions applying "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson* v. *Shinseki*, 131 S. Ct. 1197, 1206 (2011) (citation omitted). As the Federal Circuit correctly recognized, no such inconsistency exists. See Pet. App. 12a-13a.

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[5] Petitioner suggests, without citation, that "thousands of remarried surviving spouses" are affected by the decision of the court of appeals in this case. Pet. 6; see *id.* at 14. Although the exact number of affected persons is uncertain, the relevant group is a limited one. To benefit from the rule that petitioner advocates, a person who once qualified as a "surviving spouse" would need to (1) have remarried after attaining age 57 and prior to 2004; (2) continue to be married nearly ten years later, with such marriage not having been annulled or "terminated by death or divorce," 38 U.S.C. 103(d)(1)-(4); (3) have failed to apply for reinstatement of benefits between December 16, 2003, and December 16, 2004; and (4) be interested in receiving DIC benefits from the Secretary.

The canon on which petitioner relies does not dictate that a veteran's interpretation of a statute must prevail even if Congress has clearly expressed a contrary intent. Rather, it supplies a tool for resolving any ambiguities that remain after other available methods of interpretation have already been brought to bear. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 117-118 (1994) (stating "the rule that interpretive doubt is to be resolved in the veteran's favor"); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (stating that provisions should be given "as liberal a construction for the benefit of the veteran" as their "harmonious interplay * * * permits").[6]

Because the court of appeals found Section 101(e) unambiguous, it correctly held that the canon favoring veterans had no relevance in this case. That interpretive approach is fully consistent with the decisions of this Court on which petitioner relies, whether or not the court of appeals was correct in viewing Section 101(e) as unambiguous. The Federal Circuit has consistently acknowledged and properly applied the pro-veteran canon, see, *e.g.*, *Terry* v. *Principi*, 340 F.3d 1378, 1383-1384 (Fed. Cir. 2003), cert. denied, 541 U.S. 904 (2004), just as it did in this case, see Pet. App. 12a-13a. Accordingly, "clarif[ication] and reinforce[ment]" of the canon

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[6] Cf. *Richlin Sec. Serv. Co.* v. *Chertoff*, 553 U.S. 571, 589-590 (2008) (explaining that "there is no need for us to resort to the sovereign immunity canon" when "traditional tools of statutory construction" leave "no ambiguity left for us to construe"); *Chickasaw Nation* v. *United States*, 534 U.S. 84, 93-94 (2001) (discussing canon that "statutes are to be construed liberally in favor of the Indians with ambiguous provisions interpreted to their benefit," and explaining that such a canon is not a "mandatory rule[]" and cannot be used to "produce an interpretation that we conclude would conflict with the intent embodied in the statute Congress wrote") (citation omitted).

(Pet. 6, 17)—which this Court has recently restated, see *Henderson*, 131 S. Ct. at 1206—is not necessary.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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