

# Bloomberg Law

## Republicans Back High Court Bid to Limit Federal Agency Power

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Fifteen Republican-led states and a quartet of GOP senators urged the U.S. Supreme Court to take a veteran disability case that could make federal regulations of all types more vulnerable to legal challenge.

The state coalition and Republican lawmakers filed briefs Monday backing Air Force veteran Thomas Buffington's bid for nearly three years of disability benefits he claims were wrongfully denied. The U.S. Court of Appeals for the Federal Circuit applied the *Chevron* doctrine—which calls for courts to defer to agency interpretations of ambiguous laws—to side against Buffington in an August [ruling](#).

“If *Chevron* requires courts to abdicate their own obligation to adjudicate legal questions by elevating an agency's views over Congress's intent to favor veterans, then it patently violates the basic structure of our Constitutional design,” the GOP senators said in their [brief](#).

The case directly tees up the *Chevron* doctrine for the Supreme Court's conservative majority to reconsider. That canon has been in the crosshairs of critics of the administrative state who contend it lets agencies wield too much power.

The justices already have a case that gives them a chance to roll back the doctrine. They heard [oral argument in \*American Hospital Association v. Becerra\*](#) in November, which involves an industry challenge to Medicare rules for drug reimbursement rates.

But the hospital group's chief argument wasn't that the court should overturn *Chevron*, but rather that the law in question clearly supported its interpretation over the government's, said [Richard Samp](#), a lawyer with the New Civil Liberties Alliance who represents Buffington.

Should the high court cut back on *Chevron* in that Medicare case, then it would vacate the Federal Circuit's ruling in Buffington's case, Samp said. But it's more likely that the court wouldn't reach *Chevron* and thus have no impact on his client's case, he said.

The Justice Department, which represents the Department of Veterans Affairs in Buffington's case, didn't respond to a request for comment. The federal government has until March 9 to file its brief responding to Buffington's petition for review.

## **Forfeiture Rule**

The case arises from Buffington's attempt to reinstate disability benefits for tinnitus, or ringing in the ears, which he suffered as a result of his military service. The VA had granted him those benefits after his honorable discharge in 2000, but discontinued them when he was later recalled to active duty in the Air National Guard.

Buffington sought reinstatement of his disability benefits in 2009, four years after he completed his tour of duty. His request included benefits that he said he was owed since the close of his active duty.

But the VA rejected Buffington's full request, saying he ran afoul of a forfeiture rule that veterans lose past-due disability benefits if they don't claim them within a year. Instead, the VA granted him a year's worth of back payments.

A divided Federal Circuit panel deferred to the VA under *Chevron*, saying that Congress left a gap in the statutory scheme for re-upping veterans' disability benefits and the VA's rule to fill that gap was reasonable.

## **'Fundamental Problems'**

In his petition for Supreme Court review, Buffington argues that the Federal Circuit failed to apply the "pro-veteran canon," which calls on courts to resolve ambiguous laws in favor of veterans. The high court has been using that rule of statutory construction for nearly 80 years, he said.

The pro-veteran canon makes clear that Buffington should have received all the disability benefits he sought, and not just the one year of retroactive benefits the VA allowed, Buffington said. He asked the court to either clarify that the application of the pro-veteran canon comes before application of the *Chevron* doctrine, or to throw out *Chevron* altogether.

Texas, Ohio, Arizona, Indiana, Virginia and 10 other Republican-led states said that the Federal Circuit's ruling "underscores the fundamental problems underlying *Chevron*'s application and provides a straightforward opportunity to delineate the role of courts when interpreting statutes governing federal agencies." The case is an "excellent vehicle" for the Supreme Court to either modify or scrap *Chevron*, they said in their [brief](#).

Senators Ted Cruz (R-Texas), Tom Cotton (R-Ark.), Marsha Blackburn (R-Tenn.), and Kevin Kramer (R-N.D) filed a brief supporting Buffington. Briefs also rolled in from the Cato Institute and the National Right to Work Legal Defense Foundation, [Concerned Veterans for America Foundation](#), and a [coalition of pro-veteran groups](#).

"There's been quite an outpouring of support," said Samp, Buffington's lawyer. "That certainly suggests that there is interest in the court taking this issue."

The case is [Buffington v. McDonough](#), U.S., No. 21-972, briefs filed 2/7/22.