No. 17-1821

IN THE
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 EN BANC REPLY BRIEF FOR CLAIMANT-APPELLANT ALFRED PROCOPIO, JR.

John B. Wells
MILITARY-VETERANS ADVOCACY
P.O. Box 5235
Slidell, LA 70469-5235

Matthew R. Shahabian
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Melanie L. Bostwick
Thomas M. Bondy
Robbie Manhas
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Counsel for Claimant-Appellant

November 15, 2018

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iii
INTRODUCTION 1
ARGUMENT 3
I. The Unambiguous Meaning Of The Statutory Phrase "Served In The Republic Of Vietnam" Precludes The VA's Landmass-Limited Reading. 3
A. The settled meaning of "Republic of Vietnam" encompasses the sovereign nation's entire territory, including its territorial sea. 3
1. The plain meaning of "the Republic of Vietnam" is the former sovereign nation. 3
2. The VA provides no reason why the formal name of a sovereign country should be treated as anything other than a term of art. 4
3. There is no ambiguity about how to define a sovereign nation's boundaries. 12
B. Statutory context confirms the inclusion of naval service in the territorial sea. 14
C. The legislative history shows clear congressional intent to include naval service in the territorial sea. 14
1. Congress's codification of Regulations 313 and 311 confirms the Act includes the territorial sea. 14
2. Other legislative history confirms that Congress included the territorial sea. 19
D. The pro-veterans canon confirms inclusion of naval service in the territorial sea. 20

II. The Pro-Veterans Canon Applies At *Chevron* Step One. 22

A. Agency deference cannot override a drafting presumption enshrined in a statutory scheme. 22

1. The pro-veterans canon reflects a congressional drafting presumption and thus Congress's intent, making it an appropriate tool at Step One. 22

2. The VA's arguments regarding its delegated authority ignore that its authority does not extend to rewriting unambiguous statutes. 29

B. The VA's proposal would eliminate any role for the pro-veterans canon. 31

CONCLUSION 35

CERTIFICATE OF SERVICE

CERTIFICATE OF COMPLIANCE

TABLE OF AUTHORITIES

Page(s)

CASES

Albuquerque Indian Rights v. Lujan,
930 F.2d 49 (D.C. Cir. 1991) 27

Alexander v. Sandoval,
532 U.S. 275 (2001) 18

Boone v. Lightner,
319 U.S. 561 (1943) 26

Boyer v. West,
210 F.3d 1351 (Fed. Cir. 2000) 25

Brown v. Gardner,
513 U.S. 115 (1994) 24, 25, 26

Bruesewitz v. Wyeth, LLC,
562 U.S. 223 (2011) 8

Chevron U.S.A., Inc. v. NRDC,
467 U.S. 837 (1984) 29

Cobell v. Norton,
240 F.3d 1081 (D.C. Cir. 2001) 27

Disabled Am. Veterans v. Gober,
234 F.3d 682 (Fed. Cir. 2000) 25

Epic Sys. Corp. v. Lewis,
138 S. Ct. 1612 (2018) 26, 28

Esquivel-Quintana v. Sessions,
137 S. Ct. 1562 (2017) 33

F. Hoffman-La Roche Ltd. v. Empagran S.A.,
542 U.S. 155 (2002) 6

FAA v. Cooper,
566 U.S. 284 (2012) 5

Fishgold v. Sullivan Drydock & Repair Corp.,
328 U.S. 275 (1946) 21

Haas v. Peake,
525 F.3d 1168 (Fed. Cir. 2008) 15, 18

Hodge v. West,
155 F.3d 1356 (Fed. Cir. 1998) 27

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 23

Kirkendall v. Dep't of Army,
479 F.3d 830 (Fed. Cir. 2007) 25

Kisor v. Shulkin,
880 F.3d 1378 (Fed. Cir. 2018) 27

Little Six, Inc. v. United States,
229 F.3d 1383 (Fed. Cir. 2000) 34

McGee v. Peake,
511 F.3d 1352 (Fed. Cir. 2008) 25

McLaughlin v. Richland Shoe Co.,
486 U.S. 128 (1988) 18

McNary v. Haitian Refugee Ctr., Inc.,
498 U.S. 479 (1991) 23

Moskal v. United States,
498 U.S. 103 (1990) 33

Murray v. The Charming Betsy,
6 U.S. (2 Cranch) 64 (1804) 6

Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs,
260 F.3d 1365 (Fed. Cir. 2001) 25

Nielson v. Shinseki,
607 F.3d 802 (Fed. Cir. 2010) 33

SAS Inst., Inc. v. Iancu,
138 S. Ct. 1348 (2018) 22

Sears v. Principi,
349 F.3d 1326 (Fed. Cir. 2003) 34

Shinseki v. Sanders,
556 U.S. 396 (2009) 27

Terry v. Principi,
340 F.3d 1378 (Fed. Cir. 2003) 34

United States v. Rosero,
42 F.3d 166 (3d Cir. 1994) 6

Util. Air Regulatory Grp. v. EPA,
134 S. Ct. 2427 (2014) 4, 29

Whitman v. United States,
135 S. Ct. 352 (2014) 33

STATUTES

8 U.S.C. § 1101(a)(38) 10

8 U.S.C. § 1158(a)(1) 9

16 U.S.C. § 1362(15)(A) 9

16 U.S.C. § 2402(8) 9

18 U.S.C. § 2280(b)(1)(A)(ii) 9

26 U.S.C. § 638(1) 8

26 U.S.C. § 7701(a)(9) 9

33 U.S.C. § 1203(b) 9

38 U.S.C. § 1116(a)(1) 14

38 U.S.C. § 1116(a)(1)(A) 18

38 U.S.C. § 1116(a)(1)(B) 18

38 U.S.C. § 1116(f) 14

46 U.S.C. § 2301 9

46 U.S.C. § 4301(a) 9

46 U.S.C. § 4701(3) 9

Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11 30

Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) 30

OTHER AUTHORITIES

38 C.F.R. § 3.311a (1986) 16

38 C.F.R. § 3.313 16

50 Fed. Reg. 15,848 (Apr. 22, 1985) 17

58 Fed. Reg. 50,528 (Sept. 28, 1993) 30

137 Cong. Rec. 2341 (Jan. 29, 1991) 11, 19

Centers for Disease Control, *The Association of Selected Cancers with Service in the U.S. Military in Vietnam: Final Report* (Sept. 1990) 11

Dep't of Justice, 17 Op. Off. Legal Counsel 77 (1993) 10

Dep't of Veterans Affairs, Adjudication Procedures Manual M21-1 § 4.08(k)(1) (Nov. 8, 1991) 17, 18

Exec. Order No. 11216, Designation of Vietnam and Waters Adjacent Thereto as a Combat Zone for the Purposes of Section 112 of the Internal Revenue Code of 1954, 30 Fed. Reg. 5817 (1965) 7

Institute of Medicine, *Blue Water Navy Vietnam Veterans and Agent Orange Exposure* (2011), http://nap.edu/13026 11

Institute of Medicine, *Veterans and Agent Orange Update 2008* (2009), http://nap.edu/12662 11

National Research Centre for Environmental Toxicology, *Examination of The Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans Via Drinking Water* (2002), https://tinyurl.com/ybvwr7vw 11

Restatement (Third) of Foreign Relations Law § 512 (1987) 12, 13

S. Rep. No. 104-371 (1996) 20

VA Br., *Hunter v. Shinseki*, 2013 WL 4520006 (Fed. Cir. Aug. 12, 2013) (No. 13-7114) 30

VA Opp. Br., *Haas v. Peake*, 2008 WL 5328208 (U.S. Dec. 19, 2008) (No. 08-525) 15

INTRODUCTION

Congress was clear. It understood that Vietnam veterans, including Blue Water Navy veterans, were suffering from diseases suspected of being linked to Agent Orange and other dangerous herbicides that the U.S. military sprayed in South Vietnam during the War. And it understood that the scientific and evidentiary uncertainties surrounding the use of those chemicals, the exposure levels experienced by different servicemembers, and the effects of that exposure might never be fully resolved—and certainly would not be in time to care for aging veterans who were suffering from disabling conditions. So Congress granted all veterans who "served in the Republic of Vietnam" after the military began using these herbicides a presumption of exposure and service-connection for diseases associated with exposure.

That presumption unambiguously covers Mr. Procopio's and many others' service in the territorial sea of the former sovereign nation of the Republic of Vietnam. Established international-law principles, statutory context, and the legislative history together compel that unambiguous meaning. Yet the VA stretches to create ambiguity where

there is none, in an effort to defend its policy of excluding from statutory coverage any veteran who did not serve on the Vietnamese landmass or its internal rivers (terms that appear nowhere in the statute). The VA's arguments are meritless. And they are at odds with the pro-veterans canon, which requires courts to presume that Congress drafts veterans-benefits statutes like § 1116 with a remedial, pro-veteran purpose. The VA instead asks the Court to reach out and find some reason to declare the statute ambiguous, when the Court should be resolving any arguable interpretive doubt in favor of veterans.

The VA defends its approach by proposing to effectively nullify the pro-veterans canon in the *Chevron* context. It argues that the canon applies not at Step One, nor even at Step Two, but *after* a court has considered all other tools of interpretation, including deference to the agency. It is difficult to imagine how a court would ever reach the canon under this framework, and the VA offers no explanation. Nor does it square its proposal with Supreme Court cases making clear that canons that reveal Congress's intent—including this canon—apply at *Chevron* Step One as part of the judiciary's primary obligation to determine Congress's meaning. The VA instead resorts to persistent

claims for deference, citing its delegated authority. But no delegation of authority—not general rulemaking authority, not the Agent Orange Act, and not the expressly repealed delegation in the Dioxin Act—can authorize the agency to contradict the unambiguously expressed intent of Congress.

Section 1116(a) applies to Blue Water Navy veterans who served in the Republic of Vietnam's territorial sea. The Court should reverse.

ARGUMENT

I. The Unambiguous Meaning Of The Statutory Phrase "Served In The Republic Of Vietnam" Precludes The VA's Landmass-Limited Reading.

A. The settled meaning of "Republic of Vietnam" encompasses the sovereign nation's entire territory, including its territorial sea.

1. The plain meaning of "the Republic of Vietnam" is the former sovereign nation.

Mr. Procopio (at 31) demonstrated that the statute's use of the formal name "the Republic of Vietnam" refers to the former sovereign nation of South Vietnam. The VA (at 27) makes a passing attempt to dispute this point: It suggests that "the plain meaning" of the words "Republic of Vietnam" refers not to the named country but rather "areas on the Vietnam peninsula where herbicides were sprayed." The VA

does not explain how this highly specific interpretation could be "plain" from the country's name. It is not. Nor does the VA offer an elaborated theory for how the statutory definition of "herbicide agent" is relevant—and its bare assertion (at 28 n.10) that herbicides were sprayed only "on the land" is both unsupported and irrelevant. *See* Procopio Br. 9 (citing evidence of spraying at land-water interface and distribution into open sea); *infra* 10-12 & n.2. The VA seeks leeway to *interpret* the statute's words based on its theory that herbicides affected only land-based troops, but the words plainly do not say that. "[A]n agency may not rewrite clear statutory terms to suit its own sense of how the statute should operate." *Util. Air Regulatory Grp. v. EPA*, 134 S. Ct. 2427, 2446 (2014).

2. The VA provides no reason why the formal name of a sovereign country should be treated as anything other than a term of art.

Mr. Procopio also demonstrated (at 31-36) that Congress used the formal name of a sovereign nation as a term of art. The VA offers no reason why a court interpreting § 1116(a) should reject that ordinary understanding. That "the Republic of Vietnam" includes the Republic's territorial sea follows from a "cardinal rule of statutory construction":

"[W]hen Congress employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it was taken." *FAA v. Cooper*, 566 U.S. 284, 292 (2012) (quotation marks omitted); *see* Procopio Br. 31-32. Congress's selection of a term of art should be given its natural effect; here, where the term is the formal name of a (former) sovereign nation, Congress's chosen term should be given a meaning consistent with international law. And under international law, a sovereign nation's boundaries unambiguously include its territorial sea.

The VA (at 28) demurs, suggesting that there are no "decisions in which courts have treated a statutory reference to a country like a term of art … defined by international law." But the VA does not provide any reason *why* a sovereign nation's formal name would be treated as something other than a term of art, nor does it show how "the Republic of Vietnam" is anything but a term of art springing from and recognized in international law. *See* Procopio Br. 31-36. The term-of-art rule is based on a settled principle applicable to all cases; it does not require explicit evidence confirming that Congress was consciously thinking of the rule when it drafted a particular statute. On the contrary, when

statutes invoke terms of art from international law, courts must read the terms to reflect the meaning they are given in international law unless the statute dictates otherwise. *See, e.g.*, *United States v. Rosero*, 42 F.3d 166, 171 (3d Cir. 1994) (term-of-art rule "logically applies when Congress uses a term that has acquired a settled meaning under customary international law").

This approach is also consistent with the general principle, reflected in the *Charming Betsy* canon, that courts will not lightly interpret statutes contrary to tenets of international law. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2002) (citing *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)). The VA (at 35) claims that the *Charming Betsy* canon "provides a rule for construing ambiguous statutory language," rather than for "determin[ing] congressional intent." But the Supreme Court has said otherwise, explaining that the canon "reflects principles of customary international law—law that *(we must assume) Congress ordinarily seeks to follow*." *F. Hoffman-La Roche*, 542 U.S. at 164 (emphasis added). The VA (at 36) also misses the point when it objects that *Charming Betsy* does not apply because, technically, excluding the territorial sea

would not "interfere with the Republic's sovereign authority." Mr. Procopio does not contend that the canon applies in that strict sense. He argues only that its overall thrust supports application of an interpretive rule that is directly applicable: the term-of-art rule. *See* Procopio Br. 31-32, 36.

There is every reason to treat the term "the Republic of Vietnam" the same as any other term of art, and no reason not to. The VA (at 28) contends that there is such a reason, because "when Congress intends to include a country's territorial sea or other adjacent waters within the ambit of its legislation, it has done so expressly." But its claimed illustrations are inapt.

To start, three of the VA's examples are statutes in which Congress specified that the "waters adjacent" to a country would be included. *See* VA Br. 28-29, 32-33 (statutes referring to Vietnam, Mexico, and Republic of Korea); *see also* Exec. Order No. 11216 (1965).[1]

[1] It is unclear what point the VA intends to make in footnote 11 of its brief. The fact that the "Vietnam theatre of operations" included waters beyond either Vietnamese nation's sovereign control—but waters in which the U.S. military was operating—and the fact that things occurred "during the Vietnam era" that did not occur within the

As demonstrated in Mr. Procopio's opening brief (at 58) and below (at 12-13), the "waters adjacent" to a country include the country's territorial sea, but they also include other waters that are not within the nation's full sovereign control. It is natural for Congress to have specified when it wanted to clarify that a law reaches beyond a nation's sovereign territory to other waters, such as the exclusive economic zone. *See also* 26 U.S.C. § 638(1) (specifying that, for certain tax purposes, "United States" will include seabed and subsoil of areas "adjacent to the territorial waters of the United States").

The fact that Congress sometimes takes care to specify that the "United States" includes the territorial sea is also inapposite for multiple reasons. *See* VA Br. 29-31.

First, unlike the formal name of a sovereign nation, "the United States" is used in many different contexts in the U.S. Code—as litigant, government, geographic area, jurisdiction, and so on. The term-of-art rule does not necessarily apply to a statutory term with such a range of meanings. *Cf. Bruesewitz v. Wyeth, LLC*, 562 U.S. 223, 233-35 (2011)

Republic of Vietnam have no bearing on the meaning of that specific country's formal name used without such modifiers in § 1116.

(declining to treat statute's use of "unavoidable" as a "term of art" because "'[u]navoidable' is hardly a rarely used word").

Second, the VA overreads the import of those clarifications. None of the VA's examples suggests that the territorial sea would be excluded from the term "the United States" if Congress had not clarified that it was included. *See* 16 U.S.C. §§ 1362(15)(A), 2402(8); 18 U.S.C. § 2280(b)(1)(A)(ii); 33 U.S.C. § 1203(b); 46 U.S.C. §§ 2301, 4301(a), 4701(3). On the contrary, the statutes confirm that Congress knows how to cabin the definition of the "United States" when it wants to do so. *See, e.g.*, 26 U.S.C. § 7701(a)(9).

Third, the VA ignores context. Context, for example, undermines the VA's immigration-law analogy (at 29-30). Mr. Procopio (at 54-55) already explained why courts have interpreted asylum statutes requiring "physical presen[ce]" in the United States, such as 8 U.S.C. § 1158(a)(1), to exclude the territorial sea. The OLC opinion cited by the VA confirms this explanation: It does not, as the VA (at 30) contends, define "[t]he term 'United States'" as excluding "aliens interdicted in territorial waters." Rather, it explains that "entry" in the immigration context is "a term of art" that requires "*physical[]*

presen[ce]" and therefore, in that highly specific context, does not include interdiction in territorial waters. 17 Op. Off. Legal Counsel 77, 83-85 (1993). There is nothing in the *generic* definition of "the United States," divorced from this asylum context, that excludes the territorial sea. *See* 8 U.S.C. § 1101(a)(38).

The VA (at 34) attempts to turn context to its own purpose, arguing that whether veterans served in the territorial sea "has nothing to do with whether they were likely exposed to herbicides that were used on land during the war." The VA is wrong. The Act's very purpose was to establish a presumption of exposure because of the uncertainties of where the chemical was sprayed, who may have been exposed, and what the effects may have been. *See* Procopio Br. 41-44. In passing the Act, Congress was well aware of the risks of herbicide exposure for Blue Water sailors serving in the territorial sea. Indeed, Congress explicitly considered the elevated risk of non-Hodgkin's lymphoma faced by Blue Water Navy veterans. *See* Procopio Br. 12-13, 38-44.

The VA (at 6-7, 39) asserts that the *Selected Cancers Study* counsels in the other direction, noting that the study did not find that this increased risk was due to herbicide exposure. But the study

acknowledged that it "only indirectly examine[d] any possible association with exposure to herbicides," concluding that its "results do not constitute an adequate test of the hypothesis that exposure to Agent Orange or dioxin is associated with the development of NHL." *Selected Cancers Study* at 3, 5, 94. That matters because Congress was not trying to achieve scientific certainty; instead, it was concerned with resolving acknowledged scientific uncertainty in favor of Vietnam veterans. *See, e.g.*, 137 Cong. Rec. 2341, 2353 (Jan. 29, 1991) (statement of Rep. Evans).

Subsequent studies have confirmed likely exposure pathways for Blue Water Navy veterans. *See* Procopio Br. 18-21; IOM Blue Water Report at 135-40; IOM 2008 Update at 655-56; NRCET Study at 5-10, 33-35; Appx107-118.[2] These studies, of course, were not before

---

[2] *See also, e.g.*, Appx53 ("ships in the near shore marine waters collected waters that were contaminated with the runoff from areas sprayed with Agent Orange" and "distilling plants aboard the ship[s] ... converted the salt water into potable drinking water, [which] actually enhanced the effect of the Agent Orange"); Appx87 ("Given that Da Nang was one of two primary points of activity for the Ranch Hand Herbicide Spray Project, the environment of Da Nang and [its] Harbor itself was contaminated with herbicide."); Appx107 (describing river plumes deposited in South China Sea); Appx111 ("degradation of coral reefs" of

Congress in 1991. But they weigh against the VA's current attempt to rewrite history and the law by suggesting that a statute addressing Agent Orange exposure is relevant only to veterans who served on the Vietnamese landmass.

3. There is no ambiguity about how to define a sovereign nation's boundaries.

Apart from urging this Court to treat the formal name of a sovereign nation as something other than a term of art, the VA (at 34, 36-38) attempts to introduce ambiguity by arguing that the term has no single meaning because there are "many ways to define the boundaries of a country."

But international law does not, as the VA (at 36) suggests, provide "multiple ways to define a country's boundaries." It defines a country's sovereign territory to include its land, territorial sea, and airspace. Restatement (Third) of Foreign Relations Laws § 512 (1987). The choice of the territorial sea—as opposed to other waters in which a nation enjoys more limited rights—is not "arbitrary," as the VA charges (at

---

Nha Trang Bay "seems to be the input of dioxin-containing chemicals used as defoliants in the American-Vietnamese War").

37). It respects the text of the statute, because the territorial sea is the only zone of water that is "in" the Republic of Vietnam. Unlike other stretches of water, a nation's territorial sea unequivocally falls within, and indeed defines, the nation's sovereign borders. *See, e.g.*, Restatement (Third) of Foreign Relations Law § 512, cmt. a ("The rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." (citations omitted)). A nation enjoys only more limited functional rights—research, exploration, and the like—in other coastal waters. *See id.* § 511, cmt. b; Procopio Br. 53-54 (*Haas* mistakenly relied on 200-mile exclusive economic zone).

The VA (at 37-38) also suggests that the precise scope of the Republic of Vietnam's territorial sea is (or was) subject to debate. That suggestion is not germane. Even if the extent of the territorial sea varied over time, that variation would not make the statute's inclusion of the sea as part of a nation's sovereign territory ambiguous, any more so than the fact that land boundaries can change over time would render ambiguous the reference to the country as including its land. Moreover, it is undisputed that Mr. Procopio served within the Republic

of Vietnam's territorial sea, as shown by the *Intrepid*'s deck logs. Appx49-52.

B. Statutory context confirms the inclusion of naval service in the territorial sea.

The Act's presumption applies to any veteran who served in the Republic of Vietnam "during active military, naval, or air service." 38 U.S.C. § 1116(a)(1), (f). The VA has no meaningful response to the point that Congress specifically included naval and air service, underscoring that service in the water and air falls within the statutory presumption. The VA (at 38) discounts the clause as "simply emphasiz[ing] that all veterans who served, regardless of which branch of the armed forces, are entitled to the presumption." But reading a statute expressly including naval service as nonetheless excluding service at sea is highly strained, at best.

C. The legislative history shows clear congressional intent to include naval service in the territorial sea.

1. Congress's codification of Regulations 313 and 311 confirms the Act includes the territorial sea.

Both parties now agree on the critical point: Congress codified both Regulation 311 and Regulation 313 in the Act. Thus there is no dispute that Congress incorporated a regulation (313) that the VA

admits covers the territorial sea, along with a regulation (311) that the VA in 1991 agreed also covered the territorial sea. *See* Procopio Br. 11-13, 38-41 & n.7. Congress's intent in 1991 is therefore clear.

The VA (at 40) suggests that Mr. Procopio's brief "purposely omits Congress's repeated recognition of the fact that it was codifying *both* of the VA's regulatory presumptions." That is not correct. Mr. Procopio's purpose was to show, contrary to this Court's prior holding and the government's prior position, that Regulation 313 was codified *in addition to* Regulation 311. The *Haas* majority, relying on incomplete legislative history, concluded that the Act effectively codified *only* the presumption in Regulation 311, and *not* the presumption in Regulation 313. *Haas v. Peake*, 525 F.3d 1168, 1185-86 (Fed. Cir. 2008). In opposing certiorari, the VA insisted to the Supreme Court that this was correct. *See* VA Opp. Br. 14, *Haas v. Peake*, 2008 WL 5328208 (U.S. Dec. 19, 2008) (No. 08-525) ("There is … no reason to believe that Congress intended to adopt the formulation in [Regulation 313], which did not concern herbicide exposure, as opposed to the different language in [Regulation 311], which did."). The VA apparently (and

appropriately) no longer contests that both regulations were codified. That is an important concession.

That Congress in 1991 codified both Regulations 311 and 313 unambiguously confirms that Congress intended "served in the Republic of Vietnam" to cover Blue Water Navy veterans. The VA (at 39) asserts that Regulation 311 "requires claimants to have been present on the landmass of the Republic of Vietnam to claim presumptive service connection." Nothing in the regulation says as much. And the VA did not adopt its current position until years after the Act's passage.

Regulation 311 defined "Service in the Republic of Vietnam" as including "service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.311a (1986). The only differences in how the two rules refer to service in the Republic's offshore waters are the placement of the comma and the use of a disjunctive. *See* 38 C.F.R. § 3.313 (covering "service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam").

Those minor differences cannot bear the weight the VA places on them. In promulgating Regulation 311, the VA understood the conditional "duty or visitation" clause to modify "service in other locations," rather than "service in the waters offshore." *See* 50 Fed. Reg. 15,848, 15,849 (Apr. 22, 1985). And even if the VA's present argument were correct, and the conditional clause modified "service in the waters offshore" in Regulation 311 but not Regulation 313, that would not exclude the Blue Water Navy. The "waters offshore" extend beyond the territorial sea. *See supra* 8, 12-13. So service in those waters counted if it included "duty or visitation in the Republic of Vietnam"—which in turn includes the territorial sea.

Confirming this straightforward reading, when the Act was passed in 1991 (and for many years thereafter), the VA interpreted both regulations to apply to the territorial sea. The VA Adjudication Procedures Manual M21-1—which "DVA adjudicators relied on … [in] determin[ing] whether claimants had served 'in the Republic of Vietnam'"—"'conceded" such service to a veteran who had "'received the Vietnam Service Medal,'" an award eligible "to a broader class of service members than those who served on the landmass of Vietnam," including

Blue Water Navy veterans. *Haas II*, 525 F.3d at 1188 (quoting M21-1 § 4.08(k)(1) (1991)).[3]

Furthermore, even if there were a difference in scope between the two regulations, that would not, as the VA (at 42) suggests, "confirm[] the ambiguity" of the Act that codified them. The VA, prior to the Act, may have believed that the Regulation 311 diseases (chloracne and, later, soft-tissue sarcoma) were linked to herbicide exposure while the Regulation 313 disease (non-Hodgkin's lymphoma) was not. But Congress clearly rejected that notion when it included all three diseases in a statute that is linked to the time period during which Agent Orange was used and which expressly provides a presumption of service connection for diseases "associate[d] with exposure to an herbicide agent." 38 U.S.C. § 1116(a)(1)(A)-(B). Contrary to the VA's position (at

[3] The VA's suggestion (at 26 n.9) that Congress's silence in later amending the Act should be treated as an endorsement of the VA's post-Act reinterpretation of its regulations to exclude Blue Water Navy veterans—an interpretation that was unstated at the time of at least some of the amendments—rests on far "too slender a reed … to support the inference" of congressional acquiescence. *McLaughlin v. Richland Shoe Co.*, 486 U.S. 128, 132 n.8 (1988) (rejecting acquiescence even where agency interpretation was introduced in the Congressional Record during debates over amendments); *see Alexander v. Sandoval*, 532 U.S. 275, 292 (2001).

40-41), there is no reason to privilege the "exposure" regulation over the supposed "non-exposure" regulation.

2. Other legislative history confirms that Congress included the territorial sea.

The inclusion of Blue Water sailors is also consistent with the Act's broader purpose, as reflected in its history: to resolve scientific and evidentiary uncertainty in favor of all veterans who served in the Republic of Vietnam. Procopio Br. 41-44. Congress reaffirmed that scope in its 1996 amendments. *Id.* at 44.

The VA (at 42) appears to dispute that addressing scientific uncertainty was a driving purpose behind the Act, but it fails to acknowledge the clear congressional statements to that effect. The VA (at 42-43) offers only generic, unsupported assertions that Congress wanted to "eas[e] the claims process" and that most herbicides used during the war were sprayed over land. These suggestions are at odds with Congress's expressed intent to resolve the "difficulty" in determining the precise reach and pathways of Agent Orange exposure and "giv[e] veterans the benefit of the doubt"—as well as its explicit consideration of the uncertainty affecting "men who served on ships offshore Vietnam." 137 Cong. Rec. at 2347, 2351.

The VA (at 43-44) is also wrong to dismiss the Senate Committee's explanation in 1996 that the Act's presumption was intended to cover "those veterans who actually served within the borders of the Republic of Vietnam during [the relevant] time frame." S. Rep. No. 104-371, at 21 (1996). The Senate Committee's statement was made in connection with revising the start of the "Vietnam era" to an earlier date, to capture when American servicemembers arrived in Vietnam. Because that newly adjusted date predated the military's use of herbicides, Congress specified a later date for purposes of the service-connection presumption in § 1116. *Id.* The VA (at 44) deduces from this that "Congress has not historically enacted veterans' benefits legislation with a single definition of the 'Republic of Vietnam' in mind." But using two dates to define the *temporal* term "Vietnam era" in no way affects the definition of the *geographic* "borders" of "the Republic of Vietnam."

D. The pro-veterans canon confirms inclusion of naval service in the territorial sea.

Even if the VA's arguments introduced any doubt about whether Blue Water Navy veterans "served in the Republic of Vietnam" for purposes of the Act, this Court should apply the pro-veterans canon and resolve any such doubt in favor of veterans who served in the Republic's

territorial sea. As Mr. Procopio (at 45-50) explained, this is the pro-veteran reading of the statute's plain language.

The VA (at 58) maintains that its "boots-on-the-ground" policy is "a 'pro-veteran' construction of the statute." Perhaps the VA is correct that this reading favors veterans in some respects, at least if the alternative were that all naval and air servicemembers would be excluded. But the exercise is not to start with the VA's policy preference and then add a measure of beneficence to veterans. It is to read Congress's words in light of Congress's presumed pro-veteran intent. The VA's reading does not give § 1116(a) "as liberal a construction for the benefit of the veteran as a harmonious interplay of [the statutory] provisions permits," *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). It excludes the naval service of veterans like Mr. Procopio, even though all interpretive clues point to these veterans' service being covered. Even if there were any interpretive doubt here, the pro-veterans canon requires resolving that doubt against excluding tens of thousands of eligible veterans from the statute's plain scope.

II. The Pro-Veterans Canon Applies At *Chevron* Step One.

A. Agency deference cannot override a drafting presumption enshrined in a statutory scheme.

1. The pro-veterans canon reflects a congressional drafting presumption and thus Congress's intent, making it an appropriate tool at Step One.

The Supreme Court has explained that the pro-veterans canon reflects a basic presumption about how Congress drafts veterans-benefits statutes. In resolving interpretive doubt in favor of veterans, the canon upholds what courts presume Congress intended in its drafting choices, based on the overarching statutory remedial purpose of benefiting veterans. To the extent there is a line to be drawn between different kinds of tools of statutory interpretation, that should be the line: If the tool sheds light on congressional intent, it should be applied at Step One. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) ("[U]nder *Chevron*, we owe an agency's interpretation of the law no deference unless, after employing traditional tools of statutory construction, we find ourselves unable to discern Congress's meaning." (quotation marks omitted)).

The VA fails to convincingly demote the pro-veterans canon to second-class citizenship and exclude it from the Step One inquiry. The

VA (at 45-46) draws an arbitrary distinction between "linguistic" canons and "clear-statement" rules on the one hand, and the pro-veterans canon on the other. This purported distinction is without basis. No decision has ever grounded the applicability of a given canon at Step One on the idea that the canon could be classified as a "clear-statement" rule, as opposed to any other canon that "legitimately aid[s] in discerning Congress's intent," VA Br. 45.

The VA does not address *King*'s explanation that the pro-veterans canon reflects a congressional drafting presumption, such that courts "presume congressional understanding" of it. *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9 (1991); *see* Procopio Br. 64-65. *King* emphasizes: "'It is presumable that Congress legislates with knowledge of our basic rules of statutory construction.'" 502 U.S. at 220 n.9 (quoting *McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 496 (1991)). *King* thus directs that a court considering a veterans-benefits statute should presume that Congress wrote the statute knowing and intending that the court would apply the pro-veterans canon when interpreting its terms—precisely the kind of evidence of congressional intent that is considered at Step One. The canon does not, as the VA (at

46-48) suggests, paradoxically render an ambiguous statute unambiguous; it confirms that—given the presumed drafting intent of Congress—there is no ambiguity in the first place.

That is why the Supreme Court indicated in *Gardner* that the pro-veterans canon applies at Step One. As Mr. Procopio explained (at 65-67), although the Court did not need to apply the canon to rule for the veteran, it expressed skepticism regarding the "possib[ility]" of having an "ambiguity" that would be resolved in favor of the government's interpretation of a statute "after applying the rule that interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 117-18 (1994). The VA's only response (at 52) is to note that the Supreme Court did not "hold" that the canon applies at Step One. But the VA has no response to the substance of what the Supreme Court said.

Similarly, the VA's attempt (at 51-52) to distinguish decisions from this Court stating that the pro-veterans canon applies at Step One cuts too finely. Although the VA is correct that the *holdings* of many of these decisions rested on other grounds, it ignores that, like the Supreme Court in *Gardner*, this Court's *reasoning* stated or implied

that the canon is part of the Step One analysis of determining the statute's unambiguous meaning. For example, in *Kirkendall*, although neither the majority nor the plurality needed to rely on the canon to resolve the questions presented there, both portions of the opinion recognized that, even if the VA's statutory arguments had more merit, the canon would have precluded any finding of ambiguity. *Kirkendall v. Dep't of Army*, 479 F.3d 830, 843-44 (Fed. Cir. 2007) (en banc); *id.* at 846 (plurality op.); *accord McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008) (quoting *Gardner*, 513 U.S. at 118); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) (same); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 692 (Fed. Cir. 2000) (same);[4] *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000) (same).

It is of course true, as Mr. Procopio (at 68) acknowledged, and as the VA (at 47-48) emphasizes, that panels of this Court have not consistently stated that the pro-veterans canon applies at Step One.

---

[4] The VA (at 51) errs in contending that *Gober* "consider[ed] the canon after applying deference principles." *Gober* merely noted that, for certain challenged rules, the VA had already "resolved the ambiguity … in favor of the veteran." 234 F.3d at 694-95.

And as Mr. Procopio (at 70) also acknowledged, the Supreme Court's opinions in *King* and *Gardner* state that the canon resolves "interpretive doubt" in the veteran's favor, without explaining to what extent "interpretive doubt" is necessarily co-extensive with "ambiguity" under *Chevron*. But every indication from the Supreme Court's opinions shows that the canon applies at Step One.

To the extent this Court wishes to address whether resolving "interpretive doubt" in applying the canon forecloses a finding that the statute is "ambiguous" under *Chevron* Step One, however, the answer is yes. *Gardner* makes the order of operations clear: The Supreme Court expressed its doubt that any relevant statutory ambiguity could remain "*after* applying the rule that interpretive doubt is to be resolved in the veteran's favor." 513 U.S. at 118 (emphasis added). Furthermore, giving preeminence to the canon would accord with the Supreme Court's admonition that veterans-benefits statutes are "always" to be liberally construed, *Boone v. Lightner*, 319 U.S. 561, 575 (1943), and its more recent reaffirmation that canons are part of the Step One inquiry and are designed to determine the unambiguous meaning of statutory language, *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018).

Moreover, as members of this Court and amicus DAV have noted, this would not be the first time a liberal-construction canon has been deemed dispositive at *Chevron* Step One. The D.C. Circuit has determined that "*Chevron* deference is not applicable" in the context of Indian law because "[t]he governing canon of construction requires that statutes are to be construed liberally in favor of the Indians, with ambiguous provisions interpreted to their benefit." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001); *see, e.g.*, *Albuquerque Indian Rights v. Lujan*, 930 F.2d 49, 59 (D.C. Cir. 1991); *Kisor v. Shulkin*, 880 F.3d 1378, 1381 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of reh'g en banc); DAV Br. 15-18.

Although the VA (at 55-56) objects that the "Indian canon is unique" given the trust relationship between the United States and Indian tribes, this country likewise has a singular relationship with its veterans. That relationship is reflected in the "special solicitude" that "Congress has expressed … for the veterans' cause." *Shinseki v. Sanders*, 556 U.S. 396, 412 (2009); *see, e.g.*, *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) ("This court and the Supreme Court both have long recognized that the character of the veterans' benefits

statutes is strongly and uniquely pro-claimant."). Given this "special solicitude," the pro-veterans canon warrants treatment on par with the D.C. Circuit's treatment of the pro-Indian canon.

But this Court can leave the precise scope of the interplay between the pro-veterans canon and *Chevron* ambiguity for another day. All that need be said here is that the canon is at least a thumb on the scale in favor of finding no ambiguity. It is clear that, because the canon incorporates a settled understanding of how Congress drafts veterans-benefit statutes, it is a device for ascertaining Congress's meaning. Like other such statutory tools, it therefore can and should be used at Step One to resolve the question of what Congress intended. Because the term "the Republic of Vietnam" unambiguously includes the territorial sea, and because the pro-veterans canon would require resolving any interpretive doubt in Mr. Procopio's favor, applying the canon as a thumb on the scale both resolves this case and is beyond debate: "Where, as here, the canons supply an answer, *Chevron* leaves the stage." *Epic Sys.*, 138 S. Ct. at 1630 (quotation marks omitted).

2. The VA's arguments regarding its delegated authority ignore that its authority does not extend to rewriting unambiguous statutes.

The VA (at 48-50, 53-55) urges at length that Congress has delegated to it the authority to interpret the Act. But even assuming the VA is right about the scope of its authority, it can claim deference only where a court concludes the relevant statute is ambiguous. If, as here, "the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842-43 (1984).

Because the statute here is unambiguous in its inclusion of the Republic of Vietnam's territorial sea, the VA's delegated authority is irrelevant. Whether Congress has delegated authority to an agency to interpret an ambiguous statute has no bearing on how a court decides at *Chevron* Step One whether the statute is, in fact, ambiguous. The VA cannot reinterpret a statute that is unambiguous, nor can it leverage congressional delegation as a reason to deny the pro-veterans canon its proper place at Step One. *See Util. Air*, 134 S. Ct. at 2446.

The VA also repeatedly invokes the delegated authority it *formerly* had under the Dioxin Act to "establish guidelines and (where appropriate) standards and criteria" for resolving benefit claims "based on exposure to dioxin," Pub. L. No. 98-542 § 5(a)(1)(A), 98 Stat. 2725, 2727 (1984). *See, e.g.*, VA Br. 4-5, 25-26, 49 & n.16, 54 n.17. It is not clear what relevance the VA believes the Dioxin Act has; the VA never explains. Even if it were still good law, the delegation could no more entitle the VA to override the unambiguous language of the Agent Orange Act than could the VA's more general delegated rulemaking authority. But the Dioxin Act is not good law, at least not in any relevant part. The Agent Orange Act expressly repealed it, stripping the VA's authority with regard to dioxin exposure while leaving in place the ability to regulate regarding exposure to ionizing radiation. *See* Pub. L. No. 102-4 § 10(c)(1)-(2), 105 Stat. 11, 19 (1991) (striking all of § 5(a)(1)(A) and all dioxin references in § 5(b)).[5] Congress, apparently unsatisfied with the VA's actions under the Dioxin Act, replaced that

[5] Indeed, reflecting yet another change in position, the VA has previously acknowledged that the Agent Orange Act repealed its dioxin-related rulemaking authority under the Dioxin Act. *See, e.g.*, 58 Fed. Reg. 50,528, 50,529 (Sept. 28, 1993); VA Br. 5 n.2, *Hunter v. Shinseki*, 2013 WL 4520006 (Fed. Cir. Aug. 12, 2013) (No. 13-7114).

law with the statutory presumptions of exposure and service-connection in the Agent Orange Act. The VA has no authority, under any law, to disregard the clear language that Congress enacted.

B. The VA's proposal would eliminate any role for the pro-veterans canon.

The *Chevron* analysis reflects the precept that the judiciary bears the obligation to interpret statutes and give effect to Congress's clear intent. The VA does not appear to dispute this basic premise of statutory interpretation, nor does it explain how considering the pro-veterans canon as part of the Step One inquiry could undermine either the *Chevron* framework or congressional intent.

Instead, the VA (at 50) criticizes Mr. Procopio and the many amici in this case for approaching the interplay between *Chevron* and the pro-veterans canon from different angles. The VA's criticism (at 50-51, 53-55) of the alternative approaches proposed by the Taina and American Legion amici are of no moment; Mr. Procopio does not endorse those arguments. And to the extent the VA (at 57-58) dismisses NOVA's and NVLSP's positions as supposed "Step Two" arguments, the VA again ignores that it cannot use its claimed delegated authority, whatever it

may be, to unsettle the unambiguous meaning of a statute at *Chevron* Step One. *See supra* 29-31.

Moreover, that different stakeholders may have varying perspectives is no defense for the VA's apparent proposed rule: barring the canon from applying at Steps One *and* Two entirely, thereby relegating it to an unclear role (if any) at a sort of *Chevron* Step Three. According to the VA, the pro-veterans canon applies only "where interpretive doubt lingers even after a court has used all other interpretive tools at its disposal, *including principles of deference*." VA Br. 47 (emphasis added); *accord* Dkt. No. 57 at 7 (suggesting in supplemental brief that the "canon should have no impact on *either* step of the *Chevron* analysis").

The VA does not explain what possible role would be left for the pro-veterans canon if it took effect only *after* a court has applied deference principles. Hamstringing the canon by relegating it to an analytical afterthought would be an ad hoc and unjustified departure from *Chevron*'s normal application. Not only has the VA failed to offer any credible support for its notion that *Chevron* reserves certain canons for an unspecified Step Three, but the VA has not even cited an example

of a canon that the Supreme Court or this Court has declined to apply at Step One.[6]

The VA (at 47) incorrectly suggests that this Court has endorsed reserving the canon for Step Three. The decisions the VA cites show no such thing. For example, *Nielson v. Shinseki* reflects only a narrow principle: that the canon does not apply independent of other interpretive tools, which might reveal clarity that renders the canon inapplicable or might conflict with the canon such that *Chevron* deference is warranted. 607 F.3d 802, 808 (Fed. Cir. 2010) (holding

---

[6] The VA (at 47-48) missteps where it reasons by analogy that the rule of lenity is trumped by the *Chevron* doctrine. First, the case the VA cites for this proposition is not a *Chevron* case. *See Moskal v. United States*, 498 U.S. 103 (1990). It merely notes that courts do not apply the rule of lenity until after considering *other* Step One tools—"the language and structure, legislative history, and motivating policies of the statute"—not that the Court would defer to agency interpretations of criminal statutes *before* applying the rule of lenity. *Id.* at 108 (quotation marks omitted). Second, although the Supreme Court has yet to resolve this issue, *see Esquivel-Quintana v. Sessions*, 137 S. Ct. 1562, 1572 (2017), two justices have previously indicated that they would hold the opposite of the VA's position, noting that *Chevron* deference in the context of ambiguous criminal statutes "would turn their normal construction upside down, replacing the doctrine of lenity with a doctrine of severity," *Whitman v. United States*, 135 S. Ct. 352, 353 (2014) (Scalia, J., respecting the denial of certiorari; joined by Thomas, J.) (punctuation marks omitted).

statute unambiguous after "applying other interpretive tools"); *accord Sears v. Principi*, 349 F.3d 1326, 1331-32 (Fed. Cir. 2003) (holding merely that the canon does not require "a pro-claimant outcome in every imaginable case"); *Terry v. Principi*, 340 F.3d 1378, 1383-84 & n.7 (Fed. Cir. 2003) (suggesting only that the canon does not apply at Step Two; canon's relevance at Step One not considered because the statute was "not ambiguous" and "did not give rise to interpretive doubt"); *Little Six, Inc. v. United States*, 229 F.3d 1383, 1384 (Fed. Cir. 2000) (Dyk, J., dissenting from denial of reh'g en banc) (arguing only that pro-Indian canon should not be applied before other tools are considered to see whether language is unambiguous).

What the VA is asking this Court to do is eliminate the canon from *Chevron*-based statutory analysis entirely. If this Court were to accept that position, it would thwart its ability to ensure that Congress's pro-veterans intent is carried out. The Court should reject the VA's subversion of judicial primacy and its à la carte approach to *Chevron*'s focus on congressional intent. All relevant tools of statutory interpretation that shed light on congressional intent—including the

pro-veterans canon—should apply at Step One of the *Chevron* framework.

CONCLUSION

The Court should reverse the judgment of the Veterans Court.

November 15, 2018

Respectfully submitted,

/s/ Melanie L. Bostwick

John B. Wells
MILITARY-VETERANS ADVOCACY
P. O. Box 5235
Slidell, LA 70469-5235

Matthew R. Shahabian
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

Melanie L. Bostwick
Thomas M. Bondy
Robbie Manhas
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Counsel for Claimant-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on November 15, 2018.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Melanie L. Bostwick
Melanie L. Bostwick
Counsel for Claimant-Appellant

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 32(a), because this brief contains 6,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Century Schoolbook 14-point font.

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Melanie L. Bostwick

Melanie L. Bostwick
Counsel for Claimant-Appellant