UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

17-1821

ALFRED PROCOPIO, JR.,
Claimant-Appellant
v.

Peter O'Rourke,
Acting Secretary of Veterans Affairs,
Respondent.-Appellee

APPEAL FROM THE UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS, 15-4082, JUDGE PIETSCH

ORIGINAL SUPPLEMENTAL OF APPELLANT ALFRED PROCOPIO

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Procopio v. O'Rourke

Case No. 17-1821

CERTIFICATE OF INTEREST

Counsel for the:
☐ (petitioner) ▣ (appellant) ☐ (respondent) ☐ (appellee) ☐ (amicus) ☐ (name of party)

certifies the following (use "None" if applicable; use extra sheets if necessary):

1. Full Name of Party Represented by me	2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:	3. Parent corporations and publicly held companies that own 10% or more of stock in the party
Alfred Procopio. Jr.	Alfred Procopio, Jr.	Not Applicable

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court **(and who have not or will not enter an appearance in this case)** are:

Not Applicable

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 directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None

6/2/2018
Date

//s// John B. Wells
Signature of counsel

Please Note: All questions must be answered

John B. Wella
Printed name of counsel

cc: Eric Bruskin

Reset Fields

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Statement of Issues

What is the impact of the pro-claimant canon on step one of the *Chevron* analysis in this case, assuming that *Haas v. Peake* did not consider its impact?

Statement of the Case

On May 8, 2008, this Court overruled the Court of Appeals for Veterans Claims in a 2-1 decision. *Haas v. Peake,* 525 F.3d 1168 (Fed. Cir. 2008) *reh'g denied Haas v. Peake*, 544 F.3d 1306, 1310 (Fed. Cir 2008). The veterans court, in *Haas v. Nicholson*, 20 Vet.App. 257 (Vet.App. 2006), had found that the term "served in the Republic of Vietnam" during the Vietnam War must be read to include service in the waters near the shore of Vietnam, without regard to actual visitation or duty on land in the Republic of Vietnam, and provisions of the Department of Veterans Affairs (VA) Adjudication Procedure Manual in effect at time veteran filed service connection claim entitled him to presumption of service connection for exposure to herbicide based on his receipt of the Vietnam Service Medal (VSM). *Id*. at 257.

Summary of the Argument

Substantive canons of statutory construction, including the pro-claimant canon historically used in veterans law should be applied at step 1 in any

delegation analysis under *Chevron*. The delegation doctrine is a general doctrine which should yield to any specific canon such as the pro-claimant canon.

Congress has directed that the veteran's benefit process be paternal and non-adversarial, but over the years, the quest for benefits has become more and more esoteric. The pro-claimant doctrine acts to balance that trend and restore the original intent of Congress. The Supreme Court has supported Congress' original intent in a trilogy of recent cases to limit the automatic application of the delegation doctrine without first requiring statutes to be viewed in light of these substantive canons of construction.

Argument

I. The Pro-Claimant Canon Controls and Is Binding on Step One of the *Chevron* Analysis in this Case, Assuming That *Haas v. Peake* Did Not Consider its Impact.

A. The Pro-Claimant Canon Like All Canons of Construction Applies to Step One of any Analysis Required Under *Chevron*.

The Supreme Court has recently spoken out on this very issue. In *Epic Sys. Corp. v. Lewis*, No. 16-285, 2018 WL 2292444, at *14 (U.S. May 21, 2018) the Supreme Court held that canons of construction should be applied at the first step of the *Chevron* [v. *Natural Resources Defense Council, Inc.,* 467 U.S. 837, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984)]. analysis. Speaking for the majority Justice Gorsuch said as follows:

> Finally, the *Chevron* Court explained that deference is not due unless a "court, employing traditional tools of statutory construction," is left with an unresolved ambiguity. 467 U.S., at 843, n. 9, 104 S.Ct. 2778. And that too is missing: the canon against reading conflicts into statutes is a traditional tool of statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, "*Chevron* leaves the stage." *Alternative Entertainment*, 858 F.3d, at 417 (opinion of Sutton, J.)."

Epic Sys., 2018 WL 2292444, at *14.

The pro-claimant or pro-veteran canon has been recognized as an accepted canon of statutory construction. A unanimous Supreme Court re-affirmed "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 561 U.S. 428, 441, 131 S.Ct. 1197, 1206 (2011). The Federal Circuit has also recognized the paternalistic non-adversarial intent of the system designed by Congress. *Gambill v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gambill* court described the process as uniquely pro-claimant." *Id*. at 1316. Applying the holding of *Epic*, this canon of construction should have been used during the initial step in the *Chevron* analysis.

Epic is the latest in the Supreme Court move to limit the effects of *Chevron* deference. In the term following *Henderson*, the High Court put the brakes on unfettered and excessive *Chevron* deference in *Christopher v. Smith Kline*

Beecham Corp., 132 S.Ct. 2156 (2012), finding no deference when:

> it appears that the interpretation is nothing more than a "convenient litigating position," or a " ' *post hoc* rationalizatio[n]' advanced by an agency seeking to defend past agency action against attack. (Citations omitted).

Christopher v. Smith Kline Beecham Corp. 567 U.S. 142, 155, 132 S.Ct. at 2166 - 2167 (2012). *Epic* is the logical next step in this process.

In many respects, the *Henderson, Christopher, Epic*, trilogy is really a restatement of the original intent of *Chevron.* In an often forgotten footnote, the *Chevron* Court noted that "[i]f a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect." *Chevron*, 467 U.S. at 843 n.9. Reading this note *in para materia* with *Henderson, Christopher* and *Epic* there is no doubt that the Supreme Court intended, and perhaps always intended, for canons of construction to be applied during the first step in the process.

Throughout its post-*Chevron* history, the Supreme Court has required other canons of construction to be applied at step one in the *Chevron* process. *See, e.g.*, *Watters v. Wachovia Bank, N.A.*, 550 U.S. 1, 20-21 (2007) (applying the preemption canon instead of Chevron); *Clark v. Martinez*, 543 U.S. 371, 381-82 (2005) (applying the canon of constitutional avoidance instead of *Chevron*).

In a case analogous to veterans, the Supreme Court has also ruled that

canons favoring Native American tribes should be applied and construed liberally in favor of the Indians, with any ambiguity interpreted to their benefit. *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 2403, 85 L. Ed. 2d 753 (1985). As is the case with veterans, the Supreme Court found that a special relationship exists between the United States and the recognized tribes.

Here there is little evidence that *Chevron* intended to challenge the canons of statutory construction. Indeed, as discussed *supra*, *Chevron* itself conceded that canons should be applied before undertaking step two of the analysis. The *Chevron* Court noted that the first step in the process is to determine the intent of Congress and, if clear, that is the end of the matter. *Chevron*, 467 U.S. at 842-43. It makes sense that the canons of statutory construction would first be used to ascertain the clarity of the Congressional intent. *Smith v. United States*, 507 U.S. 197, 209, 113 S. Ct. 1178, 1186, 122 L. Ed. 2d 548 (1993) (Stevens, J. dissenting). *See also*, *Chickasaw Nation v. United States,* 534 U.S. 84, 94, 122 S. Ct. 528, 535, 151 L. Ed. 2d 474 (2001) ([canons of construction] are designed to help judges determine the Legislature's intent as embodied in particular statutory language).

Courts should look to the purpose behind judicial doctrines, such as the delegation doctrine, and canons of construction. *Chevron*, the pro-veteran canon, and other substantive canons all ultimately derive their legitimacy from the fact

that they are rooted in congressional intent. *Chevron* is typically justified as an implicit delegation from Congress to agencies, and the substantive canons are likewise justified based on the fact that they reflect Congress's intent. See, e.g., *King v. St. Vincent's Hosp*., 502 U.S. 215, 221, 112 S.Ct. 570, 574 (1991). (explaining that Court's should presume that Congress legislates against the backdrop of the pro-veteran canon); see also Slocum, The *Importance of Being Ambiguous*, 69 Md. L. Rev. 791, 812–15 & n.111-129 (discussing this issue and giving many examples of how the Court has justified the substantive canons based on intent).

Because *Chevron* and the canons of statutory construction are designed to help Court's discern Congressional intent, the resolution of any conflict between the canons should be resolved by considering Congress's likely intent. Here, Congress's specific intent with respect to veterans (the pro-veteran canon) trumps its more general delegation doctrine espoused by *Chevron*). This approach is consistent with the general rule that when statutory provisions appear to conflict, the specific provision controls over general provisions. Although this case involves conflicting presumptions (pro-veteran vs. *Chevron*), rather than conflicting statutory provisions, the same basic guiding principle of determining whether Congress' intent still applies. *See, generally Radzanower v. Touche Ross*

& Co., 426 U.S. 148, 153, 96 S.Ct. 1989, 1992–93, (1976) (a statute dealing with a narrow, precise, and specific subject is not submerged by a later enacted statute covering a more generalized spectrum). Absent a clear intention to the contrary, a specific statute will not be controlled or nullified by a general one, regardless of the priority of enactment. *Morton v. Mancari*, 417 U.S. 535, 550-551, 94 S.Ct. 2474, 2482, 41 L.Ed.2d 290, 301. Members of Congress are presumed to know the law, and absent a clear expression in a general statute contradicting a specific act, there should be no assumption that they intended to invalidate the specific act. The same holds true with judicial doctrines. The *Chevron* delegation doctrine should not be construed to nullify the specific pre-claimant canon of construction that has long been seen as a manifestation of Congressional will. *Henderson*, 462 U.S. at 440.

Although the *Haas* Court did not apply the pro-claimant canon of construction they did attempt to marginalize it. In reliance upon *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003), *Haas* questioned the impact of the canon on a *Chevron* analysis. That doubt was misplaced. *Sears* itself noted that the facts in that case did not "conflict with the spirit of the veterans' benefits scheme in any substantial way, or at all." *Sears*, 349 F.3d at 1332. That is not the case here. Stripping tens of thousands of veterans from a presumption of exposure that had

been recognized for over a decade could not be construed in any way as being in consonance with the spirit of the veterans benefits scheme. Notably, both *Sears* and *Haas* were decided prior to the *Henderson, Christopher, Epic* trilogy.

This Court has always recognized the Congressional intent that the administration of veterans benefits be non-adversarial. Congress itself, noted their intent to foster a pro-claimant benefits system. In *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998), the Court quoted from the legislative history of the Veteran's Judicial Review Act and Veterans' Benefits Improvement Act of 1988:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally by-passed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof. H.R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95 (emphasis added). This passage demonstrates that, even in creating judicial review in the veterans context, Congress intended to preserve the historic, pro-claimant system.

Hodge v. West, 155 F.3d 1356, 1362-63 (Fed. Cir. 1998).

Unfortunately, the VA benefits system and VA law have gotten too adversarial, esoteric and technical. The process has become much more complicated than that envisioned by Congress and *Haas* serves as a perfect example of that. Application of the pro-claimant canon of construction in veterans cases in the first step of the *Chevron* analysis would seem to better comport with the will and intent of Congress. While *Haas* might have been justifiable in the minds of the attorneys, the question must be asked is this what Congress and the American people wanted?

Within this Circuit, there has been tension among various panels in their application of the pro-claimant canon. *Compare*, *Sears, Gambill and Hodge, supra.* Admittedly, there has been some confusion on its applicability. Justice Gorsuch's opinion in *Epic*, however, has resolved that confusion and unconditionally states that substantive canons, such as the pro-claimant canon, must be applied at the initial step in the *Chevron* analysis.

Often the Secretary has argued to Congress and to the courts that the cost of the proposed expansion would be prohibitive. They have claimed that the move would put a large dent in the Treasury. As a threshold matter, compensation of veterans is a cost of war and once the Untied States commits forces to combat, the country has to bear the financial burden of taking care of those who fight the

battles. Additionally, the non-partisan Congressional Budget Office has estimated the ten year cost of expansion to the territorial seas to be only $887 million rather than the multi billions of dollars estimated by the Secretary and the VA. https://www.cbo.gov/system/files/115th-congress-2017-2018/costestimate/hr299.pdf.

At oral argument the question arose concerning whether the airspace of Vietnam could be covered under the pro-claimant canon. This certainly gives rise to a public policy question concerning further expansion of benefits, Certainly, airplanes that flew into South Vietnamese[1] airspace would be covered, however this would not necessarily result in a significant increase in cost. Carrier launched raids in the south from Dixie Station would already be covered because those ships, like the *Intrepid* in the instant case, normally entered the territorial seas. Air raids in the north seldom broached South Vietnamese air space. Aircraft carriers that remained on Yankee Station[2] and their embarked aircraft seldom entered the South Vietnamese air space. If warplanes originating from outside of Vietnamese territorial seas broached South Vietnamese airspace, it was normally to land in-

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[1] The original Agent Orange Act of 1991 only covers the Republic of Vietnam or South Vietnam. The territory of the Democratic Republic of Vietnam, or North Vietnam was not covered.

[2] Yankee Station was located 30 nautical miles north of the 17th parallel which marked the northern limit of South Vietnamese sovereignly.

country.[3] Those aircrews are covered under existing law. Consequently, while a fair reading under the pro-claimant canon could include South Vietnamese airspace, the impact on the number of personnel covered or the cost would be *de minimis*, if at all.

While *Chevron* and the delegation doctrine are important gap fillers to speak to matters not addressed by Congress, they cannot and should not be used to bypass the will of the legislative branch. Substantive canons of statutory construction, including the pro-claimant canon, are not only useful but essential to fostering Congressional will. The Supreme Court has recognized this in the *Henderson*, *Christopher* and *Epic* line of cases. Arguably, the *Haas* court erred by not *sua sponte* applying the pro-claimant canon. Accordingly this Court should limit *Haas* to its facts and recognize that it is not bound by its holding.

B. The *Haas* Court Did Apply the Pro-Claimant Canon of Construction in Step One of their *Chevron* Analysis.

In reversing, the *Haas* court noted that they did not apply the pro-veteran of construction required by *Walters v. National Assn. of Radiation Survivors*, 473 U.S. 305, 311 (1985). *Haas*, 544 F.3d at 1308-1309. Their reasoning was that

[3] Diversion to airfields within South Vietnam was often due to battle damage or low fuel. Additionally, there were daily flights of C-2 aircraft known as Carrier Onboard Delivery (COD) from aircraft carriers to pick up repair parts, passengers, mail etc.

this was waived by the Claimant.

As discussed *supra*, canons of construction are used to assist courts in ascertaining the meaning of a statute. The *Haas* Court could have applied the canon *sua sponte*. The Court does not need to decide whether the failure to do so was error, since the issue was carefully preserved in the instant case.

Conclusion

For the reasons delineated herein, the court should reverse the court below and find for the veteran. The dictates of the Supreme Court and common practice dictate that all substantive canons of construction, including the pro-claimant canon, should be employed at the initial step of any statutory analysis. These canons are critical to ascertaining statutory meaning and Congressional intent. In light of *Epic*, this Court should find that the canon must be applied at step one of the analysis. In other words, for purposes of the instant case, *Chevron* has left the building and *Haas* should be close behind.

Respectfully Submitted:

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Certificate of Service

The undersigned certifies that the within was served on counsel for the Secretary and the court via the CM/ECF filing system this 4th day of June, 2018.

//s// John B. Wells
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CERTIFICATE OF COMPLIANCE

The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because it contains 2781 by computer word count, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Federal rule of Appellate Procedure 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared in a monospaced typeface using Wordperfect 8.0 with 14-point proportionally spaced face.

/s/ John B. Wells
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