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

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

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October 1, 2018

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Procopio v. Wilkie

Case No. 17-1821

CERTIFICATE OF INTEREST

Counsel for the:
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Alfred Procopio, Jr.

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

10/1/2018
Date

/s/ Melanie L. Bostwick
Signature of counsel

Please Note: All questions must be answered

Melanie L. Bostwick
Printed name of counsel

cc: Counsel of Record

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STATEMENT OF RELATED CASES

No other appeal in or from the same proceeding in the Veterans Court was previously before this or any other appellate court. A panel of this Court (Moore, Wallach, Chen, JJ.) previously heard argument in this appeal.

Counsel are not aware of any cases 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, within the meaning of Fed. Cir. R. 47.5(b) and the accompanying practice note. Counsel believe that numerous cases pending in the Court of Appeals for Veterans Claims or before the administrative tribunals within the Department of Veterans Affairs may be directly affected by the outcome of this case. Those cases include at least the following, which counsel understand are stayed at the Veterans Court pending resolution of the present appeal:

Procopio v. Wilkie, No. 17-537

Wolfe v. Wilkie, No. 17-2894

Shaffer v. Wilkie, No. 18-2679

Thatcher v. Wilkie, No. 18-3554

Edwards v. Wilkie, No. 18-3779

INTRODUCTION

During the Vietnam War, millions of Americans answered the call to service. Soldiers, sailors, and airmen fought a brutal war and then returned home to peacetime lives of citizenship. When those veterans—like Navy veteran Alfred Procopio, Jr.—fell ill, they turned to the disability benefits that Congress enacted on behalf of a grateful nation.

Many Vietnam War veterans, however, faced particular difficulties in proving, as they must, that the illnesses they later suffered could be traced to their service. This was especially true for cancers and other diseases linked to exposure to herbicides, like the infamous Agent Orange widely used for defoliation during the War.

Facing scientific uncertainty and incomplete records of herbicide deployment, Congress enacted the Agent Orange Act in 1991. The Act states that, for certain diseases associated with exposure to herbicide agents like Agent Orange, a veteran is entitled to a presumption that his disability was service connected so long as he "served in the Republic of Vietnam" during the War. 38 U.S.C. § 1116. That presumption applies to "military, naval, or air service" veterans alike.

Id. It enables otherwise shut-out Vietnam War veterans to receive critical disability benefits.

But not Mr. Procopio. Taking an unjustifiably narrow view of the Act's presumption, the Secretary of Veterans Affairs has limited the statutory phrase "served in the Republic of Vietnam" to include only troops whose boots touched the ground of the Vietnamese landmass and so-called "Brown Water Navy" veterans who patrolled its rivers. This restriction denies the presumption of service connection to the tens of thousands of "Blue Water Navy" veterans, like Mr. Procopio, who served on ships offshore in the Republic of Vietnam's territorial sea. Based on this flawed interpretation, the Department of Veterans Affairs and the Veterans Court denied Mr. Procopio's claim for disability benefits, even though he suffers from diabetes mellitus and prostate cancer, diseases that are eligible for the presumptive service connection afforded to other Vietnam veterans.

The Secretary's interpretation cannot stand. Every relevant tool of statutory interpretation—the text, context, legislative history, and the canon of construction that veterans statutes should be construed in favor of veterans—demonstrates that the unambiguous meaning of

"served in the Republic of Vietnam" includes service in its territorial sea. By using the official name of the former nation of South Vietnam—the "Republic of Vietnam"—Congress conveyed that any veteran who served within its sovereign territory, including Blue Water Navy veterans who served in its territorial sea, would be entitled to the presumption of service connection.

Because the meaning of the statute is unambiguous, a prior panel of this Court erred in deferring to the Secretary's contrary interpretation under the *Chevron* doctrine. Under *Chevron* Step One, no deference is due where, as here, the court can discern Congress's meaning using the traditional tools of statutory construction. And while the statute is unambiguous even without turning to the pro-veterans canon, that canon is one of the traditional tools that can be considered at Step One to reject the Secretary's flawed interpretation.

Disabled Blue Water Navy Vietnam veterans like Mr. Procopio cannot wait. They are entitled to the presumption of exposure and service connection that Congress enacted for the benefit of *all* veterans who served in the Republic of Vietnam. This Court should reject the Secretary's exclusionary interpretation and reverse the judgment below.

STATEMENT OF THE ISSUES[1]

1. Does the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 unambiguously include service in offshore waters within the legally recognized territorial limits of the Republic of Vietnam, regardless of whether such service included presence on or within the landmass of the Republic of Vietnam?
2. What role, if any, does the pro-veterans canon play in this analysis?[2]

STATEMENT OF THE CASE

Vietnam is divided into north and south, the Republic of Vietnam is created, and the U.S. military becomes heavily involved in the ensuing Vietnam War.

In May 1954, the communist Viet Minh nationalist movement routed French forces at Dien Bien Phu and effectively ended French colonial rule in Indochina. In the immediate aftermath, world powers

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[1] Pursuant to the Court's en banc order, this brief is limited to the questions framed in paragraph (2) of that order. *See* Dkt. 63 ¶ 5. Mr. Procopio reserves the right to challenge the Veterans Court's ruling on all other grounds previously asserted in this case.

[2] This rule has been called different things, including (as in the en banc order) the "pro-claimant canon"—recognizing that veterans statutes can have non-veteran beneficiaries, such as surviving spouses. To distinguish the canon from interpretive rules favoring claimants in other areas of law, this brief refers to it as the "pro-veterans canon."

took up the question of the region's geopolitical future. I Edwin Bickford Hooper, Dean C. Allard & Oscar P. Fitzgerald, *The United States Navy and the Vietnam Conflict* 263 (1976). The Geneva Accords of 1954 partitioned the State of Vietnam, whose sovereignty had only just been recognized, into two zones divided by the 17th parallel of latitude. The region to the north, colloquially known as North Vietnam, was a socialist state designated the "Democratic Republic of Vietnam"—an appellation dating back to Ho Chi Minh's 1945 declaration of independence from France. The region to the south was colloquially known as South Vietnam. Formally, it became the "Republic of Vietnam" in October 1955, following the proclamation of newly elected President Ngo Dinh Diem. *See id.* at 328; *see also* Marilyn B. Young, *The Vietnam Wars 1945-1990* 52, 58 (1991).

The two Vietnams would remain formally separate until July 1976, when they merged to form the current Socialist Republic of Vietnam. *2 Parts of Vietnam Officially Reunited; Leadership Chosen*, N.Y. Times, July 3, 1976, https://tinyurl.com/y9b7qmze.

In the 1950s, the partitioned Vietnam quickly became a front in the Cold War. The U.S.-backed government in the Republic of Vietnam

faced extensive communist insurgencies from the guerilla Viet Cong in the South. The guerillas were aided (first unofficially and later officially) by support from the North, which was in turn backed by the Soviet Union and China. The U.S. military began providing training to the Army of the Republic of Vietnam in 1955. A.J. Langguth, *Our Vietnam* 672 (2000). In 1961, the United States increased its commitment by supplying its own military forces. II Edward J. Marolda & Oscar P. Fitzgerald, *The United States Navy and the Vietnam Conflict* 165-66 (1986).

The U.S. Navy played a critical role during this period. U.S. naval forces helped patrol the 1200-mile-long coastline of the Republic of Vietnam to prevent enemy infiltration by sea. *See id.* at 155, 166-77. The U.S. fleet also provided operations such as intelligence gathering, air support, Navy-SEAL raids launched from small boats, and technical assistance from SEABEE construction teams. *See generally id.* at 177-200; *see also id.* at 24. Naval forces in the offshore coastal seas were called the "Blue Water" Navy, in contrast to the "Brown Water" Navy operating in Vietnam's rivers and inland waters. *See* Institute of

Medicine, *Blue Water Navy Vietnam Veterans and Agent Orange Exposure* 31 (2011), http://nap.edu/13026 ("IOM Blue Water Report").

The U.S. Navy's engagement in Vietnam intensified after August 1964, when Congress authorized the conventional use of U.S. military force in the wake of the Gulf of Tonkin incident. The Blue Water Navy continued to provide extensive coastal patrols, as well as full-scale combat and combat-support operations, throughout the War. *See* II Marolda & Fitzgerald 314-16, 355-56, 452-63.

The U.S. military uses Agent Orange in Vietnam; Congress and the VA respond to mounting concerns over its toxic effects.

The Vietnamese landscape is cloaked by dense jungle. In 1962, the U.S. military began using several herbicides to defoliate the forests of South Vietnam to help detect enemy operations, prevent ambushes, clear vegetation around military installations, and destroy crops that fed enemy forces. Adm. E.R. Zumwalt, Jr., *Report to the Secretary of the Department of Veterans Affairs,* reprinted in *Links Between Agent Orange, Herbicides, and Rare Diseases: Hearing Before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Operations*, 101st Cong., 2d Sess. 23-24 (1990) ("Zumwalt Report"). The herbicides were sprayed from aircraft, from boats, and

directly on the ground. *See* Institute of Medicine, *Veterans and Agent Orange Update 2010* 55 (2012), http://nap.edu/13166 ("IOM 2010 Update"). Each herbicide was known by the color of the band painted on its container. *Id.* at 57.

One of these herbicides was Agent Orange. It is a 50:50 mixture of the n-Butyl esters of two organic compounds: 2,4-dichlorophenoxyacetic acid ("2,4-D") and 2,4,5-trichlorophenoxyacetic acid ("2,4,5-T"). *Id.* at 56; National Academy of Sciences, *The Effects of Herbicides in South Vietnam*, Part A, II-3 (1974), https://tinyurl.com/yb92rtr2 ("NAS 1974 Report"). When 2,4,5-T is manufactured, it becomes contaminated with a third compound: 2,3,7,8-tetrachlorodibenzo-*p*-dioxin, known as "TCDD." IOM 2010 Update at 54, 57-59. Although it is often generically dubbed "dioxin," TCDD is in fact "the most toxic" form of dioxin. *Id.* at 54. Its toxic biological effects occur even at "extremely low concentrations." NAS 1974 Report at II-34. Recent evidence suggests that TCDD was present in Vietnam-era Agent Orange at a rate of around 13 ppm—far greater than the 0.05 ppm allowed by contemporaneous manufacturing standards for domestic use of 2,4,5-T. IOM 2010 Update at 59. It is estimated that

nearly 50 million liters of Agent Orange were sprayed in the Republic of Vietnam during the Vietnam War. *Id.* at 56.

Much of this spraying was concentrated on the low-lying swamps of the Mekong River Delta, at the interface between land and water. The Mekong River exits into the South China Sea, where its considerable discharge "plume" can carry river water—and the dirt and silt that washes into the river—hundreds of miles into the open sea. IOM Blue Water Report at 64-66; Appx95-98; Appx102-109.

Questions about Agent Orange's toxicity to humans began to surface at least as early as 1968, as scientists linked TCDD to a potential increase in birth defects and deformities. Zumwalt Report at 26-27. The Department of Defense phased out the use of Agent Orange by 1971, *see* IOM 2010 Update at 57, but concerns remained about the health effects on Vietnam veterans who had already been exposed.

Congress responded. In 1979, it enacted a provision requiring the Veterans Administration ("VA")[3] to conduct an epidemiological study of potential long-term adverse health effects on Vietnam veterans who

[3] The agency became the cabinet-level Department of Veterans Affairs in 1989. This brief uses the shorthand "VA" to refer to both entities.

were exposed to dioxins. Veterans Health Programs Extension and Improvement Act of 1979, Pub. L. No. 96-151 § 307, 93 Stat. 1092, 1097-98. The responsibility for conducting that study was subsequently reassigned to the Centers for Disease Control. *See* H.R. Rep. No. 98-592, at 5 (1984).

At the same time, concern and uncertainty over Agent Orange's health effects affected veterans seeking disability benefits. To be eligible for compensation, a veteran must establish that a disability is "service-connected"—that is, "incurred or aggravated … in [the] line of duty in the active military, naval, or air service." 38 U.S.C. § 101(16). Establishing service connection generally requires the veteran to prove the so-called "nexus" requirement, that is, "a causal relationship between the present disability and the disease or injury incurred or aggravated during service." *Holton v. Shinseki*, 557 F.3d 1362, 1366 (Fed. Cir. 2009) (quotation marks omitted). Mounting such proof was difficult for Vietnam veterans suffering illnesses they believed were connected to Agent Orange exposure, given both scientific uncertainty regarding Agent Orange's health effects and the lack of comprehensive documentary evidence regarding precisely where and when the

chemical was used. *See, e.g.*, Institute of Medicine, *Veterans and Agent Orange Update 2008* 23-24 (2009), http://nap.edu/12662 ("IOM 2008 Update") (noting uncertainties around health effects have persisted through decades of research).

Again, Congress responded. First, in 1984, Congress passed the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (the "Dioxin Act"). Congress declared that there was emerging "evidence that chloracne, porphyria cutanea tarda, and soft tissue sarcoma are associated with exposure to certain levels of dioxin as found in some herbicides." *Id.* § 2(5), 98 Stat. at 2725. It directed the VA to "establish guidelines and (where appropriate) standards and criteria for the resolution of claims" based on dioxin exposure during service "in the Republic of Vietnam." *Id.* § 5(a)(1)(A), 98 Stat. at 2727.

Reacting to this congressional directive, the VA first promulgated a regulation to govern disability benefits for chloracne, a skin condition. That regulation established a presumption of exposure and service connection if the veteran served "in the Republic of Vietnam," which it defined to include "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(a)(1) (1986) ("Regulation 311"). The VA explained its rule and its "longstanding policy of presuming dioxin exposure in the cases of veterans who served in the Republic of Vietnam" as being grounded in "the many uncertainties associated with herbicide spraying during that period." 50 Fed. Reg. 34,454, 34,454-55 (Aug. 26, 1985). Regulation 311's coverage tracked the language of the Dioxin Act and did not purport to limit the presumption only to veterans who set foot on the Vietnam landmass.

The VA next addressed service connection for non-Hodgkin's lymphoma, a form of cancer. The CDC had concluded that Vietnam veterans faced a roughly 50% increased risk of developing non-Hodgkin's lymphoma as compared to other men in the United States, and that Blue Water Navy veterans had an even higher risk than those who served in the Brown Water Navy or on the ground. Centers for Disease Control, *The Association of Selected Cancers with Service in the U.S. Military in Vietnam: Final Report* 37, 40 (Sept. 1990) ("*Selected Cancers Study*"). The CDC could not find a correlation, however, between non-Hodgkin's lymphoma and dioxin exposure. *See id.* at 3.

Accordingly, in 1991, the VA promulgated a regulation presuming service connection for non-Hodgkin's lymphoma for all veterans who served in Vietnam. *See* 38 C.F.R. § 3.313 ("Regulation 313"). That regulation tracked the language of Regulation 311, with minor variation. It provided that "Service in Vietnam includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam." *Id.* § 3.313(a). Like Regulation 311, Regulation 313 did not purport to limit its scope to presence on the Vietnam landmass.

Meanwhile, in response to a successful legal challenge by Vietnam veterans, the VA proposed to modify Regulation 311 to include soft-tissue sarcomas in addition to chloracne. 56 Fed. Reg. 51,651, 51,651-52 (Oct. 15, 1991); *see also Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1423 (N.D. Cal. 1989).

Congress passes the Agent Orange Act to cut through scientific uncertainty and provide benefits, and for several years the VA affords a presumption of service connection to Blue Water Navy veterans.

Even as the VA was actively promulgating regulations, Congress began to consider a more comprehensive framework for Vietnam-era disability claims related to herbicide exposure. These efforts

culminated in 1991 with the Agent Orange Act, Pub. L. No. 102-4, 105 Stat. 11. The Act relieved the VA of some of its regulatory discretion by codifying the presumption of exposure and service connection for the three diseases covered by Regulations 311 and 313—non-Hodgkin's lymphoma, soft-tissue sarcomas, and chloracne. It specified that, when one of those diseases manifested "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era," the disease would be considered to have been incurred in or aggravated by such service. *Id.* § 2(a)(1), 105 Stat. at 11 (codified, as amended, at 38 U.S.C. § 1116(a)(1)); *see also* 38 U.S.C. § 1116(f).

Congress did not stop with these three diseases. The Act also directed the VA to identify other any other disease shown over time to have a "positive association" with the "exposure of humans to an herbicide agent," and to "prescribe regulations providing that a presumption of service connection is warranted for that disease." Pub. L. No. 102-4, § 2(b)(1), 105 Stat. at 12 (codified, as amended, at 38 U.S.C. § 1116(b)(1)).

Shortly after passage of the Agent Orange Act, the VA interpreted the "served in the Republic of Vietnam" prerequisite for benefits. The VA amended its adjudication manual to adopt a policy consistent with the broad phrasing of the statute: "In the absence of contradictory evidence, 'service in Vietnam' will be conceded if the record[] shows that the veteran received the Vietnam Service Medal." VA Adjudication Procedures Manual M21-1 § 4.08(k)(1) (Nov. 8, 1991) (citation omitted). Blue Water Navy veterans were at all relevant times eligible for the Vietnam Service Medal—indeed, Mr. Procopio received this award. Appx225. Blue Water veterans thus qualified for benefits with respect to the specified conditions that were tied by statute or regulation to Agent Orange exposure. *See* IOM Blue Water Report at 16.

The VA's general implementing regulation likewise tracked the statutory phrasing of the Act and afforded no significance to whether a veteran had been present on the Vietnam landmass. This regulation, adopted in 1994, defines service in the Republic of Vietnam in language that tracks Regulations 311 and 313, albeit with slightly different punctuation: "'Service in the Republic of Vietnam' includes 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. § 3.307(a)(6)(iii). This test applies to all the covered § 1116 diseases, including non-Hodgkin's lymphoma. 38 C.F.R. § 3.309(e).

In subsequent years, Congress amended the Agent Orange Act to codify the presumption of service connection for a total of eight disease categories. *See* 38 U.S.C. § 1116(a)(2). The VA likewise modified its regulations to add several more diseases. There are now fourteen diseases eligible for the presumption of service connection under the regulation. *See* 38 C.F.R. § 3.309(e).

The VA changes course and begins to deny benefits to Blue Water Navy Veterans, even as evidence increasingly suggests that these sailors were exposed to Agent Orange.

At the same time that the scope of presumptive Agent Orange-linked service connection was expanding, Congress made another change that enlarged the scope of disability benefits for Vietnam veterans. In the Veterans Benefits Improvements Act of 1996, Congress modified the statutory definition of "Vietnam era." Previously, this period had extended only as far back as the congressional authorization of force in August 1964. Now, for veterans who "served in the Republic of Vietnam," the "Vietnam era" would date back to February 1961,

when U.S. forces were already present in Vietnam. Pub. L. No. 104-275, § 505, 110 Stat. 3322, 3342 (codified at 38 U.S.C. § 101(29)). A veteran who served in the "Vietnam era" is considered to have served in a "period of war" and is therefore entitled to the VA's more generous benefits for wartime veterans. *See* 38 U.S.C. § 101(11) (defining "period of war" to include "the Vietnam era"); *see also, e.g.*, 38 U.S.C. § 1521(a) (entitling disabled wartime veterans to non-service-connected pension benefits).

As benefits available for disabled Vietnam veterans grew, the VA began to suggest a narrower reading of the statutory phrase "served in the Republic of Vietnam"—albeit without any formal rule change. In a series of steps, the VA introduced its restrictive and now-familiar "boots-on-the-ground" requirement.

First came a 1997 General Counsel opinion construing the phrase as used in the statutory definition of "Vietnam era." The opinion, regarding pension benefits, construed the phrase "served in the Republic of Vietnam" as used in § 101(29)(A) not to apply to servicemembers whose service was on ships in the waters off Vietnam's coast. In dicta, the General Counsel suggested that the same term in

the Agent Orange Act likewise did not cover offshore service. Dep't of Veterans Affairs, Op. Gen. Counsel Prec. 27-97 (1997). Similarly, the VA's response to comments in rulemakings about spina bifida and diabetes stated that service in the "Republic of Vietnam" was limited to service on land or in inland waterways. 66 Fed. Reg. 23,166, 23,166 (May 8, 2001); 62 Fed. Reg. 51,274, 51,274-75 (Sept. 30, 1997).

In early 2002, the VA amended the language of its Manual M21-1, abandoning the Vietnam Service Medal test and construing 38 C.F.R. § 3.307(a)(6) as requiring a veteran, including Navy veterans, to show that he "actually served on land within the Republic of Vietnam" before the VA would apply the presumption of herbicide exposure. M21-1, Pt. III, ¶ 4.24(e)(1) (Feb. 27, 2002). The VA also twice proposed to codify its "boots-on-the-ground" interpretation by amending the actual regulation, but neither rulemaking was finalized. *See* 69 Fed. Reg. 44,614, 44,620 (July 27, 2004); 73 Fed. Reg. 20,566, 20,567 (Apr. 16, 2008).

In the meantime, epidemiological research continued to advance. Faced with an increase in cancer incidence among Royal Australian Navy Vietnam veterans—significantly greater than among Army personnel who fought on the ground—the Australian Department of

Veterans Affairs commissioned the University of Queensland's National Research Centre for Environmental Toxicology ("NRCET") to determine why naval personnel had more cancers.

In 2002, NRCET published the results of its study. NRCET, *Examination of the Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans Via Drinking Water* (2002) ("NRCET Study"), https://tinyurl.com/ybvwr7vw. The NRCET Study noted that ships in the near-shore marine waters collected water that was contaminated with the runoff from areas sprayed with Agent Orange. *Id.* at 9-10. Shipboard distillers converted the marine water into water for the boilers and potable water by vaporizing and then condensing the liquid to remove salt. This process, however, also "co-distilled" the TCDD—that is, the toxin evaporated and then recondensed along with the water. This co-distillation enhanced the effect of the Agent Orange by increasing its relative concentration in the purified water. *Id.* at 5-8, 33-35; *see also* IOM Blue Water Report at 135-40.

Hydrological studies have shown that river water containing dirt and debris contaminated with TCDD would have discharged several

hundred miles into the South China Sea. *See, e.g.*, Appx107-109; *see also* Appx111-117, Appx110. Combined with the NRCET findings, these studies indicate clear pathways to Agent Orange exposure for a wide swath of Blue Water sailors.

The NRCET Study has twice been validated by the American Institute of Medicine's Agent Orange Committee. The Committee recommended, based on the NRCET Study, that Blue Water Navy personnel not be excluded from the presumption of exposure: "[T]here is little reason to believe that exposure of US military personnel to the herbicides sprayed in Vietnam was limited to those who actually set foot in the Republic of Vietnam." IOM 2008 Update at 655; *see also id.* at 655-56. A follow-on report again corroborated the NRCET findings of plausible exposure pathways for the Blue Water Navy via wind drift and the flow of TCDD-polluted water down rivers and streams and into the open sea, particularly in the Mekong River Delta area. *See* IOM Blue Water Report at 9-10.

The IOM could not state with certainty whether or to what extent such exposure had occurred. But the overarching "paucity of scientific data" meant that it likewise could not quantify the exposure, if any,

with respect to Brown Water sailors or ground forces. *Id.* at 133. The VA nonetheless relied on the IOM's findings to continue denying the presumption of Agent Orange exposure and service connection to Blue Water Navy veterans. *See* 77 Fed. Reg. 76,170, 76,171 (Dec. 26, 2012).

This Court defers to the VA's interpretation excluding Blue Water Navy Veterans from the statutory presumption.

In 2008, this Court first confronted the issue of whether Blue Water Navy veterans "served in the Republic of Vietnam" under 38 U.S.C. § 1116. Jonathan Haas, a Blue Water Navy Vietnam veteran, sought disability benefits under the Agent Orange Act for multiple herbicide-linked conditions. *Haas v. Peake*, 525 F.3d 1168, 1772-73 (Fed. Cir. 2008) ("*Haas II*"). A divided panel held that the statutory phrase "served in the Republic of Vietnam" was ambiguous as to whether it included naval service in the territorial waters off Vietnam's coast. *See id.* at 1183-86. The majority deferred to the VA's asserted "boots-on-the-ground" policy as a reasonable interpretation under *Chevron* Step Two and a legally permissible interpretation of the VA's regulations under *Auer*. *See id.* at 1186-95.

Mr. Haas sought rehearing, arguing that the panel had improperly held the statute ambiguous without resolving any doubt in

his favor under the pro-veterans canon. In a supplemental opinion denying rehearing, the panel majority held that Mr. Haas had waived that argument by not raising it earlier and that, in any event, "it [was] by no means clear" that applying the canon would have changed the majority's decision. *See Haas v. Peake*, 544 F.3d 1306, 1308-09 (Fed. Cir. 2008) ("*Haas III*").

Mr. Procopio, a Blue Water Navy veteran, is denied benefits for his disabilities.

Which brings us to Mr. Procopio. His story begins back in 1963. As the United States was considering its commitment to the Republic of Vietnam, 18-year-old Alfred Procopio, Jr., left his home in Boston to enlist in the U.S. Navy. Appx225. He was not drafted. *Id.* He chose to go to sea to serve his country.

Less than one year later, Mr. Procopio found himself preparing to go to war. He served with distinction in the Navy from September 1963 to August 1967. *Id.* By the time of his honorable discharge, he had been awarded the National Defense Service Medal, the Vietnam Campaign Medal, and the Vietnam Service Medal with two bronze stars. *Id.*

Mr. Procopio served on the U.S.S. *Intrepid*, the renowned aircraft carrier, from November 1964 through July 1967. Appx5; Appx41; Appx225. In July 1966, the *Intrepid* was deployed off the coast of the Republic of Vietnam. Appx5; Appx49-52; *see also* Appx7. The *Intrepid* repeatedly entered the Republic's territorial sea in the course of launching or recovering aircraft. Appx31-32; Appx49-52; *see generally* Bill White & Robert Gandt, *Intrepid: The Epic Story of America's Most Legendary Warship* 216-17 (2008).

After rising to the rank of Electrician Mate Second Class Petty Officer (E-5), Mr. Procopio was honorably discharged from active duty on August 15, 1967, having served 3 years, 11 months, and 3 days—much of it in the active war zone. Appx189; Appx225.

Like many veterans, Mr. Procopio encountered multiple health problems following his return to civilian life. In 2006 and 2007, he sought service connection and disability benefits for two of his conditions: diabetes mellitus and prostate cancer. Appx5. Both conditions are eligible for the presumption of service connection based on Agent Orange exposure. *See* 38 U.S.C. § 1116(a)(2)(H) (diabetes mellitus); 38 C.F.R. § 3.309(e) (prostate cancer). But the VA regional

office refused to afford Mr. Procopio this presumption and denied his claims. Appx195-197. The Board of Veterans Appeals did the same. Appx172-184; Appx19-40. Both in its initial ruling and in a subsequent ruling after a court-ordered remand, the Board cited *Haas* and stated that Mr. Procopio was not entitled to the statutory presumption because he did not "serve[] or visit[] on-shore in Vietnam." Appx179; *accord* Appx21 (Mr. Procopio was not "present on the landmass or the inland waters of Vietnam"). The Board also found that he had not directly demonstrated exposure to Agent Orange. Appx21; Apx173.

The Court of Appeals for Veterans Claims affirmed. Appx4-15. The Veterans Court applied "the controlling precedent in *Haas*" (Appx11) and refused to extend to Mr. Procopio the presumption of exposure to Agent Orange (or the accompanying presumption of service connection) because he could not prove that he had been present at some point on the landmass or inland waters of Vietnam. Appx9-11. The Veterans Court also accepted the Board's finding that Mr. Procopio had not established direct exposure to Agent Orange. Appx14-15. Mr. Procopio appealed to this Court.

Mr. Procopio asked this Court for en banc hearing in the first instance, arguing that *Haas* should be overruled. *See* Dkt. 10. The government objected, and the Court denied the request. *See* Dkt. 19, Dkt. 20. At oral argument, however, the panel expressed uncertainty about the controlling effect of *Haas* on the question addressed in the *Haas* rehearing denial: whether the statutory term "served in the Republic of Vietnam" is actually ambiguous, particularly in light of the pro-veterans canon. The panel ordered the parties to submit supplemental briefing. Dkt. 50; *see also* Dkt. 56, Dkt. 57, Dkt. 60.

After receiving supplemental briefing, this Court sua sponte ordered an en banc hearing. Dkt. 63. The Court directed the parties to file new briefs addressing (1) whether the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116(a)(1) "unambiguously include[s] service in offshore waters within the legally recognized territorial limits of the Republic of Vietnam, regardless of whether such service included presence on or within the landmass of the Republic of Vietnam," and (2) what role, if any, the "pro-claimant canon play[s] in this analysis." *Id.* at 2.

SUMMARY OF THE ARGUMENT

I. The Agent Orange Act mandates that the VA presume that a Vietnam veteran's disability is service-connected if the veteran has an eligible disease and "served in the Republic of Vietnam" during the specified time period. 38 U.S.C. § 1116(a)(1). By using the formal name of a sovereign nation, Congress intended the statutory presumption to apply to any veteran who served within its territorial boundaries. Under longstanding principles of national sovereignty and international law, "served in the Republic of Vietnam" unambiguously includes service in the Republic's territorial sea.

Statutory context supports this plain-text interpretation. By delineating the presumption's scope as applying to any "veteran who, during active *military, naval, or air service*, served in the Republic of Vietnam," Congress made clear that any veteran regardless of military branch—including Blue Water Navy veterans—who served in the sovereign territory of the Republic of Vietnam would be entitled to the service-connection presumption.

The legislative history of the Agent Orange Act confirms Congress's unambiguously expressed intent. That history shows

Congress used "served in the Republic of Vietnam" with the intent to codify then-existing regulatory presumptions that defined the relevant service area as including the "waters offshore" of Vietnam. It also demonstrates Congress's purpose in creating the presumption, which was to cut through the scientific and evidentiary uncertainty over Agent Orange exposure and its health effects by allowing all Vietnam veterans suffering from herbicide-connected diseases to benefit from a presumption of service connection. And in later legislation, Congress continued to treat "served in the Republic of Vietnam" as referring to service within the borders of that sovereign state.

Even if any interpretive doubt remained after considering the Act's pertinent statutory text, context, and legislative history, the canon of statutory construction that doubt should be resolved in favor of the veteran would settle the matter. Applying this historically grounded canon here is easy: The VA's "boots-on-the-ground" policy excludes tens of thousands of Blue Water Navy veterans who otherwise would be entitled to the statutory presumption of exposure. Interpreting "served in the Republic of Vietnam" to include the territorial sea upholds the

phrase's plain meaning by resolving, as Congress intended, interpretive doubt in veterans' favor.

To the extent *Haas* held otherwise, it should be overruled. The *Haas* majority found Mr. Haas had waived reliance on the pro-veterans canon, but it nonetheless misapplied the canon in dicta. The majority also lacked critical legislative history and misapprehended the plain meaning of "Republic of Vietnam," which encompasses all of that nation's sovereign territory, including its territorial sea.

II. Even if this were a close case after consulting the text, context, and legislative history—which it is not—the pro-veterans canon would apply at Step One of the *Chevron* framework to resolve any remaining interpretive doubt in favor of Mr. Procopio's pro-veterans interpretation. Under Step One, an agency is entitled to deference only if, after using the traditional tools of statutory interpretation, the court finds the statute so ambiguous that it is unable to discern its meaning. In reaching this determination, canons of interpretation that reflect congressional drafting presumptions, like other traditional tools of construction, inform whether a statute is ambiguous.

Accordingly, as both the Supreme Court and this Court have indicated, courts properly apply the pro-veterans canon at Step One of the *Chevron* inquiry. That not only accords with the primary duty of the judiciary to interpret the law, it makes good sense. The canon is not a "veteran always wins" rule. Nor is it a way to provide a pro-veteran result unsupported by clear statutory text or to override congressional delegations of authority to the VA. Rather, it incorporates the understanding that Congress legislates with the intent that interpretive uncertainty will be resolved to benefit veterans. The pro-veterans canon gets at the heart of *Chevron* Step One: discerning Congress's meaning.

STANDARD OF REVIEW

This Court sets aside any decision of the Court of Appeals for Veterans Claims that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," or was rendered "in violation of a statutory right." 38 U.S.C. § 7292(d)(1). The Veterans Court's legal determinations, including interpretations of statutes, are reviewed de novo. *See Saunders v. Wilkie*, 886 F.3d 1356, 1360 (Fed. Cir. 2018).

ARGUMENT

I. The Statutory Phrase "Served In The Republic Of Vietnam" Unambiguously Includes Naval Service In The Republic's Territorial Sea.

Section 1116 requires a presumption that a veteran was exposed to Agent Orange and that a qualifying disability is service connected if the veteran, "during active military, naval, or air service, served in the Republic of Vietnam" within dates that correspond to U.S. military involvement and the start of herbicide use in the Vietnam War. Read in light of the text, statutory context, and legislative history, that language unambiguously includes service in offshore waters within the legally recognized territory of the former Republic of Vietnam. Even if there were any lingering basis for interpretive doubt, the pro-veterans canon would require resolving that doubt in favor of Blue Water Navy veterans and confirming the clear pro-veteran meaning of the statute. To the extent a divided panel of this Court held otherwise in *Haas*, that holding should not be followed.

A. Congress's use of the name of a sovereign, coastal nation incorporates the settled understanding of the boundaries of that nation, which include its territorial sea.

In the Agent Orange Act, Congress made clear that *any* veteran who developed a disease linked to Agent Orange exposure and had "served in the Republic of Vietnam" within a specified timeframe would be entitled to a presumption of exposure and service connection. In creating this presumption, Congress did not link a veteran's service to a colloquial geographic region, like "Vietnam," or to a specific service role, like riverboat patrols in the Mekong Delta. Instead, Congress referred to service in "the Republic of Vietnam," the formal name of the former sovereign nation of South Vietnam. That usage, a term of art, unambiguously refers to the entire territory of the nation-state, which includes its territorial sea.

When Congress uses a term of art, courts give effect to its technical meaning. *See McDermott Int'l, Inc. v. Wilander*, 498 U.S. 337, 342 (1991); *Johnson v. United States*, 559 U.S. 133, 139 (2010). The boundaries of a sovereign nation have a clear meaning both in

customary international law and in American recognition of that law.[4] By using the formal name of a sovereign nation, Congress unequivocally dictated that any service within the sovereign boundaries of that nation would qualify as service for purposes of presuming exposure to Agent Orange. *See FAA v. Cooper*, 566 U.S. 284, 292 (2012) ("[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." (quotation marks omitted)).

Under accepted international-law principles, the territorial sea of a coastal nation is considered part of its national territory. "A state has *complete sovereignty* over the territorial sea, analogous to that which it possesses over its land territory, internal waters, and archipelagic waters." Restatement (Third) of Foreign Relations Law § 511, cmt. b (1987) (emphasis added). "The rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." *Id.* § 512, cmt. a (citations omitted).

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[4] "Customary international law" refers to "[i]nternational law that derives from the practice of states and is accepted by them as legally binding." Black's Law Dictionary 941 (10th ed. 2014).

By 1991, it was beyond question that the boundaries of a coastal nation encompassed its territorial sea. The principle that a coastal nation's sovereignty extends to its territorial sea has long been established under customary international law. *See, e.g.*, *United States v. California*, 332 U.S. 19, 33-34 (1947) (noting that federal government's "exercise [of] broad dominion and control" over United States territorial sea is a "settled fact" that is "binding upon this Court" and "is a function of national external sovereignty"); *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906) ("'[I]t must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tide waters is a marine league from its coast[.]'" (quoting *Manchester v. Massachusetts*, 139 U.S. 240, 258 (1891)).

That principle was further entrenched by the 1958 Convention on the Territorial Sea and the Contiguous Zone (the "1958 Convention"). The United States and the other signatories to that treaty codified customary international law in agreeing that "[t]he sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea." 1958

Convention, art. 1(1), 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958); *accord* United Nations Convention on the Law of the Sea, art. 2, 1833 U.N.T.S. 397 (Dec. 10, 1982, *entered into force on* Nov. 16, 1994) ("UNCLOS III");[5] Restatement (Third) of Foreign Relations Law § 512, Reporters' n.1.

Not only has this understanding been long settled in the United States as a matter of binding treaties, its pedigree is also well established in Supreme Court precedent. For example, the Supreme Court adopted the 1958 Convention for purposes of defining federal-state boundaries in the Submerged Lands Act. *See United States v. Alaska*, 503 U.S. 569, 588 (1992) (explaining that adopting international-law principles gave the statute "definiteness and stability" (quotation marks omitted)). In doing so, the Court explained that the definitions adopted in the 1958 Convention provided "the best and most workable definitions available" for defining coastal boundaries. *United States v. California*, 381 U.S. 139, 165 (1965).

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[5] Although the United States has not formally ratified UNCLOS III, it "has recognized," for example, "that its baseline provisions reflect customary international law." *United States v. Alaska*, 503 U.S. 569, 588 n.10 (1992) (quotation marks omitted).

Congress's incorporation of this settled understanding of international law in the Agent Orange Act is particularly clear against the backdrop of the hotly contested disputes over the territory of Vietnam. In creating the boundaries between north and south, the Geneva Accords expressly accounted for each region's territorial sea. Article 4 states that the 17th parallel "provisional military demarcation line … is extended into the territorial waters by a line perpendicular to the general line of the coast." *Id.* art. 4.[6] And in April 1965, the Republic of Vietnam made an official claim to its territorial sea, which the United States respected as part of the "Defensive Sea Area" in defending the Republic. *See* Epsey Cooke Farrell, *The Socialist Republic of Vietnam and the Law of the Sea* 48-49 (1998) (citing Republic of Vietnam, Decree No. 81/NG (Apr. 27, 1965)); Judith C. Erdheim, *Market Time (U) CRC 280*, Center for Naval Analyses, App'x I, at I-2, I-6, I-7 (1975), https://tinyurl.com/ydbbota9.

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[6] Although the United States did not sign the Geneva Accords, it later incorporated their terms into the Paris Accords ending the Vietnam War. *See* Agreement on Ending the War and Restoring Peace in Vietnam, art. I, 24 U.S.T. 1, 4-23, T.I.A.S. No. 7542 (Jan. 17, 1973).

Courts understand that Congress ordinarily intends to follow principles of international law where they are implicated. This is reflected, for example, in the *Charming Betsy* canon against construing statutes to violate the law of nations, as well as the presumption against extraterritoriality. *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 542 U.S. 155, 164 (2004) (citing, *inter alia*, *Murray v. The Charming Betsy*, 6 U.S. (2 Cranch) 64, 118 (1804)); *Litecubes, LLC v. N. Light Prods., Inc.*, 523 F.3d 1353, 1363-64 (Fed. Cir. 2008). That understanding of congressional intent applies here. By employing the term of art, "the Republic of Vietnam," Congress plainly intended that the presumption of service connection in the Agent Orange Act would extend to service in all of the former Republic's sovereign territory, including service in its territorial sea.

B. Other statutory language reinforces that the statutory phrase covers naval service in the Republic of Vietnam's territorial sea.

In addition to the plain meaning of "the Republic of Vietnam," other language in the Agent Orange Act underscores that a veteran who "served in the Republic of Vietnam" unambiguously includes a sailor who served in its territorial sea. "Courts have a duty to construe

statutes, not isolated provisions," and must consider statutory meaning in context. *Graham Cty. Soil & Water Conservation Dist. v. United States ex rel. Wilson*, 559 U.S. 280, 290 (2010) (quotation marks omitted); *see also King v. St. Vincent's Hosp.*, 502 U.S. 215, 221 (1991) (following "the cardinal rule that a statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context" (citation omitted)).

Here, interpreting the contours of "serv[ice] in the Republic of Vietnam" must consider its placement in a statute expressly written to benefit all servicemembers: soldiers, sailors, and airmen. The statute, to be precise, presumes service connection with respect to specified conditions associated with exposure to Agent Orange as to any "veteran who, during active *military, naval, or air service*, served in the Republic of Vietnam." 38 U.S.C. § 1116(a)(1), (f) (emphasis added). The full statutory phrase thus makes even more plain that the presumption of exposure and service connection applies to servicemembers in all branches of the Armed Forces so long as they served in the Republic of Vietnam, including Blue Water Navy sailors like Mr. Procopio. Indeed, a statute whose express terms treat naval veterans equally to ground

troops and airmen cannot plausibly be construed to exclude service on ships in the territorial sea—quintessential "naval … service."

C. Legislative history confirms that "served in the Republic of Vietnam" covers naval service in the Republic of Vietnam's territorial sea.

The relevant legislative history further confirms that the statutory phrase "ser[vice] in the Republic of Vietnam" encompasses service in the Republic's territorial sea. Three strands of that history stand out.

1. Congress codified a presumption that encompassed service in offshore waters.

The legislative history of the Agent Orange Act expressly connects service "in the Republic of Vietnam" with Blue Water Navy service. As discussed above (at 12-13), before the Agent Orange Act, the VA had promulgated Regulation 313. That rule established a presumption of service connection for non-Hodgkin's lymphoma based on "service in Vietnam," and it expressly applied to "service in the waters offshore." 38 C.F.R. § 3.313(a).[7]

[7] The regulation provides that "service in Vietnam" "includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam." 38 C.F.R. § 3.313(a).

In enacting the Agent Orange Act, Congress codified this regulatory presumption. Congress made this clear in the explanatory statement jointly prepared by the House and Senate Committees on Veterans' Affairs in conjunction with the bill that became law. That statement explains that the bill "would … codify [the] decision[] the Secretary of Veterans Affairs has announced to grant [a] presumption[] of service connection for non-Hodgkin's lymphoma … in veterans who served in Vietnam." 137 Cong. Rec. 2341, 2349 (Jan. 29, 1991); *see also id.* at 2345 (statement of Rep. Montgomery, floor manager and House Veterans' Affairs Committee chair); *id.* at 2352-53 (statement of Rep. Hammerschmidt); *id.* at 2352 (statement of Rep. Smith).[8]

The government has previously conceded that the clause "if the conditions of service involved duty or visitation in Vietnam" does not modify "service in the waters offshore," and that Regulation 313 thus applies to veterans who "never visited the landmass of Vietnam." *Haas II*, 525 F.3d at 1179.

[8] This Court has recognized that statements by floor managers and committee chairs "are … particularly reliable indication[s] of congressional intent." *New Mexico v. United States*, 831 F.2d 265, 268-69 (Fed. Cir. 1987); *see also* Robert A. Katzmann, *Judging Statutes* 48-49, 54 (2014) (same).

Congress's intent is also clear from the legislative history surrounding the 1990 bill from which the Agent Orange Act was derived.[9] The House Committee Report for that bill explained that it "would codify decisions of the Secretary of Veterans Affairs announced during the summer of 1990 to compensate veterans suffering from [non-Hodgkin's lymphoma]." H.R. Rep. No. 101-857, at 15 (1990); *accord* S. Rep. No. 101-379, at 106 (1990).

This legislative history thus makes plain that Congress intended the Act's use of the phrase "served in the Republic of Vietnam" to reflect and match Regulation 313's inclusion of the Blue Water Navy. But Congress did not limit its codification of Regulation 313's scope or its inclusion of Blue Water Navy veterans to non-Hodgkin's lymphoma. Instead, it used a uniform standard—"served in the Republic of Vietnam"—to delineate the scope of the presumption that would apply not only to non-Hodgkin's lymphoma, but also to chloracne, soft-tissue

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[9] *See* 137 Cong. Rec. at 2349. The 1990 House bill, similar to the bill that was ultimately enacted, used the phrase "service in the Republic of Vietnam." Veterans' Compensation Amendments of 1990, H.R. 5326, 101st Cong. § 304 (Oct. 15, 1990). This bill was passed by the House and referred to the Senate committee but was not enacted before the legislative session expired.

sarcomas, and whatever other diseases might subsequently be linked to Agent Orange exposure under the statute and VA regulations. *See* Pub. L. No. 102-4 § 2(a), 105 Stat. 11, 11-13. This uniform standard, especially taking into account the backdrop of Regulation 313, includes service in the territorial sea of the Republic of Vietnam.

The *Haas* majority rejected Mr. Haas's legislative-history argument and declined to hold that Congress codified Regulation 313 "absen[t] … any clearer statement in the legislative record, which Mr. Haas has not identified." *Haas II*, 525 F.3d at 1185. Mr. Haas did not cite the 1991 joint explanatory statement, the 1990 House Committee Report, or the relevant portions of the 1990 Senate Committee Report. *Haas* thus reflects an incomplete record of the Agent Orange Act's legislative history.

2. Congress intended the Act to respond to the uncertainty that affected Blue Water Navy veterans just as it did others.

Legislative history also shows that the presumption of service connection was intended to resolve prevailing scientific and evidentiary uncertainty. Representative Montgomery, the House floor manager for the Agent Orange Act, explained that the entire reason for adopting a

presumption was that the empirical evidence regarding Agent Orange was contentious, complex, and arguably inconclusive. *See* 137 Cong. Rec. at 2351 (noting the bill was a "compromise" intended to "giv[e] veterans the benefit of the doubt and attempt[] to settle one of the most complex and contentious veterans' issue[s] ever brought before this body for consideration").

The Act, in other words, gave Vietnam veterans the benefit of the doubt in the face of difficult and complicated scientific uncertainty. That uncertainty—both in 1991 and continuing to this day—affected Blue Water Navy veterans just as it affected others who served in the Republic of Vietnam. It concerned not only the health effects of exposure to Agent Orange, but also whether any individual Vietnam veteran, regardless of military branch, may have been exposed in the first place. *See* 137 Cong. Rec. at 2347 (noting "the difficulty in estimating Agent Orange exposure in individual veterans," which caused the CDC's "Agent Orange Exposure Study" to be "put on hold" and ultimately "canceled" because it "c[ould] not be conducted") (statement of Rep. Montgomery); *see also* VA, *Agent Orange Study*

Canceled, Agent Orange Review, Oct. 1988, at 3 (explaining difficulties leading to cancellation).

For example, as noted by Representative Montgomery, the *Selected Cancers Study* found that "[t]he higher non-Hodgkin's lymphoma ratio [in Vietnam veterans] was due to excessive non-Hodgkin's lymphoma *among men who served on ships offshore Vietnam*." 137 Cong. Rec. at 2347 (emphasis added). This finding led to the adoption of the service-connection presumption in Regulation 313 and in the Agent Orange Act, even though the study—noting the uncertainty involved—had been unable to specifically link higher incidence of non-Hodgkin's lymphoma in Blue Water Navy veterans to Agent Orange exposure. *See* 55 Fed. Reg. 43,123, 43,123 (Oct. 26, 1990); *Selected Cancers Study* at 3, 5 (study "focus[ed] on the risk of cancer after Vietnam service in general" and only "indirectly examine[d] any possible association with exposure to herbicides"), 94 (noting that "the results do not constitute an adequate test of the hypothesis that exposure to Agent Orange or dioxin is associated with the development of NHL"); *see also* IOM Blue Water Report at 133 (concluding that lack of reliable data "makes it impossible to quantify [Agent Orange]

exposures for Blue Water and Brown Water Navy sailors and, so far, for ground troops as well"). The presumption thus accords with the uncertainty surrounding whether any individual Vietnam veteran was exposed to Agent Orange.

3. Congress equated the Republic of Vietnam's sovereign borders with the key statutory phrase.

Congress's subsequent treatment of the term "served in the Republic of Vietnam" further illustrates its plain meaning. As discussed above (at 16-17), Congress in 1996 expanded the time period constituting the "Vietnam era" for those veterans who "served in the Republic of Vietnam." Pub. L. No. 104-275, § 505(a), 110 Stat. at 3342, codified at 38 U.S.C. § 101(29). In doing so, the Senate Committee explained that the amended definition would apply "with respect to those veterans who actually served within the borders of the Republic of Vietnam during that time frame." S. Rep. No. 104-371, at 21 (1996). In other words, Congress understood "the Republic of Vietnam" to mean the area within the nation's borders—which, as explained above, includes the Republic's territorial seas under the accepted understandings of national sovereignty and international law. *See supra* § I.A.

D. The pro-veterans canon, which Congress understood would govern interpretation of the Act, underscores that Blue Water Navy veterans "served in the Republic of Vietnam."

The pro-veterans canon points in the same direction as all other interpretive indications: that service in the Republic of Vietnam's territorial sea plainly qualifies as "serv[ice] in the Republic of Vietnam."

For at least 75 years, the Supreme Court has made clear that statutes benefitting veterans must "be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone v. Lightner*, 319 U.S. 561, 575 (1943); *see also Lawrence v. Shaw*, 300 U.S. 245, 249-50 (1937) (construing veterans statute in light of congressional intent to benefit veteran); *Henderson ex rel. Henderson v. Shinseki*, 562 U.S. 428, 441 (2011) ("We have long applied [the pro-veterans canon]."). This Court has likewise recognized "the canon that veterans' benefits statutes should be construed in the veteran's favor." *Kirkendall v. Dep't of Army*, 479 F.3d 830, 843 (Fed. Cir. 2007) (en banc).

When considering a statute like § 1116, therefore, "interpretive doubt is to be resolved in the veteran's favor." *Brown v. Gardner*, 513 U.S. 115, 118 (1994). This means that an argument that might

otherwise introduce some measure of uncertainty about Congress's intent and support a finding of ambiguity does not have that effect in the veterans context. *See Gardner*, 513 U.S. at 117-18 (expressing skepticism about whether any claim of ambiguity "would be possible after applying" the pro-veterans canon); *King*, 502 U.S. at 220-21 n.9; *infra* § II.B-C. Courts "will presume congressional understanding of such interpretive principles." *King*, 502 U.S. at 220-21 n.9. Congress in 1991 is thus presumed to have known and intended that the statutory term "served in the Republic of Vietnam" would be interpreted accordingly.

This case, like *Gardner* and *King*, is not a close case that requires resort to the pro-veterans canon. In those cases, as here, the other tools of statutory interpretation—text, context, and legislative history—left no interpretive doubt about whether the statute might be susceptible to multiple interpretations. *See King*, 502 U.S. at 220 (finding that statute's text and context revealed its plain meaning and did not "render it susceptible to interpretive choice"); *Gardner*, 513 U.S. at 117-18 (explaining that the government "cannot plausibly" claim ambiguity in the word "injury" based on statutory context). But here, as in those

cases, the pro-veterans canon would preclude a finding of statutory ambiguity even if some doubt remained. *See King*, 502 U.S. at 220-21 n.9; *Gardner*, 513 U.S. at 117-18.

In *King*, for example, the statute in question allowed a leave of absence from civilian employment to complete military training, without any explicit time limit. 502 U.S. at 218. In contrast, related provisions expressly stated that there was no time limit for similar absences. *Id.* at 220-21. Even if such variation could have "unsettled" the reading of the otherwise plain statute in other contexts, the Court held that the pro-veterans canon mandated the pro-veteran interpretation of no time limit. *Id.* at 220-21 & n.9. Likewise here, where every indication is that Congress intended to include in the Act's ambit veterans serving in the territorial sea of the Republic of Vietnam, the pro-veterans canon would preclude a finding of ambiguity even if there were some competing evidence that could arguably create interpretive doubt.

The *Haas* majority mistakenly suggested otherwise based on an incorrect understanding of what it means to construe § 1116 in veterans' favor. In denying rehearing, the panel majority held that the

veteran had waived reliance on the pro-veterans canon. But it went on to state that the canon "would present a practical difficulty in determining what it means for an interpretation to be 'pro-claimant,'" such that the pro-veterans canon did not necessarily favor interpreting "Republic of Vietnam" to include its territorial sea. *Haas III*, 544 F.3d at 1308. The panel posited that the VA "already interpreted the statute in a pro-claimant manner by applying it to any veteran who set foot on land." *Id.* at 1308-09.

This proposition misapplies the canon. The question is not whether a particular interpretation provides some measure of beneficence to veterans. Rather, the pro-veterans canon privileges the interpretation that is more pro-veteran, relative to the possible alternatives. Here, understanding the "Republic of Vietnam" to include not just the landmass of Vietnam, but also its territorial sea, is the pro-veteran interpretation. It makes available the presumption of exposure and service connection to the thousands of Blue Water Navy veterans who served on ships within the sovereign territory of the Republic of Vietnam but, according to the VA's restrictive reading of the Act, nonetheless are deemed to have not served in the Republic of Vietnam.

The *Haas* majority's other objections to the application of the pro-veterans canon also fall wide of the mark. The majority noted that applying the canon "would raise the question of whether the statute applies to claimants who flew through [South] Vietnamese airspace (including the airspace above the territorial seas) but never landed in Vietnam." *Id.* at 1309. There is no question: The statute plainly applies to such airmen. That is the unequivocal meaning of Congress's chosen terms. Just as a nation's sovereignty extends to its territorial sea, so too it extends to the air above. *See* Restatement (Third) of Foreign Relations Law §§ 512 & 513, cmt. i (citing Chicago Convention on International Civil Aviation of December 7, 1944, art. 1-2, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295). The VA may rebut the presumption of service connection for an individual airman, but as an initial, legal matter, that veteran is entitled to the presumption.

The *Haas* majority also worried that "the task of determining whether a particular veteran's ship at any point crossed into the territorial seas during an ocean voyage would seemingly be even more difficult" than determining "whether the veteran set foot on land or traversed inland waters in Vietnam." *Haas III*, 544 F.3d at 1309. But

this case belies that point. The record contains contemporaneous deck logs detailing the coordinates of the U.S.S. *Intrepid* on specific dates as well as narrative comments confirming that the ship on multiple occasions entered the Republic of Vietnam's "territorial sea." Appx49-52. Such documents will allow the VA to apply the plain language of the statute for the benefit of all of the veterans whom Congress intended to cover.

E. ***Haas*'s conclusion that "served in the Republic of Vietnam" is ambiguous was wrong.**

The divided *Haas* panel held that the term "served in the Republic of Vietnam" was ambiguous and deferred to the VA's narrow interpretation that limited the presumption of exposure and service connection to veterans who "physically set foot in the Republic of Vietnam." *Haas III*, 544 F.3d at 1307-08; *accord Haas II*, 525 F.3d at 1184. As shown, the Court reached this conclusion without the full benefit of the relevant legislative history, without squarely addressing the role of the pro-veterans canon, and with a flawed discussion of that canon in dicta.

But the *Haas* majority's conclusion was also based on a misunderstanding of Congress's words. This Court sitting en banc

should not make the same mistake. It should overrule *Haas* to the extent that opinion held that the statutory phrase "served in the Republic of Vietnam" is ambiguous.

To begin with, the *Haas* majority did exactly what the pro-veterans canon forbids: Faced with plain statutory language, it nonetheless stretched to find purported ambiguity that would disfavor certain classes of veterans. "Ambiguity is a creature not of definitional possibilities but of statutory context." *Gardner*, 513 U.S. at 118. None of the majority's rationales would create ambiguity in any context, and they certainly cannot do so in the veterans context.

The *Haas* majority pointed, for example, to the Veterans Court's statement that "[t]here are many ways in which to interpret the boundaries of a sovereign nation such as the former Republic of Vietnam." *Haas II*, 525 F.3d at 1184 (quoting *Haas v. Nicholson*, 20 Vet. App. 257, 263 (2006) ("*Haas I*")). According to the majority, the Veterans Court "surveyed different sources that define sovereign nations in different ways, ranging from including only the nation's landmass to including the nation's 'exclusive economic zone,' which can extend up to 200 miles from the coastline." *Id.* (citing *Haas I*, 20 Vet.

App. at 263-64); *see also Haas I*, 20 Vet. App. at 263-64 (citing CIA World Factbook; UNCLOS III). From this, the majority concluded that "served in the Republic of Vietnam" was ambiguous. *Haas II*, 525 F.3d at 1184.

This analysis is incorrect in all respects. The Veterans Court did not, as the *Haas* majority believed, invoke any "source" that "define[s] sovereign nations" as "including only the nation's landmass." *Id.* Rather, the Veterans Court cited the unclassified Internet version of the CIA World Factbook to suggest that a country's boundaries "can be defined solely by the mainland geographic area." *Haas I*, 20 Vet. App. at 263. The notion that Congress would have legislated with the understanding of a summary almanac is unsupported.

More fundamentally, the Factbook does not purport to opine on the definition of the bounds of a sovereign nation. The Factbook provides the public with "information on the history, people, government, economy, energy, geography, communications, transportation, military, and transnational issues" of the countries of the world. https://www.cia.gov/library/publications/resources/the-world-factbook/ (last visited Oct. 1, 2018). Referring to the current Socialist

Republic of Vietnam (not the historical Republic of Vietnam that is the subject of the statute), the Factbook collects various geographic statistics, such as "Area," "Land boundaries," "Coastline," and "Maritime claims." *See* https://www.cia.gov/library/publications/resources/the-world-factbook/geos/vm.html (follow subheading "Geography :: VIETNAM") (last visited Oct. 1, 2018). The Factbook's definition of "land boundaries" does not incorporate any concept of sovereignty but merely refers to the length of a country's internal land borders with "contiguous border countries," as opposed to its coastline. *See* https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html (follow subheading: "Land boundaries") (last visited Oct. 1, 2018). Nothing in the Factbook displaces the settled understanding of customary international law, accepted by the United States, that the territory of a sovereign nation like the "Republic of Vietnam" includes its territorial sea.

The *Haas* majority's reference to Vietnam's 200-mile exclusive economic zone similarly misunderstands that concept. The exclusive economic zone is not, as the majority surmised, a way to define Vietnam's territorial boundaries. *See Haas II*, 525 F.3d at 1184. A

coastal nation does not exercise complete sovereignty over its 200-mile exclusive economic zone; rather, it enjoys certain limited functional rights in that zone. Restatement (Third) of Foreign Relations Law § 511 & cmt. b; *see* UNCLOS III, art. 58 (a coastal state must give "due regard" to the "rights and duties of other States" within its exclusive economic zone). Those rights include exploration, exploitation of natural resources, and the exercise of limited jurisdiction in connection with marine scientific research, environmental protection, and artificial islands. Restatement (Third) of Foreign Relations Law § 514 & cmt. c. In contrast, a coastal nation exercises "sovereignty" in its "territorial sea." *Id.* § 512. No source of international law would conflate a nation's sovereign territory—that is, its landmass, its internal waters, its territorial sea, and its airspace—with its limited prerogatives in the exclusive economic zone.

In denying rehearing, the *Haas* majority also cited selected cases from the immigration context holding in specified circumstances that an alien is not present "in" the United States until he has touched its soil. *Haas III*, 544 F.3d at 1309 (citing *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995); *Yang v. Maugans*, 68 F.3d 1540, 1548 (3d Cir. 1995)).

That is a completely different context. Immigration law distinguishes between the rights of an alien who "enters" the United States and one who does not, and between those who "enter" with inspection and without. *See Zhang*, 55 F.3d at 754. Entry without inspection entails both "physical presence" and evading inspection at a customs inspection point, which has led courts to interpret "physical presence" as requiring a foot on dry land. *Id.* ("United States immigration law is designed to regulate the travel of human beings, whose habitat is land, not the comings and goings of fish or birds."); *accord Yang*, 68 F.3d at 1549.

That immigration context cannot be used to create ambiguity in the Agent Orange Act, which applies by its terms to *all* members of the Armed Forces who "served" in "the Republic of Vietnam" "during active military, naval, or air service." *See Pereira v. Sessions*, 138 S. Ct. 2105, 2117 (2018) (holding statutory term unambiguous based on "plain language and statutory context"). Service is not travel, nor does it require interacting with immigration officials who are located on land.

Context likewise belies the relevance of other statutes using the term the "United States" that were cited by the *Haas* majority. *See Haas III*, 544 F.3d at 1309. Sometimes these statutes expressly refer to

the territorial waters of the United States. *See* 26 U.S.C. § 638 (tax code jurisdictional provision for applicability of income taxes to offshore mines and wells); 49 U.S.C. § 40102 (transportation code definitions section for air commerce and safety provisions). Sometimes they do not. *See* 26 U.S.C. § 7701(a)(9) (tax code definitions section for procedure and administration of federal tax collection). *Accord In re Li*, 71 F. Supp. 2d 1052, 1056 (D. Haw. 1999) ("[T]he term United States has several meanings throughout the United States Code depending on the context."). The *Haas* majority erred in concluding that these linguistic variations in other contexts render ambiguous the phrase "served in the Republic of Vietnam" in the context of the Agent Orange Act.

Finally, the *Haas* majority referred to a statute describing "veterans who during the Vietnam era served in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam." *Haas III*, 544 F.3d at 1309 (quoting Veterans Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 513(b), 94 Stat. 2171, 2208, codified at 38 U.S.C. § 4107 note). The majority also cited a statute pertaining to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto." *Id.* (citing 38 U.S.C.

§ 101(30)). Because those provisions refer to "the waters adjacent to" a country, the panel reasoned, "the absence of any such reference in section 1116 to the territorial waters around Vietnam" rendered § 1116 ambiguous. *Id*. at 1309-10.

Again, the *Haas* majority's analysis overlooked key textual and contextual distinctions. Neither statute, unlike § 1116, deploys a term of art denominating a sovereign nation. In particular, the Vietnam-related statute to which the *Haas* majority alluded did not refer to the post-colonial State of Vietnam, the Republic of Vietnam, the Democratic Republic of Vietnam, or the modern Socialist Republic of Vietnam. Instead, it used the colloquial term "Vietnam." The meaning of that generic term can naturally vary by context. In this context—a statute tracking employment statistics for veterans of the Vietnam theatre of operations—Congress broadly encompassed both the North and the South and also added language to make clear that "Vietnam" would be further defined by service "in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam." 38 U.S.C. § 4107 note.

Furthermore, the "waters adjacent to" Vietnam (or Mexico) are not equivalent to the territorial sea. The territorial sea is merely the first band of several different types of "waters adjacent" to a coastline. *See, e.g.*, Restatement (Third) of Foreign Relations Law § 511 (delineating multiple "Zones of Adjacent Sea," including the territorial sea and others). For example, in designating the Vietnam combat zone for purposes of federal income tax, President Johnson defined "the waters adjacent" to Vietnam as extending well into the South China Sea more than 100 miles offshore. 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). This statute thus has a broader scope than § 1116. But that does not mean that either provision is ambiguous. Context matters, and here the statutory text and context are clear and dispositive.

II. If The Pro-Veterans Canon Plays A Role In This Case, It Does So At *Chevron* Step One And Confirms The Unambiguously Inclusive Meaning Of "Served In The Republic Of Vietnam."

As demonstrated above (§ I.D), this case is like *Gardner* and *King*. Even before reaching the pro-veterans canon, the other tools of

statutory construction all make clear that "served in the Republic of Vietnam" includes service in the territorial sea and precludes the VA's "boots-on-the-ground" limitation. But even if some lingering uncertainty remained, the canon would require resolving that interpretive doubt in favor of the veteran. That determination would be part of the first step of *Chevron*. The Supreme Court has repeatedly made clear that the traditional tools of construction for determining whether a statute is clear include canons of interpretation—like this one—that incorporate presumptions about how Congress drafts statutes. Both the Supreme Court and this Court have strongly indicated that the pro-veterans canon should be applied in this fashion. And doing so accords with the primary duty of the judiciary to interpret the law. The canon, properly applied, therefore forecloses any possible demand for *Chevron* deference by the VA.[10]

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[10] The VA's interpretation here also raises issues of *Auer* deference; as explained above (at 12-13, 17-18), even the VA's formal regulations interpreting "the Republic of Vietnam" do not on their face exclude the territorial sea. For this reason, the Court in *Haas* addressed whether to defer to the VA's "boots-on-the-ground" interpretation. *Haas II*, 525 F.3d at 1186-87. Because the statute is unambiguous, however, no agency gap-filling is allowed and there is no need for this Court to consider *Auer*.

A. Canons of interpretation, like other traditional tools of construction, can help discern congressional intent and inform whether a statute is ambiguous.

A court reviewing an agency's construction of a statute it is charged with administering must first determine whether "the intent of Congress is clear." *Chevron U.S.A., Inc. v. NRDC*, 467 U.S. 837, 842 (1984). If it is, "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." *Id.* at 842-43. Determining whether ambiguity exists, however, requires more than examining the statutory text in isolation. As the Supreme Court has recently reemphasized, "under *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." *SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1358 (2018) (quotation marks omitted). Those "traditional tools" include the statutory text, context, legislative history, and canons of construction. *See Gazelle v. Shulkin*, 868 F.3d 1006, 1010 (Fed. Cir. 2017); *Kyocera Solar, Inc. v. ITC*, 844 F.3d 1334, 1338 (Fed. Cir. 2016).

Many canons of construction incorporate settled understandings of how Congress drafts statutes. The Supreme Court has repeatedly

applied such canons at *Chevron* Step One. Most recently, in *Epic Systems Corp. v. Lewis*, the Court provided a capsule view of how these canons of construction should be reconciled with *Chevron*. 138 S. Ct. 1612 (2018). In that case, the Court consulted, among other things, the canon against reading conflicts into two applicable statutes, which incorporates the "strong presumption that repeals by implication are disfavored and that Congress will specifically address preexisting law when it wishes to suspend its normal operations in a later statute." *Id.* at 1624, 1630 (quotation marks and brackets omitted). The Court relied on that canon and other tools of statutory interpretation to hold that the Federal Arbitration Act applied to employee agreements to arbitrate individually, and not as a class, notwithstanding those employees' separate rights under the National Labor Relations Act. *Id.* at 1623-24. In doing so, the Court rejected the applicability of *Chevron* deference:

> The *Chevron* Court explained that deference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity. 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.

Id. at 1630 (quotation marks and citations omitted).

Epic reflects the Court's longstanding application of the *Chevron* framework when it comes to canons that incorporate congressional drafting presumptions. *See id.* at 1624 (noting that the canon against implied repeals incorporates "[r]espect for Congress as drafter"). The Court, for example, has applied at Step One the canon against retroactivity and the canon requiring that ambiguities in deportation statutes be resolved in favor of noncitizens—rules that reflect presumptions that Congress will "affirmatively consider" and state in legislation when it wants a statute to operate retroactively or to penalize noncitizens. *INS v. St. Cyr*, 533 U.S. 289, 315-16, 320 & n.45 (2001). It has done the same with the canon of constitutional avoidance, which presumes that Congress drafts statutes within constitutional boundaries. *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 574-75 (1988); *accord Solid Waste Agency v. U.S. Army Corps of Engineers*, 531 U.S. 159, 172-74 (2001) (noting that, even had statute been unclear, the Court would not have deferred to agency given the avoidance canon).

Additional examples abound. In *FDA v. Brown & Williamson Tobacco Corp.*, the Court refused to find ambiguity warranting deference to the FDA's asserted ability to regulate tobacco products. It reached that result by citing canons of construction that led it to a "common sense" rule that "Congress could not have intended" in ambiguous language "to delegate a decision of [great] economic and political significance to an agency." 529 U.S. 120, 132-33, 160-61 (2000).

Indeed, the Court has even applied canons like the presumption against implied repeals to *find* a statute ambiguous before deferring to the agency's interpretation at *Chevron* Step Two. *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 666 (2007) ("[T]he statutory language—read in light of the canon against implied repeals—does not itself provide clear guidance[.]"). These cases demonstrate that *Chevron* Step One requires consideration of any applicable canons of statutory interpretation that incorporate presumptions about how Congress drafts statutes.

Applying these canons to judge whether ambiguity exists makes good sense. Again, as the Supreme Court and this Court have repeatedly recognized, "[a]mbiguity is a creature not of definitional

possibilities but of statutory context." *Gardner*, 513 U.S. at 118; *accord, e.g.*, *Click-To-Call Techs., LP v. Ingenio, Inc.*, 899 F.3d 1321, 1329-30 (Fed. Cir. 2018); *Starry Assocs., Inc. v. United States*, 892 F.3d 1372, 1378 (Fed. Cir. 2018); *Kirkendall*, 479 F.3d at 845 (plurality op.); *see also Brown & Williamson*, 529 U.S. at 132 ("The meaning—or ambiguity—of certain words or phrases may only become evident when placed in context."). Canons that form part of the statutory context by informing what Congress meant reveal whether a particular word or phrase is ambiguous. They should be considered at *Chevron* Step One.

B. It is proper to apply the pro-veterans canon at *Chevron* Step One as a traditional tool of statutory interpretation.

The pro-veterans canon incorporates a presumption about how Congress drafts statutes. It therefore applies at *Chevron* Step One.

The canon is based on a longstanding judicial recognition "that the character of the veterans' benefits statutes is strongly and uniquely pro-claimant." *Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998); *see also, e.g.*, *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) ("This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great

need."). When interpreting such statutes, therefore, the canon presumes that Congress acted to benefit veterans. *King*, 502 U.S. at 220-21 n.9. Courts must give the statute "as liberal a construction for the benefit of the veteran as a harmonious interplay of the [statutory] provisions permits." *Fishgold*, 328 U.S. at 285.

The Supreme Court's opinions make clear that this understanding should be brought to bear at the first step of the *Chevron* inquiry to determine whether a statute is ambiguous. In *King*, the Supreme Court explicitly stated that "congressional understanding" of the pro-veterans canon is "presum[ed]." 502 U.S. at 220-21 n.9. By incorporating this congressional understanding, the canon is designed to do precisely what courts do at Step One: interpret the statute to "give effect to the unambiguously expressed intent of Congress." *Pereira*, 138 S. Ct. at 2213 (quoting *Chevron*, 467 U.S. at 842-43).

And although the Supreme Court did not in so many words confront in *King* the question whether the pro-veterans canon should be applied at *Chevron* Step One, it strongly suggested as much in *Gardner*. Mr. Gardner, a Korean War veteran, claimed disability benefits based on a botched surgery at a VA facility. *Gardner*, 513 U.S. at 116. The

relevant statute provides that the VA will provide compensation for an "injury" that occurs "as the result of" VA medical treatment, so long as the injury was not the result of the veteran's "own willful misconduct." *Id.* (citing 38 U.S.C. § 1151). The VA interpreted that statute to require a showing that the injury was caused by "fault" on the part of the VA or an "unforeseen" accident. *Id.* at 117.

The Supreme Court rejected the VA's adoption of a "fault-or-accident" requirement as foreclosed by the unambiguous language of the statute, which applied to all "injuries" without assignment of fault. *Id.* at 117-20. Accordingly, the Court refused to defer under *Chevron* to the agency's contrary interpretation. *Id.* at 120. In reaching this Step One holding, the Court noted that the "most … that the Government could claim" on the basis of the term "injury" connoting fault "is the existence of an ambiguity to be resolved in favor of a fault requirement (*assuming that such a resolution would be possible after applying the rule that interpretive doubt is to be resolved in the veteran's favor*)." *Id.* at 117-18 (emphasis added). Thus, while the Court did not need to rely on the pro-veterans canon to rule in the veteran's favor, it indicated

that a determination that a statute is ambiguous under *Chevron* Step One can be reached only "after applying" the canon.

This Court has done the same. In *Kirkendall*, the en banc Court considered whether Congress expressed a clear intent in 5 U.S.C. § 3330a(d)(1)(B) to override the presumption that equitable tolling of a timing provision is permissible. 479 F.3d at 835-36. The majority concluded that the statute was ambiguous (and therefore favored the veteran) even without resort to the pro-veterans canon, but emphasized that "[e]ven if this were a close case"—that is, if there might be some interpretive doubt about whether the statute was ambiguous—the canon would compel a finding of ambiguity in the veteran's favor, making equitable tolling available. *Id.* at 843.

Addressing the second issue in the case—whether 38 U.S.C. § 4324 entitles a veteran to a hearing—a five-judge plurality further remarked on the application of the pro-veterans canon. The plurality explained that the canon "operate[s] to rebut or eliminate otherwise fair readings in close cases." *Id.* at 846 (plurality op.). Even without resorting to the canon, the plurality concluded that the statute unambiguously entitles a veteran to a hearing. But the plurality noted

that, even if that statute "still fairly permitted of more than one interpretation," the canon would resolve the interpretive doubt and compel that pro-veterans reading. *Id.*

Panels of this Court have also indicated that the canon applies at *Chevron* Step One to resolve interpretive doubt. *See McGee v. Peake*, 511 F.3d 1352, 1356 (Fed. Cir. 2008); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001); *Disabled Am. Veterans v. Gober*, 234 F.3d 682, 691-92 (Fed. Cir. 2000); *Boyer v. West*, 210 F.3d 1351, 1355 (Fed. Cir. 2000). To be sure, the Court has not consistently so held. *See, e.g.*, *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010) (stating that the canon is "only applicable after other interpretive guidelines have been exhausted, including *Chevron*"); *see also Heino v. Shinseki*, 683 F.3d 1372, 1379 n.8 (Fed. Cir. 2012) ("It is not clear where the [pro-veterans] canon fits within the *Chevron* doctrine, or whether it should be part of the *Chevron* analysis at all."). Under the Supreme Court precedent discussed above, however, and with a proper understanding of the canon, this Court should treat the canon like any other traditional tool of interpretation and include it in the Step One analysis.

C. It makes sense to apply the pro-veterans canon at *Chevron* Step One.

Applying the pro-veterans canon at *Chevron* Step One is the only sensible result. "[T]he duty to interpret the statutes as set forth by Congress is a duty that rests with the judiciary." *Bankers Tr. New York Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000) (citing *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176 (1803)). Nothing in *Chevron* displaces this duty. *See SAS Institute*, 138 S. Ct. at 1358; *cf. Pereira*, 138 S. Ct. at 2120 (Kennedy, J., concurring) (criticizing some courts' watered-down Step One analysis as "an abdication of the Judiciary's proper role in interpreting federal statutes").

Determining whether a statute is clear is part of saying what the law is. Only after concluding that it is not, and that genuine ambiguity exists, may a court proceed to *Chevron* Step Two and determine whether an agency has reasonably exercised its delegated authority. The pro-veterans canon is a tool for understanding what Congress has said and whether it has spoken clearly. *See supra* § II.B. It therefore belongs at the first step of *Chevron*.

Affording the canon its proper analytical position does not mean, as the government has suggested, that courts are foreclosed from ever

determining that a veterans-benefit statute is ambiguous. *See* Dkt. 57 at 6. For one thing, ambiguity can certainly exist where a given statute has no particular pro-veterans reading, such that the canon plays no role. *See Burden v. Shinseki*, 727 F.3d 1161, 1169 (Fed. Cir. 2013) (canon inoperative where the interpretive question was whether benefits go to veteran's surviving spouse or to his minor children). Ambiguity can also exist when different tools of construction point in different directions and leave uncertainty about Congress's intent. *See, e.g.*, *Nat'l Org. of Veterans' Advocates*, 260 F.3d at 1378.

Even where the canon would favor one reading over another, it need not foreclose ambiguity in every possible instance. The canon long predates *Chevron*, and the Supreme Court has never equated the "interpretive doubt" that must be resolved in the veteran's favor with the "ambiguity" necessary to trigger *Chevron* deference. As discussed above, *Gardner* and *King* can be read to suggest that the interpretive doubt that may be resolved by applying the canon is something short of the ambiguity that leads to *Chevron* Step Two. On the spectrum of uncertainty, the zone of "interpretive doubt" and the zone of "ambiguity" may not necessarily be coextensive.

This Court need not definitively answer the question of how to draw such lines in order to resolve this case. It is enough to say, as the Supreme Court has already made clear, that the canon is at least a thumb on the scale of finding no *Chevron*-type ambiguity. Here, as in *Gardner* and *King*, the canon can confirm the pro-veterans reading where there is little (if any) reason to interpret the statute differently. *See Gardner*, 513 U.S. at 117-18; *King*, 502 U.S. at 220-21 n.9; *see also Kirkendall*, 479 F.3d at 846 (plurality op.). This case certainly is not one where the canon would be used to mandate a pro-veterans outcome when the statute unambiguously requires the opposite. *See, e.g.*, *Fishgold*, 328 U.S. at 285 (refusing to apply the canon to "distort the language" of the statute); *Boyer*, 210 F.3d at 1355.

Applying the canon at *Chevron* Step One also will not, as the government has suggested, "usurp" the role of the agency or its expertise. Dkt. 57 at 10. The canon cannot erase an express delegation of gap-filling authority to the VA. *See, e.g.*, *Veterans Justice Grp. v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1350 (Fed. Cir. 2016). Indeed, the Agent Orange Act itself contains such an express delegation. Congress took a hybrid approach, identifying certain diseases that are

presumptively service connected while expressly delegating to the VA the authority to designate additional conditions linked to Agent Orange exposure, as continued research over time yields new epidemiological insights. 38 U.S.C. § 1116(b). The VA's exercise of that expressly delegated authority would typically be reviewed under the rubric of *Chevron* Step Two.

Here, as shown above in Part I.D, application of the pro-veterans canon is both appropriate and clear. The VA has no delegated authority (or particular expertise) to define the legal meaning of "the Republic of Vietnam." And the pro-veterans canon points in the same direction as every other relevant tool of statutory interpretation: Navy veterans who served on ships in the Republic of Vietnam's territorial sea unambiguously "served in the Republic of Vietnam."

CONCLUSION

The Court should reverse the judgment of the Veterans Court.

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Respectfully submitted,

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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 October 1, 2018.

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. Cir. R. 32(a), because this brief contains 13,986 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b).

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