No. 2017-1821

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.

Appeal from the United States Court of Appeals for Veterans Claims
Case No. 15-4082, Judge Coral W. Pietsch

BRIEF OF NATIONAL VETERANS LEGAL SERVICES PROGRAM AND VETERANS OF FOREIGN WARS OF THE UNITED STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLANT

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CERTIFICATE OF INTEREST

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National Veterans Legal Services Program ("NVLSP") and Veterans of Foreign Wars of the United States ("VFW")

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
National Veterans Legal Services Program ("NVLSP") and Veterans of Foreign Wars of the United States ("VFW")	NVLSP and VFW	None

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:

None.

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.

Dated: October 11, 2018

/s/ Stephen B. Kinnaird
Signature of Counsel

Stephen B. Kinnaird
Printed name of counsel

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INTEREST OF *AMICI CURIAE*

The National Veterans Legal Services Program ("NVLSP") is an independent, nonprofit organization that has worked since 1980 to ensure that the nation's 22 million veterans and active duty personnel receive the benefits to which they are entitled because of disabilities resulting from their military service to our country.[1] NVLSP has long been involved in litigation over the Agent Orange Act, and has brought a class action to require the Department of Veterans Affairs ("DVA" or "Department") to compensate veterans for a broader class of diseases linked to herbicide exposure. *Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404 (N.D. Cal. 1989). NVLSP currently represents a number of veterans who served in the offshore waters of the Republic of Vietnam (so-called "Blue Water Navy" veterans) who are entitled to (but have been unfairly denied) benefits under the Act.

The Veterans of Foreign Wars of the United States ("VFW") is a congressionally chartered veterans service organization established in 1899. The VFW and its Auxiliary comprise over 1.7 million members and 2,050 VA-

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* certify that no part of this brief was authored by counsel for any party to the this case, and no party in this case, counsel for a party in this case, or person other than the *amici curiae*, their members, or their counsel contributed money that was intended to fund preparing or submitting this brief. This brief is submitted pursuant to the Court's August 15, 2008 Order (No. 63) inviting the views of *amici curiae*.

accredited VFW representatives. The VFW is the nation's largest organization of war veterans and its oldest major veterans' organization. The VFW was instrumental in establishing the Veterans Administration ("VA," and later the DVA), creating the World War II GI Bill and the Post-9/11 GI Bill, and developing the national cemetery system. Of particular relevance here, many Blue Water Navy veterans fought in combat from the coastlines of the Republic of Vietnam and earned their VFW eligibility strictly through Blue Water Navy service. The VFW also joins as amicus curiae to preserve the pro-veteran canon. The pro-veteran canon must continue to be applied to ensure that the law never again leaves veterans behind, when it was never the intent of Congress or the American people to do so.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case presents a question within the Federal Circuit's exclusive jurisdiction that has extraordinary importance for Navy veterans. In the Agent Orange Act of 1991, as amended, Congress required a finding of service connection for specified diseases "manifest . . . in a veteran who, during active military, *naval,* or air service, *served in the Republic of Vietnam* during the [specified] period." 38 U.S.C. § 1116(a)(1)(A).[2] The Federal Circuit in *Haas v.*

[2] Unless otherwise noted, all emphases have been added, and all internal quotations, citations, and modifications have been omitted.

Peake, 525 F.3d 1168 (Fed. Cir. 2008) ("*Haas I*"); *Haas v. Peake*, 544 F.3d 1306 (Fed. Cir. 2008) (per curiam) ("*Haas II*") (together, "*Haas* Court"), siding with the Department of Veterans Affairs, has interpreted Section 1116 contrary to its plain language to apply not to all naval service in the Republic of Vietnam, but only to service on land or in the inland waterways. The *Haas* Court imputed to Congress an intent to deny statutory protection to the many thousands of Blue Water Navy veterans who served in the Republic's territorial seas and coastal waters, even though such veterans had the highest incidence of the covered disease non-Hodgkin's lymphoma ("NHL"), and even though the Act's sponsors declared that it would codify an existing NHL regulation that protected such veterans. Finally, in conflict with *Brown v. Gardner*, 513 U.S. 115, 118 (1994), the *Haas* Court improperly awarded deference under *Chevron, U.S.A., Inc. v. NRDC, Inc.*, 467 U.S. 837 (1984), to the Department before applying the canon that interpretive ambiguity in the statute must be resolved in the veteran's favor. This Court should overrule *Haas*.

ARGUMENT

I. THE PLAIN MEANING OF THE "REPUBLIC OF VIETNAM" REFERS TO THE SOVEREIGN NATION WHOSE BOUNDARIES INCLUDE THE TERRITORIAL SEAS.

A. The Statutory Text

Under *Chevron*, courts must, in interpreting a statute, first consider whether Congress has "directly spoken to the precise question at issue." *Chevron*, 467 U.S.

at 842. This question is analyzed using traditional tools of statutory interpretation, and if the meaning of the statute is clear, it must be applied. *Id.* at 842-43 & n.9; *Cathedral Candle Co. v. Int'l Trade Comm'n,* 400 F.3d 1352, 1362 (Fed. Cir. 2005). That is the case here.

Section 1116(a)(1)(A) of the Agent Orange Act as codified creates a presumption of exposure and service connection with respect to diseases linked to Agent Orange exposure for veterans "who, during active military, naval, or air service, served in the *Republic of Vietnam* during the period beginning on January 9, 1962, and ending on May 7, 1975." 38 U.S.C. § 1116(a)(1)(A). The term "Republic of Vietnam" in Section 1116(a)(1)(A) is plain and unambiguous: it refers to the sovereign nation colloquially known as "South Vietnam." *See Haas v. Nicholson*, 20 Vet. App. 257, 263 n.3 (2006), *rev'd*, 525 F.3d 1168; I Edwin Bickford Hooper, Dean C. Allard & Oscar P. Fitzgerald, *The United States Navy and the Vietnam Conflict* 328 (1976); *see also* Marilyn B. Young, *The Vietnam Wars 1945-1990* 52-53, 58 (1991).

And under international law, it is well-established that "[t]he territory of a state consists of (a) its land area; (b) its internal waters and their beds; (c) *its territorial sea* and the bed of the territorial sea; and (d) the subsoil under, and . . . the air space above, (a), (b), and (c)." *Restatement (Second) of Foreign Relations Law* § 11 (1965) ("*Restatement*"); *Restatement (Third) of Foreign Relations Law*

§ 511, comment b (1987) ("A state has complete sovereignty over the territorial sea, analogous to that which it possesses over its land territory, internal waters, and archipelagic waters."); *id.* at § 512, comment a ("[I]nternational law treats the territorial sea like land territory, subject only to the right of passage for foreign vessels."); *see also* United Nations Convention on the Law of the Sea, Dec. 10, 1982, Part II, Art. 2(1) (1982) ("The sovereignty of a coastal State extends, beyond its land territory and internal waters and, in the case of an archipelagic State, its archipelagic waters, to an adjacent belt of sea, described as the territorial sea."); Presidential Proclamation 5928, Territorial Sea of the United States of America, 54 Fed. Reg. 777 (Dec. 27, 1988); 1958 Convention on the Territorial Sea and the Contiguous Zone, Art. 1(1), 15 U.S.T. 1607, T.I.A.S. No. 5639 (Apr. 29, 1958) ("The 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.").

The Supreme Court has likewise recognized that the territory of sovereign nation includes the territorial seas. *See United States v. California*, 332 U.S. 19, 33-34, 38-39 (1947) ("Federal Government . . . has paramount rights in and power over" three-mile marginal belt of territorial seas); *Louisiana v. Mississippi*, 202 U.S. 1, 52 (1906) (territorial seas are "the minimum limit of the territorial jurisdiction of a nation"). In enacting the Agent Orange Act of 1991, Congress would thus have understood the Republic of Vietnam's territory to encompass its

territorial seas. Accordingly, Section 1116(a)(1)(A)'s reference to the "Republic of Vietnam" is unambiguous and includes the nation's territorials seas.

B. The Statute as a Whole

Consideration of the rest of Section 1116 and the Agent Orange Act further confirms that "Republic of Vietnam" includes the territorial waters. *See King v. St. Vincent's Hosp.*, 502 U.S. 215, 222 (1991) ("[A] statute is to be read as a whole, since the meaning of statutory language, plain or not, depends on context"). For example, a veteran seeking benefits for chloracne or porphyria cutanea tarda must show disease manifestation in a specified period "after the last date on which the veteran performed active military, naval, or air service in the Republic of Vietnam." 38 U.S.C. § 1116(a)(2)(C), (E). Interpreting "Republic of Vietnam" contrary to its plain meaning (as occurs, *e.g.*, under the current "boots-on-land" interpretation) puts the veteran to the often impossible task of proving not just when he last served in Vietnam, but when he was last on the mainland or traversing inland waters. Congress did not intend this absurdity.

Nor can that interpretation be squared with Congress's usage of the identical phrase in other parts of the 1991 Act (which is presumed to have the same meaning, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Dabit*, 547 U.S. 71, 86 (2006)). Section 6 of the 1991 Act directed the Secretary to collect DVA exam data for use in determining "the association, if any, between the disabilities of

veterans referred to in such section and exposure to dioxin or any other toxic substance referred to in such section *or* between such disabilities and active military, naval, or air service in the Republic of Vietnam during the Vietnam era." Pub. L. No. 102-4 at § 6(a), 105 Stat. at 15. Section 7 directed the Secretary to archive blood and tissue samples of veterans "who performed active military, naval, or air service in the Republic of Vietnam during the Vietnam era." *Id.* § 7(a), 105 Stat. at 16. Section 8 directed the Secretary to investigate the feasibility of further scientific study separately of the "health hazards resulting from exposure to dioxin"; "health hazards resulting from exposure to other toxic agents in herbicides used in support of United States and allied military operations in the Republic of Vietnam during the Vietnam era"; and "health hazards resulting from active military, naval, or air service in the Republic of Vietnam during the Vietnam era." *Id.* § 8(a), 105 Stat. at 17. These provisions collectively show that Congress did not link the concept of "served in the Republic of Vietnam" solely to dioxin exposure. They further underscore the error of an interpretation requiring the Secretary to make individualized inquiries into whether the veteran set foot on land or traversed inland waters in Vietnam in collecting medical exam data, archiving tissues, or designing studies.

Finally, in 1996 Congress amended the general definition of the "Vietnam era" to adopt the same language of "served in the Republic of Vietnam" for the

1961 to 1964 period. *See* 38 U.S.C. § 101(29)(A). This provision governs wartime pension benefits and eligibility for hospital, nursing, and domiciliary care. S. Rep. No. 104-371, at 19-21, *reprinted in*, 1996 U.S.C.C.A.N. 3762, 3770-71 (1996). The Senate Report expressly states that, as in Section 1116, Congress intended to cover "veterans who actually served within the borders of the Republic of Vietnam." *Id.* at 21, 1996 U.S.C.C.A.N. at 3772. Vietnam's coastal borders indisputably encompass the territorial seas.

C. The *Haas* Court Incorrectly Concluded that "Republic of Vietnam" Was Ambiguous

In previously considering the meaning of "Republic of Vietnam," this Court found the term ambiguous because there were "competing methods" identified by the CAVC that purportedly "define sovereign nations" to, for example, "includ[e] only the nation's landmass." *See Haas I*, 525 F.3d at 1184-85; *see also Haas II*, 544 F.3d at 1309-10 (concluding that "we are not persuaded that the term can have only one meaning" and citing examples from "other contexts"). However, the contrary authorities relied on in *Haas* do not support the conclusion that this term is ambiguous, nor are they relevant to the interpretation of "Republic of Vietnam" as used in Section 1116(a)(1)(A).

The only authority cited for the proposition that a sovereign nation's "boundaries can be defined solely by the mainland geographic area" by the CAVC in the *Haas* case was an online CIA factbook describing the "land boundaries" of

the *current* Communist Republic of Vietnam as 4,639 km long. *Haas v. Nicholson*, 20 Vet. App. at 263. Aside from the irrelevance of this later source for divining Congress's intent in the 1991 Act regarding the now-defunct Republic of Vietnam, the CIA factbook does ***not*** purport to describe the boundaries of a sovereign nation as simply its landmass. The term "land boundaries" is a defined term referring only to a country's *internal* land borders with "contiguous border countries." CIA World Factbook (definitions), *available at* https://www.cia.gov/library/publications/the-world-factbook/docs/notesanddefs.html) (last visited Oct. 11, 2018). The "land boundaries" of a country do not include "coastlines," which are separately reported, precisely because no one considers the coastline a "boundary" of a sovereign nation's territory.[3] The CAVC also found ambiguity in the term "Republic of Vietnam" because it might refer to a 200 mile exclusive economic zone. *Haas v. Nicholson*, 20 Vet. App. at 263-64. But Section 1116 addresses the service member's

[3] *See id.* (Vietnam), *available at* https://www.cia.gov/library/publications/the-world-factbook/geos/vm.html (last visited Oct. 11, 2018) (reporting the "land boundaries" of Vietnam as "4616 km", consisting of "Cambodia 1,158 km, China 1,297 km, Laos 2,161 km," and separately reporting its coastline of 3,444 km); *see id.* (United States) (reporting the "land boundaries" of the United States as "12,048 km," consisting of "Canada 8,893 km (including 2,477 km with Alaska), Mexico 3,155 km," and separately reporting its coastline of 19,224 km).

presence in a sovereign nation's territory, and has nothing to do with rights of natural resource exploitation.

The CAVC also noted that Vietnam claims certain "surrounding islands . . . in the Hoang Sa and Truong Sa archipelagos." *Id.* at 263-64. But sovereignty over coastal islands only affects where the baseline for the territorial sea is drawn. *Restatement (Second)* § 14. It does not cast doubt on whether the term "Republic of Vietnam" refers to the entire sovereign territory, rather than just part of it. Even if those islands were Vietnamese territory that would only mean that the Republic of Vietnam would encompass the islands and their archipelagic seas *in addition* to the territorial seas off its mainland. *See supra* at 4-5. Critically, either alternative (if deemed a plausible interpretation of Section 1116) encompasses the territorial seas, and would create service-connection for veterans who served in those seas. No plausible construction of the term makes the statute ambiguous as to whether it excludes territorial seas and is limited to the geographic mainland.

Nor do the authorities cited in the *Haas* Court's denial of rehearing support the conclusion that Section 1116(a)(1)(A)'s use of the term "Republic of Vietnam" is ambiguous. First, the *Haas* Court purported to rely on immigration cases. *Haas II*, 544 F.3d at 1309 (citing *Yang v. Mauqans*, 68 F.3d 1540, 1548 (3d Cir. 1995); *Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995). But (except for one erroneous decision) those cases do not claim that the territorial seas are excluded from the

term "United States" for purposes of immigration statutes.[4] Rather, they hold that (in context) the statutory requirement of "entry" into the United States is not satisfied by mere "physical presence" in the United States territory because "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." *See Zhang*, 55 F.3d at 754.

Second, the *Hass* Court pointed to special statutory definitions of sovereigns, such as the provision governing taxation of continental shelf activities that specially defines "United States" for that purpose to include the "subsoil of those submarine areas which are adjacent to the territorial waters of the United States." *See Haas II*, 544 F.3d at 1309 (quoting 26 U.S.C. § 638(1)). But "Republic of Vietnam" in Section 1116 is an *undefined* statutory term, and thus has its ordinary, recognized meaning. *Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). Congress often uses special definitions when it departs from ordinary meaning. For example, Congress has sometimes defined the term "State" to include Wake Island and the Canal Zone, 29 U.S.C. § 1002(10) (ERISA), but such usage creates no ambiguity as to whether the undefined term "State" in a different

[4] *Yang v. Mauqans* does so hold, but its reading of the definition of "United States" in the Immigration and Nationality Act as implicitly excluding the territorial seas is questionable. 68 F.3d at 1548-49. For example, the provision requiring vessels "arriving in the United States" to detain alien crewmen, 8 U.S.C. § 1284, would make no sense if it did not refer to the territorial seas.

statute would include those jurisdictions. So too here Congress's use of special sovereign definitions in other statutes does not warrant a judicial rewrite of the statutory term "Republic of Vietnam."

Finally, the *Haas* Court pointed to veterans' statutes that define service by reference to a country and the waters "adjacent" thereto. *Haas II*, 544 F.3d at 1309-10. But "adjacent" waters is a different concept from territorial waters, and would not be inherent in a reference to a sovereign nation. Indeed, President Johnson defined "the waters adjacent" to Vietnam as extending more than 100 miles offshore in designating the Vietnam combat zone for purposes of the Internal Revenue Code. Exec. Order 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). Section 1116 may not reach naval service in all waters adjacent to the Republic of Vietnam, but it clearly encompasses service in the waters *within* that Republic. In sum, there is not a *single* authority that defines a sovereign nation solely in terms of the perimeter of its landmass, as the *Haas* Court supposed. There is no ambiguity whatsoever as to whether "naval service" in the "Republic of Vietnam" in Section 1116 includes naval service in its territorial seas.

II. THE HISTORICAL CONTEXT AND LEGISLATIVE HISTORY CONFIRM THE PLAIN MEANING OF THE "REPUBLIC OF VIETNAM."

Historical context and legislative history must be analyzed in step one of *Chevron*. *INS v. Cardoza-Fonseca*, 480 U.S. 421, 449 (1987), and makes clear that the "Republic of Vietnam" must encompass its territorial waters. Congress intended to codify a regulation (Regulation 313) that expressly applied to naval veterans who served in the offshore waters, and was predicated on research findings that Blue Water Navy veterans had the highest risk of one of the listed diseases (Non-Hodgkin's Lymphoma).

A. The Dioxin Act

In the 1970's and 1980's, scientific evidence began to link dioxin to various diseases, including cancer. 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. 28 (1990) ("Zumwalt Report"). As Congress tackled the question of disability benefits for veterans, it confronted substantial difficulties in defining workable compensation rules. It was practically impossible to require Vietnam veterans to prove actual exposure to dioxin. Records of the location and time of troop movements and Agent Orange spraying were erratically created and

frequently destroyed or lost. *Id.* at 70. The Centers for Disease Control ("CDC"), which had been commissioned by Congress to undertake a study of the health effects of Agent Orange, concluded that it was impossible from service records to determine who had been exposed and who had not been exposed. *Haas I*, 525 F.3d at 1177. The CDC also concluded that blood and tissue testing could not determine exposure. *Id.* Furthermore, the mechanisms of dioxin exposure were not well understood. In addition to direct contact at a spray site, there were a number of plausible pathways of exposure. There was substantial risk of surface runoff contamination: namely, that dioxin, like all toxic chemicals sprayed aerially, would leech underground or be carried by Vietnam's heavy rainfall and contaminate the inland and coastal waters of Vietnam. Dioxin could then enter the food and drinking-water supply through contaminated lands and waters. *See* Zumwalt Report at 68-70.[5] Moreover, toxic chemicals aerially sprayed over land will be carried by the wind (including coastal spraying that is blown out to sea). This "wind drift" can lead to chemicals traveling great distances. *Id*. Finally, the dosage of dioxin exposure appeared to be very small; some immunologists of the

[5] A recent study found that Australian Blue Water Navy veterans were exposed to concentrated dioxin through distillation tanks that converted seawater to drinking water. Nat'l Research Ctr. for Envtl. Toxicology, Queensland Health Scientific Servs., *Examination of the Potential Exposure of Royal Australian Navy (RAN) Personnel to Polychlorinated Dibenzodioxins and Polychlorinated Dibenzofurans via Drinking Water* (Dec. 12, 2002).

time believed that exposure to even a single molecule could catalyze disease processes in some individuals. *Id.* at 67-68.

In 1984, Congress enacted the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Pub. L. No. 98-542, 98 Stat. 2725 (1984) (the "Dioxin Act"). In so doing, Congress recognized "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). Congress instructed the Department (then named the "VA") to "establish guidelines" for determining service connection based on dioxin exposure. *Id.* § 5(1), (1)(A).

Regulation 311. In response, the Department promulgated a regulation governing disability awards for chloracne. The regulation presumed service connection if the veteran served "in the Republic of Vietnam"—defined as including "service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.311a(a)(1) (1986). In explaining this rule, the Department noted that its "longstanding policy of presuming dioxin exposure in the cases of veterans who served in the Republic of Vietnam . . . is based on the many uncertainties associated with herbicide spraying during that period[.]" Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,454, 34,454-55 (Aug. 26, 1985).

Regulation 313. Several years later, the Department promulgated Regulation 313, which recognized service connection for NHL for all Vietnam veterans. 38 C.F.R. § 3.313 (1991). A CDC study had previously concluded that "Vietnam veterans have a roughly 50% increased risk of developing [NHL] 15 to 25 years after military service in Vietnam." Centers for Disease Control, *Final Report of the Association of Selected Cancers with Service in the U.S. Military in Vietnam* 3, 40 (Sept. 1990). Moreover, veterans in the Blue Water Navy had a higher risk of developing NHL than their counterparts who served in the Brown Water Navy, or on the ground in Vietnam: "[r]elative to other Vietnam veterans, the risk for NHL tended to be highest among men who (1) served in I Corps or the Blue Water Navy, (2) were stationed in Vietnam for 1.5 to 1.9 years, and (3) were officers." *Id.* at 37. Significantly, the CDC concluded that NHL was correlated with Vietnam service but not dioxin exposure, a conclusion that the Department accepted. *See* Claims Based on Service in Vietnam, 55 Fed. Reg. 43,123, 43,124 (Oct. 26, 1990); Claims Based on Exposure to Herbicides Containing Dioxin Soft Tissue Sarcomas, 56 Fed. Reg. 51,651, 51,651 (Oct. 15, 1991).

Regulation 313 largely mirrored the language of Regulation 311, proving:

> (a) *Service in Vietnam*. *Service in Vietnam* includes service in waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.
>
> (b) *Service connection based on service in Vietnam*. Service in Vietnam during the Vietnam Era together with development of non-

> Hodgkin's lymphoma manifested subsequent to such service is sufficient to establish service connection for that disease.

Proposed Soft-Tissue Sarcoma Rule. Prior to Regulation 313, the Department had presumed service connection based on Vietnam service only for chloracne, as noted above. When veterans challenged that narrow standard, the district court ruled in the veterans' favor, holding that "[t]he Administrator both imposed an impermissibly demanding test for granting service connection for various diseases *and* refused to give veterans the benefit of the doubt in meeting that demanding standard." *Nehmer v. U.S. Veterans' Admin.*, 712 F. Supp. 1404, 1423 (N.D. Cal. 1989). In response to *Nehmer*, the Department proposed to modify Regulation 311 to include soft-tissue sarcomas. 56 Fed. Reg. 51,651, 51,651-52.

B. The Agent Orange Act of 1991

Codification of Regulatory Provisions. During this time period Congress began developing a more complete approach for addressing Vietnam-related disability claims. In 1991, Congress passed the Agent Orange Act of 1991, Pub. L. No. 102-4, 105 Stat. 11, which codified the presumption of service connection for these three diseases. The Act specified that when one of the three disease classes—NHL, soft-tissue sarcomas, and chloracne—manifested "in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the Vietnam era," the disease "shall be considered to have been

incurred in or aggravated by such service." Pub. L. No. 102-4, § 2(a)(1), 105 Stat. 11 (1991) (codified, as amended, at 38 U.S.C. § 1116(a)(1)).[6]

The legislative history makes clear Congress's intention to codify the Regulation 313 presumption. The 1991 joint explanatory statement of the House and Senate Committees on Veterans' Affairs announces that the bill "would . . . codify [the] decision[] the Secretary of Veterans Affairs has announced to grant presumptions of service connection for non-Hodgkin's lymphoma . . . in veterans who served in Vietnam." 137 Cong. Rec. 2341, 2349 (Jan. 29, 1991). So did statements of the bill's floor manager and other representatives. *See id.* at 2345 (statement of Rep. Montgomery, floor manager and House Veterans' Affairs Committee chair); *id.* at 1352-53 (statement of Rep. Hammerschmidt); *id.* at 1352 (statement of Rep. Smith); *id.* at 2352 (statement of Rep. Stump). Indeed, Representative Montgomery had observed 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 (statement of Rep. Montgomery) (emphasis added). The 1990 House Committee Report similarly declared that the bill "would codify decisions of the

[6] Section 1116(a) was amended in 1996 to require that the service in the Republic of Vietnam occurred "during the period beginning on January 9, 1962 and ending on May 7, 1975." Veterans' Benefits Improvement Act of 1996, Pub. L. No. 104-275, § 505(b), 110 Stat. 3322, 3342.

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).

In codifying Regulation 313, Congress did not limit its scope or its applicability to Blue Water Navy veterans to only non-Hodgkin's lymphoma. Rather, Congress adopted a single standard ("served in the Republic of Vietnam"), thereby making clear that the presumption would apply to NHL as well as chloracne, soft-tissue 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 standard thus includes service in the Republic of Vietnam's territorial seas.

The Department's Regulatory Implementation of Section 1116. Following the enactment of the Agent Orange Act, the Department interpreted the "served in the Republic of Vietnam" requirement for coverage, amending its adjudication manual to be consistent with the purpose and phrasing of the statute:

> It may be necessary to determine if a veteran had 'service in Vietnam' in connection with claims for service connection for non-Hodgkin's lymphoma, soft-tissue sarcoma, and chloracne. *In the absence of contradictory evidence, 'service in Vietnam' will be conceded if the records shows that the veteran received the Vietnam Service Medal*."

Dep't of Veterans Affairs, Adjudication Procedures Manual M21-1 ¶ 4.08(k)(1) (November 8, 1991). Blue Water Navy veterans were eligible for and received the

Vietnam Service Medal. *See* Dep't of Def. Manual of Military Decoration & Awards, ¶ C6.6 (Sept. 1996). The Department drew no distinctions in applying the "served in the Republic of Vietnam" test for Regulations 311 and 313.

In 1993, the Department promulgated a general implementing regulation for the Agent Orange Act. In that regulation, the Department defined service in the Republic of Vietnam using language that mirrored Regulations 311 and 313, but with minor punctuation differences: "'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) (1994). This standard was applicable to all the diseases covered by Section 1116, including NHL. 38 C.F.R. § 3.309(e). Indeed, it was not until Congress expanded the number of diseases for which a presumption attaches (including common diseases like type 2 diabetes), *see* 38 U.S.C. § 1116(a)(2), that the Department began to advance a narrow interpretation of the Republic of Vietnam later adopted in *Haas I*.[7]

[7] *See* Dep't of Veterans Affairs, Op. Gen. Counsel Prec. 27-97 (1997) (dicta suggesting that the term did not extend to service on ships off the Vietnam coast); Presumptions of Service Connection for Certain Disabilities and Related Matters, 69 Fed. Reg. 44,614, 44,620 (July 27, 2004) (proposed rule requiring inland service); Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566 (Apr. 16, 2008) (same).

The *Haas* Court rejected the codification of the Regulation 313 definition, opining that the 1991 Congress may have (1) understood Regulations 311 and 313 to have different service requirements; (2) understood Regulation 311 to embody a "boots-on-land" requirement, and (3) intended to adopt the "narrower" 311 standard. The *Haas* Court thus imputed to Congress the intent to deny a statutory presumption of service connection to Blue Water Navy veterans with NHL, even though they were covered under the Secretary's regulation, and even though they were the group that the CDC specifically found had the excess risk of developing NHL. *Haas I*, 525 F.3d at 1177-80, 1185-86.

This reasoning does not withstand scrutiny. As noted above, the definitions of service in Vietnam in Regulations 311 and 313 are practically identical, and should have the same meaning. Even if there were any daylight between the two, the legislative history and context makes clear that Congress intended to adopt the latter.

The *Haas* Court reached the opposite conclusion based on different punctuation in Regulations 311 and 313. It reasoned that the absence in 311 of "a comma separating the reference to 'service in the waters offshore' and 'service in other locations,' . . . suggested that the requirement of visitation or duty in the Republic of Vietnam applied to both of those forms of extraterritorial service." *Haas I*, 525 F.3d at 1178. But statutory analysis "based only on punctuation is

necessarily incomplete and runs the risk of distorting a statute's true meaning." *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of Am., Inc.*, 508 U.S. 439, 454 (1993). The Department placed no such weight on punctuation in the 1993 regulation implementing the 1991 Act: it omitted all commas in defining "service in the Republic of Vietnam" to mean "[s]ervice 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). If punctuation is to have sway, under the rule of the last antecedent, the phrase "if the conditions of service involved duty or visitation in the Republic of Vietnam" in the 1993 regulation modifies only "service in other locations," and not the phrase "service in the waters offshore." *Anhydrides & Chems., Inc. v. United States*, 130 F.3d 1481, 1483 (Fed. Cir. 1997).

In all events, punctuation cannot trump the direct legislative history, and Congress did not intend to exclude from the NHL statutory presumption the very group (Blue Water Navy veterans) who were found to have excess NHL risk. The *Haas* Court attempted to justify its conclusion by positing that Congress determined that NHL in fact was correlated to dioxin exposure. *Haas I*, 525 F.3d at 1179 & n.1. The court relied on a May, 1990 report from Admiral Zumwalt to the Secretary evaluating epidemiological evidence. *Id.* But the *Haas* Court overlooked that the Secretary, in issuing Regulation 313 as a final rule in October,

1990, accepted the CDC's conclusion that NHL was correlated with Vietnam service but not dioxin exposure. Claims Based on Service in Vietnam, 55 Fed. Reg. 43,123, 43,124 (Oct. 26, 1990); Claims Based on Exposure to Herbicides Containing Dioxin (Soft Tissue Sarcomas), 56 Fed. Reg. 51,651, 51,651 (Oct. 15, 1991) (noting that "the bases for granting service connection are fundamentally different" for NHL and STS because NHL is linked to Vietnam service and STS to dioxin exposure). There is no evidence that Congress disagreed with that conclusion or overruled the Secretary's decision. Rather, Congress codified the Department's regulations as to all three diseases, including NHL.

III. APPLICATION OF THE PRO-VETERAN CANON CONFIRMS THAT "REPUBLIC OF VIETNAM" IS NOT AMBIGUOUS

Traditional canons of statutory interpretation further confirm that the "Republic of Vietnam" in Section 1116(a)(1)(A) is not ambiguous so as to require step two of the *Chevron* analysis. The Supreme Court has instructed that, *before* applying *Chevron* deference, any interpretive ambiguity in the statute must be resolved in the veteran's favor. *Brown v. Gardner*, 513 U.S. 115, 118 (1994) (noting "the rule that interpretive doubt is to be resolved in the veteran's favor . . ."); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-21 n.9 (1991) ("[P]rovisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor."); *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, 260 F.3d 1365, 1378 (Fed. Cir. 2001) ("[I]t is a well-established rule of statutory

construction that when a statute is ambiguous, 'interpretive doubt is to be resolved in the veteran's favor.'"); *see also Kirkendall v. Dep't of Army*, 479 F.3d 830, 843 (Fed. Cir. 2007) (en banc) ("Even if this were a close case, which it is not, the canon that veterans' benefits statutes should be construed in the veteran's favor would compel us to find that section 3330a is subject to equitable tolling.").

Congress is presumed to incorporate that rule, *King*, 502 U.S. at 220-21 n.9, so as to benefit "those who left private life to serve their country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946); *see also Quaker State Oil Refining Corp. v. United States*, 994 F.2d 824, 832 (Fed. Cir. 1993) ("Congress is presumed to have known the basic rules of statutory construction when enacting legislation.") (*citing McNary v. Haitian Refugee Ctr., Inc.*, 498 U.S. 479, 495-97 (1991)). As a result, where there is a reasonable interpretation of a statute designed to benefit veterans, the issue should be resolved in favor of the veteran, consistent with Congress's presumed intent, before deferring to a contrary agency interpretation. *Chevron*, 467 U.S. 843 n. 9 ("If a court, employing traditional tools of statutory construction, ascertains that Congress had an intention on the precise question at issue, that intention is the law and must be given effect."). Thus, to the extent there is any uncertainty with respect to the meaning of "Republic of Vietnam," the pro-veterans canon compels that the term be interpreted to include the territorial waters.

Moreover, the DVA's current interpretation of the statute requiring "boots-on-land" cannot be squared with the pro-veterans canon. The Court in *Haas II* suggested that the DVA's interpretation is in fact "pro-claimant" under *Brown* because it applies "to any veteran who set foot on land, even if for only a very short period of time." *See Haas II*, 544 F.3d at 1308-09. That conclusion is unsound. The "boots-on-land" construction is the most restrictive that the statute conceivably permits, and does not resolve ambiguity in favor of claimants. That is especially problematic here because although the statute specifically contemplates providing benefits to "naval [and] air service" veterans, the DVA's interpretation effectively excludes a large number of such veterans.

Application of the pro-veteran canon accords with congressional intent: Congress did not intend *any* lines to be drawn among Vietnam veterans because in 1991 there was not (and there is not today) either the scientific evidence to rule out certain classes of veterans as unexposed or the records of troop movements to allow for rational administration of such a rule. There is no reason why Congress would want a soldier to recover if he set foot on land in Vietnam for one day in 1975 (years after Agent Orange spraying had ended), but not naval veterans who were directly engulfed in drifting Agent Orange clouds.[8]

[8] The *Haas* Court defended the Department's line-drawing by surmising that Congress would not have intended Section 1116 to cover long-distance pilots whose missions consisted strictly of overflight in the airspace of Vietnam. *Haas II*,

From the earliest days of American involvement in the Vietnam conflict, the U.S. Navy focused much of its effort on coastal sea patrol to prevent communist infiltration. The Republic of Vietnam had a very long coastline, extending approximately 1,200 miles. II Edward J. Marolda & Oscar P. Fitzgerald, *The U.S. Navy and the Vietnam Conflict* 155 (1986). This long coastline, with its many inlets, shallow shores, natural harbors and large number of islands, created a logistical nightmare for patrolling and counterinsurgency efforts during the 1960s. *Id*. at 154-57, 189. By the end of 1961, the U.S. Navy was conducting significant coastal patrols along and below the 17th parallel while air patrol monitored the waters east of this coastal sea patrol. *Id.* at 164-76. The U.S. Navy increased its steaming miles per month from 10,000 in May 1961 to 37,000 in May 1962 and extended sea patrol to the Mekong Delta and the Cambodian border in an effort to counter the Communist infiltration threat from Cambodia. *Id*. at 172-76. After war was declared in 1964, the Blue Water Navy continued to provide extensive coastal patrols as well as full-scale combat and combat-support operations

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544 F.3d at 1309. But there is no reason why Congress would deny benefits to those pilots but grant them to other pilots who made single refueling stop on land, or why Congress would put claimants to that proof. In any event, interpreting Section 1116 on the basis of the assuredly small number of long-distance pilots whose service in Vietnam only involved overflights is the tail wagging the dog. Even if *arguendo* the Department has some basis for excluding overflight pilots from Section 1116, there is no warrant for excluding Blue Water Navy veterans, given the statutory codification of an NHL regulation designed primarily to give relief to that class.

throughout the war. *Id*. at 314-16, 325-26, 355-56, 452, 513, 527. U.S. Naval forces providing close gunfire support to army and marines on the beach, performing supply functions, or interdicting enemy boats would commonly come within a few thousand yards of shore. *Id*. at 288-89, 311, 315, 355-56, 463, 513, 527.

Congress clearly understood that Blue Water Navy veterans would have been exposed to Agent Orange. Forested coastal lands were heavily contested areas between the U.S. and the southern guerilla insurgencies, and were accordingly subject to constant spray missions. Young at 185; Jeanne Mager Stellman et al., *A Geographic Information System for Characterizing Exposure to Agent Orange and Other Herbicides in Vietnam*, 111 Env't Health Perspectives 321, 325-26 (Figure 5) (2003). Density maps show that the U.S. concentrated the spraying of Agent Orange on the far eastern coastal areas and the western mountain range border with Laos. Further south, the III and IV Corps tactical zones were heavily sprayed, especially around the coastal inlet areas and entrances to the Mekong River. *Id*.

Indeed, contrary to the DVA's unscientific claim that only inland service had a significant exposure risk, Admiral Zumwalt, the former Chief of Naval Operations in Vietnam whose report the panel otherwise credited, recommended that at a minimum, service connection should be presumed for any veteran within

20 kilometers of a spray area (which would include veterans serving in the territorial waters off the heavily sprayed coasts). Zumwalt Report at 70. But Admiral Zumwalt also recommended an alternative of presuming service connection for all Vietnam veterans (as the Secretary had done for NHL), because while overinclusive "it is the only alternative that will not unfairly preclude receipt of benefits by a [dioxin] exposed Vietnam veteran." *Id.* at 71. That is the approach Congress chose. The DVA's interpretation of Rule 307 and Section 1116(a)(1)(A) should thus be rejected.

The *Haas* Court speculated 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 a veteran set foot on land. *Haas II*, 544 F.3d at 1309. This is not so. All deck logs of commissioned ships operating more than thirty years ago are retained by and available from the Modern Military Branch, National Archives. These deck logs track the ship's latitude and longitude three times daily, and the ship's course and direction, among other things. *See* Navy History & Heritage Command, What is a Deck Log?, https://www.history.navy.mil/research/archives/deck-logs/what-is-a-deck-log.html (last visited Oct. 11, 2018).

In sum, this case should be resolved in step one of *Chevron*. The term "Republic of Vietnam" clearly encompasses the territorial seas in which the Blue

Water Navy veterans served. Congress intended to codify the broad definition of Regulation 313 that encompassed service in the offshore waters, and cannot be deemed to have excluded the group of veterans that had the highest incidence of one of the three originally designated diseases. Were that not enough, the Secretary (like this Court) is obliged to apply the pro-veteran canon to adopt this broader definition before exercising any delegated discretion to resolve statutory ambiguity.

CONCLUSION

The Court should reverse the judgment of the Veterans Court.

Respectfully Submitted,

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