17-1821

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 OF AMICI CURIAE BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, ASSOCIATION OF THE UNITED STATES NAVY, AND FLEET RESERVE ASSOCIATION IN FAVOR OF REVERSAL IN SUPPORT OF CLAIMANT-APPELLANT

DLA PIPER LLP (US)

Stanley J. Panikowski
Erin P. Gibson
401 B Street, Suite 1700
San Diego, California 92101
Tel: (619) 699-2700

Attorneys for Amici Curiae
Blue Water Navy Vietnam Veterans Association
Association of the United States Navy
Fleet Reserve Association

October 11, 2018

FORM 9. Certificate of Interest **Form 9**
Rev. 10/17

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Alfred Procopio, Jr. v. Robert Wilkie

Case No. 17-1821

CERTIFICATE OF INTEREST

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

Blue Water Navy Vietnam Veterans Association, Association of the United States Navy, Fleet Reserve Association

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
Blue Water Navy Vietnam Veterans Association	None	None
Association of the United States Navy	None	None
Fleet Reserve Association	None	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

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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

October 11, 2018
Date

/s/ Stanley J. Panikowski
Signature of counsel

Please Note: All questions must be answered

Stanley J. Panikowski
Printed name of counsel

cc: Counsel of Record

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I. STATEMENT OF INTEREST OF AMICI CURIAE

Amici curiae are three veterans advocacy organizations who care deeply about fully restoring to Blue Water Navy Vietnam veterans benefits they earned by serving our nation in the Republic of Vietnam. Congress decided to give Blue Water Navy Vietnam veterans a presumption of service connection for certain health conditions regardless of whether they set foot on land or traveled the inland waterways of Vietnam. But the United States Department of Veterans Affairs (VA) has thwarted the will of Congress by arbitrarily withholding this statutory presumption from this class of Vietnam veterans. This case presents an opportunity to finally right this wrong.

The Blue Water Navy Vietnam Veterans Association (BWNVVA) is a non-profit membership organization supporting veterans of all wars and providing the general public with educational materials on veterans. Among other services, the BWNVVA maintains one of the largest repositories of documentation relating to the use of herbicides in Southeast Asia. The BWNVVA also provides avenues for veterans and their families to communicate with and support each other. The BWNVVA has long advocated that *all* Vietnam veterans—including Blue Water Navy—be equally afforded the benefits that Congress has prescribed.

The Association of the United States Navy (AUSN) is the leading voice for America's Sailors, with 35,000 members and supporters. The AUSN's

membership includes active and retired, veterans, former Sailors, and all Navy families. A non-profit organization, the AUSN is the premier advocate for a strong Navy. The Blue Water Navy issue affects many of AUSN's veterans, who make up a large percentage of its membership. The issue is arguably AUSN's highest advocacy priority today, as it affects tens of thousands of Navy veterans who suffer from the effects of Agent Orange exposure during the Vietnam War. A very important part of AUSN's mission is being the voice for Sailors to decision-makers in the United States Government. This brief allows AUSN an opportunity to fulfill that mission.

The Fleet Reserve Association (FRA) is a non-profit membership organization that represents a community of the Sea Services: U.S. Navy, Marines, and Coast Guard personnel. The FRA's mission is to protect and enhance military pay and benefits for active duty, veteran, retiree, and reserve members of the Sea Services. The FRA works tirelessly to preserve and enhance pay, benefits, and quality-of-life programs for all of its members and their families and communities.

Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* certify that no party's counsel authored this brief in whole or in part, that no party or party's counsel contributed money that was intended to fund preparing or submitting the brief, and that no person other than the *amici curiae*, its members or its counsel contributed money that was intended to fund preparing or submitting

the brief. This Court's August 16, 2018 order granting rehearing *en banc* is the source of the authority to file this amicus brief.

II. INTRODUCTION

All plausible analytical paths lead to the same conclusion: the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 unambiguously includes 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. This amicus brief focuses on one of these analytical paths: the well-settled presumption that Congress legislates against the backdrop of relevant international law and, above all, Supreme Court precedent applying the relevant international law.

Principles of international law establish that a state's sovereignty extends to its territorial sea. This rule is firmly rooted in both customary international law and treaties. When one refers to a sovereign state, therefore, one is in the same breath referring to any adjacent territorial sea. The territorial sea is no less a part of the state than its landmass, inland waters, or territorial airspace. While sovereign rights in the territorial sea are limited by the international law principle of the right of innocent passage, this limitation is no different in character than international law principles that may limit a state's exercise of its sovereignty in the other parts of its territory. The territory is still part of the state.

As shown below, the Supreme Court of the United States agrees. Congress is presumed to legislate against the backdrop of this international law and the Supreme Court precedent embracing it. This equation leads to only one reasonable conclusion: when Congress said "service in the Republic of Vietnam," Congress unambiguously included service in the territorial sea of the Republic of Vietnam. Any other interpretation usurps the will of the legislative branch. *Amici curiae* therefore respectfully submit that *Haas v. Peake* should be overruled and the VA's decision in this case should be reversed.

III. ARGUMENT

A. Principles Of International Law Confirm That The Definition Of A Sovereign Nation Includes Its Territorial Sea

A nation is sovereign in the belt of water immediately adjacent to its coast, known as the territorial sea. *See* Convention on the Territorial Sea and the Contiguous Zone, art. 1(1), Apr. 29, 1958, 15 U.S.T. 1606, T.I.A.S. No. 5639 [hereinafter 1958 Convention]; Restatement (Third) of Foreign Relations Law of the United States § 511(a) (Am. Law. Inst. 1987). "By contrast, a nation is not sovereign over the high seas, which are the remainder of the ocean beyond the territorial sea." Legal Issues Raised by Proposed Presidential Proclamation to Extend the Territorial Sea, 12 O.L.C. 238, 240 n.5 (1988) [hereinafter Office of Legal Counsel Opinion]; Convention on the High Seas, art. 2, Apr. 29, 1958, 13 U.S.T. 2313, 2314.

"While originally subject to doubt by some, *the modern view is that the territorial sea is part of a nation and that a nation asserts full sovereignty rights over its territorial sea*." Office of Legal Counsel Opinion at 247 (emphasis added). The principle became the "supreme law of the land" when the United States ratified the 1958 Convention. *See United States v. Schooner Peggy*, 5 U.S. 103, 109 (1801) ("The constitution of the United States declares a treaty to be the supreme law of the land."). In the 1958 Convention, the United States and other signatories agreed 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); *accord* United Nations Convention on the Law of the Sea, art. 2, *opened for signature* Dec. 10, 1982, 1833 U.N.T.S. 397, *entered into force* Nov. 16, 1994 ("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."); *see also* 2 United Nations Convention on the Law of the Sea 1982: A Commentary 52 (Myron H. Nordquist *et al.* eds., 2002) (Under UNCLOS Section 1, Article 2, "the legal status of the territorial sea, the air space over it, and its bed and subsoil" are "expressed in terms of the extension of the sovereignty of the coastal State beyond its land territory seaward. … [T]his sovereignty is exercised subject both to the terms of [UNCLOS] and to other rules of international law.").

More than two years before Congress enacted the Agent Orange Act of 1991, the Office of Legal Counsel stated "[t]he notion that a nation is less than fully sovereign over its territorial sea is now considered archaic." Office of Legal Counsel Opinion at 240, n.3; *see* Restatement (Third) of Foreign Relations Law § 511, cmt. b ("A state has complete sovereignty over the territorial sea, analogous to that which it possesses over its land territory, internal waters, and archipelagic waters.").

The only qualification on a nation's sovereignty within its territorial sea—that all ships enjoy a right of innocent passage—does not mean that those ships are outside the territory of the nation. 1958 Convention, art. 14(1); Restatement (Third) of Foreign Relations Law § 513(1)(a). Indeed, the 1958 Convention makes clear that "[f]oreign ships exercising the right of innocent passage shall comply with the laws and regulations enacted by the coastal State…." 1958 Convention, art. 17. The coastal state can further "take the necessary steps in its territorial sea to prevent passage which is not innocent." *Id.*, art. 16(1). The coastal state is also permitted to exercise criminal jurisdiction on board a foreign ship passing through the territorial sea if (1) "the consequences of the crime extend to the coastal State," (2) "the crime is of a kind to disturb the peace of the country or the good order of the territorial sea," (3) "the assistance of the local authorities has been requested by the captain of the ship or by the consul of the country whose flag the ship flies," or

(4) "it is necessary for the suppression of illicit traffic in narcotic drugs." *Id.*, art. 19(1). Put another way, "[t]he rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." *See* Restatement (Third) of Foreign Relations Law § 512, cmt. a (internal citations omitted). Notably, the 1958 Convention expressly applies to warships, such as the ship on which Mr. Procopio served during the Vietnam War: "If any warship does not comply with the regulations of the coastal State concerning passage through the territorial sea and disregards any request for compliance which is made to it, the coastal State may require the warship to leave the territorial sea." 1958 Convention, art. 23.

Consistent with customary law and the above-identified treaties, the Republic of Vietnam claimed sovereignty over territorial seas since its founding. Article 4 of the July 20, 1954 Agreement on the Cessation of Hostilities in Vietnam [hereinafter 1954 Geneva Accords] provides: "The provisional military demarcation line between the two final regrouping zones is extended into the territorial waters by a line perpendicular to the general line of the coast. All coastal islands north of this boundary shall be evacuated by the armed forces of the French union, and all islands south of it shall be evacuated by the forces of the People's Army of Viet-Nam." Geneva Accords, art. 4, July 20, 1954, 935 U.N.T.S. 149, https://www.mtholyoke.edu/acad/intrel/genevacc.htm (last visited October 8, 2018). Article 24 of the 1954 Geneva Accords confirms the

sovereignty of the territorial seas: "The armed forces of each party shall respect the demilitarized zone and the territory under the military control of the other party, and shall commit no act and undertake no operation against the other party and shall not engage in blockade of any kind in Viet-Nam." *Id.*, art. 24. The United States formally recognized the sovereignty of the territorial seas of the Republic of Vietnam in 1973, with the ratification of the Agreement On Ending The War And Restoring Peace In Viet-Nam: "The United States and all other countries respect the independence, sovereignty, unity, and territorial integrity of Viet-Nam as recognized by the 1954 Geneva Agreements on Viet-Nam." Art. 1, Jan. 27, 1973, 24 U.S.T. 1, T.I.A.S. No. 7542. The Court therefore should reject the VA's attempt to redefine the territory and scope of sovereignty of the Republic of Vietnam.

B. Congress Is Presumed To Legislate Against The Backdrop Of Relevant Supreme Court Precedent And Principles Of International Law

For Mr. Procopio and other Vietnam veterans with eligible diseases, the VA must presume those veterans' disabilities are service-connected if they "served in the Republic of Vietnam" during the specified time period. 38 U.S.C. § 1116(a)(1). The VA urges the Court to narrowly interpret "Republic of Vietnam" to exclude its territorial waters—thereby excluding from the service-connected presumption disabled Blue Water Navy veterans who served in Vietnam

waters but did not set foot on Vietnam soil. Bedrock principles of statutory construction do not support the VA's narrowing of Congress's pro-veteran statute. *See Hodge v. West*, 155 F.3d 1356, 1362 (Fed. Cir. 1998) (recognizing the "strongly and uniquely pro-claimant" character of veterans benefits statutes).

Congress deliberately chose "Republic of Vietnam" to define the boundaries of Section 1116's service-connected presumption. 38 U.S.C. § 1116(a)(1). "Republic of Vietnam" is a term of art and the official name of a sovereign nation. Applying "a cardinal rule of statutory construction," the Court must presume that Congress understood and adopted the commonly accepted meaning of "Republic of Vietnam" in legislating the boundaries of the service-connected presumption at issue. *F.A.A. v. Cooper*, 566 U.S. 284, 292 (2012) ("[I]t is a cardinal rule of statutory construction that, when 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) (citations omitted)).

Congress also is presumed to legislate with respect for customary international legal principles, such as to "avoid unreasonable interference with the sovereign authority of other nations" for the sake of comity. *See F. Hoffman-La Roche Ltd. v. Empagram S.A.*, 542 U.S. 155, 164 (2004) ("This rule of construction reflects principles of customary international law—law that (we must assume)

Congress ordinarily seeks to follow."). Thus, the Court should presume that Congress, in legislating, afforded "Republic of Vietnam" its full meaning as a term of art, which includes its sovereign territories as recognized by international law.

Under Supreme Court precedent, the fact that Section 1116 does not expressly define "Republic of Vietnam" to *include* its territorial waters does not introduce ambiguity or support that Congress intended to redefine "Republic of Vietnam" to *exclude* its territorial waters from the statute. In *Haas v. Peake*, the Court incorrectly found "Republic of Vietnam" ambiguous based upon several unrelated statutes defining "United States," "Mexico" and "Vietnam" to specifically include their "waters adjacent" or "territorial sea." 544 F.3d 1306, 1309-10 (Fed. Cir. 2008) ("In the absence of any such reference in section 1116 to the territorial waters around Vietnam or the airspace above it, we continue to regard that statute as ambiguous on this point."). This is inconsistent with the Supreme Court's holding in *Molzof v. United States* regarding statutory interpretation of a term of art in the absence of a contrary definition: "Where Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice . . . [the] absence of contrary direction may be taken as satisfaction with widely accepted definitions, not as a departure from them." 502 U.S. 301, 307 (1992) (quoting *Morisette v. United States*, 342 U.S. 246, 263 (1952)); *see also North Star Steel Co. v. Thomas*, 515 U.S. 29, 34 (1995)

(quoting *Cannon v. Univ. of Chicago*, 441 U.S. 677, 699 (1979) ("[I]t is not only appropriate but also realistic to presume that Congress was thoroughly familiar with [the Supreme Court's] precedents . . . and that it expect[s] its enactment[s] to be interpreted in conformity with them.")).

Here, no words of Section 1116 direct the Court away from interpreting "Republic of Vietnam" as a term of art, namely as the sovereign nation including its sovereign territories as recognized by international law. Applying *Molzof*, the "absence of contrary direction" in Section 1116 indicates that Congress was satisfied with the widely accepted definition of "Republic of Vietnam." *Molzof*, 502 U.S. at 307. The Court should afford "Republic of Vietnam" its full meaning here as the sovereign nation including its sovereign territories.

C. The Supreme Court Repeatedly Has Held That The Definition Of A Sovereign Nation Includes Its Territorial Sea

For more than 200 years, the Supreme Court has affirmed repeatedly that a coastal nation's boundary encompasses its territorial sea for international law purposes. *See Church v. Hubbart*, 6 U.S. 187, 234 (1804) (A nation exercises "absolute and exclusive" authority within its own territory, which includes the sea "within the range of its cannon."), *superseded on other grounds by Animal Science Prods., Inc. v. Hebei Welcome Pharm. Co. Ltd.*, 138 S. Ct. 1865, 1873 (2018); *see also The Ann*, 1 F. Cas. 926, 926-27 (C.C.D. Mass. 1812) (Story, J.) ("All the

writers upon public law agree that every nation has exclusive jurisdiction . . . over the waters adjacent to its shores, and this doctrine has been recognized by the supreme court of the United States. Indeed such waters are considered as a part of the territory of the sovereign.") (citations omitted). In 1891, the Supreme Court confirmed that "[w]e think it must be regarded as established that, as between nations, the minimum limit of the territorial jurisdiction of a nation over tidewaters is a marine league from its coast . . . ." *Manchester v. Massachusetts*, 139 U.S. 240, 258 (1891). The fact that open sea within a nation's territorial boundary is "subject to the common right of navigation" did not disturb the Supreme Court's finding. *Id*. In *Louisiana v. Mississippi*, the Supreme Court again confirmed that a nation includes its territorial seas and found that logic applied equally to the boundaries of riparian states. 202 U.S. 1, 52 (1906) ("[T]he maritime belt is that part of the sea which, in contradistinction to the open sea, is under the sway of the riparian states . . . .").

In *United States v. California*, the Supreme Court traced the history of United States' claim to its territorial sea back to statesmen including then-Secretary of State Thomas Jefferson in 1793. 332 U.S. 19 n.16 (1947). The Supreme Court found that "[l]argely as a result of their efforts, the idea of a definite three-mile belt in which an adjacent nation can, if it chooses, exercise broad, if not complete dominion, has apparently at last been generally accepted throughout the world . . .

." *Id.* at 33. More recently, in *Argentine Republic v. Amerada Hess Shipping Corp.*, the Supreme Court cited Presidential Proclamation No. 5928, 3 C.F.R. 547 (1988), that the United States would recognize a territorial sea of 12 nautical miles. 488 U.S. 428, 441 n.8 (1989). Thus, over time, the Supreme Court has not wavered in affirming that coastal nations' boundaries encompass their territorial sea. The Supreme Court's logic applies equally to the coastal Republic of Vietnam, whose territorial sea falls within its sovereign boundary under the same principles of international law. *See United States v. California*, 332 U.S. at 33 (law including territorial sea within sovereign nation's dominion is "generally accepted throughout the world").

D. "Service In The Republic Of Vietnam" Therefore Unambiguously Includes Service In The Republic Of Vietnam's Territorial Sea

Congress is presumed to legislate against the backdrop of the international law principles and the Supreme Court precedents discussed above. Application of this presumption yields only one reasonable conclusion: "service in the Republic of Vietnam" includes service in its territorial sea. Blue Water Navy Vietnam veterans are therefore entitled to the same statutory presumption of service connection as all other Vietnam veterans.

IV. CONCLUSION

Amici curiae therefore respectfully ask this Court to answer the *en banc* question presented in favor of the claimant and order reversal of the VA's decision.

Dated: October 11, 2018

DLA PIPER LLP (US)

By: */s/ Stanley J. Panikowski*

Stanley J. Panikowski
Erin P. Gibson
401 B Street, Suite 1700
San Diego, CA 92101-4297
Tel: 619.699.2700
Fax: 619.699.2701

Attorneys for Amici Curiae

Blue Water Navy Vietnam Veterans Association

Association of the United States Navy

Fleet Reserve Association

CERTIFICATE OF SERVICE

I hereby certify that on October 11, 2018, I electronically filed the foregoing EN BANC BRIEF OF AMICI CURIAE BLUE WATER NAVY VIETNAM VETERANS ASSOCIATION, ASSOCIATION OF THE UNITED STATES NAVY, AND FLEET RESERVE ASSOCIATION IN FAVOR OF REVERSAL IN SUPPORT OF CLAIMANT-APPELLANT with the Court's CM/ECF filing system, which constitutes service, pursuant to Fed. R. App. P. 25(c), Fed. Cir. R. 25(a), and the Court's Administrative Order Regarding Electronic Case Filing 6(A) (May 17, 2012).

Also, in accordance with the Court's August 16, 2018 *en banc* order, two paper copies of this brief will be served on counsel for Respondent-Appellee.

/s/ Stanley J. Panikowski

Stanley J. Panikowski
DLA Piper LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101
619.699.2700

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Circuit Rule 32(a). The brief contains 3,154 words, excluding the portions of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6).

This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14 point Times New Roman.

By: */s/ Stanley J. Panikowski*

Stanley J. Panikowski
DLA Piper LLP (US)
401 B Street, Suite 1700
San Diego, CA 92101
Tel. (619) 699-2700