No. 2017-1821

In the

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

BRIEF OF AMICUS CURIAE JOSEPH A. TAINA

Re

ALFRED PROCOPIO, JR.,
Claimant-Appellant,

versus

ROBERT WILKIE,

Acting Secretary of Veterans Affairs,
Respondent-Appellee.

ON APPEAL FROM THE
UNITED STATES COURT OF APPEALS FOR VETERANS CLAIMS
IN VET. APP. NO. 15-4082, JUDGE CORAL W. PIETSCH.

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

PROCOPIO V. DVA, 2017-1821

Certificate of Interest

Counsel for the Amicus certifies the following:

1. The full name of every party or *amicus* represented by me is:

   Joseph A. Taina.

2. The name of the real party in interest is:

   Same.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or *amicus curiae* represented by me are:

   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 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:

Taina v. Wilkie, Fed Cir Case No. 17-1829

October 10, 2018
Date

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Table of Contents

Page

Page

Table of Authorities

Page

Decisions

Statutes

Regulations

Other

STATEMENT OF INTEREST

Joseph A. Taina is party to an appeal pending before this Court in case No. 2017-1829, which has been stayed by the Court pending the outcome of the en banc Court's decision in this matter. Mr. Taina respectfully submits his brief as amicus curiae in support of claimant-appellant Alfred Procopio, Jr., and reversal.[1]

[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), amicus states that no counsel for a party in this matter authored this brief in whole or in part. No party in this matter contributed money intended to fund preparing or submitting this brief. No person other than amicus curiae or his counsel contributed such money. The Court has approved the filing of this brief without the consent of all parties.

SUMMARY OF ARGUMENT

The *en banc* Court has determined that it will consider the issue of whether the phrase "served in the Republic of Vietnam" as used by Congress 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. *See sua sponte* Order for Hearing *En Banc* (dated August 16, 2018). By virtue of the Court's Order, the en banc panel will consider the role, if any, the unique proclaimant/veteran-friendly canon of statutory construction will play in this analysis. *Amicus* Mr. Taina urges this Court to recognize that the uniquely special canon of construction of veterans's statutes and regulations is the exclusive canon of construction to be applied when interpreting a statute or regulation affecting a veteran or a claimant for benefits under both Title 38 of the United States Code and of the Code of Federal Regulations.

In Mr. Taina's view, this Court should recognize the unique canon of construction of veterans's statutes and regulations is the exclusive canon of construction to be applied **whenever** the courts consider the meaning and intent of a Title 38 statute or a Title 38 regulation. In this light, whether a statute or regulation is unambiguous or ambiguous is of no moment. The judicial responsibility of courts interpreting such statutes and regulations is to interpret them in the light most

favorable to the veteran or claimant. In so doing, the question of whether the language is ambiguous or not is irrelevant because the interpretation of the statute or regulation is dictated by the unique canon that resolution of any doubt regarding meaning is to be resolved in favor of the veteran or his or her family.

Recognition of the exclusivity of the uniquely special canon of construction of veterans's statutes and regulations is consistent with the intent of Congress to treat veterans and their families differently. Inherent to the mission of the Department of Veterans Affairs ("VA") is that it is not an ordinary federal agency. The undebatable intent of Congress was to create a non-adversarial, paternalistic, and uniquely proclaimant statutory scheme for the adjudication of veterans's claims and appeals, which the mission of the VA is to implement. As such, the interpretation of statutes and regulations affecting benefits afforded to veterans's and their families in a manner that consistently **favors** them is essential to ensuring the non-adversarial, paternalistic, and uniquely proclaimant statutory scheme that Congress intended.

In a process for providing benefits in such a unique fashion, to uncritically give deference to the Secretary's interpretations of both statutes and regulations is antithetical to ensuring a non-adversarial, paternalistic, and uniquely proclaimant statutory scheme. Deference to the VA's interpretations shifts the burden to veterans and their families to show such interpretations as being unreasonable or inconsistent with the intent of Congress. However, the statutory scheme created by Congress was

not intended to impose such burdens on veterans and their families. To the contrary, the statutory scheme created by Congress was intended to require that, regarding any issue material to the determination of a matter, the benefit of the doubt always would enure to the claimant. Interpretations of statutes and regulations affecting benefits afforded to veterans's and their families is an issue that will always be material to the determination of a veterans benefits matter. Thus, the uniquely special canon of construction of veterans's statutes and regulations is the only canon that should be applied for such purpose.

In the case at hand, upon using the unique canon of construction that applies in veterans' cases, the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 must be interpreted to mean **all** veterans who served in any active military, naval, or air service in the Vietnam war. This interpretation is required because it interprets the meaning of the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 to be inclusive and not exclusive. Such an interpretation interprets the meaning of the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 in the light most favorable to all of the veterans who served in the Vietnam war and not in a way which interprets the phrase to exclude some veterans who served in that war.

ARGUMENT

I. The unique canon of construction available to veterans benefits claimants is the only canon of construction which should be employed by courts to interpret veterans's statutes and regulations.

A. The judicial history of the uniquely special canon of construction.

The Supreme Court announced the uniquely special veterans benefits canon of construction in 1943 in its decision in *Boone v. Lightner*, 319 U.S. 561, 575 (1943). In *Boone*, the Supreme Court held that: "The Soldiers' and Sailors' Civil Relief Act **is always to be liberally construed** to protect those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 574. It follows then that the provisions of Title 38 of the United States Code as well as the provisions of Title 38 of the Code of Federal Regulations are always to be liberally construed to protect those who have been obliged to drop their own affairs to take up the burdens of the nation.

Three years later in 1946, the Supreme again noted when interpreting a statute granting returning veterans certain reemployment rights: "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." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). The Supreme Court explained:

> Our problem is to construe the separate provisions of the Act as parts of an organic whole and give **each as liberal a construction for the benefit of the veteran as a**

> **harmonious interplay of the separate provisions permits**.

See id. (emphasis added).

In 1980 the Supreme Court again held that the Vietnam Era Veterans' Readjustment Assistance Act was to be liberally construed for the benefit of the returning veteran. *See Coffy v. Republic Steel Corp.*, 447 U.S. 191, 196, 100 S.Ct. 2100, 65 L.Ed.2d 53 (1980). In 1991, three years after the enactment of the Veterans' Judicial Review Act and Veterans' Benefits Improvement Act of 1988 (VJRA), the Supreme Court reaffirmed the uniquely special canon of construction required that ambiguities in provisions for benefits to veterans "are to be construed in the beneficiaries' favor." *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221, n.9 (1991). Thus, even when the language of a veterans's statute is ambiguous, those ambiguities must be construed in the beneficiaries' favor.

The first decision by the Supreme Court after the enactment of the VJRA was *Brown v. Gardner,* 513 U.S. 115, 117-18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994). Fittingly, in *Brown*, the Supreme Court again restated the special rule of construction that applies with respect to veterans's statutes and regulations. The essential holding in *Brown* was that any doubt with respect to the interpretation of a veterans benefits statute or regulation must be resolved in the veteran's favor. *See id.* at 117-118, 115 S.Ct. 552.

In its most recent decision interpreting a veterans's statute, *Henderson v. Shinseki*, the Supreme Court noted: "We have long applied 'the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries favor.'" *See* 131 S. Ct. 1197, 1206 (2011) (quoting *King v. St. Vincent's Hospital, supra*). This view of veterans benefits law was premised on the Supreme Court's recognition that:

> "The solicitude of Congress for veterans is of long standing." *United States v. Oregon*, 366 U.S. 643, 647, 81 S.Ct. 1278, 6 L.Ed.2d 575 (1961); *see also Sanders*, 556 U.S., at ----, 129 S.Ct., at 1707-1708. And that solicitude is plainly reflected in the VJRA, as well as in subsequent laws that "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions," *id.*, at ----, 129 S.Ct., at 1709 (Souter, J., dissenting). *See*, *e.g.*, Veterans Claims Assistance Act of 2000, 114 Stat. 2096; Act of Nov. 21, 1997, 111 Stat. 2271; VJRA, § 103, 102 Stat. 4106-4107.

Id. at 1205. The placement of "a thumb on the scale in the veteran's favor" is precisely what occurs pursuant to the uniquely special canon of construction for the interpretation of any veterans statutes or regulations.

B. The unique canon of construction should not be required to coexist with *Chevron* or any other deference standard when courts interpret any veterans statutes and regulations.

This Court, in *Sears v. Principi*, 349 F.3d 1326 (Fed. Cir. 2003), issued a three-part holding: (1) statutes addressing effective dates for benefits award were ambiguous; (2) the regulation addressing effective dates for benefits awarded on

reopened claims for veterans benefits was reasonable and consistent with statutory framework, and thus entitled to deference under the standard set out by the Supreme Court in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984); and (3) the pro-claimant policy underlying the veterans benefits scheme does not override *Chevron* deference accorded to reasonable agency regulations. Yet, this Court in *Sursely v. Peake*, 551 F.3d 1351 (Fed. Cir. 2009), noted that in veterans benefits cases, "interpretive doubt is to be resolved in the veteran's favor." *See Sursely*, 551 F.3d at 1355 (citing Brown v. Gardner, 513 U.S. at 118). The panel in *Sursely* concluded that in the face of statutory ambiguity, it must apply the rule that "interpretive doubt is to be resolved in the veteran's favor." *Id.* at 1357. The panel in *Sursely* explained in a footnote:

> Because the Secretary has not provided an interpretation of the statute eligible for *Chevron* deference, we need not consider the applicability of *Sears v. Principi*, 349 F.3d 1326 (Fed.Cir.2003), which properly urges caution when considering the meaning of a statute in light of both *Brown* and *Chevron*.

Id. at footnote 5. Thus, in this case this Court concluded that the uniquely special canon of construction with respect to interpretations of veterans statutes and regulations applies only when the Secretary has not provided an interpretation of the statute eligible for *Chevron* deference.

This Court has correctly determined that it must convene *en banc* to address the what role, if any, the proclaimant canon of statutory and regulatory constructions plays in the area of veterans benefits law. Mr. Procopio, in his *en banc* brief argues: "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.'" *See* Procopio Brief at 58-72. Mr. Taina is aware that other *amici* will be offering suggestions to this Court on how the special canon of construction of veterans statutes and regulations can coexist with the rule of deference mandated under *Chevron*. There are numerous law articles on how a canon of construction can coexist with a rule of law which requires that courts afford federal agencies deference. *See, e.g.,* Linda D. Jellum, "Heads I Win, Tails You Lose: Reconciling *Brown v. Gardner*'s Presumption that Interpretive Doubt be Resolved in Veterans' Favor with *Chevron*." 60 American University Law Review 59 (2011).

Mr. Taina urges this Court sitting *en banc* to hold that the uniquely special canon of construction of veterans statutes and regulations cannot coexist with the rule of deference mandated under *Chevron*. Statutory and regulatory construction is the process by which courts determine what a particular statute or regulation means so that a court may apply it accurately. *See* https://www.law.cornell.edu/wex/statutory_construction (last visited October 6, 2018). Under the special canon of construction of veterans statutes and regulations there is but one goal—to interpret a

statute or regulation involving veterans and their families in the light most favorable to the beneficiary under the statute or regulation.

Conversely, the rule created by the Supreme Court in *Chevron*, has a two steps. Under *Chevron*'s first step, a court should determine "whether Congress has directly spoken to the precise question at issue." *Chevron*, 467 U.S. at 843. If Congress has not so spoken, then, pursuant to *Chevron*'s second step, a court must accept any "permissible" or "reasonable" agency interpretation. *Id.* at 843–844. Thus, if the reviewing court concluded that Congress has directly spoken to the precise question at issue, then the court must defer to any "permissible" or "reasonable" agency interpretation. Under such an interpretive scheme the reviewing court's role is not to interpret at step two. Rather, it is limited to only determining whether the agency's interpretation is "permissible" or "reasonable." Such a rule is inconsistent with the statutory scheme created by Congress which is meant to be the "antithesis of an adversarial, formalistic dispute resolving apparatus." *Forshey v. Principi*, 284 F.3d 1335, 1360 (Fed. Cir. 2002) (*en banc*). The deference rule under *Chevron* is an adversarial formalistic dispute resolution process which shifts the burden to the veteran/claimant to show that the agency's interpretation is not "permissible" or "reasonable."

C. Deference is the antithesis of the uniquely special canon of construction that applies to a court's interpretation of veterans's statutes and regulations.

It was not until 1984, more than forty years after the Supreme Court articulated the uniquely special canon of statutory construction for veterans cases in *Boone v. Lightner, supra*, that the Supreme Court announced its deference rule in *Chevron*, supra. The *Chevron* rule was created by the Supreme Court:

> With regard to judicial review of an agency's construction of the statute which it administers, if Congress has not directly spoken to the precise question at issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron, 467 U.S. at 837-838. Nothing in the Supreme Court's deference rule set forth in *Chevron* negates or diminishes the uniquely special canon of construction that applies with respect to veterans benefits statutes. To the contrary, each of these rules serves a quite different purpose.

The purpose of the special canon of construction that applies in the area of veterans benefits is to ensure that veterans statutes and regulations are construed in the beneficiaries' favor. The purpose of the deference rule as explained by the Supreme Court in *Chevron* is to give considerable weight to an executive department's construction of a statutory scheme it is entrusted to administer. *See id.* at 844. In the former, the courts need not engage in construction of the statutory scheme because it is not required. Rather, the special rule of veterans law construction mandates that all

veterans statutes and regulations are to be construed by VA in the light most favorable to the beneficiary. In the latter, all other federal executive departments have been judicially delegated the responsibility to construe their respective individual statutory schemes which they have been entrusted by Congress to administer.

There is a fundamental difference between the special canon of construction of veterans statutes and regulations and the deference afforded to all other executive departments. Under the deference rule set out in *Chevron*, as well as its progeny,[2] this rule places a thumb on the scale in **favor of** the agency. Such "*Chevron*" deference is afforded to an agency by courts whenever a decision as to the meaning or reach of a statute requires reconciling conflicting policies, and a full understanding of the force of the statutory policy in the given situation has depended upon more than ordinary knowledge respecting the matters subjected to agency regulations. *See Chevron*, 467 U.S. at 844.

The *Chevron* deference rule thus is antithetical to the uniquely special canon of construction of veterans's statutes and regulations, which places a thumb on the scale in **favor of** the veteran when veterans's statutes and regulations require interpretation. The clear intent of Congress to treat veterans differently with respect to the VA's

[2] *See Auer v. Robbins*, 519 U.S. 452, 461-62 (1997) (holding that an agency's interpretation of an ambiguous regulation is entitled to substantial deference); *Skidmore v. Swift & Co.*, 323 U.S. 134, 140, 65 S. Ct. 161, 89 L. Ed. 124 (1944). *See also Wanless v. Shinseki*, 618 F.3d 1333, 1338 (Fed.Cir.2010).

administration of its various benefits programs clearly distinguish it from the rules that apply with respect to other agencies that require the courts to defer to their reasonable interpretations of statutes and regulations. That such special treatment must accrue to veterans and their families is clear given Congress's undebatable solicitude towards veterans as recognized by the Supreme Court in *United States v. Oregon*, 366 U.S. 643 (1961), and the fact that Congress has made clear that the VA is not an ordinary agency. *See Shinseki v. Sanders*, 556 U.S. 396, 129 S. Ct. 1696, 1707, 173 L.Ed.2d 532 (2009).

Considered in this light, any requirement that courts must defer to the VA's interpretations of veterans statutes and regulations improperly shifts the burden to the veteran to prove that such interpretations are not reasonable. Whereas, the special canon of construction of veterans's statutes and regulations requires interpretative doubt to be resolved in favor of the veteran. This approach imposes no burden on veterans to overcome any interpretation made by VA that a veteran may assert is unreasonable.

Therefore, this Court should find that the only rule of construction applicable to veterans statutes and regulations is the long-standing special canon of construction articulated by the Supreme Court that requires any interpretative doubt in the meaning of a VA statute or regulation is to be resolved in favor of the beneficiary of that provision.

This Court in *Bailey v. West*, 160 F.3d 1360 (Fed. Cir. 1998), observed that the Veterans Court operates in a unique, paternalistic administrative environment. The basis for this observation was the following legislative history from Congress's creation of judicial review of benefits decisions by VA:

> Congress has designed and fully intends to maintain a beneficial non-adversarial system of veterans benefits. This is particularly true of service-connected disability compensation where the element of cause and effect has been totally bypassed in favor of a simple temporal relationship between the incurrence of the disability and the period of active duty.
>
> I[m]plicit in such a beneficial system has been an evolution of a completely ex-parte system of adjudication in which Congress expects [the DVA] to fully and sympathetically develop the veteran's claim to its optimum before deciding it on its merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt.

See H.R.Rep. No. 100-963, at 13 (1988), *reprinted in,* 1988 U.S.C.C.A.N. 5782, 5795. The Veterans Court is an adjudicatory body that was created in 1988 with the legislative intent that it reflect the pre-existing, benevolent nature of the veterans benefits system which Congress wished to continue. *See Bailey v. West*, 160 F.3d at 1368-1369.

Based on this perspective the uniquely special canon of construction of veterans statutes and regulations is consistent with the expressed desire of Congress to resolve all issues, including issues of statutory and regulatory interpretation, by

giving the veteran/claimant the benefit of any reasonable doubt in the meaning of such statutes and regulations. In *Hodge v. West*, 155 F.3d 1356 (Fed. Cir. 1998) , this Court observed:

> . . . **in the context of veterans' benefits where the system of awarding compensation is so uniquely pro-claimant, the importance of systemic fairness and the appearance of fairness carries great weight**. To this extent, the ability of the Board to render a fair, or apparently fair, decision may depend on the veteran's ability to ensure the Board has all potentially relevant evidence before it.

See Hodge, 155 F.3d at 1363 (emphasis added). The importance of systemic fairness can only be accomplished if the special canon of construction of veterans's statutes and regulations—which requires any interpretative doubt in the meaning of a VA statute or regulation is to be resolved in favor of the beneficiary of that provision—is the exclusive canon of construction used by the courts.

II. The phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 must be interpreted using the uniquely special veterans canon of construction to mean that it applies to all veterans of the Vietnam war who served in any active military, naval, or air service.

Using the special veterans canon of construction the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 must be interpreted to mean that it applies to all veterans who served in the Vietnam war in any active military, naval, or air service. By using the special veterans canon of construction it is not necessary to parse out whether the phrase "served in the Republic of Vietnam" is unambiguous or

is ambiguous. Further, it is not necessary for this Court to determine whether the plain meaning of the language used by Congress addresses the question at issue. The special veterans canon of construction permits this Court, as well as the Veterans Court, to interpret the language by resolving any interpretative doubt in favor of the veteran.

The Secretary's interpretation that the phrase "served in the Republic of Vietnam" does not include a veteran who served in the Vietnam war in offshore waters within the legally recognized territorial limits of the Republic of Vietnam. This exclusionary view of the intent of the statute **is not an interpretation** which resolves interpretative doubt in favor of every one of those veterans who served during active naval service in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. *See* 38 C.F.R. § 3.2(f) (2015) ("Vietnam era."). The Secretary's interpretation that the phrase "served in the Republic of Vietnam" requires such service to include the veteran's presence on or within the landmass of the Republic of Vietnam **is not an interpretation** which resolves interpretative doubt in favor of those veterans who served during active **naval or air service** in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975. *Id.*

This Court's, as well as the Veterans Court's reliance on rules affording deference to the interpretations of the Secretary have been misplaced. The reliance

on rules of deference effectively precludes consideration by this Court and the Veterans Court of the only applicable canon of statutory and regulatory construction which otherwise expressly applies to veterans statutes and regulations, which is the uniquely special rule of statutory construction that any interpretive doubt must be resolved in the veteran's favor. This is the only rule which applies and its application ensures the intent of Congress will be adhered to, which is that interpretations of statutes and regulations involving benefits to veterans and their families will be "strongly and uniquely pro-claimant." *Hodge*, 155 F.3d at 1362. Congress designed the veterans' benefits adjudication process to be "a nonadversarial, ex parte, paternalistic system." *See Collaro v. West*, 136 F.3d 1304, 1309-10 (Fed. Cir. 1998); *see also Hayre v. West*, 188 F.3d 1327, 1334 (Fed. Cir. 1999) (observing that Congress has established a "uniquely claimant friendly system of awarding compensation"), *overruled, in part, on other grounds*, *Cook v. Principi*, 318 F.3d 1334 (Fed. Cir. 2002). The veterans' benefits regime is thus the "antithesis of an adversarial, formalistic dispute resolving apparatus." *See Forshey*, 284 F.3d at 1335, *supra*), *superseded on other grounds by statute*, Veterans Benefits Act of 2002, Pub. L. No. 107-330, Section 402, 116 Stat. 2820, 2832.

CONCLUSION

For the foregoing reasons, and those stated in claimant-appellant's *en banc* brief, *amicus curiae* Joseph A. Taina, Jr., requests that the judgment of the Veterans Court be reversed.

Respectfully submitted by:

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Certificate of Compliance

Pursuant to Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure, Amicus Curiae's counsel certifies that this Brief complies with the Court's type-volume limitation rules. This brief was printed in Garamond font at 14 points. According to the word-count calculated, using WordPerfect v.11, this Brief contains a total of 3952 words, which is within the 7,000 word limit.

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Certificate of Service

I certify that on the 10th day of October, 2018, the foregoing amicus brief was electronically filed through CM/ECF system with the Clerk, United States Court of Appeals for the Federal Circuit. Copies of the document were served to counsel through the Court's CM/ECF system via the Notice of Docket Activity. Pursuant to the Court's Order thirty paper copies of the brief were mailed to the Court this date.

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