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 *AMICI CURIAE* NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC.; PARALYZED VETERANS OF AMERICA; MILITARY OFFICERS ASSOCIATION OF AMERICA; AMVETS; AND THE VETERANS AND MILITARY LAW SECTION, FEDERAL BAR ASSOCIATION IN SUPPORT OF CLAIMANT-APPELLANT AND REVERSAL

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

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

Procopio v. Wilkie

Case No. 17-1821

CERTIFICATE OF INTEREST

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

National Organization of Veterans' Advocates, Inc., et al.

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 Organization of Veterans' Advocates, Inc.	National Organization of Veterans' Advocates, Inc.	None
Paralyzed Veterans of America	Paralyzed Veterans of America	None
Military Officers Association of America	Military Officers Association of America	None
AMVETS	AMVETS	None
Veterans and Military Law Section, Federal Bar Association	Veterans and Military Law Section, Federal Bar Association	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

FORM 9. Certificate of Interest **Form 9**
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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

10/10/2018
Date

/s/ Catherine E. Stetson
Signature of counsel

Please Note: All questions must be answered

Catherine E. Stetson
Printed name of counsel

cc: Counsel of Record

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STATEMENT OF INTEREST

Several of the nation's leading organizations advocating on behalf of veterans and contributing to the development of veterans' law respectfully submit this brief as *amici curiae* in support of claimant-appellant and reversal.[1]

The National Organization of Veterans' Advocates, Inc. (NOVA) is a not-for-profit educational membership organization. It is comprised of nearly 600 individual members actively engaged in representing our nation's military veterans, their families, and their survivors before the Department of Veterans Affairs (VA) and federal courts. NOVA's bylaws include as its "purpose" the development of veterans' law and procedure through research, discussion, and participation as an *amicus* before this Court.

Paralyzed Veterans of America (PVA) is a non-profit veterans service organization founded in 1946 and chartered by Congress. *See* 36 U.S.C. §§ 170101-170111 (2012). The organization has more than 17,000 members; each is a veteran of the Armed Forces of the United States who suffers from an injury or disease of the spinal cord. PVA's statutory purposes include: acquainting the public with the needs and problems of those with spinal cord disease or

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), amici state that no counsel for a party authored this brief in whole or in part. No party contributed money intended to fund preparing or submitting this brief. No person other than amici curiae, their members, or their counsel contributed such money. The Court has approved the filing of this brief without the consent of all parties.

dysfunction; promoting medical research in the several fields connected with injuries and diseases of the spinal cord; and advocating and fostering complete and effective reconditioning programs for those with spinal cord injuries or disease. *Id.* PVA carries out its statutory purposes by operating various beneficial programs, including providing free representation before the VA and federal courts to its members and other veterans, dependents, and survivors in connection with their claims for veterans' benefits authorized by Congress.

AMVETS is a non-partisan, volunteer-led organization formed by World War II veterans of the United States military. AMVETS seeks to enhance and safeguard earned entitlements for the 20 million American veterans in the U.S. who have served honorably and to improve the quality of life for them, their families, and the communities where they live through leadership, education, advocacy, and services.

Military Officers Association of America (MOAA) is an independent, non-profit, non-partisan organization of more than 390,000 members from every branch of service—including active duty, National Guard, Reserve, retired, former officers, and their families. MOAA's mission is to advocate for our military community and connect it to the Nation it serves. In particular, MOAA actively advocates for all members of the military community on compensation and benefits matters.

The Veterans and Military Law Section (VMLS) of the Federal Bar Association (FBA) was established under the Constitution of the FBA and is governed by that Constitution and the by-laws of the FBA and VMLS. The by-laws of VMLS state that one of its purposes is to adopt public positions on matters concerning veterans and military law.[2]

Given their collective wealth of experience advocating for veterans before the VA, Congress, and federal courts, amici are well-positioned to describe why a strong pro-veteran canon is important to the veterans' benefits system in general, and why it should be applied at *Chevron* Step One. They are also well-positioned to describe why the presumption of service connection in the Agent Orange Act, 38 U.S.C. § 1116, unambiguously applies to Navy veterans who served in the territorial waters of the Republic of Vietnam.

[2] The views of VMLS expressed in this brief do not necessarily reflect the opinion of the entire FBA.

SUMMARY OF ARGUMENT

We owe a tremendous debt to those who have served and defended our country in uniform. That is why Congress established a veterans' benefits system that promotes claimants' interests at every step of the process, from the time a benefits application is first filed through the last stage of judicial review. And that is why the Supreme Court, consistent with Congress's intent, has long recognized that veterans' benefits statutes are to be construed "liberally" in the beneficiaries' favor. *Boone v. Lightner*, 319 U.S. 561, 575 (1943).

This pro-veteran canon of construction implements Congress's vision to establish a generous, non-adversarial veterans' benefits system. It ensures that sloppy drafting or unforeseen sources of ambiguity do not result in the denial of benefits to veterans. And it reserves to Congress the power to correct any over-inclusive statutory interpretations. The canon is an important safeguard in any forum, but is particularly critical in the day-to-day administration of benefits at the VA—a process that is ill-equipped to consider thoroughly issues of statutory interpretation.

As a means of implementing Congress's intent, the pro-veteran canon should be considered at *Chevron* Step One. That approach is consistent with how the Supreme Court has treated similar canons of construction. It also ensures that the canon is not lost amid the highly deferential, multi-factor analysis at *Chevron* Step

Two. Moreover, featuring the pro-veteran canon prominently at Step One will send a clear signal to the VA that it should adopt appropriate pro-veteran constructions in the first instance, rather than pressing dubious sources of ambiguity in hopes of earning deference to its independent judgments. Achieving the right result early is critical in the veterans' benefits system, given the many years it takes for new interpretive issues to reach the courts for judicial review.

That is not to say that the pro-veteran canon eliminates the VA's role in interpreting veterans' benefits statutes altogether. The VA's judgment should still be afforded *Chevron* deference where Congress expressly authorizes it to elaborate on a specific statutory provision. The VA's judgment should also be afforded deference where the pro-veteran canon is so at odds with other indications of Congress's intent that it does not resolve all ambiguity, or even creates additional ambiguity, leaving a gap for the agency to fill.

Here, the Agent Orange Act establishes a presumption of service connection for diseases associated with herbicide exposure for all veterans who served "in the Republic of Vietnam." 38 U.S.C. §§ 1116(a)(1)(A), (f). This provision unambiguously applies to so-called Blue Water Navy veterans who served in the territorial waters of Vietnam. The text, statutory context, and legislative history of the Act make this clear. But even if the Court finds that some ambiguity remains after considering each of those other tools of statutory construction, the pro-veteran

canon resolves it. The Court should therefore find at *Chevron* Step One that the VA's restrictive interpretation excluding Blue Water Navy veterans is inconsistent with Congress's clearly expressed intent.

ARGUMENT

I. The Pro-Veteran Canon Is An Established And Significant Tool Of Statutory Construction.

The pro-veteran canon of construction has long been an integral part of interpreting veterans' benefits statutes. It has deep roots in Supreme Court precedent, and accounts for Congress's clear intent to establish an informal and generous veterans' benefits system. Further, as a practical matter, the canon promotes veteran-friendly decisions in the often-harried day-to-day operation of the veterans' benefits system. Such an established and valuable canon should be given meaningful effect.

The Supreme Court has acknowledged the pro-veteran canon for over seventy years. In the post-World-War-II era, the Supreme Court instructed that statutes affording benefits to veterans 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." *Boone*, 319 U.S. at 575; *see also Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (courts must "give each [statutory provision] as liberal a construction for the benefit of the veteran" as the statutory scheme permits). The canon has retained its force in the decades since.

See, e.g., *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220-221 n.9 (1991) (noting "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor"). Most recently, the Supreme Court in *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011), applied the pro-veteran canon as part of a holistic analysis to find that Congress did not intend the 120-day limit for an appeal to the Court of Appeals for Veterans Claims to be "jurisdictional." The canon's extended lineage underscores its importance for ascertaining and implementing Congress's intent regarding veterans' benefits.

The pro-veteran canon is but one manifestation of Congress's overarching intent to "place a thumb on the scale in the veteran's favor in the course of administrative and judicial review of VA decisions." *Shinseki v. Sanders*, 556 U.S. 396, 416 (2009) (Souter, J., dissenting).[3] Congress designed the VA's adjudicatory process "'to function throughout with a high degree of informality and solicitude for the claimant.'" *Henderson*, 562 U.S. 428, 431 (2011) (quoting *Walters v. Nat'l Ass'n of Radiation Survivors*, 473 U.S. 305, 311 (1985)). For example, the VA, unlike almost every other federal agency that administers benefits, must assist claimants in developing their claims, including by helping them obtain record evidence. 38 U.S.C. § 5103A. And where that evidence is in equipoise on any

[3] The majority in *Sanders* "recognize[d] that Congress ha[d] expressed special solicitude for the veterans' cause," but reversed this Court's harmless-error standard because it was too complex and inflexible, contrary to other indications of Congress's intent. *See* 556 U.S. 396 at 407-412.

material issue, the VA must find for the veteran. *Id.* § 5107(b). The pro-veteran canon applies this same "thumb on the scale" to statutory interpretation, encouraging the VA and courts to err on the side of veterans when veterans' benefits statutes are unclear. *See* William N. Eskridge Jr. & Philip P. Frickey, *Foreword: Law as Equilibrium*, 108 Harv. L. Rev. 26, 105 (1994) (listing the pro-veteran canon as a "[s]tatute-[b]ased" canon of statutory construction).

Implementing Congress's intent through the pro-veteran canon is important at any level of the veterans' benefits system. But it is a particularly important safeguard in the day-to-day administration of veterans' benefits at the VA. As this Court knows well, Congress's directives regarding veterans' benefits are almost constantly changing. *See, e.g.*, OPM, *Position Classification Standard for Veterans Claims Examining Series, GS-0996* 18 (revised May 2009) (observing that "[h]ardly a session of Congress is concluded without some veterans' legislation being enacted"), *available at* http://bit.ly/2MWRSwT (last visited Oct. 9, 2018) [hereinafter "OPM Position Classification Standard"]. For example, just this past year, Congress overhauled the VA's internal appeals process, adding new procedures and evidentiary standards. *See* Veterans Appeals Improvement and Modernization Act of 2017, Pub. L. No. 115-55, 131 Stat. 1105 (codified as amended in scattered sections of 38 U.S.C.). Although the VA often promulgates regulations and other guidance to implement these new laws, further interpretive

issues inevitably arise once those statutory provisions are tested in practice.

The VA adjudication and appeal process, however, is not equipped to effectively resolve questions of statutory interpretation. As has been well documented, claims benefits examiners in VA regional offices are saddled with an extraordinary number of cases each year, many of which involve lengthy records on factually complex issues. *See, e.g.*, *The VA Claims Backlog Working Group March 2014 Report*, VA Backlog Working Group 27 (Mar. 2014) (noting that in 2012, full-time claims processing employees processed an average of 74 claims each, which took an average of 262 days to complete), *available at* http://bit.ly/2O2kdGw (last visited Oct. 9, 2018); *see also* VA, *Veteran Benefits Administration Reports, Characteristics of Claims* (Oct. 6, 2018) (noting there has been a 200 percent increase in the last ten years in original claims containing eight or more specific medical issues), *available at* http://bit.ly/2xMaKJ5 (last visited Oct. 9, 2018). These examiners are not required to have, and generally do not have, law degrees. *See* OPM Position Classification Standard, at 3. Nor do most veterans, nor do most of the Veterans Service Organization (VSO) representatives who participate in the process. Examiners thus lack the time, resources, and expertise to analyze thoroughly any interpretive issues that may arise, creating a high risk of erroneous interpretations that result in the denial of benefits to veterans. If properly enforced by reviewing courts, the pro-veteran canon would

mitigate this risk by encouraging examiners to err on the side of veterans.

Veterans of course may appeal adverse decisions to the Board of Veterans' Appeals, whose members are trained attorneys, and ultimately to federal courts. But these appeals proceed at a snail's pace: During fiscal year 2017, for example, veterans whose appeals were resolved by the Board had waited an average of *seven years* from the date they initiated the appeal until resolution, during which time they are generally deprived of full benefits. *See* VA, *Department of Veterans Affairs Board of Veterans' Appeals Annual Report Fiscal Year (FY) 2017*, 13 (2017), *available at* http://bit.ly/2ptoTam (last visited Oct. 9, 2018); *see also Martin v. O'Rourke*, 891 F.3d 1338, 1341 (Fed. Cir. 2018) (highlighting that the two-and-a-half-hour certification of appeal process takes an average of 773 days for the VA to complete). Even if the Board corrects an unduly restrictive statutory interpretation, therefore, much damage to the veteran will have already been done. Moreover, the Board itself is overworked—hence the delays—and often turns out decisions without the benefit of advocacy from attorneys with the training and resources to flesh out issues of statutory interpretation. *See id.* at 29 (indicating that in FY 2017, only 15.30 percent of Board dispositions involved attorney representation). Appealing Board errors in federal court will only add years to the veterans' wait. Thus, the pro-veteran canon is a valuable safeguard against misinformed Board decisions as well.

The pro-veteran canon appropriately acknowledges and advances Congress's intent to err on the side of granting benefits to those who have served our country. This safeguard is particularly important given the limited resources and lack of legal expertise in the day-to-day operation of the veterans' benefits system, as well as the extensive delays before any correction through judicial review.

II. To Give The Pro-Veteran Canon Meaningful Effect, It Should Be Considered At *Chevron* Step One.

The pro-veteran canon should be considered at Step One of the *Chevron* analysis, as part of the inquiry into whether "the intent of Congress is clear" on the issue at bar. *See Chevron, U.S.A., Inc. v. Natural Res. Council Inc.*, 467 U.S. 837, 842-843, 845 (1984). In *Chevron*, the Supreme Court instructed that courts should "employ[] traditional tools of statutory construction" at Step One to ascertain Congress' intent. *Id.* at 843 n.9. And it has since confirmed that those tools include canons of construction. *See Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1630 (2018) (applying the canon against reading conflicts into statutes, among other traditional canons). Specifically, the Supreme Court has applied at Step One canons that call for liberal constructions in favor of certain parties, similar to the pro-veterans canon. *See INS v. St. Cyr*, 533 U.S. 289, 320 & n.45 (2001) (applying at Step One "the longstanding principle of construing any lingering ambiguities in deportation statutes in favor of the alien" (internal quotation marks and citations omitted)); *see also* Brian G. Slocum, *The Importance of Being Ambiguous:*

Substantive Canons, Stare Decisis, and the Cent. Role of Ambiguity Determinations in the Admin. St., 69 Md. L. Rev. 791, 812-815, 830-835 (2010) (explaining that substantive canons of construction reflect Congress's intent and should be considered at Step One).

Treating the pro-veteran canon differently would not only depart from Supreme Court precedent; it would fail to give the pro-veteran canon full effect. The Step Two analysis is highly deferential: Courts rarely invalidate agency interpretations at Step Two for being unreasonable. *See, e.g.*, Kent Barnett & Christopher J. Walker, *Chevron Step Two's Domain*, 93 Notre Dame L. Rev. 1441, 1461 (2018) (reporting that from 2003 to 2013, agencies won 93.8% of the time when circuit courts reached Chevron Step Two); Orin S. Kerr, *Shedding Light on Chevron: An Empirical Study of the Chevron Doctrine in the U.S. Courts of Appeals*, 15 Yale J. on Reg. 1, 31 (1998) (finding agencies won 89% of the time when courts reached Step Two). The Step Two analysis also takes into account a wide range of factors beyond traditional tools of statutory construction to assess whether the agency's interpretation is reasonable. Courts at Step Two may consider, for instance, whether the agency has examined relevant facts, whether the agency's policy has a rational connection to those facts, and whether the agency's policy is consistent with past administrative practice. *See Michigan v. EPA*, 135 S. Ct. 2699, 2707-10 (2015). At Step Two, therefore, the pro-veteran canon would

be lost in a mix of competing policy considerations subject to heavy deference, making it a far less effective tool for enforcing Congress's intent to err on the side of veterans.

By contrast, at Step One, courts may apply the pro-veteran canon cleanly as part of a full inquiry into Congress's intent. This approach has the benefit of analytical clarity and predictability: The canon would be considered along with other tools of statutory construction in one analysis, rather than artificially cast off into the morass of Step Two.[4] It would also allow courts to give full effect to the pro-veteran canon, consistent with the canon's pedigree and close connection to Congress's intent to create a veteran-friendly benefits system.

Furthermore, by increasing the visibility and potency of the pro-veteran canon, a Step One interpretative approach would encourage the VA to interpret Congress's directives liberally in favor of veterans from the outset. The VA would be less likely to invest time and resources into pressing and defending cramped interpretations of veterans' benefits statutes, such as its construction of "Republic of Vietnam" at issue here, if it is on notice that an overly constrained reading

[4] Indeed, to more clearly distinguish between Steps One and Two, numerous commentators have argued that courts should *only* consider tools of statutory construction at Step One, while applying at Step Two the "arbitrary and capricious" standard under the APA, § 706. *See, e.g.*, M. Elizabeth Magill, *Step Two of Chevron v. Natural Resources Defense Council*, in *A Guide to Judicial and Political Review of Federal Agencies* 85, 93-94 (John F. Duffy & Michael Herz, eds., 2005); Ronald M. Levin, *The Anatomy of Chevron: Step Two Reconsidered*, 72 Chi.-Kent L. Rev. 1253, 1268 (1997).

would pose a high risk of reversal by the courts. Likewise, applying the canon at Step One would temper the VA's incentive to manufacture sources of statutory ambiguity in hopes of earning deference for its policy determinations. *Cf. Kisor v. Shulkin*, 880 F.3d 1378, 1379-80 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of reh'g en banc) (observing that analogous doctrine of *Auer* deference encourages agencies to write ambiguous regulations to enhance agency discretion). These incentives for the VA to adopt pro-veteran interpretations in the first instance are particularly important because, as discussed, it often takes several years for new interpretive issues to reach the courts for judicial review, during which time veterans will generally have been denied full benefits. *See supra* Section I. Applying the pro-veteran canon at Step One will thus create a more efficient, veteran-friendly system, just as Congress intended.

III. Applying The Pro-Veteran Canon At *Chevron* Step One Will Not Eliminate All Deference To The Agency.

Contrary to the government's concern, *see* Dkt. 57 at 6, applying the pro-veteran canon at Step One would not eliminate *Chevron* deference to the agency altogether. The pro-veteran canon is just one tool for interpreting Congress's intent. It is therefore subject to clear indications from Congress that the canon does not resolve an interpretive issue. There are at least two scenarios in which courts may afford deference to the agency's interpretation notwithstanding the pro-veteran canon.

First, where Congress has expressly delegated interpretive authority to the agency to elaborate on a specific statutory provision, courts should infer that Congress intended to prioritize the agency's judgment on those issues over the generally applicable pro-veteran canon. *See Chevron*, 467 U.S. at 843-844. The Agent Orange Act itself illustrates this principle. Congress expressly authorized the VA to identify additional diseases that warrant a presumption of service connection. *See* 38 U.S.C. §§ 1116(a)(1)(B), (b). On those issues, therefore, Congress plainly intended courts to defer to the agency's judgment, even if the courts would otherwise adopt a more veteran friendly approach. By contrast, there is no such express authority to elaborate on the scope of "in the Republic of Vietnam." *Id.* at §§ 1116(a)(1)(A), (f).

Second, the pro-veteran cannon may not resolve all ambiguity regarding a particular statutory provision. As this Court has observed, the canon does not call for "a single-factor test of whether the [proposed interpretation] is uniformly pro-claimant." *Veterans Justice Group, LLC v. Sec'y of Veterans Affairs*, 818 F.3d 1336, 1352 (Fed. Cir. 2016) (internal quotation marks omitted). Rather, the canon should be applied alongside other tools of statutory construction. In some cases, those other indications of Congress's intent may so contradict a particular pro-veteran construction that the provision in question remains ambiguous. *See, e.g.*, *Nat'l Org. of Veterans' Advocates v. Sec'y of Veterans Affairs*, 260 F.3d 1365,

1377-78 (Fed. Cir. 2001) (finding statute ambiguous where pro-veteran canon and legislative history "push in opposite ways"). And in that scenario, the court may infer from the ambiguity that Congress delegated authority to the agency to fill in the gap, such that deference should apply to the agency's judgment. *See Chevron*, 467 U.S. at 843-844. But where, as here, there is a sensible pro-veteran construction that is well-supported by other evidence of congressional intent, there is no ambiguity for the agency to resolve. *See infra* Section IV; *cf. Sursely v. Peake*, 551 F.3d 1351, 1355-56 (Fed. Cir. 2009) (finding legislative history and pro-veteran canon together resolve any ambiguity in the statute). Congress's clear intent should govern.

At bottom, the pro-veteran canon restricts the VA's discretion, but not in all circumstances. Whatever the difficulties in future cases of assessing how far the pro-veteran canon goes when considered at Step One, they are far preferable to losing the benefits of the canon altogether at Chevron Step Two. The pro-veteran canon is too important, and too closely connected to Congress's intent, to be buried in the Step Two analysis.

IV. Interpreting "The Republic Of Vietnam" In Favor Of Veterans To Include Territorial Waters Is Consistent With The Statutory Framework.

The Agent Orange Act created a statutory presumption of service connection for diseases associated with herbicide exposure that applies to veterans who

"during active military, naval, or air service, served in the Republic of Vietnam." 38 U.S.C. §§ 1116(a)(1)(A), (f). As the text, statutory context, and legislative history of the Act make clear, this category of veterans unambiguously includes Navy veterans who served in the territorial waters of the Republic of Vietnam. *See* Dkt. 70 at 30-44. But even if the Court finds that ambiguity remains after consulting these indications of Congress's intent, application of the pro-veteran canon resolves it. There is thus no basis to defer to the VA's interpretation of the statute to exclude veterans like Mr. Procopio.

The text of the Act shows that Congress intended the presumption of service connection to apply to Blue Water Navy veterans. The formal term that Congress chose to define the geographic scope of the presumption—"Republic of Vietnam"—plainly refers to a *nation*, not merely the nation's defined landmass. And under established international law, a nation's boundaries include its territorial waters. *See, e.g.*, *United States v. Alaska*, 503 U.S. 569, 587-588 (1992) (adopting definition of sovereign territory that includes territorial waters from 1958 United Nation Convention on the Territorial Sea and the Contiguous Zone). A Navy sailor serving in those territorial waters, therefore, falls within the intended scope of the presumption.

Other terms surrounding "Republic of Vietnam" point to the same conclusion. The statute explicitly states that the presumption applies to veterans

who were engaged in active "naval[] or air service." 38 U.S.C. § 1116(a)(1). Because these service members operated in the airspace and seas, their inclusion suggests that Congress did not view "Republic of Vietnam" as strictly limited to the land portion of that nation.

The Agent Orange Act's legislative history likewise shows that Congress intended the presumption of service connection to cover Blue Water Navy veterans. The legislative history contains specific references to Navy sailors as among those who suffered from herbicide-related diseases. *See* 137 Cong. Rec. 2347 (1991) (recognizing study finding "excessive non-Hodgkin's lymphoma among men who served on ships offshore Vietnam") (statement of Rep. Montgomery). Further, the purpose of the presumption was in part to address how difficult it is for veterans to locate evidence that they had actually been exposed to Agent Orange. *See id.* (observing "the difficulty in estimating Agent Orange exposure in veterans" and noting that the CDC's study of Agent Orange exposure "cannot be conducted" due to a lack of reliable exposure information) (statement of Rep. Montgomery); *see also* Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 34,452, 34,454-455 (Aug. 26, 1985) (VA explaining that presumptions of herbicide exposure are warranted given "the many uncertainties associated with herbicide spraying during [the Vietnam era]"). Blue Water Navy veterans, of course, have no greater access to records of where

herbicide was used, and whether they were exposed to it, than do their land-based counterparts. The purpose of the statute therefore weighs in favor of including them under the presumption of service connection.

The VA contends that Blue Water Navy veterans may not all have faced the same general *likelihood* of herbicide exposure as ground troops. *See* Dkt. 27 at 9-10 (noting VA's position that the risk of exposure facing Blue Water Navy veterans was not "similar in kind or degree to the risk attending service within the land borders of the Republic of Vietnam" (internal quotation marks omitted)). Even if that were true, it is no basis to exclude Blue Water Navy veterans from the presumption. The statutory presumption operates as a burden-shifting mechanism, not a final determinant. The likelihood of exposure therefore should not inform the presumption's scope. If any particular sailor, airman, marine, or other service member was not actually exposed to herbicide, Congress designated a means to permissibly exclude them from receiving those benefits. *See* 38 U.S.C. § 1116(f) (presumption of exposure may be rebutted if "there is affirmative evidence to establish that the veteran was not exposed" to herbicide during service). As Congress made clear, however, the VA—not the veteran—should carry the evidentiary burden on this issue. And that logic applies to Blue Water Navy veterans as much as any other.

The text, context, and purpose of the statute thus establish that Blue Water

Navy veterans who served in the territorial waters of the Republic of Vietnam qualify for a presumption of service connection. If any interpretive doubt remains, however, the pro-veteran canon of construction resolves it. Between the two competing interpretations of § 1116 before the Court—one that includes Blue Water Navy veterans, and one that does not—there is no question as to which is more favorable to veterans. And that pro-veteran interpretation is well supported by other indications of Congress's intent. Regardless of whether the pro-veteran canon may be used to resolve ambiguity in every case, therefore, it certainly closes the gap here. *See Kirkendall v. Dep't of Army*, 479 F.3d 830, 846 (Fed. Cir. 2007) (observing that the pro-veteran canon "operate[s] to rebut or eliminate otherwise fair readings in close cases").

The en banc Court should hold that the term "Republic of Vietnam" as used in 38 U.S.C. § 1116 includes the territorial waters of that nation, and therefore the presumption of service connection for diseases associated with herbicide exposure applies to Blue Water Navy veterans like Mr. Procopio.

CONCLUSION

For the foregoing reasons, and those stated in claimant-appellant's en banc brief, *see* Dkt. 70, the judgment of the Veterans Court should be reversed.

Respectfully submitted,

October 10, 2018

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CERTIFICATE OF COMPLIANCE

1. This petition complies with the page limitations of Federal Rules of Appellate Procedure 29(a)(5) because it contains 4,628 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman 14-point font.

October 10, 2018 /s/ Catherine E. Stetson

CERTIFICATE OF SERVICE

I certify that I served a copy of the foregoing document on all counsel of record on October 10, 2018 by electronic means.

October 10, 2018 /s/ Catherine E. Stetson