2017-1821

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FEDERAL CIRCUIT**

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ALFRED PROCOPIO, JR.,
*Appellant*

v.

PETER O'ROURKE,
Acting Secretary of Veterans Affairs,
*Appellee*

---

Appeal from Decision of Judge Pietsch,
U.S. Court of Appeals for Veterans Claims
Cause No. 15-4082

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# AMICUS BRIEF SUPPORTING NEITHER PARTY & REVERSAL BY NATIONAL ORGANIZATION OF VETERANS' ADVOCATES, INC. (NOVA)

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

**UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT**

Alfred Procopio, Jr. **v.** Peter O'Rourke

Case No. 2017-1821

**CERTIFICATE OF INTEREST**

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

National Organization for Veterans' Advocates, Inc. (NOVA)

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. (NOVA) | National Organization of Veterans Advocates, Inc. (NOVA) | No such corporation |
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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:

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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).

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/s/ Chris Attig
Signature of counsel

Please Note: All questions must be answered

Chris Attig
Printed name of counsel

cc: All Counsel of Record

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## STATEMENT OF THE ISSUE

What is the impact of the pro-claimant canon on step one of the *Chevron* analysis in this case, assuming that *Haas v. Peake* did not consider its impact?

## STATEMENT OF INTEREST

*Amicus* National Organization of Veterans' Advocates, Inc., (NOVA), is an educational membership organization. Its members are attorneys, agents, and advocates who serve those who served our nation. NOVA's mission includes the development of a better understanding of federal veterans benefits law and procedure. NOVA has provided training and legal education for those who represent America's veterans and their dependents since 1993. NOVA's members have represented, collectively, hundreds of thousands of veterans and dependents before the Department of Veterans Affairs, the Board of Veterans' Appeals, the U.S. Court of Appeals for Veterans Claims, the U.S. Court of Appeals for the Federal Circuit, and the U.S. Supreme Court. Our members and executive staff have worked hand in hand with VA, Veterans Service Organizations, and members of both houses of Congress to draft, debate, and pass legislation meant to benefit and improve the station of those who set aside their lives to stand in defense of our nation. Our members and their clients will be affected by the outcome of the Court's decision in this case.

In accordance with FRAP 29(c)(5): neither counsel of either party authored the brief in whole or part; neither counsel for a party nor any party contributed money intended to fund preparing or submitting the brief. No person contributed money

intended to fund preparing or submitting the brief. Costs associated with the filing of this brief are borne solely by the law firm of attorney for the Amicus; counsel for the Amicus donated his time pro bono and waives all compensation and fees for his work on this brief. NOVA's counsel authored this brief in whole.

Pursuant to Federal Rule of Appellate Procedure 29(a), all parties have consented to the filing of this brief.

## SUMMARY OF ARGUMENT

Consideration of the pro-veteran canon at *Chevron* step one creates practical and philosophical challenges. Such consideration will be confusing to apply in a way that neither dilutes the canon nor sterilizes the *Chevron* framework in the interpretation of veterans benefits statutes. Because the Court has access to a vast array of statutory construction tools that are more than capable of resolving interpretive puzzles, the question is begged why the Supreme Court created the pro-veteran canon in the first place.

NOVA believes the pro-veteran canon is more than just a traditional tool: it is a unique canon that defines the boundaries of the *Chevron* framework in every case. An examination of the application of the canon in *Gardner* demonstrates that the canon protects the separation of power: if a branch of government is going to exclude a class of veterans from VA benefits, or assistance of the government they served to protect, that branch will be Congress.

Applied to this case, the pro-veteran canon protects a power Congress has reserved for itself: absent affirmative evidence disproving an herbicide exposure, the judiciary should defer to Congress to exclude a class of veterans who served on land, air, or sea in the Republic of Vietnam from entitlement to the presumption of herbicide exposure in 38 U.S.C. §1116.

## ARGUMENT

### 1. Courts will struggle with how to practically apply the pro-veteran canon at *Chevron* step one in each individual case.

Step one of *Chevron* requires the Court to use "traditional tools of statutory construction" to consider whether Congress made its intent clear. *Chevron, U.S.A., Inc. v. NRDC,* 467 U.S. 837, 843 n. 9 (1984). The Supreme Court describes the pro-veteran canon as a traditional tool: "We have *long applied* the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson v. Shinseki,* 562 U.S. 428, 441 (2011)(emphasis added), *citing King* v. *St. Vincent's Hospital*, 502 U.S. 215, 220-221, n. 9 (1991); *Coffy* v. *Republic Steel Corp.*, 447 U.S. 191, 196 (1980); *Fishgold* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).

However, considering the pro-veteran canon at *Chevron* step one creates practical problems for this court and lower courts.

First, when a party challenges the interpretation of a veterans benefits statute, a court will first need to answer a "chicken-or-egg" question: does a court use the canon after finding an ambiguity in statutory language, or does it use the canon to preclude a finding of ambiguity because the statute can be construed in veteran's favor. The former tends to add an intermediate step between *Chevron* steps one and

two; the effect of the latter sterilizes the *Chevron* framework when interpreting veterans benefits statutes. *See, e.g.*, *Trafter v. Shinseki,* 26 Vet. App. 267 (2013)("[C]ourts are precluded from substituting their judgment for that of VA, *unless the Secretary has exceeded his authority*; the Secretary's action was clearly wrong; or the Secretary's interpretation is unfavorable to veterans, such that it conflicts with the beneficence underpinning VA's veterans benefits scheme, *and a more liberal construction is available* that affords a harmonious interplay between provisions.")(*emphasis added).*

Second, applying the pro-veteran canon at *Chevron* step one places it on equal footing with other interpretive canons; each time canons clash with the pro-veteran canon, courts will need to resolve whether the pro-veteran canon subordinates or is subordinate to some other interpretive guideline. *See, e.g.*, *Nielson v. Shinseki*, 607 F.3d 802, 808 (Fed. Cir. 2010).

Behind the practical difficulties lies a philosophical conundrum. Courts have access to a vast array of traditional interpretive canons that are "…more than up to the job of solving [an] interpretive puzzle." *See Epic Sys. Corp. v. Lewis,* ____ U.S. ____, 2018 U.S. LEXIS 3086 at *36 (May 21, 2018). They do not need another interpretive tool for resolving veteran-specific puzzles.

NOVA believes the pro-veteran canon serves a broader and more vital role than textual interpretation at *Chevron* step one: it is a memorialization of judicial deference to congressional power over the provision of veterans benefits.

**2. The pro-veteran canon is more than a traditional interpretive canon: it is a memorialization of judicial deference to congressional power.**

NOVA respectfully suggests the pro-veteran canon is more than a traditional canon. It serves a purpose as unique as the statutes it construes and as unique as the agency administering those statutes. It focuses the Court's attention not on the meaning of words in a statute, but instead on congressional desire to act for the good of veterans as a class. It is the tool through which the judicial branch extends comity to a congressional reservation of power over the provision of veterans benefits.

NOVA's reasoning rests on two fundamental, if not universal, truths about *Chevron*.

First, the Supreme Court recognizes the great variety of ways by which Congress invests administrative agencies with authority, discretion, and procedures to give meaning to Congressional statutes. *U.S. v. Mead Corp.*, 533 U.S. 218, 235-236 (2001). Time and again, when pressed to make bright-line rules narrowing *Chevron,* the Supreme Court has chosen instead to "…tailor deference to [that] variety." *Id.,* 236 – 237 ; *FDA v. Brown and Williamson Tobacco Corp.*, 529 U.S. 120 (2000)(the

Court studied the history of interaction between Congress and the FDA to find Congress denied the FDA jurisdiction to regulate tobacco); *Barnhart v. Walton,* 535 U.S. 212, 222 (2002)(in a near unanimous decision, Justice Breyer noted that a case-by-case inquiry, considering many factors, is "…the appropriate legal lens through which to view the legality of the Agency interpretation…"); *City of Arlington v. FCC,* 569 U.S. 290, 307 (2013)(Justice Scalia rejected a broad "jurisdictional" prerequisite to *Chevron* as semantics: courts must still rigorously determine if Congress established a clear line beyond which an agency cannot go).

Second, *Chevron* presumes congressional ambiguity is an implicit, but not absolute, delegation of interpretive authority to an agency. *City of Arlington,* 569 U.S. at 306 (2013)("No one disputes…" that before *Chevron* deference can apply "…. the agency must have received congressional authority to determine the particular matter at issue in the particular manner adopted."). An agency's authority to give meaning, life, or application to a congressional statute is limited by the degree of authority Congress has delegated, as this Court has noted:

> Deference to an agency interpretation under the *Chevron* framework "is premised on the theory that a statute's ambiguity constitutes an implicit delegation from Congress to the agency to fill in the statutory gaps." [internal citations omitted]. There are "extraordinary cases," however, where we should "hesitate before concluding that Congress has intended such an implicit delegation." [internal citations omitted]. In other words, there are times when courts should not search for an ambiguity in the statute because it is clear Congress could not have

> intended to grant the agency authority to act in the substantive space at issue.

*ClearCorrect Operating, LLC v. ITC*, 810 F.3d 1283, 1302 (Fed. Cir. 2015).

Applying those two fundamental truths, the best consideration of the pro-veteran canon would occur before *Chevron* even enters the stage.

First, Congress has made clear "VA is not an ordinary agency." *Shinseki v. Sanders,* 556 U.S. 396, 412 (2009). It administers a benefit system unique in American jurisprudence, a system in which Congress presses hard its thumb on the scales of justice. *Henderson v. Shinseki*, 562 U.S. 428, 440-442 (2011). Congress has, in very unique and dramatic ways, authorized VA to give life to statutes affecting veterans. *Jaquay v. Principi,* 304 F.3d 1276, 1286 (Fed. Cir. 2002)(en banc), *overruled on other grounds by Henderson ex rel. Henderson v. Shinseki,* 589 F.3d 1201 (Fed. Cir. 2009). Tailoring deference to the unique variety of authority conferred on VA requires that a court first take note of the pro-veteran nature, scope, and purpose of a statute before deciding whether *Chevron* is needed to find or resolve any ambiguity in it. *Brown v. Gardner,* 513 U.S. 115, 117 – 120 (1994).

Second, "[t]he solicitude of Congress for veterans is of long standing." *United States v. Oregon,* 366 U.S. 643, 647 (1961). The beneficence of a grateful nation suffuses the laws Congress writes. *Bailey v. West,* 160 F.3d 1360, 1370 (Fed. Cir. 1998)(Michel, J., concurrence), *overruled on other grounds by Henderson ex rel.*

*Henderson v. Shinseki,* 589 F.3d 1201 (Fed. Cir. 2009). The pro-veteran canon is a recognition of – indeed, judicial deference to – congressional solidarity with veterans.

NOVA believes the pro-veteran canon is an acknowledgment that Congress has never delegated *absolute* authority to VA to act in the substantive space of veterans law. Instead, Congress has delegated to VA only enough authority to define ambiguity and interpret Congressional statutes in a manner that furthers, not limits, congressional beneficence. *See, e.g.,* 38 U.S.C. §501 (Congress has given the Secretary "authority to prescribe all rules and regulations which are necessary or appropriate to *carry out* the laws administered by the Department and are *consistent with* those laws.")(emphasis added).

More concisely stated: if a branch of government is going to exclude a class of veterans from any benefit, the pro-veteran canon ensures it is Congress that does so – not the Executive or Judicial branches.

### 3. The pro-veteran canon reserves to Congress alone the power to say "no" to veterans.

The operation of the pro-veteran canon in apportioning power among the co-equal branches to care for our nation's veterans can be observed in the *Gardner* case. *Brown v. Gardner,* 513 U.S. 115 (1994).

There, the Supreme Court considered whether Congress did or did not include an element of fault in the text of 38 U.S.C. §1151, a statute allowing veterans to recover disability compensation for disabilities incurred during VA medical treatment. *Gardner*, 513 U.S. at 117. VA alleged the ambiguity in the statute empowered it to read into the statute a requirement that a veteran show VA fault led to the disability; it asserted that VA primacy in rendering such an interpretation was evidenced by congressional failure to check the VA's power for many decades. *Id.,* at 120 – 121. The Court rejected this argument, finding that if any ambiguity existed in the statute's text, it must first survive application of the pro-veteran canon. *Id.,* at 117 – 118, *citing King v. St. Vincent's Hospital*, 502 U.S. 215, 200 – 221, n. 9 (1991). The Court held that the statute's language was clear and required no proof of fault, and ended its analysis at or before *Chevron* step one.

Shortly after the Court's decision, Congress amended 38 U.S.C. §1151 to include a fault requirement. *Accord,* Pub. L. No 104-204, §411(a), 110 Stat. 2874, 2926-27 (1996).

The lesson of *Gardner* is not that the Supreme Court was wrong to reject the VA's interpretation. Nor is it a lesson about the pro-veteran canon's primacy, or whether or how the canon fits into the *Chevron* framework.

The lesson of *Gardner* is the role the canon serves. Through *Gardner,* the Supreme Court recognized the special and long-standing relationship between veterans and their government. It honored the congressional reservation of power over the nature and scope of veterans benefits, and ensures that if a branch of government is going to exclude a class of veterans from VA benefits or assistance of the government they served to protect, that branch will be Congress.

The lesson of *Gardner* echoes from the earliest days of our republic through the first explicit mention of the pro-veteran canon and beyond. *Accord Hayburn's Case*, 2 U.S. 409, 410 n.1&2 (1792) (Jay, C.J.)("[T]he objects of [these statutes] are exceedingly benevolent, and do real honor to the humanity and justice of Congress…the Judges desire to manifest, on all proper occasions, and in every proper manner, their high respect for the National Legislature."); *Boone v. Lightner,* 319 U.S. 561, 575 (1943)(After quoting the pro-veteran canon, the Court notes its role of deference to Congress: "…discretion is vested in the courts to see that the immunities of the Act are not put to such unworthy use.")

**4. The pro-veteran canon ensures Congress is the only branch to exclude veterans who served on land, air, or sea in the Republic of Vietnam from entitlement to a legal presumption of herbicide exposure, absent affirmative evidence against such an exposure.**

In this case, the Court may consider how the pro-veteran canon would impact the interpretation of a particular statute if it were applied at *Chevron* step one. NOVA believes the impact would encompass not only the practical and philosophical challenges noted above, but also the dilution of the role of the pro-veteran canon.

When Congress passed the Agent Orange Act of 1991, it sought to fulfill a specific purpose:

> To provide for the Secretary of Veterans Affairs to obtain independent scientific review of the available scientific evidence regarding associations between diseases and exposure to dioxin and other chemical compounds in herbicides, and for other purposes.

Pub. L. 102-4, §2(a)(1). Congress's first step in fulfilling that purpose was to extend a legal presumption of herbicide exposure to a "veteran who, *during active military, naval, or air service*, served in the Republic of Vietnam…" 38 U.S.C. §1116(a)(1)(A) (emphasis added). This broad inclusion of all veterans, regardless of the nature or branch of their service, is repeated no less than five times throughout the Act. 38 U.S.C. §1116(a)(1)(A); §1116(a)(1)(B); §1116(a)(2)(C); §1116(a)(2)(E); §1116(f). Congress's goal of broad inclusion of veterans in the class entitled to the presumption is limited only by the Secretary's production of "…affirmative evidence to establish

that the veteran was not exposed to any such agent during that service." 38 U.S.C. §1116(f).

Application of the pro-veteran canon at *Chevron* step one might result in a decision interpreting the phrase "served in the Republic of Vietnam" consistent with that congressional goal of inclusion of a broad class of veterans. Nevertheless, the impact – even should the outcome favor Mr. Procopio – is to dilute the unique role of the pro-veteran canon.

The Supreme Court created the canon as a guarantee to veterans and to Congress, that above and beyond any other canon of construction, "…discretion is vested in the courts…" to protect congressional solicitude with and beneficence for those who were exposed to an herbicide regardless of the branch or nature of their service in the Republic of Vietnam. *See Boone,* 319 U.S. at 575.

If a branch of government is going to exclude a class of veterans who served on land, air, or sea in the Republic of Vietnam from entitlement to the presumption of herbicide exposure, without affirmative evidence against such exposure, the pro-veteran canon is the tool by which the Supreme Court ensures the judiciary defers to Congress's power to do so.

Respectfully Submitted,
Attig | Steel, PLLC

By: */s/ Chris Attig*

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**FORM 19. Certificate of Compliance With Rule 32(a)**

**Form 19**
**Rev. 12/16**

# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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# UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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