QUESTION(S) PRESENTED

I. Whether This Court Should Grant *Certiorari* to Resolve an Important Point of Law Concerning the Applicability of the "Substantially Justified" Standard In Adjudicating Petitions for Attorneys Fees Under the Equal Access to Justice Act In Veterans Benefits Cases.

II. Whether This Court Should Grant *Certiorari* to Resolve an Important Point of Law and Judicial Conflict Narrowing the Definition of "Substantially Justified," to Exclude Cases Where the Government Was Clearly Wrong.

PARTIES TO THE PROCEEDING

All parties to the proceeding are listed on the cover.

STATEMENT OF RELATED CASES

None.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER

OPINIONS BELOW

The Opinion of the Court of Appeals for the Federal Circuit denying the petition for attorneys fees under the Equal Access to Justice Act is unpublished and shown in Appendix 1a. The underlying decision is *Procopio v. Wilkie*, which is reported at 913 F.3d 1371 (Fed. Cir. 2019) and as shown in Appendix 9a.

.

JURISDICTION

These issues are properly before the Supreme Court of the United States pursuant to 28 U.S.C. § 1254 and Rule 10 of the Supreme Court rules. The final judgment of the United States Court of Appeals for the Federal Circuit denying the petition was entered on September 25, 2019. Appendix 1a. The submission for filing is within the 90 day requirement of Rule 13.1 of the Supreme Court Rules. This proceeding does not question the constitutionality of any Act of Congress or any State Legislature. Consequently, the provisions of Rule 29.4(b) and (c) do not apply.

RELEVANT PROVISIONS INVOLVED (see appendix)

INTRODUCTION

Congress has long required that the attorneys fees for meritorious cases that rest on the backs of everyday Americans be shifted to the United States when, as here, the government has been proven to be in error. Al Procopio is a disabled veteran who has been engaged in a decades long fight to obtain his earned benefits. Fighting against the entire weight of the federal government, Procopio finally prevailed by

successfully arguing the error of the Secretary's position. Using the precepts of international law and statutory construction, Procopio overcame the odds and gained benefits for himself and up to 90,000 additional veterans.

Applying an over technical interpretation of the "substantially justified" language of the Equal Access to Justice Act goes against principals of fundamental fairness and the intent of Congress. This is especially true in a veteran's case, where Congress and this Court have dictated that any ambiguity in statutory language should be interpreted in favor of the veteran. Veterans should be encouraged to challenge unreasonable and inappropriate VA interpretations and not be punished by having to bear the entire burden of attorneys fees. Often proceeding *pro se* or represented by sole practitioners, the veteran is left to face the overwhelming barrage of legal theories brought by an army of government attorneys. Hiring an experienced veterans law attorney works to even the playing field. When this uneven battle results in a victory for the veteran, the government should be required to assume some or all of the attorneys fees.

While existing precedent may be a defense in an EAJA case, it is not an automatic exclusion for the benefit of the government. When, as here, the government position was clearly wrong there is no basis to find substantial justification.

Since World War II, the United States has promoted a special relationship with its veterans. In enacting the Veteran's Judicial Review Act and Veterans' Benefits Improvement Act of 1988, the legislative history noted:

> 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 by-passed 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 the merits. Even then, [the DVA] is expected to resolve all issues by giving the claimant the benefit of any reasonable doubt. In such a beneficial structure there is no room for such adversarial concepts as cross examination, best evidence rule, hearsay evidence exclusion, or strict adherence to burden of proof. H.R. Rep. No. 100–963, at 13 (1988), *reprinted in* 1988 U.S.C.C.A.N. 5782, 5794–95 (emphasis added).

Here, the court below has taken an inelastic and rigid approach which may jeopardize judicial review of the Secretary's arbitrary decisions by limiting compensation for attorneys. Without allowing or even encouraging attorney participation in the veterans benefits system, veterans will be forced to accept the dictates of the federal bureaucracy without recourse. This not only strips veterans of meaningful review, but creates conflicts with other Circuits. This Court's action is required to resolve between the Federal Circuit and other Circuit Courts of Appeal.

STATEMENT

In 1991, Congress passed the Agent Orange Act, codified at 38 U.S.C. § 1116, granting a presumption of service connection for certain diseases to veterans who "served in the Republic of Vietnam." Since 2002, the VA has refused to grant the presumption of exposure to "Blue Water Navy" veterans who served in bays, harbors and the territorial seas of the Republic of Vietnam.[1] Since then "Blue Water Navy" veterans like Al Procopio have fought a recalcitrant Department of Veterans Affairs in Congress and the courts for their earned benefits. In *Haas v. Peake*, 525F.3d 1168 (Fed. Cir. 2008), a panel of the court below ignored the plain meaning of the statute and the pro-claimant canon recognized by *Boone v. Lightner*, 319 U.S. 561, 575 (1943). In a 2-1 decision the *Haas* court below applied *Chevron*[2] deference to the VA's decision to deny the presumption of exposure to those who served off the coastline. On rehearing, the *Haas* Court noted that they did not apply the pro-veteran canon of construction required by *Henderson ex rel. Henderson v. Shinseki* 131 S.Ct.1197 (2011). *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir 2008). Additionally, *Haas* only addressed the area bounded by the Vietnam Service Medal demarcation line, and did not specifically speak to the territorial sea of the Republic of Vietnam.

---

[1] reviously the crews of ships operating within the Vietnam Service Medal demarcation area, approximately 100 nautical miles from shore, were granted the presumption.

[2] The *Chevron* Court found that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer, and the principle of deference to administrative interpretations. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 844 (1984).

In the instant case, an *en banc* Court overruled *Haas* in a 9-2 decision and found for Mr. Procopio.

Appellant hereby filed an application for an award under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d), for reasonable attorneys' fees and expenses incurred by Appellant in this litigation.

The veteran served in the U.S. Navy from September 1963 to August 1967. He was assigned to the *U.S.S. Intrepid*, (CV-11), an aircraft carrier, from November 1964 through July 1967. In July 1966, the *Intrepid* was deployed off the coast of Vietnam within, the territorial sea of that nation.

In October 2006, Mr. Procopio sought entitlement to service connection for diabetes mellitus. In October 2007, Mr. Procopio sought entitlement to service connection for prostate cancer. Both claims were denied and Mr. Procopio submitted his Notice of Disagreement (NOD).

Mr. Procopio's claims were subsequently transferred to the Board of Veterans Appeals. In September 2010, the Board held a hearing. In March 2011, the Board issued a decision denying service connection for prostate cancer and diabetes, based on herbicide exposure. This decision was based on their interpretation that Mr. Procopio "did not serve or visit on-shore in Vietnam" and was "not exposed to herbicide while on active duty."

Mr. Procopio appealed the Board's decision to the Court of Veterans Claims and, in October 2012, the Court vacated and remanded the Board's decision. *Procopio v. Shinseki*, 26 Vet.App. 76 (2012). A panel of the court below held that remand was warranted because Mr. Procopio was not provided with an adequate Board hearing.

In March 2013, the Board remanded Mr. Procopio's claims for further adjudication and development, to include additional VA notice. Additional evidence was received, including the deck log book of the U.S.S. *Intrepid*, showing the ship's deployment off the coast of Vietnam commencing on July 1, 1966, at Yokosuka, Japan, and ending on July 31, 1966, at Dixie Station, in the South China Sea to include the territorial sea of the Republic of Vietnam. A hearing was held on November 13, 2014.

In July 2015, the Board issued the decision denying both claims. The court below affirmed in a non-precedential decision on December 12, 2016. This appeal followed.

On April 26, 2017, Appellant filed a Petition for an *en banc* hearing. The basis of the Petition was the Appellant's intent to argue that *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008) should be overruled. Appellant argued that *Haas* should be overruled or limited to its facts because it violated the plain meaning of the statute and did not apply the pro-claimant canon of statutory construction reiterated by *Henderson v. Shinseki* 131 S.Ct. 1197, 1206 (2011). On June 12, 2017, the court denied the petition, after vigorous opposition by the Secretary.

Oral argument was held on May 4, 2018 before a panel of three Judges. Subsequently the Court ordered supplemental briefing. On August 16, 2018, the Court *sua sponte* ordered *en banc* consideration. Another oral argument was heard on December 7, 2018. The opinion reversing and remanding the case was issued on January 29, 2019.

On September 25, the court below denied petitioner's request for attorneys fees under EAJA

despite a strong dissent by Judge O'Malley. Appendix 3a-8a.

REASONS FOR GRANTING THE PETITION

I. This Court Should Grant *Certiorari* to Resolve an Important Point of Law Concerning the Applicability of the "Substantially Justified" Standard In Adjudicating Petitions for Attorneys Fees Under the Equal Access to Justice Act In Veterans Benefits Cases.

A. The Court Below's Interpretation of "Substantially Justified" Does Not Comport With the Intent of Congress.

In matters of statutory construction the Court's duty is to give effect to the intent of Congress beginning with the literal meaning of words employed. *Flora v. United States*, 357 U.S. 63, 65, 78 S. Ct. 1079, 1081, 2 L. Ed. 2d 1165 (1958), *on reh'g*, 362 U.S. 145, 80 S. Ct. 630, 4 L. Ed. 2d 623 (1960). At issue here is the definition that should be ascribed to the term "substantially justified." This Court has held that the government's position would satisfy a *reasonable* person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). Effectively the Court has adopted an objective or "reasonable person" standard.

This rule seems to fly in the face of the plain meaning of the statute, however. It is well settled that "[w]ords are to be given the meaning that proper grammar and usage would assign them. *Nielsen v. Prep.*, 139 S. Ct. 954, 965, 203 L. Ed. 2d 333 (2019).

As Judge O'Malley noted in her concurrence, Congress could have, but did not, adopt a reasonableness standard. Appendix 4a. As Judge O'Malley pointed out, the Senate Judiciary Committee considered and rejected an amendment" to replace "substantially" with "reasonably." *Pierce*, 487 U.S. at 576 (Brennan, J., concurring) (citing S. Rep. No. 96-253, at 8 (1979)).

The reasoned O'Malley concurrence went on to say:

> I would instead adopt a standard that breathes life back into the text and purpose of the EAJA. At the very least, I would adopt a standard that recognizes that the statutory language requires something more than reasonableness. The term "substantially" precedes and thus modifies "justified." Accordingly, the word "substantially" must do some work in defining precisely how justified the government's position must be. The Supreme Court has noted that the word "substantially" can have two definitions.
>
> *Pierce*, 487 U.S. at 564. It can mean "[c]onsiderable in amount, value, or the like; large." *Id.* (citing Webster's New Int'l Dictionary 2514 (2d ed. 1945)). Or, it can mean "[t]hat is such in substance or in the main," *id.*, as in, having a "firm foundation," *id.* at 577 (Brennan J., concurring). Notably, neither definition invokes a reasonableness standard and instead connotes something more than mere reasonableness. In fact, "'reasonable' simply means 'not absurd,' 'not ridiculous,' 'not conflicting with reason.'" *Riddle v. Sec'y of Health & Human Servs.*, 817 F.2d 1238 (6th Cir. 1987) (Jones, J.) (quoting 1 Webster's

> Third New Int'l Dictionary Unabridged 1892 (1965)). And, as Justice Brennan noted in his concurrence in *Pierce*, "substantially justified" reflects Congress's attempt to occupy a middle ground between those who would award fees whenever the government loses and those who would award fees only when the government's position was not reasonable. 487 U.S. at 578 (Brennan J., concurring) (citing S. Rep., at 2–3). Thus, the plain meaning of the statutory text requires that the government's position be justified by a considerable amount or, at least, that it have a solid foundation in substance.

(Appendix 4a-5a).

Here the VA Secretary denied earned benefits to tens of thousands of veterans based on a conducted interpretation of the Agent Orange Act that violated international law and this Court's precedent. They disregard the canons of statutory interpretation, recognized by this Court, in their opposition to this request. Unfortunately, the court below took a narrow view of the

B. In Veterans Matters, the Court Below Should Interpret Statutes Liberally In Favor of the Veteran As Required By the Pro-Veteran Canon of Construction.

The pro-claimant or pro-veteran canon has been repeatedly recognized as an accepted canon of statutory construction. This Court unanimously re-affirmed "the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." *Henderson ex rel. Henderson v. Shinseki* 561 U.S.

428, 441, 131 S.Ct. 1197, 1206 (2011). *See, also*, *Gamble v. Shinseki*, 576 F.3d 1307, 1317 (Fed. Cir.2009). The *Gamble* court described the process as uniquely pro-claimant." *Id.* at 1316.

Since the days of World War II, the United States, has properly recognized that "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." *Fishpole* v. *Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946) (citing *Boone* v. *Lightner*, 319 U.S. 561, 575 (1943). Military veterans have "been obliged to drop their own affairs and take up the burdens of the nation" (*Boone*, 319 U.S. at 575), "subjecting themselves to the mental and physical hazards as well as the economic and family detriments which are peculiar to military service" (*Johnson* v. *Robison*, 415 U.S. 361, 380 (1974)). The United States adopted the "long standing policy of compensating veterans for their past contributions by providing them with numerous advantages." *Regan* v. *Taxation with Representation*, 461 U.S. 540, 550-551 (1983). This led to the pro-claimant canon which requires interpretative ambiguities to be resolved in favor of the beneficiaries. See, *e.g.*, *Brown* v. *Gardner*, 513 U.S. 115, 118 (1994).

Accordingly, even if there was some ambiguity to the term "substantially justified" any ambiguity must be resolved in favor of the veteran.

Nothing in this Court's jurisprudence limits the pro-veteran canon. It's application to EAJA requests is an appropriate utilization of the canon. Requiring the government to bear the cost or a substantial portion of the cost of proving them wrong, is fundamentally fair and may help them to engage in a more pro-veteran attitude when interpreting statutes and regulations.

Consequently the Court should grant *certiorari* to resolve this important point of law.

II. This Court Should Grant *Certiorari* to Resolve an Important Point of Law and Judicial Conflict Narrowing the Definition of "Substantially Justified," to Exclude Cases Where the Government Was Clearly Wrong.

A. The VA Was Placed On Notice That Their Position Was Not Substantially Justified.

In her concurrence Judge O'Malley noted that the Secretary's position was "plainly wrong." Appx 6a. The *Procopio* court, sitting *en banc* clearly stated that "Congress has spoken directly to the question of whether Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam," "served in the Republic of Vietnam." He did." *Procopio v. Wilkie*, 913 F.3d 1371, 1375 (Fed. Cir. 2019). There was no ambiguity in the Court's finding.

The Convention on the Territorial Sea and Contiguous Zone, [1958] 15 U.S.T. 1607, T.I.A.S. No. 5639 clearly states that the territorial sea was part of the sovereign territory of the nation state. The pertinent provisions of the Convention were adopted by this Court in *United States v. California*, 332 U.S. 19, 33, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947).

Additionally, *Gray v. McDonald* 27 Vet.App. 313 (2015) redefined the Blue Water Navy problem for the VA. The *Gray* court has found that the Secretary acted irrationally in excluding the bays and harbors from the presumption of exposure. The VA had historically argued that spraying took place only over land and not over the water areas. In doing so, they limited the

presumption of exposure to those who set foot on the ground or entered the rivers.

Gray gives rise to the question of where the inland river ends. Certainly there is an area where the fresh water of the river mixes with the salt water of the sea. While the salinity will increase as the river discharge plume goes farther and farther from land, the VA failed to ascertain the point where the river discharge ceases. That plume can be significant and actually can extend for miles.

In *Gray*, the veterans court found the VA definition of inland waters irrational. *Gray*, 27 Vet.App. At 326. The *Gray* court went on to vacate the regulation and direct the Secretary to 'exercise its fair and considered judgment to define inland waterways in a manner consistent with the regulation's emphasis on the probability of exposure." *Id* at 327. The Secretary defied this invitation and doubled down on his previous exclusions. Accordingly the rule prior to *Procopio* today remained "boots on the ground" without any rational analysis of where the river discharge ends.

Accordingly, the VA was placed on notice that their "boots on the ground" policy was erroneous. Their arbitrary decision to pursue this irrational policy in the *Procopio* case was not justified, substantially or otherwise.

B. The Failure of the *Haas* Court to Use the Pro-Veteran Canon of Statutory Construction Was Sufficient to Place the VA On Notice That Their Litigation Position Was Not Substantially Justified.

As discussed *supra*, this Court has historically found that when dealing with veterans issues,

interpretations of statutes and regulations should be construed in favor of the veteran. In *Haas*, *supra*, the Federal Circuit specifically refused to apply the pro-veterans canon. *Haas v. Peake*, 544 F.3d 1306, 1308 (Fed. Cir. 2008). In light of this Court's validation of the canon in *Henderson*, *supra*., the VA was on notice that *Haas* was clearly erroneous, or at best, limited to its facts.

The pro-claimant canon stands out as a public policy designed to ensure that veterans obtain their earned benefits. It is based on the belief that a thankful nation must care, in the words of Abraham Lincoln, "to care for him who shall have borne the battle and for his widow, and his orphan." This maxim, although adopted as the VA motto, and adorns the outside wall of VA Headquarters, https://www.va.gov/opa/publications/celebrate/vamotto.pdf, has been widely ignored by the burgeoning bureaucracy the VA has become. Nevertheless, the VA should have reviewed their litigation position in light of this venerated canon of construction. Their failure to do so precludes a finding that their position was substantially justified.

C. The Clearly Erroneous *Haas* Decision Does Not Sustain the VA Position as Substantivally Justified.

It is well settled that in the Federal Circuit. the Government's position must be evaluated with respect to both the underlying agency action that gave rise to the civil litigation and the arguments made during the litigation itself. *DGR Associates, Inc. v. United States*, 690 F.3d 1335, 1340 (Fed. Cir. 2012)

The burden of establishing that its position was substantially justified is on the government. *Doty v.*

United States, 71 F.3d 384, 385 (Fed.Cir.1995). This includes proof that the government's position was "justified in substance or in the main," and had a "reasonable basis both in law and fact." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988). This requires the government to establish that it adopted a reasonable, albeit incorrect, interpretation of a particular statute or regulation. *Id.* at 566 n. 2. (emphasizing that an erroneous position could be substantially justified "if a reasonable person could think it correct").

Other Circuit Courts of Appeal have taken a more liberal approach, holding that the government's position is not substantially justified if the statutory interpretation is contrary to the plain language of the statue. *See, Role Models Am., Inc. v. Brownlee*, 353 F.3d 962, 967 (D.C. Cir.2004) (concluding that the government's position was not substantially justified where "it was wholly unsupported by the text of the applicable regulations" (citations and internal quotation marks omitted); *Halverson v. Slater*, 206 F.3d 1205, 1212 (D.C.Cir.2000) (holding that the government's position was not substantially justified where it was contrary to "the easily ascertainable plain meaning of" a statute); *Marcus v. Shalala*, 17 F.3d 1033, 1038 (7th Cir.1994) (concluding that the government's position was not substantially justified where it was "manifestly contrary to the statute." Notably, even this Court' decision in *Pierce*, relied upon by the government and the court below, does not include an automatic rejection of an EAJA claim if it simply based on the fact that a controlling precedent existed. *Pierce*, 487 U.S. at 569, 108 S.Ct. 2541. Nor is the fact that the government prevailed in the court below dispositive on whether they were substantially justified. *Cmty. Heating & Plumbing*

Co. v. Garret, 2 F.3d 1143, 1145 (Fed.Cir.1993).. Instead, the Court must consider all pertinent factors.

As discussed *supra.*, the government litigation position was not supported by the plain language of the statute. Even the *Haas* court did not hold that the statutory language supported the government. Instead they found the statute ambiguous, allowing it to move to step two of *Chevron*. The Secretary had the responsibility to review the statute as part of their litigation strategy and to temper that strategy with the plain meaning of the language chosen by Congress. The plain meaning of the statute must be derived from both text and structure. *Norfolk Dredging Co., Inc. v. United States*, 375 F.3d 1106, 1110 (Fed.Cir.2004). *See*, *also*, *McEntee v. Merit Sys. Prot. Bd.*, 404 F.3d 1320, 1328 (Fed. Cir. 2005). Applying the plain meaning canon, the Court found that "Congress has spoken directly to the question of whether those who served in the 12 nautical mile territorial sea of the "Republic of Vietnam" are entitled to § 1116's presumption if they meet the section's other requirements. They are." *Procopio*, 913 F.3d at 1380–81. Given that the Secretary's position was contrary to the plain meaning of the statute, the inquiry stops and the Court must find their position substantially unjustified. *See, e.g. Patrick v. Shinseki*, *supra.*

CONCLUSION

For the reasons delineated herein, petitioner prays that a writ of certiorari be issued to the United States Court of Appeals for the Federal Circuit.

JOHN B. WELLS
Counsel of Record
LAW OFFICE OF JOHN B. WELLS
769 ROBERT BLVD., SUITE 201D
SLIDELL, LA 70458
985-641-1855
JohnLawEsq@msn.com

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALFRED PROCOPIO, JR.,
Claimant-Appellant
v.
ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee
2017-1821

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

ON MOTION

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, and STOLL, Circuit Judges.*

Order for the court filed PER CURIAM. Concurrence in the denial of fees filed by *Circuit Judge* O'MALLEY.
PER CURIAM.

ORDER

Upon consideration of Appellant Alfred Procopio, Jr.'s motion for attorney fees and expenses under the Equal Access to Justice Act,

IT IS ORDERED THAT:

Appellant's motion is denied.

FOR THE COURT
Date September 25, 2019

/s/ Peter R. Marksteiner
Peter R. Marksteine
Clerk of Court

Footnote

*Circuit Judge Hughes did not participate.

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

ALFRED PROCOPIO, JR.,
Claimant-Appellant
v.
ROBERT WILKIE, SECRETARY OF VETERANS AFFAIRS,
Respondent-Appellee

2017-1821

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

O'MALLEY, *Circuit Judge*, concurring in denial of fees.

Today, the court concludes that the government was "substantially justified" in maintaining for over a decade its position that the phrase "Republic of Vietnam" does not encompass the Republic of Vietnam's own territorial waters. But the plain language of the Agent Orange Act, 38 U.S.C. § 1116, unambiguously provides otherwise, despite the government's own failed attempts to inject ambiguity into the statute. *Procopio v. Wilkie*, 913 F.3d 1371, 1376 (Fed. Cir. 2019) (en banc). And, in that decade's time, countless veterans of the Vietnam War who were presumptively exposed to Agent Orange were denied their rightful benefits under § 1116 to great personal detriment. Thus, while I agree with my colleagues that both Supreme Court and our precedent[1] compel us to

deny Procopio's motion for fees under the Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412(d)(1)(A), I write separately to express my belief that the governing interpretation of "substantially justified" sets the bar far too low for the government in a way that is contrary to the plain text of the EAJA and its underlying purpose.

The EAJA provides that we "shall award to a prevailing party . . . fees and other expenses, . . . unless [we] find[] that the position of the United States[2] was *substantially justified*." *Id.* (emphasis added). The Supreme Court has held that the government's position is "substantially justified" if it is "justified to a degree that could satisfy a *reasonable* person." *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (emphasis added). But such a reasonableness standard is unsupported by the text of the statute. Rather, it is cherry-picked from the legislative history. *Id.* at 563– 64 (citing H.R. Rep. No. 96-1434, p. 22 (1980) (Conf. Rep.)). If Congress had meant to impose a reasonableness standard, it would have used the word "reasonable" in the statute. Indeed, "[t]he Senate Judiciary Committee considered and rejected an amendment" to replace "substantially" with "reasonably." *Pierce*, 487 U.S. at 576 (Brennan, J.,concurring) (citing S. Rep. No. 96-253, at 8 (1979)).

I would instead adopt a standard that breathes lifeback into the text and purpose of the EAJA. At the veryleast, I would adopt a standard that recognizes that the statutory language requires something more than reasonableness. The term "substantially" precedes and thus modifies "justified." Accordingly, the word "substantially" mus tdo some work in defining precisely how justified the government's position must be. The Supreme Court has noted that the word "substantially" can have two definitions. *Pierce*, 487

U.S. at 564. It can mean "[c]onsiderable in amount, value, or the like; large." *Id.* (citing Webster's New Int'l Dictionary 2514 (2d ed. 1945)). Or, it can mean "[t]hat is such in substance or in the main," *id.*, as in, having a "firm foundation," *id.* at 577 (Brennan J., concurring). Notably, neither definition invokes a reasonableness standard and instead connotes something more than mere reasonableness. In fact, "'reasonable' simply means 'not absurd,' 'not ridiculous,' 'not conflicting with reason.'" *Riddle v. Sec'y of Health & Human Servs.*, 817 F.2d 1238 (6thCir. 1987) (Jones, J.) (quoting 1 Webster's Third New Int'l Dictionary Unabridged 1892 (1965)). And, as Justice Brennan noted in his concurrence in *Pierce*, "substantially justified" reflects Congress's attempt to occupy a middle ground between those who would award fees whenever the government loses and those who would award fees only when the government's position was not reasonable. 487 U.S. at 578 (Brennan J., concurring) (citing S. Rep., at 2–3). Thus, the plain meaning of the statutory text requires that the government's position be justified by a considerable amount or, at least, that it have a solid foundation in substance.

This is consistent with the purpose underlying the EAJA, which recognizes that the average litigant should not have to bear the financial burden of correcting the government's error. *Gavette v. Office of Pers. Mgmt.*, 785 F.2d 1568, 1571 (Fed. Cir. 1986); *Comm'r, I.N.S. v. Jean*, 496 U.S. 154, 163 (1990); H.R. Rep. No. 96-1418, at 10 (1980)("The Bill thus recognizes that *the expense of correcting error* on the part of the government should not rest wholly on the party whose willingness to litigate or adjudicate has helped to define the limits of federal authority." (emphasis added)). The EAJA "rests on the premise that a party who chooses

to litigate an issue against the government is not only representing his or her own vested interest but is also refining and formulating public policy." H.R. Rep. 96-1418, at 10.

This is the very type of case for which Congress enacted the EAJA. The government's position here was plainly wrong. We held in *Procopio* that "[t]he intent of Congress is clear from its use of the term 'in the Republic of Vietnam,' which all available international law unambiguously confirms includes its territorial sea." *Procopio v. Wilkie*, 913 F.3d 1371, 1375 (Fed. Cir. 2019). To the extent there was *any* doubt regarding the scope of the "Republic of Vietnam," the government's position was still unjustified because it should have resolved any such doubt in favor of the veterans under the pro veteran canon of construction. *Id.* at 1383 (O'Malley, J., concurring) (citing *Henderson v. Shinseki*, 562 U.S. 428, 441 (2011)). Thus, the government's position here lacked a firm foundation.[3]

Mr. Procopio is the very type of prevailing party, moreover, for whom Congress enacted the EAJA. Mr. Procopio changed the law for all Vietnam War veterans who served in the Republic of Vietnam's territorial waters. And his financial burden in doing so was only increased by the government's failure to codify its tenuous position into a type of rule whose validity we may review on its face rather than as applied to any individual case. Indeed, in *Gray v. Sec'y of Veterans Affairs*, 875 F.3d 1102, 1109 (Fed. Cir. 2017),"Petitioners sought direct review in this court" of the government's interpretation of § 1116 in order "to bypass yet another years-long course of individual adjudications or petitions for rulemaking." *Id.* We sympathized, finding Petitioners' urgency understandable "[g]iven the health risks that many of

these veterans face" and "the costs that [the] outcome imposes on Petitioners and the veterans they represent." *Id.* But, "constrained by the narrow scope of the jurisdiction that Congress has granted to us," we dismissed Petitioners' facial challenge to "await an individual action to assess the propriety of the VA's interpretation of the Agent Orange Act and attendant regulations." *Id.*

As it happens, that "individual action" became Mr. Procopio's case. In this way, Mr. Procopio's prolonged litigation costs resulted, at least in part, from the government's use of Congress's jurisdictional statute as a shield for what the government must have understood was increasingly obvious—its position was a weak one. The access to justice for veterans who served in the territorial waters of Vietnam was far from equal under these circumstances. Thus, while I agree that we must deny Mr. Procopio's motion for fees under governing law, I write separately to interpretation of the EAJA, it does not, in my view, justify a disallowance of them. Nor does it render the position taken by the government at all stages of *this* litigation "substantially justified."

Footnotes

[1] *See Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *Owen v. United States*, 861 F.2d 1273, 1274 (Fed. Cir. 1988).

[2] The EAJA defines the "position of the United States" to mean, "in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based." 28 U.S.C. § 2412(d)(2)(D).

[3] I recognize that our decision in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008), upholding the government's treatment of these veterans, may have encouraged—for a time—the government's adherence to its position. But our analysis there stood upon layers and layers of what we now know are questionable deference principles, aggravated by the government's promulgation of its own ambiguous regulations—none of which actually interpreted the relevant statutory language. While the decision in *Haas* might be relevant to the amount of fees recoverable under a correct express my view that the statutory text requires more from the government under the EAJA.

913 F.3d 1371
United States Court of Appeals, Federal Circuit.

Alfred PROCOPIO, Jr., Claimant-Appellant
v.
Robert WILKIE, Secretary of Veterans Affairs,
Respondent-Appellee
2017-1821
Decided: January 29, 2019

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

Attorneys and Law Firms

Melanie L. Bostwick, Orrick, Herrington & Sutcliffe LLP, Washington, DC, argued for claimant-appellant. Also represented by Thomas Mark Bondy, Robert Manhas; Matthew R. Shahabian, New York, NY; John B. Wells, Law Office of John B. Wells, Slidell, LA.

Eric Peter Bruskin, Commercial Litigation Branch, Civil Division, United States Department of Justice, Washington, DC, argued for respondent-appellee. Also represented by Joseph H. Hunt, Robert E. Kirschman, Jr., Martin F. Hockey, Jr.; Brian D. Griffin, Brandon A. Jonas, Office of General Counsel, United States Department of Veterans Affairs, Washington, DC.

Catherine Emily Stetson, Hogan Lovells US LLP, Washington, DC, for amici curiae National Organization of Veterans' Advocates, Inc., Paralyzed Veterans of America, Military Officers Association of America, AMVETS, Veterans and Military Law

Section, Federal Bar Association. Also represented by William David Maxwell. Amicus curiae National Organization of Veterans' Advocates, Inc. also represented by Chris Attig, Attig Steel, PLLC, Little Rock, AR.

Kenneth M. Carpenter, Law Offices of Carpenter Chartered, Topeka, KS, for amicus curiae Joseph A. Taina.

Glenn R. Bergmann, Bergmann Moore, LLC, Bethesda, MD, for amicus curiae The American Legion. Also represented by James Daniel Ridgway.

Angela K. Drake, The Veterans Clinic at The University of Missouri School of Law, Columbia, MO, for amicus curiae National Law School Veterans Clinic Consortium.

Doris Hines, Finnegan, Henderson, Farabow, Garrett & Dunner, LLP, Washington, DC, for amicus curiae Disabled American Veterans. Also represented by Charles Collins-Chase, Sean Damon, Ronald Lee Smith.

Stanley Joseph Panikowski, III, DLA Piper LLP (US), San Diego, CA, for amici curiae Blue Water Navy Vietnam Veterans Association, Association of the United States Navy, Fleet Reserve Association. Also represented by Jacob Anderson, Erin Gibson.

Stephen Blake Kinnaird, Paul Hastings LLP, Washington, DC, for amici curiae National Veterans Legal Services Program, Veterans of Foreign Wars of the United States. Amicus curiae National Veterans Legal Services Program also represented by Barton F. Stichman, National Veterans Legal Services Program, Washington, DC.

Before Prost, Chief Judge, Newman, Lourie, Dyk, Moore, O'Malley, Reyna, Wallach, Taranto, Chen, and Stoll, Circuit Judges.

Opinion

Opinion for the court filed by Circuit Judge MOORE, in which Chief Judge Prost and Circuit Judges Newman, O'Malley, Reyna, Wallach, Taranto, and Stoll join.

Concurring opinion filed by Circuit Judge Lourie.

Concurring opinion filed by Circuit Judge O'Malley.

Dissenting opinion filed by Circuit Judge Chen, in which Circuit Judge Dyk joins.

Moore, Circuit Judge.

Alfred Procopio, Jr., appeals a decision of the Court of Appeals for Veterans Claims denying service connection for prostate cancer and diabetes mellitus as a result of exposure to an herbicide agent, Agent Orange, during his Vietnam Warera service in the United States Navy. Because we hold that the unambiguous language of 38 U.S.C. § 1116 entitles Mr. Procopio to a presumption of service connection for his prostate cancer and diabetes mellitus, we reverse.

Background

In 1991, Congress passed the Agent Orange Act, codified at 38 U.S.C. § 1116, granting a presumption of service connection for certain diseases to veterans who "served in the Republic of Vietnam":

> [A] disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975; and [B] each additional disease (if any) that (i) the Secretary determines in regulations prescribed under this section warrants a presumption of service-connection by reason of having positive association with exposure to an herbicide agent, and (ii) becomes manifest within the period (if any) prescribed in such regulations in a veteran who, during active military, naval, or air service, *served in the Republic of Vietnam* during the period beginning on January 9, 1962, and ending on May 7, 1975, and while so serving was exposed to that herbicide agent, shall be considered to have been incurred in or aggravated by such service, notwithstanding that there is no record of evidence of such disease during the period of such service.

38 U.S.C. § 1116(a) (emphasis added). Under § 1116(f), such a veteran "shall be presumed to have been exposed during such service to [the] herbicide agent ... unless there is affirmative evidence to establish that the veteran was not exposed to any such agent during that service."

In 1993, the Department of Veterans Affairs issued regulations pursuant to § 1116 that stated " 'Service in the Republic of Vietnam' includes service in the waters offshore and service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6) (1993)

("Regulation 307"). In 1997 in a General Counsel opinion about a different regulation, the government interpreted Regulation 307 as limiting service "in the Republic of Vietnam" to service in waters offshore the landmass of the Republic of Vietnam only if the service involved duty or visitation on the landmass, including the inland waterways of the Republic of Vietnam, ("foot-on-land" requirement). Gen. Counsel Prec. 27-97 (July 23, 1997); 62 Fed. Reg. 63,603, 63,604 (Dec. 1, 1997).

A panel of this court considered the government's interpretation of § 1116 in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). Mr. Haas had served in waters offshore the landmass of the Republic of Vietnam but was denied § 1116's presumption of service connection because he could not meet the government's foot-on-land requirement. *Id.* at 1173. Accordingly, we were asked to decide whether "serv[ice] in the Republic of Vietnam" in § 1116 required presence on the landmass or inland waterways of the Republic of Vietnam. *Id.* at 1172.

We applied the two-step framework of *Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 842–43, 104 S.Ct. 2778, 81 L.Ed.2d 694 (1984), to § 1116 and Regulation 307. At *Chevron* step one, the *Haas* court held that § 1116 was ambiguous as applied to veterans who, like Mr. Haas, served in the waters offshore the landmass of the Republic of Vietnam but did not meet the foot-on-land requirement. 525 F.3d at 1184. At *Chevron* step two, the *Haas* court held Regulation 307 was "a reasonable interpretation of the statute" but itself ambiguous. *Id.* at 1186. It then "[a]ppl[ied] the substantial deference that is due to an agency's interpretation of its own regulations" under Auer v. Robbins, 519 U.S. 452, 461–

63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), to uphold the government's interpretation of Regulation 307, i.e., the foot-on-land requirement. Id. at 1195. See also Haas v. Peake, 544 F.3d 1306 (Fed. Cir. 2008).

Mr. Procopio served aboard the U.S.S. Intrepid from November 1964 to July 1967. In July 1966, the Intrepid was deployed in the waters offshore the landmass of the Republic of Vietnam, including its territorial sea.[1] Mr. Procopio sought entitlement to service connection for diabetes mellitus in October 2006 and for prostate cancer in October 2007 but was denied service connection for both in April 2009. Diabetes mellitus is listed in the statute under paragraph (2) of § 1116(a), and prostate cancer is listed in the pertinent regulation, 38 C.F.R. § 3.309(e). The Board of Veterans' Appeals likewise denied him service connection in March 2011 and again in July 2015, finding "[t]he competent and credible evidence of record is against a finding that the Veteran was present on the landmass or the inland waters of Vietnam during service and, therefore, he is not presumed to have been exposed to herbicides, including Agent Orange," under § 1116. The Veterans Court affirmed, determining it was bound by our decision in *Haas*. Mr. Procopio timely appealed.

A panel of this court heard oral argument on May 4, 2018, and on May 21, 2018, the parties were directed to file supplemental briefs on "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." On August 16, 2018, the court sua sponte ordered the case be heard en banc. We asked the parties to address two issues:

> Does the phrase "served in the Republic of Vietnam" in ... § 1116 unambiguously include

> 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?
>
> What role, if any, does the pro-claimant canon play in this analysis?

In addition to the parties' briefs, we received seven amicus briefs. The en banc court heard oral argument on December 7, 2018.

Discussion

Section 1116 extends the presumption of service connection to veterans who "served in the Republic of Vietnam" during a specified period if they came down with certain diseases. At issue is whether Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam" during the specified period, "served in the Republic of Vietnam" under § 1116.

Chevron sets forth a two-step framework for interpreting a statute, like § 1116, that is administered by an agency. 467 U.S. at 842, 104 S.Ct. 2778. Step one asks "whether Congress has directly spoken to the precise question at issue." *Id.* "If the intent of Congress is clear, that is the end of the matter," and we "must give effect to the unambiguously expressed intent of Congress." *Id.* at 842–43, 104 S.Ct. 2778. If, on the other hand, "the statute is silent or ambiguous with respect to the specific issue," we proceed to *Chevron* step two, at which we ask "whether the agency's answer is based on a permissible construction of the statute." *Id.* at 843, 104 S.Ct. 2778.

Here, we determine at *Chevron* step one that Congress has spoken directly to the question of whether Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam," "served in the Republic of Vietnam." He did. Congress chose to use the formal name of the country and invoke a notion of territorial boundaries by stating that "service *in* the Republic of Vietnam" is included. The intent of Congress is clear from its use of the term "in the Republic of Vietnam," which all available international law unambiguously confirms includes its territorial sea. Because we must "give effect to the unambiguously expressed intent of Congress," we do not reach *Chevron* step two.

In 1954, the nation then known as Vietnam was partitioned by a "provisional military demarcation line" into two regions colloquially known as "North Vietnam" and "South Vietnam." Geneva Agreements on the Cessation of Hostilities in Vietnam, art. 1, July 20, 1954, 935 U.N.T.S. 149 ("Geneva Accords"). In 1955, South Vietnam was formally named, by proclamation of its president, the "Republic of Vietnam." *Provisional Constitutional Act Establishing the Republic of Viet-Nam*, Oct. 26, 1955, reprinted in A.W. Cameron (ed.), *Viet-Nam Crisis: A Documentary History, Volume I: 1940-1956* (1971).

International law uniformly confirms that the "Republic of Vietnam," like all sovereign nations, included its territorial sea. This was true in 1955 when the "Republic of Vietnam" was created. Geneva Accords at art. 4 (extending the provisional military demarcation line into the "territorial waters"). And this was true in 1991 when Congress adopted the Agent Orange Act. In 1958, the United States entered into the Convention on the Territorial Sea and the Contiguous Zone ("1958 Convention"), agreeing 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), 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958); *see also* *United States v. California*, 381 U.S. 139, 165, 85 S.Ct. 1401, 14 L.Ed.2d 296 (1965) (stating the 1958 Convention provides "the best and most workable definitions available" for defining coastal boundaries); Legal Issues Raised by the Proposed Presidential Proclamation to Extend the Territorial Sea, 12 O.L.C. 238, 247 (1988) ("[T]he modern view is that the territorial sea is part of a nation and that a nation asserts full sovereignty rights over its territorial sea ...."). In 1982, the United Nations Convention on the Law of the Sea ("UNCLOS") echoed the 1958 Convention, stating "[t]he sovereignty of a coastal State extends ... to an adjacent belt of sea, described as the territorial *1376 sea," having a breadth "not exceeding 12 nautical miles." Part II, arts. 2, 3, 1833 U.N.T.S. 397, 400 (Dec. 10, 1982). And the Restatement of Foreign Relations Law in effect when the Agent Orange Act was passed provided that "[a] state has complete sovereignty over the territorial sea, analogous to that which it possesses over its land territory, internal waters, and archipelagic waters," meaning "[t]he rights and duties of a state and its jurisdiction are the same in the territorial sea as in its land territory." Restatement (Third) of Foreign Relations Law §§ 511, cmt. b, 512, cmt. a (1987); *see also* *id.* ("[I]nternational law treats the territorial sea like land territory ...."); Presidential Proclamation 5928, 103 Stat. 2981 (1988) ("International law recognizes that coastal nations may exercise sovereignty and jurisdiction over their territorial seas.").[2]

Thus, all available international law, including but not limited to the congressionally ratified 1958 Convention, confirms that, when the Agent Orange Act was passed in 1991, the "Republic of Vietnam" included both its landmass and its 12 nautical mile territorial sea.[3] The government has pointed to no law to the contrary. This uniform international law was the backdrop against which Congress adopted the Agent Orange Act. By using the formal term "Republic of Vietnam," Congress unambiguously referred, consistent with that backdrop, to both its landmass and its territorial sea.[4] We also note that the statute expressly includes "active military, naval, or air service ... in the Republic of Vietnam," § 1116(a)(1), reinforcing our conclusion that Congress was expressly extending the presumption to naval personnel who served in the territorial sea. We conclude at *Chevron* step one that the intent of Congress is clear from the text of § 1116: Mr. Procopio, who served in the territorial sea of the "Republic of Vietnam," is entitled to § 1116's presumption.

We find no merit in the government's arguments to the contrary. Its primary argument is that *it* injected ambiguity into the term "Republic of Vietnam" prior to the Agent Orange Act by promulgating two regulations, 38 C.F.R. § 3.311a(a)(1) ("Regulation 311") and § 3.313(a) ("Regulation 313"). According to the government, Regulation 311 imposed the foot-on-land requirement, but Regulation 313 did not. The government contends that § 1116 codified *both* regulations and that, accordingly, it is ambiguous whether Congress intended to impose the foot-on-land requirement. We are not persuaded.

Regulation 311 created a presumption of service connection for chloracne and later soft-tissue sarcomas

for veterans who served in "the Republic of Vietnam." It stated:

> "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam.

Regulation 313 created a presumption of service connection for Non-Hodgkin's lymphoma for veterans who served in "Vietnam." It stated:

> "Service in Vietnam" includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

The government asks us to infer that Regulation 311 imposed the foot-on-land requirement, and that Regulation 313 did not. This distinction is essential to its argument that § 1116, which codified both, is ambiguous. We do not agree. We do not read Regulation 311, Regulation 313, or even later-adopted Regulation 307 as articulating the government's current foot-on-land requirement. And there is no indication anyone, including the government, did before § 1116 was adopted.

Regulation 311 grants a presumption of service connection for "service in the waters offshore *and* service in other *locations*, *if* the conditions of service involved duty or visitation in the Republic of Vietnam." Regulation 313 grants the presumption for "service in the waters offshore, *or* service in other locations *if* the conditions of service involved duty or visitation in

Vietnam." We do not read these minor grammatical differences to compel the distinction the government urges. At best, the addition of a comma in Regulation 311 permits the clause "if the conditions of service involved duty or visitation in the Republic of Vietnam" to modify both "service in the waters offshore" and "service in other locations." But even if Regulation 311 is so read, it still does not impose the foot-on-land requirement: it covers everyone whose service included duty or visitation "in the Republic of Vietnam," which, under background law, embraces the territorial sea.

That is the straightforward meaning of the regulation even after taking full account of the comma. As the government concedes, the "waters offshore" are broader than the territorial sea. *See* Oral Argument at 55:08–55:19 (government's counsel acknowledging offshore waters "can also include beyond the territorial seas"); *id.* at 55:40–56:10 (government's counsel confirming offshore waters extend beyond the territorial sea); *cf. id.* at 2:00–2:16 (Mr. Procopio's counsel stating "[t]he offshore water is broader than the territorial sea ... and it's an important difference because a nation is sovereign only in its territorial sea."). Regulation 311's requirement of "duty or visitation in the Republic of Vietnam" brings within coverage only a subset of all those who served "offshore," namely, those whose service included presence on land, in the inland waterways, or in the territorial sea, consistent with international law. That is, veterans who served in the waters offshore or in other locations would be eligible for the presumption if during such service they visited the Republic of Vietnam (which is defined as the landmass and territorial sea by international law).

Given the undisputed distinction between offshore waters and territorial seas, we see no basis for incorporating a foot-on-land requirement into Regulation 311. The only discussion of this provision appears in the proposed rulemaking where the government explains that, "[b]ecause some military personnel stationed elsewhere may have been present in the Republic of Vietnam, 'service in the Republic of Vietnam' will encompass *services elsewhere if* *1378 *the person concerned actually was in the Republic of Vietnam*, however briefly." 50 Fed. Reg. at 15,848, 15,849 (Apr. 22, 1985). We see no evidence that the government understood Regulation 311 to include the foot-on-land requirement until *after* the Agent Orange Act was passed. The government first articulated this position in 1997, six years after the Act. Gen. Counsel Prec. 27-97 (July 23, 1997). We cannot read into § 1116 an ambiguity that relies on a distinction made only *after* § 1116 was adopted.

It is undisputed that Regulation 313 covering Non-Hodgkin's lymphoma does not include the foot-on-land requirement, meaning the presumption of service connection for Non-Hodgkin's lymphoma would have applied to veterans who served on the landmass or in the territorial sea. The government asserts that Regulation 311 presumed service connection for diseases—chloracne and soft-tissue sarcomas—linked to herbicide exposure, while Regulation 313 presumed service connection for a disease—Non-Hodgkin's lymphoma—*not* linked to herbicide exposure. But that asserted distinction does not indicate ambiguity in § 1116. Indeed, when Congress enacted § 1116 it expressly extended the presumption to Non-Hodgkin's lymphoma, as well as chloracne and soft-tissue sarcomas. And the government argues that § 1116

intended to codify Regulation 311 and Regulation 313. No fair reading of § 1116 can exclude the very veterans suffering from Non-Hodgkin's lymphoma that were entitled to Regulation 313's presumption, yet the government's (and the dissent's) reading does just that: According to the government, a veteran with Non-Hodgkin's lymphoma who served in the Republic of Vietnam's territorial sea would have been entitled to service connection under Regulation 313, but this same veteran would not be entitled to service connection under § 1116. This cannot be right. We decline to read § 1116, as the dissent urges, to both codify Regulation 313 and erode that regulation's coverage. We see no basis to conclude that Congress chose to reduce the scope of service connection for Non-Hodgkin's lymphoma without explanation.

In short, we do not understand Regulation 311 or Regulation 313 to articulate a foot-on-land requirement. We find no merit to the government's argument that § 1116 is ambiguous because "Congress's codification of the existing regulatory presumptions ... tells, at best, a conflicting story." Appellee's Br. 39–40. In 1991, Congress legislated against the backdrop of international law that had defined the "Republic of Vietnam" as including its territorial sea for decades. The government's foot-on-land requirement, first articulated in 1997, does not provide a basis to find ambiguity in the language Congress chose.

The government also argues the "Republic of Vietnam" in § 1116 does not include its territorial sea because when Congress intends to bring a territorial sea within the ambit of a statute, it says so expressly.[5] But the examples the government points to address *not* a nation's territorial sea, but only "waters adjacent." 10 U.S.C. §§ 3756, 6258, 8756 (extending the Korea

Defense Service Medal to those who "served in the Republic of Korea or the waters adjacent thereto"); Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 513(b) (providing for the publishing of labor statistics on "veterans ... who served ... in naval missions in the waters *1379 adjacent to Vietnam"); 38 U.S.C. § 101(30) (defining the term "Mexican border period" in the case of "a veteran who ... served in Mexico, on the borders thereof, or in the waters adjacent thereto"). While the dissent calls this distinction "speculative," Dissent at 1391, both parties conceded at oral argument that the "waters adjacent" to a nation are distinct from, and extend beyond, its territorial sea. *See* Oral Argument at 26:50-27:18 (Mr. Procopio); *id.* at 55:00–55:15 (government). It is precisely because "waters adjacent" go *beyond* a nation's landmass and territorial sea that Congress needed to specify "waters adjacent" in these statutes. *See*, *e.g.*, *Keene Corp. v. United States*, 508 U.S. 200, 208, 113 S.Ct. 2035, 124 L.Ed.2d 118 (1993) ("[I]t is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion" of "particular language"); *W. Va. Univ. Hosps., Inc. v. Casey*, 499 U.S. 83, 88-92, 111 S.Ct. 1138, 113 L.Ed.2d 68 (1991) (comparing distinct usage of "attorney's fees" and "expert fees" among statutes). These statutes cast no doubt on our conclusion that, by using the formal term "Republic of Vietnam," Congress unambiguously referred, consistent with uniform international law, to both its landmass and its 12 nautical mile territorial sea.

The other statutes the government cites likewise cast no doubt on this conclusion. The government has failed to cite any instance in which the unmodified use of a formal sovereign name has been construed to not include its territorial sea. Instead, the government

would have us infer that because several statutes refer to both the "United States" and its "territorial seas" or "territorial waters," the term "United States" cannot be generally understood to include territorial sea. We see no basis for drawing that inference. As the Supreme Court has observed, there are "many examples of Congress legislating in that hyper-vigilant way, to 'remov[e] any doubt' as to things not particularly doubtful in the first instance." *Cyan, Inc. v. Beaver Cty. Employees Ret. Fund*, —— U.S. ——, 138 S.Ct. 1061, 1074, 200 L.Ed.2d 332 (2018).[6]

Respectfully, the *Haas* court went astray when it found ambiguity in § 1116 based on "competing methods of defining the reaches of a sovereign nation" and the government's urged distinction between Regulations 311 and 313. 525 F.3d at 1184–86. As discussed above, international law uniformly confirms that the "Republic of Vietnam" included its territorial sea. And we cannot read into § 1116 an ambiguity that relies on a distinction between Regulations 311 and 313 made by the government only *after* § 1116 was adopted. *Haas* is overruled.[7]

The parties and amici have differing views on the role the pro-veteran canon should play in this analysis. *See generally Henderson v. Shinseki*, 562 U.S. 428, 441, 131 S.Ct. 1197, 179 L.Ed.2d 159 (2011); *Brown v. Gardner*, 513 U.S. 115, 117-18, 115 S.Ct. 552, 130 L.Ed.2d 462 (1994); *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991); *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285, 66 S.Ct. 1105, 90 L.Ed. 1230 (1946); *Boone v. Lightner*, 319 U.S. 561, 575, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943). Given our conclusion that the intent of Congress is clear from the text of § 1116—and that clear intent favors veterans—we have no reason to reach this issue.

No judge on this court has determined that this veteran should be denied benefits under § 1116. One concurrence concludes that § 1116 is ambiguous but finds the agency's interpretation unreasonable. *See* Lourie, J., concurring. Because we decide that the statute is unambiguous, we need not decide whether the agency's interpretation is reasonable. The dissent concludes that § 1116 is ambiguous but claims it is "premature" to decide whether the agency's interpretation is unreasonable. Dissent at 1395–96 (refusing to consider the reasonableness of the agency's interpretation). Respectfully, by declining to reach *Chevron* step two, the dissent fails to decide this case.[8]

Conclusion

Congress has spoken directly to the question of whether those who served in *1381 the 12 nautical mile territorial sea of the "Republic of Vietnam" are entitled to § 1116's presumption if they meet the section's other requirements. They are. Because "the intent of Congress is clear, that is the end of the matter." *Chevron*, 467 U.S. at 842, 104 S.Ct. 2778. Mr. Procopio is entitled to a presumption of service connection for his prostate cancer and diabetes mellitus. Accordingly, we reverse.

REVERSED AND REMANDED

Footnotes

1The Board of Veterans' Appeals found, and the parties do not dispute, that Mr. Procopio served in the Republic of Vietnam's territorial sea. J.A. 32, 49-52.

2The dissent criticizes that these sources of international law merely "define the territorial waters over which a sovereign nation has dominion and control" but "do not purport to define territorial waters as part of the definition of the country itself." Dissent at 1389. But the area over which a sovereign nation has dominion and control *is* a definition of the country itself, and the dissent points to no sources supporting any other definition of the "Republic of Vietnam." The dictionaries and maps the dissent cites define other terms ("Vietnam," "United States," "Socialist Republic of Vietnam"). Dissent at 1389–90, 1390–91 nn.2-3. When trying to discern what Congress meant by "in the Republic of Vietnam," we think the contemporaneous definition provided by international law is a better source than the definitions of other countries provided by these generalist dictionaries and maps.

3There is no dispute that, when the Agent Orange Act was passed in 1991, a nation's territorial sea had a breadth "not exceeding 12 nautical miles." UNCLOS, 1833 U.N.T.S. at 400.

4We do not, as the dissent contends, "create[ ] a new canon of statutory construction that any use of a formal country name necessarily includes the nation's territorial seas." Dissent at 1390. This case requires us to determine only what Congress meant when it used the phrase "in the Republic of Vietnam" in 1991.

5The government conceded, though, at oral argument that if Congress were to pass a statute forbidding military action within a nation, that statute would be violated if the President sent forces into the nation's 12-mile territorial sea, as that would "impact the sovereign boundary of [the nation]." *See* Oral Argument at 27:37-28:13.

6In several cases, it is clear Congress' express reference to territorial sea was to remove any doubt as to a provision's meaning. For instance, in 16 U.S.C. § 2402(8)'s definition of "import," the statement that "any place subject to the jurisdiction of the United States" "include[s] the 12-mile territorial sea of the United States," clearly reflects Congress' express concern that "import" as defined in § 2402(8) could be misread to have the same meaning as it has under the customs laws of the United States. For customs purposes a good may not be imported until it arrives at a port, *see, e.g.*, 19 C.F.R. § 101.1, and the "customs territory of the United States" is limited to the States, the District of Columbia, and Puerto Rico, and does not include other sovereign territory of the United States, *see* Harmonized Tariff Schedule of the United States, General Note 2. Similarly, the reference to "United States waters" in 8 U.S.C. § 1158(a)(1) serves a clarifying purpose in light of caselaw holding "physical presence" is a term of art in immigration law requiring an alien to have landed on shore, *see Zhang v. Slattery*, 55 F.3d 732, 754 (2d Cir. 1995). Nothing in these provisions, 18 U.S.C. § 2280(b)(1)(A)(ii), or 33 U.S.C. § 1203, suggests Congress did not understand the term "United States" to generally include its territorial sea.

It is also unsurprising that Congress has found it expedient to define phrases including the term "United States" for use in particular statutes and in some of those instances it referred to the territorial sea of the United States. *E.g.*, 16 U.S.C. § 1362(15); 26 U.S.C. § 638(1); 46 U.S.C. §§ 2301, 4301, 4701(3). That provides little insight into Congress' use of the formal name of a foreign country *absent an express definition*. In short, none of these statutes sheds any light on how Congress understood the "Republic of Vietnam" when it passed

the Agent Orange Act in 1991, and none create any ambiguity in the face of long-established, uniform international law recognizing the "Republic of Vietnam" includes its territorial sea.

7"[W]e have never applied *stare decisis* mechanically to prohibit overruling our earlier decisions determining the meaning of statutes." *Monell v. Dep't of Social Servs. of City of New York*, 436 U.S. 658, 695, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978). Charging that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done,' " the dissent seems to suggest we can *never* overrule a precedent interpreting a statute. Dissent at 1388–89 (quoting *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008)). But we see no reason here to "place on the shoulders of Congress the burden of the Court's own error." *Monell*, 436 U.S. at 695, 98 S.Ct. 2018. The parties have presented arguments and evidence not considered in *Haas. Haas*, 525 F.3d at 1183-86. Moreover, the dissent's concern for "stability in the law" is misplaced. Dissent at 1388–89 (quoting *Robert Bosch, LLC v. Pylon Mfg. Corp.*, 719 F.3d 1305, 1316 (Fed. Cir. 2013)). While there are certainly situations where parties' reliance on our settled law is of paramount concern (*see, e.g.*, *Dickerson v. United States*, 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000) (declining to overrule *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694 (1966), because "*Miranda* has become embedded in routine police practice to the point where the warnings have become part of our national culture")), no such reliance concern exists here.

8The dissent criticizes our interpretation of § 1116 as a "policy choice [that] should be left to Congress," noting

the "cost of expanding the presumption of service connection." Dissent at 1394–95. Respectfully, we are interpreting a statute, not making a policy judgment. Moreover, the dissent's criticism seems out of place where it has not concluded that the agency's determination is reasonable or that Mr. Procopio should be denied his benefits.

Lourie, Circuit Judge, concurring in the judgment.

I join the majority in reversing the judgment of the Veterans Court, but, respectfully, I would do so for different reasons.

I do not agree with the majority that international law and sovereignty principles, which would include the territorial waters of the Republic of Vietnam, render the phrase "served in the Republic of Vietnam" in 38 U.S.C. § 1116 unambiguous. *See* Majority at 1375–76. Sovereign borders are not necessarily what Congress had in mind when it enacted statutes for veterans' benefits, and specifically, when it enacted the Agent Orange Act. *See Haas v. Peake*, 525 F.3d 1168, 1175–83 (Fed. Cir. 2008) (discussing the difficulty in determining the likelihood of exposure to herbicides rather than any sovereignty concerns). The majority's holding thus covers more legal territory than necessary and decides an issue not before us.

I instead agree with the court in *Haas*, *see id.* at 1183–86, and the dissent, *see* Dissent at 1389–94, that "served in the Republic of Vietnam" is ambiguous under *Chevron* step one. The statute entitles a veteran to a presumption of service connection for certain diseases if the veteran "served in the Republic of Vietnam." 38 U.S.C. § 1116(a). That qualification does not tell us whether offshore waters are or are not included. Thus, as to that issue, the statute surely is ambiguous.

I also agree with the *Haas* court that under *Chevron* step two, the regulation promulgated by the agency reflects a reasonable interpretation of the statute. *See Haas*, 525 F.3d at 1186. However, unlike the court in *Haas*, I would hold that the agency's interpretation of its regulation is not owed any

deference as generally required by *Auer v. Robbins*, 519 U.S. 452, 461–63, 117 S.Ct. 905, 137 L.Ed.2d 79 (1997), because the regulation is not ambiguous, *see Christensen v. Harris Cty.*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."). *Contra Haas*, 525 F.3d at 1186–97.

The agency's regulation states that " '[s]ervice in the Republic of Vietnam' *includes* service in the waters offshore *and* service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." 38 C.F.R. § 3.307(a)(6)(iii) (emphasis added). In interpreting the regulation, we need not resort to international definitions of national sovereignty over waters adjacent to land or to the pro-veteran canon; we should simply read the plain language of the regulation. And, the plain reading of this inclusive regulation specifies that service in the Republic of Vietnam includes (1) "service in the waters offshore" and (2) "service in other locations if the conditions of service involved duty or visitation in the Republic of Vietnam." *Id.* Thus, a veteran who served in the "waters offshore" is included within the meaning of "service in the Republic of Vietnam" and entitled to presumptive service connection.

The agency in this case appears to have interpreted the "duty or visitation" clause to modify not only the service in "other locations," but also "waters offshore," creating a foot-on-land requirement. *See* Majority at 1393–94 (discussing the agency's *1382 interpretation). However, if "duty or visitation" were required for all Vietnam veterans, the phrases "waters offshore" and "other locations" would be superfluous. *Cf. Hibbs v. Winn*, 542 U.S. 88, 102, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (citation omitted) ("A statute should

be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant ...."). Under the agency's interpretation, it would matter not whether the veteran served in the "waters offshore" or "other locations" as long as the veteran set foot on the Vietnam landmass, which renders the "duty or visitation" clause the only operative phrase. That is contrary to the regulation's plain language.

While we, at least until higher law says otherwise, are obligated to give some degree of deference to an agency in interpreting its own regulation, *see* *Auer*, 519 U.S. at 461, 117 S.Ct. 905, deference has its limits. We are not obligated to give an agency deference when the regulation is not ambiguous, *see* *Christensen*, 529 U.S. at 588, 120 S.Ct. 1655, or when an "alternative reading is compelled by the regulation's plain language," *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 512, 114 S.Ct. 2381, 129 L.Ed.2d 405 (1994) (quoting *Gardebring v. Jenkins*, 485 U.S. 415, 430, 108 S.Ct. 1306, 99 L.Ed.2d 515 (1988)), as it does here. Thus, I would reverse the judgment of the Veterans Court because the agency's regulation plainly entitled Mr. Procopio to a presumption of service connection for his prostate cancer and diabetes mellitus based on his service in the offshore waters of Vietnam.

O'Malley, Circuit Judge, concurring.

I agree with the majority's well-reasoned decision. The term "Republic of Vietnam," as it appears in 38 U.S.C. § 1116, unambiguously encompasses its territorial waters.

I write separately because I believe the pro-veteran canon of construction adds further support to the majority's conclusion. Specifically, I write to explain that: (1) the pro-veteran canon, like every other canon of statutory construction, can and should apply at step one of *Chevron* to help determine whether a statutory ambiguity exists; and, (2) even when a statute remains irresolvably ambiguous, when a choice between deferring to an agency interpretation of that statute—or particularly where that interpretation is itself ambiguous—and resolving any ambiguity by application of the pro-veteran canon come to a head, traditional notions of agency deference must give way.[1]

The Supreme Court has made clear that courts are obligated to apply *all* traditional tools of statutory interpretation at step one of *Chevron*. 467 U.S. at 843 n.9, 104 S.Ct. 2778. Indeed, "we owe an agency's interpretation of the law no deference unless, after 'employing traditional tools of statutory construction,' we find ourselves unable to discern Congress's meaning." *SAS Inst., Inc. v. Iancu*, —— U.S. ——, 138 S.Ct. 1348, 1358, 200 L.Ed.2d 695 (2018) (quoting *Chevron*, 467 U.S. at 843 n.9, 104 S.Ct. 2778.); *see also Epic Sys. Corp. v. Lewis*, —— U.S. ——, 138 S.Ct. 1612, 1630, 200 L.Ed.2d 889 (2018) ("[D]eference is not due unless a court, employing traditional tools of statutory construction, is left with an unresolved ambiguity. And *1383 [here,] that [ ] is missing: the canon against reading conflicts into statutes is a traditional tool of

statutory construction and it, along with the other traditional canons we have discussed, is more than up to the job of solving today's interpretive puzzle. Where, as here, the canons supply an answer, *Chevron* leaves the stage." (internal citations and quotations omitted)); *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (employing at *Chevron* step one the "fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme"); *Gazelle v. Shulkin*, 868 F.3d 1006, 1011–12 (Fed. Cir. 2017) (employing at *Chevron* step one the canon that "Congress 'legislate[s] against the backdrop of existing law' " (citation omitted)).

A court similarly may not defer to an agency's interpretation of its own regulation or any other interpretive ruling unless, after applying the same interpretative principles that apply in the context of statutory interpretation, the court finds the regulation or interpretation to be ambiguous. *Christensen v. Harris County*, 529 U.S. 576, 588, 120 S.Ct. 1655, 146 L.Ed.2d 621 (2000) ("*Auer* deference is warranted only when the language of the regulation is ambiguous."); *Aqua Prods., Inc. v. Matal*, 872 F.3d 1290, 1316 (Fed. Cir. 2017) (en banc) ("We use the same interpretive rules to construe regulations as we do statutes[.]"); *Roberto v. Dep't of Navy*, 440 F.3d 1341, 1350 (Fed. Cir. 2006) (same). Thus, there is no doubt that courts must apply all traditional tools of statutory construction before resort to agency deference, regardless of at what point the agency seeks deference.

There is also no doubt that the pro-veteran canon is one such traditional tool. *Henderson v. Shinseki*, 562 U.S. 428, 441, 131 S.Ct. 1197, 179 L.Ed.2d

159 (2011) ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." (quotations omitted)); *see* Antonin Scalia, Judicial Deference to Administrative Interpretations of Law, 1989 DUKE L.J. 511, 515 (1989) ("[T]he consideration and evaluation of policy consequences" is "part of the traditional judicial tool-kit that is used in applying the first step of *Chevron*[.]"). The pro-veteran canon instructs that provisions providing benefits to veterans should be liberally construed in the veterans' favor, with any interpretative doubt resolved to their benefit. *See, e.g.*, *King v. St. Vincent's Hosp.*, 502 U.S. 215, 220 n.9, 112 S.Ct. 570, 116 L.Ed.2d 578 (1991). The Supreme Court first articulated this canon in *Boone v. Lightner* to reflect the sound policy that we must "protect those who have been obliged to drop their own affairs to take up the burdens of the nation." 319 U.S. 561, 575, 63 S.Ct. 1223, 87 L.Ed. 1587 (1943). This same policy underlies the entire veterans benefit scheme. *Barrett v. Principi*, 363 F.3d 1316, 1320 (Fed. Cir. 2004) ("[T]he veterans benefit system is designed to award entitlements to a special class of citizens, those who risked harm to serve and defend their country. This entire scheme is imbued with special beneficence from a grateful sovereign." (quotations omitted)).

Few provisions embody this veteran-friendly purpose more than § 1116's presumption of service connection for those who served in the Republic of Vietnam. Congress enacted this presumption in response to concerns that the agency was "utilizing too high a standard for determining if there is a linkage between exposure to Agent Orange and a subsequent manifestation of a disease" and was thereby "failing to give the benefit of the doubt to veterans in prescribing

the standards in *1384 the regulations for VA to use in deciding whether to provide service connection for any specific disease." Sidath Viranga Panangala et al., Cong. Research Serv., R41405, Veterans Affairs: Presumptive Service Connection and Disability Compensation 14 (2014) (quoting *Nehmer v. United States Veterans' Admin.*,712 F. Supp. 1404, 1423 (N.D. Cal. 1989)); *see also Agent Orange Legislation and Oversight: Hearing on S. 1692 & S. 1787 Before the S. Comm. on Veterans' Affairs*, 1988 Leg., 2nd Sess. 5 (statement of Sen. Thomas A. Daschle, Member, S. Comm. on Veterans' Affairs) ("[T]here is a time for study and more study, and there is a time for leadership. In the case of veterans exposed to Agent Orange ... science will never be able to dictate policy. That is our role."). Section 1116 was designed to afford veterans the benefit of the doubt in the face of scientific uncertainty.

Courts have "long applied" the pro-veteran canon of construction to such provisions. *Henderson*, 562 U.S. at 441, 131 S.Ct. 1197. And, because we presume Congress legislates with the knowledge of judicial canons of statutory construction, we should apply this canon to resolve doubt in a claimant's favor because that is precisely what Congress intended when it enacted the Agent Orange Act in 1991 against the backdrop of *Boone*. *King*, 502 U.S. at 220 n.9, 112 S.Ct. 570. Thus, when interpreting such statutes, or regulations promulgated thereunder, we may not resort to agency deference unless, after applying the pro-veteran canon along with other tools of statutory interpretation, we are left with an unresolved ambiguity.[2]

The government contends that applying the pro-veteran canon before resorting to agency deference

would usurp the agency's role of gap-filling. But the government forgets that an agency has no responsibility to fill gaps if we find that Congress did not leave such a gap. *SAS*, 138 S.Ct. at 1358; *City of Arlington v. F.C.C.*, 569 U.S. 290, 327, 133 S.Ct. 1863, 185 L.Ed.2d 941 (2013) (Roberts, C.J., dissenting) ("We do not leave it to the agency to decide when it is in charge."). And, importantly, it ignores that "the duty to interpret statutes as set forth by Congress is a duty that rests with the judiciary." *Bankers Tr. N.Y. Corp. v. United States*, 225 F.3d 1368, 1376 (Fed. Cir. 2000). Deference cannot displace either this duty or the duty to consider appropriate legal doctrines when exercising it.

When the pro-veteran canon and agency deference come to a head, it is agency deference—the weaker of two doctrines at any level—that must give way. Several justices of the Supreme Court have urged their colleagues "to reconsider, in an appropriate case, the premises that underlie *Chevron* and how courts have implemented that decision." *Pereira v. Sessions*, – — U.S. ——, 138 S.Ct. 2105, 2121, 201 L.Ed.2d 433 (2018) (Kennedy, J., concurring); *see also Michigan v. E.P.A.*, —— U.S. ——, 135 S.Ct. 2699, 2712, 192 L.Ed.2d 674 (2015) (Thomas, J., concurring) ("I write separately to note that [the *1385 agency's] request for deference raises serious questions about the constitutionality of our broader practice of deferring to agency interpretations of federal statutes."). By requiring courts to defer to an agency's interpretation of a statute—not because it is the correct interpretation but because it is merely reasonable—*Chevron* deference "wrests from Courts the ultimate interpretative authority to say what the law is," and thereby "raises

serious separation-of-powers questions." *Michigan*, 135 S.Ct. at 2712.

The case for *Auer* deference is even weaker. Not only have several justices expressed concerns with *Auer* deference, the Supreme Court recently granted certiorari on the question of whether the Court should overrule *Auer* entirely. *Kisor v. Shulkin*, 880 F.3d 1378 (Fed. Cir. 2018), *cert. granted*, *Kisor v. Wilkie*, —– U.S. ——, 139 S.Ct. 657, —– L.Ed.2d ——, 2018 WL 6439837 (2018) (granting certiorari on question of "[w]hether the Court should overrule *Auer* and *[Bowles v.] Seminole Rock [& Sand Co.*, 325 U.S. 410, 65 S.Ct. 1215, 89 L.Ed. 1700 (1945)]" and declining to consider "[a]lternatively"-presented question of "whether *Auer* deference should yield to a substantive canon of construction"). As I have previously opined, *Auer* deference "encourages agencies to write ambiguous regulations and interpret them later, which defeats the purpose of delegation, undermines the rule of law, and ultimately allows agencies to circumvent the notice-and-comment rulemaking process." *Kisor v. Shulkin*, 880 F.3d 1378, 1379–80 (Fed. Cir. 2018) (O'Malley, J., dissenting from denial of en banc) (internal quotations and alterations omitted) (citing *Hudgens v. McDonald*, 823 F.3d 630, 639 n.5 (Fed. Cir. 2016) (O'Malley, J.); *Johnson v. McDonald*, 762 F.3d 1362, 1366–68 (Fed. Cir. 2014) (O'Malley, J., concurring)). In this way, *Auer* deference leaves agencies' rulemaking authority unchecked and, as with *Chevron*, raises serious questions regarding separation of powers. *Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 621, 133 S.Ct. 1326, 185 L.Ed.2d 447 (2013) (Scalia, J., dissenting) (explaining that *Auer* "contravenes one of the great rules of separation of powers" that "[h]e who writes the law must not adjudge its violation")

Of course, we have no authority to overturn either *Chevron* or *Auer*. But we can and should consider these well-documented weaknesses when agency deference conflicts with the pro-veteran canon of construction. Questionable principles of deference should not displace long-standing canons of construction. Here, there is no justification for deferring to the agency's interpretation of "Republic of Vietnam" when that interpretation fails to account for the purpose underlying the entire statutory scheme providing benefits to veterans. *See Util. Air Regulatory Grp. v. E.P.A.*, 573 U.S. 302, 321, 134 S.Ct. 2427, 189 L.Ed.2d 372 (2014) ("Even under *Chevron*'s deferential framework, agencies must operate within the bounds of reasonable interpretation. ... A statutory provision that may seem ambiguous in isolation is often clarified by the remainder of the statutory scheme because only one of the permissible meanings produces a substantive effect that is compatible with the rest of the law." (internal quotations and alterations omitted)). Rather, deference should yield to the canon that embodies this very purpose. To hold otherwise would not only wrest from us our interpretative authority to say what the law is, it would displace congressional intent.

Similarly, there is no justification for deferring to the agency's interpretation of its own ambiguous regulation when it twice attempted and failed to codify the foot-on-land requirement through the notice-and-comment rulemaking process. *1386 Presumptions of Service Connection for Certain Disabilities, and Related Matters, 69 Fed. Reg. 44,614, 44,620 (July 27, 2004); Definition of Service in the Republic of Vietnam, 73 Fed. Reg. 20,566, 20,567 (Apr. 16, 2008). We should not reward the agency with *Auer* deference when it

circumvents the rules mandated by Congress in the Administrative Procedure Act in its effort to reach a result contrary to the pro-veteran canon. And, when the agency does not deny that its interpretation of the regulations to which it now points to support the foot-on-land requirement has been inconsistent over the years, the case for deference is weaker still. *Haas*, 525 F.3d at 1190 ("[T]he agency's current interpretation of its regulations differs from the position it took in some previous adjudications and seemed to take in its Adjudication Manual[.]"). Thus, in a case like this one, where questionable resort to agency deference and the pro-veteran canon come to a head, agency deference must yield.

The government contends that the pro-veteran canon, like the rule of lenity—which "requires interpreters to resolve ambiguity in criminal laws in favor of defendants"—is a canon of last resort that cannot trump agency deference. *Whitman v. United States*, —— U.S. ——, 135 S.Ct. 352, 353, 190 L.Ed.2d 381 (2014). This comparison misses the mark. While the Supreme Court cautions against the overuse of the rule of lenity, it has treated the pro-veteran canon more favorably. *Compare* *Moskal v. United States*, 498 U.S. 103, 108, 111 S.Ct. 461, 112 L.Ed.2d 449 (1990) ("[W]e have always reserved lenity for those situations in which a reasonable doubt persists about a statute's intended scope even after resort to the language and structure, legislative history, and motivating policies of the statute." (internal quotations omitted)), *with* *Henderson*, 562 U.S. at 441, 131 S.Ct. 1197 ("We have long applied the canon that provisions for benefits to members of the Armed Services are to be construed in the beneficiaries' favor." (quotations omitted)). This is not surprising considering that the principles animating

the rule of lenity differ greatly from those of the pro-veteran canon. The rule of lenity merely reflects a "presupposition of our law to resolve doubts in the enforcement of a penal code against the imposition of a harsher punishment," but it is "not out of any sentimental consideration, or for want of sympathy with the purpose of Congress in proscribing evil or anti-social conduct." *Bell v. United States*, 349 U.S. 81, 83, 75 S.Ct. 620, 99 L.Ed. 905 (1955). In contrast, the pro-veteran canon recognizes this country's equitable obligation to "those who have been obliged to drop their own affairs to take up the burdens of the nation." *Boone*, 319 U.S. at 575, 63 S.Ct. 1223.

In this way, the pro-veteran canon is more analogous to the substantive canon of construction applied in the context of Indian law, which instructs that "statutes are to be construed liberally in favor of Indians, with ambiguous provisions interpreted to their benefit." *Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S.Ct. 2399, 85 L.Ed.2d 753 (1985). As the Supreme Court has explained, "standard principles of statutory construction do not have their usual force" when weighed against the pro-Indian canon because the canon is "rooted in the unique trust relationship between the United States and the Indians." *Id.*

Applying this principle, courts have found that the pro-Indian canon trumps agency deference under *Chevron*. *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) ("*Chevron* deference is not applicable" in the context of Indian law because "the special strength" of this canon trumps the normally-applicable deference.); *see also Ramah Navajo Chapter v. Lujan*, 112 F.3d 1455, 1461–62 (10th Cir. 1997) ("[T]he canon of construction favoring Native Americans controls over the more general rule of deference to agency

interpretations of ambiguous statutes."). The same should be true in this context.

As explained above, this country's relationship with its veterans is also both unique and important. The policy that we owe a debt of gratitude to those who served our country, which is the driving purpose behind the Agent Orange Act, is derived from the same sources as the pro-veteran canon, i.e., that those who served their country are entitled to special benefits from a grateful nation. *See, e.g.*, 137 Cong. Rec. E1486-01, 137 Cong. Rec. E1486-01, E1486, 1991 WL 65877, *1 ("We owe it to our Vietnam veterans to enact badly needed legislation such as this so that they are given a full and proper 'thank you.' "); *Barrett*, 363 F.3d at 1320. Therefore, when the pro-veteran canon and reflexive agency deference conflict, the canon should control.

By codifying in § 1116 a presumption of service connection for those who served in the Republic of Vietnam, Congress recognized that veterans should not have to fight for benefits from the very government they once risked their lives to defend. We ignore this purpose when we fail to apply the pro-veteran canon to resolve ambiguities in statutes and regulations that provide benefits to veterans; and, by failing to hold that agency deference must yield to the pro-veteran canon, we permit agencies to do the same. The practical result is that veterans like Mr. Procopio, even after returning home, are still fighting. Therefore, while I agree with the majority's decision, I write separately to lament the court's failure—yet again—to address and resolve the tension between the pro-veteran canon and agency deference.[3]

Footnotes

1I address both *Chevron* and *Auer* deference because we relied on both in *Haas v. Peake* to uphold the agency's regulation. We deferred to the agency's interpretation of its own ambiguous regulation under *Auer*, and then, in turn, found "that the regulation reflects a reasonable interpretation of the statute" under *Chevron*. 525 F.3d 1168, 1186 (Fed. Cir. 2008).

2Of course, application of the pro-veteran canon will not always resolve ambiguities in a statute or regulation in the veterans' favor. For example, in *Nat'l Org. of Veterans' Advocates, Inc. v. Sec'y of Veterans Affairs*, we resorted to agency deference despite applying the pro-veteran canon because other canons of statutory construction and the pro-veteran canon pulled in opposite directions. 260 F.3d 1365, 1378 (Fed. Cir. 2001). And, in *Burden v. Shinseki*, we found that the pro-veteran canon was not enough to resolve a statutory ambiguity when deciding whether to award benefits to a veteran's surviving common law spouse over the veteran's children because neither interpretation had a particularly pro-veteran reading. 727 F.3d 1161, 1169–70 (Fed. Cir. 2013). Thus, while application of the pro-veteran canon may resolve any apparent ambiguity, it will not always do so.

3While the Supreme Court will consider whether *Auer* should be overruled and, thus, not available in any cases, it did not agree to consider a second question raising whether principles of agency deference generally must yield when at odds with the pro-veteran canon of construction.

Chen, Circuit Judge, dissenting, with whom Circuit Judge Dyk joins.

Mr. Procopio suffers from prostate cancer and type 2 diabetes. He claims that his conditions are service connected, relying on a statutory provision, 38 U.S.C. § 1116, that creates a presumption of service connection for service members who "served in the Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975." We granted en banc review to determine whether this provision unambiguously applies to Blue Water Navy veterans, like Mr. Procopio, who served in the territorial waters of Vietnam.

The majority concludes that the statute unambiguously applies to Blue Water Navy veterans who did not set foot on the Vietnam landmass and overrules our prior decision to the contrary in *Haas v. Peake*, 525 F.3d 1168 (Fed. Cir. 2008). In my view, the statute is ambiguous, and the majority inappropriately preempts Congress's role in determining whether the statute should apply in these circumstances—an issue which Congress is grappling with at this very time.

Our court has already confronted this precise interpretive question for veterans who served on ships off the coast of Vietnam during the Vietnam War. And we concluded, after considering the statute and its legislative history, that this statutory phrase is ambiguous. *See id.* at 1185–86. By repudiating a statutory interpretation from a 10-year old precedential opinion without any evidence of changed circumstances, today's decision undermines the principle of *stare decisis*.

Contrary to the majority's conclusion, international law and sovereignty principles do not

dictate that Congress unambiguously intended "Republic of Vietnam" to include its territorial waters. No prior case has announced a principle that a statute's reference to a country name should be treated as a term of art that encompasses both the country's landmass and territorial waters. Such a rule is particularly anomalous in the context of a statute governing veterans' disability benefits, which in no way implicates a foreign country's sovereignty over territorial waters. Further, I see nothing in the legislative history of § 1116 suggesting that Blue Water Navy veterans would be covered by the presumption of service connection. Because herbicides were sprayed throughout the landmass of the Republic of Vietnam, it is at least a reasonable understanding of the statute that Congress at the time of the Agent Orange Act directed its statutory presumption of service connection towards those service members who had actually served within the country's land borders. I would therefore find, as we did in *Haas*, that § 1116 is ambiguous under *Chevron* step one. Accordingly, I respectfully dissent.

Stare Decisis And *Haas V. Peake*

This court has already ruled on the statutory interpretation of service "in the Republic of Vietnam" under 38 U.S.C. § 1116(a)(1). In *Haas*, we addressed whether a veteran who served on a ship that traveled in the territorial waters of Vietnam but who never went ashore "served in the Republic of Vietnam." 525 F.3d at 1172. There, we reviewed the statute and legislative history and concluded that the phrase was ambiguous. *Id.* at 1184.

Despite our court's settled statutory interpretation from a decade ago, the majority

nevertheless elects to re-open this already-decided interpretive issue. In doing so, the majority disregards *stare decisis*, which serves an important purpose in American law. *See* Deckers Corp. v. United States, 752 F.3d 949, 956 (Fed. Cir. 2014) ("*[S]tare decisis* exists to 'enhance [ ] predictability and efficiency in dispute resolution and legal proceedings' through creation of settled expectations in prior decisions of the court.") (citation omitted).

In *Robert Bosch, LLC v. Pylon Manufacturing Corp.*, we considered what effect *stare decisis* has when this court reviews panel decisions en banc. 719 F.3d 1305, 1316 (Fed. Cir. 2013) (en banc). We pointed out that "the implications of stare decisis are less weighty than if we were [reconsidering] a precedent established by the court en banc." *Id.* (internal quotation marks omitted). Nevertheless, we concluded that "panel opinions, like en banc opinions, invoke the principle of stare decisis," reasoning that, "because [our precedent] represents the established law of the circuit, a due regard for the value of stability in the law requires that we have good and sufficient reason to reject it at this late date." *Id.* (internal quotation marks and citation omitted) (alteration in original).

The Supreme Court has warned that "*stare decisis* in respect to statutory interpretation has 'special force,' for 'Congress remains free to alter what we have done.' " *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139, 128 S.Ct. 750, 169 L.Ed.2d 591 (2008) (citation omitted). "A difference of opinion within the Court ... does not keep the door open for another try at statutory construction ...." *Watson v. United States*, 552 U.S. 74, 82, 128 S.Ct. 579, 169 L.Ed.2d 472 (2007). Indeed, "the very point of *stare decisis* is to forbid us from revisiting a debate every time there are

reasonable arguments to be made on both sides." *1389 *Lighting Ballast Control LLC v. Philips Elecs. N. Am. Corp.*, 744 F.3d 1272, 1283 (Fed. Cir. 2014) (en banc), *abrogated by Teva Pharm. USA, Inc. v. Sandoz, Inc.*, — – U.S. ——, 135 S.Ct. 831, —— L.Ed.2d —— (2015) (quoting *Morrow v. Balaski*, 719 F.3d 160, 181 (3d Cir. 2013) (Smith, J., concurring)). Congress has the responsibility for revising its statutes; the Judiciary should be more circumspect before forsaking prior statutory interpretations. *See Neal v. United States*, 516 U.S. 284, 295–96, 116 S.Ct. 763, 133 L.Ed.2d 709 (1996). Indeed, the recent debates in Congress, which required consideration of the significant cost of the proposed addition of Blue Water Navy veterans underscores why Congress, rather than the courts, should be the one to revisit our interpretation in *Haas*. *See* Citation of Supplemental Authority 1, ECF No. 39; Blue Water Navy Vietnam Veterans Act, H.R. 299, 115th Cong. (2017–18) ("Blue Water Navy Vietnam Veterans Act of 2018"). The Supreme Court's admonishment against overruling prior statutory interpretation is particularly apt here, where Congress has been actively considering whether to take any action in response to this court's interpretation.

Our statutory interpretation in *Haas* has been the law of this court for over ten years. Neither party has identified any intervening development of the law that has removed or weakened the conceptual underpinnings from *Haas* in this regard. I would therefore follow *Haas* to conclude that the statutory phrase at issue is ambiguous.

Statutory Ambiguity

I do not find persuasive the majority's conclusion that international law dictates its interpretation. The *Haas* court considered similar sources of evidence but still concluded that the statutory phrase was ambiguous. *Haas*, 525 F.3d at 1184. All of the international law sources relied upon by the majority relate to laws that statutorily define the territorial waters over which a sovereign nation has dominion and control. *See, e.g.*, Restatement (Third) of Foreign Relations Law § 511(a) ("The territorial sea: a belt of sea that may not exceed 12 nautical miles, measured from a baseline that is either the low-water line along the coast or the seaward limit of the internal waters of the coastal state or, in the case of an archipelagic state, the seaward limit of the archipelagic waters"); *United States v. California*, 332 U.S. 19, 33, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947) ("That the political agencies of this nation both claim and exercise broad dominion and control over our three-mile marginal belt is now a settled fact."); 1958 Convention on the Territorial Sea and the Contiguous Zone, art. 1(1), 15 U.S.T. 1606, T.I.A.S. No. 5639 (Apr. 29, 1958) ("The sovereignty of a State extends, beyond its land territory and its internal waters, to a belt of sea adjacent to its coast, described as the territorial sea."); United Nations Convention on the Law of the Sea, art. 2, 1833 U.N.T.S. 397, 400 (Dec. 10, 1982, entered into force on 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."). They do not purport to define territorial waters as part of the definition of the country itself.

Section 1116, a U.S. veterans' disability benefits statute, has nothing to do with the dominion and control

of a foreign sovereign over territorial waters. Nor would an opinion construing a U.S. veterans' disability benefits statute be in any danger of violating the law of the nations. *See* *Murray v. Schooner Charming Betsy*, 6 U.S. 2 Cranch 64, 2 L.Ed. 208 (1804).

There is no support for a rule that a statute that refers to a country includes *1390 the country's territorial waters.[1] The majority admonishes the government for "fail[ing] to cite any instance in which the unmodified use of a formal sovereign name has been construed to not include its territorial sea" (Majority Op. at 1379) but the same can be said of the majority. The majority creates a new canon of statutory construction that any use of a formal country name necessarily includes the nation's territorial seas, without citing a single instance where Congress has stated this intent or where the Judiciary has construed a statute's use of a formal country name to include the country's territorial seas.

Dictionaries from 1991, when the Agent Orange Act was passed, often defined countries in terms of square miles of the land mass.[2] The same is true of maps, which typically show the land area of a country.[3] I am unaware of any dictionary or standard map that defines countries in terms of land plus the territorial sea, nor does the majority point to any.

Congress has repeatedly shown that when it wants to include a country's territorial waters, it does so expressly. *See, e.g.*, Veterans' Rehabilitation and Education Amendments of 1980, Pub. L. No. 96-466, § 513(b), 94 Stat. 2171 (1980) (defining eligibility *1391 for educational assistance and other service-connected benefits as "veterans who during the Vietnam era served in Vietnam, in air missions over Vietnam, or in naval missions in the waters adjacent to Vietnam shall

be considered to be veterans who served in the Vietnam theatre of operations"); Tax Reform Act of 1986, H. Rep. No. 99-841, at 599 (1986), as reprinted in 1986 U.S.C.C.A.N. 4075, 4687 (clarifying that "income attributable to services performed in the United States or in the U.S. territorial waters is U.S. source."); 18 U.S.C. § 2280(b)(1)(A)(ii) (criminalizing certain acts if committed "in the United States, including the territorial seas").[4] This is true even when Congress uses a sovereign nation's formal name in the statute. *See* 10 U.S.C. §§ 3756, 6258, 8756 (extending the Korea Defense Service Medal to veterans who "served in the Republic of Korea or the waters adjacent thereto"). The underlying assumption in each of these statutes is that the use of the country name is not sufficient to include territorial or adjacent waters. The majority's contrary conclusion renders Congress's express inclusion or exclusion of territorial seas in these statutes superfluous, which is "at odds with one of the most basic interpretive canons, that ' "[a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant." ' " *Corley v. United States*, 556 U.S. 303, 314, 129 S.Ct. 1558, 173 L.Ed.2d 443 (2009) (quoting *Hibbs v. Winn*, 542 U.S. 88, 101, 124 S.Ct. 2276, 159 L.Ed.2d 172 (2004) (quoting 2A N. Singer, Statutes and Statutory Construction § 46.06 pp. 181–186 (rev. 6th ed. 2000))). And the majority's attempt to explain a few of these examples away by creating a distinction between Congress's use of the term "waters adjacent" versus territorial waters or seas is speculative and entirely unconvincing. *See* Majority Op. at 1378–79.

By enacting the Agent Orange Act, Congress intended to help Vietnam veterans who had manifested certain specified diseases as a result of having been

exposed to Agent Orange. *See* 38 U.S.C. § 1116. The VA has explained that "virtually all herbicide spraying in Vietnam, which was for the purpose of eliminating plant cover for the enemy, took place over land." 73 Fed. Reg. 20566–01, 20568 (Apr. 16, 2008) (citing Jeanne Mager Stellman et al., *The extent and patterns of usage of Agent Orange and other herbicides in Vietnam*, 422 Nature 681, 681–687 (2003)). It therefore stands to reason that Congress would restrict the service connection presumption to those veterans who were actually exposed to Agent Orange on the landmass of Vietnam.[5] *Accord* *1392 *Haas*, 525 F.3d at 1192–93. Congress did not possess any information suggesting that herbicides had been used up to three or twelve nautical miles from the shore.

The majority errs in dismissing the relevance of §§ 3.311a and 3.313, regulations that existed before the enactment of § 1116. The majority suggests that Congress was enacting the statute against a background in which the existing regulations covered territorial waters, but it misunderstands the history behind each rule. Regulation 3.311a was promulgated in 1985 to implement the Veterans' Dioxin and Radiation Exposure Compensation Standards Act, Public Law 98–542, 98 Stat. 2725, 2725–34 (1984) ("1984 Dioxin Act"). Section 5 of the 1984 Dioxin Act directed the VA to establish guidelines grounded in "sound scientific and medical evidence" that require the veterans' death or disability be based on actual exposure to herbicides containing dioxin. *Id.* at 2727–28. The 1984 Dioxin Act noted that there was evidence that specific diseases—chloracne, porphyria cutanea tarda, and soft tissue sarcoma—were linked to exposure to dioxin-containing herbicides. *Id.* at 2725. Thereafter, the VA promulgated § 3.311a. The § 3.311a rulemaking notice noted that

herbicides "were used during the Vietnam conflict to defoliate trees, remove ground cover, and destroy crops," and that many veterans "were deployed in or near locations where Agent Orange was sprayed." Adjudication of Claims Based on Exposure to Dioxin or Ionizing Radiation, 50 Fed. Reg. 15848, 15849 (Apr. 22, 1985). Because the regulation required exposure to dioxin-containing herbicides and herbicides had been sprayed on Vietnam's landmass, the VA imposed a foot-on-land requirement for veterans that served offshore or in locations other than Vietnam:

> "Service in the Republic of Vietnam" includes service in the waters offshore and service in other locations, if the conditions of service involved duty or visitation in the Republic of Vietnam.

38 C.F.R. § 3.311a(b) (1986). The natural reading of the regulation's use of the conjunctive "and" confirms that the prepositional phrase applied both to offshore veterans and those stationed outside of Vietnam.

The VA promulgated § 3.313 for an entirely different purpose. Contrary to § 3.311a, § 3.313 was not linked to herbicide exposure, but rather was based on a 1990 CDC study that determined that *all* Vietnam veterans—including those that served on the landmass as well as those who served offshore—had a higher incidence rate of non-Hodgkin's lymphoma than non-Vietnam veterans. Claims Based on Service in Vietnam, 55 Fed. Reg. 43123–01 (Oct. 26, 1990). The 1990 study further concluded that no correlation existed between non-Hodgkin's lymphoma and exposure to Agent Orange. *Id.* The VA therefore

worded § 3.313 specifically to apply to all offshore veterans, without a foot-on-land requirement:

> Service in Vietnam includes service in the waters offshore, or service in other locations if the conditions of service involved duty or visitation in Vietnam.

38 C.F.R. § 3.313(a) (1990). The natural reading of the regulation's use of the disjunctive "or" and movement of the comma to offset "offshore" from the rest of the sentence confirms that the offshore veterans were not subject to a foot-on-land requirement. While the grammatical differences *1393 between the two regulations may appear to be small, they set forth critical distinctions driven by the different purposes between the regulations.

When the VA promulgated these two regulations, their meanings were not ambiguous. The ambiguity arose when Congress appeared to codify both VA regulations in the Agent Orange Act, one regulation with a foot-on-land requirement and one without. 137 Cong. Rec. H719-01 (1991) ("[T]he bill would ... codify decisions the Secretary of Veterans Affairs has announced to grant presumptions of service connection for non-Hodgkin's lymphoma and soft-tissue sarcoma in veterans who served in Vietnam ...."). The Agent Orange Act used the term "served in the Republic of Vietnam" without defining the term:

> [A] disease specified in paragraph (2) of this subsection becoming manifest as specified in that paragraph in a veteran who, during active military, naval, or air service, served in the

> Republic of Vietnam during the period beginning on January 9, 1962, and ending on May 7, 1975;

38 U.S.C. § 1116(a)(1)(A).

As we concluded in *Haas*, § 1116's use of "Republic of Vietnam" rather than "Vietnam" counsels against the majority's reading of the statute because the language more closely tracks that used in § 3.311a, which imposed the foot-on-land requirement on offshore veterans. *Haas*, 525 F.3d at 1185–86. A congressional choice to codify the foot-on-land requirement from § 3.311a would have been a reasonable one, since both § 3.311a and the Agent Orange Act—unlike § 3.313—required that the service connection be based on actual exposure to herbicides during the war. Moreover, "Congress included non-Hodgkin's lymphoma [from § 3.313(a)] on the list of diseases specifically identified in the Agent Orange Act based on evidence that, contrary to the conclusion of the 1990 CDC study, non-Hodgkin's lymphoma was in fact associated with exposure to Agent Orange." *Id.* at 1179 n.1 (citing *Report to the Secretary of Veterans Affairs on the Association Between Adverse Health Effects and Exposure to Agent Orange, reprinted in Links Between Agent Orange, Herbicides, and Rare Diseases: Hearing before the Human Resources and Intergovernmental Relations Subcomm. of the Comm. on Gov't Relations*, 101st Cong., 2d Sess. 22, 41 (1990)). Against this regulatory backdrop prior to the codification of service connection presumption for certain diseases through the Agent Orange Act, it is far from clear that Congress intended § 1116 to encompass veterans who served in offshore waters up to 12 nautical miles away from Vietnam. During that lead-up to the Agent Orange Act, the majority cites no

evidence that Blue Water Navy veterans had been receiving service connection presumptions for any of these diseases listed in § 3.311a.

The majority's conclusion that "Republic of Vietnam" in § 3.311a "covers everyone whose service included duty or visitation 'in the Republic of Vietnam,' which, under background law, embraces the territorial sea" (Majority Op. at 1377) is incorrect, because it assumes that the VA also bought into the majority's newly announced principle that reciting a sovereign's formal name in a statute or—for purposes of § 3.311a—a regulation, necessarily includes the country's territorial seas. The majority cites no case law or other support for this assumption. Nor does the majority cite support for its subsequent conclusion that § 3.311a encompasses "only a subset" of offshore veterans—those that served on land, within the internal waterways, or within the territorial seas of Vietnam. *See id.* There is no evidence in the regulation or its history that the VA intended this interpretation.

I also disagree with the majority's conclusion that § 1116's language specifying that the presumption is applicable to veterans regardless of what military branch they served in (*i.e.*, "active military, naval, or air service in the Republic of Vietnam") has any bearing on whether offshore veterans are subject to a foot-on-land requirement. *See* Majority Op. at 1376. A veteran who served in the Navy but spent time on the landmass of Vietnam is no less likely to have a service connection due to exposure to Agent Orange than a veteran who served on the land in Vietnam in the Army. Moreover, this statutory phrase is commonly used in other sections of Title 38, suggesting that Congress did not have something particular in mind as to how it repeated this phrase in § 1116. *See, e.g.*, 38 U.S.C. § 1110

(entitling certain veterans to compensation for disability, injury, or disease contracted or aggravated "in the active military, naval, or air service, during a period of war"); *id.* § 1112(b) (establishing presumption of service connection for prisoners of war where condition became manifest "after active military, naval, or air service").

After reviewing the applicable provisions, it is not clear to me that Congress unambiguously intended "served in the Republic of Vietnam" to include Blue Water veterans. Although international law establishes that sovereign nations have dominion and control over their territorial seas, a U.S. veterans' benefits statute has nothing to do with regulating interactions with a foreign sovereign. And the Agent Orange Act's legislative history provides no support for the majority's conclusion. I therefore believe, as this court concluded in *Haas*, that the statutory phrase "Republic of Vietnam" is ambiguous when applied to service in the waters adjoining the landmass of Vietnam. *See Haas*, 525 F.3d at 1184.

As for the liberal construction principle known as the pro-veteran canon, neither the Supreme Court nor this court has applied it at step one of *Chevron* as a means for deeming Congress's intent clear for an otherwise unclear statute. But even if it were relevant to the step one inquiry, I do not view this canon, given its indeterminate nature, as compelling the conversion of this ambiguous statute into an unambiguous one.

The significance of the policy choice and budget impact that the court makes today further underscores why more compelling indicia are required before concluding that Congress clearly intended the majority's statutory interpretation. Congress recently estimated that it would need to allocate an additional

$1.8 billion during fiscal year 2019, and $5.7 billion over 10 years, to fund the Blue Water Navy Vietnam Veterans Act of 2018, a bill that would have explicitly expanded the presumption of Agent Orange exposure to Blue Water Navy veterans. *See* Blue Water Navy Vietnam Veterans Act of 2018: Hearing on H.R. 299 Before the S. Comm. on Veterans' Affairs, 115th Cong. 1, 4 (2018) (statement of Dr. Paul R. Lawrence, Under Secretary, Benefits Department, Veterans' Affairs). The bill passed the House unanimously in 2018 but failed to pass the Senate before the end of the 2018 session, due, in part, to concerns over the cost of expanding the presumption of service connection. It is not for the Judiciary to step in and redirect such a significant budget item—rather, that policy choice should be left to Congress.

I do not reach the question of whether *Haas* should be reaffirmed insofar as it held that at step two of *Chevron*, deference was owed to the interpretation of the statute by the VA. *See id.* at 1184, 1192–93. Relying on principles of *Auer* deference, the *Haas* panel held that the VA had *1395 interpreted the statute to preclude coverage of Blue Water Navy veterans who had not set foot on the Vietnam landmass. *See id.* at 1186–90, 1197. The court also held that the interpretation was reasonable in the light of the evidence available to the VA at the time it made its interpretation. *Id.* at 1195, 1197. The court declined to consider other evidence not considered by the VA. *Id.* at 1194.

In ordering rehearing en banc we asked that the parties address the question of ambiguity.[6] In accordance with our order the parties have not, in fact, fully addressed the step two *Chevron* issues. At the same time there have been relevant developments that

bear on that question. The Supreme Court has recently granted certiorari to address the question of whether *Auer* should be overruled.[7] There have been additional studies of the issue of Blue Water Navy diseases attributable to dioxin exposure, and the issue continues to be studied, with a new report predicted to become available next April. Under these circumstances, I think it premature to address *Haas*' treatment of step two of *Chevron*.

Footnotes

1Moreover, there is no clear evidence that the now-defunct Republic of Vietnam ever claimed a territorial sea extending 12 nautical miles from its shore, including during the Vietnam War. *See* Majority Op. at 1376–77. Up until 1988, the United States only claimed a three-mile nautical belt as its territorial sea. *See* Territorial Sea of the United States of America, Presidential Proclamation 5,928, 103 Stat. 2981, 2982 (Dec. 27, 1988); *see also United States v. California*, 332 U.S. 19, 33–34, 67 S.Ct. 1658, 91 L.Ed. 1889 (1947). There is no reason to believe that the Republic of Vietnam, when it existed, would have done otherwise.

2*See, e.g.*, *Vietnam*, Random House Webster's College Dictionary (1991) ("a country in SE Asia, comprising the former states of Annam, Tonkin, and Cochin-China: formerly part of French Indochina; divided into North Vietnam and South Vietnam in 1954 and reunified in 1976. [pop] 64,000,000; 126,104 sq. mi. (326,609 sq. km)"); *Vietnam*, Webster's Ninth New Collegiate Dictionary (1991) ("country SE Asia in Indochina; state, including Tonkin & N Annam, set up 1945–46; with S. Annam & Cochin China, an associated state of French Union

1950–54; after civil war, divided 1954–75 at 17th parallel into republics of North Vietnam (* Hanoi) & South Vietnam (* Saigon) reunited 1975 (* Hanoi) area 127,207 sq mi (330,738 sq km), pop 52,741,766" (emphasis omitted)); Vietnam, Webster's New Geographic Dictionary (1988) ("Republic, SE Asia, divided 1954–75 into North Vietnam and South Vietnam ..."); *United States of America*, Random House Webster's College Dictionary (1991) ("country made up of the North American area extending from the Atlantic Ocean to the Pacific Ocean between Canada and Mexico, together with Alas. & Hawaii; 3,615,211 sq. mi. (9,376,614 sq. km); pop. 240,856,000; cap. Washington; also called the United States"); *United States of America*, Webster's Ninth New Collegiate Dictionary (2001) ("United States"); *United States*, Webster's Ninth New Collegiate Dictionary (2001) ("a republic in the N Western Hemisphere comprising 48 conterminous states, the District of Columbia, and Alaska in North America, and Hawaii in the N Pacific. 249,632,692; conterminous United States, 3,615,122 sq. mi. (9,363,166 sq. km); Washington, D.C. ... Also called United States of America"); *United States of America* commonly shortened to *United States*, Webster's New Geographic Dictionary (1988) ("Federal republic, North America, bounded on N by Canada and (in Alaska) by the Arctic Ocean, on E by the Atlantic Ocean, on S by Mexico and Gulf of Mexico, and on W by Pacific Ocean; 3,615,123 sq. m. (excluding Great Lakes); pop. (1980c) 226,545,805; * Washington, D.C.").

3*See, e.g.*, National Geographic, Atlas of the World 18–19 (6th ed. 1990) [hereinafter, "Atlas of the World"] (depicting the United States in terms of land area); Central Intelligence Agency, the World Factbook 1991 324, 332 (1991). National Geographic's Atlas of the

World also defined countries in terms of the size of their land mass. *See, e.g.*, Atlas of the World at 127 ("Socialist Republic of Vietnam Area: 329,556 sq km (127,242 sq mi)").

4*See also, e.g.*, 38 U.S.C. § 101(30) (referring to veterans who "served in Mexico, on the borders thereof, or in the waters adjacent thereto"); Omnibus Consolidated Appropriations Act, 1997, Pub. L. No. 104-208, Division C, § 604, 110 Stat. 3009 (1996) (codified at 8 U.S.C. § 1158(a)(1)) ("[a]ny alien who is physically present in the United States or who arrives in the United States (whether or not at a designated port of arrival and including an alien who is brought to the United States after having been interdicted in international or United States waters), irrespective of such alien's status, may apply for asylum in accordance with this section ...."); 16 U.S.C. § 2402(8) (defining "import" to mean "to land on, bring into, or introduce into, or attempt to land on, bring into or introduce into, any place subject to the jurisdiction of the United States, including the 12-mile territorial sea of the United States"). *Compare* 26 U.S.C. § 638(1) ("United States" includes "subsoil of those submarine areas which are adjacent to the territorial waters of the United States"), *with id.* at § 7701(a)(9) ("United States" includes "only the States and the District of Columbia").

5Mr. Procopio counters this understanding with another theory—that "ships in the near-shore marine waters collected water that was contaminated with the runoff from areas sprayed with Agent Orange," and the "[s]hipboard distillers converted the marine water into water for the boilers and potable water by vaporizing them and condensing the liquid" in a way that "enhanced the effect of Agent Orange." Appellant En Banc Op. Br. at 19. But Mr. Procopio presents no

evidence that Congress at the time of the Agent Orange Act was aware of or had considered the potential dangers from contaminated runoff.

6*See* Order Granting En Banc Rehearing at 2, *Procopio v. Wilkie*, No. 17-1821 (Fed. Cir. Aug. 16, 2018), ECF No. 63 (ordering the parties to brief the following issue: "Does the phrase 'served in the Republic of Vietnam' in 38 U.S.C. § 1116 unambiguously include 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?").

7*See* Order Granting Certiorari, *Kisor v. Wilkie*, No. 18-15, —— U.S. ——, 139 S.Ct. 657, —— L.Ed.2d ——, 2018 WL 6439837 (Dec. 10, 2018) ("The petition for writ of certiorari is granted limited to Question 1 presented by the petition"); Cert. Pet., *Kisor v. Wilkie*, No. 18-15 (Jun. 29, 2018) ("1. Whether the Court should overrule *Auer* and *Seminole Rock*.").

28 USC 2412(d)

(1) If, in a civil action brought by the United States or a proceeding for judicial review of an adversary adjudication described in section 504(a)(4) of title 5, the demand by the United States is substantially in excess of the judgment finally obtained by the United States and is unreasonable when compared with such judgment, under the facts and circumstances of the case, the court shall award to the party the fees and other expenses related to defending against the excessive demand, unless the party has committed a willful violation of law or otherwise acted in bad faith, or special circumstances make an award unjust. Fees and expenses awarded under this subparagraph shall be paid only as a consequence of appropriations provided in advance.

(2) For the purposes of this subsection--

(A) "fees and other expenses" includes the reasonable expenses of expert witnesses, the reasonable cost of any study, analysis, engineering report, test, or project which is found by the court to be necessary for the preparation of the party's case, and reasonable attorney fees (The amount of fees awarded under this subsection shall be based upon prevailing market rates for the kind and quality of the services furnished, except that (i) no expert witness shall be compensated at a rate in excess of the highest rate of compensation for expert witnesses paid by the United States; and (ii) attorney fees shall not be awarded in excess of $125 per hour unless the court determines that an increase in the cost of living or a special factor, such as the limited availability of qualified attorneys for the proceedings involved, justifies a higher fee.);

(B) "party" means (i) an individual whose net worth did not exceed $2,000,000 at the time the civil action was

filed, or (ii) any owner of an unincorporated business, or any partnership, corporation, association, unit of local government, or organization, the net worth of which did not exceed $7,000,000 at the time the civil action was filed, and which had not more than 500 employees at the time the civil action was filed; except that an organization described in section 501(c)(3) of the Internal Revenue Code of 1986 (26 U.S.C. 501(c)(3)) exempt from taxation under section 501(a) of such Code, or a cooperative association as defined in section 15(a) of the Agricultural Marketing Act (12 U.S.C. 1141j(a)), may be a party regardless of the net worth of such organization or cooperative association or for purposes of subsection (d)(1)(D), a small entity as defined in section 601 of title 5;

(C) "United States" includes any agency and any official of the United States acting in his or her official capacity;

(D) "position of the United States" means, in addition to the position taken by the United States in the civil action, the action or failure to act by the agency upon which the civil action is based; except that fees and expenses may not be awarded to a party for any portion of the litigation in which the party has unreasonably protracted the proceedings;

(E) "civil action brought by or against the United States" includes an appeal by a party, other than the United States, from a decision of a contracting officer rendered pursuant to a disputes clause in a contract with the Government or pursuant to chapter 71 of title 41;

(F) "court" includes the United States Court of Federal Claims and the United States Court of Appeals for Veterans Claims;

(G) "final judgment" means a judgment that is final and not appealable, and includes an order of settlement;

(H) "prevailing party", in the case of eminent domain proceedings, means a party who obtains a final judgment (other than by settlement), exclusive of interest, the amount of which is at least as close to the highest valuation of the property involved that is attested to at trial on behalf of the property owner as it is to the highest valuation of the property involved that is attested to at trial on behalf of the Government; and

(I) "demand" means the express demand of the United States which led to the adversary adjudication, but shall not include a recitation of the maximum statutory penalty (i) in the complaint, or (ii) elsewhere when accompanied by an express demand for a lesser amount.